Arctic Governance
Synthesis and assessment of Arctic governance mechanisms and recent policy actions

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A. Summary of existing architecture for the governance and management of the Arctic

A.1. Regional forums

While several institutions are involved in the governance of the Arctic marine area, the most prominent among them is the Arctic Council. The Arctic Council was established as a high level inter-governmental forum in 1996 to “provide a means for promoting cooperation, coordination and interaction […] on common arctic issues, in particular issues of sustainable development and environmental protection in the Arctic”.1

![Image](http://arctic-council.org/filearchive/Declaration%20on%20the%20Establishment%20of%20the%20Arctic%20Council-1.pdf).

The Arctic Council was established by non-legally binding declaration and is a consensus-based organization.2 Decisions of the Council do not have any binding effect on individuals.3

The eight Arctic states are Members of the Arctic Council4 and eight Non-Arctic States are Official Observers.5 A variety of governmental organizations and NGO's also hold observer status. Of particular interest, the Arctic Council establishes significant participation by the indigenous peoples of the Arctic, whom the Council Members must consult prior to any consensus decision-making.6

The Council’s current responsibilities pertain to research, advising on policy, and disseminating voluntary guidelines on the main topical areas that it is concerned with, including climate change, sustainable development, Arctic monitoring and assessment, persistent organic pollutants and other contaminants in the Arctic and other issues covered by its six Working Groups.7

According to Arctic expert Brooks Yeager, the Arctic Council has made major contributions to the Arctic region, by “identifying issues of importance to the conservation of the Arctic environment and the well-being of Arctic people, and in developing assessments that have become the basis for cooperative action by the Arctic governments”.8 The Council has also

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2 Ibid.


4 Canada, Denmark / Greenland / Faroe Islands, Finland, Iceland, Norway, Sweden, The Russian Federation, United States of America.

5 China, France, Germany, Italy, Poland, Spain, The Netherlands, United Kingdom.

6 Indigenous peoples are represented by six “Permanent participants”. The list on the Website of the Arctic Council at <http://arctic-council.org/section/the_arctic_council>. See also the Council membership on a map of the Arctic region at <http://eppr.arctic-council.org/content/risk/images/cover.jpg>.

7 See details on the Website of the Arctic Council at <http://arctic-council.org/article/about>.

8 The assessments include “the 1998 AMAP assessment of Arctic Pollution Issues, the 2001 assessment Arctic Flora and Fauna, Status and Conservation, the 2004 Arctic Human Development Report, and the 2004 Arctic Climate Impact assessment.” Brooks B. Yeager, “Managing Towards Sustainability in the...
issued guidelines and manuals of good practices, particularly related to the Arctic marine area.9

A.2. Regional Governance

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) is the legal instrument guiding international cooperation on the protection of the marine environment of the North-East Atlantic.10

The OSPAR Convention “covers the regulation of all human activities which can have an adverse effect on the ecosystems and the biodiversity in the North East Atlantic, with the explicit exception of fisheries management and with certain limitations for the regulation of shipping”.11 The OSPAR Commission was tasked to implement and monitor the Convention and can adopt measures and programs in the form of both legally binding decisions and non-legally binding recommendations.

There are currently fifteen contracting parties to the OSPAR Convention, all from Europe. The European Commission also participates on behalf of the European Union.12

OSPAR has been cited as an example of the successful implementation of ecosystem-based management at the international level,13 even though the OSPAR Convention does not explicitly refer to the ecosystem approach.14

Arctic: Some Practical Considerations” (Remarks at the International Conference of the German Federal Foreign Office, Opportunities and responsibilities in the Arctic Region: the European Union’s perspective, Berlin, 11 March 2009).

9 Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP), Arctic Climate Impact Assessment (ACIA), and the Arctic Marine Strategic Plan. See T. Koivurova and and Erik J. Molenaar, International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis, n. 3 above. In certain cases, the Arctic Council’s guidelines and rules can be adopted by international organizations such as the International Maritime Organization (IMO) Polar Code on navigation rules. See T. Koivurova, “Alternative for an Arctic Treaty. Evaluation and a New Proposal”, 17:1 RECIEL (2008), 14, available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/119411559/HTMLSTART?CRETRY=1&SRETRY=0>.

10 See Website of the organization at <http://www.ospar.org>. A map of the area covered by the Convention is available on the OSPAR Commission Website at <http://www.ospar.org/content/regions.asp?menu=00020200000000_000000_000000>. See T. Koivurova and and Erik J. Molenaar, International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis, n. 3 above. The overall objective of the OSPAR Convention is “to prevent and eliminate marine pollution and to achieve sustainable management in the region, that is, the management of human activities in such a manner that the marine ecosystem will continue to sustain the legitimate uses of the sea and will continue to meet the needs of present and future generations”. See the Preamble of the OSPAR Convention at <http://www.ospar.org/html_documents/ospar/html/OSPAR_Convention_e_updated_text_2007.pdf>.

11 See T. Koivurova and and Erik J. Molenaar, International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis, n. 3 above.

12 The list of the contracting parties is available on the OSPAR Convention Website at <http://www.ospar.org/content/regions.asp?menu=00020200000000_000000_000000>.


14 See T. Koivurova and and Erik J. Molenaar, International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis, n. 3 above.
A.3. Global governance

The United Nations Convention on the Law of the Sea (UNCLOS) establishes a comprehensive binding framework for the rights and responsibilities of nations in their use of the world's oceans.15

To date 156 countries and the European Community have joined in the Convention. The United States is not a member.16 However, the Convention is accepted as a codification of the customary international law.

Certain UNCLOS articles are directly relevant to the Arctic, such as Article 118 234 (Ice-covered areas) that extend environmental protection powers to Arctic coastal States within the limits of their exclusive economic zones (EEZ) if ice is present in an area for most of the year,17 and Annex II (Commission on the Limits of the Continental Shelf) and Article 76 (Definition of the continental shelf), which led to the current submissions of “outer continental shelf” sovereignty claims (extending beyond the 200 nautical miles EEZ limit) by some Arctic states to the Commission established by the UNCLOS.18 In addition, Article 123 calls on the states bordering semi-enclosed seas to cooperate through an “appropriate regional organization”. If the Arctic maritime area were so classified, the littoral States would have greater obligations to cooperate in regard to environmental protection.19

The UNCLOS has two implementation agreements, the Part XI Deep-Sea Mining Agreement20 and the Fish Stock Agreement.21

The International Maritime Organization (IMO) is the United Nations’ specialized agency that was tasked with developing and maintaining a comprehensive regulatory


17 Specifically, Article 234, the Arctic Clause”, concerns the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the EEZ. Canada used Article 234 to enforce a strict pollution-prevention regime in its Arctic EEZ under the provisions of its “Arctic Waters Pollution Prevention Act”. See <http://www.dfo-mpo.gc.ca/oceans/canadasoceans-oceansducanada/marinezones-zonesmarines-eng.htm#ex>.


20 The Agreement establishes an international organization to regulate the exploration of deep sea mining in international waters, the International Seabed Authority.

21 In particular, the Agreement strengthens the legal regime for conservation and management of highly migratory and straddling fish stocks implemented through global, regional and sub-regional fisheries management organisations (RFMOs). See the Agreement online at <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm>.
framework for shipping with a focus on ship safety. The jurisdiction of the IMO includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.\footnote{IMO Website, \url{http://www.imo.org/About/mainframe.asp?topic_id=3}. See also M. Jariabka, Report of the Expert Workshop on 11 - 12 September 2008, n. 13 above.}

As a United Nations agency, the IMO is composed of 168 Member States and three Associate Members (Hong Kong, China; Macao, China; and Faroe Islands, Denmark).

Regarding the Arctic, IMO Guidelines for Ships Operating in Arctic Ice-covered Waters, also known as the Polar Code, created a unified set of voluntary classification standards for ships navigating in both Polar regions. According to Arctic governance expert Lynda Nowlan, the Polar Code “buil[t] upon existing treaties administered by the IMO, such as the International Convention for the Prevention of Pollution from Ships (MARPOL), and associated safety and training treaties. Protocols under the LRTAP Convention also contain specific references to the Arctic environment”.\footnote{Linda Nowlan, Arctic Legal Regime for Environmental Protection (\textit{Environmental Policy and Law} Paper No. 44, IUCN (World Conservation Union), available at \url{http://data.iucn.org/dbtw-wpd/edocs/EPLP-044.pdf}.}

\section{B. Synthesis of gaps in the existing architecture}

\subsection{B.1. The Arctic Council}

The Arctic Council is based on international soft law; therefore it has neither a legal personality nor regulatory powers which are found in international treaties (e.g. UNCLOS) or organizations (e.g. OPSAR Commission). The Arctic Council is mainly a consultative council.

As reviewed above, the Ottawa Declaration on the Establishment of the Arctic Council does not impose any legally binding obligations on its Members, nor does the Declaration empower the Arctic Council to impose any binding obligations.\footnote{Yet, some point to the benefit of soft law for its norms building functions and argue that consensus can be more readily achieved in a forum that is non-binding in nature. Despite its informal structure, members of the Arctic Council have invested more in Arctic environmental monitoring, harmonized some of their activities. Non-binding forums also facilitate discussion and policy directives. See Brooks B. Yeager,”Managing Towards Sustainability in the Arctic: Some Practical Considerations”, n. 8 above.} Others have observed that the Arctic is not a monitoring body and does not systematically evaluate whether its non-legally binding guidelines are being followed and therefore their impacts are difficult to determine.\footnote{T. Koivurova and and Erik J. Molenaar, \textit{International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis}, n. 3 above.} Finally, the Arctic Council lacks structural funding and a permanent independent secretariat.\footnote{M. Jariabka, Report of the Expert Workshop on 11 - 12 September 2008, n. 13 above.} In the absence of a permanent secretariat, the work of the Arctic Council is influenced by the priorities that the chair State lays out for its two-year chair period.\footnote{T. Koivurova, “Alternative for an Arctic Treaty. Evaluation and a New Proposal”, n. 9 above. It should be noted however that the three Scandinavian States have agreed to establish a joint-secretariat for their successive chair periods (2006-2012). See \url{http://arctic-council.org/article/2007/11/common_priorities}.}
B.2. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)

Although The OSPAR Commission can adopt legally binding decisions and has been cited as an example of the successful implementation of ecosystem-based management, it only covers part of the Arctic region and does not apply to fisheries.


The prevailing view among experts is that UNCLOS, and to some extent its two implementation agreements, offers a general governance framework but not an operational regulatory regime; instead, UNCLOS relies upon regional or sectoral institutions to implement its provisions. The Convention relies on implementation of its provision by means of concrete regulations at the global and regional level through “competent” and “appropriate” international organizations, as stated in the Convention. In the absence of surveillance and enforcement mechanisms, nothing prevents States from not fulfilling their obligations.

For example, the UNCLOS does not impose obligations for states to cooperate on management plans or implementation (with a key exception being the related fish stock agreement, the framework in which regional fisheries regional arrangements are developed.)

As regards the Arctic, the following limits of UNCLOS application were identified.

-- Article 234 - Ice-covered areas
Article 234 was intended to include the Arctic through its application to "ice-covered" waters. Yet, “there are currently no mandatory standards for the environmental policing of the Arctic or of the international shipping companies whose vessels are already plying these waters”.

-- Article 123 - Cooperation of States bordering enclosed or semi-enclosed seas
The article provides a framework for cooperation of states. However, there are questions raised in international law literature whether this article would apply to the Arctic. These questions are still not resolved.

-- Annex II - Commission on the Limits of the Continental Shelf and Article 76 - Definition of the continental shelf
According to this article, a coastal state may claim rights on its continental shelf beyond 200 miles from the territorial sea baseline. Russia and other Arctic neighboring countries have filed or are planning to file claims to expand the continental shelf with the U.N. Commission

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29 Scott G. Borgerson, Arctic Meltdown. The Economic and Security Implications of Global Warming (Foreign Affairs, March/April 2008).
on the Limits of the Continental Shelf under the Law of the Sea Treaty. Yet, some of these claims include disputed areas, which might make acceptance of the Commission decision uncertain, particularly given the abundance of mineral resources in these areas. As noted above, the United States has not ratified the Convention and as such is not bounded by the Commission’s decisions.

*Fish Stock Agreement*

The Fish Stock Agreement applies only to straddling and highly migratory fish stocks. Yet, in the Arctic context, new fishing opportunities are also likely to relate to shared and anadromous fish stocks. Only the relatively general obligations of the UNCLOS apply to these fish stocks.

According to T. Koivurova and E.J. Molenaar (2009), the “mere existence of the UNCLOS two implementation agreements reflects that the international community was prepared to address what it perceived to be gaps” in UNCLOS. Recently, the United Nations General Assembly made an attempt to further address these gaps and established the United Nations 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.

B.3. International Maritime Organization (IMO)

Experts have pointed to the following limits of the IMO.

-- The IMO’s Guidelines for Ships Operating in Arctic Ice-covered Waters, known as the Polar Code, exclusively apply to transport in ice-covered water. It therefore does not cover cruise ships that sail in free Arctic waters.

-- By contrast with the UNCLOS, many key IMO standards are non-legally biding, such as the Polar Code.

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33 Ibid.


36 T. Koivurova and Erik J. Molenaar, n.3. above.
-- According to experts, IMO lacks important marine environment standards, such as emission or ballast water exchange standards for the Arctic marine area and mandatory or voluntary IMO ships routing systems for the Arctic marine area.37

As a concluding remark, compliance and enforcement mechanisms are critical to ensure that states fulfill their obligations. Regional compliance and enforcement mechanisms are better suited to that task. However, there is limited regional approach by Arctic states specifically aimed at ensuring compliance with applicable international rules and standards and national laws and regulations,38 OPSAR being an exception but it covers only a limited part of the Arctic and does not apply to fisheries.

C. Opportunities under existing policy directives and initiatives

Both Arctic and non-Arctic nations are sharpening their focus on Arctic-related policy, as expressed in recent declarations by the largest Arctic states and the European Union. These expressions have in common (1) an affirmation of the growing strategic interest in the region, in terms of resource exploitation and transport, (2) endorsement of the UNCLOS but rejection of an Antarctic-like treaty, (3) allowance of the need for new cooperative arrangements to address complex environmental stewardship responsibilities, and (3) de facto defense and military forces build-up (while the EU emphasizes a priority on environmental protection and the well-being of indigenous populations).

C.1. The Ilulissat declaration

The US, Canada, Russia, Denmark and Norway issued the Ilulissat Declaration on May 29, 2008.39

While the Declaration dismisses calls for a new international treaty, similar in nature to the Antarctic Treaty (“We […] see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean”) it reflects a minimum consensus of the Arctic coastal states, particularly in their support of the UNCLOS as the legal regime for the Arctic40, and states a commitment for the Arctic states to “take[ ] steps in accordance with international law both nationally and in cooperation among the five states and other interested parties to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean.”41

37 Ibid.
38 Ibid.
40 M. Jariabka, n. 13 above. Some have suggested that in the context of this consensus, a protocol could be adopted under the UNCLOS, see T. Koivurova and Erik J. Molenaar, n. 3 above. Yet, international maritime law experts consider that a universal treaty system does not allow the establishment of regional protocols. (Discussion with Badr Zerhdoud, Visiting researcher, Georgetown University Law School, Washington, DC., April 4, 2009).
41 Brooks B. Yeager, “Managing Towards Sustainability in the Arctic: Some Practical Considerations”, n. 8 above.

On January 9, 2009, the Bush Administration issued a new policy directive to update the United States government’s Arctic policy.

It notes human and environmental changes affecting the region, “This directive takes into account several developments, including, among others: “…The effects of climate change and increasing human activity in the Arctic region; […] A growing awareness that the Arctic region is both fragile and rich in resources.” and emphasizes the need for the U.S. to assert its interests, “The United States has broad and fundamental national security interests in the Arctic region and is prepared to operate either independently or in conjunction with other states to safeguard these interests”. It also calls on Congress to ratify the UNCLO (“The Senate should act favorably on U.S. accession to the U.N. Convention on the Law of the Sea promptly,”), yet rejects the need for a binding new international or regional instrument, “The geopolitical circumstances of the Arctic region differ sufficiently from those of the Antarctic region such that an "Arctic Treaty" of broad scope -- along the lines of the Antarctic Treaty -- is not appropriate or necessary.” Nevertheless, it leaves open opportunities for improving existing structures, “The United States is nevertheless open to updating the structure of the Council, including consolidation of, or making operational changes to, its subsidiary bodies, to the extent such changes can clearly improve the Council's work and are consistent with the general mandate of the Council”.

C.3. EU Communication on the Arctic

On November 20, 2008, the European Union published a “Communication on the Arctic”. This position paper is a comprehensive review of the EU interests in the Arctic.

The Communication states the need to develop a holistic ecosystem-based management approach for the Arctic and emphasizes that the involvement and active participation of Arctic indigenous people is essential to supporting measures in the region. 42

In a subsequent speech, Joe Borg, Member of the European Commission, Responsible for Fisheries and Maritime Affairs, re-stated the EU position that there is a need to allow for greater international involvement in Arctic. The Commissioner proposed that the IMO Polar Code be changed and become binding and that part of the Arctic could be designated as “particularly sensitive sea area” under the PSSA IMO regime.\(^{43}\)

C.4. Russia new Arctic strategy

The new Russian government’s Arctic Strategy prioritizes the delineation of the Arctic shelf "with respect to Russia's national interests." In addition, according to the document, Russia will create by 2020 a group of forces to protect its political and economic interests in the Arctic.\(^{44}\) “The basic national interests of the Russian Federation in the Arctic are: […] to create a general purpose grouping of troops (forces) of the Armed Forces of the Russian Federation and of other troops, military formations and organizations (primarily border organizations) in the Arctic Zone of the Russian Federation that are able to provide for military security under various conditions of military and political situations”.

The document also specifies that Moscow views the Arctic as “a strategic resource base of the Russian Federation that provides for the solution of tasks for the social and economic development of the country;”

Finally, as part of Russia strategic priorities in the Arctic, the document calls on Russia “to strengthen the good-neighborly relations of Russia with Arctic-adjacent states on a bilateral basis and within the framework of regional organizations, including the Arctic Council and the Barents/Euroarctic Region Council” and “to promote participation of Russian state institutions and social organizations in the work of international forums dedicated to Arctic problem sets, including inter-parliamentary interactions within the framework of the Russia-European Union partnership.”

C.5. Canada and the Arctic

As recently stated in an address on Canada’s Arctic Foreign Policy by Canada Minister of Foreign Affairs, Lawrence Cannon, each existing governance mechanism leaves room for enhancement of governance in the Arctic. Yet, Canada will not seek the creation of a new treaty, but rather seek to enhance existing tools. “We have an extensive, existing international legal framework that applies to the Arctic Ocean, notably the law of the sea, which covers continental shelf delimitation, marine environment protection and other uses


of the sea. […] In the 2008 Ilulissat Declaration, all five Arctic Ocean coastal states reaffirmed their commitment to the framework established by the law of the sea, including peaceful resolution of any competing interests.”

The Government of Canada also committed to enhance surveillance and military presence in the Canadian Arctic waters and to assert its “outer continental shelf” sovereignty claims in the Arctic. “It is also important to determine where Canada can exercise its sovereign rights. That is the point behind the work being done to delineate the outer limits of Canada’s extended continental shelf. […] The United Nations Convention Law of the Sea explicitly recognizes Canada’s sovereign rights over its continental shelf and sets out a process for a coastal state like Canada to secure international recognition for the precise limits of its continental shelf. […] My government has invested significantly—$40 million over four years for a total expenditure of $109 million over the course of the project—to ensure that Canada secures recognition for the maximum extent of its continental shelf in both the Arctic and the Atlantic. 45

45 The speech is available at <http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=386933&Mode=print>.