



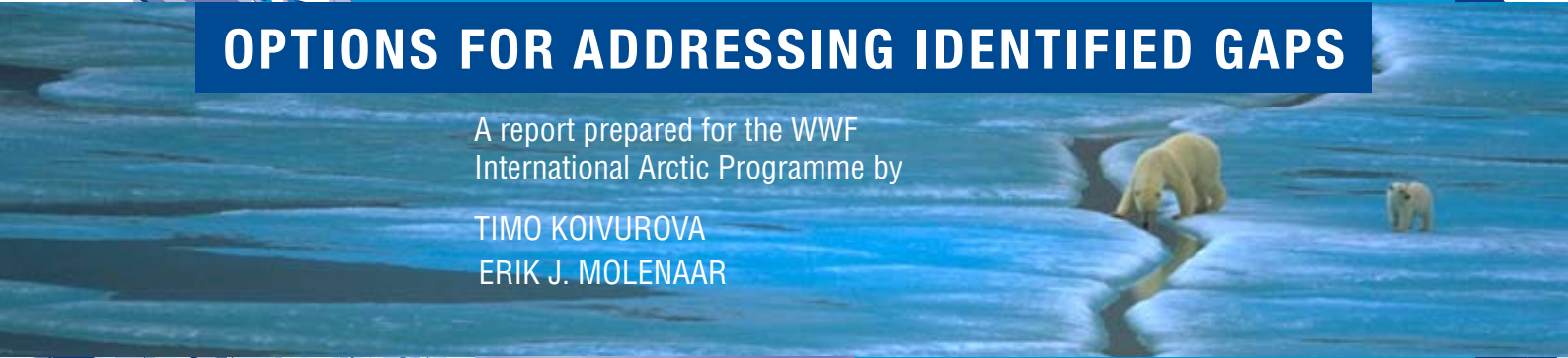
for a living planet

# International Governance and Regulation of the Marine Arctic

## OPTIONS FOR ADDRESSING IDENTIFIED GAPS

A report prepared for the WWF  
International Arctic Programme by

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## Foreword

It is a generally agreed fact that the Arctic Ocean meltdown is by now largely irreversible. Recent empirical research tends to show that the Arctic Ocean will not be seasonally ice-free by the end of this century, as projected by the 2004 Arctic Climate Impact Assessment (ACIA), but much earlier.

There is also widespread agreement that the existing regime governing the Arctic Ocean's marine environment is insufficient and that improvements are urgently needed. Indeed, the governance and regulatory regime that currently exists in the Arctic may have been adequate for a hostile environment that allows very little human activity for most of the year. But when the Arctic Ocean becomes increasingly similar to regional seas in other parts of the world for ever longer parts of the year, adequacy of the current regime can no longer be assumed.

In a first report commissioned by WWF, *International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis*, authors Timo Koivurova and Erik J. Molenaar identified the gaps of the current regulatory and governance regime. The analysis in the *Overview and Gap Analysis* report revealed various governance and regulatory gaps, in particular the absence of an operational arctic institution. Given the pace of change in the Arctic, it is difficult to see how the Arctic and its Ocean could be sustainably and coherently managed without dedicated institutions. Rules alone – especially non-legally binding ones – are hardly enough to govern the new sea emerging underneath the sea ice.

WWF subsequently commissioned this complementary report to explore options for addressing the gaps identified in the *Overview and Gap Analysis* report. The present publication therefore largely mirrors this latter report.

This present report addresses four main issues: (a) general principles and considerations for addressing identified gaps; (b) options for addressing identified gaps in the Arctic Council and its constitutive instrument; (c) options for addressing identified gaps in sectoral governance and regulation; and (d) options for pursuing integrated, cross-sectoral ecosystem-based oceans management.

WWF hopes this and other reports it has commissioned will shed light on the limitations of existing regulatory and governance tools, and nourish the debate on the urgent changes that are needed. WWF is convinced that in order to leave our children a living planet, we must rethink the current governance and legal framework to protect the Arctic's emblematic biodiversity, as well as its rich natural resources which must be managed sustainably for present and future generations.

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## Executive summary

### Introduction

This report was commissioned by the WWF International Arctic Programme as a consequence of the perceived inadequacies of the current international governance and regulatory regime of the marine Arctic in light of current and future effects of climate change on the Arctic. This report complements two other reports with the same main title but with different subtitles, namely *Overview and Gap Analysis*<sup>1</sup> and *A Proposal for a Legally Binding Instrument*<sup>2</sup>. The purpose of this report is to identify options for addressing certain of the gaps identified in the *Overview and Gap Analysis* report. The present report therefore largely mirrors this latter report.

The present report consists of four main sections, namely (a) general principles and considerations for addressing identified gaps; (b) options for addressing identified gaps in the Arctic Council and its constitutive instrument; (c) options for addressing identified gaps in sectoral governance and regulation; and (d) options for pursuing integrated, cross-sectoral ecosystem-based oceans management. The main arguments and conclusions of these sections are summarized below.

### General principles and considerations

In developing options for addressing identified gaps, account should be taken of various general principles and considerations, including (a) necessity; (b) timing and comprehensiveness of reform; (c) type, level and proposals for reform; and (d) balancing rights, interests and obligations. The analysis of these general principles and considerations has led to a number of conclusions, for instance that the need for reform of the international governance and regulatory regime of the marine Arctic is not disputed as such. Even the Ilulissat Declaration of 28 May 2008 indicates that the five Arctic Ocean coastal states do not question the need for reform as such, but only the need for certain types of reform at certain levels.

In considering the timing and comprehensiveness of reform, the point of departure should be that at least a minimum level of governance and regulation is in place before human activities commence or expand. While proactive/precautionary approaches such as those pursued within the Antarctic Treaty system (ATS) appear commendable, they should not be pursued without taking proper account of cost-effectiveness, fairness and equity.

A prerequisite for successful reform of the international regime for the governance and regulation of the marine Arctic is that it acceptably balances the rights, interests and obligations of relevant states, the international community and Indigenous peoples. Which states are relevant depends first of all on the spatial scope of the instrument and/or the spatial mandate of the institution by means of which reform is to be brought about. This is due to the fact that different states have different rights, interests and obligations depending on the different maritime zones. There seem to be three basic options for the spatial scope of reform. These are: (a) only areas within national jurisdiction; (b) only areas beyond national jurisdiction (high seas and the 'Area'); and (c) both areas within and beyond national jurisdiction.

We believe that reform under option (c) is best. Pursuing this option would place neither coastal states nor other states in a more advantageous position due to lower costs/higher profits, would better facilitate addressing transboundary issues and effects, would enhance

1. Final version of January 2009, available at <[www.panda.org/arctic](http://www.panda.org/arctic)>.

2. Forthcoming in 2009.

uniformity and would be conducive to successful integrated, cross-sectoral ecosystem-based ocean management. The challenge of pursuing this option is to balance the rights, interests and obligations of coastal states on the one hand with those of other states and the international community on the other hand. The point of departure for addressing this challenge is that the envisaged governance and regulatory regime does not have to be uniform – both substantively and spatially – for all sectors. This would be entirely unrealistic in view of the sovereignty, sovereign rights and jurisdiction of Arctic Ocean coastal states.

### **Arctic Council and its constitutive instrument**

The Arctic Council has a role in marine governance and regulation in the Arctic, but it is a limited one, even though gradually expanding. It is difficult to argue that the Arctic Council alone, as it presently stands, could do much to counter the vast challenges facing the Arctic marine area. There are proposals as to how to revise the Arctic Council to enhance its role in promoting sustainable development in the region. The strong side of these proposals is that they could be implemented fairly rapidly since they do not call for major reforms of the Arctic Council or the present governance system in the Arctic. The proposals, however, suffer from their political realism. Given the pace of change in the Arctic, such minor changes to the present governance regime are unlikely to enable the system to counter the vast challenges ahead.

### **Sectoral governance and regulation**

The report has developed options for three sectors, namely (a) fisheries management; (b) shipping; and (c) offshore hydrocarbon activities. The main options are summarized in Table 1 below. Two of the options under fisheries management are discussed in more detail in this report, namely a declaration on new and existing fisheries in the Arctic marine area and adjusting the spatial scope of the NEAFC Convention and the North-East Atlantic Fisheries Commission (NEAFC) established by it. As regards the declaration, some steps have already been taken for initiating a process towards its adoption.

The discussion on spatial adjustments of the NEAFC Convention takes place in the context of the option of establishing one or more state-of-the-art regional fisheries management organizations (RFMOs) or Arrangements for species other than tuna and tuna-like species and anadromous species. NEAFC (& the NEAFC Convention) is an obvious candidate for a spatial adjustment. While spatial adjustments are in principle possible, large expansions by which the NEAFC Convention Area would comprise the entire Arctic Ocean – as suggested in the European Commission's Arctic Communication – appear much more problematic than relatively small geographical adjustments (expansions as well as shrinkages). Arguably, this is mainly due to NEAFC's practices on the establishment and allocation of the total allowable catch (TAC) for straddling fish stocks, for the reason that these clearly give preferential treatment to coastal states.

Table 1: Options for Addressing Gaps in Sectoral Governance and Regulation

Fisheries management	Shipping	Offshore hydrocarbon activities
<p>1. <b>Conducting basic fisheries research</b> as well as developing future scenarios about areas, dates, species, fishing techniques</p> <p>2. <b>Individual regulation by states</b> – both Arctic Ocean coastal states and other states – in their capacities as flag, coastal, port and market states and with regard to their natural and legal persons. Such regulation should, among other things, be aimed at combating illegal, unreported and unregulated (IUU) fishing</p> <p>3. <b>Bilateral or subregional arrangements</b> between relevant Arctic Ocean coastal states on the conservation and management of shared and anadromous fish stocks</p> <p>4. <b>A declaration on new and existing fisheries in the Arctic Ocean</b> by which the main relevant general principles of the Fish Stocks Agreement, the recent United Nations General Assembly (UNGA) Resolutions in relation to vulnerable marine ecosystems and destructive fishing practices and relevant conservation and management measures drawn from regional fisheries management organizations (RFMOs) are made applicable to new and existing fisheries in the Arctic marine area. In particular, this declaration could stipulate that there shall be no new or expanded fisheries until adequate assessments of their potential impacts on target and non-target species, the broader marine environment and the livelihoods of Indigenous peoples are carried out</p> <p>5. Individual or collective initiatives towards developing mechanisms or procedures similar to an <b>environmental impact assessment (EIA) and/or a strategic impact assessment (SEA)</b> for new fisheries in the Arctic marine area</p>	<p>1. <b>Options for action within the International Maritime Organization (IMO):</b></p> <ul style="list-style-type: none"> <li>• Make the IMO Polar Shipping Guidelines mandatory</li> <li>• Pursue the adoption of special standards, for instance: <ul style="list-style-type: none"> <li>• Special discharge or emission standards for all or part of the Arctic marine area under MARPOL 73/78</li> <li>• Special fuel content or ballast water treatment standards;</li> <li>• One or more mandatory ships' routing systems, whether or not in the form of an comprehensive 'Arctic Sea Lanes' proposal</li> <li>• Ship reporting systems</li> <li>• Compulsory pilotage and ice-breaker or tug assistance</li> <li>• Special anti-fouling standards</li> </ul> </li> <li>• Designate part of the Arctic Ocean as a particularly sensitive sea area (PSSA), with a comprehensive package of associated protective measures (APMs) consisting of one or more of the special standards just mentioned above</li> </ul> <p>2. <b>Options for arctic states at the regional level, in their capacities as coastal states:</b></p> <ul style="list-style-type: none"> <li>• Agree on legally binding agreements on monitoring, contingency planning and preparedness for pollution incidents, as well as on search and rescue, including by designating places of refuge</li> <li>• Agree on a harmonized approach on enforcement and ensuring compliance, inter alia by means of shared platforms</li> <li>• Implement the BWM Convention individually or in concert</li> <li>• Take other action under Article 234 of the LOS Convention</li> </ul> <p>3. <b>Options for arctic states and other states at the regional level, in their capacities as port states:</b></p> <ul style="list-style-type: none"> <li>• Develop a strategy for port state control in the Arctic, for instance by establishing an Arctic Memorandum of Understanding (MOU) on port state control or by adjusting Paris MOU and the Tokyo MOU on port state control to ensure that proper account is taken of intra-arctic and trans-arctic marine shipping</li> <li>• Implement Article 218 of the LOS Convention in concert</li> <li>• Exercise port state residual jurisdiction in concert – relying in part on Article 234 of the LOS Convention – in case the IMO Polar Shipping Guidelines are not made mandatory</li> </ul> <p>4. <b>Other options for arctic states in particular, individually or collectively:</b></p> <ul style="list-style-type: none"> <li>• Address the need for hydrographic surveying and charting</li> <li>• Consider the need to develop a regional liability regime</li> <li>• Encourage self-regulation by the shipping industry</li> <li>• Urge the International Association of Classification Societies (IACS) to restrict the margin of discretion that individual members have in relation to the IACS Unified Requirements concerning Polar Class</li> </ul>	<p>1. Develop <b>legally-binding regulations for offshore hydrocarbon activities in the Arctic marine area</b>, drawing in particular on the Arctic Council's Arctic Offshore Oil and Gas Guidelines, the OSPAR Convention and the relevant acts of the OSPAR Commission</p> <p>2. Ensure that the aforementioned regulations also have an <b>institutional component</b> to ensure that a body is mandated to implement and update the substantive standards when necessary. The spatial competence of this body should as a minimum complement that of the OSPAR Commission and the International Seabed Authority (ISA), thus achieving full coverage of the Arctic marine area</p> <p>3. Develop a <b>regional agreement on contingency planning and preparedness</b> for incidents involving offshore hydrocarbon activities which, among other things, establishes a body mandated to implement and update the substantive standards when necessary. The spatial scope of such an agreement and the spatial mandate of the body established by it should as a minimum complement that of existing bilateral and multilateral agreements; thus achieving full coverage of the Arctic marine area</p>

### **Integrated, cross-sectoral ecosystem-based oceans management**

While most, if not all, states would acknowledge the merits of integrated, cross-sectoral ecosystem-based management of the Arctic marine area, they are likely to have very divergent views on how it should be pursued. For instance, whether it should be pursued by means of legally binding or non-legally binding instruments or whether it should be pursued at the global or at the regional level.

‘Soft-law’ and ‘hard-law’ approaches both have their advantages and disadvantages and these should be carefully considered. It seems that support for soft-law approaches is occasionally at least partially based on misunderstandings of the disadvantages of hard-law approaches, for example that the latter always require lengthy negotiation-processes and a long time to enter into force. For many reasons, however, the LOS Convention cannot be used as a representative example in this context. Moreover, nothing in the law of treaties prevents states per se from granting Indigenous peoples’ organizations a participatory status in a treaty that equals, or goes beyond, the status that permanent participants now enjoy within the Arctic Council.

Support for initiatives at the global level seems in this context minimal, if only because success in integrated, cross-sectoral ecosystem-based oceans management depends to a significant extent on its spatial delimitation (scale). A global scale would not provide much operational impact. Also, linking a legally binding instrument for the marine Arctic to the LOS Convention – even if its spatial scope would be limited to areas beyond national jurisdiction – would not be acceptable to Arctic Ocean coastal states because its negotiation would fall under the United Nations General Assembly (UNGA); a forum where the five Arctic Ocean coastal states could potentially be confronted by 180-odd states with opposing views and interests.

Regional approaches are for the same reasons likely to attract more support.<sup>3</sup> However, the Arctic Ocean coastal states are in view of their Ilulissat Declaration not in favor of a legally binding instrument in case that would amount to “a new comprehensive international legal regime to govern the Arctic Ocean”. Proposals such as those by the European Parliament in its Resolution of 9 October 2008 on arctic governance for a treaty inspired by the Antarctic Treaty have the additional hurdle of being too closely associated with the agreement to disagree on the status of sovereignty in Antarctica.

Some elements of the ATS – such as the agreement to disagree on the question of sovereignty, elements directly related thereto and an indefinite ban on mineral resource activities modeled on Articles 7 and 25(2) of the Madrid Protocol to the Antarctic Treaty – are clearly not suitable as a model for reform of the arctic regime. While some elements – such as use for peaceful purposes only, modeled on Article I(1) of the Antarctic Treaty – are unlikely to be suitable, yet other elements appear in principle suitable, for instance the linkages between the instruments of the ATS and the bodies established by them for the reason that these are conducive to integrated, cross-sectoral ecosystem-based ocean management.

Expanding the spatial scope of the OSPAR Convention to include the entire Arctic Ocean would not strictly speaking be a ‘new regime’, but it is questionable if Canada, the Russian Federation and the United States would be prepared to accept this entire ‘acquis’; namely the OSPAR Convention as well as all the legally binding decisions, non-legally binding recommendations and other agreements adopted by the OSPAR Commission – without significant amendments.

A pertinent question is nevertheless how the Ilulissat Declaration should be interpreted in this regard: does it draw a line in the sand or is it an opening bid in the initial stages of the ongoing debate on reform? The latter could certainly turn out to be the better interpretation, in particular if the primary purpose of the phrase “a new comprehensive

3. See also the main reasons for regional regimes listed in the *Overview and Gap Analysis* report, at p. 6.

international legal regime to govern the Arctic Ocean” is to reject reform along the lines of the Antarctic Treaty and if existing and newly established sectoral arrangements do not succeed in adequate coordination and coordination. The pace of change in the Arctic is likely to be a crucial factor in that regard.

In the view of the authors of this report, a regional legally binding instrument dedicated to the marine Arctic is the most convincing option for reforming the current regime of the Arctic and should be seriously considered. In designing the basic features and elements of such an instrument, account should be taken of the general principles and considerations and other arguments discussed in this report. While expanding the spatial scope of the existing OSPAR Convention might at first sight seem an attractive option, an instrument that is tailor-made for the Arctic would seem to be able to garner more support. Moreover, the instrument should be self-standing, should build on the achievements of the Arctic Council so far and retain its viable parts and bodies, and should not be formally linked to for instance the LOS Convention. Finally, the instrument should have an overarching character which is at a minimum conducive to integrated, cross-sectoral ecosystem-based oceans management and whose primary body could also be mandated to pursue that objective. These and other basic features and elements are elaborated in the report *A Proposal for a Legally Binding Instrument*.

#### List of abbreviations

AECO	Association of Arctic Expedition Cruise Operators
AEPS	Arctic Environmental Protection Strategy
AMSA	Arctic Marine Shipping Assessment
AMSP	Arctic Marine Strategic Plan
APMs	associated protective measures
ATCM	Antarctic Treaty Consultative Meeting
ATS	Antarctic Treaty system
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CDEM	construction, design, equipment and manning (standards)
COFI	FAO Committee on Fisheries
DE	Sub-Committee on Ship Design and Equipment, of the IMO
EC	European Community
EEZ	exclusive economic zone
EIA	environmental impact assessment
EP	European Parliament
EPPR	Emergency, Prevention, Preparedness and Response (working group)
EU	European Union
FAO	United Nations Food and Agriculture Organization
FMP	fishery management plan
GAIRAS	generally accepted international rules and standards
IACS	International Association of Classification Societies
ICES	International Council for the Exploration of the Sea
IMO	International Maritime Organization
ISA	International Sea-bed Authority
IUCN	International Union for Conservation of Nature
IUU	illegal, unreported and unregulated
IWC	International Whaling Commission
LME	large marine ecosystem
MOU	Memorandum of Understanding
NAMMCO	North Atlantic Marine Mammal Commission
NEAFC	North-East Atlantic Fisheries Commission
NPFMC	North Pacific Fishery Management Council
NGO	non-governmental organization
PAME	Protection of the Arctic Marine Environment (working group)
PSSA	particularly sensitive sea area
RFMO	regional fisheries management organization
SAO	Senior Arctic Official
SDWG	Sustainable Development (working group)
SEA	strategic impact assessment
TAC	total allowable catch
UNGA	United Nations General Assembly

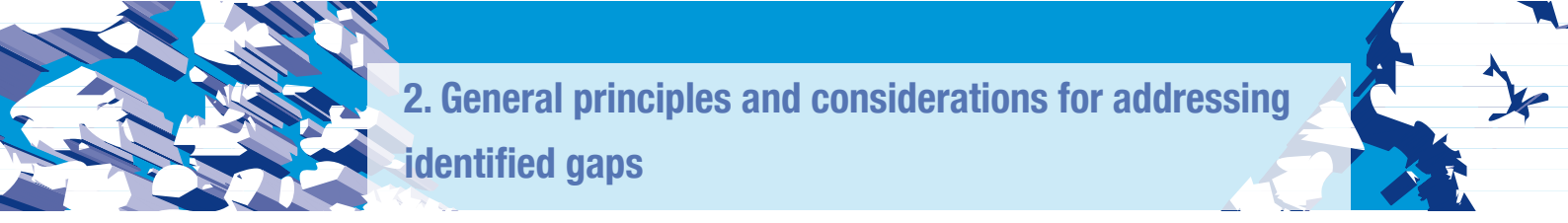




## 1. Introduction

This report was commissioned by the WWF International Arctic Programme as a consequence of the perceived inadequacies of the current international governance and regulatory regime of the marine Arctic in light of current and future effects of climate change on the Arctic. This report complements two other reports with the same main title but with different subtitles, namely *Overview and Gap Analysis*<sup>4</sup> and *A Proposal for a Legally Binding Instrument*<sup>5</sup>.

The purpose of this report is to identify options for addressing certain of the gaps identified in the *Overview and Gap Analysis* report. The present report therefore largely mirrors this latter report. The next section discusses general principles and considerations for addressing identified gaps. Subsequently, section 3 examines options for addressing identified gaps in the Arctic Council and its constitutive instrument, section 4 discusses options for addressing identified gaps in sectoral governance and regulation and section 5 analyzes options for pursuing integrated, cross-sectoral ecosystem-based oceans management.



## 2. General principles and considerations for addressing identified gaps

### 2.1. Introduction

The aim of this section is to identify general principles and considerations that have a bearing on the choice for particular options to address identified gaps. The following subsections discuss necessity (subsection 2.2), timing and comprehensiveness of reform (subsection 2.3), type, level and proposals for reform (subsection 2.4) and balancing rights, interests and obligations (subsection 2.5). As will become apparent, it is not always easy to find suitable headings for all relevant issues. It is therefore noted that the spatial scope of reform is integrated in subsection 2.5. Finally, subsection 2.6 will discuss the relevance of Articles 122–123 of the LOS Convention<sup>6</sup>.

### 2.2. Necessity

Reform of the international regime for the governance and regulation of the marine Arctic should only be undertaken after it has been ascertained that it is necessary. Necessity can for instance be determined in the light of the impacts of climate change, and the ensuing increase of human activities on the marine environment and marine biodiversity in the Arctic.

It is submitted that the need for reform as such is not disputed. There is no scientific disagreement that the Arctic is rapidly changing. Rather, the debate focuses on the pace of change and future projections. The governance and regulatory regime that currently exists

4. Final version of January 2009, available at <[www.panda.org/arctic](http://www.panda.org/arctic)>.

5. Forthcoming in 2009.

6. 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)>.

in the Arctic may have been adequate for an environment that largely restricted human activity for most of the year. But when the Arctic Ocean becomes increasingly similar to regional seas in other parts of the world for ever longer parts of the year, adequacy can no longer be assumed. In fact, the Ilulissat Declaration of 28 May 2008<sup>7</sup> indicates that the five Arctic Ocean coastal states also do not question the need for reform as such, but only the need for certain types of reform at certain levels.

Notwithstanding the above, the need to address identified governance and regulatory gaps has to be carefully ascertained for each individual gap. For instance, even though there are currently no special legally binding construction, design, equipment and manning (CDEM) standards for the Arctic marine area, this does not automatically mean that the International Maritime Organization (IMO) Polar Shipping Guidelines,<sup>8</sup> once adopted, should be made mandatory.

### **2.3. Timing and comprehensiveness of reform: pro-active/precautionary, fair and equitable and cost-effective**

In considering the timing and comprehensiveness of reform, the point of departure should be that at least a minimum level of governance and regulation is in place before human activities commence or expand. In this context, mention can be made of the pro-active approach pursued by the Contracting Parties to the Antarctic Treaty<sup>9</sup> by commencing the negotiation processes for the CCAS Convention,<sup>10</sup> the CCAMLR Convention<sup>11</sup>, and the CRAMRA<sup>12</sup>, before the relevant human activities had begun (or would be resumed). This pro-active approach is widely regarded as a significant achievement of the Antarctic Treaty system (ATS)<sup>13</sup>.

Pursuing a pro-active approach is not fundamentally different from pursuing a precautionary approach, which requires certain measures to be taken depending on the extent of scientific uncertainty, risk of certain consequences and the seriousness and irreversibility of such consequences. This is the essence of the view expressed at the outset of this subsection, namely that the point of departure should be that at least a minimum level of governance and regulation is in place before human activities commence or expand. Having nothing in place in case risks are underestimated in terms of timing, seriousness or irreversibility – as often happens – is both undesirable and inappropriate. The response time between a decision that governance and regulation is required and the moment when such governance and regulation is actually operational is often considerable. A telling example relates to the fishery for orange roughy (*Hoplostethus atlanticus*) in the Southwestern Indian Ocean, which had completed a ‘boom-and-bust’ cycle around 2001 before serious negotiations to establish a regional fisheries management mechanism were under way.<sup>14</sup> The SIOF Agreement<sup>15</sup>, that was eventually adopted in 2006 has yet to enter into force. It is

7. Ilulissat, 28 May 2008 (available at <arctic-council.org>).

8. In March 2009, the Sub-Committee on Ship Design and Equipment (DE) concluded its revision of the IMO Arctic Shipping Guidelines. The extension of their spatial scope to include ‘Antarctic waters’ - namely waters south of 60° South - is reflected in the new title ‘Guidelines for Ships Operating in Polar Waters’. The draft Guidelines are incorporated in Annex I to IMO doc. DE 52/WP.2, of 19 March 2009, ‘Guidelines for Ships Operating in Arctic Ice-Covered Waters. Report of the working group’. The Guidelines are intended to be adopted by the IMO Assembly in November 2009 by means of a resolution.

9. Antarctic Treaty, Washington D.C., 1 December 1959. In force 23 June 1961, 402 *United Nations Treaty Series* 71; <www.ats.aq>.

10. Convention for the Conservation of Antarctic Seals, London, 1 June 1972. In force 11 March 1978, 1080 *United Nations Treaty Series* 176; <www.ats.aq>.

11. Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 19 *International Legal Materials* 837 (1980); <www.ccamlr.org>.

12. Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988. Not in force, 27 *International Legal Materials* 868 (1988).

13. For a definition of this acronym see subsection 5.4.

14. For a discussion of the initial stages of the negotiations see E.J. Molenaar, ‘The South Tasman Rise Arrangement of 2000 and other Initiatives on Management and Conservation of Orange Roughy’, 16 *International Journal of Marine and Coastal Law* 77-118 (2001), at pp. 109-115.

15. Southern Indian Ocean Fisheries Agreement, Rome, 7 July 2006. Not in force, <www.fao.org/legal>.

in that context particularly welcome that the Legal Advisor of the United States Department of State recently observed:

Finally, I view it as a very positive development that, both domestically and internationally, experts are considering the legal issues associated with the warming of the Arctic. To the extent enhancements are needed in one or more areas regarding the safety, security, or environmental protection of the Arctic Ocean, these can be agreed upon and put in place *before they become necessary*.<sup>16</sup> [emphasis added]

While the example of the orange roughy fishery focuses in particular on the implications that responding too late may have for the long-term sustainable management of living resources or even for marine biodiversity, there may also be implications for fair and equitable – both inter-generational and intra-generational – access to, allocation of, or sharing benefits arising out of the utilization of, resources.<sup>17</sup> Open access regimes in areas beyond national jurisdiction<sup>18</sup> are commonly advantageous to developed states that have the technology, expertise and other resources required for pioneering. This was the main reason for developing states to push for Part XI of the LOS Convention and also seems to be the main motivation for their view that bio-prospecting for genetic resources of the Area is, or should be, governed by the principle of the common heritage of mankind and not by the regime of the high seas.<sup>19</sup> In the context of marine capture fisheries, reference should also be made to the wide-spread practice of using historic fishing rights as the main or predominant criterion for the allocation of fishing opportunities.

However, while pro-active/precautionary approaches appear *prima facie* commendable, they should not be pursued without taking proper account of cost-effectiveness. The regime for deep sea-bed mining in Part XI of the LOS Convention could be regarded as an example of a pro-active approach. The negotiations on this regime were particularly complex and contentious and were most likely responsible for extending the overall negotiation process by several years.<sup>20</sup> Twelve years after the adoption of the LOS Convention, the regime in Part XI was significantly modified by the Part XI Deep-Sea Mining Agreement.<sup>21</sup> And at the time of writing – more than 35 years after the start of the negotiation process of the LOS Convention – commercial exploitation of mineral resources of the Area has yet to begin.

These examples should be kept in mind when considering the comprehensiveness of reform of the governance and regulatory regime for the Arctic marine area. In view of the difficulty of making accurate predictions of the impacts of climate change – and the ensuing increase of human activities – on the marine environment and marine biodiversity in the Arctic, devoting extensive resources on a multilateral negotiation-process for a full-fledged, comprehensive and detailed governance and regulatory regime for all possible human activities in the marine Arctic would hardly be seen as cost-effective. This is especially true if most of these activities are not expected to reach a significant level and intensity within a decade, and other regional or global issues are on face-value more pressing.

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16. J.B. Bellinger, III, 'The United States and the Law of the Sea Convention', address of 3 November 2008 (available at <[www.state.gov/s/rls/111587.htm](http://www.state.gov/s/rls/111587.htm)>).

17. See, inter alia, Art. 1 of the CBD (Convention on Biological Diversity, Nairobi, 22 May 1992. In force 29 December 1993, 31 *International Legal Materials* 822 (1992); <[www.biodiv.org](http://www.biodiv.org)>).

18. The phrase 'areas beyond national jurisdiction' refers to the high seas and the 'Area'.

19. This issue was debated at length during the Eight Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP) (2007) (see UN doc. A/62/169, of 30 July 2007, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eighth meeting', at pp. 15-16).

20. The negotiations on the LOS Convention lasted from 1973 to 1982.

21. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994. In force 28 July 1996, 33 *International Legal Materials* 1309 (1994); <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

#### 2.4. Type, level and proposals for reform

As noted above, this subsection is devoted to a discussion on the type, level and proposals for reform whereas the next subsection discusses other aspects of reform, such as its spatial scope.

Several different types of reform are possible. Reform can for instance have a narrow, issue-specific focus, a sectoral focus (e.g. shipping or fishing) or a more integrated, cross-sectoral focus. The type of reform can also vary in terms of outcome, namely legally binding or non-legally binding and whether or not new institutions are established.

Of paramount importance to choices between different types and levels of reform is the decentralized nature of international law and the absence of hierarchy among its forms/manifestations as well as its law-making processes. Consequently, particular care should be taken to ensure that proposed reform minimizes competition or overlap with existing instruments and institutions. Moreover, in view of the constantly increasing number of international instruments and institutions, it should be seriously considered if the problem may also be solved by enhancing implementation of existing instruments and improved coordination and cooperation between existing institutions.

As the Arctic Council is currently the main intergovernmental forum for the Arctic, proposals to reform the governance and regulatory regime for the Arctic need to address their relationship to the Arctic Council. Reform should therefore build on the achievements of the Arctic Council so far and retain its viable parts and bodies as much as possible. Radically throwing out everything that has been gradually and painstakingly created and maintained during a period of almost 20 years would make no sense.<sup>22</sup>

Proposals for reform may not generate sufficient support if they are, or appear to be, 'locked in' to a particular type and level of, or pathway to, reform instead of being more neutral, flexible and open-minded, provided certain problems (gaps) are adequately addressed. For instance, proposals to reform the current governance and regulatory regime of the Arctic marine area by means of an 'international legally binding instrument' may trigger less knee-jerk opposition than proposals that call for an 'Arctic Treaty'. While the former proposal is quite neutral – even though ruling out a non-legally binding instrument – the latter proposal is immediately associated with the Antarctic Treaty.<sup>23</sup> It is clear that many elements of the Antarctic Treaty cannot be transposed to the Arctic and would at any rate be entirely unacceptable to arctic states (for a more extensive discussion see subsection 5.4). A proposal for an Implementing Agreement under the LOS Convention (see subsection 5.5) is also worth mentioning in this context. Such a proposal implies the negotiation of a global instrument and thereby rules out a regional instrument and also implies a potentially problematic linkage to another instrument as well as an open-ended negotiation process under the United Nations General Assembly (UNGA).

#### 2.5. Balancing the rights, interests and obligations of states, the international community and Indigenous peoples

A prerequisite for successful reform of the international regime for the governance and regulation of the marine Arctic is that it acceptably balances the rights, interests and obligations of relevant states, the international community and Indigenous peoples. Which states are relevant and thereby also which rights, interests and obligations, depends first of all on the spatial scope of the instrument and/or the spatial mandate of the institution by means of which reform is to be brought about. This is due to the fact that different states have different rights, interests and obligations depending on the different maritime zones.

22.The Arctic Council is a continuation of the Arctic Environmental Protection Strategy (AEPS), whose negotiation commenced in 1989.

23.See, for instance, the United States Arctic Region Policy (National Security Presidential Directive/NSPD-66 & Homeland Security Presidential Directive/HSPD-25, of 9 January 2009. In effect same day; text at <[www.whitehouse.gov](http://www.whitehouse.gov)> (press release of 12 January 2009)), which notes that the "geopolitical circumstances of the Arctic region differ sufficiently from those of the Antarctic region such that an "Arctic Treaty" of broad scope -- along the lines of the Antarctic Treaty -- is not appropriate or necessary" (section III(C)(3)).

There seem to be three basic options for the spatial scope of reform. These are:

- (a) Only areas within national jurisdiction;
- (a) Only areas beyond national jurisdiction; and
- (a) Both areas within and beyond national jurisdiction.

As regards option (a), coastal states are the obvious participants in the reform process. Some coastal states may argue that they are the only relevant states. This, however, depends on the substantive scope of reform. If governance and regulation also relate to rights and interests that other states and the international community have – for instance navigation – it may be necessary to also allow such other states to participate in reform processes. The extent of coastal state powers under current international law will be determinative in that respect. In addition to user rights and interests such as navigation, other states could also invoke non-user interests as a basis for their entitlement to participate in the reform process. These non-user interests include the protection and preservation of the marine environment and safeguarding marine biodiversity. Such other states may indicate that they intend to participate in their own right, on behalf of the international community or both. Their participation may for instance be aimed at monitoring and ensuring that coastal states discharge relevant obligations with respect to the Arctic marine area.

It is submitted that reform under option (a) has the highest priority because the impacts of climate change and the ensuing human activities will occur first in areas under national jurisdiction. However, areas beyond national jurisdiction may follow not long thereafter. Also, limiting reform to these areas would in effect place coastal states in a disadvantageous position vis-à-vis other states whose nationals engage in activities in the adjacent areas<sup>24</sup>. In the absence of governance and regulation, the latter can operate with lower costs and higher profits and thus undermine the level-playing field that is of such crucial importance to successful international governance and regulation. Moreover, there may also be transboundary effects of activities in adjacent areas, for instance pollution or fishing activities targeting or impacting species that also occur in the coastal states' maritime zones. Limiting reform to areas under national jurisdiction would also not be in line with the preference for uniformity in governance and regulation by operators that work throughout the Arctic marine area. Finally, such a limited spatial scope of reform would obviously not be conducive to the success of integrated, cross-sectoral ecosystem-based ocean management, if such an approach is intended to be pursued.

As regards option (b), both (adjacent)<sup>25</sup> coastal states and other states are entitled to be participants in the reform process. Whether or not states are entitled to participate in their capacity as (adjacent) coastal states depends once again on the substantive scope of reform. Similar to option (a), states could invoke non-user interests as a basis for their entitlement in reform processes. As argued above, priority in reform lies with areas within national jurisdiction. Limiting reform to areas beyond national jurisdiction would place coastal states in a more advantageous position vis-à-vis other states due to lower costs/higher profits or transboundary effects, does not strive to enhance uniformity and is not conducive to successful integrated, cross-sectoral ecosystem-based ocean management.<sup>26</sup>

As regards option (c), both (adjacent) coastal states and other states are entitled to be participants in the reform process.<sup>27</sup> The comments on non-user interests made above

24. In essence the high seas.

25. In some scenarios (e.g. fisheries management) certain states may also qualify as coastal states even though their maritime zones are not immediately adjacent to the envisaged areas beyond national jurisdiction.

26. See nevertheless European Parliament's Resolution of 9 October 2008 on Arctic governance, discussed in subsection 5.4.1 *infra*; R.G. Rayfuse, 'Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction', 17 *Review of European Community and International Environmental Law* 3-13 (2008), at p. 11; S. Borgerson and C. Antrim, 'An Arctic Circle of Friends', *New York Times* 28 March 2009, who advocate a 'zone of peace' north of 88° North; and P.A. Berkman and O.R. Young, 'Governance and Environmental Change in the Arctic Ocean', 324 *Science* 339-340 (2009).

27. Note in this respect the views of D. McRae, 'Rethinking the Arctic: A New Agenda for Canada and the United States', within the Canada-US Project, *Blueprint for Canada-US Engagement under a New Administration*, Centre for Trade Policy and Law, Carleton University, 2008 (text at <[www.carleton.ca/ctpl/conferences](http://www.carleton.ca/ctpl/conferences)>), at p. 8, who advocates a regime for the arctic basin with "the objective of providing overall

are applicable here as well. In view of the comments made under options (a) and (b) on the need for a level-playing field, to take account of transboundary effects, uniformity and conduciveness to integrated, cross-sectoral ecosystem-based ocean management, it is submitted that reform under option (c) is the preferred course. Much more so than in case of reform under option (b), however, the challenge is to balance the rights, interests and obligations of coastal states on the one hand with those of other states and the international community on the other hand. The point of departure for addressing this challenge is that the envisaged governance and regulatory regime does not have to be uniform – both substantively and spatially – for all sectors. This would be entirely unrealistic in view of the sovereignty, sovereign rights and jurisdiction of coastal states.

During the reform process, alliances are likely to be created between stakeholders with similar rights, interests and obligations. The eight arctic states and the five Arctic Ocean coastal states seem likely alliances on some issues within certain spatial areas. In case the five Arctic Ocean coastal states group together, the three other arctic states might join the group of other states that have user or non-user interests in the Arctic.

So far, very little attention has been devoted to Indigenous peoples. While they do not have rights and obligations under the international law of the sea in their own right, they enjoy a status within the Arctic Council that effectively recognizes their interests in the Arctic. Proposals for reform that diminish that status may lead to pressure by Indigenous peoples on arctic states.

By way of conclusion, it should be noted that the balancing act discussed in this subsection is not just something that must be achieved in the final outcome of the reform. In particular the issue of participation needs to be carefully considered at the very beginning of the reform process.

### **2.1. The relevance of Articles 122–123 of the LOS Convention**

It has sometimes been suggested that Articles 122 and 123 of the LOS Convention would provide a legal obligation for Arctic Ocean coastal states to negotiate an international treaty over the Arctic Ocean. According to Article 122:

For the purposes of this Convention, “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

As is readily clear, this provision contemplates two types of sea-areas to be within its scope: either those which are covered primarily by territorial seas and EEZs of coastal states or those which are connected to other sea areas only by a narrow strait. Since the terms used in Article 122 are fairly vague, it is difficult to provide a clear-cut answer as to whether the Arctic Ocean is an enclosed or semi-enclosed sea in the meaning of Article 122. As regards the first type of sea-area, it must be pointed out that a large part of the Arctic Ocean consists of high seas and thereby would not convincingly satisfy the requirement of “primarily”. As regards the second type of sea-area, it should be noted that in comparison to the seas which clearly are enclosed or semi-enclosed – such as the Baltic or Mediterranean Seas – the Arctic Ocean opens relatively broadly to the North-East Atlantic.

But even if the argument could be made that the Arctic Ocean is an enclosed or semi-enclosed sea in the meaning of Article 122, Article 123 does not provide a clear-cut legal obligation for regional co-operation. It reads:

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environmental management of Arctic areas beyond national jurisdiction and coordination of management and objectives in respect of those areas within national jurisdiction”. It seems that this regime should be developed by arctic basin states as a pre-emptive strategy to avoid regimes based on universal participation.

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

According to the phrasing of this provision, it seems better to interpret Article 123 as encouraging regional sea cooperation over marine environmental protection, management of living resources and marine scientific research rather than imposing on coastal states a legally binding obligation to do so. In international treaty practice, “should” is normally used to denote non-legally binding encouragement rather than a legal obligation (for which “shall” or “must” are used). Moreover, the use of “shall” in the second sentence of the chapeau is significantly qualified by the term “endeavour”. It can thus be argued that Article 123 merely contains a weak obligation to cooperate, but it does urge the coastal states – perhaps together with other states and international organizations – to engage in regional co-operation over the policy areas enumerated in the provision.

If the coastal states were to regard the Arctic Ocean as an enclosed or semi-enclosed sea in the meaning of Article 122 (which they did not in the May 2008 Greenland meeting, where they issued the Ilulissat Declaration), and if they were to be prepared to commence negotiations over how to implement cooperation in the fields mentioned in Article 123, they would also need to figure out the relationship between this initiative and the Arctic Council, given that the Council’s work so far also extends to marine environmental protection and scientific research in the Arctic Ocean. It can be presumed that this relationship would not be easy to manage for the reason that the Council has as its members three states with no Arctic Ocean coastline, and these states might be excluded from the initial negotiations over the Arctic Ocean regional co-operation (even though they might later be invited to join in some status). This is likely to create friction between the Arctic Council and the new initiative (and friction between this initiative and the region’s Indigenous peoples who enjoy a particularly strong status in the Arctic Council).

Another difficulty of relying on Articles 122 and 123 is that it encourages the coastal states to cooperate over a limited number of issues only, not mentioning for instance navigation and offshore mining in its list of fields of cooperation; it is also not clear whether such regional cooperation would need to be enshrined in a treaty as this is not specifically mentioned in the Article (although this can be argued to be implied by Article 123 encouraging states to conclude such form of cooperation, with the intention to execute the littoral state rights and duties under the LOS Convention).

Even though from the strict legal point of view Articles 122 and 123 do not seem to be applicable to the Arctic Ocean, these provisions are flexible enough for the coastal states to make use of them if the political will for that exists. As argued by Hans Corell, the former Under-Secretary General for Legal Affairs of the UN:

Instead, it is possible to create a specific environmental regime for the Arctic, perhaps on the basis of UNCLOS Articles 122 and 123 (on cooperation of States bordering enclosed or semi-enclosed seas and Article 234 on ice-covered areas).<sup>28</sup>

Yet, even if the coastal states would commence negotiations on the basis of these provisions, this initiative would not resolve the problem of how to regulate the vast area of high seas in the Arctic Ocean, given that the coastal states are not accorded any additional powers on the basis of Articles 122 and 123.

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28.H. Corell, 'Reflections on the Possibilities and Limitations of a Binding Legal Regime', 37 *Environmental Policy and Law* 321-324 (2007), at p. 322.



### 3. Options for addressing identified gaps in the Arctic Council and its constitutive instrument

There are many who believe that the identified gaps in the international governance and regulatory regime for the Arctic marine area can be addressed by strengthening the Arctic Council. For instance, the recent policy statements by the United States and the European Commission identify the Arctic Council as a relevant forum for tackling the forthcoming challenges. In a similar vein, during a recent bilateral meeting between the Russian and the Danish Ministers of Foreign Affairs, both agreed that the Arctic Council has a key role to play in the future.<sup>29</sup> The Russian Federation's Minister of Foreign Affairs Sergei Lavrov even stated that:

All problems in the Arctic, including climate change and reducing ice cover, can successfully be considered and resolved within specially created international organisations such as the Arctic Council.<sup>30</sup>

Yet, this is more easily stated than put into practice. As argued in the *Overview and Gap Analysis* report,<sup>31</sup> the Arctic Council has a very limited mandate (environmental protection and sustainable development) and can only adopt consensus-based, non-legally binding decisions. The *Overview and Gap Analysis* also point to the general shortcomings of the Council, including the lack of an independent secretariat, a stable funding mechanism and its limited membership. Even though its maritime work has become more ambitious, especially with the Arctic Marine Strategic Plan (AMSP),<sup>32</sup> this has not changed the way the Council functions in the marine field: promoting influential scientific assessments and sometimes adopting recommendations that may or may not have an impact on practice. It is submitted that the more recent developments suggest three possible roles for the Council to tackle the vast challenges ahead.

First, with the policy recommendations flowing out of the scientific assessments, the Council could strengthen the implementation of existing treaties applicable in the Arctic and address the identified governance and regulatory gaps by issuing recommendations to various forums where regulatory action could be taken. For instance the Arctic Marine Shipping Assessment (AMSA) has made recommendations for regulatory action to be taken at various levels. In this way, the Council could catalyze normative developments, which would further strengthen and complete the existing international governance and regulatory regime in the Arctic marine area. It should be noted, however, that apart from the general challenge of trying to persuade these other fora to take action as proposed by the Arctic Council, the member states of the Council have also become more cautious in how these assessment-related policy recommendations can be adopted. In its recent Arctic Region Policy, the United States emphasizes that “policy recommendations developed within the ambit of the Council's scientific reviews [...] are subject to review by Arctic governments”,<sup>33</sup> thereby encouraging a development whereby the policy recommendations are subject to tighter scrutiny by the member states.

Another possible role the Council could assume would be to coordinate the implementation and application of various treaties applicable to the marine Arctic. This was, in effect, the starting-point of the precursor of the Arctic Council, the 1991 Arctic

29. 'Arctic News' item of 2 March 2009, available at <arctic-council.org>.

30. Ibid.

31. At subsection 2.3.

32. See at <arcticportal.org/pame/amsp>.

33. At Section III(C)(5)(c)), see note 23 supra.

Environmental Protection Strategy (AEPS). With the AEPS, the arctic countries aimed at protecting the arctic environment by implementing and adjusting the existing treaties for the arctic conditions and by urging each other to become parties to treaties with relevance to the Arctic. Yet, even though some studies have been undertaken within the Council's working groups to examine what the relevant treaties in their field of operation are, this is all what has been done to date.

A third possible role for the Council was taken up by the Senior Arctic Official (SAO) of the United States Julie Gourley in a recent Arctic TRANSFORM conference in Brussels on 5 March 2009.<sup>34</sup> She announced that the Council will be increasingly used as a negotiating platform for even legally binding agreements.<sup>35</sup> According to Gourley, an intergovernmental task-force will soon be established to examine the possibility for a legally binding or non-legally binding instrument on search and rescue in the Arctic Ocean. This is indeed a new role for the Council since the preparatory work for this possible intergovernmental agreement is not done by an existing working-group (such as the Emergency, Prevention, Preparedness and Response (EPPR) working group), which has experience in this policy area of the Council but an ad hoc working group established solely for the purpose of studying the possibility for an arctic instrument on search and rescue. This new role, if it takes off, does contribute to the Arctic Council assuming operational action elements in its work-program.

Even though there are some new normative developments in the Council, it is very difficult to see what the Arctic Council could do to address the gaps identified in the *Overview and Gap Analysis* report. There is currently no consensus among member states for the Council to become involved in the governance and regulation of fisheries or marine mammals activities, even if all would agree that the Council has a mandate to do so under the Ottawa Declaration<sup>36</sup>. While it has adopted various relevant guidelines, for instance the Arctic Offshore Oil and Gas Guidelines, it is difficult to say whether these have made any difference since there is no evaluation mechanism in the Council to study the effectiveness of its guidelines. The AMSA has issued recommendations, but given the stronger policy of the United States to scrutinize carefully what can be issued as policy recommendations, it may be that these will remain at a fairly general and un-ambitious level. The large marine ecosystems (LMEs) of the Arctic marine area have been defined by the Protection of the Arctic Marine Environment (PAME) working group.<sup>37</sup> The ministerial declaration of the Arctic Council in April 2009 has endorsed the summary of best practices in ecosystem-based management on the basis of joint SDWG (Sustainable Development working group) PAME project entitled 'Best Practices in Ecosystems-Based Oceans Management' (BePOMAr).<sup>38</sup>

Yet, these interesting projects rely on member states voluntarily using them and it is difficult to see how LMEs could be managed without any legally binding obligations to that effect. The Council does not have any working group which would coordinate the application of treaties related to the Arctic marine area and overall cannot adopt any legally binding guidance. With the use of the Council as a negotiating platform, it is possible to negotiate legally binding treaties, but only on an ad hoc basis and presumably only issue-specific or sector-specific instruments. The Arctic Council thus has a role in marine governance and regulation in the Arctic, but it is a limited one. It is difficult to argue that the Arctic Council alone, as it presently stands, could do much to counter the vast challenges facing the Arctic marine area.

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34.For information see <[www.arctic-transform.eu](http://www.arctic-transform.eu)>. This took place in the panel discussion on 'Next steps - near-term strategies for pursuing our common interests in the Arctic'.

35.At the November 2008 SAOs Meeting this was discussed as the United States proposal for a MoU on search and rescue in the Arctic Ocean (see the Final Report of the November 2008 SAOs Meeting, at section 3.4).

36.Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996; 35 *International Legal Materials* 1387 (1996), <[arctic-council.org](http://arctic-council.org)>.

37.These can be found on <[arcticportal.org/en/pame](http://arcticportal.org/en/pame)>.

38.For the most recent status see the Final Report of the November 2008 SAOs Meeting, at section 5.3.

There are also interesting scholarly suggestions to revise the role of co-operation in general in the Arctic and the role of the Arctic Council in particular. At a recent Arctic Frontiers Conference, Oran Young suggested that the Arctic Council could be developed to focus its efforts further on what it has done best, namely, to prepare scientific assessments of the Arctic.<sup>39</sup> His vision was that the Arctic Council could provide continuous scientific data and assessments to various (sectoral) institutions with a governance or regulatory mandate relevant to the Arctic. His idea was to build on the relevance of the scientific data and assessments produced under the auspices of the Arctic Council, which could then form usable knowledge to all kinds of governance and regulatory regimes relevant to the Arctic.

Olav Schram Stokke – another international relations scholar – has argued that the existing institutions are enough (or at least they are what is currently politically achievable), and what we need most is for these existing institutions to engage in productive interplay.<sup>40</sup> This presumably means creating linkages between the existing institutions, thereby engaging these institutions to find synergies and possibly prompting them to search for more holistic ways of management when the governance regimes realize the limitations of sectoral approaches to management.

Both of these proposals build on what is already in existence in terms of governance and regulation in the Arctic, and try to have that fragmented system function in a more effective way to counter the vast challenges ahead. The strong side of both proposals is that they could be implemented fairly rapidly since they do not call for major reforms. Young's proposal does pose a challenge to the Arctic Council, given that the Council is performing also other roles than promoting scientific assessments (providing non-legally binding policy guidance and high-level policy recommendations, acting as a platform for co-operation, etc.), and thus his proposal might require more time to implement than Stokke's proposal. Increasing productive interplay between the existing institutions seems a worthy goal, given that there is very little interplay between the existing institutions relevant to the Arctic.<sup>41</sup>

Both proposals, however, also suffer from a focus on what they deem politically achievable. Given the pace of change in the Arctic, it has to be asked whether such minor changes to the present governance regime functioning in the Arctic are enough. Young does not envisage anything more than re-focusing the work of the Arctic Council. He does not perceive any need for contemplating its legal status, funding system or institutional set-up, issues which many see as the Council's major problems. Stokke sees no political support for new institutions and thus suggests productive interplay between those institutions that are in existence.

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39. O. Young, 'Arctic ocean governance: status and prospects', presentation at the Arctic Frontiers conference, Tromsø, 21 January 2009. Presentation can be viewed via webcam, at <http://leo.infotek.no/uit4/Viewer/Viewers/Viewer320BR.aspx?mode=Default&peid=01f5346e-8e05-45d1-9fd4-41dcfd621e6&pid=cb0c95aa-c9c6-48b9-8e96-2b577bb01150&playerType=Wm7>.

40. O.S. Stokke, 'The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment', paper prepared for the 7th Conference of Parliamentarians of the Arctic region, Kiruna, Sweden, 2-4 August 2006; available at <[www.arcticparl.org](http://www.arcticparl.org)>.

41. See C. Keskitalo, T. Koivurova and N. Bankes, 'Conclusions on Climate Governance in the Arctic' in T. Koivurova, C. Keskitalo and N. Bankes (eds) *Climate Governance in the Arctic* (Springer: 2009), at pp. 429-443.

## 4. Options for addressing identified gaps in sectoral governance and regulation

### 4.1. Introduction

The ensuing subsections complement the sectoral sections in the *Overview and Gap Analysis* report and are for that reason limited to fisheries management, shipping and offshore hydrocarbon activities.

### 4.2. Fisheries management

#### 4.2.1. Introduction

The following options can be identified:

- conducting basic fisheries research as well as developing future scenarios about areas, dates, species, fishing techniques for which new fishing opportunities are likely to arise and potential impacts for non-target species and the broader marine environment
- individual regulation by states – both Arctic Ocean coastal states and other states – in their capacities as flag, coastal, port and market states and with regard to their natural and legal persons. Such regulation should, among other things, be aimed at combating illegal, unreported and unregulated (IUU) fishing
- bilateral or subregional arrangements between relevant Arctic Ocean coastal states on the conservation and management of shared and anadromous fish stocks
- a declaration or statement by which the main relevant general principles of the Fish Stocks Agreement,<sup>42</sup> the recent UNGA Resolutions in relation to vulnerable marine ecosystems and destructive fishing practices and relevant conservation and management measures drawn from regional fisheries management organizations (RFMOs)<sup>43</sup>, are made applicable to new and existing fisheries in the Arctic marine area. In particular, this declaration could stipulate that there shall be no new or expanded fisheries until adequate assessments of their potential impacts on target and non-target species, the broader marine environment and the livelihoods of Indigenous peoples are carried out
- individual or collective initiatives towards developing mechanisms or procedures similar to an environmental impact assessment (EIA) and/or a strategic impact assessment (SEA) for new fisheries in the Arctic marine area
- one or more state-of-the-art RFMOs or Arrangements<sup>44</sup> for species other than tuna and tuna-like species and anadromous species, whether self-standing or as part of a legally binding framework instrument for the Arctic and possibly in conjunction with adjustments in the competence of existing RFMOs or Arrangements, in particular in geographical terms

The ensuing subsections discuss some of these options, namely a declaration on new and existing fisheries in the Arctic Ocean and adjusting the spatial scope of the NEAFC Convention<sup>45</sup>.

42. 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)>.

43. E.g. CCAMLR Conservation Measures 21-01 (2008) 'Notification that Members are considering initiating a new fishery' and 21-02 (2008) 'Exploratory fisheries'.

44. These are the alternatives to RFMOs that do not establish international organizations (for a definition see Art. 1(1)(d) of the Fish Stocks Agreement).

45. • 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,

#### 4.2.1. Declaration on new and existing fisheries in the Arctic Ocean

As one of the options referred to in the previous subsection is a declaration or statement, reference should be made to initiatives undertaken by the United States pursuant to United States Senate joint resolution (SJ Res.) No. 17 of 2007.<sup>46</sup> These include informal bilateral consultations with a number of relevant players, including the other Arctic Ocean coastal states, on their willingness to support a process which would culminate in a general statement or declaration on present and future arctic fisheries. During the recent Session of the Committee on Fisheries (COFI) of the United Nations Food and Agriculture Organization (FAO) in March 2009, the United States convened a side-event to discuss this process. At this side-event, the United States suggested that an intergovernmental meeting could be convened – possibly in 2010, possibly in the United States – during which such a general statement or declaration could be adopted.<sup>47</sup> The European Commission's Arctic Communication<sup>48</sup> would seem to be supportive of such an initiative.<sup>49</sup>

#### 4.2.2. Adjusting the spatial scope of the NEAFC Convention

One of the options listed in the previous subsection is the development of one or more state-of-the-art RFMOs or Arrangements for species other than tuna and tuna-like species and anadromous species. That bullet also mentions that this may require “adjustments in the competence of existing RFMOs or Arrangements, in particular in geographical terms”.

An obvious candidate for a spatial adjustment is the North-East Atlantic Fisheries Commission (NEAFC) established by the NEAFC Convention. The five existing members of NEAFC are the European Community (EC), Denmark on behalf of the Faroe Islands and Greenland, Iceland, Norway and the Russian Federation. Unlike the OSPAR Convention,<sup>50</sup> the NEAFC Convention does not explicitly mention the option of amending its spatial scope. On the other hand, there is also nothing in Article 19 or elsewhere in the NEAFC Convention that would preclude spatial adjustments as such.

It should be noted that the NEAFC Convention's eastern boundary and the western boundary north of Greenland<sup>51</sup> do not coincide with the two relevant boundaries of FAO Statistical Area No. 18, entitled 'Arctic Sea'. While the spatial scope of the NEAFC Convention is identical to the spatial scope of its 1959 predecessor,<sup>52</sup> the two relevant boundaries of FAO Statistical Area No. 18 already existed in 1970 and have not changed since then.<sup>53</sup> The spatial scope of the OSPAR Convention and its two predecessors – the

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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)>.

46. • Passed by the Senate on 4 October 2007. The House of Representatives voted in favor of SJ Res. No. 17 in May 2008 and President Bush signed it on 4 June 2008. Reference should in this context also be made to efforts of the North Pacific Fishery Management Council (NPFMC) with respect to arctic fishery management. This eventually culminated in the adoption of the arctic fishery management plan (FMP) on 5 February 2009 (Council Motion of 5 February 2009 'Arctic Fishery Management Plan'). The United States Secretary of Commerce still has to act on this motion. The Arctic FMP entails, inter alia, to “close the Arctic to commercial fishing so that unregulated fishing does not occur and until information improves so that fishing can be conducted sustainably and with due concern to other ecosystem components” (Public Review Draft Environmental Assessment / Regulatory Impact Review / Initial Regulatory Flexibility Analysis for the Arctic Fishery Management Plan (version of January 2009), at p. iii. By means of its Motion of 5 February 2009, this note, the Council opted for Alternative 2, Option 3) (all texts available at <[www.fakr.noaa.gov/npfmc](http://www.fakr.noaa.gov/npfmc)>).

47. Information based on communications between E.J. Molenaar and a governmental official of the United States in December 2008 and January and March 2009. The United States Arctic Region Policy, note 23 supra, does not refer to the possibility of such a process in the relevant implementation section (section III(H)(6)).

48. COM (2008) 763, of 20 November 2008, 'Communication from the Commission to the European Parliament and the Council on The European Union and the Arctic Region'.

49. On p. 8 it is observed “Until a conservation and management regime is in place for the areas not yet covered by such a regime, no new fisheries should commence”.

50. Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992. In force 25 March 1998, <[www.ospar.org](http://www.ospar.org)>. Annex V, Sintra, 23 September 1998. In force 30 August 2000; amended and updated text available at <[www.ospar.org](http://www.ospar.org)>. See Art. 27(2).

51. Note the lack of clarity on the exact location of this boundary, as described in the *Overview and Gap Analysis* report, in subsection 2.5.1.

52. The North-East Atlantic Fisheries Convention (London, 24 January 1959. In force 27 June 1963; 486 *United Nations Treaty Series* 157; <[www.neafc.org](http://www.neafc.org)>).

53. See the historical FAO statistical charts at <[ftp.fao.org/fi/maps/Default.htm](http://ftp.fao.org/fi/maps/Default.htm)>.

Oslo Convention<sup>54</sup> and the Paris Convention<sup>55</sup> – is also identical to that of the NEAFC Convention (and its 1959 predecessor). Interestingly, the ICES Convention<sup>56</sup> stipulates that the spatial mandate of the International Council for the Exploration of the Sea (ICES) is “the Atlantic Ocean and its adjacent seas”, but the northern boundaries of the ‘ICES Areas’ are identical to those of FAO Statistical Area No. 18.

The rationale for the northern boundaries of the predecessor to the NEAFC Convention is not evident. Perhaps they simply demarcated the most northerly range of distribution that commercially significant fish stocks could possibly have in the most optimistic scenario and then just a bit further north to be on the safe side. It should also be noted that until recently the exact location of the northern boundaries did not have practical relevance for NEAFC.<sup>57</sup>

While spatial adjustments are thus possible, it is submitted that only relatively small geographical adjustments – expansions as well as shrinkages – do not seem problematic.<sup>58</sup> Such adjustments could for instance follow maritime boundaries or ecosystem boundaries between different hydrographic regimes, submarine topography and distributional ranges of certain target species or other species.<sup>59</sup> A well-known example of an international regulatory regime whose spatial scope was mainly determined by ecosystem boundaries is the CCAMLR Convention by which the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was established.<sup>60</sup> Even in that case, however, the approximation of the Antarctic Convergence agreed to during the negotiation of the CCAMLR Convention, took account of political considerations, thereby causing a small diversion from pre-existing FAO Statistical Areas.<sup>61</sup>

For the purpose of adjusting the spatial scope of the NEAFC Convention, account could perhaps be taken of the LMEs of the Arctic marine area developed by the PAME working group of the Arctic Council.<sup>62</sup> A quick comparison of these LMEs with the current spatial scope of the NEAFC Convention might suggest that, for instance, the latter’s spatial scope could be expanded by including all of LME No. 20, entitled ‘Barents Sea’ and perhaps even LME No. 58, entitled ‘Kara Sea’ as well. Another option would be to restrict the spatial scope of the NEAFC Convention by excluding the spatial scope of LME No. 64, entitled ‘Arctic Ocean’. The spatial scope of FAO Statistical Area No. 18, could then be adjusted accordingly.<sup>63</sup>

A word of caution is warranted here, however. While the Arctic LMEs defined by PAME have taken account of ‘trophic relationships’,<sup>64</sup> this is quite different from a criterion such as ‘usefulness for conservation and management of target species’. And even if the latter criterion were in fact used, the negotiations on the CCAMLR Convention illustrate that political considerations can override science-based criteria. Another political consideration would nevertheless attribute great weight to the LMEs defined by PAME. This would be

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54. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, 15 February 1972. In force 7 April 1974, 932 *United Nations Treaty Series* 4, as amended. See Art. 2.

55. Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris, 4 June 1974. In force 6 May 1978, 1546 *United Nations Treaty Series* 119, as amended. See Art. 2.

56. 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)>.

57. See also note 51 above.

58. Conversely, Rayfuse, note 26 supra, at p. 11 takes the view that “it is unlikely that OSPAR and NEAFC would be prepared to reduce their geographical scope”.

59. See L.M. Alexander, *Large Marine Ecosystems as Global Management Units*, in: ‘Biomass Yields and Geography of Large Marine Ecosystems’, K. Sherman and L.M. Alexander (eds.), Boulder, Westfield Press, 1989, pp. 339-344, at p. 339.

60. It is of course acknowledged that regimes for enclosed or semi-enclosed seas are also mainly or exclusively determined by ecosystem boundaries.

61. J.N. Barnes, ‘The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean’, in J.I. Charney (ed.) *The New Nationalism and the Use of Common Spaces* (Allanheld, Osmun Publishers: 1982), pp. 239-286, at p. 262 observes that at the insistence of Argentina, the boundary was drawn further away from Argentine territory in order to exclude the Drake Passage (FAO statistical charts were later modified accordingly (see the historical FAO statistical charts at <[ftp.fao.org/fi/maps/Default.htm](http://ftp.fao.org/fi/maps/Default.htm)>). Cf. also F.M. Auburn, *Antarctic Law and Politics* (Indiana University Press: 1982), at pp. 218 and 292.

62. These can be found on <[arcticportal.org/en/pame](http://arcticportal.org/en/pame)>.

63. The historical FAO statistical charts referred to in note 61 above indicate that this is a common practice.

64. PAME Working Group Meeting Report No. I-2006, at p. 11.

the wish to pursue integrated, cross-sectoral ecosystem based ocean governance. This is examined in more detail in section 5.

By contrast, large expansions by which the NEAFC Convention Area would comprise the entire Arctic Ocean – as suggested in the European Commission’s Arctic Communication<sup>65</sup> – appear much more problematic. This is not so much caused by the interests of what would be the ‘new’ coastal state members of NEAFC, namely Canada and the United States. In fact, Canada is currently not really a ‘new’ coastal state as it already has the status of Cooperating Non-Contracting Party (NCP) with NEAFC. In light of this status, Canada may even apply for full membership in the future. NEAFC’s existing spatial competence in the Atlantic sector of the Arctic as well as potential adjustments of this spatial competence do not appear to have played a role in Canada’s decision to apply for NCP status.<sup>66</sup> This does not exclude, however, that such considerations could not play a role in the future.<sup>67</sup> In case Canada would indeed apply for full membership, this would at any rate indicate its willingness to accept the substance of the NEAFC Convention as modified by the 2004 and 2006 amendments.<sup>68</sup> It is less clear if the United States would have significant problems with the substance of the amended NEAFC Convention.

Perhaps more important, however, is whether or not Canada and the United States have fundamental objections to NEAFC’s practices on the establishment and allocation of the total allowable catch (TAC) for straddling fish stocks, for the reason that these clearly give preferential treatment to coastal states. The initiative lies here with the coastal states, who first agree on a coastal state TAC while taking account of the scientific advice provided by ICES.<sup>69</sup> However, as the ICES advice relates to the entire stock, the coastal states effectively determine the high seas TAC as well. The coastal states also allocate the coastal state TAC between them without specifying which part of each coastal state’s allocation should be caught within or beyond areas under national jurisdiction.<sup>70</sup> NEAFC is then charged with determining and allocating the high seas TAC.<sup>71</sup> Even though room for maneuvering seems limited, it should not be forgotten that there are only five Members of NEAFC and three of these are regarded as coastal states with respect to all three main straddling fish stocks regulated by NEAFC.<sup>72</sup>

While Canada and the United States would, as coastal states, of course benefit from such preferential treatment as well, it is not excluded that they would object to such practices in order to be consistent with their user or non-user interests in other RFMOs and Arrangements. Much more problematic, however, are the user interests of states that are not coastal states with respect to the North-East Atlantic Ocean or the Arctic Ocean, e.g. the other states that currently have the status of NCP with NEAFC (Belize, Cook Islands, Japan and New Zealand) and other states with large distant water fishing fleets, such as China and South Korea. Even though fishing opportunities in the high seas pocket of the central Arctic Ocean are likely to be very minimal in the near future, climate

65. See note 48 supra. On p. 8 it is observed that “In principle, extending the mandate of existing management organisations such as NEAFC is preferable to creating new ones.”

66. Email correspondence between E.J. Molenaar and L. Ridgeway, Director General, International Policy and Integration, Fisheries and Oceans Canada, November 2008.

67. Of course, once Canada is a member of NEAFC it can participate in decision making on proposals to adjust the spatial scope of the NEAFC Convention. Such decisions require a three-fourths majority (cf. Art. 19).

68. See note 45 above. It seems that if Canada would insist on acceding to the ‘old’ version of the NEAFC Convention, this would not attract the necessary majority pursuant to Art. 20(4) of the NEAFC Convention.

69. E.g. the 2007 trilateral coastal state arrangement on Northeast Atlantic mackerel (Agreed record of conclusions of fisheries consultations between Norway, the European Community and the Faroe Islands on the management of mackerel in the North-East Atlantic for 2008, Oslo, 30 October 2007, available at <[www.neafc.org](http://www.neafc.org)>). See also the ‘Performance Review Panel Report of the North East Atlantic Fisheries Commission, NEAFC’ (November 2006), at pp. 14 and 17.

70. Cf. the 2007 trilateral coastal state arrangement on Northeast Atlantic mackerel, Annex I, at para. 1.

71. With respect to Mackerel, see e.g. the 2008 NEAFC Recommendation on mackerel (Recommendation I: 2008 ‘Recommendation by the North East Atlantic Fisheries Commission in accordance with Article 5 of the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries at its Annual Meeting in November 2007 to adopt convention and management measures for mackerel in the NEAFC Convention Area in 2008’).

72. These are blue whiting, herring and mackerel. The Russian Federation is not regarded as a coastal state for blue whiting and mackerel and Iceland is not regarded as a coastal state for mackerel.

change may alter the Arctic marine area both rapidly and fundamentally in the medium term. Consequently, it cannot be ruled out that fishing opportunities in the high seas of the Arctic Ocean will be substantial in the medium and long term. Not only is the size of the high seas pocket enormous but the fisheries on the nose and tail of the Grand Banks in the Northwest Atlantic also aptly illustrate that just a small area of the high seas may be sufficient.

### 4.3. Shipping

The suggested options below are grouped together as: options for action within IMO; options for arctic states at the regional level, in their capacities as coastal states; options for arctic states and other states at the regional level, in their capacities as port states, other options for arctic states, individually or collectively and, finally, other options for all states, individually or collectively, in their capacities as flag states. While the Arctic Council is not listed as a separate category, some of these options could be pursued there as well, with the important qualification that the output cannot be legally binding.

Options for action within IMO<sup>73</sup>:

- Make the IMO Polar Shipping Guidelines<sup>74</sup> mandatory, for instance by incorporating them into SOLAS 7475. and complement them with new elements such as training for ice navigators, which could be incorporated in STCW 78<sup>76</sup>;<sup>77</sup>.
- Pursue the adoption of special standards, for instance:
  - Special discharge or emission standards for all or part of the Arctic marine area under MARPOL 73/7878.
  - Special fuel content<sup>79</sup>. or ballast water treatment standards<sup>80</sup>.
  - One or more mandatory ships' routing systems, whether or not in the form of an comprehensive 'Arctic Sea Lanes' proposal
  - Ship reporting systems
  - Compulsory pilotage and ice-breaker or tug assistance
  - Special anti-fouling standards
- Designate part of the Arctic Ocean as a particularly sensitive sea area (PSSA), with a comprehensive package of associated protective measures (APMs) consisting of one or more of the special standards just mentioned above

Options for arctic states at the regional level, in their capacities as coastal states:

- Agree on legally binding agreements on monitoring, contingency planning and preparedness for pollution incidents, as well as on search and rescue,<sup>81</sup> including by designating places of refuge

73.As recommended by the AMSP of the Arctic Council, at p. 10. Note also the commitment by the five Arctic Ocean coastal states to work within IMO as expressed in the Ilulissat Declaration, note 7 supra.

74. See note 8 supra.

75. International Convention for the Safety of Life at Sea, London, 1 November 1974. In force 25 May 1980, with protocols and regularly amended.

76. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, 1 December 1978. In force 28 April 1984, as amended and modified by the 1995 Protocol. Cf. D. VanderZwaag and others, *Governance of Arctic Marine Shipping*, (August 2008) <arcticportal.org/en/pame>, at p. 68.

77. Both these suggestions are advocated by Denmark, Norway and the United States by means of IMO doc. MSC 86/23/9, of 24 February 2009, 'Work Programme. Mandatory application of the polar guidelines'. See also the proposal for inclusion of a new item on 'Development of a Code for ships operating in Polar waters' in the work programme of DE in Annex 2 to IMO doc. DE 52/WP2, note 8 supra.

78. International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, as modified by the 1978 Protocol (London, 1 June 1978) and the 1997 Protocol (London, 26 September 1997) and as regularly amended. Entry into force varies for each Annex. At the time of writing Annexes I-VI were all in force.

79. See IMO doc. MSC 86/23/9, note 77 supra, at paras 4 and 19. See also the decisions made at recent Antarctic Treaty Consultative Meetings (ATCMs), for instance Decision 8 (2005) 'Use of Heavy Fuel Oil', Decision 2 (2006) 'Ballast Water Exchange: Referral to IMO' and Resolution 3 (2006) 'Ballast Water Exchange' with the Practical Guidelines for Ballast Water Exchange in the Antarctic Treaty area annexed thereto (all available at <www.ats.aq>; see also note 80 infra on the subsequent action by IMO). See also the discussion on 'Antarctic area vessel issues' in IMO Doc. MEPC (Marine Environment Protection Committee) 57/21, of 7 April 2008, paras 20.16-20.19, which inter alia notes that the issue of "use and carriage of heavy grade oil (HGO) on ships in the Antarctic area" will be dealt with by the Sub-Committee on Bulk Liquids and Gases (BLG) during its 13<sup>th</sup> Session in March 2009.

80. See Resolution MEPC.163(56), of 13 July 2007, 'Guidelines for ballast water exchange in the Antarctic Treaty Area'.

81. See also ATCM Resolution 4 (2007), 'Ship-based tourism' and ATCM Resolution 6 (2008), 'Maritime Rescue Coordination Centres and Search and Rescue in the Antarctic Treaty Area'.



- Agree on a harmonized approach on enforcement and ensuring compliance, inter alia by means of shared platforms (e.g. ‘shiprider agreements’<sup>82</sup>)
- Implement the BWM Convention<sup>83</sup> individually or in concert
- Take other action under Article 234 of the LOS Convention, in particular if the IMO Polar Shipping Guidelines are not made mandatory

Options for arctic states and other states at the regional level, in their capacities as port states:

- Develop a strategy for port state control in the Arctic, for instance by establishing an Arctic Memorandum of Understanding (MOU) on port state control or by adjusting Paris MOU<sup>84</sup> and the Tokyo MOU<sup>85</sup> on port state control to ensure that proper account is taken of intra-Arctic and trans-Arctic marine shipping
- Implement Article 218 of the LOS Convention in concert
- Exercise port state residual jurisdiction in concert – relying in part on Article 234 of the LOS Convention – in case the IMO Polar Shipping Guidelines are not made mandatory

Other options for arctic states in particular, individually or collectively:

- Address the need for hydrographic surveying and charting<sup>86</sup>.
- Consider the need to develop a regional liability regime<sup>87</sup>.
- Encourage self-regulation by the shipping industry – for instance the cruise industry<sup>88</sup> – by means of positive and negative incentives (e.g. positive discrimination and limiting landings and access to ports to cooperating players<sup>89</sup>)
- Urge the International Association of Classification Societies (IACS) to restrict the margin of discretion that individual members have in relation to the IACS Unified Requirements concerning Polar Class<sup>90</sup>.
- Require the marine insurance industry to promote compliance with IACS Unified Requirements concerning Polar Class, for instance by linking the level of compliance to the height of premiums

Other options for all states, individually or collectively, in their capacities as flag states:

- Impose standards on their vessels that are more stringent than generally accepted international rules and standards (GAIRAS), for instance special discharge, emission and ballast water exchange standards or by implementing the IMO Polar Shipping Guidelines into their legislation

#### 4.1. Offshore hydrocarbon activities

The following options can be identified:

- Develop legally-binding regulations for offshore hydrocarbon activities in the Arctic marine area, drawing in particular on the Arctic Council’s Arctic Offshore Oil and Gas Guidelines, the OSPAR Convention and the relevant acts of the OSPAR Commission
- Ensure that the aforementioned regulations also have an institutional component to ensure that a body is mandated to implement and update the substantive standards

82. For a discussion see E.J. Molenaar, “Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean. The Pursuits of the *Viansa 1* and the *South Tomi*”, 19 *International Journal of Marine and Coastal Law* 19-42 (2004), at pp. 34-35.

83. International Convention for the Control and Management of Ships’ Ballast Water and Sediments, London, 13 February 2004. Not in force, IMO Doc. BWM/CONF/36, of 16 February 2004.

84. Memorandum of Understanding on Port State Control, Paris, 26 January 1982. In effect 1 July 1982, as regularly amended. Updated version at <www.parismou.org>.

85. Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Tokyo, 1 December 1993. In effect 1 April 1994, as regularly amended. Most recent text at <www.tokyo-mou.org>.

86. See also ATCM Resolution 5(2008), ‘Hydrographic surveying and charting’.

87. Note in this regard Annex VI to the Madrid Protocol, note 99 infra.

88. See in this regard the Association of Arctic Expedition Cruise Operators (AECO; <www.aeco.no>).

89. For some suggestions in relation to antarctic sea-borne tourism, see E.J. Molenaar, “Sea-Borne Tourism in Antarctica: Avenues for Further Intergovernmental Regulation”, 20 *International Journal of Marine and Coastal Law* 1-49 (2005), at p. 47.

90. These are Unified Requirement (UR) I1 ‘Polar Class Descriptions and Application’ (Corr.1, Oct. 2007), UR I2 ‘Structural Requirements for Polar Class Ships’ (Corr.1, Oct. 2007) and UR I3 ‘Machinery Requirements for Polar Class Ships’ (Corr.1, Oct. 2007). All texts are available at <www.iacs.org.uk>.

when necessary. The spatial competence of this body should as a minimum complement that of the OSPAR Commission and the ISA, thus achieving full coverage of the Arctic marine area

- Develop a regional agreement on contingency planning and preparedness for incidents involving offshore hydrocarbon activities which, among other things, establishes a body mandated to implement and update the substantive standards when necessary. The spatial scope of such an agreement and the spatial mandate of the body established by it should at a minimum complement that of existing bilateral and multilateral agreements; thus achieving full coverage of the Arctic marine area

## 5. Options for pursuing integrated, cross-sectoral ecosystem-based oceans management

### 5.1. Introduction

While most, if not all, states would acknowledge the merits of integrated, cross-sectoral ecosystem-based management of the Arctic marine area, they are likely to have very divergent views on how it should be pursued. For instance, whether it should be pursued by means of legally binding or non-legally binding instruments or whether it should be pursued at the global or at the regional level.

The debate on the advantages and disadvantages of soft-law and hard-law is taken up in section 5.2. The option of adjusting the spatial scope of the OSPAR Convention is then discussed in subsection 5.3 and the suitability of the Antarctic Treaty system as a model for reform in subsection 5.4. Subsection 5.5 then examines the idea of using an Implementing Agreement under the LOS Convention in this context. Finally, subsection 5.6 contains some conclusions.

### 5.2. Soft-law vs hard-law

It is sometimes argued that negotiating a treaty to govern the Arctic is not a good way to move ahead because it is a time-consuming effort. For instance, the negotiation process for the LOS Convention lasted almost a decade and it took from 1982 to 1994 for the Convention to enter into force. This would suggest that soft-law should be the preferred approach to governance in the Arctic, since it offers the possibility to regulate quickly and flexibly, and avoids raising contentious legal issues. This is an argument that needs to be studied in the context of any proposal for regulatory reform in the Arctic for the reason that the Arctic Council is a type of soft-law regime and some proposals for reform in the Arctic rely on soft-law as the most appropriate way to proceed.

It is submitted that soft-law may have some advantages in very limited areas of regulation, but overall there are severe deficiencies with using this approach. The term soft-law is nowadays used to refer to various kinds of normative instruments that have been adopted by states and intergovernmental organizations (and even by the private sector). It is thus easier to say what soft-law is not than what it is. A soft-law instrument – for instance a declaration or an action program signed by states – is not legally binding on states that have adopted it and neither can a soft-law organization adopt legally binding regulation.

In the intergovernmental context, soft-law instruments are mostly used at a stage when states are not yet ready to commit themselves to legally binding obligations, but want to indicate progress in resolving problems. It is only when states are ready to commit to a legally binding instrument – that frequently needs to be incorporated as part of their national legislation – that a treaty is negotiated. Only when a treaty is negotiated, states can feel secure enough to make the necessary financial and human resource investments to regulate effectively. Soft-law can be used in areas of policy where no substantial investments need to be made; in general, it is not used in areas which require effective governance, given that it does not provide reciprocal guarantees of performance, with the possibility for reacting to breaches or non-compliance. Moreover, states cannot adopt legally binding rules via soft-law instruments, with the result that these types of rules do not need to be incorporated into national law. The evolution of arctic intergovernmental co-operation now functioning under the Arctic Council is a good example of this. As a soft-law creation, the Council cannot adopt legally binding rules.

It is also a misunderstanding that negotiating treaties always takes a long time. The negotiation process that culminated in the LOS Convention is not a representative example

since it has probably been the most difficult process ever tackled by the international community (hence many refer to the LOS Convention as ‘the Constitution of the Oceans’). Treaties can, in fact, be negotiated quickly and they can be flexible as to revising and changing their content. Much depends on how sensitive issues are regulated, and whether the goal is to negotiate detailed substantive rules or adopt a framework treaty to facilitate such more specific regulation. Even global treaties can be negotiated quickly, enter into force soon after their adoption and can provide flexible regulation. Good examples are the UNFCCC<sup>91</sup> and the CBD<sup>92</sup>. Both have near-universal participation, had short negotiation processes, came into force rapidly and provide for flexible regulation. It is true that negotiation of treaties typically takes longer than negotiating soft-law instruments for the simple reason that the level of regulatory ambition is higher, and because there are domestic procedures for consenting to a treaty. Yet, this is the price that must be paid for having ambitious regulation in place.

From the perspective of arctic Indigenous peoples, who enjoy a unique status in the Arctic Council as permanent participants, the treaty option can be problematic. Organizations of Indigenous peoples are normally given the status of NGOs in treaty negotiations or in the rules of procedures of intergovernmental organizations, with corresponding limited possibility to influence these processes. Yet, it is important to note that the customary law of treaties – largely codified in the Vienna Convention on the Law of Treaties<sup>93</sup> – does not pose any obstacles to according Indigenous peoples organizations a status similar to that they now have in the Arctic Council. It will be recalled that in the Arctic Council it is the member states that adopt decisions by consensus after having consulted the permanent participants. There is nothing in the law of treaties that prevents states from according Indigenous peoples organizations this kind of status in an international treaty.

### 5.3. Adjusting the spatial scope of the OSPAR Convention

As the Atlantic sector of the Arctic Ocean is already covered by the OSPAR Convention, it is logical to examine the opportunities and limitations of adjusting the spatial scope of the OSPAR Convention. It is interesting to note that whereas the European Commission’s Arctic Communication refers explicitly to the option of adjusting the spatial scope of the NEAFC Convention,<sup>94</sup> this option is not raised with regard to the OSPAR Convention. Quite surprisingly, the European Commission’s Arctic Communication in fact does not explicitly refer to the OSPAR Convention or the OSPAR Commission at all.

There are currently 16 parties to the OSPAR Convention: three states that are located upstream on watercourses reaching the OSPAR Maritime Area (Finland, Luxembourg and Switzerland), the EC and all coastal states bordering the North-East Atlantic, except the Russian Federation. The spatial adjustment of the OSPAR Convention is specifically mentioned in Article 27(2), which stipulates:

The Contracting Parties may unanimously invite States or regional economic integration organisations not referred to in Article 25 to accede to the Convention. In the case of such an accession, the definition of the maritime area shall, if necessary, be amended by a decision of the Commission adopted by unanimous vote of the Contracting Parties. Any such amendment shall enter into force after unanimous approval of all the Contracting Parties on the thirtieth day after the receipt of the last notification by the Depositary Government.

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91. United Nations Framework Convention on Climate Change, New York, 9 May 1992. In force 21 March 1994, 1771 *United Nations Treaty Series* 107; <unfccc.int>.

92. See note 17 *supra*.

93. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. In force 27 January 1980, 1155 *United Nations Treaty Series* 331; <www.un.org/law/ilc>.

94. See note 65 *supra* and accompanying text.

The states envisaged by this provision can, in view of the list in Article 25, be either coastal states whose maritime zones are adjacent or near to the OSPAR Maritime Area or states that have no such maritime zones (e.g. states whose vessels or nationals are engaged in activities in the OSPAR Maritime Area). While it is not clear which states of the former category the negotiators had in mind when negotiating this provision, Canada and the United States would seem to be among them. The Russian Federation does not need an invitation to accede as Article 27(1) gives it – as a coastal state to the OSPAR Maritime Area – a right to do so. If desired, an extension of the OSPAR Maritime Area would in such a case probably have to follow the amendment procedure laid down in Article 15.

As pointed out in subsection 4.2.3, the northern boundaries of the OSPAR Convention are identical to those of its predecessors – the Oslo Convention and the Paris Convention – which were in their turn modeled exactly on those of the 1959 predecessor to the NEAFC Convention. It was also noted that the rationale for these northern boundaries is not evident.

Similar to the discussion in subsection 4.2.3, a distinction can be made between relatively small adjustments and a large adjustment by which the entire Arctic Ocean would be comprised within the OSPAR Maritime Area. Small adjustments – expansions as well as contractions – may for instance be warranted due to changes in the spatial scope of the NEAFC Convention or the creation of an arctic marine environmental protection regime immediately adjacent to the OSPAR Maritime Area.<sup>95</sup> In view of the discussion above, it is clear that nothing in the OSPAR Convention would preclude such spatial adjustments as such.

Similarly, nothing in the OSPAR Convention would preclude a large adjustment by which the entire Arctic Ocean would be comprised within the OSPAR Maritime Area as such. This may for instance be warranted if a similar adjustment is made in the spatial scope of the NEAFC Convention and a 100% overlap is desirable. This option would have the considerable advantage of subjecting the entire Arctic Ocean to OSPAR Commission's competence on cross-sectoral issues and sectoral activities that are not yet subject to the competence of other regional and global bodies. It should also be remembered, however, that the shortcomings of the OSPAR Convention and the OSPAR Commission would be transposed to the Arctic Ocean as well.

More important seem to be the preparedness of Canada, the Russian Federation and the United States to become bound to the OSPAR Convention and the many legally binding decisions, non-legally binding recommendations and other agreements adopted by the OSPAR Commission. Would they be prepared to accept this 'acquis' without significant amendments? Perhaps this is one of the main reasons why the Russian Federation is currently not a party to the OSPAR Convention, even though it is a coastal state to the OSPAR Maritime Area.<sup>96</sup> It is also noteworthy that neither the Russian Federation nor the Soviet Union were ever party to the Oslo and Paris Conventions.

## 5.4. The suitability of the Antarctic Treaty system as a model

### 5.4.1. Introduction

The issue of the suitability of the Antarctic Treaty system (ATS) as a model for reform of the Arctic regime automatically surfaces due to the fact that both the Arctic and the Antarctic are polar regions. The question is, however, if the characteristics that they have in common warrants convergence between their regimes. In its Resolution of 9 October 2008 on Arctic governance,<sup>97</sup> the European Parliament (EP)

95. See also note 58 supra.

96. O.S. Stokke, "A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention", 31 *Marine Policy* 402-408 (2007), notes at p. 406 that despite continuous encouragement the Russian Federation has not acceded to the OSPAR Convention.

97. EP doc. P6\_TA-PROV(2008)0474.

Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean;

A few observations can be offered here. First, the EP does not suggest that the envisaged treaty should draw inspiration from the ATS as a whole but only from certain elements, namely the Antarctic Treaty<sup>98</sup>. and its Madrid Protocol<sup>99</sup>. (for a definition of the acronym ATS, see below). Second, the EP only explicitly refers to one of the fundamental differences between the Arctic and Antarctic and their regimes, namely the lack of a ‘normal’<sup>100</sup>. human population in the Antarctic. The fundamental difference on the issue of sovereignty is not more than alluded to by means of the words “the consequent rights and needs of the peoples and nations of the Arctic region”. Third, the last sentence relates to the minimum spatial scope of the envisaged treaty. While the choice of wording obviously lacks accuracy,<sup>101</sup> the intention seems to be that areas beyond national jurisdiction are to be the minimum spatial scope.

While it is not surprising that the United States Arctic Region Policy dismisses an ‘Arctic Treaty’ along the lines of the Antarctic Treaty,<sup>102</sup> the European Commission’s Arctic Communication has not enthusiastically embraced the suggestion by the EP either. One of the policy objectives in the section on ‘Contributing to enhanced Arctic multilateral governance’ contains the following policy objectives:

The full implementation of already existing obligations, rather than proposing new legal instruments should be advocated. This however should not preclude work on further developing some of the frameworks, adapting them to new conditions or Arctic specificities.<sup>103</sup>

But one of the proposals for action that is listed thereafter nevertheless suggests that this policy objective should not be interpreted too strictly. This proposal for action is to

Explore the possibility of establishing new, multi-sector frameworks for integrated ecosystem management. This could include the establishment of a network of marine protected areas, navigational measures and rules for ensuring the sustainable exploitation of minerals.<sup>104</sup>

Subsequently, on 2 April 2009 the EP dealt with a Joint Motion ‘on the international treaty for the protection of the Arctic’.<sup>105</sup> The Joint Motion has 9 operative paragraphs, the first and third of which read:

1. Calls on the Council and Commission to initiate international negotiations for the adoption of an international treaty for the protection of the Arctic, along the lines of the existing Antarctic Treaty, in order to make the Arctic a zone of peace and cooperation reserved solely for peaceful activities and free of disputes over sovereignty;

98. See note 9 supra.

99. Protocol on Environmental Protection to the Antarctic Treaty and Annexes I-IV, Madrid, 4 October 1991. In force 14 January 1998; Annex V (adopted as Recommendation XVI-10), Bonn, 17 October 1991. In force 24 May 2002; Annex VI (adopted as Measure 1(2005)), Stockholm, 14 June 2005. Not in force. All texts available at <www.ats.aq>

100. Apart from scientific, military and other governmental personnel.

101. The term “unpopulated” is particularly puzzling in the context of the high seas and the Area.

102. See note 23 supra.

103. At p. 10.

104. At p. 11.

105. Joint Motion of 30 March 2009, doc. RC-B6-0163/2009, replacing six other motions on the same topic.

3. Calls on the Commission and Council to work towards establishing a moratorium on the exploitation of geological resources in the Arctic for a period of 50 years pending fresh scientific studies;

Following a request, however, the EP decided to adjourn a vote on the Motion.<sup>106</sup>

A possible origin of the abovementioned suggestion by the EP is a project by the International Union for the Conservation of Nature (IUCN), in which a study by Nowlan<sup>107</sup> played a key role. One possibility outlined by Nowlan is to formalize arctic cooperation through an international treaty which would contain well-established principles of international environmental law (e.g. the precautionary principle), substantive obligations and some innovative features. While the Annexes to the Madrid Protocol would be prominent sources for the substantive obligations, the proposed innovative features all relate to the participation of Indigenous peoples, for instance by means of co-management, according a role to Traditional Ecological Knowledge (TEK) and developing Impact and Benefit Agreements (IBAs).<sup>108</sup>

On the basis of Nowlan's study, the IUCN convened an expert meeting in Ottawa on 24–25 March 2004<sup>109</sup> to discuss whether the ATS could provide the needed input for the development of a regime for environmental protection in the Arctic. The expert meeting was divided on the question of how environmental protection should and could be developed. The main approach to arctic governance identified at the meeting was not to borrow from the Antarctic experience but to examine which environmental protection issues should be addressed at which level, namely global, regional (the Arctic Council), bilateral, national, and sub-national.

For the purpose of the present report, however, it is useful to identify elements of the ATS that are (a) unsuitable; (b) unlikely to be suitable; or (c) suitable for a future arctic regime. This is undertaken in the subsections further below. Before doing so, however, it should be clear what is meant by the acronym 'ATS'.<sup>110</sup> Article 1(e) of the Madrid Protocol defines it as

the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments.

Adherence to this definition of ATS would include the Antarctic Treaty, the Recommendations, Measures, Decisions and Resolutions made by Antarctic Treaty Consultative Meetings (ATCMs), the Madrid Protocol, the CCAS Convention,<sup>111</sup> the CCAMLR Convention,<sup>112</sup> the Conservation Measures and Resolutions adopted by CCAMLR and arguably also the CRAMRA,<sup>113</sup> even though it is not expected to ever enter into force. Such a broad definition would make the analysis envisaged for the purpose of the present report too lengthy and time-consuming, however. The scope of following analysis is therefore limited to the Antarctic Treaty, its Madrid Protocol, the CCAS Convention, the CCAMLR Convention and the CRAMRA.

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106. Minutes of 2 April 2009, at 9.23.

107. L. Nowlan, 'Arctic Legal Regime for Environmental Protection' (IUCN Environmental Policy and Law Paper No. 44: 2001), at Part IV. P. Sands, *Principles of International Environmental Law* (Cambridge, Cambridge University Press, 2nd edition, 2003), at p. 731 has similar ideas.

108. See sections 3.3 and 4 of Part VI.

109. The expert meeting was attended by scholars (including T. Koivurova), representatives of arctic Indigenous peoples and government officials. The IUCN recently decided to establish a permanent Arctic Specialist Group.

110. On the acronym see also D. Vidas, 'The Antarctic Treaty System in the International Community: An Overview', in O.S. Stokke and D. Vidas (eds.) *Governing the Antarctic. The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge, University Press: 1996), pp. 35–60, at pp. 37–39.

111. \* Note 10 supra.

112. \* Note 11 supra.

113. \* Note 12 supra.

#### 5.4.2. Unsuitable elements

The following elements of the ATS are unsuitable for a future arctic regime:

- An agreement to disagree on the question of sovereignty over territory as laid down, *inter alia*, in Article IV of the Antarctic Treaty and Article IV of the CCAMLR Convention. The disagreement on the question of sovereignty over territory south of 60° South was of course the main reason for the negotiation of the Antarctic Treaty. Apart from the dispute between Canada and Denmark over the tiny Hans Island – situated in the Nares Strait that separates Canada and Greenland – there are no disputes over title to territory in the Arctic marine area<sup>114</sup>.
- Elements directly related to the agreement to disagree on the question of sovereignty, such as the alternative bases of jurisdiction reflected in Article VII(5) of the Antarctic Treaty and Article 8(2) of the Madrid Protocol as well as Annex VI on Liability to the Madrid Protocol
- An indefinite ban on mineral resource activities modeled on Articles 7 and 25(2) of the Madrid Protocol.<sup>115</sup> Only regulation of such activities and a temporary freeze of expansion in clearly defined new areas would seem achievable
- A prohibition on nuclear explosions modeled on Article V(1) of the Antarctic Treaty, which would be unnecessary in view of globally applicable commitments and obligations on underground and atmospheric nuclear explosions<sup>116</sup>.
- Freedom of scientific information and mandatory exchange of scientific observations and results modeled on Articles II and III of the Antarctic Treaty. As regards the terrestrial dimension this would be unacceptable for Arctic states and as regards the marine dimension this is unnecessary as the LOS Convention's regime for marine scientific research would already be applicable
- An acknowledgment of the primacy of the International Whaling Commission (IWC), as, *inter alia*, laid down in Article VI of the CCAMLR Convention. Such an acknowledgement is not likely to be supported by Canada (a non-Member of the IWC), the members of the North Atlantic Marine Mammals Commission (NAMMCO),<sup>117</sup> and many, if not most, of the current permanent participants of the Arctic Council
- Designating the Arctic as “a natural reserve, devoted to peace and science” modeled on Article 2 of the Madrid Protocol. It is not necessary to explain that this is entirely unrealistic

#### 5.4.3. Elements unlikely to be suitable

The following elements of the ATS are unlikely to be suitable for a future arctic regime:

- Use for peaceful purposes only, modeled on Article I(1) of the Antarctic Treaty,<sup>118</sup> and a prohibition on the disposal of nuclear waste modeled on Article V(1) of the Antarctic Treaty. Their suitability would above all depend on their spatial delimitation
- Broad participation linked with consensus decision-making on in principle all issues – including direct regulation of human activities – similar to, *inter alia*, Article IX(4) of the Antarctic Treaty and Article XII(1) of the CCAMLR Convention. Suitability would primarily depend on the body's spatial and substantive mandate
- Open and equal access to resources similar to the ‘Olympic fishery’<sup>119</sup> in the waters of the CCAMLR Convention Area beyond the EEZs of the Sub-Antarctic Islands. This

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114. There are of course many maritime delimitation disputes between states and states also have different views on various aspects relating to the outer limits of continental shelves.

115. See, however, para. 3 of the Joint Motion of 30 March 2009 before the EP, note 105 *supra* and accompanying text.

116. See also Art. V(2) of the Antarctic Treaty.

117. Faroe Islands, Greenland, Iceland and Norway.

118. See paras 1 and 2 of the Joint Motion of 30 March 2009 before the EP, note 105 *supra* and accompanying text.

119. This refers to a situation where a ‘race for the fish’ ends with the closure of the fishing season once the TAC has been reached.



is likely to be unacceptable for the maritime zones of the Arctic Ocean coastal states and also unsuitable for areas beyond national jurisdiction

#### 5.4.4. Suitable elements

The following elements of the ATS are in principle suitable for a future arctic regime:

- Linkages between the instruments of the ATS and the bodies established by them, for instance Article 5 of the Madrid Protocol and Articles III and V of the CCAMLR Convention. It is submitted that these linkages are conducive to integrated, cross-sectoral ecosystem-based ocean management

The notion that activities must be planned and undertaken on the basis of adequate information and prior assessments – including in certain situations environmental impact assessments (EIAs) – as laid down in Articles 3 and 8 of, and Annex I to, the Madrid Protocol

The notion that certain areas need special protection for various purposes, as laid down in Annex V to the Madrid Protocol

The precautionary and ecosystem approaches to fisheries management developed by CCAMLR pursuant to Article II(3) of the CCAMLR Convention, including the CCAMLR Ecosystem Monitoring Program

#### 5.5. Implementing Agreement under the LOS Convention

It has been suggested that in case a legally binding instrument for the marine Arctic is pursued, one option would be to link it directly to the LOS Convention by means of an Implementing Agreement under the LOS Convention.<sup>120</sup> It must be acknowledged that no rule of international law, including the LOS Convention, would preclude this per se. Even though the LOS Convention contains various amendment procedures,<sup>121</sup> at two earlier instances the UNGA expressed the international community's preference for an Implementing Agreement instead. These are the Part XI Deep-Sea Mining Agreement and the Fish Stocks Agreement. Pragmatic and strategic considerations may therefore be of overriding importance. This is in particular evident in the case of the Part XI Deep-Sea Mining Agreement, which clearly modifies Part XI of the LOS Convention. Thus, while there is no precedent for an Implementing Agreement with a regional scope,<sup>122</sup> no rule of international law – including the LOS Convention – would in principle prevent the international community from pursuing such an option if the required majority so desires.

This notwithstanding, there are various reasons why an Implementing Agreement under the LOS Convention is not a realistic option. Most importantly, the direct linkage with the LOS Convention would imply that its negotiation process would fall under the UNGA. Not only would the UNGA decide on the main objective(s), scope and elements of an Implementing Agreement but also determine – implicitly or explicitly – the rules of procedure for its negotiation, in particular on participation and adoption of the future instrument. As the LOS Convention is a global instrument and the UNGA a global body, it would be difficult to conceive a negotiation process open to a select group of states instead of all members of the United Nations (UN). However, it is almost unthinkable that the five Arctic Ocean coastal states would support and participate in a negotiation process

120. This has for instance been suggested by the Executive Director of the European Environment Agency (EEA) J. McGlade, The Arctic Environment - Why Europe should care, speech delivered at the Arctic Frontiers Conference, Tromsø, 23 January 2007, <[www.eea.europa.eu/pressroom/speeches/23-01-2007](http://www.eea.europa.eu/pressroom/speeches/23-01-2007)>. The actual wording used in this speech is "Polar Ocean protocol". This wording is confusing because it can be interpreted as applying to both the Arctic Ocean and the Southern Ocean. Note that the words "based on UNCLOS" in p. 10 of the European Commission's Arctic Communication (note 48 supra; text reproduced in subsection 5.4 supra) would seem to indicate that the option of an Implementing Agreement under the LOS Convention is not considered; at least not as regards the Arctic (see in this regard also note 124 infra and accompanying text on the other proposal for an Implementing Agreement).

121. See Arts 312-314 of the LOS Convention.

122. None of the existing regional marine environmental protection regimes are formally linked to the LOS Convention. While the LOS Convention contains qualified obligations on regional cooperation, it does not provide guidance on the outcome of such cooperation. Likewise, the constituent instruments of RFMOs and Arrangements are formally linked to the LOS Convention or the Fish Stocks Agreement, even though the Fish Stocks Agreement provides considerable guidance as regards the functions and operation of RFMOs and Arrangements and the substance of their constituent instruments.

where they could potentially be confronted by 180-odd states with opposing views and interests.

Such lack of support by the Arctic Ocean coastal states would be obvious if the envisaged Implementing Agreement would apply to the entire Arctic Ocean, including areas under their national jurisdiction. However, even if the instrument would exclusively apply to areas beyond national jurisdiction (high seas and the Area), it is easy to understand that the Arctic Ocean coastal states would fear that the UNGA would not take adequate account of their sovereignty, sovereign rights and jurisdiction as coastal states when determining substantive and procedural aspects of the negotiation process. States with a claim or a basis of a claim to the Antarctic continent had to some extent similar concerns when they were confronted by the Malaysian-led initiative to bring the governance of Antarctica under the scope of the UN.<sup>123</sup> In light of these considerations it is not surprising that there is no precedent for an Implementing Agreement to the LOS Convention with a regional scope.

Reference should finally also be made to an already existing European Union (EU) proposal for an Implementing Agreement to the LOS Convention.<sup>124</sup> Such an instrument might also serve a purpose that is essentially similar to the guidance provided by the Fish Stocks Agreement on the functions and operation of RFMOs and Arrangements and the substance of their constituent instruments. This global Implementing Agreement could then provide guidance on the substance of the regional arctic instrument and the functions and operation of the bodies established by it. It should be mentioned, however, that the EU proposal for such an Implementing Agreement has received very little support from non-EU member states.

## 5.6. Conclusions

In the view of the authors of this report, a regional legally binding instrument dedicated to the marine Arctic is the most convincing option for reforming the current regime of the Arctic and should be seriously considered. In designing the basic features and elements of such an instrument, account should be taken of the general principles and considerations and other arguments discussed in this report. While expanding the spatial scope of the existing OSPAR Convention might at first sight seem an attractive option, an instrument that is tailor-made for the Arctic would seem to be able to garner more support. Moreover, the instrument should be self-standing, should build on the achievements of the Arctic Council so far and retain its viable parts and bodies, and should not be formally linked to for instance the LOS Convention. Finally, the instrument should have an overarching character which is at a minimum conducive to integrated, cross-sectoral ecosystem-based oceans management and whose primary body could also be mandated to pursue that objective. These and other basic features and elements are elaborated in the report *A Proposal for a Legally Binding Instrument*.<sup>125</sup>

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123. See UN doc. A/RES/38/77, of 15 December 1983 and C.C. Joyner, 'Antarctica and the Indian Ocean States: The Interplay of Law, Interests, and Geopolitics', 21 *Ocean Development & International Law* 41-70 (1990), at pp. 48-49.

124. Cf. the Annex to the Statement by Austria, on behalf of the EU, at the 7th Meeting of the ICP (2006) and COM(2007) 575 final, of 10 October 2007, 'An Integrated Maritime Policy for the European Union', at p. 14, where it is noted that the "Commission will propose an Implementing Agreement of UNCLOS on marine biodiversity in areas beyond national jurisdiction and work towards successful conclusion of international negotiations on Marine Protected Areas on the high seas". It should also be noted, however, that the Arctic Communication refers on p. 11 to the following policy action: "Explore all possibilities at international level to promote measures for protecting marine biodiversity in areas beyond national jurisdiction, including through the pursuit of an UNCLOS Implementing Agreement". It is not altogether clear why these items with a global scope should be listed in the Arctic Communication. The precise meaning and intention of these items are not clear, but they seem at any rate related to a process at the global level that is intended to have output that applies throughout the globe and not just the Arctic. Or does it imply that the high seas in the Arctic Ocean should be designated as a marine protected area?

125. See note 5 supra.

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