

## SYMPOSIUM ON GOVERNING HIGH SEAS BIODIVERSITY

### MANAGING BIODIVERSITY BEYOND NATIONAL JURISDICTION IN THE CHANGING ARCTIC

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The development of an Internationally Binding Legal Instrument (ILBI) for the conservation and sustainable management of marine biological diversity in areas beyond national jurisdiction (BBNJ) has profound implications for the future regulatory activities of a host of regional governance structures exercising competence over these waters. In the rather stilted vernacular of the BBNJ Process, the ILBI aspires to “not undermine” the work of preexisting institutions and initiatives.<sup>1</sup> Inevitably, given the emphasis upon future institutional symbiosis, a key challenge facing the ILBI is to promote its four thematic priorities—marine genetic resources, area-based management tools, environmental assessment, and capacity building and technology transfer—in a manner that can be effectively harnessed by current regional and sectoral frameworks. One region in which the intriguing set of challenges and opportunities presented by the ILBI are strikingly manifested is the Arctic. Some have argued for a regional treaty<sup>2</sup> or clearer recognition of the “special” nature of Arctic conditions.<sup>3</sup> However, we view the ILBI as a potential milestone in Arctic governance that can provide a firm platform to build on current cooperative arrangements for these vulnerable and rapidly changing marine ecosystems. Moreover, we argue that the present legal and institutional framework for the Arctic need not be revisited at this juncture, as it provides a strong regime through which to implement the core objectives of the ILBI. Its ability to do so, however, will depend on whether the ILBI (1) is effectively designed to work with preexisting machinery and (2) succeeds in clarifying and advancing universally-agreed methodological requirements for its four priority areas.

#### *Regulatory Challenges for a Changing Arctic*

Some 2.8 million square kilometers of high seas lie beyond the combined Exclusive Economic Zones of the coastal states of the Arctic. The Central Arctic Ocean, as these waters are broadly termed, thus remains one of the last great oceanic wilderness areas of the planet. These waters will assume greater geostrategic and industrial interest in the mid-term future, however, due to a combination of changing climatic conditions and a slow but discernible anthropogenic creep. Approximately forty percent of these waters is now open during the summer months. The receding ice coverage in these waters presents tantalizing commercial and industrial opportunities that could

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<sup>1</sup> [G.A. Res. 69/292](#) para. 3 (June 19, 2015).

<sup>2</sup> Kamrul Hossain & Kathleen Morris, *Protecting Arctic Marine Biodiversity in Areas Beyond National Jurisdiction*, in *THE FUTURE OF THE LAW OF THE SEA: BRIDGING GAPS BETWEEN NATIONAL, INDIVIDUAL, AND COMMON INTERESTS* 105, 121–23 (Gemma Andreone ed., 2017).

<sup>3</sup> Vito de Lucia, *The Arctic Environment and the BBNJ Negotiations: Special Rules for Special Circumstances?*, 86 *MARINE POL'Y* 234 (2017).

have significant impacts upon the marine biodiversity of this fragile region. Life is also on the move northwards, with warming waters facilitating an influx of sub-Arctic species of algae, invertebrates, fish, mammals, and birds. The Convention on Biological Diversity<sup>4</sup> and the Arctic Council—the preeminent intergovernmental forum for this region—have identified the biodiversity of the Arctic beyond areas of national jurisdiction as an emerging regulatory challenge.

In many respects, the changing Arctic represents an intriguing test case for the precautionary management of emerging resources and species. The exploitation of these resources remains at a preliminary stage; hence, as some scholars have argued,<sup>5</sup> there is an inviting opportunity to establish supervisory measures *ab initio* through the development of a new regional treaty. There is a certain seductive logic to this proposal, since Arctic ecosystems remain largely pristine, even if they are changing rapidly. These conditions are likely to change in the coming decades, as a perfect storm of warmer temperatures and diminishing ice-coverage may facilitate a dramatically heightened industrial presence in an area of high seas that used to be considered too remote and hostile for viable commercial activity. These concerns indeed underpinned the recent conclusion of a new Arctic fisheries agreement. Accordingly, the emergence of the ILBI is particularly timely in the Arctic context, especially given its aspirations to work collaboratively with regional institutions to promote a series of underregulated aspects of marine affairs. Indeed, the Arctic Council in particular—which has a significant recent history of environmental innovation<sup>6</sup>—may provide particularly fertile ground for achieving the objectives of the ILBI within this region.

#### *Regulatory Opportunities and the Role of Current Arctic Institutions*

The Arctic Council is the preeminent intergovernmental platform for cooperation between the eight Arctic states, aided by permanent participants (in the form of six groups representing indigenous interests) and approved observers. The work of the Arctic Council is promoted primarily through its six working groups, each of which exercises a remit over sustainable development and the protection of the Arctic environment. The Arctic states have long resisted establishing an Antarctic-style formalized network of specific treaty obligations, believing that the 1982 UN Convention on the Law of the Sea<sup>7</sup> and the Arctic Council provide an appropriate platform for marine governance in this region. Notably, there has recently been significant regulatory activity to address the Arctic under the auspices of existing processes and institutions, incorporating both hard and soft law approaches.<sup>8</sup> Important binding policy developments have also occurred both within and beyond the auspices of the Arctic Council, which have been inspired to some extent by initial discussions within the Council. These include special navigational rules to improve shipping safety—and a residual form of marine environmental protection—elaborated by the International Maritime Organization through the adoption of the Polar Code, which entered into force on January 1, 2017.<sup>9</sup> Moreover, in November 2017, agreement was reached on the regulation of nascent fishing efforts in the Arctic,<sup>10</sup> preemptively restricting future fishing activity to precautionary endeavours and

<sup>4</sup> [Convention on Biological Diversity](#), June 5, 1992, 1760 UNTS 79.

<sup>5</sup> Hossain & Morris, *supra* note 2.

<sup>6</sup> Timo Koivurova et al., *Innovative Environmental Protection: Lessons from the Arctic*, 27 J. ENVTL. L. 285 (2015).

<sup>7</sup> [UN Convention on the Law of the Sea](#), Dec. 10, 1982, 1883 UNTS 397.

<sup>8</sup> See Oran R. Young, *If An Arctic Ocean Treaty is Not the Solution, What is the Alternative?*, 47 POLAR RECORD 327 (2011).

<sup>9</sup> See generally J. Ashley Roach, *Arctic Navigation: Recent Developments*, in CHALLENGES OF THE CHANGING ARCTIC: CONTINENTAL SHELF, NAVIGATION, AND FISHERIES 173 (Myron H. Nordquist et al. eds., 2016).

<sup>10</sup> Hannah Hoag, *Nations Agree to Ban Fishing in Arctic Ocean for at Least 16 Years*, 358 SCIENCE 1112 (2017). On the so-called “Broader Process” underpinning these developments, see Erik J. Molenaar, *International Regulation of Central Arctic Ocean Fisheries*, in CHALLENGES OF THE CHANGING ARCTIC: CONTINENTAL SHELF, NAVIGATION, AND FISHERIES 429, 448–57 (Myron H. Nordquist et al. eds., 2016).

instituting a moratorium on commercial operations for the immediate future.<sup>11</sup> Of further relevance are the three independent legally binding agreements that have been more explicitly centered within the Arctic Council, namely the 2011 Search and Rescue Agreement, the 2013 Oil Spills Agreement, and the 2017 Science Agreement.<sup>12</sup> While these developments are not predicated upon the need to conserve and sustainably manage marine biodiversity per se, they do nonetheless exemplify sectoral initiatives with which the ILBI will ultimately seek to interact. For instance, the Science Agreement provides a cautious basis to consider capacity-building in the region and a tentative recognition of intellectual property rights arising from research activities. This latter aspect may be relevant to the ILBI's focus on marine genetic resources.

Given that the ILBI will prefer to cooperate with (or at least not undermine) regional mechanisms, there appears to be particular scope to advance the four thematic priorities of the ILBI through the Arctic Council. The important soft-law work undertaken by the Arctic Council will provide a platform through which the mutual objectives of the ILBI and the Arctic Council can be more directly harnessed. This is particularly evident in the context of area-based management, where the Arctic Council has been exploring the preconditions for establishing high seas Marine Protected Areas (MPAs) in the Central Arctic Ocean. This work will constitute a significant step towards meeting the objectives of the ILBI within the Arctic. The Conservation of Arctic Flora and Fauna—the working group of the Arctic Council primarily responsible for biodiversity—has provided scientific and technical support to identify Ecologically and Biologically Significant Areas within the marine space of the Arctic. The resultant network of Ecologically and Biologically Significant Areas, as maintained by the Convention on Biological Diversity, may eventually form a core basis for the designation of high seas MPAs under the new ILBI. Accordingly, the identification of candidate sites and the vital (and time-consuming) process of data-collection has already been initiated under these joint auspices. Indeed, one such Ecologically and Biologically Significant Area identified at the workshop was the “multi-year ice of the Central Arctic Ocean,” which covers the high seas portion of the Arctic Ocean.<sup>13</sup> While designation of a particular location as an Ecologically and Biologically Significant Area will not automatically translate into a future MPA, this is the clearest global process yet to identify potential high seas sites requiring the area-based management tools likely to be mandated under the prospective ILBI.

A further challenge facing the ILBI is the need to integrate sectoral initiatives into its agenda. As David Freestone observes, area-based management tools are not only advanced through regional bodies, but also by individual sectoral regulators, yet these regulators have thus far demonstrated limited enthusiasm for integrating their efforts with other bodies or processes.<sup>14</sup> In the context of the Arctic Council, however, there are already signs that fruitful partnerships can be developed to harness the cooperation of sector-specific regulators. One prominent opportunity is the potential to advance Particularly Sensitive Sea Area proposals through the International Maritime Organization, a form of area-based management that could be highly complementary to future Arctic high seas MPAs. This approach has been promoted by a further Arctic Council working group, the Protection of the Arctic Marine Environment, which has developed the Arctic Marine Shipping Assessment and has clearly recommended that the contracting governments elaborate Particularly Sensitive Sea Area proposals for the

<sup>11</sup> See Richard Caddell, *Precautionary Management and the Development of Future Fishing Opportunities: The International Regulation of New and Exploratory Fisheries*, 32 INT'L J. MARINE & COASTAL L. 199 (2018).

<sup>12</sup> See ARCTIC COUNCIL.

<sup>13</sup> *Ecologically or Biologically Significant Areas*, CLEARING-HOUSE MECHANISM OF THE CONVENTION ON BIOLOGICAL DIVERSITY INFORMATION SUBMISSION SERVICE.

<sup>14</sup> David Freestone, *Governance of Areas beyond National Jurisdiction: An Unfinished Agenda*, in LAW OF THE SEA: UNCLOS AS A LIVING INSTRUMENT 231, 264 (Jill Barrett & Richard Barnes eds., 2016).

high seas components of the Arctic Ocean.<sup>15</sup> Therefore, the Arctic Council has already demonstrated enthusiasm towards linking the sectoral regulation of shipping to its prospective programme of MPAs, which will also be an overarching aspiration of the ILBI. One of the working group's large-marine ecosystems remains the Central Arctic Ocean, and the essential groundwork to promote ecosystem-based management—including in the high seas—is advancing through many subsidiary bodies in the Arctic Council. This may in time be complemented further by a new subsidiary body that is being developed to enhance the marine policy role of the Arctic Council.<sup>16</sup> If this initiative comes to fruition, a likely key element of the new subsidiary body's activities will be coordinating policies to advance the governance of the high seas areas of the Arctic Ocean, as envisaged under the ILBI.

### *The ILBI's Potential for Standardizing Conservation Methodologies*

If the ILBI expects much from regional institutions, in turn regional institutions will expect much from the ILBI. The BBNJ process provides a rare—and welcome—opportunity to develop standardized methodologies and objectives for a range of underdeveloped aspects of marine conservation. Regional symbiosis (both in the Arctic and elsewhere) will be most effectively advanced if the ILBI prescribes a clear set of procedures and objectives by which to promote conservation tools. This is especially true for area-based management and environmental assessment, for which regional initiatives have often been undermined by the lack of an overarching set of unified global principles and guiding practices.

The performance, quality, and methodological basis for environmental assessment is highly variable, both nationally and regionally. For environmental assessment to be further promoted by regional actors, the ILBI will have to clarify methodological expectations, including what types of assessment will be required, how they are to be conducted, and when. Indeed, these uncertainties have hamstrung laudable endeavours to facilitate far-sighted, yet nonbinding, environmental assessment requirements for the Arctic.<sup>17</sup> Such clarity in the ILBI will be especially valuable, given that existing environmental assessment regimes have a limited or questionable application to projects commonly conducted in the marine environment.<sup>18</sup> The lack of a universally-agreed suite of requirements and expectations for environmental assessment has arguably diminished the role and scope of such assessments in the marine sphere, even for jurisdictions noted for a proactive emphasis on these processes, both within<sup>19</sup> and beyond<sup>20</sup> the Arctic region. If the ILBI can generate an agreed set of standards for environmental assessments, the Arctic Council is well-placed to develop mechanisms to implement these on a regional basis.

<sup>15</sup> Indeed, this has been recently reiterated by the working group in its subsequent report on [Specially Designated Marine Areas in the Arctic High Seas](#) (2013).

<sup>16</sup> Arctic Council, [Fairbanks Declaration](#) para. 12 (May 11, 2017).

<sup>17</sup> Timo Koivurova, [Implementing Guidelines for Environmental Impact Assessment in the Arctic](#), in *THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT* 151, 166 (Kees Bastmeijer & Timo Koivurova eds., 2008). See also the new [EIA project](#) under the auspices of the Sustainable Development Working Group of the Council.

<sup>18</sup> See Gunnar Sander, [International Legal Obligations for Environmental Impact Assessment and Strategic Environmental Assessment in the Arctic Ocean](#), 31 *INT'L J. MARINE & COASTAL L.* 88 (2016); Rachael Lorna Johnstone, [OFFSHORE OIL AND GAS DEVELOPMENT IN THE ARCTIC UNDER INTERNATIONAL LAW: RISK AND RESPONSIBILITY](#) 145 (2015).

<sup>19</sup> Meinhard Doelle et al., [Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions: Applying Lessons Learned from Atlantic Canada to the Beaufort Sea](#), 22 *REV. EUR. COMMUNITY & INT'L ENVTL. L.* 103 (2013).

<sup>20</sup> Richard Caddell, [Uncharted Waters: Strategic Environmental Assessment in the UK Offshore Area](#), in *THE STRATEGIC ENVIRONMENTAL ASSESSMENT DIRECTIVE: A PLAN FOR SUCCESS?* 283 (Gregory Jones & Eloise Scotford eds., 2017).

Likewise, the ILBI can provide clear methodological pathways and criteria for identifying and creating protected areas. Presently, identifying potential high seas MPAs remains a complex and labor-intensive process. The difficulties are compounded by subsequent challenges in making them legally binding on states other than those championing the protected area. This has already inhibited attempts by the Protection of the Arctic Marine Environment working group to establish a pan-Arctic network of MPAs.<sup>21</sup> With an ILBI, in contrast, the subsequent elaboration of high seas MPAs will be legally binding on the parties to that treaty. Accordingly, if the ILBI comes to fruition, and especially if it is widely ratified, the extensive work conducted under the auspices of the Arctic Council could be translated into a meaningful network of high seas protected areas in the Arctic.

The greatest potential of the ILBI, then, would be to establish methodological baselines ratified by a large number of countries. Once methodological agreement is reached, the Arctic Council provides a strong foundation upon which the goals and conservation tools advanced by the ILBI can be realized in the Arctic.

*Conclusion: Preserving the Arctic's Legal Framework*

The BBNJ process engenders a degree of regional introspection as to the ability of current frameworks to effectively implement the prospective ILBI. While there may be a temptation to consider new regional arrangements to accommodate these adjustments, our prognosis for the Arctic is that the current machinery remains essentially fit for purpose—for the immediate future, at least. We should therefore refrain from prescribing radical surgery to the existing framework, which is well-suited to capitalize on the new management opportunities presented by the ILBI for the sensitive marine ecosystem of the High North.

Indeed, we would counsel against the developments of more binding arrangements for the Arctic than are currently in place, which would be no better placed than the status quo to deliver any meaningful advantages in the context of the ILBI. There are, as yet, no vested economic interests in the high seas portion of the Arctic, while the current framework for sectoral regulation in these waters has been proactive in facilitating the precautionary management of prospective fishing and shipping activities as and when they become more widespread. While these efforts are not intended to address Arctic marine biodiversity in a holistic manner, they do provide effective coverage of the key anthropogenic threats facing marine species in these rapidly changing waters. The ILBI also presents a convenient regulatory framework to bolster particular marine conservation tools by elaborating standardized methodologies, procedures, and requirements, notably in the context of environmental assessment. Existing regional actors such as the Arctic Council are thus well-positioned to promote the ILBI. Another significant opportunity presented by the ILBI is the ability to create binding high seas MPAs, which will add a vital tier of legal obligation to the groundwork already being laid by the Arctic Council. More pertinently, it is not immediately evident how these efforts could be improved by the elaboration of further regional arrangements. Accordingly, modifications to the legal and institutional fabric of the Arctic would be premature and should be resisted.

<sup>21</sup> INGVIÐ ULRIKKE JAKOBSEN, [MARINE PROTECTED AREAS IN INTERNATIONAL LAW: AN ARCTIC PERSPECTIVE](#) 233–43 (2016).