RULING THE WAVES
or WAIVING THE RULES?

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Photo: Dr. Phillip Clapham, NMFS/AKFSC/NMML – Creative Commons

ABOVE: U.S. Coast Guard icebreaker Healy cuts through thick multiyear sea ice in the Arctic Ocean. July 6, 2011.
Photo: NASA/Kathryn Hansen – Creative Commons
THE ARCTIC COUNCIL was set up twenty years ago with a focus on conservation and sustainable development in the Arctic region including its marine realm. Since then we have seen the dizzying downward spiral of Arctic sea ice due to climate change. We have seen fish stocks moving around the Arctic, fleeing warming waters or chasing moving food sources. We have seen the catastrophic failure of a deep sea drilling rig as well as nations and businesses preparing for a future where the Arctic Ocean is more liquid more of the time. To deal with these changes, the Arctic Council must change. The Council has laid much groundwork for responding to changing conditions with its reports and policy recommendations. An evolving Council now needs to focus on implementing decisions and recommendations collectively made by Arctic states including the Arctic Marine Strategic Plan, in an effective and collaborative way. This requires new approaches to Arctic marine cooperation.

At time of publication, the Arctic Council’s Task Force on Arctic Marine Cooperation is developing options for cooperation mechanisms for the Arctic marine environment. Arctic states and Permanent Participants will elaborate on a number of questions to be answered before proposing a working instrument. Those questions include identification and acquisition of knowledge inputs; coordination of stewardship efforts at various scales; area-based management measures; relations with other international marine instruments (and lessons learned from their operations and experience); scope (legal and geographical) of the instrument; organizing principles within the structure of the Arctic Council and how that structure may need to be changed.

Authors in this issue provide context and insight on some of those questions to help inform discussions at the Task Force on Arctic Marine Cooperation. Paul Berkman and Alexander Vylegzhannin explore questions of Arctic states’ authority in the Arctic area beyond national jurisdiction, and the role of non-Arctic states. Some states from outside the Arctic have long experience of joint management of marine areas. Kanako Hasegawa shares UNEP’s experience of regional seas agreements and lessons learned. Alistair Graham examines those portions of the Arctic Ocean beyond national jurisdiction, and how international tools already developed or in development may interact with those being developed by Arctic states, a theme also explored by Eric Molenaar.

Governments are not the only entities with an interest in management of the seas. Kuupik Kleist writes of an Inuit-led commission examining the Pikialasorsuaq (North Water Polynya) and involving Inuit in management of the marine environment. Betsy Baker focuses on ecosystem-based management as the basic guiding principle for any management system in the Arctic. She underscores Indigenous participation and knowledge are key to such management.

We also present WWF’s proposal for Arctic marine cooperation within the structure and current mandate of the Arctic Council. The options respond to many Task Force questions. They also support an opportunity for open discussion about the future of the Arctic Council and potential improvements in its current structure and efficiency as related to implementation of the Council’s recommendations. With the change in the Arctic Ocean over the past two decades, coordinated and mutually supportive implementation mechanisms are urgently needed to secure a sustainable future for the Arctic marine environment.

**Editorial Note:**

**MUTUALLY SUPPORTIVE IMPLEMENTATION MECHANISMS ARE URGENTLY NEEDED TO SECURE A SUSTAINABLE FUTURE FOR THE ARCTIC MARINE ENVIRONMENT**

Dr. ALEXANDER SHESTAKOV is Director of the WWF Global Arctic Programme
Polar bear conflict at record high in Greenland

A YEAR OF RECORD WARM temperatures and lower than normal sea ice has led to unprecedented numbers of polar bears venturing into Greenland’s communities. A WWF-supported patrol in the community of Ittoqqortoormiit has encountered 20 polar bears in town in the past three months. That’s twice the number of conflicts recorded throughout Greenland in 2012.

Polar bears prefer to spend their time on the sea ice, where they can hunt for seals. Longer ice-free seasons force them onto land and into communities to search for food. The polar bear patrol does daily surveillance during peak periods and chases bears away so they aren’t shot in self-defense.

However, the number of polar bears shot to protect life and property has also increased. 2014 was a record year, with at least 12 bears killed in Greenland because they posed an imminent danger. WWF expects even more polar bear encounters this summer.

“We have had a winter with extremely little sea ice and an early melt, and so we expect a new record this season,” says WWF biologist Kaare Winther Hansen.

And polar bear patrols can only treat the symptom, not the underlying problem, says Gitte Seeberg, Secretary General of WWF-Denmark. “The root cause is climate change and we should do our utmost to slow it down.”

WWF is advocating for a global reduction in greenhouse gas emissions, a move to 100 per cent renewable energy by 2050, and for policies that help Arctic communities and wildlife cope with the consequences of climate disruption.

Canada preparing claim to Arctic Continental shelf

CANADA PLANS to submit its Arctic continental shelf claim in 2018 and is expected to include the North Pole. Canadian officials acknowledge this will overlap with both Russian and Danish submissions that also claim ownership of the planet’s northernmost point.

Under the United Nations Convention on the Law of the Sea (UNCLOS), which Canada ratified in 2003, all coastal states have a continental shelf extending 200 nautical miles (370 km) from coastal baselines. They can also extend their claim by 150 nautical miles (278 km) beyond 200 nautical miles if the shelf is a natural prolongation of their landmass.

However, there are circumstances where a coastal state can claim even further than 350 nautical miles, said Mary-Lynn Dickson, head of Canada’s UNCLOS Program.

“In the case of submarine elevations, if a coastal state can prove that submarine elevation is part of its continental landmass, and if that feature extended beyond 350 nautical miles if the shelf is a natural prolongation of their landmass. However, there are circumstances where a coastal state can claim even further than 350 nautical miles, said Mary-Lynn Dickson, head of Canada’s UNCLOS Program.

“Exploring Last Ice Area online

LANCASTER SOUND, a region in Canada’s high Arctic at the southern edge of the Last Ice Area, is being brought closer to people around the world thanks to a new interactive map (http://lancastersound.wwf.ca). The map contains exclusive footage, stories about the region and rich mapping features.

The area is slated for protection as a National Marine Conservation Area, but it also has disputed oil exploration leases within the proposed boundary.

For more than 30 years, communities have been working to protect the region from industrial development. WWF is asking the Canadian government to formally announce protection for the area and to update its records to reflect oil exploration leases in the region that should have expired in 1979.

The Last Ice Area is the only Arctic region expected to retain its summer sea ice until 2050, making it a critically important zone for the future of ice-dependent life.
U.S. lawmakers seek end to Arctic Drilling

A GROUP OF lawmakers is trying to maintain momentum against Arctic oil drilling by calling on the Secretary of the U.S. Department of Interior to exclude two sectors of the Alaskan Arctic Ocean from future oil and gas lease sales. The areas in question are the Chukchi and Beaufort seas, which have been approved for drilling by the Obama administration. The Chukchi Sea is believed to hold 15 billion barrels of recoverable oil and 78 trillion cubic feet of recoverable natural gas. It’s estimated the Beaufort Sea could hold 8 billion barrels of oil and nearly 28 trillion cubic feet of natural gas. The signatories of a letter sent to Secretary Sally Jewell argue that by banning drilling in the Chukchi and Beaufort, the U.S. would be positively contributing to the climate change goals of the Paris Agreement.

“Ending oil and gas development in the Arctic would send a powerful international signal that the United States is committed to investing its resources in a climate safe, clean-energy future,” the letter stated. The group wants the U.S. to adopt a tougher stand on fossil fuels, and for them, Alaska is ground zero for this. “Scientific consensus tells us that the vast majority of known fossil fuel reserves must be left undeveloped if we are to avoid the worst effects of climate change,” the letter stated.

Arctic ban on dirtiest shipping fuels

ELIMINATING THE USE of heavy fuel oil (HFO) in the Arctic inched closer to reality in May at a meeting of the International Maritime Organization (IMO) in London. The shipping industry’s global regulator, the IMO heard presentations from WWF and other environmental organizations about the hazards, risks and impacts of this toxic fuel. An official submission to the Marine Environment Protection Committee received positive interventions from countries including France, Norway, Sweden and Canada on the need for ongoing study and analysis. Russia was the only dissenting voice, observing that lighter fuels such as diesel are also highly toxic when spilled and have a tendency to remain in the water column and cause harm. This underscored the importance of switching from diesel and HFO to cleaner fuels such as liquefied natural gas (LNG), which have minimal emission and spill impacts.
Pikialasorsuaq (The North Water Polynya)
Rapid changes in climate, environment and sea ice conditions combined with a heightened interest from the environmental, scientific and business communities has ignited the Inuit’s drive to establish a framework for managing the Pikialasorsuaq area. KUUPIK VANDERSEE KLEIST shares his perspective as a member of The Pikialasorsuaq Commission.

THE NORTH WATER POLYNYA is called different names in different areas populated by Inuit, only serving to illustrate its cultural importance through millennia. In Greenland, it is called “Pikialasorsuaq” or “The Great Upwelling”.

A polynya is an area of open water surrounded by sea ice. Pikialasorsuaq is the largest polynya in the Northern Hemisphere and the most biologically productive ecosystem north of the Arctic Circle. It lies in northern Baffin Bay between Greenland and Canada’s Ellesmere Island near Smith Sound and Nares Strait. It is an important marine area for Inuit and the species upon which high Arctic communities rely.

This is also an area vulnerable to climate change. Inuit in the region have expressed a desire to explore locally-driven management options in advance of increased shipping, tourism, fishing, and non-renewable resource exploration/development. The Pikialasorsuaq Commission’s mandate will be to listen to Inuit community members and knowledge holders who use and depend on this region for their vision of the North Water’s future use and cooperation.

In 2013 the Inuit Circumpolar Council arranged a workshop on Pikialasorsuaq. “Bridging the Bay” in Nuuk, Greenland included hunters and fishermen from Mittimatalik/Pond Inlet, Aujuittoq/Grise Fiord and Ippiarjuk/Arctic Bay in Nunavut, and Kullorsuaq and Qaanaaq in Greenland, as well as researchers from both countries. One of the essential findings at the seminar was that the ice bridge situated north of Pikialasorsuaq played a very important role in the regular contact between Inuit from Greenland and Northern Canada.

The workshop concluded with a strong consensus to explore joint strategies for safeguarding and monitoring the health of this region for future generations.

There was also agreement to establish a commission “to consult with communities and communicate possibilities for future use and conservation of the area”.

The Pikialasorsuaq Commission held initial community hearings in Aujuittoq (Grise Fiord) and Mittimatalik (Pond Inlet), Nunavut. The hearings spanned 5 days in the two communities with additional participation from community members from Kangirttugaapik (Clyde

“We are extremely pleased with the community interest and that so many people attended the hearings in both communities and were willing to share their knowledge and perspectives with us. We are humbled by the warmth and generosity we received.”

Commissioner Eva Aariak

The Inuit-led Pikialasorsuaq Commission is led by three Commissioners: ICC Chair, Okalik Eegeesiak is the International Commissioner; former Nunavut Premier, Eva Aariak is the Canadian Commissioner; former Greenland Premier, Kuupik Vandersee Kleist is the Greenland Commissioner.
River), Ippiarjuk (Arctic Bay) and Qaus-suitturq (Resolute Bay).

The overall purpose of the consultations is to describe and document the importance of the area for Inuit and other residents in communities and areas adjacent to Pikialasorsuaq and how the riches of Pikialasorsuaq are being exploited. The Pikialasorsuaq Commission is interested in all kinds of information on how the area is used and how to strike a balance between human interests and protecting Pikialasorsuaq to secure and protect it for future generations.

The Commission will address a broad range of factors which could potentially influence the nature of Pikialasorsuaq. These include: scientific biological analysis; changes in ice conditions; changes in migration patterns; shipping; oil and gas exploration; hunting; commercial fishing and any other foreseeable activity.

It will also look at the judicial and legal frameworks currently regulating the area. Both Nunavut and Greenland have interests in the area. But Canada and Denmark – as sovereign states – also have regulatory powers and geopolitical interests which have to be addressed by the Commission.

The priority of the Commission is to build its report and formulate its recommendations based on the outcomes of the community consultations. This will include hearing from the communities adjacent to Pikialasorsuaq before attempting to develop any specific model for potential future management.

“Many community members appreciated the timing of the hearings, as outside interest and use of the Pikialasorsuaq (North Water Polynya) has increased significantly. Inuit are also observing many changes with the animals and the environment and are concerned about the future security of their food sources.”

Commissioner Okalik Eegeesiak

Inuit kayaker on the still blue waters of Eclipse Sound, Baffin Island, Nunavut, Canada
The Commission heads to Greenland in August for the next phase of hearings in communities connected with Pikialasorsuaq. Following these hearings, the Commission will bring its findings and recommendations back to the involved communities before a final report is released to the public and to decision makers in the fall of 2016. But community members have expressed a clear desire to work together and be fully involved in management decisions with their Greenlandic neighbours. We are one people with a shared history. Pikialasorsuaq is our common heritage and we will work together for our shared future.

The regional seas agreements: lessons learned

As the Arctic Council Task Force on Arctic Marine Cooperation ponders possible ways to increase cooperation around the Arctic Ocean, some states have already successfully negotiated cooperation agreements. Several have turned to “Regional Seas” agreements, using a framework developed by the United Nations Environment Programme. KANAKO HASEGAWA has compiled information on the regional sea agreements, and some lessons learned.

WHAT IS THE UNEP REGIONAL SEAS PROGRAMME?
The UNEP Regional Seas Programme was established in 1974 as one of UNEP’s flagship programmes. This programme aims to address degradation of oceans and seas at the regional level through cooperation of neighbouring countries. Currently there are 18 Regional Seas programmes across the world, of which 14 of them were established under the auspices of UNEP (Table 1). Based on decisions by the UNEP Governing Council and the United Nations Environment Assembly, UNEP administers seven Regional Seas programmes. Within the framework of the UNEP Regional Seas Programme, all the eighteen Regional Seas programmes are invited to the annual Global Meetings of the Regional Seas Conventions and Action Plans organised by UNEP in order to
share experiences and information with the other Regional Seas programmes. Establishment of a Regional Seas programme typically started with the development of an Action Plan. It is not a legally binding document but it clarifies regional priorities and areas for cooperation and actions for the conservation of the common body of water shared by the neighbouring countries. In most of the Regional Seas programmes, their Action Plans are supported by legally binding Conventions. It means that in most cases the Regional Seas programmes have both Convention and Action Plan. With time, many of the programmes developed protocols on specific issues under their Conventions such as for specially protected areas, marine pollution emergencies and pollution from land based sources.

WHO IS INVOLVED?
The Regional Seas programmes are multilateral agreements at the regional level. Thus the participating countries are the driving forces for the programmes. The programmes have respective decision making bodies, Conferences of Parties (COPs) or Commissions for Conventions and Intergovernmental Meetings (IGMs) for Action Plans serve as the decision making body. Through these mechanisms the participating countries make decisions on a Programme of Work (PoW) and budgets among others. In

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<th>Table 1 The Regional Seas programmes established under the auspices of UNEP and those independent of UNEP</th>
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<td><strong>THE UNEP REGIONAL SEAS PROGRAMME (18 REGIONAL SEAS PROGRAMMES)</strong></td>
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<td><strong>14 Regional Seas programmes established under the auspices of UNEP</strong></td>
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<td>Abidjan Convention (Western Africa Region)</td>
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<td>East Asian Seas Action Plan (East Asian Seas)</td>
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<td><strong>CPPS2 and Lima Convention (South East Pacific)</strong></td>
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<td><strong>Teheran Convention (Caspian Sea)</strong></td>
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<td><strong>Helsinki Convention (Baltic Sea)</strong></td>
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<td><strong>OSPAR Convention (Northeast Atlantic)</strong></td>
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<td><strong>Protection of the Arctic Marine Environment (Arctic)</strong></td>
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Atlantic Puffin (Fratercula arctica) in flight on Grimsey, Iceland

Photo: Michael Ransburg – Creative Commons
most cases, a Trust Fund is established for the operation of a Regional Seas programme and the Fund is replenished by the respective participating countries. With this fund, a secretariat is normally established to coordinate activities. For the implementation of their respective Action Plans and PoWs, the Regional Seas programmes may work with external partners such as international organisations, other regional organisations, multilateral environmental agreements, research institutions and Non-Governmental Organisations (NGOs) as appropriate.

**UNEP’S ROLE**

UNEP provided technical assistance to the development of Action Plans for the 14 Regional Seas programmes. UNEP continues to provide technical support on thematic issues upon requests by the Regional Seas programmes. For example, training can be jointly organised by a Regional Seas programme and UNEP on thematic issues such as ecosystem based management.

UNEP also plays a coordination role for the UNEP Regional Seas Programme. For example, UNEP together with the Regional Seas programmes set Regional Seas Strategic Directions (RSSD) in order to connect regional activities with global processes. Thus, the RSSD (2017-2020) aims to coordinate activities with the 2030 Agenda for Sustainable Development and Paris Agreement of UNFCCC among others. One of the main activities UNEP currently coordinates is the initiation of dialogues between the Regional Seas programmes and the Regional Fisheries Bodies in respective regions. As a joint effort between UNEP and United Nations Food and Agriculture Organization, the activities aim to catalyse a shift toward a more integrated management of the marine and coastal ecosystems based on the ecosystem approach.

In addition, UNEP hosts secretariats of the seven Regional Seas programmes. However, the funds are derived from respective Trust Funds. Thus, UNEP does not provide any financial support to the functioning of the secretariats. Regional seas programmes each have their intergovernmental decision making processes independent from the UNEP’s decision making body and their PoWs are different from UNEP’s PoW, reflecting social, cultural and environmental status of the regions.

**LESSONS LEARNED**

The UNEP Regional Seas Programme has worked to protect the oceans and seas for more than 40 years. Over the years the programmes have implemented various projects and activities to protect the health of oceans and seas. However, political and economic instabilities are the major challenges to many of the Regional Seas programmes. Without sufficient funds it would be difficult to implement the Action Plan. Therefore, political and financial commitments by the participating countries are the key for a successful operation of a Regional Seas programme regardless of the region.
Building common interests

Research and investment into sustainable development across the Arctic Ocean are urgently needed. Some investment initiatives have already emerged: The Arctic Business Council appeared in 2012, then the Arctic Economic Council in 2015, and the Arctic Investment Protocol in 2016. PAUL BERKMAN and ALEXANDER VYLEGZHANIN say the emerging challenge now is to find options that contribute to informed decision-making on sustainability in the Arctic Ocean.

For consideration by all stakeholders, the Arctic high seas offer humankind such a path because this marine region is unambiguously beyond sovereign jurisdictions. Freedom of the high seas became international law in 1958 with the Convention on the High Seas, establishing that the high seas are “open to all nations” and “no State may validly purport to subject any part of them to its sovereignty.”

Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), all states have rights and responsibilities in the high seas, explicitly the water column beyond the 200-mile Exclusive Economic Zones (EEZ) of the coastal states. In this international space, Indigenous peoples—with their unique relationship to nation states through the Arctic Council—also have rights and responsibilities as residents of the Arctic for millennia.

Both the Northern Sea Route (along the coasts of Russia) and the Northwest Passage (along the coasts of Canada and Alaska) are within EEZ and not within the Arctic high seas. Environmental laws and regulations of the Arctic coastal states under Article 234 of UNCLOS (“Ice-Covered Areas”) also are applicable only within EEZ, not but in the Arctic high seas.

Moreover, the high seas in the Arctic Ocean will continue to exist, independent of any decisions made about Arctic continental shelves by the surrounding states (Canada, Denmark, Norway, Russian Federation and United States). Even if these nations delimit all the sea floor up to the North Pole as their continental shelf under Article 83 of UNCLOS, there still will be overlying waters of the high seas in the Central Arctic Ocean. Importantly, the Arctic high seas do not conflict with “sovereignty, sovereign rights and jurisdictions” of the Arctic coastal states relating to their continental shelf and EEZ. Significant for humanity, the water column in the Arctic Ocean surrounding the North Pole beyond EEZ—defined as the Arctic high seas with an area over 2.8 million square-kilometers—is unique to build common interests in the Arctic.

With stewardship, in 2015 the five Arctic coastal states adopted their Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean:

- Recognizing that until recently ice has generally covered the high seas portion of the central Arctic Ocean on a year-
Recalling the obligations of States under international law to cooperate with each other in the conservation and management of living marine resources in high seas areas, including the obligation to apply the precautionary approach...

This Declaration along with the Chairman’s Statements (in Nuuk from February 2014 and in Washington in December 2015) open the door for the international community to collectively address fisheries, as well as shipping, research and other issues of common concern in this international space.

Other international forums are also addressing the Arctic high seas, including the Convention on Biological Diversity, which convened a workshop in March 2014 with the Northeast Atlantic Fisheries Commission and the Convention for the Protection of the Marine Environment of the North-East Atlantic to consider potential “Ecologically or Biologically Significant Marine Areas” in the Arctic high seas. Also in March 2014, the European Parliament introduced a joint motion for a resolution that would include area protection as well as precautionary measures in the Arctic high seas.

The Arctic High Seas is the heart of the Arctic (see Figure). In effect, the sea floor represents the coastal states looking seaward toward the North Pole from the perspective of their national interests. Conversely, the Arctic high seas involves the entire international community with rights and duties – in an inclusive manner – looking coastward from the North Pole in view of their common interests.

This juxtaposition of perspectives in the Arctic Ocean reflects the challenge that we face as a civilization to balance national interests and common interests, promoting cooperation and preventing conflict. Such harmony is necessary to ensure that the Arctic remains a region of low tension, which is the precursor for sustainable development of the high north.

Looking at the Arctic and Earth with a sense of shared responsibility – we are in our infancy to resolve issues with planetary implications. Nearly 30% of our planet’s surface falls within the boundaries of nations, reflecting diverse national interests. The other 70% of the Earth’s surface exists in areas beyond national jurisdictions, in international spaces that humankind has established in terms of common interests. Building common interests in the Arctic high seas – a special area that is unambiguously beyond national jurisdictions – holds lessons as well as answers to achieve balance, harmony and sustainability for the benefit of all on Earth.


The Arctic high seas is the heart of the Arctic Ocean, pulsing poleward with national interests from the surrounding coastal states and landward with common interests from our global society. Progress to balance national interests and common interests in the Arctic Ocean will resonate with precedents and lessons for humanity on a planetary scale.
The conundrum: conserving biodiversity in Areas Beyond National Jurisdiction

So much of human outlook on life is from a land-based perspective. On land, we have developed rules for everything built up over millennia of learning how to get along with our neighbours. At sea, we only have a few centuries of experience in developing rules which, ALISTAIR GRAHAM observes, seem to be more about maintaining traditional freedoms than being mindful of others’ interests.

CONSERVATIONISTS need to appreciate two big picture realities regarding Biodiversity Beyond National Jurisdiction (BBNJ): one, it takes a long time to change the rules of the maritime game and the current rules purposefully favour freedoms and two, maintaining unimpeded maritime trade is overwhelmingly important. States are jealously protective of their sovereignty – the right to do what they like within their own territory and jurisdiction constrained only by their own laws.

The centuries of maritime rules development are manifest in UNCLOS – the United Nations Convention on the Law of the Sea – often referred to as the constitution for the oceans to emphasise its importance and reluctance to change it. UNCLOS is the third iteration of the law of the sea in recent decades but still owes much to the seminal work of Dutch lawyer, Hugo Grotius, ‘Mare Liberum’ – where he expounds the principle of ‘free seas’ or ‘unrestricted access.’ That was published in 1609 proving maritime norms really do evolve very slowly.

These freedoms are maintained by mutual respect for flag state responsibility. UNCLOS gives every state the right to operate a vessel registry and to allow registered vessels to fly its flag. Flagged vessels are deemed to be nationals of that state in the same way that people become nationals when registered as citizens and businesses become nationals when registered as companies. This is how activities in Areas Beyond National Jurisdiction (ABNJ) are controlled – by extending state jurisdiction over its nationals to vessels even when beyond national jurisdiction. States are then responsible to each other by virtue of having signed on to UNCLOS and other international agreements to abide by the obligations set out in the provisions of those agreements. But everyone understands that conflict will ensue if anyone tries usurping flag state responsibility by taking matters into their own hands and, uninvited, exercising control of others’ nationals. That’s why ‘piracy’ has such a bad ring to it. The merchant shipping industry has long dealt with this reality by adopting port state controls. Because ports are within national
jurisdiction, states can force operators of vessels to behave by making access to their ports conditional upon their doing so.

These are the 'big picture' notions we have to keep in mind as we contemplate conservation issues in the vast marine areas beyond national jurisdiction. We now have an opportunity to influence negotiation of a new binding agreement under UNCLOS on the conservation and sustainable use of living things in these international seas. We just need to be smart about knowing when, where and how to push. Now is a good time because of the United Nations Conference on Environment and Development. The United Nations is a good place for these negotiations because ABNJ is a global issue and an UNCLOS implementing agreement is a good vehicle for our conservation ambitions.

Cooperation between states in ABNJ habitually takes the form of setting up sectoral bodies which then make decisions, generally by consensus, for the orderly development of that sector. The International Whaling Commission was set up to do this in 1946 although, not foreseeing conflict to come, the whalers...
set up an open access body that decided by simple voting – something they bitterly regretted in later years. The merchant shippers were far more prudent in establishing IMO, the International Maritime Organisation, in 1948 with voting power of member states linked to the size of the fleets flying their flags and a tradition of consensus decision-making. The miners ensured that there was a whole part of UNCLOS that created the International Seabed Authority, to actually regulate mining in ABNJ and to ensure that exclusive mineral rights could be issued.

Meanwhile, fishing interests had been negotiating international agreements as and when regional circumstances warranted it, starting with the US/Canada Halibut Commission in 1923. These were typically limited-membership, regional arrangements among states with a ‘real interest’ i.e., commercial fishing of particular fish stocks in a region, generally making decisions by consensus as much as possible.

UNCLOS, however, gives all states the equal ‘freedom to fish’ in ABNJ thus challenging the legitimacy of limited, ‘real interest’ membership Regional Fisheries Management Organisations (RFMOs). To fix this legitimacy problem, fishing interests negotiated an UNCLOS implementing agreement – the UN Fish Stocks Agreement which was adopted in 1995 and entered into force in 2001. This agreement explicitly legitimises RFMOs but needs widespread, if not universal ratification before legitimacy is effectively achieved. This is proving hard to achieve as some countries, especially Latin American countries and Argentina in particular, object to being expected to legitimise a restricted membership body that gives members privileged access to fish resources in ABNJ in breach of the UNCLOS freedom to fish provisions.

As ice recedes, controlling activities in the Arctic is becoming more of an issue. The most immediate ABNJ issue to deal with is merchant shipping. Most of the Arctic is ABNJ for merchant shipping because the limit of states’ national jurisdiction is the limit of territorial waters, only 12 nautical miles from the coast. Receding ice means that major all-year-round shipping routes will open up within decades, significantly cutting transit times between major destinations. Arctic states need to decide whether they’re prepared to see these routes controlled vicariously by controls exercised by non-Arctic port authorities at either end of these shipping routes or whether they want a special agreement that has them more in control. Meanwhile, oil and gas exploitation will be an Exclusive Economic Zone issue for a long while yet.

Fisheries, however, warrant some immediate attention and, in July last year, Arctic coastal states signed a Declaration wherein they voluntarily agree not to fish in the high Arctic ABNJ other than in compliance with RFMO measures. To be useful, however, that Declaration will need to be converted into a binding agreement that any state can sign up to so that no state’s vessels, or other nationals, go fishing in the Arctic unless and until appropriate RFMO management arrangements are in place. In effect, there is a moratorium in place but all states with an interest in high Arctic ABNJ fishing will need to join that binding agreement if the intended restraint is to be effective.

The important point here is that those wanting effective control of activities in Arctic ABNJ don’t need to wait for any international agreement to legitimise their efforts. They just need to ensure that any regional agreements they negotiate are open to participation by all states and then use diplomatic efforts to ensure that all relevant states sign up.
Ecosystem based management: a flexible tool for stewardship

Betsy Baker

Governments, stakeholders, and rights-holders in the Arctic and globally are recognizing the limits of managing individual species or geographic sectors and the need to manage marine areas from an ecosystem perspective. In the Arctic Marine Strategic Plan for 2015-2025 the Arctic Council confirmed ecosystem-based management (EBM) as the “cornerstone” of its work. EBM is a science-based approach that takes into account interactions between a range of ecosystem components and which can be adapted for the regions and ecosystems involved. While no one definition exists, an Arctic Council Expert Group on EBM endorsed the following:

[EBM is] the comprehensive integrated management of human activities based on best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of ecosystems thereby achieving sustainable use of ecosystem
goods and services and maintenance of ecosystem integrity.

The Strategic Plan also recognizes humans and their activities are an integral part of the ecosystem as a whole, something Indigenous Peoples of the Arctic have understood for generations. The 2015 Inuit Circumpolar Council Technical Report on Food Security is the most recent articulation of the age-old appreciation of holistic connections between humans and ecosystems. Rather than defining EBM, the ICC Report includes the ecosystem in its definition of food security:

Alaskan Inuit food security is the natural right of all Inuit to be part of the ecosystem, to access food and to care-take, protect and respect all of life, land, water and air.

The Arctic marine area encompasses multiple ecosystems in the Arctic Ocean and its adjacent seas. The eighteen Marine Ecosystems (LMEs) endorsed by the Arctic Council in 2013 (see map) intersect with these and other areas such as the Faroe Plateau, the Icelandic Shelf and Sea, and the Aleutian Islands. The Arctic Council’s strong endorsement of EBM has led its Task Force on Arctic Marine Cooperation to consider EBM as a component of potential cooperative mechanisms between the Arctic States.

Why introduce each of these seas and their component ecosystems in connection with their coastal landmasses and countries? Because, in the end, both the science and the management structures for EBM are largely national efforts. EBM has significant potential to connect managers in neighboring Arctic coastal states: it can provide a platform for exchanging technical expertise and tailoring marine management to national and trans-boundary ecosystems with shared characteristics. Supporting national marine managers’ networks can also strengthen cooperation in managing areas beyond national jurisdiction, such as the Central Arctic Ocean LME.

While EBM is largely nascent in the marine Arctic, several coastal states are developing national or trans-boundary marine EBM projects. Even though not yet fully implemented, these projects can be fruitfully shared with other Arctic states. The Joint Norwegian-Russian Commission on Environmental Protection has operated since the 1990s and produces regular bilateral environmental status updates for the Barents Sea. The Commission is currently engaged in the Ocean-3 project to establish a base for joint Norwegian-Russian monitoring of the Barents Sea ecosystem. Ocean-3 supports two other phases of the Commission’s work, developing an EBM plan for the Russian side of the Barents Sea, and the Commission’s portal for the Barents Sea environmental status updates. The Ocean-3 project builds on existing structures and allows experts in both Russia and Norway to contribute to designing the monitoring system. Ocean-3 complements existing Norwegian EBM work in the Barents. Norway was one of the first of the states globally to institute integrated EBM plans for all of its marine areas, Arctic and non-Arctic.

Canada’s Beaufort Sea Large Ocean Management Area is another example of national and trans-boundary projects in the Arctic and beyond that can be instructive for EBM. This offers a case study of widely participatory EBM that builds on the existing land claims agreement and other regional governance structures.

In order to benefit from Arctic and non-Arctic case studies alike, Arctic marine managers must consider in-depth analyses of projects from other parts of the world, as exemplified in studies such as the Marine Ecosystem Based Management in Practice Database (http://webservices.itcs.umich.edu/drupal/mebm/?q=node/68). Among the most important lessons to be learned from the database are why a particular EBM project was launched, how it is governed, what it accomplishes, what factors facilitate its success, what challenges it faces, and what enables both collaboration and conflict management. Among the clearest messages from surveying successful EBM projects around the world are that EBM is inherently science-based and participatory, even as it retains clear lines of managerial authority to the states with jurisdiction over the resource in question. Participation, science, Indigenous knowledge, and flexible governance mechanisms that build on existing state and regional structures will be the key to EBM and to better stewardship of the Arctic Ocean in these times of rapid and unpredictable change.

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The evolution of the Arctic Council and the Arctic Council System

International interest in the Arctic increased spectacularly between 2004-2008. This was due to a number of events including the 2004 Arctic Climate Impact Assessment, the dramatic Arctic sea-ice loss in 2007 and Russia planting its flag on the geographical North Pole’s deep sea-bed that same year.

As ERIK MOLENAAR writes, the flag planting triggered a broad range of reactions.

SOON AFTER Russian explorer Artur Chilingarov plunked a Russian flag on the sea floor, there was a wide-spread, incorrect perception that the flag-planting heralded the last land-grab on earth and an unchecked resource bonanza, due to an international law vacuum. This was followed by the incorrect assumption that this vacuum had to be filled by a treaty modelled on the Antarctic Treaty.

However, the Arctic Ocean coastal states – Canada, Denmark/Greenland, Norway, the Russian Federation, and the United States – pointed out that “an extensive international legal framework applies to the Arctic Ocean”, namely the law of the sea as per their famous 2008 Ilulissat Declaration. While they did not question the usefulness of new issue- or sector-specific regulation, they saw “no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”

Rather than a comprehensive reform or overhaul, the Arctic Council has pursued a two-tiered approach of adaptation in this new climate of heightened interest and climate change. The first tier consists of strengthening the Council with the establishment of the Arctic Council Secretariat in 2014.

The second tier involves establishing and expanding the concept of the Arctic Council System (ACS) which has two basic components: the Council’s constitutive instrument (the 1996 Ottawa Declaration), other Ministerial Declarations, other instruments adopted by the Arctic Council and the Council’s institutional structure. The second component consists of treaties negotiated under the Council’s auspices and their institutional components. Two such treaties have been adopted to date: the 2011 Arctic Search and Rescue (SAR) Agreement and the 2013 Arctic Marine Oil Pollution Preparedness and Response (MOPPR) Agreement. Both treaties provide for Meetings of the Parties (MoPs), although none have been convened so far. MoPs can also be convened under a third treaty, the Arctic Scientific Cooperation Agreement, which is to be signed at the 2017 Arctic Council Ministerial Meeting.

The linkage between the Council and this second component is not confined to the instruments’ mere negotiation under the Council’s auspices, but also comprises a considerable and increasing extent of substantive and institutional integration. This relates in particular to the role of the Council’s Emergency Prevention, Preparedness and Response (EPPR) Working Group under the Arctic SAR and MOPPR Agreements.

In 2014 and 2015, the Arctic’s institutional complexity increased further with the establishment of three new bodies: the Arctic Economic Council, the Arctic Offshore Regulators Forum and the Arctic Coast Guard Forum. While none of these were formally established by the Council or pursuant to a treaty negotiated under its auspices, all three have different extents of integration – substantively as well as procedurally – with the Arctic Council and the broader ACS. Rather than forming part of the Council or the broader ACS, however, they could be regarded as belonging to a new, more peripheral category of Arctic cooperative mechanisms. At any rate, the establishment of these new bodies requires increased efforts on institutional coordination and cooperation.

Despite these developments, the question remains whether the current institutional set-up of the Council will

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be sufficient to address future challenges and ambitions. While support for re-establishing the Council pursuant to a treaty has in the recent past also been expressed by Arctic Council participants – namely by Finland and the Conference & Standing Committee of Parliamentarians of the Arctic Region – the required consensus among the Arctic Council Members to commence such negotiations is not even remotely in sight. A key concern of the Permanent Participants is the risk of losing the very influential participatory status they currently have in the Arctic Council. As international law is inherently dynamic, however, nothing prevents the Arctic states from progressively developing international law by giving Arctic Indigenous peoples a similar participatory status under a treaty.

The currently ongoing engagement of Arctic Council participants in the context of the Council’s Task Force on Arctic Marine Cooperation (TFAMC) provides the best opportunity to assess their appetite for institutional change in the Arctic Council in the near future. The TFAMC has a mandate to “assess future needs for a regional seas program or other mechanism, as appropriate, for increased cooperation in Arctic marine areas”.

At the time of writing, the TFAMC had met once in 2015 and 2016 respectively and is scheduled to meet in June and September 2016 then again in 2017. While some common ground on overarching goals and principles has crystallized, the more fundamental agreement on the core objective of the abovementioned mechanism and its institutional dimension remains entirely absent.

One of the TFAMC’s key challenges is how to address the various interrelated choices on key features of a future mechanism. For instance its substantive mandate, its geographical scope; whether it should be part of the Arctic Council, the broader ACS or a more peripheral category of Arctic cooperative mechanisms; its relationship to (other) Arctic Council bodies; and the participatory status of Permanent Participants (and non-Arctic states).

Some Members also remained unconvinced about the need for any new body at all. This seems motivated at least to some extent by current budgetary constraints and concerns relating to institutional proliferation. Some may also feel the need to proceed cautiously to ensure coherence between their interests and positions in the TFAMC process and the recently commenced negotiations on a possible new UNCLOS Implementation Agreement on biodiversity in areas beyond national jurisdiction. Russia seemed to have more fundamental concerns relating to any initiative that could potentially lead to restrictions on economic development in the ‘Russian Arctic’.

Finally, the Arctic Council’s substantive mandate is almost unlimited, but significantly under-utilized. Yet, more optimal use and associated institutional change are constrained by existing (sub-)regional or bilateral instruments and bodies. In the context of the TFAMC, reference can be made to the OSPAR Commission, whose geographical competence extends all the way to the geographical North Pole. Even if the Arctic states would prefer the OSPAR Commission to relinquish part of its regulatory area, this is unlikely to secure the necessary support among the OSPAR Commission’s Membership. In many other scenarios, however, the Arctic states have no desire at all to replace or subsume existing (sub-)regional or bilateral instruments and bodies, or to preclude new (sub-)regional or bilateral instruments and bodies from being created. Pertinent examples are instruments and bodies relating to the conservation and management of marine mammals and fish stocks, for instance the currently ongoing Broader Process on international regulation of high seas fishing in the central Arctic Ocean. In view of the widening acceptance of ecosystem-based ocean management, however, one would expect increasingly closer coordination and cooperation between the Arctic Council and these formally stand-alone instruments and bodies.
The rapidly changing Arctic faces new challenges. Therefore, new approaches to marine governance are needed to ensure the sustainability of the entire region and a healthy Arctic Ocean. The Arctic Council (AC) is evolving from a science dialogue forum to policy shaping regional instrument. Improving the implementation of AC decisions and recommendations is essential to this evolution.

STRENGTHENING marine cooperation in the Arctic will provide for better coordination, decision-making and implementation mechanisms. It would also address the gap between technical and scientific analysis and policy design while supporting monitoring and reporting on implementation within the AC.

As an active observer to the AC, WWF is developing approaches and options for Arctic marine cooperation.

WWF proposes four potential options:

1. Create strong Science, Policy and Implementation interactions through a new AC structure

Integrate Working Groups (WGs), Task Forces (TFs) and Senior Arctic Officials (SAOs) through three subsidiary bodies within the AC with separate but complementary responsibilities:

i.) science (or knowledge) coordination group: would house the existing WGs and expert groups; produce scientific assessments and reports on topics specified by Ministers, provide corresponding scientific and technical recommendations and identify new and emerging issues.

ii.) policy coordination group: would recommend further action based on the scientific assessments/reports/recommendations; responsible for bringing the resulting policy recommendations to Ministers. Run by SAOs and would oversee Task Forces.

iii.) implementation coordination group: would consider the recommendations provided by the policy group and develop general implementation plans with clear timelines and measures to guide Arctic States in developing national implementation plans; would also identify where policies could be implemented by other relevant international frameworks.

2. Create an Arctic Council Marine Commission

The mandate of the Commission would be based on the four strategic objectives of the Arctic Marine Strategic Plan 2015-2025 (AMSP). Its work would focus on ensuring full implementation of the entire plan. The Commission would be composed of Permanent Participants as well as high level representatives from each Arctic State with expertise in marine issues and the authority to implement marine related policies and strategies in their respective States. The Commission would coordinate the work of all WGs and facilitate connectivity between the science and policy processes.

A polar bear rests on the ice Aug. 23, 2009, after following the U.S. Coast Guard Cutter Healy for nearly an hour.
3. Establish an Arctic Marine Cooperation Framework Agreement

A framework agreement would facilitate cooperative actions by the eight Arctic states, acting through the AC Ministers, to achieve the agreed goals of the Arctic Marine Strategic Plan. A framework agreement would function through a system of agreed action on key Arctic marine issues as identified by Arctic Ministers, with implementation timeframes and procedures to measure their success. The Arctic Council Secretariat (ACS) would work with the Ministers to facilitate actions stemming from the Framework Agreement.

4. Build an Arctic Council Marine Implementation System

This includes three steps to enhance the coordination and integration of all elements of the marine agenda within the AC:

iv.) scheduled “Arctic Council Marine Coordination Sessions” convening experts from all working groups on marine issues with agenda focus on specific cross-cutting issues addressing elements of the AMSP

v.) regular meetings of Ministers responsible for marine implementation. There would be a concrete agenda as per coordination session. Advice would be strictly related to the implementation of the AMSP. Different Ministers could attend different meetings depending on agenda items

vi.) strengthen the ACS by providing it with a mandate to facilitate/coordinate/administer a “marine agenda” among the WGs while serving as the Secretariat responsible for organizing coordination sessions and Ministerial meetings, including the preparation of meeting documents.

These options are not mutually exclusive but can complement one another. WWF suggests that a new AC structure (based on policy coordination groups) could be implemented through a binding framework agreement on marine cooperation. An implementation system could include elements of the fourth option.

All options envisage a strong role for the AC. Each option would work within the Council, based on current operating principles including the continued strong involvement of Permanent Participants. These options do not prejudice the sovereignty of coastal states over their territorial seas, their sovereign rights and jurisdiction in their Exclusive Economic Zones regarding their continental shelves, or the rights of other states in these areas in accordance with international law, including the United Nations Convention on the Law of the Sea.

These options would cover all marine elements of work under the AC mandate, including but not limited to: Arctic shipping management; oil spill prevention; national coordination of ecosystem-based approaches to management and cooperation to establish special management areas. All options should apply to the entire Arctic marine environment as per the geographical area defined by the Council’s activities, from the surface of the sea to, but not including, the seabed below.

These options would have implications for the current structure of the AC, such as increasing capacity, and establishing new positions and bodies. They would also provide for better marine coordination both within the council, and in the Council’s dealings with the rest of the world, and for predictable and measurable progress on marine issues.
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