



Universiteit Utrecht

Protecting the North from going south?

Developing area-based management tools for the conservation of marine biodiversity of areas beyond national jurisdiction in the Arctic Ocean

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Our mission to protect marine biodiversity of areas beyond national jurisdiction will not always be smooth sailing, we will not always paddle in the same direction, but if we continue in our cooperative, flexible and committed mode, we will reach our destination one day.

- Rena Lee*

* United Nations General Assembly (UNGA), Statement by the President of the conference at the closing of the first session, A/CONF.232/2018/7 (20 September 2018), available at: <https://undocs.org/en/A/CONF.232/2018/7>

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List of abbreviations

ABMTs	area-based management tools
ABNJ	areas beyond national jurisdiction
AC	Arctic Council
AMAP	Arctic Monitoring and Assessment Program
ATS	Antarctic Treaty System
AUNJ	areas under national jurisdiction
CAFF	Conservation of Arctic Flora and Fauna
CAOFA	Agreement to prevent unregulated High Seas Fisheries in the Central Arctic Ocean
CBD	Convention on Biological Diversity
CLCS	Commission on the Limits of the Continental Shelf
CoP	Conference of the Parties
EBSAs	ecologically or biologically significant areas
EEZ	Exclusive Economic Zone
ICES	International Council for Exploration in the Sea
IGC	Intergovernmental Conference on marine biodiversity of areas beyond national jurisdiction
ILBI	international legally binding instrument
IMO	International Maritime Organization
MARPOL	International Convention for the prevention of pollution from ships
MoU	Memorandum of Understanding
MPAs	Marine Protected Areas
NEAFC	North-East Atlantic Fisheries Commission
NEAFC Convention	Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries
nm	nautical miles
OSPAR	Convention on the Protection of the Marine Environment of the North-East Atlantic

PAME	Protection of the Arctic Marine Environment
PSSAs	particularly sensitive sea areas
RFMO	Regional Fisheries Management Organization
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement
UNGA	United Nations General Assembly
VME	vulnerable marine ecosystem

Introduction

1. Background

The Arctic Ocean¹ is one of the most pristine regions in the world, hosting a great number of (threatened) species, rare wildlife, and an exceptional marine habitat.² Its importance is paramount to sustaining the regional ecosystem as it constitutes a significant source of food and oxygen, provides beneficial ecosystem services and shelter to a plethora of marine species.³ Specifically, the Arctic Ocean hosts 21,000 species, among which 5,000 animal species, 2,000 kinds of algae and myriads of ecologically essential microorganisms.⁴ The conservation of these species is indispensable for, *inter alia*, the provision of food, medicines, livelihoods, and economic wealth.⁵ According to the Arctic Marine Shipping Assessment produced by the Arctic Monitoring and Assessment Program (AMAP), the Arctic contains areas of “heightened ecological significance”, which have vital ecological value for the marine ecosystem.⁶

Apart from the marine environment, the Arctic Ocean constitutes a geopolitically distinct region. The natural wealth of the Arctic region has drawn the attention and interests of non-Arctic nations in search of secure and precious supplies.⁷ The gradual retreat of sea ice sheets offers easier access to, and improved exploitation conditions of, significant resources, such as fisheries and hydrocarbons, which can benefit their owners in terms of economic and energy security.⁸ On the other hand, the stewardship role of the Arctic coastal States (or Arctic five)⁹ in the region and their strong

¹ Although there is no agreed definition of the geographical extent of the Arctic Ocean, the Protection of the Arctic Marine Environment (hereafter: PAME) supports that it covers: the Central Arctic Ocean and its surrounding seas: the Bering Sea, the East Siberian Sea, the Chukchi Sea, the Beaufort Sea, the Davis Strait, Baffin Bay and Labrador Sea, the Greenland Sea, the waters around Iceland and the Faroe Islands, and northern parts of the Norwegian Sea, the Barents Sea, the Kara Sea, and the Laptev Sea. See PAME, *The Arctic Ocean Review: Phase I Report (2009-2011)*, second edition (2013), pp 3-5, available at: <https://pame.is/index.php/document-library/shipping-documents/arctic-ocean-review-documents/347-aor-phase-i-report-to-ministers-2011-nov-2013/file>

² Conservation of Arctic Flora and Fauna (hereafter: CAFF), *Arctic Biodiversity Assessment: Status and trends in Arctic biodiversity* (2013), pp 22-23.

³ PAME, *Arctic Ocean Review Final Report, Executive Summary with Recommendations* (2013), p 2.

⁴ CAFF, *supra* note 2, pp 66, 380.

⁵ PAME, *Framework for a Pan-Arctic Network of Marine Protected Areas* (2015), p 6.

⁶ Arctic Monitoring and Assessment Program (hereafter: AMAP)/CAFF/SDWG, *Identification of Arctic marine areas of heightened ecological and cultural significance: Arctic Marine Shipping Assessment IIc*, (2013), pp 3-4, 7.

⁷ Coates K and Holroyd C, *Non-Arctic States and Their Stake in Arctic Sustainability* in Keil K and Knecht S (eds.) *Governing Arctic Change: Global Perspectives* (Springer 2016), p 218. Also, De Lucia V, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' (2017) 86 *Mar Policy*, p 236.

⁸ Gupta A, 'Geopolitical Implications of Arctic Meltdown' (2009) 33(2) *Strategic Analysis*, pp 174-175.

⁹ Arctic coastal States are considered the nations that have a coastal frontage in the Arctic Ocean, namely Canada, Denmark/Greenland, Russia, USA, Norway and Iceland. Despite Iceland's coastal frontage in the Arctic Ocean, it seems generally accepted that only the rest of the aforementioned nations bear the title of an Arctic coastal State, thus, also called “Arctic five”. See, Koivurova T and Liu N, 'The

commitment to regulate the potentials and challenges of the Arctic demonstrate their desire to maintain their leading role in protecting the ocean.¹⁰ This, however, might affect to a certain extent the interests of non-Arctic nations in the region since Arctic States might use the stewardship regime to give precedence to their own national interests.¹¹ Furthermore, the geopolitical importance of the Arctic Ocean is reflected in its geographical position in-between three continents: Asia, Europe, and America. Its location along with the decrease of sea ice can provide for shorter trade routes between the Pacific and the Atlantic Ocean, which might affect the pattern of international shipping and global trade.¹²

Additionally, a significant portion of the ocean falls under the sovereignty or the sovereign rights of the Arctic coastal States (due to the Exclusive Economic Zones (EEZ) and continental shelf).¹³ Pursuant to article 76 of the United Nations Convention on the Law of the Sea (UNCLOS),¹⁴ coastal States can extend the limits of their continental shelf beyond 200 nautical miles (nm) and up to 350nm from the baselines or up to 100nm from the 2,500 meters isobath. Norway, for instance, submitted information to the Commission on the Limits of the Continental Shelf (CLCS) in 2006 and received a recommendation in 2009 to delineate the outer limits of its continental shelf.¹⁵ Respectively, Canada made a partial submission in 2019 for which the Commission has not yet delivered its decision.¹⁶ Consequently, in the hypothetical scenario where all the Arctic coastal States delineate the outer limits of their continental shelf beyond 200nm, small deep-sea pockets will remain open to non-Arctic States to explore and exploit strategically important natural resources.¹⁷

protection of the Arctic marine environment” in Hassan D and Karim S (eds.), *International Marine Environmental Law and Policy* (Routledge 2018), p 208.

¹⁰ Ilulissat Declaration 2008, available at: <https://cil.nus.edu.sg/wp-content/uploads/2017/07/2008-Ilulissat-Declaration.pdf>

¹¹ Wilson P, 'Society, steward or security actor? Three visions of the Arctic Council' (2016) 51(1) *Cooperation and Conflict*, pp 62-63.

¹² Bekkers E, Francois JF and Rojas-Romagosa H, 'Melting ice caps and the economic impact of opening the Northern Sea Route' (2018) 128(610) *The Economic Journal*, pp 1098-1099.

¹³ Article 56 and 77 of the United Nations Convention on the Law of the Sea.

¹⁴ United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, United Nations Treaties Series (hereafter: UNTS), vol 1833, no. 31363

¹⁵ Commission on the Limits of the Continental Shelf (hereafter: CLCS), Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006 (2006), available at: https://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf

¹⁶ CLCS, Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Arctic Ocean (2019), available at: https://www.un.org/Depts/los/clcs_new/submissions_files/can184_2019/CDA_ARC_ES_EN_secured.pdf

¹⁷ Center for Borders Research (IBRU), Map of maritime jurisdiction and boundaries in the Arctic region (2015), available at: <https://www.dur.ac.uk/resources/ibru/resources/Arcticmap04-08-15.pdf> Also, Koivurova T and Liu N, *supra* note 9. For more information on resource potential in the Arctic Ocean see, for example, Max MD, Johnson A and Dillon W, 'NGH Likelihood in the Arctic Ocean' in *Natural Gas Hydrate-Arctic Ocean Deepwater Resource Potential* (Springer 2013), pp 77-84; Circum-Arctic Resource Appraisal (CARA), 'Estimates of Undiscovered Oil and Gas North of the Arctic Circle', USGA Fact Sheet 2008-3049 (2008), US Department of the Interior, U.S. Geological Survey.

Currently, nonetheless, despite the sovereignty and sovereign rights of the Arctic coastal States in large parts of the region, vast marine areas are situated beyond national jurisdiction subject to the high seas freedoms¹⁸ and the common heritage of mankind principle.¹⁹ This allows any State to engage in a series of activities such as fishing or navigation without prejudice to the relevant international agreements and general provisions of parts VII and XI of UNCLOS. In such areas beyond national jurisdiction (ABNJ) – comprising of the high seas and the Area – the scientific community has discovered precious new resources which may have significant value not only from an economic perspective but also in the framework of biotechnology and pharmaceutical evolution.²⁰

However, climate change, overfishing,²¹ the intensification of shipping,²² gas and oil exploitation, and other anthropogenic activities constitute major stressors that endanger the Arctic marine biodiversity.²³ The most apparent threat is the reduction of sea ice cover and thickness, which deteriorates the natural conditions for ice-related flora and fauna, while the increase of submarine light levels and water temperatures is catastrophic.²⁴ These transformative changes along with ocean acidification directly impact marine biodiversity leading to, among others, the reduction of primary production and species distribution.²⁵ Hence, regulating these challenges is a compelling priority which could assist in striking a balance among preserving the marine ecosystems, enhancing resilience to ocean degradation²⁶ and allowing States to benefit from the Arctic natural wealth.

The absence of a specific regulatory framework offering holistic protection to the marine ecosystem and biodiversity of ABNJ adds considerably to the existing risks.²⁷ Today, various legal instruments concern the protection of biodiversity in ABNJ but not in a direct and targeted way. As a result, the legal framework regarding the conservation of marine biodiversity in ABNJ contains regulatory gaps and poses challenges in terms of coherence among the different constitutive elements of the current regime. This becomes clearer bearing in mind the United Nations' initiative to create a new international legally binding instrument (ILBI) under the UNCLOS on the

¹⁸ Article 87 UNCLOS.

¹⁹ Article 136 UNCLOS.

²⁰ Freestone D, 'Conserving biodiversity in areas beyond national jurisdiction', (Brill Nijhoff 2019), p 5.

²¹ *Ibid.*

²² Hartmann J, 'Regulating Shipping in the Arctic Ocean: An Analysis of State Practice' (2018) 49(3) *Ocean Dev Int Law*, p 278.

²³ Hossain K, 'A New Legal Regime for the Protection of Arctic Marine Biodiversity in the ABNJ?' (2016), p 1. Also, the definition of biodiversity can be found in article 2 of the Convention on Biological Diversity (hereafter: CBD) of 5 June 1992, United Nations Treaties Series, vol 1760, no. 30619.

²⁴ Bluhm BA, Gebruk AV, Gradinger R, Hopcroft RR, Huettmann F, Kosobokova KN, Sirenko BI, and Weslawski JM, 'Arctic marine biodiversity: an update of species richness and examples of biodiversity change' (2011) 24(3) *Oceanography*, p 233.

²⁵ *Ibid.*

²⁶ AMAP, Arctic Climate Change Update 2019: An Update to Key Findings of Snow, Water, Ice and Permafrost in the Arctic (SWIPA) 2017 (2019), pp 10-11.

²⁷ Warner RM, "Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea" in Rothwell D, Oude Elferink A, Scott K, Stephens T (eds) *The Oxford handbook of the law of the sea*, (Oxford Handbooks in Law 2015), p 752.

conservation and sustainable use of marine biological diversity of ABNJ, which illustrates the need to clarify the applicable regime in this specific field.²⁸

To this end, the new ILBI will address, *inter alia*, the development of area-based management tools (ABMTs), including Marine Protected Areas (MPAs).²⁹ Although currently, no commonly accepted definition exists, an MPA is understood as “a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”³⁰ This definition reflects the particularities of MPAs as juxtaposed to the surrounding areas, since they are subject to stricter regulation of one or more anthropogenic activities based on a series of measures, for one or more purposes. Due to the possible interaction of the different stressors described above, managing these risks in isolation may prove ineffective. Several stressors should be regulated in a holistic way for which MPAs can be the means to an end.

The significance of ABMTs for the conservation of marine biodiversity in ABNJ was recognized by States in various instances,³¹ and recently by the UN General Assembly (UNGA) when it decided to convene an Intergovernmental Conference on marine biodiversity of ABNJ (IGC).³² By way of illustration of the need to focus on further developing such measures – particularly in the Arctic – studies have shown that

“the extent of protected areas in the Arctic’s marine environment covered in 2016 was 4.7% of the Arctic marine area, which, when considered at a pan-Arctic scale, falls short of the Aichi Biodiversity Target 11 goal of 10% of coastal and marine areas to be protected by 2020”.³³

There are numerous types of ABMTs such as single-, multi- or cross-sectoral tools,³⁴ and they can pursue multiple objectives such as the preservation of marine biodiversity and the environment, the sustainable use of components of the marine biodiversity etc.³⁵ Nonetheless, while the use of ABMTs is a well-known technique for the protection of the marine environment, the implementation of these mechanisms in ABNJ poses a

²⁸ UNGA Resolution 69/292, Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/69/292 (6 July 2015), available at <https://undocs.org/A/RES/69/292>

²⁹ *Ibid.*

³⁰ Day J, Dudley N, Hockings M, Holmes G, Laffoley D, Stolton S., Wells S, Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas, IUCN (2012), p 12.

³¹ World Summit on Sustainable Development, Agenda 21 Plan of Implementation. Johannesburg Declaration on Sustainable Development, A/CONF.199/20, Johannesburg, South Africa, September 2002. Also, UN Conference on Sustainable Development (Rio+20), The future we want, annexed to UNGA Resolution 66/288, A/RES/66/288, 2012, para 177.

³² UNGA Resolution 72/249, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/72/249 (24 December 2017), available at <https://undocs.org/en/a/res/72/249>

³³ CAFF and PAME, Arctic Protected Areas: Indicator Report, (2017), p 11.

³⁴ Molenaar EJ, Area-Based Management Tools (2013), slides 7-12, available at: http://www.un.org/Depts/los/biodiversityworkinggroup/workshop2_molenaar.pdf

³⁵ *Ibid.*, slide 5.

multitude of challenges, specifically in relation to the Arctic Ocean. For instance, there are no specific objectives and content for these tools regarding ABNJ,³⁶ while the role of different actors such as the Arctic coastal States in MPA designation is uncertain. Consequently, the absence of a comprehensive regulatory framework on ABMTs in ABNJ and the fact that there is no confirmation of the authority of relevant global and regional bodies to identify, designate and monitor ABMTs,³⁷ demonstrate the urgency to address these challenges.

2. Research question and methodology

The increasing attention and interest of the international community to address the protection of marine biodiversity in ABNJ was the fuel to develop this thesis. The development of an effective regulatory framework, which addresses the existing *lacunae* and takes into account the current developments is a practical issue of high value for the evolution of international law. Therefore, this dissertation aims at answering the following research question:

“How could a regulatory framework be developed in order to address the legal and institutional gaps regarding area-based management tools in areas beyond national jurisdiction towards the conservation of marine biodiversity in the Arctic Ocean?”

To inclusively respond to this question, the analysis will be guided by the following sub-questions:

Which are the applicable legal instruments relevant to the designation of MPAs in the Arctic ABNJ? To what extent do these instruments provide an adequate ground for the creation of MPAs in ABNJ? Which are the regulatory gaps identified in the Arctic in a legal and institutional level? Is a regional approach more suitable than other solutions to overcome these challenges? What could a possible new framework contain to effectively develop MPAs in the Arctic ABNJ? What should be the role of the Arctic five, the non-Arctic actors and the Arctic Council (AC) in the designation process?

The nature of the research question requires both a normative and an evaluative approach. However, a descriptive approach will also be used at certain points to properly frame and develop the content of the thesis. Thus, to reach the conclusions of the research, the starting point will be an analysis of the existing legal rules pertinent to MPAs establishment in the Arctic ABNJ. Then, the analysis will proceed with an assessment of the current legal and institutional *lacunae* in connection with MPAs in the Arctic region. This will provide the necessary basis to continue with the development of a possible Arctic-oriented regulatory framework to address the

³⁶ Preparatory Committee established by the UN General Assembly Resolution 69/292, ‘Report of the Preparatory Committee: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’, (2017), A/AC.287/2017/PC.4/2, p 11.

³⁷ Molenaar EJ, *supra* note 34, slide 19.

identified challenges. Of note is that, given the limited extent of the thesis and the large number of ABMTs, the present study will principally deal with the creation of MPAs.

3. Structure

The first chapter of this study aims at portraying the current framework regulating the protection of marine biodiversity and designation of MPAs in (the Arctic) ABNJ. Therefore, the analysis will firstly deal with the general international legal framework for the law of the sea, the UNCLOS. Then it will touch upon specific legal instruments such as the Convention on Biological Diversity (CBD),³⁸ the OSPAR Convention,³⁹ the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (NEAFC Convention)⁴⁰, the International Maritime Organization (IMO) Particularly Sensitive Sea Areas (PSSAs) guidelines and the International Convention for the Prevention of Pollution from Ships (MARPOL) (section 1.1).⁴¹ Then, the analysis will address the practicability of the existing framework to cope with the emerging challenges concerning the establishment of MPAs in the Arctic ABNJ (section 1.2).

Next, chapter two will focus on the gaps and challenges regarding the designation of MPAs in the Arctic ABNJ. The study will first deal with the legal *lacunae* such as the absence of an agreed approach (ecosystem-based, precautionary etc.), the lack of commonly accepted criteria, content and objectives for the designation of MPAs etc. (section 2.1). Afterward, the research will look at the institutional challenges, such as the suitability of the Arctic Council to address the issue of MPAs in the Arctic ABNJ, the role of observer non-Arctic actors in the Council etc. (section 2.2).

Then, the analysis will turn to possible solutions to address these gaps (chapter three). For that purpose, the study will first briefly discuss the potential pathways for the creation of MPAs in the Arctic ABNJ, such as an implementing agreement under UNCLOS, an Arctic Annex to the new ILBI, an additional protocol to the CBD etc., and will explicate why an Arctic State-led approach would seem more suitable for the Arctic region (section 3.1). The next section will deal with the institutional aspect and provide an insight on the Arctic Council's contribution as well as on the possible role of different actors operating in the region in the designation process (section 3.2). The last chapter of the thesis will offer some concluding remarks, including a summary of the findings.

³⁸ CBD, *supra* note 23.

³⁹ Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) of 22 September 1992, UNTS vol 2354, no 42279.

⁴⁰ Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries (NEAFC) of 18 November 1980, UNTS, vol. 1285, no. 21173.

⁴¹ Protocol of 1978 relating to the International Convention for the prevention of pollution from ships (MARPOL) of 17 February 1978, UNTS, vol. 1340, 1341, no. 22484.

4. Limitations

The designation of MPAs in ABNJ is a multi-faceted subject. As such, the adoption and implementation of these tools in the Arctic Ocean require an extensive and interdisciplinary research to resolve issues of scientific and technical nature. However, such an analysis is practically impossible in the context of a legal dissertation. Thus, the content and recommendations of the current study primarily follow a theoretical legal approach, which might encounter difficulties when applied in practice.

Additionally, given that the creation of MPAs in the Arctic ABNJ has drawn the attention of the academic and international community in the recent years, the existing literature, case law and judicial decisions concerning this specific field is limited. The author has encountered only a few articles focusing on the designation of MPAs in the Arctic ABNJ, which made necessary the use of analogies drawn from the international practice to reach the conclusions of the thesis and make recommendations that will be applicable in the future.

Finally, this analysis will present issues at the crossroads of current initiatives to protect and conserve marine biodiversity and contingencies arising from ocean internationalization, climate change, and transboundary concerns. Given that the adoption of a new regulatory framework is the result of a multi-level procedure, including national interests, political expediencies, and State negotiations, embarking on such an endeavor in the context of a thesis requires a certain level of speculation. Nevertheless, we hope that this study will accentuate a new standpoint for scholars and practitioners to further develop international law and the regime governing the designation of MPAs in ABNJ.

Chapter 1 – Where do we stand? Understanding the legal architecture for MPA designation in the Arctic ABNJ

In order to properly assess the challenges and possible solutions for the designation of MPAs in the Arctic Ocean, it is important to first portray the existing legal structure relevant to marine biodiversity conservation and MPAs creation in ABNJ. It should be noted that the terms marine environment and marine biodiversity will be used interchangeably since the latter is an integral part of the former, whilst a healthy marine environment is a prerequisite for the conservation of marine biodiversity.⁴² This chapter will focus on existing legal instruments pertinent to MPA establishment in ABNJ, namely the UNCLOS, the CBD, the OSPAR, the NEAFC Convention, the MARPOL Convention, and the IMO PSSAs Guidelines.

1.1 Legal instruments relevant to the establishment of MPAs in ABNJ in the Arctic

1.1.1. *The Law of the Sea Convention*

The UNCLOS constitutes the main regulatory regime governing the oceans. Although it provides an extensive framework covering different marine areas and a range of activities, the provisions specifically relevant to ABNJ are contained in Parts VII and XI. These two regimes overlap spatially since the former regards the water column of the high seas, the seabed and subsoil thereof,⁴³ while the latter is applicable only to the Area (the ocean floor and subsoil in ABNJ).⁴⁴

Whilst article 87 UNCLOS refers to the freedoms of the high seas, the Convention stipulates that they must be exercised in accordance with the provisions developed throughout its text and with respect to other rules of international law.⁴⁵ The objective of this provision is to strike a balance between the rights of States and their duties, among which the protection of the marine environment pursuant to article 192 *et seq.* The latter in turn could function as the legal basis for the designation of MPAs within the Arctic ABNJ.⁴⁶

⁴² Strong JA *et al*, 'Marine biodiversity and ecosystem function relationships: the potential for practical monitoring applications' (2015) 161 *Estuar Coast Shelf Sci*, p 48; Daam MA *et al*, 'Establishing causal links between aquatic biodiversity and ecosystem functioning: Status and research needs' (2019) 656 *Sci Total Environ*, p 1147; of relevance can be the *Southern Bluefin Tuna* case (New Zealand v Japan; Australia v Japan), Provisional Measures, International Tribunal for the Law of the Sea (hereafter: ITLOS) Reports 1999, para 70.

⁴³ Article 86 UNCLOS.

⁴⁴ Articles 1(1), 134 UNCLOS.

⁴⁵ Article 87 (1) UNCLOS.

⁴⁶ Hossain K and Morris K, 'Protecting Arctic Ocean Marine Biodiversity in the Area Beyond National Jurisdiction' in Andreone G (ed.) *The Future of the Law of the Sea* (Springer, Cham 2017), p 117.

The establishment of MPAs is not included in the UNCLOS, at least not in an explicit manner. The regulatory regime under the Convention does not provide for a specific procedure for the designation of ABMTs neither in areas under national jurisdiction (AUNJ) nor beyond.⁴⁷ Nonetheless, it does not exclude this possibility as it encompasses provisions that could be viewed as the legal basis to designate MPAs in ABNJ. As stated above, article 192 stipulates that all States have the legal obligation to protect and preserve the marine environment,⁴⁸ whilst the absence of an (exhaustive) list of measures to that end might imply that States are free to apply any tools to meet this obligation, including MPAs.⁴⁹ Moreover, as is submitted by Molenaar and Oude Elferink, article 194(5) presents also a possible legal basis to develop MPAs in ABNJ, with a spatial focus on rare or fragile ecosystems.⁵⁰

Additionally, article 197 draws the attention to the special characteristics of regional marine areas when States are cooperating to adopt conservation measures.⁵¹ This, in turn, along with the rest of the provisions contained in Part XII concerning States' duties and the respect to the jurisdictional regime of certain maritime zones – in the case of ABNJ Parts VII and XI – could result in the creation of MPAs in ABNJ.⁵² However, of note is that under the existing UNCLOS regime, there is no possibility to unilaterally establish MPAs in ABNJ without interfering with the freedoms of the high seas and the due regard duty owed to other States.⁵³ Consequently, should a group of nations proceed to the declaration of a high seas MPA under UNCLOS, this could only be legally binding on those States establishing the MPA.⁵⁴

By virtue of articles 117-119 UNCLOS, States are required to cooperate and adopt conservation measures aiming at the protection of the living resources of the high seas. These provisions foster collaboration at a regional level and stipulate that “any

⁴⁷ However, article 211 UNCLOS, for example, could be viewed as relevant to area-based management through the regulations of the IMO regarding the protection of specific marine areas from vessel-source pollution. Yet, it does not explicitly provide for a designation process of ABMTs. See Molenaar EJ and Oude Elferink AG, 'Marine Protected Areas in ABNJ: The Pioneering Efforts Under the OSPAR Convention' (2009) 5(1) Utrecht Law Review, p 10.

⁴⁸ The general obligation of States to protect the (marine/aquatic) environment was highlighted in the following cases: *South China Sea Arbitration* (Philippines v China), Award, Permanent Court of Arbitration, 12 July 2016, para 941; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice (hereafter: ICJ), Reports 1996 (I), para 29; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Reports 2011, para 148; *MOX Plant Case*, (Ireland v United Kingdom), Provisional Measures, ITLOS Reports 2001, paras 26, 63, 64; *Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment, ICJ Reports 2010, para 197.

⁴⁹ Jakobsen IU, 'Marine Protected Areas as a Tool to Ensure Environmental Protection of the Marine Arctic: Legal Aspects' in *Arctic Marine Governance* (Springer 2014), p 225. Also, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), UN Doc A/Conf.48/14/Rev. 1 (1973), principle 7.

⁵⁰ Molenaar EJ and Oude Elferink AG, *supra* note 47, p 9.

⁵¹ In general, the duty to cooperate for the preservation of the marine environment was highlighted in the *MOX Plant Case*, *supra* note 48, para 26; *Land Reclamation in and around the Straits of Johor* (Malaysia v Singapore), Provisional Measures, ITLOS Reports 2003, para 92.

⁵² Oude Elferink AG, 'Coastal states and MPAs in ABNJ: Ensuring consistency with the LOSC' (2018) 33(3) *The International Journal of Marine and Coastal Law*, p 445.

⁵³ Article 87 UNCLOS. Also, see *Fisheries Jurisdiction* (United Kingdom v Zeeland), Judgment, ICJ Reports 1974, pp 23, 30, 40.

⁵⁴ Drankier P, 'Marine protected areas in areas beyond national jurisdiction' (2012) 27(2) *The International Journal of Marine and Coastal Law*, p 295.

generally recommended international minimum standards, whether sub-regional, regional or global” shall be borne in mind when adopting conservation measures.⁵⁵ Subsequently, the establishment of MPAs in the Arctic region could benefit from these provisions, which lay the ground for bolstering the objectives of protected areas.

Moreover, the Convention offers protection to the marine environment as a whole, fortifying, thus, the provisions which could function as the legal ground for MPAs development. Indeed, several provisions under the UNCLOS, such as article 94(4)(c) and article 208 *et seq.*, require States and their flag vessels to abide by international rules and standards to protect the marine environment from pollution. The relevant organizations for standard setting, which are often organs with a sectoral focus such as the IMO, could contribute to the establishment of MPAs by consolidating the objectives of the latter. Finally, article 145 UNCLOS explicitly refers to the protection of the marine environment and the obligation of States to this end when undertaking mining activities in the Area which might be dangerous for the surrounding environment. Hence, it could function as a springboard to enhance the competence of the International Seabed Authority (Authority) to work towards the establishment of MPAs in ABNJ.^{56,57}

Lastly, given that all Arctic States are parties to the UNCLOS – excluding the US which, nonetheless, recognizes that it contains provisions reflecting customary law—⁵⁸ permits them to use the Convention as a legal basis for the establishment of MPAs in the Arctic Ocean. Therefore, the jurisdictional framework included in the UNCLOS provides an impetus to adopt protected areas in the Arctic ABNJ, but, as will be discussed later, it leaves several questions unanswered.

1.1.2. *The Convention on Biological Diversity*

The CBD is another legal instrument aiming at biodiversity protection and pertinent to MPAs in ABNJ. Although the CBD does not apply to marine areas where States do not have sovereignty, its jurisdictional scope can extend to ABNJ. Its provisions bind the Contracting Parties which control activities whose impacts may take place in the high seas.⁵⁹ In addition, article 5 makes explicit reference to ABNJ where States Parties are obliged to cooperate for the protection of biodiversity. Other provisions regard general measures for protection,⁶⁰ the *in situ* or *ex situ* conservation etc.⁶¹ These

⁵⁵ Article 119 (1)(a) UNCLOS.

⁵⁶ Molenaar EJ and Oude Elferink AG, *supra* note 47, p 8.

⁵⁷ However, this might not be the best approach as the mandate of the Authority to regulate mining activities in the Area may make it less well-suited to deal with environmental concerns in general. See Molenaar EJ and Oude Elferink AG, *supra* note 47, p 8.

⁵⁸ National Strategy for the Arctic Region 2013, p 10, available at: https://obamawhitehouse.archives.gov/sites/default/files/docs/nat_arctic_strategy.pdf . Also, Duff JA, 'The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification' (2005) 11 Ocean & Coastal LJ 1, pp 10-11.

⁵⁹ Articles 3-4 CBD.

⁶⁰ Article 6 CBD.

⁶¹ Articles 8-9 CBD.

provisions are also applicable to high seas biodiversity bearing in mind, of course, the abovementioned specificities.

Concerning the designation of MPAs, the CBD plays a catalytic role as it develops a concrete regime for the identification of ecologically or biologically significant areas (EBSAs), which can pave the way for the establishment of MPAs in ABNJ. A mosaic of criteria has been adopted, including “the uniqueness or rarity of the region, fragility, and slow recovery of the area” etc.⁶² Its purpose is to draw the attention to areas that may need enhanced protection and management due to their ecological value. Considering the main purpose of MPAs, which is to offer protection to significant ecosystems, it is logical to assume that EBSAs criteria can be used to identify possible protected areas in ABNJ. According to Drankier, *in situ* conservation measures can also be adopted in ABNJ pursuant to article 8 CBD, if special actions need to be taken to guarantee the protection of biodiversity.⁶³ Additionally, State cooperation in relation to ABNJ according to article 5 can enable the application of article 8.⁶⁴

The above provisions illustrate that the CBD could provide the legal basis for MPAs designation in ABNJ, respecting and recognizing, nonetheless, the primacy of UNCLOS.⁶⁵ In practical terms, this indicates that the UNCLOS overrides the CBD when the latter conflicts with the rights and obligations enshrined in the provisions under UNCLOS.⁶⁶ As such, the designation of an MPA pursuant to the CBD cannot disregard the freedoms of the high seas and the “due regard” duty owed to other States operating in ABNJ.

Consequently, the CBD offers a considerable boost for MPA designation due to its scientific expertise on the establishment of EBSAs. The latter are based on certain criteria which by analogy can guide the creation of MPAs in ABNJ. Besides, the CBD’s Conference of Parties (CoP) and the Working Group (WG) on Protected Areas have manifestly called for an effort to identify priority areas for the conservation of marine biodiversity, while recognizing the need to establish MPAs in ABNJ in consistency with the current international legal framework.⁶⁷ Thus, the Arctic States which are all parties to the CBD except for the US could rely on this mandate to create MPAs in the Arctic ABNJ.

⁶² UNEP/CBD, Report of the expert workshop on ecological criteria and biogeographic classification systems for marine areas in need of protection (2007), UNEP/CBD/EWS.MPA/1/2, 13 Nov. 2007, Annex II.

⁶³ Drankier P, *supra* note 54, p 297.

⁶⁴ *Ibid.*

⁶⁵ Article 22(2) CBD.

⁶⁶ Jakobsen IU, *Marine protected areas in international law: An arctic perspective* (Brill 2016), pp 266-267; Wolfrum R and Matz N, The interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity (2000) 4 Max Planck Yearbook of United Nations Law, p 476.

⁶⁷ Conference of the Parties to the Convention on Biological Diversity, VII/5, Marine and coastal biological diversity (2004), UNEP/CBD/COP/DEC/VII/5, 13 April 2004, paras 29-31; Ad-Hoc Open-ended Working Group on Protected Areas, Report of the First Meeting of the Ad Hoc Open-Ended Working Group on Protected Areas, UNEP/CBD/COP/8/8 (2006), Annex II, pp 25-29.

1.1.3. The OSPAR Convention

The OSPAR Convention constitutes a pioneering attempt to protect the marine environment of the North-East Atlantic, namely the Arctic waters, the Greater North Sea, the Celtic seas, the Bay of Biscay and the Iberian coast, and the Wider Atlantic. Although it covers a limited portion of the Arctic Ocean,⁶⁸ the legal regime it establishes encompasses noteworthy provisions for the development of MPAs in the Arctic ABNJ. Its ground-breaking character lies on the inclusion of sizeable ABNJ in its spatial scope,⁶⁹ while the Contracting Parties' political will to establish MPAs in ABNJ is another significant element.⁷⁰ For instance, "The North-East Atlantic Strategy" was adopted necessitating that the OSPAR Commission complements the work of the Contracting Parties by assisting, for example, the designation and implementation of an MPA network, including ABNJ.⁷¹

In 2009, the OSPAR Commission recognized eight areas as possible ABNJ MPAs and a year later six of them were created, proving that regional cooperation in MPAs designation in the open ocean can be achieved.⁷² Additionally, a roadmap was drafted regarding further steps for the possible establishment of MPAs in ABNJ within the Convention Area. It included considerations, actions, and engagements for inter-institutional cooperation to be undertaken by the OSPAR bodies.⁷³ While this roadmap focused on the Charlie Gibbs MPA – an area in the Mid-Atlantic ridge between Iceland and the Azores – its guidelines could apply *mutatis mutandis* to other suggestions for MPAs in ABNJ.⁷⁴ Therefore, the OSPAR provides for a solid framework for MPAs designation in ABNJ but also presents certain drawbacks, as will be analyzed below.

In general, the Convention enumerates 16 States Parties, among which most of the Arctic States, namely Denmark, Finland, Iceland, Norway, and Sweden. Also, it leaves room for the participation of other States not located in the immediate proximity of the Convention Area, enhancing, thus, the implementation of its provisions and the protection of the marine environment.⁷⁵ The OSPAR deals with the protection of biodiversity through preventive measures regarding marine pollution generated from different sources such as dumping or incineration.⁷⁶ Although it does not regulate fishing and shipping activities, the assessment of the quality status of the marine environment pursuant to article 6 provides for the consideration of these activities, thus,

⁶⁸ Article 1(a) OSPAR; Three high seas areas are located within the OSPAR's Arctic waters, namely in the Norwegian Sea (the "Banana Hole"), the Barents Sea (the "Loop Hole") and to the north of the 200nm zone of Greenland. Regarding the seabed of these areas, its biggest part probably falls within the continental shelves beyond 200nm of the coastal States. See Molenaar EJ and Oude Elferink AG, *supra* note 47, p 13.

⁶⁹ Article 1(a) OSPAR.

⁷⁰ OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas (2003), para 2.5.

⁷¹ Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010-2020, (2010), Part II, para 4.2(f)(i).

⁷² OSPAR Commission, 2012 Status Report on the OSPAR Network of Marine Protected Areas (2013), pp 19-26.

⁷³ OSPAR Commission, Work Priorities for OSPAR Secretariat 2018-2020, (2018), OSPAR 18/10/2 Rev.I.

⁷⁴ Drankier P, *supra* note 54, p 315.

⁷⁵ Article 27 OSPAR.

⁷⁶ Articles 3-4 OSPAR.

enabling a more integrated approach to protect the marine ecosystem. Furthermore, the Convention offers an inclusive regulatory framework for the application of Part XII of the UNCLOS and the CBD regarding the conservation of marine biodiversity at a regional level.⁷⁷ Finally, although the Convention relies on a specific set of principles such as precaution and best environmental practice,⁷⁸ the OSPAR Commission builds its work program on the ecosystem approach aiming at an integrated management of hazardous anthropogenic activities occurring at sea.⁷⁹

Despite the remarkable work and progress on the OSPAR network of MPAs, only a few activities concern the Arctic Ocean.⁸⁰ To the extent the Convention Area covers parts of the Arctic Ocean, the Commission and the Contracting Parties have not yet agreed on establishing MPAs in the Arctic waters and considerable gaps still remain.⁸¹ Nonetheless, the Convention creates a strong precedent for MPA designation in the high seas which could be of great value for the development of a regulatory framework in the Arctic ABNJ. In any case, if OSPAR carries on its aspiring work in synchronizing the work of different institutions with responsibilities in ABNJ, it might forge the role of regional bodies in the management of MPAs in ABNJ.⁸²

1.1.4. *The North East Atlantic Fisheries Convention*

The management of fisheries in the North-East Atlantic is governed by NEAFC, a Regional Fisheries Management Organization (RFMO) responsible for the conservation and protection of fish stocks in an area extending from the southern edge of Greenland, east to the Barents Sea and south to Portugal. This body seeks to guarantee the long-term preservation and optimum utilization of fisheries resources offering sustainable financial, environmental and social payoffs. Hence, the NEAFC establishes management measures for conservation of various fish stocks and other components of the marine ecosystem which could potentially affect fish populations. Over the years it closed several areas to protect fisheries or other marine resources,⁸³ whilst it has also undertaken important work in parts of the high seas in the North-East

⁷⁷ Molenaar EJ and Oude Elferink AG, *supra* note 47, p 14.

⁷⁸ Article 2 OSPAR.

⁷⁹ First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (JMM), Statement on the Ecosystem Approach to the Management of Human Activities, “Towards an Ecosystem Approach to the Management of Human Activities” (2003).

⁸⁰ However, the contribution of the OSPAR regarding the protection of the Arctic marine environment in general, and its involvement in various initiatives and forums has been significant. See OSPAR, Summary of activities 2017-2018, An OSPAR contribution under UN General Assembly Resolution 72/73 of 5 December 2017 on Oceans and the law of the sea to the seventy-third session of the General Assembly, pp 4-6, available at: https://www.un.org/depts/los/general_assembly/contributions_2018/OSPAR.pdf

⁸¹ OSPAR Commission, 2016 Status Report on the OSPAR Network of Marine Protected Areas (2017), pp 11-12, 18, 20, 22.

⁸² Weidemann L, *International governance of the Arctic marine environment: With Particular Emphasis on High Seas Fisheries* (Springer 2014), p 104.

⁸³ For instance, the NEAFC closed five areas in the Hatton-Rockall Bank Area to avert bottom fishing aiming at the protection of deep-water corals.

Atlantic.⁸⁴ Yet, these measures are only of a temporary nature, providing, thus, limited protection.

Concerning area-based management, the NEAFC has the competence to identify vulnerable marine ecosystems (VMEs) to ensure the sustainability of these areas but, except for setting up closures, does not in itself establish MPAs. However, the OSPAR has concluded a Memorandum of Understanding (MoU) with the NEAFC, aiming at fisheries management and environmental protection, including ABNJ, given the complementary competences of the two organizations.⁸⁵ Furthermore, the “Collective arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic” allows for cooperation among different bodies through the exchange of information, the review of specific measures etc.⁸⁶ Hence, the NEAFC launched a series of closures to regulate fishing activities and protect VMEs from the effects of ABNJ bottom fishing, whilst these measures were used as a key basis for the OSPAR MPA network.⁸⁷ Consequently, NEAFC’s participation in high seas MPAs creation is, arguably, relevant as it can provide for an insightful input on conservation measures even if limited to fish stocks.

Finally, the Convention Area regarding Arctic waters only covers 8% of the Central Arctic Ocean,⁸⁸ which represents the main Arctic ABNJ. While a potential expansion of this area to include the entirety of the ocean was proposed by the European Union, it was objected since some of the Arctic States are not members of the NEAFC.⁸⁹ In any case, according to treaty law,⁹⁰ only Denmark, Norway and Russia would be bound by the rules contained in the NEAFC Convention as obligations could not be imposed to non-parties. Nevertheless, due to the identification process regarding VMEs and the establishment of closures, this instrument could offer valuable insight for the designation of potential protected areas and a boost for the conservation and protection of fisheries in the Arctic ABNJ.

⁸⁴ For example, the Commission adopted a recommendation in 2018 to prohibit fishing in ABNJ in the Haddock area, available at: https://www.neafc.org/managing_fisheries/asures/current

⁸⁵ Memorandum of Understanding the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission (2008), available at: https://www.ospar.org/site/assets/files/1357/mou_neafc_ospar.pdf

⁸⁶ OSPAR Agreement 2014-09, Collective Arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic, (2015), available at: <https://www.ospar.org/documents?v=33030>

⁸⁷ Rulska-Domino A, Nordtvedt Reeve LL and Gjerde KM, The Future of High Seas Marine Protected Areas (2012) 26(1) Ocean Yearbook Online, p 284.

⁸⁸ PEW, The international waters of the CAO: Protecting fisheries in an emerging ocean, (2012), p 10, available at: <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2013/04/theinternational-waters-of-the-central-arctic-ocean-protecting-fisheries-in-an-emerging-ocean>

⁸⁹ Rayfuse R, Regulating Fisheries in the Central Arctic Ocean: Much Ado About Nothing? in *Arctic Marine Resource Governance and Development* (Springer 2018), p 43.

⁹⁰ Article 26, Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155.

1.1.5. *The MARPOL Convention and the IMO PSSAs*

The MARPOL Convention offers a general regulatory framework pertinent to the prevention of vessel-source marine pollution and applicable to all maritime zones. The Convention contains a series of Annexes, each of which promotes a different regulatory approach to marine pollution. Yet, their point of convergence lies on the concept of “special areas”, namely specific vulnerable portions of the oceans requiring enhanced protection.⁹¹ In particular, these areas due to their ecological and oceanographical characteristics require special methods to achieve protection from vessel-source pollution.⁹² The designation of such areas is undertaken according to a set of guidelines which include a series of criteria covering ecological, social, economic and other aspects of the marine environment.⁹³ To date, only two MARPOL special areas, including ABNJ, have been established, none of which concern the Arctic Ocean.⁹⁴

Furthermore, the IMO has introduced another tool for the creation of protected areas, namely the PSSAs. These areas are important for their ecological, socio-economic and scientific value and are susceptible to harm by shipping activities.⁹⁵ The development of PSSAs complement the contribution of the MARPOL special areas, whilst they are also applicable to all maritime zones, including ABNJ. Regarding the identification and designation of PSSAs, this depends on criteria which are similar to those concerning the special areas under MARPOL. Notwithstanding the applicability of PSSAs to ABNJ, none of the existing PSSAs established by the IMO cover such areas.

Consequently, the following conclusions can be drawn in respect of MPAs in ABNJ. Firstly, the IMO PSSAs framework and the MARPOL Convention offer an important contribution to the identification of vulnerable sites as well as to the designation process and management of these areas. Secondly, their universal applicability in terms of geographical scope indicates that they can provide guidance for the establishment of MPAs in the Arctic ABNJ. Lastly, the participation of all Arctic States in the IMO facilitates the use of its expertise, whilst it enables the implementation and monitoring of PSSAs in the Arctic ABNJ,⁹⁶ which could later evolve to more inclusive MPAs. Of note is, however, that in this scenario significant other stressors in the Arctic region will remain unregulated since this regime follows a sectoral approach strictly limited to vessel-source marine pollution.

⁹¹ Kachel MJ, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas* (Springer 2008), p 97.

⁹² MARPOL, Regulation I/1(10), II/1(7), and V/1(3).

⁹³ IMO, Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, A 22/Res.927, 2002.

⁹⁴ Overview of Existing High Seas Spatial Measures and Proposals with relevance to High Seas Conservation (2007), p 22, available at: <https://www.cbd.int/doc/meetings/mar/ewsebm-01/other/ewsebm-01-ardron-en.pdf>

⁹⁵ IMO, Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSAs), A 24/Res.982, 2006, para 1.2.

⁹⁶ Drankier P, *supra* note 54, p 304.

1.2 Assessing the practicability of the existing legal instruments regarding the designation of MPAs in the Arctic ABNJ

Designing and implementing MPAs in ABNJ necessitates efficient governance regimes and mechanisms that are capable of coping with emerging challenges. However, the international community has raised doubts regarding the ability of the existing regulatory framework to address sustainable development issues and to sufficiently tackle the problems stemming from climate change, increasing activities in, and uses of, the ABNJ.⁹⁷ Therefore, this section will briefly consider if the existing legal regime is still fit for purpose to adequately guide the establishment of MPAs in ABNJ.

Firstly, it should be clarified that the aforementioned instruments and their contribution to evolving the current regulatory framework are of indisputable value and in no case, the present analysis aims at disregarding them. Nevertheless, their inability to keep up with the increasing threats and the changing reality might have been the result of their conclusion decades ago. For instance, while the UNCLOS remains the pillar of ocean governance, its provisions are almost 40 years old which inevitably results in presenting some important weaknesses. The sectoral approach adopted by this Convention fails to assist in developing multi-purpose MPAs in ABNJ since the relevant organs for standard-setting may not necessarily aim at the protection of the marine ecosystem.⁹⁸ Respectively, the NEAFC and MARPOL Conventions do not holistically protect marine biodiversity in ABNJ as they focus on fisheries management and marine pollution, while they cannot individually be used as a basis for MPAs in the Arctic ABNJ. According to Freestone: “An important result of the sectoral approach in the treaty regimes applicable to ABNJ is that the modalities by which the parties comply with article 192 UNCLOS vary widely from regime to regime”.⁹⁹ Consequently, even if an MPA is established under the current sectoral regime, the ocean will be protected from distinct sector-specific threats, while remaining exposed to other stressors.

Furthermore, the UNCLOS does not contain any provision relevant to the designation process of MPAs, all the more so in ABNJ. Simultaneously, it has been challenged whether the provisions of the CBD actually apply in the high seas and if so to what extent, given that it mainly offers technical and scientific guidance.¹⁰⁰ Likewise, the OSPAR, although an important convention concerning MPA establishment in ABNJ, is spatially restricted and does not apply to vast areas of the Arctic Ocean.

⁹⁷ UNGA, Outcome of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs’ summary of discussions appended to the Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, A/69/780, 2015, paras 10, 12, 17, 18, available at: <https://undocs.org/A/69/780>

⁹⁸ Molenaar EJ and Oude Elferink AG, *supra* note 47, p 10.

⁹⁹ Freestone D, *supra* note 20, pp 11-12.

¹⁰⁰ Prip C, “Towards a new legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction”, The blog of the K.G. Jebsen Centre for the Law of the Sea (hereafter: JCLOS Blog) (2016), available at: <https://site.uit.no/jclos/2016/10/21/towards-a-new-legally-binding-instrument-on-the-conservation-and-sustainable-use-of-marine-biodiversity-of-areas-beyond-national-jurisdiction/>

Lastly, under the current regime, the Arctic States do not participate in the same instruments, resulting in different obligations for different States. This, in turn, does not permit for a comprehensive approach to preserve marine biodiversity in the Arctic ABNJ.

In short, the protection of the Arctic marine ecosystem in ABNJ is based on a patchy regulatory regime, which does not enable the effective establishment of MPAs in the Arctic ABNJ. The lack of an inclusive regime to this end muddies the waters in terms of distribution of roles among the different actors in the Arctic region, the objectives of such measures, their content etc. Hence, a legal reform of the existing framework is probably imperative to enhance resilience to climate change impacts and anthropogenic threats. To this end, an overview of the legal and institutional challenges pertinent to MPA designation in the Arctic ABNJ is a prerequisite and, thus, is advanced in the next chapter.

Chapter 2 – The regulatory gaps and challenges regarding MPAs creation in the Arctic ABNJ

Covering the legal and institutional gaps relevant to the designation of MPAs in the Arctic ABNJ requires a prior identification of these challenges. Therefore, the following analysis will focus on the regulatory *lacunae* concerning the establishment of MPAs in the Arctic ABNJ. The first part of this chapter will deal with the legal challenges, whereas the next section will address the institutional gaps.

2.1 Legal gaps in the designation of MPAs in the Arctic ABNJ¹⁰¹

Firstly, the conservation of marine biodiversity in the Arctic ABNJ is not guided by a commonly agreed set of overarching principles according to which the Arctic States can shape their policies and adopt preservation measures. For instance, the CBD mainly relies on the no-harm principle,¹⁰² whereas the OSPAR Commission follows an ecosystem-based approach.¹⁰³ This, however, does not indicate that other principles cannot be applicable in the context of these instruments but rather illustrates that the conservation measures undertaken within this context may not pursue the same goal. Absent a common goal and, thus, a common vision, the adoption of area-based measures in ABNJ might come across additional hurdles such as the inability to conclude a well-coordinated plan of action.

The importance of establishing overarching principles lays on finding an equilibrium between the necessity for a fixed legal framework and the need for flexibility and guidance for practical implementation.¹⁰⁴ The lack of a commonly accepted set of governance principles for the Arctic ABNJ along with the increasing access to ice-free marine areas by different actors might lead to the adoption of various diverging interpretations on the use of these areas. As a result, strong disagreements arise about how and when to designate area-based tools.¹⁰⁵ Besides, the increasing interests of non-Arctic States in the region might add to this complexity since their involvement in the development of the region has grown significantly over the last few years.¹⁰⁶

¹⁰¹ The legal gaps identified in this section may not necessarily concern solely the Arctic ABNJ. However, the special characteristics of the region might require special attention when developing a new framework. As such, in order to effectively cover these gaps and address the particularities of the Arctic, a regional approach might be more appropriate, as will be discussed further below.

¹⁰² Article 3 CBD.

¹⁰³ JMM, *supra* note 79.

¹⁰⁴ Wright G., Rochette J., Gjerde K., Seeger I, “The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction”, IDDRI, *Studies* N°08/18, (2018), p 31.

¹⁰⁵ Nereus Scientific & Technical Briefs on ABNJ series, Policy Brief, Space for Conservation and sustainable use: area-based management in areas beyond national jurisdiction, (2016), p 4, available at: <https://nereusprogram.org/works/policy-brief-space-for-conservation-and-sustainable-use-area-based-management-in-areas-beyond-national-jurisdiction/>

¹⁰⁶ Hossain K and Morris K, *supra* note 46, p 110.

Although many international legal documents refer to principles such as precaution, intergenerational equity, ecosystem approach etc., a comprehensive set of principles concerning activities in ABNJ has not yet been adopted. The main driver to do so would be to reconfirm the applicability of these principles in ABNJ and to promote the development of a consistent framework for the regulation of ABNJ activities, among which the establishment of MPAs.¹⁰⁷ Subsequently, an inclusive list of principles applicable to ABNJ, rather than simply consulting other instruments, would further enhance their role in “fostering integrated decision-making”¹⁰⁸ and would reiterate that “they should not operate in isolation”.¹⁰⁹

Furthermore, the existing legal framework does not identify the designation process for MPAs in the Arctic ABNJ which is necessary to effectively protect the regional marine biodiversity. Indeed, the special characteristics of the Arctic marine environment,¹¹⁰ the vulnerability of the marine species, and the increasing presence of vessels for a range of activities necessitate the adaptation of the content and objectives of MPAs to directly meet the conservation needs of the Arctic marine ecosystem.¹¹¹ Additionally, the absence of clear-cut purposes and identification criteria might create additional obstacles for States or other relevant actors regarding MPAs designation or international cooperation to this end. The significance of determining these elements becomes apparent taking into consideration the UNGA’s initiative for the development of a new ILBI which recognizes the need to adopt area-based measures and set out, *inter alia*, their criteria, objectives, and content.¹¹² Lastly, defining the content of MPAs is essential to minimize the possibility of diverging interpretations regarding the conservation objectives as was evidenced by regional practice.¹¹³

Moreover, the prevailing sectoral approach adopted by most of the current legal instruments and the different regulatory measures adopted by different sectors hinders the establishment of MPAs capable of holistically protecting the Arctic ABNJ. For example, some sectors have developed plans for area-based measures such as fisheries, shipping, and seabed mineral extraction,¹¹⁴ whereas others are only guided by a general legal regime (e.g. marine scientific research, laying of submarine pipelines and cables).¹¹⁵ Therefore, this approach, although beneficial to a certain extent, leaves marine biodiversity exposed to a great degree since not all the hazardous activities are equally regulated. Also, a sectoral approach might limit the efficiency of the existing

¹⁰⁷ Oude Elferink AG, 'Governance principles for areas beyond national jurisdiction' (2012) 27(2) *The International Journal of Marine and Coastal Law*, p 206.

¹⁰⁸ Houghton K, 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) 49 *Mar Policy*, p 120.

¹⁰⁹ Barnes RA, 'Consolidating governance principles for areas beyond national jurisdiction' (2012) 27(2) *The International Journal of Marine and Coastal Law*, p 289.

¹¹⁰ CAFF, *supra* note 2, pp 379-410.

¹¹¹ *Ibid*, p 59.

¹¹² Report of the Preparatory Committee, *supra* note 36, p 11.

¹¹³ For instance, the Contracting Parties to the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) were disagreeing on the interpretation of the phrase “rational use”, which was relevant for the establishment of MPAs. See Smith D, Jabour J, 'MPAs in ABNJ: lessons from two high seas regimes' (2017) 75(1) *ICES J Mar Sci*, pp 418, 423.

¹¹⁴ For example, the cooperation between NEAFC and OSPAR, and the IMO Polar Code and ISA recommendations for Areas of Particular Environmental Interest.

¹¹⁵ Molenaar EJ, *supra* note 34, slide 18.

legal instruments since States not parties to them will not be bound by their content. For instance, the Arctic States are not Parties to the same Conventions (e.g. Russia is not a member of the OSPAR, while the US (among others) is not a member of the CBD), resulting in different legal obligations for the principal stakeholders of the Arctic region.

Apart from the above, the current legal regime does not provide for adequate monitoring and surveillance obligations, whilst weak implementation and enforcement constitute an additional impediment to MPA establishment. As stated above, the participation of different States in different instruments weakens the enforcement of any legal obligation and, thereafter, hinders the implementation of MPAs in ABNJ. Studies have shown that among the regulatory and governance gaps in ABNJ is the failure of States to sufficiently implement and enforce general obligations of cooperation for the protection of biodiversity either under their competence as flag States or as members of regional agreements and RFMOs.¹¹⁶ The gravity of this problem becomes apparent considering the discussions of the informal working group of the IGC on ABMTs, including MPAs, which highlighted the significance for further deliberations on this issue.¹¹⁷

Taking a step forward by developing a new regulatory regime constitutes in itself a great challenge since the relationship between the new framework and the existing (regional) instruments remains unclear. It has been proposed that a new framework regarding ABNJ must not undermine the existing instruments and initiatives,¹¹⁸ while the UNCLOS stipulates that the existing rights and obligations shall be respected.¹¹⁹ However, the different positions adopted during the discussions at the Preparatory Committee demonstrate that the relationship between the new and existing legal frameworks is not yet a given.¹²⁰ It should be noted, nonetheless, that recent proposals indicate that the final language of the ILBI might be mandatory.¹²¹ In any case, at the moment, this issue remains ambiguous.

2.2 Institutional gaps regarding the designation of MPAs in the Arctic ABNJ

The existing institutional framework regarding the establishment of MPAs in ABNJ presents major shortcomings both spatially and substantially. The predominant sectoral approach inevitably triggers problems of inconsistency among the mandates and roles

¹¹⁶ Gjerde K *et al*, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, IUCN, Gland, Switzerland, (2008), p viii.

¹¹⁷ Informal Working Group on measures such as area-based management tools, including marine protected areas, Oral report of the facilitator to the plenary, (2019), pp 10-11.

¹¹⁸ UNGA Resolution 69/292, *supra* note 28, p 3.

¹¹⁹ Articles 237(2), 311 UNCLOS.

¹²⁰ De Lucia V, Reflecting on the meaning of “not undermining” ahead of IGC-2, JCLOS Blog (2019), available at: <https://site.uit.no/jclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/>

¹²¹ UNGA, President’s aid to negotiations, A/CONF.232/2019/1, p 7.

of existing institutions, leading to obstacles in terms of coordination and cooperation across the different sectors.¹²² The current fragmented institutional regime does not allow for effective cross-sectoral and inter-institutional cooperation, even more so in ABNJ where the regulatory framework in connection to marine ecosystem protection is less straightforward than in AUNJ. The issue of fragmentation was recognized by the Global Oceans Commission which highlighted that:

“In such a highly fragmented landscape, policy coherence and effective international cooperation at and between global and regional levels are essential to achieving common objectives [...] Over the years, efforts have been made to improve coordination and coherence [...] These efforts have not generally met with great success.”¹²³

However, it should be noted that there have been examples of promising efforts regarding cooperation between different organizations such as the enhanced level of collaboration between the OSPAR and the NEAFC.

The lack of a managing body to coordinate the activities of the different instruments and institutions adds to the complexity of adopting MPAs in the Arctic ABNJ. While the Arctic region possesses an intergovernmental forum – the Arctic Council – it principally deals with fostering regional cooperation, conducting scientific and technical studies, and facilitating discussions among the stakeholders in the Arctic region based on a broad-brushed mandate.¹²⁴ Therefore, the Council does not have the competence to regulate the creation of MPAs in the Arctic ABNJ nor can it legally bind the Arctic States through its decisions or recommendations. Accordingly, the role of RFMOs relevant to the Arctic Ocean is still ambiguous in relation to the creation of MPAs in ABNJ. Their power to manage multi-sectoral and holistic area-based measures is still restricted, despite their capacity to designate protected zones in marine areas.¹²⁵ As such, the question remains: which actor could be the protagonist in coordinating the designation of MPAs in the Arctic ABNJ?

Another challenging issue concerns the role of the Arctic coastal States, the rest of the Arctic States as well as the non-Arctic actors operating in the region. The development of a new regime possibly affecting Arctic governance finds the Arctic five in favor of a strong regional approach. They remind the international community of their role as stewards in the region and reaffirm their commitment to abide by the existing regulatory framework.¹²⁶ Despite this perspective, the Arctic coastal States do not oppose to a new regulatory framework to fill the current *lacunae*, but rather reiterate their predominant position in protecting and managing the region. However, the growing influence of third States in the Arctic affairs might weaken the prevalence of the Arctic five.

¹²² Rayfuse R, 'Protecting marine biodiversity in polar areas beyond national jurisdiction' (2008) 17(1) Review of European Community & International Environmental Law 3, p 7.

¹²³ Global Ocean Commission report, 'From decline to recovery: A rescue package for the global ocean' (2014), p 18.

¹²⁴ Arctic Council, Declaration for the establishment of the Arctic Council (Ottawa Declaration), 1996.

¹²⁵ For example, the identification of VMEs and designation of closed areas by the NEAFC (article 7 NEAFC Convention).

¹²⁶ Ilulissat Declaration.

Indeed, the participation of non-Arctic nations may become gradually inevitable. The increasing retreat of sea ice in the Arctic facilitates the presence of third States in the region, seeking to exercise their legal rights under the UNCLOS.¹²⁷ For example, even though the observer status of Asian States in the Arctic Council does not accord any decision-making powers, their participation in working groups – politically and financially – can alter the power politics in the region. China’s Arctic policy, for instance, frames Arctic governance as a matter of international concern necessitating the involvement and contribution of non-Arctic nations.¹²⁸ Therefore, the impacts of such policies on the management of the Arctic might affect the designation of MPAs by further entangling issues such as the identification of areas, implementation, enforcement etc.

Lastly, some of the Arctic States have been reluctant to accept their exclusion from important Arctic initiatives concerning marine governance, as evidenced by the negotiations for the conclusion of the Central Arctic Ocean Fisheries Agreement (CAOFA).¹²⁹ In particular, Sweden, Finland, and Iceland have expressed their dissatisfaction for the Arctic five stewardship regime on the basis of undermining the role of the AC.^{130,131} Consequently, the lack of agreement regarding the governance regime of the Arctic Ocean hampers both the conservation of marine biodiversity and the establishment of MPAs in ABNJ. After all, these issues probably require a common plan of action and collective efforts to work effectively and achieve a commonly accepted outcome.

¹²⁷ Article 87 UNCLOS.

¹²⁸ Hossain K and Morris K, *supra* note 46, p 110. See also Coates K and Holroyd C, *supra* note 7, pp 213-214.

¹²⁹ Consortium for Ocean Leadership, “Iceland Blasts Arctic Five or Exclusion from Fishing Agreement”, (2015). Also, Rayfuse R, *supra* note 89, p 37.

¹³⁰ Prip C, “A global treaty on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction: threat or opportunity for Arctic ocean governance?”, JCLOSE Blog, (2018), available at: <https://site.uit.no/jclos/2018/11/07/a-global-treaty-on-the-conservation-and-sustainable-use-of-marine-biodiversity-of-areas-beyond-national-jurisdiction-threat-or-opportunity-for-arctic-ocean-governance/>

¹³¹ Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOFA), (signed on 3 October 2018).

Chapter 3 – Towards a new Arctic framework for the establishment of MPAs in ABNJ?

The effectivity of a new legal regime for the designation of MPAs in the Arctic ABNJ in terms of establishment, governance, and compliance probably depends on a designation process which takes into account the particularities of the Arctic Ocean. Thereafter, it is essential that a new regime is developed based on a cross-sectoral approach which will facilitate the establishment of multi-purpose area-based measures. The added value of such a framework lies, *inter alia*, on securing holistic protection for the marine biodiversity in the Arctic ABNJ. To this end, the participating stakeholders and contributors must ensure that the new framework is not a mere replica of the existing rules but provides an impetus for States to eliminate current impediments.

This chapter focuses on the construction of a possible legal and institutional framework for the establishment of MPAs in the Arctic ABNJ capable of addressing the existing gaps. However, of note is that the creation of each MPA is subject to negotiations and ultimately depends on the national policies and interests of the involved States which will determine the final content of such tools. Hence, the development and analysis of the exact content of the MPAs and of the relevant provisions of a new framework is not only unfeasible but also falls outside the scope of the present thesis. Rather, this study aims at portraying the rationale according to which the existing gaps could potentially be covered.

3.1 Legal Framework

Modernizing the existing legal framework to abide by the obligation to protect the (Arctic) marine environment (as discussed in chapter 1) requires resourceful and creative thinking. To this end, some scholars have proposed potential pathways for MPAs designation in the Arctic ABNJ. Apart from a general framework under a new ILBI, other suggestions concern the adoption of a UNCBD additional protocol,¹³² an Antarctic-style treaty (ATS) for the Arctic,¹³³ the inclusion of an Arctic Annex or an Arctic Working Group under the BBNJ process,¹³⁴ an Arctic regional arrangement.¹³⁵ We dare to say that the specificities of the Arctic region do not necessarily require a “black or white” solution – namely a standalone solution that excludes any alternatives – but rather calls for a combination of different approaches. This, in turn, could probably lead to a holistic, cross-sectoral, practicable designation of MPAs in the Arctic ABNJ. Put differently, developing a legal framework capable of addressing the existing *lacunae* for the creation of MPAs while ensuring a balance between the interests of the Arctic (coastal) States and those of the international community necessitates a multi-

¹³² Hossain K and Morris K, *supra* note 46, p 120.

¹³³ Morris K and Hossain K, 'Legal instruments for marine sanctuary in the high arctic' (2016) 5(2) *Laws* 20, p 10.

¹³⁴ De Lucia V, *supra* note 7, p 239.

¹³⁵ Hossain K and Morris K, *supra* note 46, p 121.

faceted approach. The next sections will first briefly assess the above-mentioned potential avenues for MPA designation and then will focus on the possible content of the new framework.

3.1.1 Assessing the potential avenues for MPA establishment in the Arctic ABNJ

A cornerstone for the successful development of a new regime is determining its nature. Firstly, the initiative put forth by the UNGA aims at concluding a global agreement for the protection of marine biodiversity in ABNJ. According to the current negotiations and preparatory documents, the implementing agreement does not focus on specific geographical areas but covers ABNJ worldwide.¹³⁶ This automatically means that it will most probably not take into account the specificities of the Arctic region,¹³⁷ which might not be in the benefit of either the Arctic States or of the Arctic marine biodiversity. Even if the Arctic States manage to steer the focus of the discussions toward Arctic matters, it remains unclear if and to what extent the rest of the participants will follow this direction. And absent a general convergence on the issues addressed in the new instrument might affect the final outcome and the level of participation in the agreement.¹³⁸ Put differently, despite the efforts to build a detailed content for the new ILBI,¹³⁹ the treaty might fall short of an effective framework for the protection of the Arctic marine biodiversity in ABNJ, absent the special focus on the uniqueness and vulnerability of the Arctic region. Lastly, although the new implementing agreement is currently *in statu nascendi*, the finalization of its content is foreseen a time-consuming process, which is a luxury given the urgency in the context of the Arctic. Of course, it is noteworthy that the new instrument remains beneficial for the Arctic as it can cover – as will be discussed below – certain gaps that other approaches may leave open.

Furthermore, despite the increased value of the CBD with regards to the protection of the marine environment and MPA establishment,¹⁴⁰ an additional protocol might not be the best option. As it has been suggested, MPAs could be identified and established at a regional level, which then could be included in an international list managed by a governing body.¹⁴¹ As such, the new ILBI could serve as a means to establish this list and potentially provide for a governing organ to coordinate the implementation process.

¹³⁶ General Assembly resolution 69/292, *supra* note 28.

¹³⁷ Hossain K and Morris K, *supra* note 46, p 119.

¹³⁸ For example, a lot of States (e.g. the Honduras, China, Iceland etc.) seem to prefer a consensus-based process both for the phase of negotiations and for the final agreement. See International Institute for Sustainable Development (hereafter: IISD), Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018 (20 September 2018) ENB 25(179).

¹³⁹ President's aid to negotiations, *supra* note 121.

¹⁴⁰ The UNCBD offers a valuable contribution to the designation of MPAs given its provision for the establishment of EBSAs, the criteria for which can also be used for the identification of protected areas. See Annex I of the CBD.

¹⁴¹ Druel E, Possible options for a global governance framework under UNCLOS which integrates existing international/regional institutions and processes (2011), slides 5,6,8, available at: <https://www.bfn.de/fileadmin/ABS/presentation3.pdf>

However, except for the lengthy process of adoption of the protocol – as it requires drafting it, convening the Conference of the Parties (CoP), negotiating the text and respecting certain timeframes –¹⁴² the US is not a party to the Convention. This fact indicates that the additional protocol (depending, of course, on its content) will most probably follow the same path. And absent one of the major Arctic players from the protocol limits the chances for proper implementation and collective protection. Besides, it is questionable to what extent the majority of non-Arctic States will have the appetite to elaborate on an Arctic-oriented protocol. Respectively, despite the valuable lessons drawn by the ATS, geographical disparities and political dissimilarities between the Arctic and the Antarctic hinder the conclusion of such a treaty.¹⁴³

Moreover, the inclusion of an Arctic Annex in the new ILBI could be an insightful way to concretize certain Arctic-focused rules and establish mechanisms that would allow for the enactment of such rules in the future separately from the main agreement. This solution guarantees flexibility and “ensures a dynamic and adaptive way to face the specific challenges of the Arctic environment”.¹⁴⁴ However, Annexes would better function as a technique to elaborate on certain thematic fields or measures, such as the systematic approach for the development of MPAs.¹⁴⁵ Besides, the creation of an Arctic Annex presupposes the conclusion of the new ILBI itself, whilst the procedure for the adoption of said Annex is currently unknown. As a result, finalizing this Annex might prove a time-consuming process. The same applies for the creation of an Arctic Working Group under the new implementing agreement which could have a broad mandate, including, for instance, the coordination of the initiatives undertaken by the Arctic actors, the identification of the need to develop Arctic-specific rules etc. Nonetheless, the effectiveness of the WG relies on its mandate, its composition, the role of a future CoP under the new ILBI, the decision-making powers of the latter etc. Consequently, it becomes apparent that this constitutes not only a lengthy procedure but also an uncertain one, probably not suitable for the urgency of an Arctic context.

On the contrary, a regional arrangement appears a more advantageous solution,¹⁴⁶ which can pave in parallel with the ongoing negotiations for a new ILBI.¹⁴⁷ Firstly, the Arctic five are in favor of a regional approach regarding the protection of the Arctic marine ecosystem,¹⁴⁸ including the establishment of MPAs, which will allow maintaining their control in the region. The development of an Arctic regime capable

¹⁴² Article 28 CBD.

¹⁴³ Borgerson SG, 'Arctic meltdown-The economic and security implications of global warming' (2008) 87 *Foreign Aff.*, pp 73-74. Also, Koivurova T, 'How to improve Arctic international governance' (2016) 6 *UC Irvine L.Rev.*, pp 94-95; Duyck S, 'Drawing lessons for Arctic governance from the Antarctic Treaty system' (2011) 3 *The yearbook of Polar law*, p 684.

¹⁴⁴ De Lucia V, *supra* note 7, p 239

¹⁴⁵ WWF, Proposed framework and key elements of a third UNCLOS Implementing Agreement, WWF submission to the BBNJ PrepCom Chair and to DOALOS for PrepCom3, 2016, p 13.

¹⁴⁶ Boyle A, “Globalism and Regionalism in the Protection of the Marine Environment” in Davor Vidas (ed), *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge University Press 2000), pp 31-32.

¹⁴⁷ Although the Arctic States are in favor of a regional approach, they are not breaching their commitments to negotiate a new implementing agreement since they have not hindered the initiation of negotiations for the new ILBI. For example, see Wright G *et al*, *supra* note 104, pp 51-54.

¹⁴⁸ Ilulissat Declaration; Arctic Council, Rovaniemi Ministerial Statements 2019, p 6.

of regulating the designation of MPAs should strike a balance between ensuring the acquired rights and interests of the Arctic States and the urgency of protecting marine biodiversity in ABNJ. Thus, a decentralized approach based on the proactiveness of the Arctic States seems more suitable to reconcile the interests of different actors, at least as a first step. Additionally, such an approach is not only beneficial for the Arctic States, but also for the Arctic marine ecosystem since a regional agreement could pay special attention to the particularities of the Arctic Ocean, emphasize on certain Arctic issues and prioritize areas of action based on common needs and goals.

A regional agreement should not be viewed as a temporary and superficial measure that will be replaced once the new ILBI has been concluded. According to States' views, the new agreement should not undermine any existing instruments,¹⁴⁹ which signifies that an Arctic regional agreement will not be rendered inoperative in the future. Hence, its content will remain valid, while the provisions of the new ILBI could provide additional guarantees for marine environmental protection and complement the existing measures.¹⁵⁰ Besides, as stated above, a combination of different solutions can provide better and more effective protection for the Arctic marine environment. Lastly, a regional approach can provide the necessary warranties for the Arctic States to support an international agreement and serve as a safety valve in the wait of an international regulatory regime.

3.1.2 Identification criteria, objectives and content of MPAs

Concerning the content of the new Arctic framework, it should first and foremost determine the overarching (set of) principle(s) which will guide the establishment of MPAs as well as the environmental policies of the Arctic States with regards to marine biodiversity in ABNJ. To achieve the creation of a multi-purpose MPA, a guiding principle should also serve the same purpose. It has been suggested that an ecosystem-based approach (EA) manages to purposefully regulate manifold impacts on the environment while aiming at environmental, socioeconomic, political, and other sectoral benefits.¹⁵¹ Considering the ecological connectivity of the Arctic marine biodiversity and the increasing human presence in the Arctic ABNJ, an EA would not only guarantee an integrated protection of the marine biodiversity. It would also secure the interests of the Arctic States and indigenous people in maintaining their financial

¹⁴⁹ UN, New Ocean Treaty Should Not Undermine Existing Legal Instruments, Delegates Caution as They Conclude First Week of Intergovernmental Negotiations [press release], 2019, available at: <https://www.un.org/press/en/2019/sea2097.doc.htm>

¹⁵⁰ Gjerde, K., Boteler, B., Durussel, C., Rochette, J., Unger, S., Wright, G., 'Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction: Options for Underpinning a Strong Global BBNJ Agreement through Regional and Sectoral Governance', STRONG High Seas Project, 2018, p 11. Also, article 15(1) of the Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (hereafter: Draft text), 2019, available at: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_text_a.conf_.232.2019.6_advanced_unedited_version_corr_0.pdf

¹⁵¹ Prip C, "The way towards strengthened marine cooperation in the Arctic", JCLOSE Blog (2017), available at: <http://site.uit.no/jclos/2017/11/03/the-way-towards-strengthened-marine-cooperation-in-the-arctic/>

benefits. Besides, both the Arctic States and the Arctic Council have recognized and endorsed the need for an ecosystem-based management approach to protect the Arctic environment.¹⁵² To this end, the work of PAME, a working group under the auspices of the AC, enhances the efforts to adopt an EA by advancing guidelines regarding its proper and effective implementation by the Arctic actors.¹⁵³

However, an EA necessitates scientific knowledge and certainty which currently, may not be available to a sufficient degree for the Arctic ABNJ. For this reason, the precautionary principle could cover the remaining gaps and guide the designation of MPAs in ABNJ. By virtue of this principle, preemptive action is to be taken when there are reasonable concerns about anthropogenic activities causing risks to the (marine) ecosystems, irrespective of the existence of tangible proof of a causal relationship. In other words, the absence of full scientific evidence should not postpone the adoption of preventive measures to protect marine biodiversity.¹⁵⁴ Moreover, the Arctic States already rely on the precautionary principle in the context of other projects. For instance, they have already encompassed this approach in other initiatives for the protection of biodiversity in the Arctic high seas such as the CAOFA.¹⁵⁵ Therefore, the precautionary principle coupled with the ecosystem approach can result in effectively conserving marine biodiversity in the Arctic ABNJ.¹⁵⁶

An effective regulatory framework should also clearly define the identification criteria, objectives, and content of MPAs. There are several instruments laying out a range of different criteria to designate MPAs, such as the CBD EBSAs scientific criteria¹⁵⁷ or the IMO PSSA criteria.¹⁵⁸ These guidelines can prove useful for the designation of MPAs in the Arctic region since they already offer a comprehensive approach to identifying individual sites. For example, the rarity, vulnerability and biological productivity of an area are some of the existing criteria which also represent important elements of the Arctic marine ecosystem. Moreover, the ecological connectivity present in the Arctic Ocean might require the inclusion of additional criteria such as representativity and connectivity of sites given the existence of straddling and migratory marine species in the Arctic ABNJ.

Listing such criteria might assist – at a second level – in the transformation of individual MPAs to an “ecologically representative and well-connected system of protected areas and other effective area-based conservation measures”.¹⁵⁹ However, the implementation of such criteria depends on the available scientific evidence, which

¹⁵² Arctic Council Secretariat, Fairbanks Declaration, 2017, p 11, para 32.

¹⁵³ PAME (Joint EA-EG), “ICES Workshop on the development of guidelines for Ecosystem Approach to management (EAM) in the Arctic (WKEAMA)”, 2018, pp 8-15.

¹⁵⁴ Rio Declaration on Environmental and Development (Rio Declaration), UN Doc A/CONF.151/26 (vol I) (1992), principle 15.

¹⁵⁵ Article 3 CAOFA.

¹⁵⁶ Park SJ, Kim KH, “The legal Framework and Relevant Issues on the Marine Protected Areas in the Areas beyond National Jurisdiction” in Myron H. Nordquist and John Norton Moore *The Marine Environment and United Nations Sustainable Development Goal 14: life below water*, Center for Oceans Law and Policy, vol 22, (Brill Nijhoff 2018), p 182.

¹⁵⁷ Annex I, CBD.

¹⁵⁸ IMO Revised Guidelines, *supra* note 95.

¹⁵⁹ Aichi Biodiversity Target 11, CBD, Strategic Plan for Biodiversity 2011-2020, UNEP/CBD/COP/10/INF/12/Rev.1, 2011, p 14.

might not be extensive in the context of the Arctic ABNJ. Thereafter, a requirement that the identification process is based on the best available scientific information and traditional knowledge, as well as the inclusion of a non-exhaustive list of criteria, would foster a more flexible and adaptable approach.¹⁶⁰ In turn, this will enhance the leading role of the Arctic States as they will be the most capable actors to gather and disseminate scientific information on the region. Lastly, a flexible approach will probably permit the identification criteria to be easily reassessed in the future.

ABMTs, including MPAs, are not a goal in themselves but are the means to achieve further objectives such as the regulation of harmful anthropogenic activities. Depending on these objectives, MPAs can vary from strictly protected marine sanctuaries to areas where activities compatible with the MPA objectives are allowed. In an ABNJ context, area-based measures cannot severely restrict all marine activities given the freedoms of the high seas pursuant to article 87 UNCLOS. Thus, the primary (general) objective should be the long-term conservation of the marine ecosystems with more specific objectives for particular areas such as the Arctic Ocean.

Apart from general objectives such as to halt biodiversity loss, to restore habitats etc., MPAs in the Arctic region necessitate additional objectives. The PAME has identified a series of such objectives in an effort to create guidelines for the establishment of a pan-Arctic MPA network.¹⁶¹ Although the PAME framework does not specifically regard ABNJ, it could offer significant guidance to shape the goals of individual MPAs in ABNJ since “it recognizes linkages to inland areas and the high seas”.¹⁶² Subsequently, MPAs in the Arctic could aim at amplifying ecological resilience, reinforcing an integrated stewardship, bolstering coordination among the Arctic States etc.¹⁶³ Particularly, these objectives could further assist in alleviating the impacts of climate change and anthropogenic activities, improve the ecosystem’s function and preserve the natural characteristics of the Arctic Ocean. Finally, the inclusion of different Arctic-specific objectives in the establishment of MPAs (e.g. natural and cultural) might be a key action to achieve the holistic and long-term conservation of the Arctic marine biodiversity.

The threats caused by the increased human presence in the Arctic ABNJ along with the effects of climate change dictate that MPAs should be capable of reacting in an efficient manner. To this end, their content should ideally not be based solely on single-sectoral solutions. These could include the restriction of certain activities with a possibility to negatively affect the Arctic marine ecosystem such as shipping, the prohibition of dumping or discharge of harmful substances etc.¹⁶⁴ Rather, the elaboration of a multi-purpose regime which allows the different international organizations to collaborate and contribute to the holistic protection of the Arctic is crucial. Bearing in mind the example of the OSPAR Convention, the inter-sectoral collaboration for the protection of the marine biodiversity, including the creation of

¹⁶⁰ Informal Working Group report, *supra* note 117, p. 9.

¹⁶¹ PAME, *supra* note 5.

¹⁶² *Ibid*, p 11.

¹⁶³ *Ibid*, pp 9-10.

¹⁶⁴ IUCN, An international Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction, Matrix of Suggestions, 2015, pp 18-19.

MPAs in ABNJ, is not unrealistic. *Au contraire*, an effective Arctic-focused framework could build on the OSPAR example to foster cooperation among international organizations and instruments (e.g. IMO, CBD, OSPAR etc.), which could play a role by filling the existing gaps relevant to their mandate.

Finally, the current single-sectoral approach does not guarantee that all States are on the same page and follow the same rules. Different States are parties to different organizations and, thus, subject to different regimes. For instance, the creation of an MPA in the Arctic Ocean by the OSPAR Commission will prevent Norway from polluting but will not hinder the Russian Federation from conducting unsafe activities. Also, it will not be able to regulate fishing as this falls outside the general obligations under the OSPAR Convention.¹⁶⁵ Instead, a cross-sectoral approach will promote unification and ensure inclusive protection. Put differently, since all the relevant bodies will cooperate under a common framework with a common goal, States Parties will be required to abide by the same rules. Consequently, the established MPA will comprehensively regulate all the activities that may endanger the agreed conservation objectives and the marine ecosystem itself.

3.1.3 Implementation and enforcement

The implementation and enforcement of the designated MPAs is *ab initio* and *per se* a thorny issue. The freedom of the high seas limits the extent to which area-based measures can be enforced to States, while State sovereignty and the need for consent create additional hurdles. The development of a regional arrangement for MPA designation adds little to solving this problem as the scope of the agreement will include a limited number of States, mainly those encircling the Arctic Ocean. Nonetheless, a regional approach does not create a dead-end since oftentimes participation by invitation is an important option. Again, the nature and content of the OSPAR Convention can function as a springboard to advance a similar regime in the Arctic ABNJ. Although the OSPAR Convention cannot impose MPAs obligations to non-parties operating in the Convention area, it provides for inviting such actors to accede to the Convention or for recognizing an observer status.¹⁶⁶ In turn, this mechanism could endorse reciprocity for the mutual recognition of participating parties' protected sites. Hence, MPAs in ABNJ enjoy greater recognition while respecting high seas freedoms and State sovereignty.¹⁶⁷

Additionally, a regional agreement among the Arctic States would not impede the conclusion of a new ILBI. Instead, it creates a preliminary safety net in case the new instrument delays excessively, while it safeguards and enhances the leading role of the Arctic five. According to Durussel

“The regional level plays a key role in addressing and strengthening the conservation and sustainable use of marine biodiversity in ABNJ. It can catalyze and progress this issue while

¹⁶⁵ Article 2 OSPAR.

¹⁶⁶ Articles 11, 27 OSPAR.

¹⁶⁷ Hossain K and Morris K, *supra* note 46, p 122.

an international agreement is being developed, negotiated, and agreed on. Notably, working at the regional level [...] can lead to large-scale changes being more efficiently tackled in the longer term”.¹⁶⁸

The development of the new ILBI could strengthen the regional framework for MPAs in the Arctic ABNJ in terms of recognition. The new instrument will probably achieve high levels of ratification by the majority of the participating States, reaching probably the number of ratifications of the UNCLOS itself.¹⁶⁹ Consequently, it will be able to ensure wider recognition of MPAs in the Arctic Ocean by endorsing (existing) regionally-established MPAs.¹⁷⁰

3.1.4 Relationship to measures under existing instruments, frameworks and bodies

A new regulatory framework aiming at addressing the existing gaps regarding the establishment of MPAs in the Arctic ABNJ should not affect the current state of affairs. Irrespective of whether this new framework will be developed in a regional or international level, it should promote coherence and complementarity with the existing frameworks. Indeed, discussions at an international level illustrate that States are in favor of an instrument whose content will not undermine the existing relevant legal instruments and bodies.¹⁷¹ Moreover, a new framework should play a unifying role to lead progress, in search of long lasting conservation and sustainable use of marine biodiversity for the benefit of present and future generations.¹⁷² Otherwise, the new regime will not serve its primary purpose to cover the existing gaps,¹⁷³ but it will rather replace the current frameworks. Therefore, cooperation among the relevant international organizations and coordination of the different legal regimes is a requirement, whilst establishing a new framework must not affect the acquired rights and the adopted national measures of adjacent coastal States.¹⁷⁴ This rationale is well supported by a cross-sectoral approach since cooperation in an inter-institutional level will prevent any inconsistencies between the new and the existing frameworks.

¹⁶⁸ Durussel C, Oyarzún ES and Urrutia O, 'Strengthening the Legal and Institutional Framework of the Southeast Pacific: Focus on the bbj Package Elements' (2017) 32(4) *The International Journal of Marine and Coastal Law*, p 637.

¹⁶⁹ Hossain K and Morris K, *supra* note 46, p 119.

¹⁷⁰ Gjerde *et al*, *supra* note 150, p 15.

¹⁷¹ UN press release, *supra* note 149. Also, UNGA Resolution 69/292, *supra* note 28, para 3; article 15(4) Draft text, *supra* note 150.

¹⁷² IUCN, Measures Such as Area-Based Management Tools, Including Marine Protected Areas, Suggested responses to questions on area based management tools (ABMTs), based on the document entitled, “Chair’s indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee”, 2015, p 15.

¹⁷³ UN, New Treaty Must Complement, Not Renegotiate, ‘Delicate Balance’ in Convention on Law of the Sea, Delegates Tell Intergovernmental Conference [press release], 2019, available at: <https://www.un.org/press/en/2019/sea2095.doc.htm>

¹⁷⁴ UN press release, *supra* note 149.

3.2 Institutional Framework

3.2.1 *The Arctic Council: a vehicle for the designation of MPAs in the Arctic ABNJ*

From an institutional perspective, the designation of MPAs in the Arctic ABNJ should be dealt with under the aegis of a managing body which will coordinate any efforts, facilitate interstate dialogues and serve as a hub for the development of a new framework. The rapid changes occurring in the Arctic marine ecosystem might not allow for time-consuming processes to create a new organ specifically designed to regulate MPAs creation in the Arctic Ocean.¹⁷⁵ Hence, an existing body should undertake these duties and the most suitable institution for this purpose is the Arctic Council. Notwithstanding its political nature and the lack of general legally binding powers, it is the preeminent interstate forum for cooperation among the eight Arctic nations, indigenous peoples and recognized non-Arctic observers. Its work through six working groups focuses on the sustainable use and development, and protection of the Arctic environment, including the marine biodiversity of ABNJ. Also, the Arctic States have voiced their ambition to “pursue opportunities to expand the Arctic Council’s roles from policy-shaping into policy-making”.¹⁷⁶ Subsequently, these features strengthen the Council’s capacities to deal with the creation of MPAs in ABNJ.

Apart from the fact that the creation of MPAs – at least in AUNJ – was part of the Council’s agenda since 1991,¹⁷⁷ the mandate of the AC leaves adequate space for the Council to actively engage in establishing area-based tools in the Arctic ABNJ. Such measures could fall under the mandate regarding the sustainable development and environmental protection of the Arctic region.¹⁷⁸ Besides, the AC has already been studying the conditions for establishing MPAs in the Central Arctic Ocean,¹⁷⁹ while the Conservation of Arctic Flora and Fauna (CAFF) – another AC working group – has provided scientific and technical support to identify EBSAs in the Arctic.¹⁸⁰ Among these areas was the “multi-year ice of the Central Arctic Ocean”, which includes the high seas parts of the Arctic ocean. While this categorization will not necessarily transform into a future MPA, the identification of such areas could offer the core basis to advance MPAs in the Arctic ABNJ.

¹⁷⁵ Even in the case of CAOFA, for example, which was negotiated in a relatively brief period of time, the whole procedure (from the beginning of the first interstate discussions until the ratification phase) lasted almost a decade. However, according to NASA, changes in the Arctic such as the retreat of sea ice can reach a significant rate of almost 13 percent per decade, which might not be a negligible figure. See Molenaar EJ, 'The Oslo declaration on high seas fishing in the Central Arctic Ocean' (2015) Arctic yearbook, p 428; NASA Global Climate Change and Global Warming: Vital Signs of the Planet, Arctic Sea Ice Minimum, 2018, available at: <https://climate.nasa.gov/vital-signs/arctic-sea-ice/>

¹⁷⁶ Arctic Council Secretariat, Vision for the Arctic, 2013, p 3.

¹⁷⁷ Johansen E, 'Climate Change and the Arctic: Legal Regulations in Changing Times' in *The Marine Environment and United Nations Sustainable Development Goal 14* (Brill Nijhoff 2018), p. 385.

¹⁷⁸ Ottawa Declaration 1996, para 1.

¹⁷⁹ Koivurova T and Caddell R, 'Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic' (2018), 112 AJIL Unbound, p 136.

¹⁸⁰ CAFF, Ecologically and Biologically Significant Areas (EBSAs), available at: <https://www.caff.is/protected-and-important-areas/ebsas>

As stated above, the Arctic Council could function as the main platform for the development of the MPA designation framework.¹⁸¹ For this purpose, it could receive proposals by stakeholders (operating) in the Arctic (e.g. Arctic States, indigenous populations, international organs etc.), assess these submissions with the aid of its working groups and provide scientific and technical guidance during the designation procedure. The AC could also lead the monitoring and review process of the MPAs through the AMAP WG, which already engages in monitoring and assessment activities. Its mandate to include the review of MPAs in ABNJ could be easily adapted since the Arctic Council's Ministers and Senior Arctic Officials are vested with such powers.

Furthermore, the AC could assist in promoting a cross-sectoral approach since it has taken promising steps to bring together actors from different sectors.¹⁸² Specifically, by granting observer status to international organizations specializing in different sectors such as the IMO or the OSPAR, the AC creates an opportunity to develop fruitful inter-institutional partnerships. This type of collaboration could foster the development of area-based measures (e.g. PSSAs) that could be complementary to future MPAs in the Arctic ABNJ. For instance, an analysis from Det Norske Veritas (DNV), requested by PAME, revised possible available IMO measures capable of protecting vulnerable marine areas, including the high seas.¹⁸³ As a result, each organization can offer its expertise to shape the content of potential MPAs in the Arctic ABNJ, aiming at holistic protection.

Lastly, the Arctic States uphold a strong regional approach and endorse to “complement the Arctic Council's existing marine cooperation by situating any new marine cooperation mechanisms within the Arctic Council”.¹⁸⁴ In turn, this could perhaps portray the desire and inclination to search for new techniques of enhancing the Arctic Council's marine stewardship of the entire Arctic region.¹⁸⁵

3.2.2 *The role of the Arctic coastal States in ABNJ MPAs designation*

The Arctic States' longstanding claim of being the stewards of the Arctic Ocean and their strong position for a regionalized approach¹⁸⁶ for the protection of marine

¹⁸¹ The Council's current mandate to protect the Arctic environment could allow for greater action, possibly including MPAs. See Ottawa Declaration 1996, para 1; Hossain K and Morris K, *supra* note 46, p 121; Hamilton N, Arctic Sanctuary: Global Commons, Environmental Protection & Future-Proofing, Greenpeace 2014, p 10;

¹⁸² Also, it has been suggested that inter-institutional collaboration can have more effective results if undertaken in a regional level. See Durussel C *et al*, *supra* note 168.

¹⁸³ De Norske Veritas (DNV), Specially Designated Marine Areas in The Arctic High Seas, Report No./DNV Reg No.: 2013-1442/17JTMM1D-26, Rev 2. Available at: <https://www.cbd.int/doc/meetings/mar/ebaws-2014-01/other/ebaws-2014-01-submission-finland-en.pdf>

¹⁸⁴ Arctic Council, Report to Ministers of the Task Force on Arctic Marine Cooperation, 2017, p 8, available at <https://oarchive.arctic-council.org/bitstream/handle/11374/1923/2017-04-30-Edocs-4079-v3-TFAMC-report-to-ministers-with-cover-and-colophon.pdf?sequence=1&isAllowed=y> .

¹⁸⁵ Johansen E, *supra* note 177, p 388.

¹⁸⁶ Ilulissat Declaration.

biodiversity in ABNJ indicate that they should be involved in the designation process for MPAs. This involvement could regard the submission of proposals for area-based measures, including MPAs, the development of their content, the assessment of proposals etc.¹⁸⁷ However, this does not necessarily mean that the Arctic five should possess a distinct role from other participating actors. The UNCLOS does not provide for a privileged position to any coastal State. It only highlights that, in cases of overlaps between the high seas and an extended continental shelf, the sovereign rights of coastal States over the latter must be respected.¹⁸⁸ In practice, though, certain regional features might inevitably accord a special position to the coastal States. Besides, discussions at an international level have highlighted the need to pay special attention to the sovereign rights and jurisdiction of coastal States over their (extended) continental shelf. Also, some delegations at the IGC have underlined the need for consultations with the adjacent coastal States with regards to the adoption of marine protection measures.¹⁸⁹

The geomorphological characteristics of the Arctic Ocean might place the Arctic coastal States in a leading position for MPA designation in ABNJ. All of the Arctic five – except for the US – have made submissions to the CLCS to delineate the outer limits of their continental shelves beyond 200nm.¹⁹⁰ The extension of the continental shelves in the geographically limited area of the Arctic Ocean results in considerable overlaps, where parts of the high seas coincide with the extended continental shelves beyond 200nm. Therefore, the establishment of MPAs in ABNJ should respect the sovereign rights of the coastal State whose continental shelf might be affected, and the consent of the latter is probably imperative.¹⁹¹ Respectively, coastal States should not exercise their rights over their continental shelf in a manner that could infringe the rights and freedoms of other States in the superjacent waters.¹⁹² However, this does not indicate that the rights and interests of the coastal State must necessarily give precedence to the exercise of high seas freedoms and rights. It means that the coastal State may restrict these rights to the degree necessary for that State to safeguard its interests in the continental shelf.¹⁹³ In practice, this might lead, for instance, to the restriction of fishing

¹⁸⁷ Informal Working Group report, *supra* note 117, p 9.

¹⁸⁸ Article 77 UNCLOS.

¹⁸⁹ UN, Delegates Say New Marine Biodiversity Treaty Must Respect Jurisdiction of Coastal States over Their Continental Shelf, as Intergovernmental Conference Continues [press release] 2019, available at: <https://www.un.org/press/en/2018/sea2077.doc.htm> ; UN, Delegates Favor Lead Role for States in Shaping Marine Protection Measures, as Intergovernmental Negotiations on New High Seas Treaty Continue [press release] 2019, available at: <https://www.un.org/press/en/2019/sea2096.doc.htm> ; Also, it could be argued that the general duty of cooperation includes interstate consultations for the protection of the (marine) environment. See, Dupuy P and Viñuales JE, *International environmental law* (Cambridge University Press 2018), pp 73-75.

¹⁹⁰ Commission on the Limits of the Continental Shelf (CLCS), Submissions by States, available at: https://www.un.org/Depts/los/clcs_new/commission_submissions.htm

¹⁹¹ Article 77 UNCLOS. Articles 79(3), 87(2) and 142(2) UNCLOS can also be of relevance. In general, see also, for example, *North Sea Continental Shelf* (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) Judgment, ICJ Reports 1969, para 19; *Delimitation of the maritime boundary in the Bay of Bengal* (Bangladesh v Myanmar), Judgment, ITLOS Reports 2012, para 475. See also articles 15(5) and 18(2)(iv) of the Draft text, *supra* note 150.

¹⁹² Article 78 UNCLOS.

¹⁹³ Mossop J, The relationship between the continental shelf regime and a new international instrument for protecting marine biodiversity in areas beyond national jurisdiction (2017) 75(1) ICES J Mar Sci, p 445.

that affects the harvest of living resources belonging to the sedentary species of the coastal State's continental shelf.

Besides, as illustrated by regional practice under the OSPAR framework, it might be problematic to designate MPAs in ABNJ without the consent of the affected coastal State.¹⁹⁴ For example, Iceland reacted to the creation of a high seas MPA – the Charlie-Gibbs Fracture Zone – that partially overlapped to the then preliminary extended continental shelf of the country.¹⁹⁵ In short, the rights of coastal States pursuant to article 77 UNCLOS shall not be violated,¹⁹⁶ and “as demonstrated by the practice of OSPAR Contracting Parties, it is difficult to conceive of the designation of high seas MPAs without their consent”.¹⁹⁷

In any case, the designation process should be in accordance with the provisions of the UNCLOS. The “due regard” obligation according to article 87 UNCLOS is an integral part of the high seas freedoms, which might be relevant for the role of coastal States in the establishment of MPAs in ABNJ. Although this duty does not explicitly refer to the rights of coastal States, it could be argued that it also applies in this case.¹⁹⁸ While this obligation might not stipulate the need for consent by the coastal State, the rights involved must be appropriately acknowledged and balanced. To this end, consultation with the coastal State might be necessary¹⁹⁹ if the designation of MPAs in ABNJ affects the rights of the latter in relation to its extended continental shelf. Consequently, in the case of the Arctic Ocean, the Arctic coastal States could be accorded with a special position to guide the designation process.

Lastly, the recent adoption of the CAOFA demonstrates the capacity of the Arctic States to produce legally binding instruments concerning the regulation of activities in the high seas.²⁰⁰ Apart from the decisive role of the Arctic five in the preparation of the agreement,²⁰¹ the preamble specifically acknowledges the central role of these States with regards to the conservation and sustainable use of fisheries in the Central Arctic Ocean.²⁰² Following this example, the Arctic five could undertake a similar initiative to establish MPAs in the Arctic ABNJ²⁰³ under the aegis of the Arctic Council. Thus, while the Arctic nations will maintain their leading role, other relevant actors operating

¹⁹⁴ Ribeiro MC, South Atlantic Perspectives on the Future International Legally Binding Instrument under the LOSC on Conservation and Sustainable Use of BBNJ (2017) 32(4) *The International Journal of Marine and Coastal Law*, pp 756-757.

¹⁹⁵ Charlie-Gibbs Marine Protected Area, *The Charlie-Gibbs Marine Protected Area – Why Was it Split in Two?*, available at: <http://charlie-gibbs.org/charlie/node/71>

¹⁹⁶ For example, see OSPAR Decision 2012/1 on the establishment of the Charlie-Gibbs North High Seas Marine Protected Area, para 2.2.

¹⁹⁷ Ribeiro MC, *supra* note 194, p 757.

¹⁹⁸ Oude Elferink AG, *supra* note 52, p 447.

¹⁹⁹ Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award of 18 March 2015, para 519; IISD, BBNJ IGC-2 Highlights: Thursday, 28 March 2019 (29 March 2018) ENB 25(189), p 2.

²⁰⁰ It should be mentioned that the adoption of the CAOFA occurred in cooperation with other States such as China, Japan and South Korea.

²⁰¹ Molenaar EJ, An introduction to the Central Arctic Ocean Fisheries Agreement, 2018, slide 11.

²⁰² CAOFA Preamble, paras 4-5.

²⁰³ Polakowski H, 'Freezing the Issues: Why Arctic Coastal States Need to Implement Marine Protected Areas in the Arctic Seas' (2017) 30(2) *Tulane Environmental Law Journal*, p 366.

in the region such as international organizations or non-Arctic States will be able to contribute (through the AC) to the development of a new regime.

3.2.3 *The role of non-Arctic actors in the designation process*

The Arctic Council has accepted many non-Arctic States and international organizations as observers to participate in its works. In 2013, China, India, Italy, Japan, the Republic of Korea and Singapore were admitted as observers in the Council,²⁰⁴ while the International Council for the Exploration of the Sea (ICES), the OSPAR Commission and the IMO were accepted as observers in 2017 and 2019 respectively.²⁰⁵ Although observers are not bestowed with decision-making powers, their participation in terms of economic contributions and political involvement is to a certain extent influential within the Council.²⁰⁶

With the rapid retreat of sea ice-sheets in the Arctic Ocean, important shipping routes become accessible and attract the interests of distant non-Arctic States, such as China.²⁰⁷ Indeed, according to Nordveit: “the opening of the Arctic for shipping affects transport and marketing possibilities for many countries in East Asia, Europe and North America”.²⁰⁸ Articles 87 and 90 UNCLOS protect the freedom of navigation by all States, including for commercial purposes,²⁰⁹ however, the nature of area-based measures and the establishment of MPAs in the Arctic ABNJ could perhaps impede the full enjoyment of such potentials.

Against this background, many non-Arctic States will probably express their interest to take part in the proceedings of the AC regarding high seas MPA designation. In this scenario, the Arctic Council’s Member States should welcome and encourage the active engagement of observer States in its projects since the possible designation of MPAs in the Arctic ABNJ ultimately affects these nations.²¹⁰ According to the Arctic Council Observer Manual for Subsidiary Bodies, observer States are allowed to participate and make contributions in the activities undertaken by the AC’s working groups.²¹¹ As such, if the AC undertakes the creation of MPAs in the Arctic ABNJ, non-Arctic States could

²⁰⁴ Arctic Council Secretariat, Kiruna Declaration, 2013.

²⁰⁵ Fairbanks Declaration, *supra* note 152, para 44; Rovaniemi Ministerial Statements, *supra* note 148, p 19.

²⁰⁶ Koivurova T, “The current and future role of Non-Arctic States in Arctic Governance” in Shibata A, Zou L, Sellheim N, Scopelliti M (eds.), *Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors*, (Routledge 2019), pp 20-21.

²⁰⁷ The State Council Information Office of the People’s Republic of China, China’s Arctic Policy, 2018, available at: <http://www.scio.gov.cn/m/32618/Document/1618217/1618217.htm>

²⁰⁸ Nordveit E, Arctic Council Update in Nordquist MH, Moore JN, Beckman RC, *Freedom of navigation and globalization* (Center for Oceans Law and Policy; Volume 18, Brill Nijhoff 2015), p 147.

²⁰⁹ Koh T, “Setting the Context: A globalized world” in Nordquist MH, Moore JN, Beckman RC, *Freedom of navigation and globalization* (Center for Oceans Law and Policy; Volume 18, Brill Nijhoff 2015), pp 5-6.

²¹⁰ Koivurova T and Liu N, *supra* note 9, pp 217-218.

²¹¹ Arctic Council, Observer Manual for Subsidiary Bodies, 2013, p 7.

play a supportive but crucial role²¹² by making suggestions, offering technical or scientific guidance and expertise etc.²¹³ The same applies to international organizations that have been accorded observer status. Besides, the attribution of the observer status to certain States and bodies illustrate their capacity to substantially assist the works of the Council since the latter “is open to observers who can contribute to the work of the Arctic Council and share the commitment of the Arctic States...”.²¹⁴

It is noteworthy, nonetheless, that observer States that stand to benefit from shipping or navigational routes in the Arctic high seas might have conflicting views with the permanent members on conservation measures in the Arctic Ocean, including probably the establishment of MPAs.²¹⁵ Consequently, the Arctic States might find their own interests in the region challenged by a rising number of actors exercising influence by way of expertise, written statements, and financial support.²¹⁶ However, the current equilibrium within the Arctic Council and, in general, in the Arctic region will not easily alter even with the active participation of observers in the Councils’ projects. The continuous and strong commitment of the Arctic States to assume leadership of the region²¹⁷ and the limited powers of the observers in the decision-making processes prove that the Arctic States remain the key players in the Arctic. Besides, notwithstanding the rising number of observers, this does not necessarily mean that they will make use of their participatory rights and, thus, influence the work of the Council.²¹⁸

²¹² Kim JD and Choi AJ, “Communications between the Arctic States and North Pacific Asian States on the Arctic Issues” in Nordquist MH, Moore JN, Beckman RC, *Freedom of navigation and globalization* (Center for Oceans Law and Policy; Volume 18, Brill Nijhoff 2015), p 159.

²¹³ Coates K and Holroyd C, *supra* note 7, pp 214-215.

²¹⁴ Vision for the Arctic, *supra* note 176.

²¹⁵ Hossain K and Morris K, *supra* note 46, p 111.

²¹⁶ *Ibid.*

²¹⁷ Vision for the Arctic, *supra* note 176; Ilulissat Declaration; Arctic Council Observer Manual *supra* note 211; IISD, *supra* note 199.

²¹⁸ Keil K and Knecht S, *Governing Arctic Change: Global Perspectives* (Springer 2016), p 180.

Concluding remarks

“The facts are clear. Our oceans are a mess”. After decades of scientific warnings and environmental initiatives to protect the marine environment, one would not expect for that phrase to be the principal message of the UN Secretary-General, António Guterres, during the last G7 Summit.²¹⁹ The catastrophic impacts of climate change and the increase of human presence in the Arctic Ocean result in life-threatening risks for marine biodiversity which remains exposed to a plethora of major stressors. Given the susceptibility and fragility of the Arctic marine ecosystem and the value of the services it provides, striking a balance between preservation and sustainable use of marine resources is of utmost significance. To this end, the designation of MPAs in the Arctic ABNJ can protect the Arctic from the damaging effects of anthropogenic activities, while ensuring the recovery from climate change impacts.

While human presence in the Arctic ABNJ increases, MPA establishment still crawls behind. The legal and institutional framework regarding area-based measures presents considerable challenges which hinder the effective protection of marine biodiversity in ABNJ. The present thesis has demonstrated this reality through the identification of these obstacles in relation to the Arctic region. For instance, it is ambiguous which criteria should be used to identify possible MPAs in ABNJ or who could lead the designation process. In turn, these issues raised a broader question of how these gaps could be covered through the establishment of a new regulatory framework. This question and its answer did not aim at shaping a new framework from scratch nor at presenting an undeniably fit for purpose solution. Rather, the current research tried to build on the existing practices and illustrate the rationale under which the establishment of MPAs in the Arctic ABNJ could represent an effective response.

Subsequently, after having examined the regulatory *lacunae* and the possible avenues to designate MPAs in the Arctic, the present thesis considers that an Arctic regional approach is the most beneficial solution. Without disregarding the rest of the possible pathways, a regional arrangement could function as a springboard to designate MPAs in the Arctic ABNJ. A regional approach is desirable in the wait of a general international regime since the latter may fall short of exhaustively tackling the existing problems.²²⁰ A new Arctic-focused framework does not need to duplicate the existing rules but rather collect the positive elements and adapt them to the relevant circumstances. The current analysis tries to demonstrate that an MPA regulatory regime in an Arctic level could enhance the conservation and sustainable use of ABNJ while international negotiations are still on-going. At a later stage, this regional approach could be further endorsed via a mechanism founded by an UNCLOS implementing agreement, which could facilitate its international recognition.²²¹ Put differently, combining global efforts and regional actions could lead faster to a comprehensive protection of the marine ecosystems in ABNJ.

²¹⁹ UN News, “We face a global emergency’ over oceans: UN chief sounds the alarm at G7 Summit event”, 2018, available at: <https://news.un.org/en/story/2018/06/1011811>

²²⁰ Molenaar EJ and Oude Elferink AG, *supra* note 47, p 19.

²²¹ Durussel C *et al*, *supra* note 168.

The present study has included critical recommendations fostering a regulatory regime that can pave the way forward. This thesis upholds a framework that is guided by the ecosystem-based approach coupled with the precautionary principle given the possible lack of adequate scientific knowledge for the Arctic ABNJ. The identification process of possible sites could follow the lead of the CBD or IMO guidelines for ecologically significant areas. Although not a pioneering suggestion, the inclusion of such criteria in a regional framework adapted to the needs and interests of the States involved might enhance State participation (i.e. the US). In terms of content, MPAs should encompass Arctic-specific objectives to directly meet the needs of the Arctic marine ecosystem, whilst a multi-sectoral approach could provide comprehensive protection to marine resources.

Drawing upon the expertise of existing (regional) frameworks and initiatives such as the OSPAR Convention and the Pan-Arctic MPA Network, the Arctic States under the aegis of the Arctic Council possess an advantageous position to begin MPA designation in the Arctic ABNJ.²²² The leading role of the Arctic coastal States in the designation process is imperative given their sovereign rights in parts of the ABNJ – due to the (possible) extended continental shelf– and their consistent strong commitment to protect the region. The composition of the AC, which includes observer States and non-Arctic actors, could ensure wider participation in the designation process, and therefore, broader recognition and compliance. Equitable stakeholder engagement and contribution should be promoted during the designation of ABMTs and MPAs.²²³ Moreover, the inclusion of non-Arctic international organizations in the AC's projects could foster a cross-sectoral approach, which could result in the holistic protection of the Arctic marine biodiversity in ABNJ.

Mapping the future of the Arctic region within this specific content portrays it as stable and prosperous. The present thesis illustrates that a regional approach would allow for the Arctic (coastal) States to maintain their leading position in the management of the Arctic region, while it will also guarantee support for the global efforts to protect the marine ecosystems of ABNJ. An Arctic-specific MPA regime would offer targeted protection to the vulnerable Arctic marine environment by prioritizing the needs of the region, and thus, the actions of the Arctic States. Additionally, the increased interests of non-Arctic States in the Arctic Ocean could further interstate cooperation and contribute to regional development.²²⁴

Yet, a complete solution to the issues addressed will have to shift from the theoretical realm to the practical sphere of State engagement so as the adoption and implementation of area-based measures to be achieved. Put differently, the establishment of MPAs must tackle practical issues that may come up during their implementation. For this to occur, further research based on interdisciplinary analyses which will elucidate issues of scientific and technical nature on this field is probably a prerequisite.

²²² Hossain K and Morris K, *supra* note 46, p 123.

²²³ De Santo EM, 'Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ)', (2018) 97 Mar Policy, p 42.

²²⁴ For instance, Japan could play a catalytic role by assisting the development of the region in relation to the fields of science, technology, environmental protection etc. See Ikeshima T, 'Japan's role as an Asian observer state within and outside the Arctic Council's framework' (2016) 10(3) Polar Science 458.

To conclude, while life below water is in “very deep trouble”,²²⁵ it might not be too late to react. Through cooperative actions and active participation in the fight against ocean degradation, there is “a chance to undertake a course correction while we still can”.²²⁶ It is, thus, time to set sail for a better future.

²²⁵ UN News, ‘We’re all in this together’ says UN Ocean Envoy, in battle to save life below the waves, 2018, available at: <https://news.un.org/en/audio/2018/09/1020981>

²²⁶ UN, Health of Oceans Critical to Planet’s Well-Being, Delegates Stress, as Conference Begins on Drafting Legally Binding Instrument Protecting Marine Biodiversity [press release] 2019, available at: <https://www.un.org/press/en/2018/sea2076.doc.htm>

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