

LEGAL FRAMEWORKS FOR INTEGRATED COASTAL AND OCEAN MANAGEMENT IN CANADA AND THE EUROPEAN UNION: SOME INSIGHTS FROM COMPARATIVE ANALYSIS

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INTRODUCTION

As an approach and paradigm for the management of the land-sea interface, integrated coastal zone management (ICZM) is firmly rooted in many States around the world.¹ Rooted to a lesser extent in the practice of States, integrated coastal and ocean management (ICOM) has wider geographical connotations, placing greater emphasis on the ocean side of the land-sea interface and less emphasis on terrestrial issues.² In practice,

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1. Jens Sorensen, *National and International Efforts at Integrated Coastal Management: Definitions, Achievements, and Lessons*, 25 COASTAL MGMT. 3 (1997) (U.K.).

2. BILIANA CICIN-SAIN & ROBERT W. KNECHT, INTEGRATED COASTAL AND OCEAN MANAGEMENT: CONCEPTS AND PRACTICES 39–40 (1998).

the two approaches overlap substantially and are functionally more extensions of the same process of integration than alternatives. Although there is no dedicated global legal instrument in international law for ICZM or ICOM, there are several instruments which can serve as framework or provide useful tools.³ In at least one region, States adopted a dedicated ICZM legal instrument to facilitate cooperation at that level.⁴ However, most efforts at ICZM and the development of appropriate governance frameworks occur at the national and sub-national levels.

The legal framework for governance in ICZM and ICOM has been identified as an important element in the management of coastal and ocean space.⁵ The development of such a framework at the national level poses special challenges to federal States because there is an expectation that it be guided by an integrated approach. In this article, and for comparative law purposes, federal States are described as “complex jurisdictions” because their pursuit of an integrated approach has to contend with a wide range of factors including: political system and history; constitutional framework and division of powers among various levels of government; aboriginal peoples’ entitlements; diverse geography that frequently includes more than one ocean and/or sea; uneven state of socio-economic development among sub-national units; eco-regional diversity; and multi-level judicatures. The challenge for such States is the development of a legal framework sufficiently broad to encompass all key issues without being too thin as to lack effectiveness.

3. See, e.g., U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, (establishing a global framework for national maritime zones and jurisdictions, ocean use and management, and marine environmental protection and preservation); Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (establishing a framework for conservation at the genetic, species and ecosystem levels, and including terrestrial and marine protected areas); Convention on Wetlands of International Importance Especially as Waterfowl Habitat, art. 1, Feb. 2, 1971, 996 U.N.T.S. 245 (an instrument that is important to the conservation of coastal wetlands).

4. See Protocol on Integrated Coastal Zone Management in the Mediterranean, Jan. 21, 2008, 2009 O.J. (L 34/19) (an agreement by Mediterranean States meant to facilitate integrated coastal zone management in the region to which the European Union (E.U.) is a party).

5. See generally S. Boelaert–Suominen & C. Cullinan, *Food and Agric. Org., FAO 93, Legal and Institutional Aspects for Integrated Coastal Area Management in National Legislation*, iii (2006) (describing the increased role of integrated coastal management in addressing coastal issues); a Cicin-Sain & Knecht, *supra* note 2 (stating that legal considerations are a key dimension of an integrated coastal management program); John Gibson, *Integrated Coastal Zone Management Law in the European Union*, 31 *Coastal Mgmt.* 127 (2003) (U.K.) (arguing that law has a significant impact on the implementation and success of integrated coastal zone management); Cormac Cullinan, *Integrated Coastal Management Law: Establishing and Strengthening National Legal Frameworks for Integrated Coastal Management* 3, 6–10 (2006) (stating that “law is one of the primary mechanisms used by government to ensure that their policies and programmes are implemented,” including integrated coastal management).

The United States, which is the quintessential federal State and initiator of coastal management, has long had a federal legal framework with a functional relationship with its component states. This relationship has enabled the pursuit of ICZM in several states over a period of decades. Other confederations have not been as successful. This article undertakes a comparative study of Canada and the European Union (E.U.) to explore the factors that have constrained the development of a legal framework at the “federal level” while identifying actual or potential facilitating factors. Although the E.U. is a supranational organization rather than a confederation *stricto sensu*, its “constitutional framework”—now consolidated in the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community of 2007 (Lisbon Treaty)—is analogous to that of a federal State.⁶ For political and legal reasons, both jurisdictions have developed policy and/or legal frameworks for ICOM, rather than ICZM, leaving the focus on the land-sea interface to the respective provincial and Member State levels. A study of Canada and the E.U. is also appropriate because both jurisdictions claim to exercise international leadership in this field. Both jurisdictions share similar social missions. Canada as a “confederation” and the E.U. share common values and approaches to promoting and maintaining their respective social unions and pursuing vigorous environmental policies.

The purpose of this article is to identify, analyze, and reflect upon the opportunities and limitations of federally-led ICOM and consider consequences for ICZM in Canada and the E.U. The article uses a contextual and comparative approach. Comparisons are also drawn with other federal States on particular issues. The exercise is guided by several questions, including the following. Given constitutional or treaty limitations, how are the Canadian federal government and the European Commission leading ICOM in their respective jurisdictions? What is the relationship between the broader ICOM approach and ICZM? What policy and legislative approaches are they using and how effective are they? How can differences be explained? What might the Canadian federal government and the European Commission take from each other in pursuing ICOM and ICZM?

6. Treaty of Lisbon Amending the Treaty on European Union and Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) art.1 [hereinafter Treaty of Lisbon]. The treaty came into force on 1 December 2009.

I. CONTEXTS IN COMPARISON

A significant factor in the comparison is how diversity of coastal and marine geography impose a major challenge to developing a federal (in the case of Canada) and supranational (in the case of the E.U.) policy and legal framework. Both jurisdictions have coastal frontages on very diverse marine environments.

Canada has coasts on three oceans (Arctic, Atlantic, and Pacific) and borders on the Great Lakes. There are three territories (rather than provinces) in the Arctic. The Northwest Territories, Nunavut, and Yukon are significantly less populated, have substantial concentrations of aboriginal peoples, and are significantly less developed than their provincial counterparts to the south.⁷ The Canadian Arctic has one of the world's largest coastal archipelagos and is generally considered a very sensitive marine environment that is undergoing significant impacts from global warming and climate change.⁸ The provinces bordering on the Laurentian Gulf and the Atlantic (Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, Québec) include some of the least economically developed in the confederation.⁹ Ontario is the only province with shores on the Great Lakes—specifically, Lakes Erie, Huron, Ontario, and Superior.¹⁰ Manitoba, Ontario, Québec, and the Territory of Nunavut front the Hudson Bay, much of which is in sub-arctic waters, south of the Arctic Circle.¹¹ British Columbia is the only province with frontage in the Pacific. Canada shares a delimited boundary with the U.S. in the Great Lakes; partially delimited maritime boundaries with the U.S. in the Gulf of Maine, and France at St. Pierre et Miquelon in the Atlantic; a partial maritime boundary in the Pacific; and a continental shelf boundary with

7. *Map: Canada*, INFOPLEASE, <http://www.infoplease.com/atlas/canada.html> (last visited Feb. 4, 2012).

8. H. Christensen et al., *Regional Climate Projections*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 902 (S. Solomon et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter11.pdf>.

9. Guy Beaumier, *Regional Development in Canada* (Oct. 27, 1998), <http://publications.gc.ca/Collection-R/LoPBdP/CIR/8813-e.htm>.

10. *Map: Canada*, *supra* note 7.

11. Canada defines "Arctic waters" as the "internal waters of Canada and the waters of the territorial sea of Canada and the exclusive economic zone of Canada, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the exclusive economic zone." Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12, s. 2 (Can.). The effect is to capture as much as a third of the Hudson Bay within the definition of Arctic waters. *Id.*

Denmark in the Arctic.¹² Canada has yet to establish complete maritime boundaries with the U.S. in the Atlantic and Pacific, as well as establish a maritime boundary in the Arctic with the U.S. Canada is also likely to delimit maritime boundaries with other Arctic States after it defines the outer limits of the continental shelf in accordance with the criteria set out in the United Nations Convention on the Law of the Sea (1982) and related procedures. Canada has only two outstanding territorial sovereignty disputes, both of which are minor.¹³

Through its Member States, the E.U. has coastal frontage on the Atlantic in France, Ireland, Portugal, Spain, and the United Kingdom, as well as coastal frontage on several seas. Eight Member States have coastal frontage in the Baltic (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, and Sweden), and a further seven in the North Sea and Kattegat (Belgium, Denmark, France, Netherlands, Germany, and the United Kingdom).¹⁴ There are two Member States with coasts in the Black Sea (Bulgaria and Romania) and seven in the Mediterranean (Cyprus, France, Greece, Italy, Malta, Slovenia, and Spain). Overseas countries and territories of Member States are technically not part of the E.U. Whereas the maritime boundaries in the Atlantic, Baltic, and North Sea are mostly delimited, several maritime boundaries in the Mediterranean between Member and non-Member States are disputed, completed in part, or yet to be delimited.¹⁵ Most Mediterranean States have not yet declared exclusive economic zones.¹⁶ The E.U., through its Member States, shares significantly more maritime boundary and transboundary management issues with neighboring States than Canada. Consequently, the E.U. has the challenge of sharing significantly more transboundary management responsibilities

12. *Map: Canada*, *supra* note 7.

13. Both concern very small islands in close proximity to land. The first is a dispute between Canada and the U.S. concerning Machias Seal Island in the Gulf of Maine. The second is between Canada and Denmark concerning Hans Island in the Nares Strait between Ellesmere Island and Northern Greenland. David H. Gray, *Canada's Unresolved Maritime Boundaries*, IBRU Boundary and Security Bulletin 61-70 (Autumn 1997), available at https://www.dur.ac.uk/resources/ibru/publications/full/bsb5-3_gray.pdf.

14. *Europe*, EUROPA, <http://europa.eu/abc/maps/> (last visited July 15, 2012).

15. See Marco Gestri, *The Extension of Coastal States' Jurisdiction in the Mediterranean: Open Issues and Their Impacts on Sub-Regional Co-Operation* (2009), available at http://www.eu4seas.eu/images/stories/deliverables/WP3/Mediterranean/eu4seas_marco_gestri.pdf (describing how some, but not all, Mediterranean States have entered into bilateral agreements to delimit the territorial sea of the Mediterranean Sea).

16. Tullio Scovazzi, *The Present Nature and Extent of Maritime Zones in the Mediterranean Sea*, MEPIEPLAN Bulletin 22 February 2012, available at <http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=2&CategoryTitle=Guest-Articles>.

with non-Member States that have uneven standards of development. Unlike Canada, however, the E.U. has no coastal frontage on the Arctic Ocean.¹⁷ Although having land territory within the Arctic Circle, Finland and Sweden's coastal frontage is only in the Baltic. Greenland, now enjoying autonomy under Denmark, ceased to be a member of the European Economic Community (the predecessor of the E.U.) in 1985 following a referendum.¹⁸

The diverse marine regional geography of Canada and the E.U. imposes a major challenge in developing and maintaining a balance between, on the one hand, a general framework and directions for coastal and ocean management that promotes coherence, consistency, and common standards across jurisdictions, and, on the other, to do so at a level of detail sufficient to provide practical guidance to provinces and Member States. In addition to the diverse regional geography and marine eco-regions, socio-economic and cultural diversity suggest that decision-makers in Ottawa and Brussels have to exercise care in launching centralized approaches that might not respond to local needs.¹⁹ Accordingly, it will be important for policy initiatives at the federal and supranational levels to permit and facilitate local approaches to local problems.

II. DISTRIBUTION OF POWERS AND INSTITUTIONAL FRAMEWORKS

Characteristic of “complex jurisdictions” are the division of powers principle and responsibilities between different levels of government, including a system of checks and balances.²⁰ Both the Canadian federal

17. Aaron Best et al., *Comparative Policy Analyses: U.S., EU and Transatlantic Arctic Policy* 29 (2009), available at <http://arctic-transform.org/download/PolicyBP.pdf>.

18. When Denmark joined the European Community in 1973, Greenland became a member as part of Denmark. Withdrawal from the E.U. occurred after a referendum in 1982. Greenland became a “special case” and retained a loose association to the E.U. as an overseas country and territory. Treaty Amending, with regard to Greenland, the Treaties Establishing the European Communities, 1985 O.J. (L 29) 3, 7, available at <http://eu.nanoq.gl/Emner/EuGI/~media/419EF30F356645048639049D197273D3.ashx>.

19. See Irene Aronstein, *Lisbon's Concessions to Euroscepticism*, 6 *UTRECHT L. REV.* 89 (2010) (Neth) (describing the tension between maintaining the cultural diversity of Member States of the E.U. and developing a more centralized political entity).

20. See Richard Simeon & Martin Papillon, *Canada*, available at <http://www.federalism.ch/files/categories/IntensivkursII/Canadag2.pdf> (describing how the distribution of power, the roles of provincial governments, and federalism influences the structure of the Canadian government); see also Jorg Monar, *The European Union's Institutional Balance of Power after the Treaty of Lisbon*, available at http://ec.europa.eu/education/jean-monnet/doc/ecs10/monarb_en.pdf (describing the recent changes in the power structures of the European Union and how these governmental bodies operate).

government and the European Commission face significant challenges to integrated policy-making simply by virtue of the constitutional frameworks in which they operate. In Canada, this distribution of powers is dictated by The Constitution Act of 1867.²¹ In the E.U., all supranational activity is subject to the E.U.'s founding treaties and, more recently, the Lisbon Treaty.²² These "constitutional" frameworks set out powers and constraints that form the basis of policy and legislative options available at the federal/supranational and provincial/Member State levels.²³ Although not addressed in this paper, the constitutional framework of each Member State provides further allocation of powers and responsibilities relevant for ICOM and ICZM at national and sub-national levels.²⁴ In general, the law-making systems of the two jurisdictions can be described as parallel in Canada, and as parallel and hierarchical in the E.U. Both intergovernmental levels in the two jurisdictions have protected core competencies, with some areas of overlapping competence. However, in the E.U., there is also a hierarchical law-making system that enables E.U. legislation to bind Member States, as will be explained below.

Many of the powers relevant for ICOM and ICZM in Canada are divided between federal and provincial governments. The federal government has primary jurisdiction in the oceans with power over extra-territorial matters, sea-coast and inland fisheries, navigation, and shipping.²⁵ It is also given responsibility over beacons, buoys, lighthouses, and Sable Island.²⁶ This allocation helps explain the emphasis on ICOM at the federal level. Provinces, on the other hand, have more landward jurisdiction, principally through their power over property and civil rights. They are also responsible for local works and undertakings, non-renewable natural resources, and, generally, all matters of a merely local or private nature in the province.²⁷ These powers are important for undertaking ICZM at the provincial level and, by extension, at the territorial level—depending on powers allocated to the territory concerned.²⁸ In the authors' view, a truly

21. Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 91–92, (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

22. Treaty of Lisbon art. 1, *supra* note 6.

23. *Id.* Constitution Act, *supra* note 21.

24. The national constitution of each individual Member State provides for the domestic distribution of powers relevant for coastal and ocean management.

25. Constitution Act, *supra* note 21, s. 91.

26. *Id.*

27. *Id.* at s. 92.

28. *See, e.g.*, Nunavut Act, S.C. 1993, c. 28 (Can.) (statute separating Nunavut from the Northwest Territories and establishing it as an independent territory). The Constitution Act of 1982 affirmed aboriginal and treaty rights and, in turn, this found expression in the Nunavut Lands Claim

integrated approach will thus depend on an organized coordination of both federal and provincial/territorial responsibilities, which collectively provide the full range of powers and tools needed for integrated management of coasts and oceans.²⁹

In practice, the distribution of powers and the exercise of related jurisdictions in Canada's coastal zones and marine areas are not always clear.³⁰ The federal government has the potential to exercise a leadership role that begins in the oceans—where jurisdiction is clear—and eventually brings provinces, territories, and coastal communities into the fold through a collaborative and consultative process.³¹ This potential has effectively been transformed into an approach to engage multiple levels of government to cooperate in areas of jurisdictional overlap in the spirit of “cooperative federalism.”³² For example, British Columbia and Nova Scotia have entered into a memorandum of understanding (MOU) to promote ICZM. Similar agreements with other provinces are expected to follow.³³

Agreement Act which established the Nunavut Wildlife Management Board. Nunavut Land Claims Agreement Act, S.C. 1993, c. 29 (Can.).

29. Such an integrated approach would have to include municipal governments. In Canada, municipalities are creatures of the provinces. They are established and changed by provincial legislatures.

30. As recently as 2009, a British Columbia Court held that aquaculture would be subject to federal jurisdiction despite arguments that farmed fish constitute private property and should continue to be regulated by the provinces. The Court chose to postpone declaring the provincial regime invalid to give the federal DFO time to prepare its own replacement regulatory framework. The provincial regulations would remain in force for a one-year period or until the federal government was prepared to replace them. In Canadian constitutional law, a suspended declaration of invalidity is an infrequently used remedy. It allows a constitutionally unacceptable state of affairs to continue on a temporary basis. The need for its use in this instance demonstrates the persistent and continued jurisdictional confusion regarding some aspects of Canada's coasts and their uses and the new and pressing matters that affect them. *See* Morton v. British Columbia (Agriculture and Lands), 2010 BCSC 100 (Can.) (ruling that aquaculture is subject to federal rather than provincial jurisdiction, and suspending a constitutionality ruling to allow the parliament time to draft new legislation). Although navigation and shipping matters are generally considered federal jurisdiction, Courts of Appeal in British Columbia and Nova Scotia recently characterized occupational health and safety matters on fishing vessels as constituting local undertakings or issues over which jurisdiction is shared, with the consequence that the provinces can regulate such matters. *See* R. v. Mersey Seafoods Ltd., 2008 NSCA 67 (CanLII), 295 DLR (4th) 244; Jim Pattison Enterprises Ltd. v. British Columbia (Worker's Compensation Board), 2011 BCCA 35, para. 93 (Can.). In the case of *Pattison*, an application for leave to appeal to the Supreme Court of Canada was recently denied.

31. Peter Ricketts & Peter Harrison, *Coastal and Oceans Management in Canada: Moving into the 21st Century*, 35 COASTAL MGMT 5, 16 (2007).

32. *Pattison Enterprises v. B.C.*, *supra* note 30, ¶ 57.

33. *See* Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada, Can.-B.C., Sept. 2004, available at <http://www.dfo-mpo.gc.ca/oceans/publications/bc-cb/index-eng.asp> [hereinafter Implementation of Canada's Oceans Strategy]; Memorandum of Understanding between Canada and Nova Scotia Respecting Coastal and

Similar jurisdictional complexity is evident in the E.U. When it came into force on December 1, 2009, the Lisbon Treaty amended the Treaty Establishing the European Community and renamed it the Treaty on the Functioning of the European Union of 2009.³⁴ Part of this process involved clarifying the division of competences between individual Member States and the E.U.'s supranational organizations. E.U. law has primacy over the law of Member States.³⁵ While exclusive competence is given to the Union on matters affecting the conservation of marine biological resources,³⁶ the majority of issues affecting the management of the coastal zone fall under the second category of *shared* competence. This includes: agriculture and fisheries; economic, social, and territorial cohesion; environment; transportation; and energy.³⁷ In addition, a third category exists where the Union is to have only a supporting and coordinating role. Areas of interest here are industry, tourism, and administrative cooperation.³⁸ To summarize, the governance framework for ICZM in Europe is heavily dependent on a high level of cooperation between the Union and its Member States.

This need for cooperation is exacerbated by the three significant treaty principles in which the European Union must operate. First, the principle of conferred powers, also known as the principle of attributed powers, holds that the E.U. can only act in areas that have been explicitly granted to it by its founding treaties.³⁹ In other words, the E.U. has no inherent legislative jurisdiction. This stands in contrast to the residual powers retained by Canada's federal government.⁴⁰ Second, the principle of subsidiarity holds that the E.U., in areas outside its exclusive competence, may only act to achieve objectives that cannot be sufficiently achieved by Member States acting on their own.⁴¹ The proposed action must be demonstrably more

Oceans Management in Nova Scotia, Can.-N.S., March 23, 2011, *available at* <http://www.gov.ns.ca/coast/canada-ns-mou-eng.pdf>.

34. Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83/49), *available at* <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML> [hereinafter TFEU].

35. *See* Declaration Concerning Primacy, 2010 O.J. (C 83) 344 (establishing that laws of the European Union have primacy over the laws of the individual Member States).

36. TFEU, *supra* note 34, art. 3.

37. *Id.* at art. 4.

38. *Id.* at art. 6.

39. LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES 138 (P.J.G. Kapteyn et al. eds., 4th ed. 2009).

40. *Her Majesty The Queen v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401, 401 (Can.) (demonstrating that Canadian federal legislation prohibits dumping of substances into the sea unless a permit allows such activities).

41. Gibson, *supra* note 5, at 129.

conducive to regulation at a European level. It is a doctrine based on the idea that devolved decision-making is always preferred. Only where it is impossible to achieve a common objective will the E.U. be permitted to act.⁴² In areas of shared competence, the E.U. is always required to take this into account. It is, in a sense, the European equivalent of a “provincial inability test”⁴³ applied to all E.U. action. Third, the principle of proportionality is concerned with the acceptable degree of intervention in national legislation. According to this doctrine, the E.U. is permitted to intervene legislatively only as much as is absolutely necessary to achieve its treaty objectives.⁴⁴ The limiting nature of these three principles suggests a clear concern for the “competence creep” of the European Union.⁴⁵

With these constraints in place, it is perhaps unsurprising that the approach to ICZM at the European level has been one characterized by general guidance. Member States are left to determine the specifics as they develop their own national strategies. As an approach to ICZM, this may seem ideal. It allows for top-down coordination while leaving room for local solutions that can take into account regional and local specificities. The E.U. also has a broad spectrum of legislative and policy instruments to choose from that are particularly well suited to this approach. The most significant of these for European environmental and coastal law are regulations, directives, recommendations, and communications. This system contrasts sharply with the Canadian federal legislative process, which consists of primary (statutes preceded by policy proposals) and subsidiary legislation (regulations as authorized by statute).

E.U. Regulations can be described as the highest order of European law and differ from Directives in three significant ways.⁴⁶ The first is in their general application. The binding obligations of a directive can only be imposed by the Commission on one of its Member States.⁴⁷ Regulations, on the other hand, apply with equal force to all E.U. legal persons.⁴⁸ They provide E.U. citizens with rights and obligations that can be enforced in

42. TC HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 122 (7th ed. 2010).

43. *Queen v. Crown Zellerbach*, *supra* note 40, at 434 (explaining the Canadian provincial inability test).

44. *LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES*, *supra* note 39, at 145.

45. HARTLEY, *supra* note 42, at 116–18 (defining the scope of the European’s Union competences. If the European Union tries to exert any powers in addition to what is expressly authorized, then it is a “competence creep”).

46. *Id.* at 243.

47. *Legal Acts of the Union, Adoption Procedures and Other Provisions*, art. 288, 2010 O.J. (C 83) 171.

48. *Id.* at 172.

both national courts and the European Court of Justice.⁴⁹ The second major difference is that regulations are binding in all respects and not just in the result that must be achieved.⁵⁰ In other words, there is no discretion granted to Member States on the form and method of implementation. Finally, unlike directives, regulations are significant, as they are considered *directly* applicable. This means that once a regulation has entered into force, it is as though the law were internally enacted by a national legislature.⁵¹ Direct applicability, however, would be meaningless if regulations did not also have primacy over any conflicting national legislation.⁵² Acknowledging this, the co-principle of supremacy for E.U. law was introduced by the European Court of Justice as early as the 1960s,⁵³ and is somewhat comparable to the Canadian doctrine of federal paramountcy.⁵⁴

E.U. Directives offer the E.U. a unique instrument with no clear parallel in national law.⁵⁵ They operate by establishing legally binding results, but allow each Member State to delegate powers to its domestic authorities as it sees fit.⁵⁶ States may also choose to implement these objectives through either legislative or administrative means.⁵⁷ As a result, there are really two steps to the legislative process for every directive. The first is the European level agreement on the directive itself. The second is the adoption in each Member State's national legislation of measures aimed at achieving the stipulated objectives. This implementation method can be both a strength and a weakness of the directive framework. While having two steps means that it can often be a time-consuming process, it does leave Member States free to develop their own strategies at a national or regional level based on common principles. However, it also leaves room for significant variation, thus often making consistency among Member States a challenge.

E.U. Recommendations provide the E.U. with yet another tool. While their adoption is subject to all the formalities of a regulation, directive, or a

49. See ANDREAS STAAB, *THE EUROPEAN UNION EXPLAINED* 68–69 (2008) (clarifying that individual citizens can bring cases to the ECJ once they have exhausted their national judicial system).

50. Legal Acts of the Union, Adoption Procedures and Other Provisions, *supra* note 47, at 171.

51. LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES, *supra* note 39, at 280–81.

52. STAAB, *supra* note 49, at 70.

53. See Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585 (holding that regulations are binding on all Member States of the European Union and that they cannot be overridden by Member State Laws).

54. *Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113 (Can.).

55. LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES, *supra* note 39, at 282.

56. *Id.* at 172.

57. *Id.* at 285.

decision, they are not legally binding.⁵⁸ This has the significant benefit of making them politically easier to agree upon and allows for more detailed standards to be articulated. Any implementing national legislation, however, will only be adopted on a voluntary basis.⁵⁹ Canada has no comparable tool.

Finally, E.U. Communications provide the E.U. with more of a persuasive tool rather than a peremptory one. They are particularly useful for identifying and clarifying E.U. policies and standards. While not binding in any technical sense, their significance should not be underestimated. Through the doctrine of legitimate expectations, communications can be potentially limiting on the future decisional power of the European Commission.⁶⁰ There is also an implicit obligation on the part of Member States to respond in good faith.⁶¹ Communications and other “soft law” instruments like recommendations are, thus, not necessarily devoid of persuasive value. They inevitably inform the framework in which national policies are developed and institutional actors must operate.⁶² These instruments give the E.U. a unique opportunity to influence national policies in areas outside the E.U.’s exclusive competence. Again, Canada has no comparable federal instrument.

It should be noted that the E.U. lawmaking process is necessarily complex. The Commission’s proposals for new legislation are, in effect, negotiating documents. Parliament and Council may substantially modify the original proposal. This process has to contend with the challenge of drafting different negotiation intentions in several languages. Thus, a proposal from the Commission may experience significant change and if the Commission does not accept proposed changes from other bodies, then it may not have any other option but to withdraw the proposal.

III. APPROACHES TO ICOM AND ICZM

A. Canada

The distribution of powers in Canada’s constitution makes formal cooperation between federal and provincial governments a requirement for ICOM rather than simply a suggested good practice. Unsurprisingly, this

58. Gibson, *supra* note 5, at 133.

59. LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES, *supra* note 39, at 291.

60. *Id.* at 292.

61. *Id.* at 154.

62. Erika Szyzyk, *Experimental Governance: The Open Method of Coordination*, 12 EURPN. L. J. 486, 500 (2006).

cooperation can often be difficult to achieve. It has resulted in periods of legislative and policy stagnation as Canada sought to truly integrate the management of its oceans and coasts experienced throughout successive governments. As a result of these jurisdictional issues, the federal government has developed an approach to ICOM that begins in the oceans and then seeks to move landward, where the division of responsibilities is less clear.

In 1987, the federal government released the Oceans Policy for Canada.⁶³ The policy recognized the limitations of Canada's fragmented approach to oceans management and was an early attempt to create a coordinated national framework. Several years later, the Federal Framework and Action Plan for Marine Environmental Quality was developed.⁶⁴ Co-led by the Department of the Environment and the Department of Fisheries and Oceans (DFO), the aim of this initiative was to coordinate the numerous federal-level programs that impacted the marine environment.⁶⁵ The challenges of horizontal or interdepartmental integration would prove significant.⁶⁶ The next step in the process would ideally have led to cooperation with provincial, territorial, and aboriginal governments in a nation-wide coordination of programs and policies.⁶⁷ Unfortunately, this desired vertical integration was never fully realized under this early policy.

Undoubtedly, Canada's most significant legislative milestone in the field has been the Oceans Act of 1996.⁶⁸ The Oceans Act was the first legal tool for better management of Canada's oceans and it is significant for several reasons. First, Part I sets out Canada's maritime zones and jurisdictions in accordance with the United Nations Convention on the Law of the Sea.⁶⁹ These declaratory provisions on national maritime zones are rarely combined with ocean management functions in a coastal and/or ocean management statute. Second, the Oceans Act assigns a lead role to a department (the DFO) and further assigns it a duty to lead the development of a national oceans strategy and integrated management initiatives.⁷⁰ Effectively, it facilitates the coordination of existing federal programs and

63. DEPARTMENT OF FISHERIES AND OCEANS, OCEANS POLICY FOR CANADA: A STRATEGY TO MEET THE CHALLENGES AND OPPORTUNITIES ON THE OCEANS FRONTIER (1987).

64. Ricketts & Harrison, *supra* note 31, at 7.

65. *Id.*

66. P.J. Ricketts et al., *The Coastal Zone Canada Association: The First Ten Years 2* (2005).

67. *Id.*

68. Oceans Act, S.C. 1996, c. 31 (Can.).

69. *Id.*

70. *Id.*

tools rather than redistributing bureaucratic powers.⁷¹ Thus, it is a framework for integrated oceans management and not a restructuring. Finally, the Act is perhaps best understood as a piece of enabling legislation (rather than directive).⁷² It has been described as a constitution for Canada's oceans.⁷³ In other words, it establishes operational principles and responsibilities for the field without dictating specifics on how the objectives are to be achieved. The legislation remains at a high level of generality. Little guidance on how to exercise these responsibilities is given. In this sense, and from a functional perspective, the Oceans Act is somewhat comparable to a directive of the E.U. While it establishes both common principles and legal obligations, it leaves significant discretion as to the form and method of implementation.

As mandated by the Oceans Act, Canada's Oceans Strategy was released as a policy document in 2002.⁷⁴ The Oceans Strategy was designed to be sensitive to jurisdictional boundaries and was careful to respect the complex distribution of powers in this area.⁷⁵ It would also create two useful tools: Large Ocean Management Areas (LOMAs) and the smaller, but inter-related, Coastal Management Areas (CMAs).⁷⁶ LOMAs constitute a distinctive characteristic of the Canadian approach to ICOM. The federal government has moved ahead in areas where it has clear jurisdiction, but has yet to move landward and incorporate non-federal partners. A number of management issues addressed by the CMAs fall within provincial jurisdiction.⁷⁷ Effective integrated management requires cooperation with provincial and territorial departments, agencies, and management boards.⁷⁸ It should also be noted that the Oceans Strategy, like the Oceans Act, is still

71. Camille Mageau et. al., *Oceans Policy: A Canadian Case Study*, in UNDERSTANDING AND STRENGTHENING EUROPEAN UNION-CANADA RELATIONS IN LAW OF THE SEA AND OCEANS GOVERNANCE 35, 50 (Timo Koivurova et al., eds. 2009).

72. *Id.*

73. Aldo Chircop & Larry Hildebrand, *Beyond the Buzzwords: A Perspective on Integrated Coastal and Ocean Management in Canada*, in TOWARDS PRINCIPLED OCEANS GOVERNANCE: AUSTRALIAN AND CANADIAN APPROACHES AND CHALLENGES 19, 28 (R. Rothwell and David L. VanderZwaag eds. 2006).

74. FISHERIES AND OCEANS CANADA, CANADA'S OCEANS STRATEGY: OUR OCEANS, OUR FUTURE 1 (2002), available at <http://www.dfo-mpo.gc.ca/oceans/publications/cos-soc/pdf/cos-soc-eng.pdf>.

75. Chircop & Hildebrand, *supra* note 73, at 40.

76. *Id.* at 38. See also FISHERIES AND OCEANS CANADA, POLICY AND OPERATIONAL FRAMEWORK FOR INTEGRATED MANAGEMENT OF ESTUARINE, COASTAL AND MARINE ENVIRONMENTS IN CANADA 15 (2002), available at <http://www.dfo-mpo.gc.ca/oceans/publications/cosframework-cadresoc/pdf/im-gi-eng.pdf>.

77. *Id.* at 19.

78. *Id.* at 21.

at a fairly high level of generality. It is not intended to provide guidance for specific circumstances.⁷⁹

In terms of implementation, 2005 saw the introduction of Phase I of the National Oceans Action Plan,⁸⁰ which provided some much needed funding for 2005-2007. Previous funds had come from a reallocation of resources within the DFO.⁸¹ More recent additional funding has come in the form of the Health of the Oceans Initiative in 2007,⁸² with funding for 2007-2012. However, lack of adequate funding remains an issue for the implementation of federal programs. For example, the federal elections of 2011 resulted in the re-election of a conservative government committed to cross-government program cuts in an attempt to bring the national budgetary deficit under control by 2016.⁸³ The cuts to the federal oceans and environment budgets are substantial.⁸⁴

At this time and continuing into the future, MOUs between federal and provincial governments are being concluded as a means to overcome some of the jurisdictional difficulties in implementation. British Columbia is a notable example with an MOU respecting the implementation of Canada's Oceans Strategy on the Pacific Coast dating back to 2004.⁸⁵ The agreement establishes regular meetings between federal and provincial implementing departments and agencies to ensure progress, coordination, and harmonization of initiatives.⁸⁶ An analogous MOU with Nova Scotia was signed on March 23, 2011, to promote cooperation to advance Nova Scotia's and Canada's priorities for coastal and ocean management under the oversight of a provincial-federal Regional Committee for Coastal and

79. Ricketts & Harrison, *supra* note 31, at 9–10.

80. FISHERIES AND OCEANS CANADA, CANADA'S OCEANS ACTION PLAN: FOR PRESENT AND FUTURE GENERATIONS (2005), available at <http://www.dfo-mpo.gc.ca/oceans/publications/oap-pao/pdf/oap-eng.pdf>.

81. Timo Koivurova, *Comparing the Integrated Maritime Policy of the European Union and the Oceans Policy of Canada*, in UNDERSTANDING AND STRENGTHENING EUROPEAN UNION-CANADA RELATIONS IN LAW OF THE SEA AND OCEANS GOVERNANCE 19, 28 (Timo Koivurova et al., eds. 2009).

82. Press Release, Fisheries and Oceans Canada, Announcement of Health of the Oceans Funding (Oct. 9, 2007), available at <http://www.dfo-mpo.gc.ca/media/infocus-alaune/2007/20071009-eng.htm>.

83. Bill Curry & Karen Howlett, *Tories Push Back Date for Balanced Budget*, GLOBE & MAIL, Nov. 8 2011, <http://www.theglobeandmail.com/news/politics/ottawa-pushes-back-date-for-balanced-budget/article2229577/>.

84. *Fisheries and Oceans to "Shed" Services*, CBC NEWS (Oct. 13 2011), <http://www.cbc.ca/news/canada/newfoundland-labrador/story/2011/10/13/nl-dfo-shedding-services-1013.html>.

85. Implementation of Canada's Oceans Strategy, *supra* note 38.

86. *Id.*

Oceans Management.⁸⁷ However, the complexity of these collaborations has often made the pace of regulatory and legislative development in the field frustratingly slow.⁸⁸ It remains to be seen how these federal-provincial agreements will fare at a time of scarce public funding and consequent, substantial cutbacks.

B. The European Union

Shared competence over most aspects of ICZM means that the E.U.'s leadership power is somewhat limited, certainly in terms of implementation. Given the constraints of subsidiarity and proportionality, it is perhaps unsurprising that the approach at the supranational level has been one characterized by general guidance. Member States are left to determine specifics as they develop their own national strategies. Numerous E.U. instruments and policies clearly affect the coastal zone, but few are tailored to it specifically. The 2002 Recommendation on Integrated Coastal Zone Management⁸⁹ (ICZM Recommendation) is a notable exception, although its implementation has been fairly uneven.⁹⁰ At the European level, significant steps have been taken towards more integrated approaches, but the wide array of issues that affect marine and coastal areas will always make this a challenge.

The E.U.'s legislative and policy process began in the early 1990s with Council resolutions that led to a proposal for a European Parliament and Council Recommendation on ICZM.⁹¹ This led to a three-year Demonstration Program and the development of numerous ICZM initiatives throughout E.U. Member States. After the program ended in 1999, few of

87. Memorandum of Understanding between Canada and Nova Scotia Respecting Coastal and Oceans Management in Nova Scotia, *supra* note 33.

88. Mageau et al., *supra* note 71, at 58.

89. Recommendation of the European Parliament and the Council Concerning Integrated Coastal Zone Management, 2002 O.J. (L148/24), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:148:0024:0027:EN:PDF> [hereinafter ICZM Recommendation].

90. See RUPPRECHT CONSULT & INTERNATIONAL OCEAN INSTITUTE, EVALUATION OF INTEGRATED COASTAL ZONE MANAGEMENT (ICZM) IN EUROPE: FINAL REPORT 9 (2006) (discussing the various ways countries have implemented the 2002 Recommendation), available at http://ec.europa.eu/environment/iczm/pdf/evaluation_iczm_report.pdf.

91. Council Resolution of 25 February 1992 on the Future Community Policy Concerning the European Coastal Zone, 1992 O.J. (C 59/1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1992:059:0001:0001:EN:PDF>;

Council Resolution of 6 May 1994 on a Community Strategy for Integrated Coastal Zone Management, 1994 O.J. (C 135/2), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1994:135:0002:0002:EN:PDF>.

the funded projects continued.⁹² The project has since been criticized for its time-limited nature and project-based (rather than process-based) mindset.⁹³ In 2000, the Commission released a Communication to Council and Parliament concerning a European Strategy for Integrated Coastal Zone Management.⁹⁴ Where possible, the strategy was to build on existing programs and policies.⁹⁵ Like in Canada, the focus has been on coordination of efforts rather than redistribution of responsibilities. The Communication sees the overall role of the E.U. as providing guidance through the creation of an enabling framework for action at other levels of government.⁹⁶ Essentially, the Commission advocates an approach similar in principle to the Coastal Zone Management Act⁹⁷ of the U.S. The E.U., like the American federal government, should be providing direction in the form of a clear endorsement of principles and financial incentives for implementation. Unfortunately, these financial incentives have often been lacking.

A clear endorsement of principles came in 2002 with the ICZM Recommendation.⁹⁸ The Commission outlined eight core principles to guide Member States in the development of their own national ICZM strategies.⁹⁹ These include a long-term perspective, working with natural processes, and involving all parties concerned (both economic and social) in the management process.¹⁰⁰ Like Canada's Oceans Act, the ICZM Recommendation is designed as a guiding framework that establishes the operational principles on which future action will be based. Its generality means that it offers little in the way of solutions to particular problems and it is likely that more detailed guidance will be needed. As of 2006, no country had fully implemented a national ICZM strategy as prompted by the 2002 ICZM Recommendation, although several had strategies

92. Brian Shipman & Tim Stojanovic, *Facts, Fictions, and Failures of Integrated Coastal Zone Management in Europe*, 35 *COASTAL MGMT.* 375, 378 (2007) (U.K.).

93. *Id.* at 384–85.

94. Communication from the Commission to the Council and the European Parliament on Integrated Coastal Zone Management: A European Strategy, at 1, COM (2000) 547 final (Sept. 27, 2000), available at, <http://www.coastlaw.uct.ac.za/iczm/docs/ec/com00547.pdf> [hereinafter *Communication from the Commission on ICZM*].

95. *Id.* at 3.

96. *Id.* at 11.

97. Coastal Zone Management Act, 16 U.S.C §§ 1451–1464 (2006).

98. ICZM Recommendation, *supra* note 89.

99. *Id.* at II(b),(e),(f).

100. *Id.* For a discussion of the eight core principles, see John McKenna et al., *Managing by Principle: A Critical Analysis of the European Principles of Integrated Coastal Zone Management*, 32 *MARINE POLICY* 941–42 (2008) (U.K.).

pending.¹⁰¹ In 2007, the Commission released another Communication on ICZM which indicated a notable change in tone.¹⁰² The focus was no longer on ICZM itself, but on ICZM as part of the broader Integrated Maritime Policy (IMP).¹⁰³ ICZM is described as having an important role to play, but the emphasis has shifted to finding ways for this management process to fit with newer (and better funded) oceans-based initiatives, such as maritime or marine spatial planning (MSP).¹⁰⁴ The Communication concludes that, while the approaches of most Member States are still largely sectoral, progress towards integration has been achieved as a result of the ICZM Recommendation.¹⁰⁵ No further legal instrument for ICZM is envisioned.

After several years in development, the IMP was released in 2008 as a strategic framework for the better management of Europe's oceans. Like Canada's Oceans Strategy, one of the main principles underlying the IMP was to coordinate existing policies rather than to replace them.¹⁰⁶ The goal was to identify gaps in the current sectoral framework and find scope for added value.¹⁰⁷ The IMP acknowledges that all matters relating to the sea are inter-linked and that these policies must be developed in an integrated fashion.¹⁰⁸ The Commission has already started the process of bringing together various E.U. agencies with maritime-related functions.¹⁰⁹ To this end, a Steering Group of Commissioners on Maritime Affairs has been established along with an Interservice Group on Maritime Affairs.¹¹⁰ According to a 2009 Progress Report, structures have been established for

101. RUPPRECHT CONSULT & INTERNATIONAL OCEAN INSTITUTE, *supra* note 90, at 9.

102. Communication from the Commission, Report to the European Parliament and the Council: An Evaluation of Integrated Coastal Zone Management (ICZM) in Europe, at 3, 5, 8, COM (2007) 308 final (July 6, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0308:FIN:EN:pdf> (recognizing that integrated coastal zone management should be part of a broader scheme).

103. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An Integrated Maritime Policy for the European Union, at 2, 4–5, COM (2007) 575 final (Oct. 10, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF> [hereinafter *Integrated Maritime Policy*].

104. *Id.* at 6.

105. *Id.*

106. *Id.* at 2.

107. Haitze Siemers, *A European Integrated Maritime Policy: An Innovative Approach to Policy-Making*, in OCEAN YEARBOOK 23, 248 (Aldo Chircop, Scott Coffen-Smout, & Moira McConnell eds., 2009).

108. Integrated Maritime Policy, *infra* note 110, at 2.

109. *Id.* at 4.

110. Communication from the Commission, Guidelines for an Integrated Approach to Maritime Policy: Towards Best Practice in Integrated Maritime Governance and Stakeholder Consultation, at 4, COM (2008) 395 final (June 26, 2008).

regular meetings among those involved in European maritime policy.¹¹¹ Considering the umbrella nature of the IMP, the importance of this cooperation should not be underrated.

The IMP also incorporates the Marine Strategy Framework Directive (MSFD)¹¹² as its environmental pillar. The MSFD is an excellent example of the European supranational approach to oceans management. The Commission has set a variety of obligations and objectives and it is up to the individual Member States to fill in the details. The directive leaves each State the responsibility of determining the precise characteristics of “good environmental status,” but gives guidance on the necessary factors to consider.¹¹³ While Member States draft their own national strategies, the E.U. has the responsibility of ensuring regional coherence and consistency.¹¹⁴ The Commission also has the significant task of evaluating each national program.¹¹⁵

The E.U.’s Water Framework Directive (WFD) is also worth noting.¹¹⁶ The WFD provides the first legislative framework for integrated management of groundwater and surface water at the European level.¹¹⁷ It commits Member States to achieve good ecological status for all water bodies by 2015.¹¹⁸ While its focus is predominantly on inland waters, the WFD extends one nautical mile off the coastal baseline.¹¹⁹ It thereby provides a basis for an integrated approach to the hydrological cycle and includes a belt of inshore waters. It is described by the European Commission as the tool for bridging the gap between management of land

111. *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Progress Report on the EU’s Integrated Maritime Policy*, at 3, COM (2009) 540 final (Oct. 15, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0540:FIN:EN:PDF> [hereinafter *Progress Report on the EU’s Integrated Maritime Policy*].

112. EU Marine Strategy Framework Directive (MSFD), EUCC MARINE TEAM, <http://marine-team.eucc-d.de/marine-strategy.html> (last visited Feb. 5, 2012).

113. Lawrence Juda, *The European Union and The Marine Strategy Framework Directive: Continuing the Development of European Ocean Use Management*, 41 OCEAN DEV. & INT. L. 34, 42 (2010).

114. *Id.* at 41.

115. *Id.*

116. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive), 2000 O.J. (L 327/1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:327:0001:0072:EN:PDF> [hereinafter *Directive for Community Action*].

117. *EU Water Framework Directive*, JOINT NATURE CONSERVATION COMMITTEE (Feb. 2010), <http://jncc.defra.gov.uk/page-1375>.

118. *Id.*

119. Directive for Community Action, *supra* note 116.

and sea.¹²⁰ While these are some of the more notable instruments affecting Europe's Coastal Zone, the (non-exhaustive) list also includes the Common Fisheries Policy, the Cohesion Policy, the Birds and Habitats Directives, and the Maritime Transport Strategy.¹²¹ Out of this complex system, however, emerges a common pattern of governance. Decision-making power is often left with the Member States.

C. Comparing Principled Approaches

Both jurisdictions have relied on principled approaches to ICOM and ICZM. While on one hand the very nature of guiding principles suggests that the principles can be applied flexibly and by various institutional actors, some overall coherence and consistency is desirable on the other hand. A more directed approach to ICOM through more specified forms of guidance at the federal level of complex jurisdictions is likely unrealistic because of the diversity of geographical and environmental contexts, and the cultures and governance systems in both Canadian and European coastal zones.

Canada's Oceans Act identifies three core principles on which the national strategy is based—namely, sustainable development, integrated management, and the precautionary approach.¹²² In the ICZM Recommendation, the E.U. outlined eight principles for good coastal zone management that drew on experience gained from the Commission's three-year demonstration program.¹²³ Both approaches are similar in several respects. The concept of sustainable development is implied in the Recommendation's principles of long-term perspective¹²⁴ and the need to work with natural processes.¹²⁵ The concept of integrated management is evident as well, through the practice of involving all relevant governance

120. EUROPEAN COMMISSION, THE EU MARINE STRATEGY: STORY BEHIND THE STRATEGY 27 (2006), available at http://ec.europa.eu/environment/water/marine/pdf/eumarinestrategy_storybook.pdf [hereinafter THE EU MARINE STRATEGY].

121. *The Common Fisheries Policy*, EUROPEAN FISHERIES COMMISSION (Sept. 15, 2011), http://ec.europa.eu/fisheries/cfp/index_en.htm; *Regional Policy*, EUROPEAN COMMISSION http://ec.europa.eu/regional_policy/what/index_en.cfm (last visited Feb. 5, 2012); *The Habitats Directive*, EUROPEAN COMMISSION ENVIRONMENT (Jan. 12, 2012), http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm; *The Birds Directive*, EUROPEAN COMMISSION ENVIRONMENT (Jan. 12, 2012), http://ec.europa.eu/environment/nature/legislation/birdsdirective/index_en.htm; MARITIME TRANSPORT STRATEGY, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR ENERGY AND TRANSPORT, available at http://ec.europa.eu/transport/citizen/doc/2009_maritime_policy_space_en.pdf.

122. Oceans Act, *supra* note 68.

123. ICZM Recommendation, *supra* note 89.

124. *Id.* at II(b).

125. *Id.* at II(e).

bodies at national, regional, and local levels¹²⁶ and the use of a wide range of instruments to achieve sectoral coherence.¹²⁷ However, unlike the Oceans Act, the ICZM Recommendation does not make any explicit reference to the precautionary approach. This could be partially explained by possible implicit consideration when seeking to promote “a long-term perspective.”¹²⁸ Nonetheless, its absence as a stand-alone principle is still surprising, given the established nature of the concept.¹²⁹

Another similarity between the two approaches is that neither jurisdiction has binding legislation specifically tailored to ICZM. Both Canada and the E.U. have attempted to embed the concept within a broader policy. This is accomplished in Canada through the National Oceans Action Plan and Health of the Oceans Initiative¹³⁰ and, in the E.U., through the ICZM Recommendation and the IMP.¹³¹ There is no particular disadvantage in incorporating coastal management in a larger oceans management framework, and, in theory, this approach helps achieve integration. However, clearer guidance for the pursuit of ICZM is needed to better explain how these processes are expected to interact. There has been discussion in the E.U. concerning a possible ICZM directive or new recommendation at some point.¹³² While a directive has the potential for securing greater continuity in ICZM across the E.U., an initiative of this type could face difficulty in securing the required qualified majority. The added value of a new recommendation, whose legal character is “soft” at best, is also questionable. It is possible that there could be some resistance from Member States that would want to maintain as much freedom as possible in land-use policy. The policy on territorial cohesion could be an alternative to, or at least a supplementary framework for, promoting ICZM at the sub-regional level.

Canada has been dealing with the need to clarify the relationship between ICOM at the federal level and ICZM at the provincial level for

126. *Id.* at II(g).

127. *Id.* at II(h).

128. *Id.*

129. McKenna et al., *supra* note 100, at 943.

130. FISHERIES AND OCEANS CANADA, *supra* note 80, at 5.

131. Integrated Maritime Policy, *supra* note 103, at 2.

132. See COASTAL AND MARINE UNION, EUCC POSITION PAPER ON THE FUTURE OF ICZM IN THE EU (May 16, 2011), available at http://www.eucc.net/en/news/EUCC_position_paper_on_the_future_of_ICZM_in_the_EU.pdf (describing the overall effectiveness of the ICZM Recommendation and what policy actions are needed to move ICZM policy forward).

several years. Numerous challenges remain.¹³³ Canada has addressed this, in part, through intergovernmental committees, and, more recently, through a series of MOUs with some provinces.

With the passage of only three years since its adoption, the E.U.'s IMP can only be considered novel. The adequate incorporation of ICZM will require significant effort. Despite interagency processes and communications, the exchanges between the Directorate-General for Fisheries and Oceans (DG Mare) and the Directorate-General for Environment (DG Environment) in the lead up to the IMP and, eventually, in relation to the former's MSP initiative were not without difficulties. One such difficulty includes defining the respective directorate's competence. In the preparation of the Roadmap for Maritime Spatial Planning,¹³⁴ the issue was addressed by separating the "dry" spaces (coasts) from the "wet" (marine) spaces. This might have helped clarify respective institutional competences, but, in a sense, it was not consistent with the integrated approach. The Commission's 2007 Communication¹³⁵ addressed the need to clarify the relationship, but there is still a need for clearer guidance for individual Member States. How to combine ICZM with the Union's new focus on MSP is one such example.

The IMP, like Canada's Oceans Strategy, is a predominantly sea-based policy and using MSP as an implementing tool is an example of that focus. Cited as one of the three areas of major importance,¹³⁶ the MSP is described as a decision-making tool. It provides a framework for balancing human uses of the marine area and managing their impact.¹³⁷ In a sense, it takes ICZM principles, articulates them at a high level of generality, and pushes them further out to sea. ICZM and MSP are by no means incompatible, but the relationship between the two is not clearly set out—although opportunities for coordination and cooperation exist and are encouraged.¹³⁸ Even so, their co-existence raises some confusing issues. In developing national strategies for ICZM (pursuant to the ICZM Recommendation)

133. See generally FISHERIES AND OCEANS CANADA, *supra* note 83 (concluding that a broader, more holistic approach to managing ocean resources will take significant investments of time, money, and governmental cooperation).

134. Communication from the Commission, Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU, at 1, COM (2008) 791 final (Nov. 25 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0791:FIN:EN:PDF>.

135. Communication from the Commission on ICZM, *supra* note 103, at 9.

136. The other two are maritime surveillance and a comprehensive source of data and information. Integrated Maritime Policy, *supra* note 110, at 6.

137. *Progress Report on the EU's Integrated Maritime Policy*, *supra* note 111, at 2.

138. Integrated Maritime Policy, *supra* note 103, at 6.

and/or in developing national integrated maritime policies (pursuant to the 2008 Guidelines¹³⁹), to whom are Member States to turn for guidance? One possibility is looking to DG Mare, which is responsible for MSP.¹⁴⁰ The newly reorganized Directorate has a broad mandate and some professional expertise, but is barely sufficient to address the needs of multiple Member States. A second possibility is seeking direction from DG Environment, which is responsible for ICZM, but the professional and other resources for ICZM are even more limited than those for MSP at the time of writing this article. DG Environment is also responsible for the legal requirements of the MSFD,¹⁴¹ for which it appears better resourced than it is for its ICZM activities. The directorates are not endowed with the technical resources to be deployed to support a Member State's initiative, as is the case, for instance, with Canada's federal departments, which do provide professional technical expertise (e.g., scientists).¹⁴² In the E.U., the answer is unclear. Member States are responsible for drafting strategies tailored to the specifics of their regional context.¹⁴³ The E.U. is responsible for providing guidance and ensuring that the national efforts are coherent and consistent,¹⁴⁴ focusing on the "big picture" in terms of ecosystem-level cooperation (including between neighboring States at the regional sea level), but resources do not appear to have been made available to accomplish these tasks. While this kind of policy overlap within the Commission persists, confusion at the national level will be somewhat inevitable. Canada has not gone as far as the E.U. in terms of framing a big-picture approach to facilitate cooperation between provinces in shared marine regions.

In Canada, the DFO, while tasked as the lead agency for oceans, has experienced a progressively diminishing budget for oceans and fisheries-

139. Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Guidelines for an Integrated Approach to Maritime Policy: Towards Best Practice in Integrated Maritime Governance and Stakeholder Consultation, COM (2008) 395 final (Jun. 26, 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0395:FIN:EN:PDF>.

140. *Maritime spatial planning*, EUR. COMM'N MAR. AFFAIRS, http://ec.europa.eu/maritimeaffairs/policy/maritime_spatial_planning/index_en.htm (last visited Feb. 20, 2012).

141. EU Marine Strategy Framework Directive, *supra* note 112.

142. See BRIAN WILKS, BROWSING SCIENCE RESEARCH AT THE FEDERAL LEVEL: HISTORY, RESEARCH ACTIVITIES, AND PUBLICATIONS (2004) (comprehensive listing of federal scientific research activities, reports, and findings).

143. *Environment and Development in Coastal Regions and in Small Islands*, UNESCO, <http://www.unesco.org/csi/act/russia/legalpro5.htm> (last visited Feb. 20, 2012).

144. Juda, *supra* note 113, at 41.

related activities.¹⁴⁵ Unlike in the case of the E.U., Canada does not have the equivalent of Union-wide recommendations for ICZM or an authoritative MSP roadmap that the provinces are expected to implement. Canada's position on the utility and possible adoption of MSP as a tool has been uncertain, despite strong advocacy from non-governmental organizations. This is possibly because the added value to current ocean management efforts in Canada is not clear.¹⁴⁶ It may be argued that MSP, if deployed in Canada's marine regions, would be a federal responsibility. While that is a fair point, Canadian provinces' ICZM initiatives are also concerned to some extent with adjacent coastal waters. In their pursuit of ICZM, provinces and territories do not have a set of commonly-agreed-to principles to serve as guidance and to promote ICZM coherency across Canada's marine regions. The DFO's challenge of promoting coherency is made more difficult without proper funding to entice ICZM initiatives at the provincial level, a problem shared with both DG Mare and DG Environment. The federal government in Canada and the E.U. institutions, in relation to Member States, do not have a program of financial support provided against broader principles and goals, such as in the U.S. does. In this respect, the U.S. has in place a stronger framework for the promotion of ICZM at the sub-national level, provided individual states buy in. Federal consistency principles then ensure that individual states pursue ICZM programs with federal government support within the framework of the Coastal Zone Management Act of 1972.¹⁴⁷

Without clearer guidance, the requirements of the Water Framework Directive (WFD)¹⁴⁸ could also add to the challenges faced by Member States seeking to develop their own national strategies. Many of the principles articulated in the WFD (such as required public participation) are

145. *Fisheries and Oceans to 'Shed' Services*, CBC NEWS (Oct. 13, 2011 9:11 PM), <http://www.cbc.ca/news/canada/newfoundland-labrador/story/2011/10/13/nl-dfo-shedding-services-1013.html>.

146. See Andrew Dumbrille, *Marine Spatial Planning: Its Time Has Come*, WWF-CANADA BLOG (July 21, 2010), <http://blog.wwf.ca/blog/2010/07/21/marine-spatial-planning-its-time-has-come/> (example of a prominent non-profit organization advocating for the Canadian government to adopt marine spatial planning).

147. See John Duff, *The Coastal Zone Management Act: Reverse Pre-Emption or Contractual Federalism?*, 6 OCEAN & COASTAL L. J. 109, 111–12 (2001) (describing the federal-state relationship in the U.S., where federal dollars are promised to states in exchange for the states independently protecting their respective coastal zones).

148. Directive for Community Action, *supra* note 116.

clearly compatible with the ICZM Recommendation.¹⁴⁹ The challenge lies in the fact that the WFD is pulling the coastal zone in yet another direction. It has a strong environmental focus and, despite including the coastal area, it is a policy that looks predominantly inland. How should Member States incorporate WFD principles in their ICZM Strategies and in their Integrated Maritime Policies? There is an answer to this, but the E.U. needs to make it clearer. None of these instruments are incompatible. As mentioned, the combined implementation of the Water Framework Directive and the Marine Strategy Framework Directive is actually expected to bridge the gap between the protection of inland waters and the open seas.¹⁵⁰ Inhibiting this is the kind of policy overlap at the European level that real integration seeks to avoid.

The ICZM Recommendation encouraged Member States to undertake a national stocktaking of the major actors and laws that impact the coastal zone and to identify mechanisms for the coordinated implementation of Community legislation and policies.¹⁵¹ This process of stocktaking and coordination should also have been undertaken within the Commission at the supranational level. While integrated solutions to concrete problems can only be found at the local level, any integration of *policies* must begin at the higher levels of administration.¹⁵² It is only through policy integration at the European level that the necessary institutional and legal context can be created, within which national ICZM strategies can effectively develop. In short, the level of policy integration achieved by the Commission itself will largely determine the quality of future ICZM strategies developed by Member States.¹⁵³ The IMP is now taking active steps towards this E.U.-level policy coordination, but there is still work to be done.

The latest step in the E.U.'s quest to promote ICZM is OURCOAST, a program funded by DG Environment and designed to facilitate the exchange of knowledge, experiences, and best practices in coastal planning and management.¹⁵⁴ The purpose was "to create an information base and groundwork that will further support implementation of ICZM in coastal areas by the establishment of long-lasting information mechanisms that

149. Compare Directive for Community Action, *supra* note 116 (stating that the success of the WFD relies on public involvement), with ICZM Recommendation, *supra* note 89 (requiring participating Member States to identify measures to promote public participation).

150. THE EU MARINE STRATEGY, *supra* note 120.

151. ICZM Recommendation, *supra* note 89, at IV(3)(f).

152. Communication from the Commission on ICZM, *supra* note 94, at 9.

153. Rupperecht Consult & International Ocean Institute, *supra* note 90, at 242.

154. *OURCOAST Project Overview*, EUROPEAN COMMISSION ENVIRONMENT (Nov. 16, 2011), <http://ec.europa.eu/environment/iczm/ourcoast.htm>.

promote the sharing of experiences and practices throughout Europe.”¹⁵⁵ The three-year program culminated in a conference of coastal and marine stakeholders convened in Riga in October 2011.¹⁵⁶ The conference was an opportunity to present ICZM case studies from around the Union. It is instructive to note that over 350 case study examples or experiences were gathered.¹⁵⁷ It is conceivable that this wealth of experience, much of it at a local level, may help address some of the concerns relating to lack of guidance for Member States mentioned earlier and further help shape future directions for ICZM in the Union as a whole. The challenge will be sustaining the critical mass built as support for this program as specific-purpose funding, rather than continuing programmatic funding, voted for by the European Parliament in 2008.

CONCLUSION

The quest for ICOM in Canada and the E.U. continues to be a work in progress. What might the two jurisdictions learn from each other? Senior officials from both jurisdictions have looked to each other’s experiences on specific initiatives. DG Mare took a close look at Canada’s Oceans Act, Oceans Strategy, and related processes in developing the IMP. Officials in DFO have similarly studied DG Mare’s initiative concerning MSP. This is not surprising because there is appreciation on both sides of the challenge of playing internal and external leadership roles in ICOM. While officials take mutual solace in their respective predicaments, perhaps there are other lessons that the two jurisdictions can draw upon from each other and also from the U.S., which has the more mature jurisdiction in this field. There is value for the E.U. in the Canadian approach of setting out a broad framework in one instrument for ocean policy, integrated management, lead role and institutional framework, and processes. Leadership for coasts and oceans in the E.U. is frequently unclear, if not conflicting. There is greater emphasis on communities in the Canadian approach to ICOM than in the E.U., whose policies appear to be directed more at betterment of social conditions for citizens, rather than communities. Canada can benefit from an important principle in the Lisbon Treaty that aims at promoting

155. ARCADIS, OURCOAST INCEPTION REPORT, REPORT NO. A22113R1R2 (2009), *available at* <http://ec.europa.eu/ourcoast/download.cfm?fileID=101>.

156. INTEGRATED COASTAL ZONE MANAGEMENT IN EUROPE, OURCOAST, <http://www.ourcoastconferenceriga.eu/> (last visited Feb. 5, 2012).

157. ARCADIS, OURCOAST: SHARING BEST PRACTICES FOR INTEGRATED COASTAL MANAGEMENT, *available at* <http://www.ourcoastconferenceriga.eu/press/ourcoast.pdf>.

consistency among Union policies and activities. Lessons can be learned from the utilization of a sophisticated array of legislative and policy instruments to influence provincial compliance with federal initiatives. Also, the growing emphasis in E.U. ocean and coastal policy on regional approaches informed by ecosystem-based management, in particular within the framework of the MSFD, has value for Canada, which appears to favor centralized decision-making under the current conservative government. Canada's diverse ocean environments could benefit from less-centralized decision-making. However, both Canada and the E.U. could learn from the U.S. approach in federally-led ICZM—the development of a broad framework with objectives, supported by a funding program and a federal consistency rule, is more likely to promote widespread integrated management practices at the sub-national and member-State levels.

