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OF NORWAY

Faculty of Law

The Establishment of Marine Protected Areas Beyond National Jurisdiction: The Central Arctic Ocean

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Sofia Sjögren

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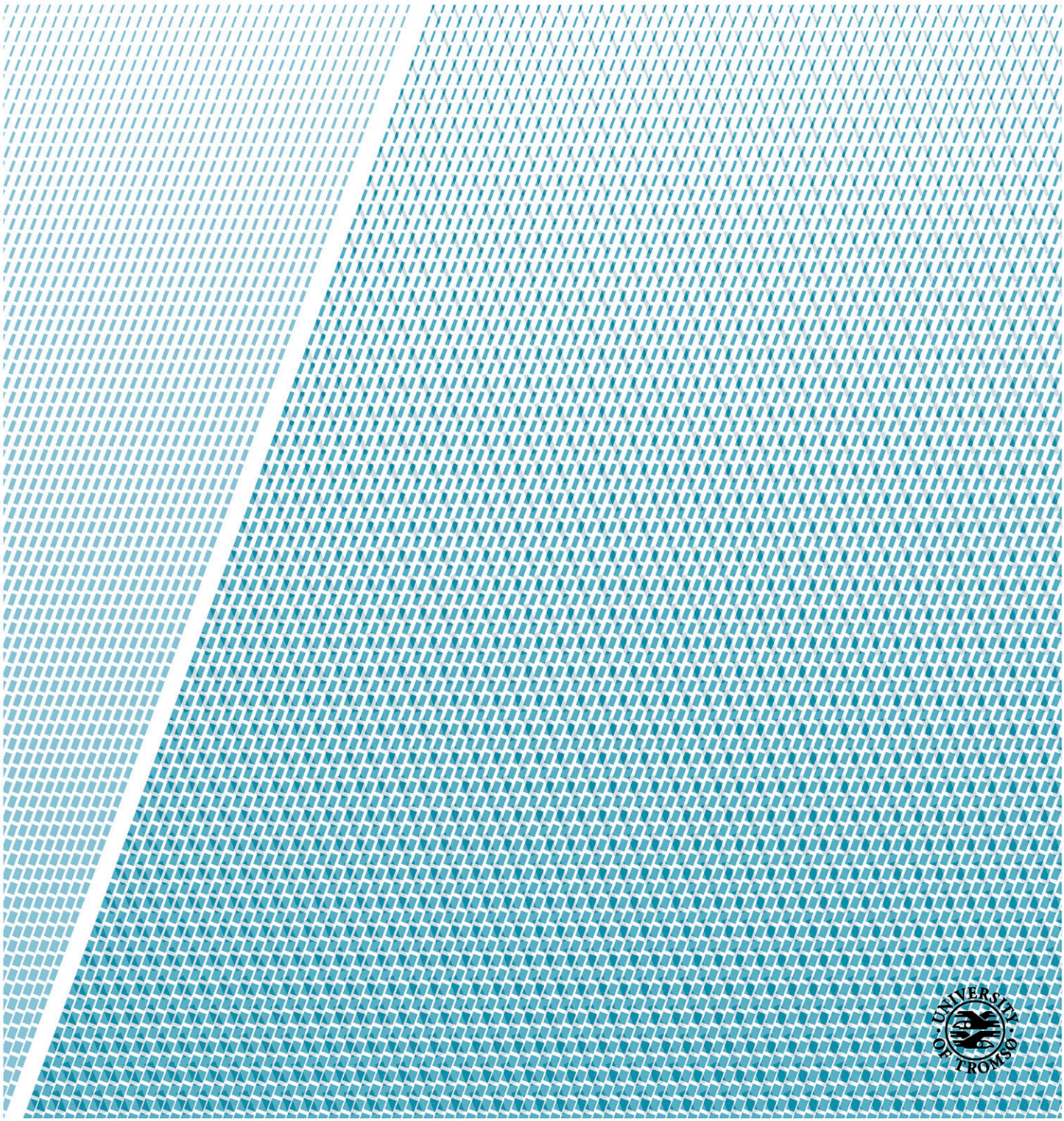

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1 Introduction

1.1 Introductory background

The Central Arctic Ocean is an area beyond national jurisdiction and among the least known bodies of water in the world ocean due to its' remoteness, sea-ice coverage and deep central basin.[1] During the last hundred years, the temperature in the area has risen at twice the global average rate.[2] A warmer climate in the Central Arctic Ocean results most prominently in warmer sea temperatures, diminished sea-ice coverage and changed ice distribution, which in due time will open up new areas.

An accessible Central Arctic Ocean can be expected to increase the human activities in the region. Under continuous ocean warming conditions, fishing activities may increase as pole ward distribution and increased interchange of native and new fish stocks, such as boreal species, will result in new resources and economical potentials of the region.[3] Diminished sea-ice is likely to lead to a loss of habitat for some producers and species in the region.[4] Navigation, both in terms of shipping and tourism, are likely to be intensified as the melting of the ice will open up for alternate and shorter routes than the currently existing ones. The exploitation of non-living marine resources of the region can also be expected to expand.[5] This result in both heightened interest in development of, and concern for, the Central Arctic Ocean.

The potentials for exploitation of living and non-living resources, navigation and other existing and emerging activities in a region priory relatively unexposed to human activities and with a varied ability to respond to climate change will result in an increased anthropogenic pressure. This intensifies the challenge to protect and preserve the Central Arctic Ocean marine environment, its unique and vulnerable biological diversity and ecosystems. As the ocean is an united ecosystem, the necessity to protect biodiversity in areas beyond national jurisdiction is the same for the Central Arctic Ocean as for ocean areas elsewhere. One answer posed to this challenge is the establishment of marine protected areas (MPAs) as an area-based management tool to safeguard the marine biodiversity and the oceans' ecosystems.

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[1] Lindal, Jørgensen et al, First Global Integrated Marine Assessment, chapter 36G, p. 1.
<www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_36G.pdf>
[2] Lindal, Jørgensen et al, First Global Integrated Marine Assessment, chapter 36G, p. 4.
<www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_46.pdf>
[3] Lindal, Jørgensen et al, First Global Integrated Marine Assessment, chapter 36G, p. 2-3, 18.
<www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_36G.pdf>
[4] Lindal, Jørgensen et al, First Global Integrated Marine Assessment, chapter 36G, p. 2.
<www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_36G.pdf>
[5] Weidemann, International Governance of the Arctic Marine Environment, p. 227.

The establishment of MPAs in the Central Arctic Ocean raises the question whether the 1982 UN Convention on the Law of the Sea (LOSC)[6] provides a legal basis for the establishment of MPAs or if the potential Implementing Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (hereinafter referred to as the potential Implementing Agreement) will provide one.[7] If so, the crucial threshold question for establishment is what competence States will have for the establishment of MPAs in the Central Arctic Ocean.

This thesis aims at discussing key legal, and to some extent political, questions related to the establishment of MPAs with an outlook on the Central Arctic Ocean.

1.2 Purpose

The aim of the thesis is to present and analyse the legal basis under the LOSC and its potential Implementing Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction for the establishment of MPAs. Springing from this, the paper will discuss the regionalization of the Arctic and the issues of competence following an establishment of MPAs respecting parts of the Central Arctic Ocean. The three main research questions are as follows:

1. What is the current legal basis for the establishment of MPAs in Central Arctic Ocean under the LOSC?

2. If no current legal basis is provided under the LOSC, what may be the legal basis for the establishment of MPAs under the potential Implementing Agreement[8] to the LOSC?

3. With respect to the latter, which States can or must engage in the establishment of MPAs under the potential Implementing Agreement in the central Arctic Ocean?

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[6] LOSC, 1982. United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 1833 U.N.T.S. 397.
[7] United Nations General Assembly Resolution A/RES/69/292.
[8] Please note that it is debatable whether the United Nations General Assembly Resolution A/RES/69/292 indicates that an implementing agreement will be negotiated or whether the decision to proceed to a diplomatic conference for the establishment of an implementing agreement has yet to be made.

1.3 Method and Materials

The traditional legal method has been used when writing this thesis. To this end, the method has been to solve the research questions by identifying the current state of law on the questions posed. A minor study is undertaken in order to assess which MPAs that have been established in areas beyond national jurisdiction and of those, which are located on an outer continental shelf when limits are not final and binding, see annex III.

The basis for all international law of the sea, the LOSC, is the foundational source for this work. Additionally, the United Nations General Assembly has tasked a preparatory committee to explore the possibility of developing an Implementing Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[9]

Case law is scarce as the establishment of MPAs beyond national jurisdiction is in a starting phase. Academic debate in the literature has been used to highlight various legal arguments and opinions. Readings on the topic of MPAs are easily accessible, but less so with regards to the potential Implementing Agreement. A book on MPAs by Ingvild Jakobsen is to be published after the handing-in of this thesis and will thereby not be taken into account. The same goes for the second meeting of the Preparatory Committee for the potential Implementing Agreement, which takes place in late August 2016.

Since the law of the sea forms part of public international law, some of the analysis in the thesis is based on rules of general international law. Since the LOSC and its implementing agreements are intra-state agreements, the Vienna Convention on the Law of Treaties (VCLT) is applicable for treaty interpretation.[10]

1.4 Demarcation

As no State can claim sovereignty on the high seas nor the Area, art 89 and 137 LOSC, no State has exclusive control over the areas beyond national jurisdiction. This makes the establishment of MPAs from a competence perspective more complex and perhaps more legally interesting in the areas beyond rather than areas under national jurisdiction. Thus, the thesis focuses on the maritime area beyond national jurisdiction, namely the

[9] United Nations General Assembly Resolution A/RES/69/292.
[10] VCLT, 1969. Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 U.N.T.S. 331.

Area and the high seas.[11] In addition to these two zones, the outer continental shelf of a coastal State beyond 200 nautical miles (nm) will be addressed to some extent.

The thesis is geographically limited to the Central Arctic Ocean, see map in annex I. The other three high seas pockets in the marine Arctic, often referred to as the 'Donut-Hole' in the central Bering Sea, the 'Loop-Hole' in the Barents Sea and the 'Banana Hole' in the Norwegian Sea, will not be taken into account.

To create an MPA, an area needs to be identified, evaluated, adopted, implemented and enforced.[12] This thesis focuses on the establishment of MPA in the sense of adoption and implementation.

The five coastal States surrounding the Central Arctic Ocean are the United States of America (the US), Canada, the Russian Federation, Norway and Denmark via Greenland (the Arctic Five). In addition to the Arctic Five are the closely situated States Finland, Sweden and Iceland (the Arctic Eight).[13] The Arctic Eight are parties to the LOSC, with the exception of the US. To the degree that the LOSC is customary international law, it is applicable to the US.

Regarding the legal instruments, the LOSC and its potential Implementing Agreement are of the central relevance. The Convention on Biological Diversity (CBD) promotes MPAs as in-situ measures for protection of biodiversity, art 8 CBD.[14] The application of art 8 CBD in the ABNJ is however likely to fall outside the jurisdictional scope of the Convention, which is defined in art 4 CBD.[15] For the purpose of the thesis, the application of the CBD can be seen as limited. This is due to the CBD's relationship with other international conventions and the conflict clause, found in art 22 CBD. Against this background, the CBD will not be discussed.

1.5 Presentation of outline

The thesis will begin with an introduction to the concept of MPAs and MPAs in areas beyond national jurisdiction, chapter 2. Chapter 3 will be devoted to describing the current potential legal basis under the LOSC for the establishment of MPAs in areas beyond national jurisdiction. This is done via assessing the legal regimes governing the

[11] For a definition of the Area, see art. 1.1.1 LOSC. The high seas are negatively defined in art 86 LOSC.
[12] Pew Charitable Trust, Marine protected areas beyond national jurisdiction, p. 5.
[13] As defined in the Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996, 35 I.L.M. 1387.
[14] CBD, 1992. Convention on Biological Diversity, 22 May 1992, in force 29 December 1993, 1992 I.L.M 31.
[15] For an opposing view, see i.e. Drankier, Marine Protected Areas in Areas Beyond National Jurisdiction, p. 296f.

high seas regarding the water column followed by the area and the outer continental shelf in the absence of final and binding limits regarding the seafloor. In chapter 4, the probable legal basis for establishment of MPAs under the potential Implementing Agreement will be discussed. In chapter 5 the issues of competence for establishment of MPA in the Central Arctic Ocean will be determined and discussed, both regarding forums and States. Finally, the thesis will provide a short summary of the findings and an outlook in its concluding remarks.

2 Marine protected areas beyond national jurisdiction

2.1 Introduction

To start, the concept of MPAs will be introduced. MPAs are area-based management tools and as such are part of an ecosystem-based approach for the protection of the marine environment with links to the concept of sustainable development.[16] The establishment of MPAs has become an important topic on the international agenda during the last decades.[17] Despite global efforts to increase the number of MPAs, the establishment of MPAs remains scarce for the areas beyond national jurisdiction where only circa 0,25% of the marine areas are covered by MPAs.[18]

2.2 Definition

There is no universally accepted definition of the term MPA. What constitutes an MPA can neither be derived from international conventions nor from state practice.[19] Generally, it refers to a marine region that has attained a special protective status due to its ecological, biological, scientifical or historical value.[20]

The first broadly accepted definition for MPAs was adopted by International Union for the Conservation of Nature (IUCN) in 1999. This definition was revised by the IUCN in 2012 when it aligned MPAs with the definition of terrestrial 'protected areas', as:

> "a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values".[21]

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[16] Wolf, Bischoff, Marine protected areas, § 4D.
[17] United Nations General Assembly Resolution A/RES/66/231, p. 30. See also the Chair's overview over the first session of the Preparatory committee, annex II § 6, p. 19. <www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf> accessed 23 June 2016.
[18] United Nations Millennium Development Goals Report 2015, p. 56. <www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf> accessed 30 June 2016. Assuming that 64% of the world oceans are areas beyond national jurisdiction and 0.25% of that space are MPAs, 0.0025*0.64 = 0.0016 gives that MPAs in areas beyond national jurisdiction covers only circa 0.16% of all ocean space.
[19] Matz-Lück, Fuchs, The impact of OSPAR on protected area management beyond national jurisdiction: effective regional cooperation or a network of paper parks?, p. 156.
[20] Wolf, Bischoff, Marine protected areas, § A1.
[21] Dudley, Guidelines for Applying Protected Area Management Categories, p. 8.

This definition is broad with respect to both the activities and the measures falling under 'legal or other effective means' as long as they are undertaken to fulfil the purpose of a 'long-term conservation of nature'. This broad definition reflects the fact that the level of protection and the difference regarding regulations on sectors and species in MPAs can vary.[22]

2.3 Types of MPAs

MPAs can be established for various protective purposes,[23] and can be divided into managing different activities.[24] To achieve the intended objectives of an MPA, both the seabed and the water column often have to be taken into account as activities in the water column will affect the biodiversity on the seabed and vice versa.[25] The following attempts to explain three types of MPAs[26] and is illustrated with existing measures of potential relevance for the Central Arctic Ocean.

Firstly, MPAs with a 'single sectorial' character regulates one particular type of human activity. With regards to shipping, the International Convention for the Prevention of Pollution from Ships' (MARPOL) Special Areas constitutes an example as it sets vessel discharge standards for designated areas.[27] The Polar Code has not yet entered into force but will in fact turn the Arctic waters into special areas due to a ban on discharge, "shall be prohibited", art II-A/1.1.1 Polar Code.[28] Another example of relevance for shipping is the International Maritime Organisation (IMO) establishment of Particularly Sensitive Sea Areas (PSSAs).[29] However, PSSAs have not yet been designated in areas beyond national jurisdiction.

Secondly, MPAs may have a 'multi sectorial' character, regulating cumulative human activities in one area. This is prominently exemplified by the Convention for the

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[22] Druel, Marine protected areas in areas beyond national jurisdiction: the state of play, p. 6.
[23] Wolf, Bischoff, Marine protected areas, § A3.
[24] Wolf, Bischoff, Marine protected areas, § A1.
[25] Salpin, Germani, Marine protected areas beyond areas of national jurisdiction: what's mine is mine and what you think is yours is also mine, p. 178.
[26] This model is presented by Molenaar, Area-based management tools, Powerpoint presentation, p. 4. Molenaar's model explains types of area-based management tools in areas beyond national jurisdiction. Here it is adapted and used to exemplify MPA measures with relevance for the Central Arctic Ocean.
[27] MARPOL, 1973/1978. International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, in force 2 October 1982, as modified by the 1978 Protocol (London, 1 June 1978) and the 1997 Protocol (London, 26 September 1997), 1340 U.N.T.S. 184. For examples of Special Areas, see Annex I regarding prevention of pollution by oil, Annex II regarding control of pollution by noxious liquid substances, Annex IV regarding prevention of pollution by sewage from ships and Annex V prevention of pollution by garbage from ships.
[28] Polar Code, not yet in force. International code for Ships Operating in Polar Waters.
[29] IMO Resolution A.982(24) Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas.

Protection of the Marine Environment of the North-East Atlantic (OSPAR) and its' commission's MPAs in areas beyond national jurisdiction, Annex V OSPAR.[30] The competence for this is argued to be found in both the LOSC and the OSPAR.[31] The international legal basis for establishment of MPAs by OSPAR is suggested to be based on art 87, 192, 194 and 197 LOSC.[32]. As regards the OSPAR itself, the legal basis is art 2.a and 3.1.b Annex V OSPAR. However, it can only regulate marine biodiversity under its remit and as regards the State parties to the OSPAR. This means that an MPA can regulate operations and activities in the OSPAR area, except shipping, as it falls under remit of the International Maritime Organization (IMO), nor fishing, as it falls under the remit of the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (NEAFC)[33], art 4 Annex V OSPAR. It could be questioned what then remains left within OSPAR's remit apart from dumping and marine scientific research. However, coordination such as memorandums of understandings between OSPAR, NEAFC and the Convention for the International Council for the Exploration of the Sea[34] results in the establishment of integrated MPAs. Non-party States will not be affected by OSPAR's MPA measures and continues to exercise their high seas freedoms irrespective of the MPA-measures taken under the auspice of OSPAR.[35]

Thirdly 'cross sectorial' MPAs are non-permissive to all human activities regardless of what sectorial character it may have.[36]

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[30] OSPAR Convention, 1992. Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, in force 25 March 1998, 2354 U.N.T.S. 67.
[31] OSPAR's Regulatory Regime for establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area, p. 6.
[32] OSPAR's Regulatory Regime for establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area, p. 2.
[33] NEAFC, 1980. Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980, in force 17 March 1982, 1285 U.N.T.S. 129.
[34] ICES Convention, 1964. Convention for the International Council for the Exploration of the Sea, 12 September 1964, in force 22 July 1968, 652 U.N.T.S 237.
[35] OSPAR's Regulatory Regime for establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area, p. 2.
[36] Molenaar, Area-based management tools, Powerpoint presentation, p. 4.

3 Legal basis for the establishment under the LOSC

3.1 Introduction

The LOSC, also known as the constitution for the oceans, provides the fundamental international legal framework for the oceans. The LOSC stipulates different legal regimes with significance for the marine areas beyond national jurisdiction. The purpose of this section is to identify if the LOSC provides a legal basis for the establishment of MPAs in areas beyond national jurisdiction.

This will be done by firstly assessing the legal regime for the high seas, which is negatively defined but spatially encompassing all parts of the water column beyond 200 nm, art 86 LOSC.[37] Secondly, the legal regimes governing the seafloor will be discussed. This will include both the Area, which constitutes the seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction, art 1.1.1 LOSC, and the legal regime applicable to outer continental shelf in the absence of final and binding limits from the Commission on the Continental Shelf (CLCS). In addition to these three regimes, Part XII LOSC establishes the legal framework regarding the protection and preservation of the marine environment that is applicable to ABNJ.

3.2 The high seas

3.2.1 Introduction

The LOSC builds on the traditional concept of freedom of the seas, enjoyed by all States in accordance with art 87 LOSC. These freedoms include *inter alia* the freedom to fish, navigate, lay submarine and cables, construct artificial islands and other installations and conduct marine scientific research. The listed freedoms, including other potential activities, are subject to conditions laid down by the LOSC and other rules of international law, art 87.1 LOSC, and are to be exercised with due regard for both the interests of other States in their exercise of the freedom of the high seas and the rights under the LOSC with respect to activities in the Area, art 87.2 LOSC. On the basis of this, one can draw the conclusion that these freedoms of the high seas are not absolute.

As noted above, the protection and preservation of the marine environment applies to activities taking place in the high seas and the Area, Part XII LOSC. Art 192 LOSC confers an obligation upon States to protect and preserve the marine environment.

[37] Molenaar, Elferink, Marine Protected Areas in ABNJ: The pioneering efforts under the OSPAR convention, p. 7.

Art 194 LOSC requires States to take all necessary measures consistent with the LOSC to prevent, reduce and control pollution of the marine environment from any source using the best practicable means at their disposal. These measures may include the establishment of MPAs. More particularly, art 194.5 LOSC affirms that measures taken in accordance with Part XII shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. A broad interpretation of the term "marine environment" in art 192 LOSC reasonably includes the marine ecosystems. In addition, art 197 LOSC requires that

> "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organization in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

Can this provision, read in conjunction with art 87, 192 and 194 LOSC, constitute a legal basis for establishment of MPAs in the Central Arctic Ocean? With guidance from art 31 VCLT the ordinary meaning of the term 'shall cooperate' in art 197 LOSC indicates an obligatory standard to be exercised in good faith, art 300 LOSC. However, even if 'shall' constitutes an obligatory standard, the general nature of the provision raises a question on how mandatory 'shall' can be, because it does not assure any concrete results of the cooperation. The term's closest context is 'shall cooperate on a global basis and, as appropriate, on a regional basis'. 'Global' is placed before 'regional', thereby suggesting a priority to the former form of cooperation. 'Appropriate' proposes a subjective element, thus, 'as appropriate' gives the States a wide margin of appreciation. If these provisions are viewed as the basis for establishment of MPAs, it is at best a weak legal basis.

With regards to the last line of art 197 LOSC, 'taking into account characteristic regional features', one can note art 234 LOSC on prevention, reduction and control of marine pollution from vessels in ice-covered areas. This provision is not applicable in areas beyond national jurisdiction, but it recognises that pollution of the marine environment could cause major harm or irreversible disturbance of the ecological balance. Another regional feature may be the Central Arctic Ocean's possible status as a

'semi-enclosed sea', art 122 LOSC, which is widely discussed in academic literature.[38] If so, the Arctic Five are required to co-operate on issues such as living marine resources and protection of the marine environment and provide for cross-sectorial cooperation.[39] But to argue that the Central Arctic Ocean is connected to another ocean via a 'narrow outlet', which is part of art 122 LOSC, appears geographically difficult, as there are no narrow outlets adjacent to the Central Arctic Ocean. Additionally, thus the duty to cooperate, 'should' in art 123 LOSC, is weaker than 'shall' in art 197 LOSC, the provision does not oblige the cooperation of the Arctic Five to any further extent than other States, but merely puts an emphasis on the importance of cooperation in regional governance.

As the words *inter alia* tied to the freedom of the high seas in art 87 LOSC indicates that the list is non-exhaustive and that art 87 LOS may entail more activities than those listed under art 87.1.a-f LOSC,[40] one could argue that art 87 LOSC may provide a legal basis for establishment of MPAs on the high seas in conjunction with the basis of art 192, 194, 197 LOSC on the protection of the marine environment. Even so, this is a stretch and any legal basis is limited given the 'due regard' wording in art 87 LOSC.

3.2.2 'Due regard'

If the above-mentioned provisions in the LOSC are to be the foundational legal basis for establishment of an MPA, focus must be given to 'due regard'. The requirement of 'due regard' in art 87 LOSC is a standard qualifying the rights of States in exercising the freedoms of the high seas. It is a balancing mechanism that requires State A to consider and be aware of other States' interests in using the high seas and may have to refrain from activities that interfere with the exercise by other States of the freedom of the high seas.[41] In its commentary from 1956, the International Law Commission stated "states are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other states".[42]

In case law, 'due regard' has been discussed but not in the context of MPAs. In the *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), attention

[38] For further discussion, see Henriksen, Conservation and Sustainable Use of Arctic Marine Biodiversity, p. 276.
[39] Henriksen, Conservation and Sustainable Use of Arctic Marine Biodiversity, p. 276.
[40] United Nations Convention on the Law of the Sea, 1982: a commentary: Vol. 3, p. 84.
[41] United Nations Convention on the Law of the Sea, 1982: a commentary: Vol. 3, p. 86.
[42] Yearbook of the International Law Commission, 1956 vol. II, p. 278.

was given to 'due regard' in art 56.2 LOSC regarding the establishment of an MPA. Mauritius instituted arbitral proceedings pursuant to art 287 and art 1 Annex VII LOSC, concerning the establishment by the United Kingdom (UK) of a cross-sectorial MPA around the Chagos Archipelago[43] extending out to the 200 nm limit.[44] In art 56.2 LOSC, the coastal State, in exercising its rights under the LOSC in the exclusive economic zone, shall have due regard to the rights and duties of other States. The rights and duties of other States in the exclusive economic zone is set out in art 58 LOSC and gives that other States enjoy the high seas freedoms referred to in art 87 LOSC in the exclusive economic zone.

In the Tribunal's view, the ordinary meaning of "due regard" called for the UK to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declined to find any universal rule of conduct in the formulation. Furthermore it stated that the LOSC neither imposes a uniform obligation to avoid any impairment of Mauritius' rights nor does it uniformly permit the UK to proceed as it wishes by merely noting Mauritius' rights, but

> "Rather, the extent of the regard required by the Convention will depend upon the *nature of the rights* held by Mauritius, *their importance*, the *extent of the anticipated impairment*, the *nature and importance of the activities contemplated* by the United Kingdom, and the *availability of alternative approaches*."[45]

May these guidelines on 'due regard' be applied in the high seas by way of analogy? The initial difference is that the coastal States holds stronger jurisdictional powers under art 56.2 LOSC compared to equal jurisdictional powers on the high seas, art 87 LOSC. Another difference is the literal context, as "due regard to the rights and duties of other states" in art 56.2 LOSC is different than "due regard for the interests of other states in their exercise of the freedom of the high seas" in art 87.2 LOSC. As a conclusion, the Tribunal's view on art 56.2 LOSC on due regard is not directly transferrable to the context of the high seas, but as the notion of 'due regard' is the same, and in the absence of

[43] United Kingdom Government <www.gov.uk/government/news/worlds-largest-no-take-marine-protected-area-celebrates-2nd-anniversary> accessed 14 June 2016.
[44] Chagos Trust <www.chagos-trust.org> accessed 14 June 2016.
[45] *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) PCA § 519. Please note that italics are inserted by author.

other interpretations, the view of the Tribunal has importance in the context of art 87.2 LOSC.[46]

Applying the Tribunal's approach, the four following guidelines have to be met. First, due regard is dependent upon the rights held by the States. On the high seas, all States' rights are equal, no matter if they be a land-locked or coastal State. Second, art 87 LOSC does not provide any hierarchy of high seas rights; it can be argued that the due regard depends on the importance of other States rights', which in the high seas context is the importance of other States interests in their exercise of the freedom of the high seas. Despite the development of international environmental law, the high seas freedoms are well preserved within, and fundamental to, the law of the sea. Third, one has to take into account the extent of the anticipated impairment. Such evaluation may depend on whether or not an MPA is single-, multi- or cross-sectorial; a no-take area has a larger anticipated impairment than a single sectorial MPA. Fourth, the nature and importance of the suggested activities can be taken into consideration. This gives focus to the MPA itself and its importance.

To conclude, 'due regard' imposes an assessment on a case-by-case basis and the guidance from the *Chagos Marine Protected Area Arbitration* will be a useful tool in clarifying 'due regard' for the establishment of MPA on the high seas. Nevertheless, under the LOSC it is not the weighing scale itself that causes the problem but rather what is put on the sides of the scale, as protection of the environment carries a weaker weight than the well-established high seas freedoms.

3.2.3 Conclusion

Does the legal regime on the high seas and protection of the marine environment provide or allow for the establishment of MPAs in areas beyond national jurisdiction? The interpretation of art 87 LOSC, read in conjunction with art 192 and 194.5 LOSC, and the provisions on high seas cooperation may provide for such legal basis. If this serves as point of departure for a legal basis, the next step is whether establishment of an MPA is consistent with the LOSC.

Essentially, the environmental provisions of the LOSC do not appear to override the high seas freedoms. The hindrance is the notion of 'due regard' as MPAs on the high seas must conform to the other freedoms in art 87 LOSC. As concluded above, for

[46] To be compared with 'reasonable regard' in the Area, see art 147.1,3 LOSC.

an MPA this requires a case-by-case analysis, with anticipated problems for the establishment of cross-sectorial and multi-sectorial MPA. This mechanism of balancing differing interest proves difficult when the explicitly stated freedoms of the high seas in art 87 LOSC carries a substantial and fundamental weight, while the protection of the marine environment and biodiversity is general, softer and lightweight, as no right for States to marine biodiversity exists under the LOSC. It can be argued that a purpose of the potential Implementing Agreement is to change the 'due regard' balance via giving more and clearer legal weight the protection of biodiversity, or more generally, to the protection of the marine environment.[47] This could for instance be technically and legally resolved by including a right and obligation to protect the marine environment including marine biodiversity in the potential Implementing Agreement. Another potential, perhaps more realistic, solution is to simply state the processes and procedures for establishment of MPAs in areas beyond national jurisdiction, without considering the 'due regard'-situation.

3.3 The seafloor

3.3.1 Introduction

The zonal approach of the LOSC and the high seas water column as a single zone adds complexity to the question of legal basis for establishment of MPAs that also encompasses the seafloor, including either the Area or the outer continental shelf. Thus, focus will be given to the relevant regimes governing the seafloor.

3.3.2 The Area

The main rule is that the spatial scope of the high seas and the Area, which is the seabed and ocean floor and subsoil in areas beyond national jurisdiction art 1.1.1 LOSC, are symmetric. The establishment of an MPA comprising the seabed beyond the continental shelf would trigger the application of the Area, Part XI LOSC. In order to assess the legal basis for establishment of an MPA in the Area, the scope and mandate of International Seabed Authority (ISA) needs to be inspected.

The ISA governs activities in the Area, art 137.2 LOSC, meaning all activities for the exploration for and exploitation of mineral resources, art 1.1.3 and 133 LOSC. In order to protect the marine environment from impacts of exploring and exploiting activ-

[47] For a discussion on the potential Implementing Agreement, see chapter 4.

ities in the Area, the ISA is to adopt appropriate measures for *inter alia* the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment, art 145 LOSC. Given ISA's mandate, could the ISA create a deep seabed MPA, as this deals neither with exploration or exploitation of mineral resources? Some argue that ISA's competencies lies solely in the exclusive mandate to govern all activities regarding the exploitation of mineral resources in the area, and that the protection of the deep seabed as an ecosystem falls outside the scope of ISA's mandate.[48] Others argue that the competence under art 145 LOSC and the Council's competence under art 162.2.x LOSC form a legal basis for ISA to establish areas where mining activities cannot take place.[49] From this follows that the ISA has mandate to establish MPA closed for mining activities on the legal basis of art 145 LOSC and the Council under art 162.2.x LOSC when it may coincide with areas of marine value.

To establish an MPA that incorporates the protection of the water column and the Area, mechanisms for coordination are necessary and will involve different institutions and not solely ISA. The issue of coordination of mechanisms governing the Area and high seas is required for the establishment of an MPA.

3.3.3 The outer continental shelf in absence of final and binding limits

As noted above, the main rule is that the spatial scope of the high seas and the Area are symmetric. An exception to this symmetry occurs if a coastal State has final and binding limits for its outer continental shelf. If so, the water column above the shelf falls under the high seas regime, while the coastal State has sovereign rights over the outer continental shelf for the purpose of exploring it and exploiting its natural resources, art 77 LOSC, as long as it does not infringe or result in any unjustifiable interference with rights and freedoms of other States following from the LOSC, art 78.2 LOSC.[50]

However, the legal regime governing this asymmetrical scenario is not as clear-cut when an outer continental shelf is in absence of its final and binding limits. In order for the limits of the outer continental shelf beyond 200 nm to be final and binding, the

[48] Matz-Lück, Fuchs, The impact of OSPAR on protected area management beyond national jurisdiction: effective regional cooperation or a network of papers parks?, p. 158.
[49] Molenaar, Elferink, Marine protected areas in areas beyond national jurisdiction, the pioneering efforts under the OSPAR Convention, p. 8.
[50] As shown by Annex III, the majority of currently established MPAs in areas beyond national jurisdiction are based on this type of scenario.

coastal State must make a submission to the CLCS in accordance with art 4 annex II LOSC. The CLCS will then make a recommendation and the limits of the shelf established by a coastal State on basis of CLCS's recommendation are final and binding, art 76.7,8 LOSC.[51] Due to the workload of the CLCS, it is a time consuming process before the States receive a recommendation. Until CLCS has completed its recommendations, the submitted limits of respective shelves remains uncertain. The consequence is that during the waiting time, a complicated legal situation for the establishment of MPA in areas beyond national jurisdiction may be created.[52]

Such scenario begs the question on what regime applies on the seabed before the CLCS has made its recommendation making the limits of the CS final and binding; the Area or the continental shelf? This is of interest in the Central Arctic Ocean, see map in Annex II, as Russia, Norway and Denmark have made their submissions to CLCS.[53] Canada intends to submit a claim on the continental shelf beyond 200 nm in the Arctic Ocean at a later date[54] and the status of a potential outer continental shelf claim from the US is uncertain, as the US is not a party to the LOSC.

What speaks in favour of coastal State jurisdiction before the establishment of final and binding limits of the outer continental shelf is that art 77.3 LOSC affirms that the continental shelf does not depend on occupation and makes no difference between outer or inner limits. In addition to this, art 76.4 LOSC can be seen as premised on the presence of a pre-existing continental shelf entitlement.[55] Moreover, the arbitral tribunal in *Barbados v Trinidad and Tobago* stated that there is only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf.[56] In the *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (Myanmar v Bangladesh), the International law of the Sea Tribunal (ITLOS) rather clearly stated that a coastal State's entitlement to the continental shelf does not require the establishment of outer limits.[57]

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[51] It can be noted that the CLCS has no legal expertise.
[52] Matz-Lück, Fuchs, The impact of OSPAR on protected area management beyond national jurisdiction: effective regional cooperation or a network of papers parks?, p. 162.
[53] The CLCS submissions can be accessed at United Nations Division for Ocean Affairs and the Law of the Sea, Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to art 76.8 LOSC <www.un.org/Depts/los/clcs_new/commission_submissions.htm> accessed 14 June 2016.
[54] Canada's partial submission <www.un.org/Depts/los/clcs_new/submissions_files/submission_can_70_2013.htm> accessed 14 June 2016.
[55] Elferink, The Regime for Marine Scientific Research in the Arctic: Implications of the Absence of Outer Limits of the Continental Shelf beyond 200 nautical miles, p. 192.
[56] *Barbados and the Republic of Trinidad and Tobago* (Barbados v. Trinidad and Tobago) PCA § 213.
[57] *Myanmar/Bangladesh* (Myanmar v Bangladesh) ITLOS § 409.

Together, this proves an inherent right for a coastal State to its continental shelf within and beyond 200 nm.

For the establishment of MPAs, an illustrative example was the plan for extending the area of Charlie-Gibbs South high seas MPA, which OSPAR Commission, after Iceland's protest, reduced in order to prevent overlap with Iceland's submission on the outer limits of if continental shelf.[58] The coastal State clearly has jurisdiction over the outer continental shelf even if it is under CLCS' consideration.

Moreover, States' *opinio juris* have been summarised for coastal State's rights over its continental shelf beyond 200 nm to be respected where applicable.[59]

A counter argument is precautionary, in the sense that it seeks to avoid unilateral, indiscriminate action by coastal States until CLCS has made their recommendation. In light of the case law outlined above, this type of legal argumentation has no bearing.

To conclude, what are the implications for the establishment MPA in the Central Arctic Ocean? The coastal States have an inherent right to outer continental shelf even if final and legally binding limits have been established. The coastal State therefore has exclusive rights over the outer continental shelf, stemming from art 79, 80, 81, 246 LOSC and also argued to follow from provisions on pollution from activities with an impact on the continental shelf, such as arts 79, 80, 208, 210, 216 LOSC.[60] The finding is therefore that in absence of final and binding limits on the outer continental shelf, which is the situation in parts of the Central Arctic Ocean, the establishment of MPAs cannot be undertaken without the express consent of the coastal State parties concerned.

3.4 Conclusion

The legal basis under the LOSC for establishment of MPAs in areas beyond national jurisdiction is a controversial issue. This is due to the fact that no provision prohibits the establishment of MPAs beyond national jurisdiction, while at the same time the LOSC contains no explicit legal basis that allows the establishment of MPAs in areas beyond national jurisdiction and there exist explicit freedoms of the sea.

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[58] Matz-Lück, Fuchs, The impact of OSPAR on protected area management beyond national jurisdiction: effective regional cooperation or a network of papers parks?, p. 162.

[59] "There also appears to be a convergence of views that the rights of the coastal State over its continental shelf, including beyond 200 nautical miles where applicable, should be respected", Chair's overview over the first session of the Preparatory committee, annex II § 6, p. 19 f. <www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf> accessed 23 June 2016.

[60] Salpin, Germani, Marine protected areas beyond areas of national jurisdiction: what's mine is mine and what you think is yours is also mine, p. 178.

The major challenge under the LOSC is the lack of an explicit legal basis for establishment. If the LOSC provided a legal basis for establishment of MPAs in areas beyond national jurisdiction, the rationale and purpose of a potential Implementing Agreement would seem to be superfluous. In addition to this, the fragmented and sectored character of the LOSC via species and sector-specified regulations and the different legal regimes such as the high seas, the Area and the outer continental shelf complicates establishment for MPAs under the current framework and requires coordination as well as cooperation by different bodies, as the ISA or the coastal State exercises jurisdiction under their respective mandate and sovereignty.

The potential Implementing Agreement on the other hand is a promising feature in the context of the international law of the sea.

4 Legal basis under the potential Implementing Agreement

4.1 Introduction

In 2015, the United Nations General Assembly adopted a resolution for the development of an international legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[61] To that end, a Preparatory Committee has been established to make recommendations to the United Nations General Assembly on features of a draft text. The matters are in particular marine genetic resources, including questions on the sharing of benefits, measures such as area-based management measures, including MPAs, environmental impact assessments and capacity-building and the transfer of marine technology.[62] In this regard, focus here is on MPAs.

It is debatable whether the United Nations General Assembly resolution indicates the actual intergovernmental negotiations of an implementing agreement or if the decision to proceed to a diplomatic conference of the parties for the establishment of an implementing agreement has yet to be made. Within the framework of the LOSC, two implementation agreements exist and may thus be a precedent: the Fish Stocks Agreement and the Deep Seabed Agreement.[63] In similarity with these two agreements, the potential Implementing Agreement will apply only to those States that ratify the Implementing Agreement regardless of whether they are a party to the LOSC.

4.2 Suggested basis for establishment

4.2.1 Legal basis

The process seems to be aimed to increase both the rights of States to be able to collectively adopt MPAs in areas beyond national jurisdiction and to create obligations on States to both adopt MPAs and to comply with such measures when adopted.

The legal basis for the potential Implementing Agreement is likely to be based on Part XII LOSC. It can be questioned whether the potential Implementing Agreement implements the Convention in this regard, as the LOSC does not contain any explicit substantive provisions on the establishment MPAs in areas beyond national jurisdiction.

[61] United Nations General Assembly Resolution A/RES/69/292.
[62] United Nations General Assembly Resolution A/RES/69/292 p. 3.
[63] Fish Stocks Agreement, 1995. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, in force 11 December 2001. 2167 U.N.T.S. 3, Deep Seabed Agreement, 1994. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, in force 28 July 1996. 1836 U.N.T.S 3.

However, as the LOSC is seen as a framework convention, a dynamic interpretation and the specification of the provisions in Part XII renders this legally possible. The legal basis for establishment of MPAs beyond national jurisdiction would be based on the potential Implementing Agreement, which can be anticipated to contain provisions to address various governance objectives and principles, such as the precautionary principle and ecosystem approaches,[64] alike the Fish Stocks Agreement.

4.2.2 Institutional mechanism

In the discussions about MPAs and area-based management measures for the ABNJ, the underlying assumptions appears to be that a new treaty process or organization will approve MPAs in areas beyond national jurisdiction,[65] instead of a legal basis on coordination and cooperation for existing sectorial and regional organisations. Diverging views have been expressed regarding the needed level of protection in MPAs and the mechanism to designate those via global, regional or a combined system.[66]

It is unclear whether States have an appetite for a new institutional organization or treaty-body with the authority to assess and approve MPAs in areas beyond national jurisdiction. The cost-effectiveness of relying on existing structures such as IMO, regional fisheries management organizations (RFMOs) and regional sea conventions has been pointed out as an alternative.[67] It can be assumed that States are reluctant to agree upon new bodies or organisations due to the fact that States have to finance the costs of such institutions, its personnel and buildings. Moreover, such an institutional authority may duplicate and weaken already existing organisations. Nevertheless, without some kind of centralised authority, the framework for the establishment of MPAs risks fragmentation.[68] One way ahead may be that proposals for the establishment should be made collectively including through existing organizations and be done in a coordinating approach between global and regional approaches.[69] Other options could

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[64] Earth Negotiations Bulletin vol. 25 no. 106, p. 9f.
[65] Chair's overview over the first session of the Preparatory committee, p. 11. <www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf> accessed 23 June 2016.
[66] Chair's overview over the first session of the Preparatory committee, annex II § 6, p. 19 f. <www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf> accessed 23 June 2016.
[67] See comments by Iceland and Norway, Earth Negotiations Bulletin vol. 25.99 <www.iisd.ca/vol25/enb2599e.html> accessed 2 July 2016.
[68] Policy Department A for the Committee on Environment, Public Health and Food Safety, Towards a Possible International Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction, p. 52. <www.europarl.europa.eu/RegData/etudes/STUD/2014/536292/IPOL_STU(2014)536292_EN.pdf> accessed 10 July 2016.
[69] Earth Negotiations Bulletin vol. 25 no. 106, p. 11.

be to establish bodies, committees, Secretariat or Conference of Parties as found in other international environmental agreements, such as the CBD.

4.2.3 Governance with linkage to a regional approach

When it comes to the basis for governance of MPAs, different alternatives have been put forward. Some suggest regional and sectorial bodies to develop measures to address biodiversity in areas beyond national jurisdiction. Others argue that MPAs should be established under regional leadership, as guided by Fish Stocks Agreement and work with existing organizations including RFMOs.[70]

The limitation of the regional approach is the varying capacities, financial resources and difference amongst regional actors' priorities that may lead to discrepancies between ocean regions.[71] Considering that the whole ocean is an ecosystem and that the problems of ocean space are closely interrelated and need to be considered as a whole as stated in the LOSC preamble, this is a negative outcome. The positive outcome of the regional approach is deeper knowledge and insight of regional specificities.[72]

4.3 Conclusion

Whether or not an institutional mechanism will be put in place, similar to the ISA regarding the deep seabed or a structure made up of a Secretariat and connected bodies, or governance with a linkage to more regional approaches, similar to RFMO's, remains to be negotiated. The legal-technical creation of a legal basis is difficult to predict based on the documents published in the aftermath of the first meeting of the Preparatory Committee. There does not appear to have yet been any detailed proposal submitted by any States.

In creating a legal basis for the establishment of MPAs in areas beyond national jurisdiction, it seems like the underlying issues are, first, to create greater legal clarity on which States can engage in the creation of a regional MPA in areas beyond national jurisdiction, and second, when so adopted, if non-participating States in the adoption who are party to the potential Implementing Agreement will be bound to respect, or at a minimum level, bound to not undermine the MPA. These two questions will now be discussed in the context of Central Arctic Ocean.

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[70] Earth Negotiations Bulletin vol. 25 no. 106 p. 10 f.
[71] Druel, Marine protected areas in areas beyond national jurisdiction: The state of play, p. 15.
[72] Druel, Marine protected areas in areas beyond national jurisdiction: The state of play, p. 15.

5 An outlook for establishment in the Central Arctic Ocean

5.1 Introduction

5.1.1 Regionalization

As with other ocean areas beyond national jurisdiction, both regional and non-regional States have rights and obligations regarding the Central Arctic Ocean. When it comes to ocean management for the Central Arctic Ocean, the increased cooperation and common understanding of policy development indicates that the area is undergoing regionalization. This marine regionalism has support in the LOSC by the legal basis found in i.e. art 121 LOSC "through an appropriate regional organization", art 194.1 LOSC "individually or jointly as appropriate", art 197 LOSC "and, as appropriate, on a regional basis".[73] Two examples supporting this perception are the Arctic Five and the Arctic Council.

5.1.2 Two main routes for regional cooperation

The Arctic Five agreed upon the first Arctic-specific agreement in the 1970's.[74] During the Cold War, the Arctic Five relations froze to some extent, but the cooperation in and around the Arctic Ocean was clearly put back on the agenda in 2008, which resulted in the Ilulissat Declaration.[75] More recently regarding fisheries, the Arctic Five have adopted the Oslo Declaration concerning the prevention of unregulated high seas fishing in the Central Arctic Ocean.[76] The Arctic Five have committed to implement interim measures for vessels flying their flags to conduct commercial fishing in the region only pursuant to regional fisheries management organisations or arrangements. A so-called "Broader Process" has followed, where the Arctic Five plus five non-regional actors China, the European Union (EU), Iceland, Japan and South Korea have participated in an accord for a step-by-step process to set binding interim measures.[77]

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[73] Lalonde, An 'à la carte' - Regional seas arrangement for the Arctic, Powerpoint presentation, p. 9 f.
[74] Polar Bears Agreement, 1973. Agreement on the Conservation of Polar Bears, 15 November 1973, in force 26 May 1976, 13 I.L.M 1974.
[75] Ilulissat Declaration, 2008. Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008.
[76] Oslo Declaration, 2015. Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean. Oslo, Norway, 16 July 2015.
[77] Third meeting of the Broader Process, 6-8 July 2016 in Canada, <www.ec.europa.eu/newsroom/mare/itemdetail.cfm?subweb=342&lang=en&item_id=33032> accessed 12 July 2016.

The Arctic Council is a high-level intergovernmental forum, see the Ottawa Declaration.[78] Its members consists of the Arctic Eight, while non-Arctic States and other organizations can achieve and have observer status, art 2-3 Ottawa Declaration. The unique feature of the Arctic Council is its permanent participants, which are six Arctic organisations of indigenous peoples, who have full rights of consultation regarding the Arctic Council's negotiations and decisions. The Arctic Council excludes military and defense matters from its remit.

The mandate of cooperation includes "all common Arctic issues", under which the establishment of MPAs could fall. The Arctic Council legal status, unlike OSPAR, various regional seas organisations or the IMO, cannot adopt legally binding measures. Without a change in its structure, scope and operation, the Arctic Council may not be the appropriate body for the establishment of MPAs in the central Arctic Ocean.

However, in 2015, the Arctic Council Ministers established a Task Force on Marine Cooperation with the purpose to "assess the future needs for a regional seas program or other mechanism, as appropriate, for increased cooperation in Arctic marine areas".[79] Such a regional seas programme or mechanism, depending upon its features and structure, could bind the Arctic States.

Respecting a regional seas approach to the Central Arctic Ocean, experience can be drawn from the UN Environmental Regional Seas Programme.[80] These aim to address the degradation of the oceans through a sustainable management and use of the marine environment via engaging neighbouring countries in comprehensive and specific actions to protect their shared marine environment. The Programme has to be made to measure its own governments and institutions to suit the environmental challenges in the relevant region.[81] One regional seas type of programme with relevance for a small part of the central Arctic Ocean is OSPAR. This approach can be compared and contrasted with the other regional polar approach being undertaken in Antarctic waters.[82]

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[78] Ottawa Declaration, 1996. Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996. 35 I.L.M. 1387.
[79] Iqaluit Declaration, 2015. Iqaluit Declaration on the occasion of the Ninth Ministerial Meeting of the Arctic Council, Iqaliut, Canada. 24 April 2015, § 43.
[80] United Nations Environmental Programme, Regional Seas Programme <www.unep.org/regionalseas/default.asp> accessed 2 July 2016.
[81] Lalonde, An 'à la carte' - Regional seas arrangement for the Arctic, Powerpoint presentation, p. 5.
[82] Antarctic Treaty, 1959. Antarctic Treaty, 1 December 1959, in force 23 June 1961, 402 U.N.T.S. 71.

5.2 Threshold questions for establishment under the potential Implementing Agreement

5.2.1 Which States will have competence to legally establish MPAs?

A threshold question for the discussion during the negotiation of the potential Implementing Agreement must be which States that would be able to legally establish an MPA for areas beyond national jurisdiction. There seem to be two scenarios for which States that will have competence to legally establish MPAs in areas beyond national jurisdiction. The following part will put some light on this question in the context of the Central Arctic Ocean.

The first scenario regards the competence to establish and/or to participate in the creation of a MPA in areas beyond national jurisdiction under the potential Implementing Agreement. This scenario suggests that the potential Implementing Agreement creates its own procedures and processes for the establishment of MPAs. MPAs in the Central Arctic Ocean will then be established through the potential Implementing Agreement.

If so, which States will have competence to establish an MPA in the central Arctic Ocean via the potential Implementing Agreement? Scholars have presented six principal perceptions that reflect, overlap or contrast States' various views of the Arctic region.[83] First, it is an area of economic development due to its hydrocarbon and marine living resources. Second, it is a vessel highway for navigation connected to economic development within and beyond the region. Third, it is an area with vulnerable environment that demands preservation or new/other approaches to environmental protection. Fourth, it is an area of research and study. Fifth, it is an area of military or strategic concern. Finally, sixth, it is an ocean neighbourhood for people who have traditionally lived in the adjacent land.[84]

In the perspective of MPAs, it is a difficult task to balance the different interests of States.[85] It could be argued that States are more attentive to ocean areas close to their geographical location. If argued on this line and to start with regional States' competence to establish an MPA, one must consider whether all of the Arctic regional

[83] McDorman, A note on Arctic Ocean Regional Governance, p. 401.
[84] McDorman, A note on Arctic Ocean Regional Governance, p. 401.
[85] Apart from States, other stakeholders may also have a voice, such as non-governmental organizations promoting environmental protection and the Arctic indigenous people, recognized to some extent via the Arctic Council. It has been suggested that States considering the establishment of MPAs should consult with those stakeholders, in order to secure the support of the groups most likely to be affected by the establishment. For this, see Pew Charitable Trust, Marine protected areas beyond national jurisdiction, p. 6.

States must be a party and thus involved in the establishment of an MPA in the Central Arctic Ocean.

In this regard, Russia plays an important role as it is considered to be "the" Arctic State with the largest capacity to undertake activities, while it at the same time puts the strongest national pivot towards the Arctic.[86] Even if all the regional States do not achieve consensus, it is important for the issue of compliance and enforcement to have and secure a regional support for the establishment. It can be questioned how likely are the regional Arctic States to accept an MPA that covers all or parts of the Central Arctic Ocean and creates a park or no-go area. Scholars argue that the submission of outer continental shelf claims "indicates a political tendency toward claiming the seabed for extractive purposes, and thus indicating possible lack of political will to restrict human activity in the areas beyond national jurisdiction".[87] Divergent to this viewpoint is the US fisheries moratorium established within the 200 nm zone north of Alaska,[88] which suggest a possible US support to park-like conditions also in the Central Arctic Ocean. The same indication derives from the Arctic Five's Oslo Fisheries Declaration on interim measures for commercial fishing in the Central Arctic Ocean.

This regional State-perspective is however not legally convincing. From a legal perspective, areas beyond national jurisdiction are indeed areas where all States have the same legal rights and obligations under the LOSC. This is also underlined by non-regional States' increasing interest in the Arctic region, exemplified by the Broader Process and the increase of observers to the Arctic Council. This has been explained by an interest of non-regional States in navigation, as all States are entitled to have their vessels flying their flags operating in the Arctic Ocean.[89] Non-regional States may also have a large interest in exploitation of natural resources, such as States with significant distant-water fishing fleets. At the same time, non-regional States and groups may have an agenda for environmental protection of the region.

This begs the questions whether non-regional States, without the regional Arctic States, may establish a Central Arctic Ocean MPA? For example, could the EU propose the creation of an MPA in this region? The EU has recently published an integrated EU policy for the Arctic, stating that the EU should promote the establishment of MPAs in

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[86] McDorman, A note on Arctic Ocean Regional Governance, p. 403.
[87] Morris, Hossain, Legal Instruments for Marine Sanctuary in the High Arctic, p. 11.
[88] US Fisheries plan for the Arctic, www.noaanews.noaa.gov/stories2009/20090820_arctic.html (accessed 11 July 2016).
[89] Corell, The Arctic And The Present Geopolitical Situation, p. 15.

the Arctic and recognizing these areas as an important element in the effort to preserve biodiversity.[90] By such a statement, the EU arguably is clearly showing an interest in the establishment of MPAs. At the same time, it could be argued that it is easy for the EU to advocate a position in the Central Arctic Ocean since the establishment of MPAs does not directly affect them. The answer to this question must be that non-regional States, under this first scenario, must be able to propose the establishment of an MPA in the Central Arctic Ocean.

The second scenario regards the relationship between an Arctic MPA Agreement and the potential Implementing Agreement. This would mean that an Arctic MPA Agreement creates the MPA, which then has to establish its relationship to the potential Implementing Agreement, for instance via a decision-based mechanism under the Implementing agreement. How may then non-regional States be included in the establishment of any Central Arctic Ocean MPAs? To answer this question, two analogies and experiences from fisheries may be of value.

The first analogy for inclusion of non-regional States is based on the Oslo Fisheries Declaration model creating a core based on the regional coastal States (the Arctic Five) for the establishment of an MPA with other interested States invited to participate in a similar broader process. Instead of having non-regional State as a direct participant in the creation of an MPA, they can be included as a State entity that can join the MPA afterwards. In this process, the permanent participants are excluded.

The second analogy derives from the model in the Fish Stocks Agreement and may be of value as an option to include non-regional States. Under the Fish Stocks Agreement, States having "a real interest in fisheries" may become members or participants in a regional fisheries arrangement, art 8.3 Fish Stocks Agreement.[91] The term "real interest" is not defined in the Fish Stocks Agreement. What constitutes a "real interest" is much debated.[92] The ordinary meaning of "real interest" is broad as it may include both economic and environmental interests, art 31.1. VCLT. The term's closest context is "real interest in fisheries", or if this model were imitated, the term may hypothetically be "real interest in biodiversity". To create an MPA requires restriction on, amongst others, navigation, dumping and research. The question is if a model with "real interest

[90] European Commission, An integrated European Union policy for the Arctic, p. 7f.
[91] See also art 8.5 and 9.2 Fish Stocks Agreement.
[92] See Molenaar, The Concept of 'Real Interest' and Other Aspects of Cooperation through Regional Fisheries Management Mechanism, p. 493ff.

in biodiversity" will lead to only being inclusive of non-users States. How can a State show a "real interest in biodiversity" - by words, actions or funding? Even if a real interest can be said to exist, the participation can be hindered by the term "may become", art 8.3 Fish Stocks Agreement.

Fishing States almost exclusively makes up the participation in regional fishery bodies. If State A has a big fishing fleet, State A is likely to have a different weighing of instruments than State B that do not fish. The perspectives of bodies that have non-users are thus very different, as they emphasize the importance of marine biodiversity rather than fisheries bodies. A case in point is the International Convention for the Regulation of Whaling (Whaling Convention).[93] The Whaling Convention has a different model for participation than the Fish Stocks Agreement and is thus dominated by strong voices for conservation.[94] The Whaling Convention proves, to some extent, the situation of States without a real interest in the resource "preserving" the resource.

It comes down to the answer that the more States engage, the better. For the establishment of MPAs, it is necessary to engage actors beyond the regional States in order to assist with implementation and compliance. To conclude, the strongest argument for the establishment of MPAs in the Central Arctic Ocean as other oceans seems to be based on a regional States approach, as it is generally more easily to manage via a regional approach. Models for this can be found in the Arctic Five's Fisheries Declaration, with the possibility to invite non-regional States, although soft-law. A similar core function can be said to exist within RFMO's under the Fish Stocks Agreement, where States with a "real interest" may become members.

5.2.2 How can the potential Implementing Agreement extend to non-parties?

The next critical issue for the establishment of MPAs in the Central Arctic Ocean is how the potential Implementing Agreement can, if at all, extend to non-parties. A treaty does not create obligations or rights for a third State without its consent, art 34 VCLT.

If the potential Implementing Agreement creates its own procedures for the creation of MPAs in areas beyond national jurisdiction there will be no need for a separate Arctic MPA Agreement, as described under the first scenario. The discussion is then instead which States can trigger the creation of an MPA under the potential

[93] ICRW, 1946. International Convention for the Regulation of Whaling, 2 December 1946, in force 10 November 1948, 161 U.N.T.S. 72.
[94] See in this regard Molenaar, Managing Biodiversity in Areas Beyond National Jurisdiction, p. 110.

Implementing Agreement and which States must or have to be involved and how might the potential Implementing Agreement deal with non-participating States, as discussed under section 5.2.1. An MPA established under the potential Implementing Agreement will simply bind the parties of the Agreement. It could be possibly to arrange memorandums of understandings with other existing bodies, such as RFMO's. Currently, NEAFC has jurisdiction over a small portion of the Central Arctic Ocean. With regards to the ecosystem approach found in the Fish Stocks Agreement and provided that the ecosystem approach is holistic, it may require regional fisheries bodies to align and cooperate with established MPAs as it may be unavoidable to impose some obligation on States that are parties also to the respective fisheries bodies.

However, if an Arctic MPA Agreement creates the MPA, which then has to establish its relationship to the potential Implementing Agreement, one solution could be to include a provision for non-participating States in the Arctic MPA Agreement to be legally bound to comply with the MPA if they are a State party to the potential Implementing Agreement. It could indicate a provision that binds its State parties to any regional MPA Agreement, in terms of imposing an obligation on States to comply. In this way, it will extend to non-participating States that are parties to the potential Implementing Agreement. For this to be accomplished, a Central Arctic Ocean MPA would have to be adopted consistent with the requirement of the potential Implementing Agreement or to be assessed in some manner as being compatible with the goals and purposes of the potential Implementing Agreement. It is likely that this would only be applicable and possible if the potential Implementing Agreement has a process for evaluating and approving an MPA. This is due to the fact that States are unlikely to want to bind themselves in the potential Implementing Agreement to an MPA Agreement to which they have no input.

5.3 Conclusion

The main point regarding legitimacy in the ocean region is that the Arctic coastal States do not have any greater jurisdiction than non-regional States in areas beyond their exclusive economic zones and outer continental shelves. Moreover, an inclusive model will strengthen the legitimacy of an established MPA.

Another point for the establishment of MPAs is that the more States that are involved, the better for the compliance with the MPAs. More generally it can be stated

that non-regional States are situated in an easier position to advocate for the establishment of MPAs, as the establishment of MPAs does not directly affect them. As a non-regional State, the interests may be very different than that of the regional States and the reconciliation of these interests, as well as internally between regional States, may not always be easy. Two options are suggested; either to create an analogy of the soft-law Arctic Five and its broader process or to make an analogy of the Fish Stocks Agreement's model to provide establishment of MPAs in the areas beyond national jurisdiction.

Further questions arise whether the potential Implementing Agreement will extend, if at all, to non-party States. This raises questions regarding what States would be able to enforce any legal measures adopted pursuant to an MPA. Compliance by non-party States is necessary. Port state measures and memorandums of understandings may play a role, in similarity with the work to combat unregulated fishing, as regards non-compliant non-party States. However, by creating provisions for non-participating States who are party to the potential Implementing Agreement to be bound to respect or at least not undermine the MPA, an effective implementation can be enhanced. In this way, the potential Implementing Agreement could extend to non-participating States in the establishment under the Arctic MPA Agreement that are parties to the potential Implementing Agreement.

6 Concluding remarks

6.1 Summary of major findings

The aim of the thesis has been to present and analyse the legal basis under the LOSC and its potential Implementing Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction for the establishment of MPAs beyond national jurisdiction. Springing from this, the paper has discussed the regionalization of the Arctic and the issues of legal competence for the establishment of MPAs respecting all or parts of the Central Arctic Ocean.

The major finding regarding the current legal basis for the establishment of MPAs in Central Arctic Ocean under the LOSC is that no explicit legal basis exists. This is further complicated by the operation of the 'due regard' wording in art 87 LOSC that presupposes an assessment on case-by-case basis. As found above, the protection of the environment carries a lesser weight than the established, although not unconditional, high seas freedoms. This means that the balancing mechanism in the LOSC gives precedence to the high seas freedoms. Following this, the establishment of MPAs in areas beyond national jurisdiction is not achievable under the current legal framework.

One way of solving this may be through the potential Implementing Agreement, which may replace the balance mechanism and wording in art 87 LOSC to provide greater legal clarity and provide greater weight to the conservation of and sustainable use of marine biodiversity in areas beyond national jurisdiction. It is too early to speculate on the outcome of a technical legal basis and the actual content of what measure may be adopted for the establishment of MPAs beyond national jurisdiction.

Nevertheless, the threshold question for the establishment of MPAs in areas beyond national jurisdiction is which States that are the relevant players that can initiate discussions of establishment and which States that can or must be involved in the creation of an Central Arctic Ocean MPA. The finding in this regard is that regional participation in the establishment may safeguard and facilitate compliance and enforcement. In line with this, it is preferable as part of an MPA to adopt measures for non-participating States that are non-participating in the establishment of the MPA, who are party to the potential Implementing Agreement, to be bound to respect or at least not undermine the MPA. In this manner, an effective implementation of the MPA can be safeguarded and the potential Implementing Agreement will extend to non-participating States that are parties to the potential Implementing Agreement.

6.2 Outlook

What is likely to happen? Two scenarios regarding the legal establishment of MPAs in areas beyond national jurisdiction have been discussed under section 5.2. The first scenario is that the potential Implementing Agreement creates its own procedures and processes for the establishment of MPAs, in other words as the establishment of an Arctic MPA through the potential Implementing Agreement. The second scenario is that an Arctic MPA Agreement creates the MPA, which relationship to the potential Implementing Agreement then has to be established. To solve the difficulties highlighted in the thesis, it is necessary to include an obligation to comply with and protect the marine environment. The implications of the establishment of MPAs are also that of enforcement and the issue of third States due to the construction of jurisdiction on the high seas. For this, perhaps a facilitative compliance mechanism and monitoring system could be introduced under the potential Implementing Agreement.

In addition to those two scenarios, there is a third scenario, namely the situation of no adoption of the potential Implementing Agreement, and then what? The implication of the latter is that it cannot be entirely excluded that the negotiations for the potential Implementing Agreement will fail and no agreement will be forthcoming. This is perhaps a common issue of balancing international public law: creating a toothless instrument supported by many States or a more demanding instrument not being universally ratified. If so, there are other types of processes to ensure an ecosystem ocean management via coordination and cooperation between bodies. Nevertheless, the result will be that no global system will exist for the protection and conservation of marine biodiversity in areas beyond national jurisdiction, which must be considered as a gap in the legal framework of the oceans.

To conclude, the establishment of MPAs in the Central Arctic Ocean can preserve the marine biodiversity resilience in a current vulnerable and in the future potentially exposed area. As the preamble in the LOSC acknowledges - the problems of ocean space are closely interrelated and need to be considered as a whole. Conservation of marine biodiversity does not have to contradict a sustainable use. The establishment of MPAs beyond national jurisdiction will be an important tool to protect the marine environment and build resilience to anthropogenic pressure. The potential Implementing Agreement has an important role to play in this regard, by giving required legal weight to the protection of marine environment in areas beyond national jurisdiction.

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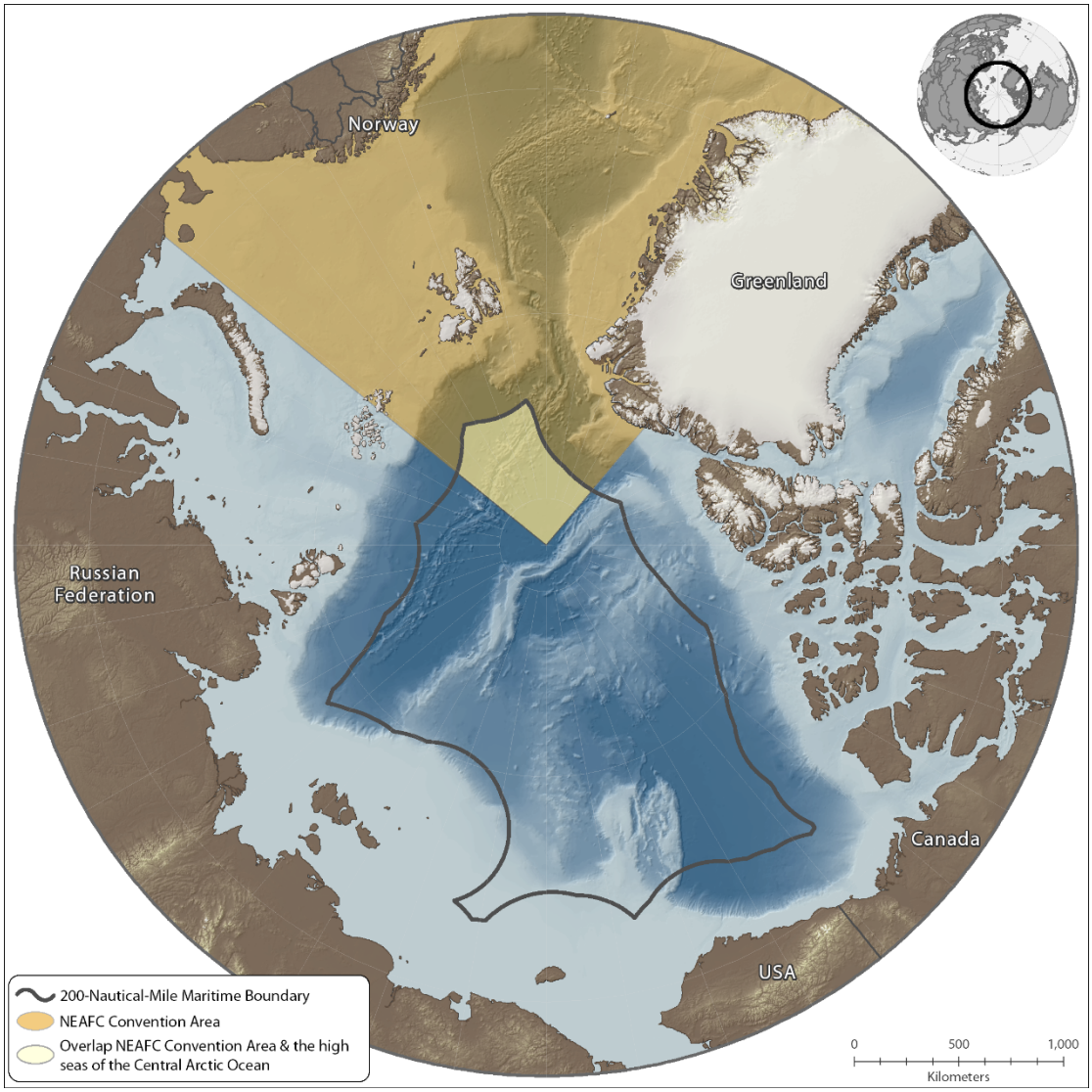
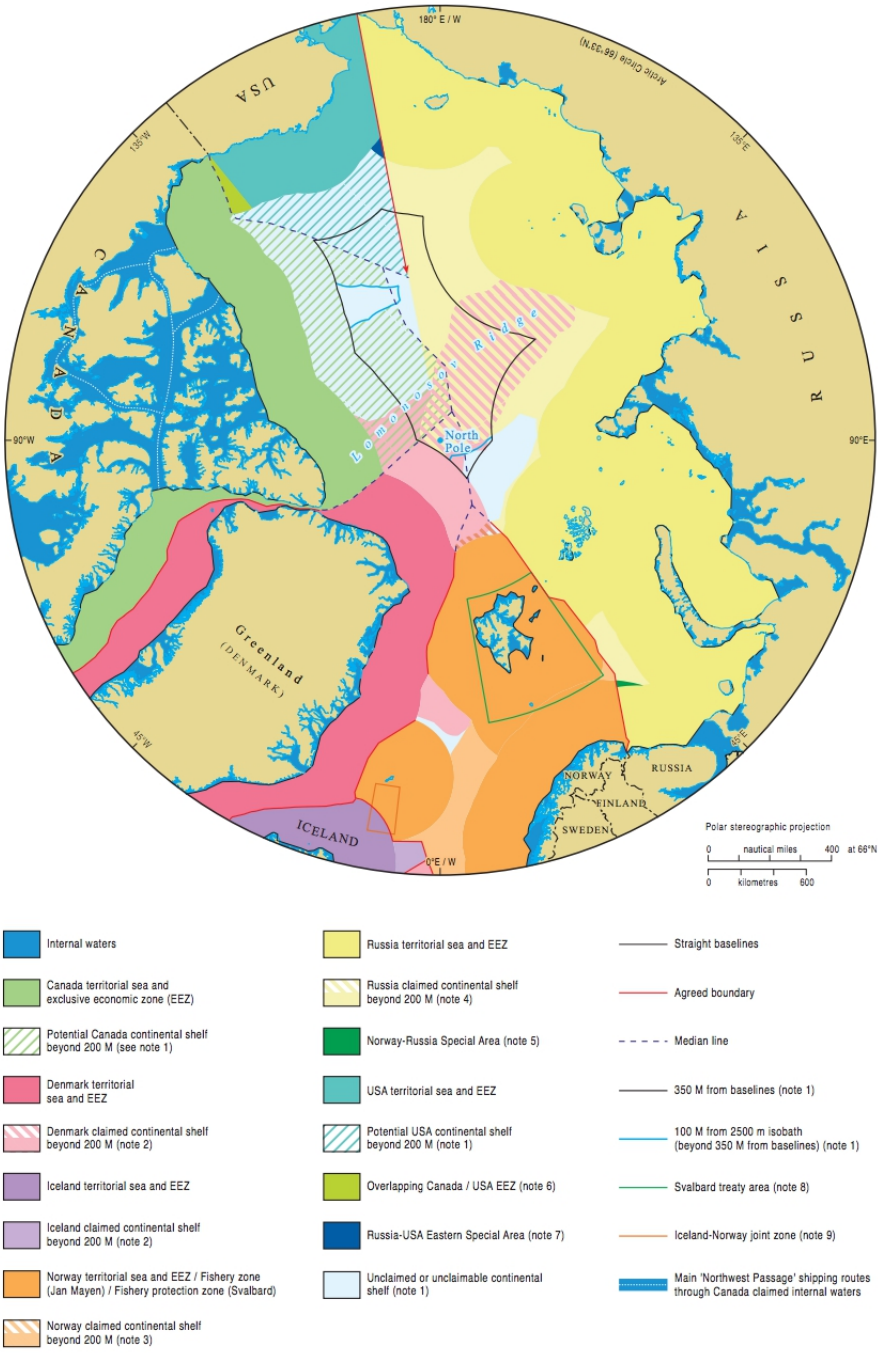
Annex I Map over the Central Arctic Ocean

Map over the high seas of the Central Arctic Ocean and the NEAFC Convention Area, used with permission of the Pew Charitable Trusts.



Annex II Map of claimed and potential boundaries in the Arctic

This map illustrates known claims and agreed boundaries, plus potential areas that might be claimed in the future, in the Arctic region, as of 1st August 2015. Source: IBRU, Durham University. For viewing briefing notes that accompany the map, visit <www.durham.ac.uk/ibru/resources/arctic>, accessed 14th June 2016.



Annex III Established MPAs in areas beyond national jurisdiction

The purpose of this study is to find which MPAs has been established in areas beyond national jurisdiction and which of them that are located on an outer continental shelf when limits are not final and binding, to support chapter 3.

The method is the following. Based on MPAatlas (www.mpatlas.org/explore/#), which uses the major data sources below, I searched for High seas, ABNJ. Based on that list, I compiled the annex below. In this annex, I chose the pure MPA's, with status as designated. Of the designated MPAs, I found the location and was able to determine if situated in areas beyond national jurisdiction or on an outer continental shelf. This shows that of the so far established MPAs, the majority are established in the high seas water column while the seafloor is located on a coastal state's outer continental shelf.

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MPA	**Designation**	**Area**	**Status**	**Location**	**Seabed subject to outer CS claim?**
East Antarctic	MPA	ABNJ	*Proposed*		
Mediterranean	*High seas trawl closure*	ABNJ	Designated		
Ross Sea	MPA (CCAMLR)	ABNJ	Proposed		
Areas of Argentina/Uruguay		ABNJ	Proposed		
Hatton Rockall Closures (NEAFC)	*High seas trawl closure*	ABNJ	Designated		
VME Closures (NEAFC)	*High seas trawl closure*	ABNJ	Designated		
Bottom gear closures (SEAFO)	*High seas trawl closure*	ABNJ	Designated		
Fogo closures (NAFO)	*High seas trawl closure*	ABNJ	Designated		
Seamount & Coral closures (NAFO)	*High seas trawl closure*	ABNJ	Designated		
Closed blocks (SPRFMO)	*High seas trawl closure*	ABNJ	Designated		

Patagonia-Antarctica Seascape	No-take MPA	ABNJ	Proposed		
Rockall Haddock Box (NEAFC)	*High seas trawl closure*		Designated		
Fishery restricted area (GFCM)	*High seas trawl closure*		Designated		
VME Area closure (CCAMLR)	*High seas trawl closure*		Designated		
Coral & sponge closures (NAFO)	*High seas trawl closure*		Designated		
Bottom trawl closure (NPFC)	*High seas trawl closure*		Designated		
Pelagos sanctuary for the conservation of marine mammals	Specially PA of marine importance (Barcelona Convention)	ABNJ			Wrong data, not ABNJ
Milne Seamount Complex MPA	**MPA (OSPAR)**		**Designated**	**Area to the west of the Mid-Atlantic Ridge**	**No**
Josephine Seamount High Seas MPA	**MPA (OSPAR)**		**Designated**	**East of the Mid-Atlantic Ridge, between Madeira and mainland Portugal**	**Seafloor subject to Portugal's submission**
Altair Seamount High Seas MPA	**MPA (OSPAR)**		**Designated**	**West of the Mid-Atlantic ridge, northwest of the Azores**	**Seafloor subject to Portugal's submission**
Charlie-Gibbs South High Seas MPA	**MPA (OSPAR)**		**Designated**	**Southern part of the Mid-Atlantic Ridge**	**Seafloor subject to Iceland's submission**
Charlie-Gibbs North High Seas MPA	**MPA (OSPAR)**		**Designated**	**Northern part of the Mid-Atlantic Ridge**	**No**
South Orkney Islands Southern Shelf MPA	**MPA (CCAMLR)**		**Designated**	**South Orkney Islands southern shelf**	**Sovereignty claims are held in abeyance by 1959 Antarctic Treaty.**
Antialtair Seamount High Seas MPA	**MPA (OSPAR)**		**Designated**	**Northeast of the Azores EEZ**	**Seafloor subject to Portugal's submission**
Mid-Atlantic Ridge North ofthe Azores (MARNA)	**Habitats or Species manage-ment PA**		**Designated**		**Seafloor subject to Portugal's submission**
Central Pacific Seascape		EEZ + High Seas	Proposed		
High Seas Costa Rica Dome area	EBSA	High Seas	Proposed		