

# Arctic Marine Biodiversity in the High Seas between Regional and Global Governance

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The recently released IPCC Special Report on Global Warming of 1.5C stresses the urgency of climate action and adaptation in light of the speed and magnitude of global warming and its environmental and socio-economic impacts. Such impacts challenge the ability of the international community to meet the United Nations Sustainable Development Goals. In the Arctic, rapid climate-driven sea ice loss is putting pressure on highly sensitive ecosystems, while also opening for an unprecedented expansion of human activities. The increasing environmental pressures associated with global warming and human activities in the Arctic are currently met by insufficient, fragmented and often incompatible legal and policy frameworks. While Arctic coastal regions may rely on domestic legislation and policy frameworks, a large portion of the Arctic Ocean is beyond national jurisdiction and arguably lacks comprehensive and efficient instruments for the conservation and sustainable use of marine biodiversity.

The UN General Assembly launched negotiations on a global treaty on marine biodiversity beyond national jurisdiction (BBNJ) in December 2017<sup>1</sup> after a lengthy

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preliminary<sup>2</sup> and preparatory<sup>3</sup> period. These ongoing negotiations may provide solutions to the challenges of Arctic Ocean governance, as well as lead to the adoption of a global framework that a) coordinates existing instruments, frameworks bodies and institutions, b) provides for common environmental standards without hindering more ambitious ones, and c) fills existing regulatory gaps. The Intergovernmental Conference (IGC) under which the negotiations are conducted, must reach a package deal on four topics: marine genetic resources, including the sharing of benefits; area-based management tools, including marine protected areas; environmental impact assessments; and capacity building and the transfer of marine technology.<sup>4</sup> The negotiations must also ensure that a new instrument ‘should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies’.<sup>5</sup> However, inter-institutional and cross-sectoral cooperation and coordination is imperative to successful implementation of the new treaty. The UN negotiations have not yet resolved the question of institutional architecture, and the related allocation of competence between the global, regional and sectoral levels, usually referred to as the global, regional and hybrid model. This was evident in the various proposals put forward at the negotiating session held in September 2018.

The UN negotiations are, however, likely to drag out for many years, and while there seems to be some convergence on the need for a hybrid approach to institutional architecture, there is still significant uncertainty regarding the degree of hybridity that will catalyze consensus and what this will mean for institutional cooperation, coordination and interaction between global and regional and/or sectoral bodies. Regional frameworks and institutions may have to wait a long time for a new global regime under which new rules and standards for the governance of biodiversity beyond national jurisdiction are set. However, this does not mean that regions should stand idly by and wait for a new legal regime to strengthen existing regional governance instruments. Rather, the UN negotiations could serve as an incentive for regions to be at the forefront of global development, by taking measures to ensure maximum regional influence on the future governance framework. For example, the recent negotiation and subsequent adoption of the Central Arctic Ocean Fisheries Agreement,<sup>6</sup> with its strong precautionary orientation, might offer a model for cooperative action in the Arctic towards an expanded protection regime that addresses stressors other than fisheries.

The Arctic Council, with its establishment of a task force to determine the mandate for a new subsidiary body on Arctic marine cooperation, could be a suitable forum for developing such a regime. However, there is strong doubt as to whether the task force will be able to deliver on its mandate, which includes developing terms of reference for a new subsidiary body to the Arctic Council.<sup>7</sup> Another option could be to develop an Arctic regional seas instrument.<sup>8</sup> This would place the stewards of the Arctic in a stronger position vis-à-vis a global body or framework. A new global body created under the BBNJ treaty would also benefit from further institutional capacity in the Arctic, considering the informal status of the Arctic Council. At

present recognition of the Council as a regional referent is difficult at best. Indeed, a global body would need to fill the gaps in a more comprehensive and top-down manner than would otherwise be the case if strong institutions were already operational. These very questions, and especially whether the Arctic Council could be, in its current form, considered a referent of any new BBNJ body, or whether it would need to formalize its legal status, were recently raised and discussed at a side event to IGC-1 in September 2018 in both the presentations and the ensuing discussions.<sup>9</sup>

Ultimately, it is our opinion that further cooperative action is needed. The Fisheries Agreement falls outside the aegis of the Arctic Council and the Council's task force has been slow to meet its mandate. The resulting global treaty could provide the needed institutional setup to integrate existing instruments, fill existing gaps, and strengthen the overall effectiveness of regional/sectoral organizations to address Arctic ABNJ issues, but it remains the task of regional actors to ensure that a strong and operational set of bodies and institutions are put in place, and thus vindicate their longstanding claim that they are the stewards of the Arctic.<sup>10</sup>

## NOTES

1. UN General Assembly Resolution 72/249, 24 December 2017, A/RES/72/249, which decided to launch an intergovernmental conference to adopt a treaty on marine biodiversity in areas beyond national jurisdiction.
2. UN General Assembly Resolution 59/24, 17 November 2004, A/RES/59/24 established an 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.
3. UN General Assembly Resolution 69/292, 19 June 2015, A/RES/69/292 launched a preparatory committee for the purposes of developing a set of elements to be included in the future agreement.
4. A/RES/72/249, para 2.
5. A/RES/72/249, para 7.
6. V. Schatz, A. Proelss and N. Liu, "The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Primer", EJIL: Talk!, October 26, 2018, <https://www.ejiltalk.org/the-2018-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean-a-primer/> (accessed November 11, 2018).
7. D. Balton, Will the Task Force on Arctic Marine Cooperation deliver?, The Circle, 1 October 2018, <https://arcticwwf.org/newsroom/the-circle/arctic-biodiversity/will-the-task-force-on-arctic-marine-cooperation-deliver/> (accessed November 11, 2018).
8. Ibid.
9. Side Event to the first session of the UN BBNJ intergovernmental conference on marine biodiversity in areas beyond national jurisdiction, titled "Coordination and Compatibility. Implications of the BBNJ Agreement for Arctic Biodiversity Governance", 12 September 2018, New York, UN Headquarters. All of the present writers participated to the side event.
10. The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27 – 29 May 2008, [https://www.regjeringen.no/globalassets/upload/ud/080525\\_arctic\\_ocean\\_conference\\_outcome.pdf](https://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference_outcome.pdf) (accessed November 11, 2018).