



**UiT** The Arctic University of Norway

# **The work of the Arctic Council, and the Future Cooperation with the new BBNJ Agreement**

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## List of abbreviations

ABNJ	Areas Beyond National Jurisdiction
ABTM	Area-Based Management Tools
AEPS	Arctic Environmental Protection Strategy
AEWA	The African Eurasian Waterbird Agreement
ACAP	Arctic Contaminants Action Program
ACS	Arctic Council System
AMAP	Arctic Monitoring and Assessment Program
AMSA	Arctic Marine Shipping Assessment
AMSP	Arctic Marine Strategic Plan
BBNJ	Biodiversity Beyond National Jurisdiction
CAFF	Conservation of Arctic Flora and Fauna
CBD	Convention on Biological Diversity
CBMP	Circumpolar Biodiversity Monitoring Program
CB&TT	Capacity Building and the Transfer of Marine Technology
CMS	The Convention on Migratory Species
COP	Conference of the Parties
CPAN	Circumpolar Protected Areas Network
EA	Ecosystem Approach
EA-EG	Ecosystem Approach to Management
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessments
EPPR	Emergency Prevention, Preparedness and Response
ICES	International Council for the Exploration of the Sea
IGC	Intergovernmental Conference
ILBI	International Legally Binding Instrument
IMO	The International Maritime Organization
LME	Large Marine Ecosystems
MPA	Marine Protected Areas
MGR	Marine Genetic Resources and Benefit Sharing
MSR	Marine Scientific Research
OSPAR	Marine Environment of the North-East Atlantic
PAME	Protection of Arctic Marine Environment Working Group
PICES	North Pacific Marine Science Organization
PREPCOM	Preparatory Committee
PSSA	Particularly Sensitive Sea Area
SAO	Senior Arctic Officials
SDWG	Sustainable Development Working Group
TFAMC	Task Force on Arctic Marine Cooperation
UNCLOS	The United Nations Convention on the Law of the Sea
UN	United Nations
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties



# 1 Introduction

## 1.1 Background and purpose

The harsh environment in the Arctic and the iced covered ocean has resulted in a region that has not been easily accessible until recently. Therefore, human activity has been low; this has given the unique ecosystem a chance to rise and function undisturbed. The biodiversity in the Arctic ocean has adapted to survive in extreme climate conditions. This vast biodiversity gives the people in the region vital resources and values. These resources and values are at risk considering how climate change is resulting in a significant reduction of sea ice. Overall, the Arctic is the home to over 21,000 recognized species of mammals, birds, fish, invertebrates, plants, fungi, and microbes.<sup>1</sup> And with the sea temperature rising, several species are immigrating further north and influencing the biodiversity in the Arctic and making the ecosystem very vulnerable. Thus, there are also a lot of possibilities for resources opening up with the sea ice melting and making the Arctic more accessible.<sup>2</sup> There are potentially oil and gas that could be found, new shipping routes are opening, and more possibilities for fisheries in the Arctic region. Because of this, there is more need for regulation and guidelines to reduce the threats and the unregulated activities happening in the Arctic. The prevalence of unregulated activities in the high sea has led to drastic consequences from human activity including pollution, overfishing, and climate change.<sup>3</sup> The high seas also come with the understanding that it belongs to no one, but it is a common responsibility for these areas today.

The United Nations Convention on the Law of the Sea (UNCLOS) is the overarching legislative framework of a constitutional nature, setting of basic principles and extensive references to global and regional mechanisms as specific regulatory instruments in the sea today. Even though UNCLOS has the legal framework for the oceans' issues, many of the provisions are not precisely defined and leave regulatory gaps, especially concerning conservation and sustainable use of biodiversity in Areas Beyond National Jurisdiction (ABNJ). The ABNJ in the context of UNCLOS is the high seas and the Area. The Area is the seabed and the ocean

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<sup>1</sup> Arctic Council, 'Biodiversity' <<https://arctic-council.org/en/explore/topics/biodiversity/>> accessed 27.06.20

<sup>2</sup> Timo Koivurova, 'How to Improve Arctic International Governance' p. 86

<sup>3</sup> Robert Blasiak and others, 'The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction' (2017) 81 Marine policy 1

floor and subsoil thereof, beyond national jurisdiction.<sup>4</sup> The high seas are defined as the open ocean, that are not within states national jurisdiction.<sup>5</sup> In the Arctic high seas today there are four pockets; *The Banana hole*; *The Loophole*; *The Donut Hole*; and *The high seas of the Central Arctic Ocean*.<sup>6</sup> The Area and its resources are the common heritage of mankind.<sup>7</sup> No state can claim the Area, and every activity done in there should benefit all of mankind.<sup>8</sup> The Area and the exploration and exploitation of mineral resources are regarded as the common heritage of mankind<sup>9</sup>, and all activities in the area should be managed for the benefit of mankind as a whole.<sup>10</sup> While the area and its mineral resources, together with the exploration and exploitation of these resources, are for the “common heritage of mankind”, the high seas are grounded in traditional high seas freedoms and the desire to secure freedoms of navigation.<sup>11</sup>

There is also the Convention on Biological Diversity (CBD) that is the first global agreement on conservation and sustainable use of biological diversity, which makes it closely related to the Biodiversity Beyond National Jurisdiction (BBNJ) process.<sup>12</sup> The international law obligations to protect ABNJ are dispersed between global and regional regimes. The Arctic high seas do not have a legally binding convention that protects the marine environment, here the BBNJ agreement could be the body to implement the Arctic Councils work into the legal frameworks. The BBNJ agreement is an ILBI being negotiated under UNCLOS on the conservation and sustainable use of marine biodiversity of ABNJ.<sup>13</sup>

The Arctic Council is the most important forum and platform for the cooperation and coordination for environmental and sustainable development issues in the Arctic today.

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<sup>4</sup> United Nations, 'Law of the Sea Convention' (1994) 15 *The International Journal of Marine and Coastal Law* 1833 UNTS 397 Art. 1(1)

<sup>5</sup> *Ibid* Art. 86

<sup>6</sup> E. J. Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* (2017) 26

<sup>7</sup> United Nations, 'Law of the Sea Convention' Art. 136

<sup>8</sup> *Ibid* Art. 137, 140

<sup>9</sup> *Ibid* Art. 136

<sup>10</sup> Kristine Dalaker Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* (2018) p. 139

<sup>11</sup> Kristine Dalaker Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' (2020) *Marine policy* 103807 p. 2

<sup>12</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 147

<sup>13</sup> Oceans & Law of the Sea United Nations, 'Preparatory Committee established by General Assembly resolution 69/292' (2015) <<https://www.un.org/depts/los/biodiversity/prepcom.htm>> accessed 27.06.20 p. 1



Compared to the Antarctic, the Arctic does not have a legal regime, which makes the cooperation between the Arctic states even more important. With the lack of a legal framework in the region, it is the working groups of the Arctic Council that works on the issues in the Arctic.<sup>14</sup> However, as the Arctic Council cannot implement legally binding agreements, an international legally binding instrument (ILBI) could help with legal regulation of activities in the Arctic high seas.

## **1.2 Legal sources and methodology**

Due to the legal nature of this thesis, the set of legal sources correspond with the list contained in Article 38 of the Statute of the International Court of Justice.<sup>15</sup> UNCLOS, as the overarching legal framework for the oceans, and the CBD, will have a prominent role among the sources. However, given that the thesis will analyze a legal regime still under negotiations, other important sources include the draft text of the new BBNJ agreement and other official documents to the BBNJ negotiations, such as United Nations General Assembly (UNGA) resolutions, BBNJ preparatory work and documents of the BBNJ preparatory committee (PrepCom) and intergovernmental conference (IGC). The Vienna Convention on the Law of Treaties (VCLT) section 3 provides a framework for interpretation of international treaties<sup>16</sup>, with Article 31(1) providing the general rule that a treaty shall be interpreted in good faith.<sup>17</sup> The thesis also takes on soft law documents and reports from the working groups in the Arctic Council. Finally, the thesis will draw on scholarly articles, webpages, and books used to inform and support the interpretations and arguments made in this thesis.

## **1.3 Scope and outline**

The thesis is structured with five chapters, including the introduction and conclusion. Chapter two will present the legal regimes in the Arctic today, the concept of soft law, and the Arctic Council. The third chapter will present the legal regime for biodiversity in ABNJ today, as well as the different phases of the BBNJ process, namely the ad-hoc working group, the PrepCom and the IGC. The fourth chapter will discuss the bases for future cooperation and interaction between the Arctic Council and the new BBNJ agreement. Lastly, the fifth chapter will offer

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<sup>14</sup> Government Offices of Sweden, 'Sweden's strategy for the Arctic region' (2011)

<sup>15</sup> United Nations, *Statute for the International Court of Justice* (1945) Art. 38

<sup>16</sup> United Nations, *Vienna Convention on the Law of Treaties* (1969)

<sup>17</sup> *Ibid* Art. 31 (1)

some concluding remarks on the future cooperation between the Arctic Council and the future BBNJ agreement.

The objective of this thesis is to explore role of the Arctic Council, and it's working groups, vis-à-vis the future BBNJ Agreement. What will the impact of the BBNJ agreement on Arctic governance be? How will the Arctic Council as one of the main actors in preserving and protecting the marine environment cooperate with the BBNJ agreement? This thesis will be focusing particularly on the working groups in the Arctic Council, and on the areas, they possibly would cooperate on with the new BBNJ agreement. The focus will be on scientific cooperation as the BBNJ agreement could contribute to filling the important legal and governance gaps related to the marine biodiversity in the Arctic region.<sup>18</sup>

The importance of this future cooperation between the Arctic Council and the BBNJ would be to not undermine the central role that the Arctic Council have, and not to overlap or duplicate the already existing work and accomplishments of the working groups. Instead, use this opportunity for the new ILBI to become a global body that can implement legal frameworks that the Arctic Council cannot do. Using the Arctic Council as the primary provider of science and knowledge within areas that the Arctic Council and the BBNJ agreement will cooperate. This includes the principles and management for Area-Based Management Tools (ABMT) and Marine Protected Areas (MPA), which have not been consistently incorporated into existing agreements or applied in practice to a full range of human activities the ABNJ in the Arctic region.<sup>19</sup>

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<sup>18</sup> Vito De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' (2019) *Marine Policy* 103756 p. 1

<sup>19</sup> Rosemary Rayfuse, 'Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction' (2008) 17 *Review of European Community & International Environmental Law* 3 p. 7

## 2 The role of the Arctic Council

This chapter will present the establishment and role of the Arctic Council, and the important function of the working groups for the protection and preservation of the marine environment and of Arctic biodiversity. The Arctic Council focuses on sustainable development issues and environmental protection, and most of their work is through the six working groups, with contributions from permanent participants and observers. It will also look into how the Arctic Council, as an international forum, uses soft law to achieve cooperation and agreements between the member states. There is not much legal framework in the Arctic region today, and most of what is regulated is under the sovereignty of the Arctic states.

### 2.1 Legal Framework in the Arctic Region

The Arctic Council cooperate internationally on several different levels. For all the different levels, there are different frameworks of either international law or domestic legislation of the Arctic states.<sup>20</sup> The Arctic states are the most important actors in the Arctic region, but it is essential to emphasize that UNCLOS<sup>21</sup> provides the fundamental international legal framework for governance in Arctic waters,<sup>22</sup> as seen in the declaration issued after the meeting in Ilulissat 2008<sup>23</sup>: *«By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limit's of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.»*<sup>24</sup>

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<sup>20</sup> Natalia Loukacheva, 'The Arctic Council and "Law-Making"' (2020) Northern Review 109 p. 111

<sup>21</sup> United Nations, 'Law of the Sea Convention'

<sup>22</sup> E.J Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' (2012) The International Journal of Marine and Coastal Law 27 (2012) 553–595 553 p. 556

<sup>23</sup> Svein Vigeland Rottem, 'The Arctic Council: vision, structure and participation ' (2016)

<sup>24</sup> Ilulissat declaration(2008)

The Ilulissat Declaration is a document signed by the five Arctic coastal states at the Arctic Ocean conference in Greenland, focusing on cooperation, science, and protection of the marine environment in the Arctic. The Declaration specifically mention that they will continue to contribute to the Arctic Council's work.<sup>25</sup>

UNCLOS is the cornerstone in legal framework for the Arctic region. In Part XII, it first sets out the general obligation to protect and preserve the marine environment.<sup>26</sup> After that the Arctic states fill in the governance gaps through coastal state jurisdiction and the right to establish a 200 nautical mile Exclusive Economic Zone (EEZ) from their coastlines and enjoys sovereignty over the resources on the continental shelf.<sup>27</sup> All parties to the Arctic Council, except the United States are a member of UNCLOS, but some of UNCLOS provisions are customary international law, which applies to all states even though not a member of the convention.<sup>28</sup> Part XII, Article 197 of UNCLOS concerning the protection and preservation of the marine environment, gives the general obligation to cooperate.<sup>29</sup> Even though UNLCOS is the framework convention, it does not contain the detailed standards that are necessary for actual regulation, therefore multilateral cooperation at a regional level is essential.<sup>30</sup> The importance of obligations in relation to regional cooperation is crucial in UNLOS, but does not prescribe or provide guidelines on how this cooperation should occur.<sup>31</sup>

Also, the CDB is an important convention for the biodiversity in the oceans, but it has some shortcomings. Article 4(a) limits “*components of biological diversity, in areas within the limits of its national jurisdiction*”, or 4(b) “*processes and activities, regardless of where their effects occur*”<sup>32</sup>, the scope of the CBD is limited to areas within the zones of national jurisdiction, and

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<sup>25</sup> Ibid p. 2

<sup>26</sup> United Nations, 'Law of the Sea Convention' Art. 192

<sup>27</sup> Olav Schram Stokke, 'A legal regime for the Arctic?. Interplay with the Law of the Sea Convention' (2007) 31 Marine Policy 402 p. 403

<sup>28</sup> Ibid p. 404

<sup>29</sup> United Nations, 'Law of the Sea Convention' p. 908

<sup>30</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 556

<sup>31</sup> Ibid p. 561

<sup>32</sup> United Nations, *Convention on Biological Diversity* (1992) Art. 4 (a)(b)

in the ABNJ the CBD only applies in activities carried out under the jurisdiction of its parties.<sup>33</sup> Also Article 22(1) says that “*the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement*”<sup>34</sup>, and 22(2) “*Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea*”<sup>35</sup>, which states that the regulation of biodiversity must be in coherence with the provision from UNCLOS. Both these Articles shows that the jurisdiction in the ABNJ of the CBD is limited.

The cooperation in the Arctic Council is happening on a regional level, which has its benefits, but regional regulation also has its disadvantages.<sup>36</sup> The Arctic Council does not bind its members because they are not competent to adopt any legal measures, and offer important recommendations and guidelines that cannot be forced on the member states.<sup>37</sup> The Arctic Council will propose policies based on the scientific knowledge they have produced. With UNCLOS having the overarching framework in the world’s oceans today, there are still regulatory and governance gaps, that now the Arctic Council is focusing on filling through the use of soft law on a regional level.

## **2.2 The Arctic Council and Soft law**

The rapidly changing environment have posed a threat to the Arctic environment, and made the Arctic states establish cooperative soft law bodies.<sup>38</sup> Cooperation in soft law consists of intergovernmental governance that implements without the framework of a legal instrument.<sup>39</sup> Arctic issues like environmental protection, human activities and climate change gives the need for quick operation and cooperation. Soft law does not contain any provisions, entry into force,

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<sup>33</sup> Arianna Broggiato and others, 'Fair and equitable sharing of benefits from the utilization of marine genetic resources in areas beyond national jurisdiction: Bridging the gaps between science and policy' (2014) 49 *Marine policy* 176 p. 178

<sup>34</sup> United Nations, *Convention on Biological Diversity Art. 22 (1)*

<sup>35</sup> *Ibid* Art. 22(2)

<sup>36</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 557

<sup>37</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 6

<sup>38</sup> Waliul Hasanat, 'Diverse Soft-Law Cooperation Forms in the Arctic - Do They Complement or Contradict Each Other?' (2012) 14 *International Community Law Review* 273 p. 274

<sup>39</sup> *Ibid* p. 273

or other clauses in hard law,<sup>40</sup> but rather principles, norms, and standards of expected behavior. There is no clear definition of soft law, but it can be considered a social norm as it tries to achieve cooperation between states to reach an agreement instead of going through legally binding agreements.<sup>41</sup> There are possibilities for soft law norms to become legally binding agreements through adaptation by states or incorporation into private binding agreements.<sup>42</sup> Soft law has become predominantly more common because it is possible to accentuate problems and challenges, resulting in solutions with which recommendations and guidelines can be given for quick reactions. Which might be difficult with a legally binding agreement where the process would take longer. A non-binding agreement is more accessible for states to agree on, faster to adopt and easier to change.<sup>43</sup> There is a variety of soft law, and a lot of soft law comes from international organizations that do not have the power to adopt legally binding rules.

The Arctic Council cannot make legally binding agreements, nor adopt legally binding rules or measures, but it does come with recommendations and guidelines to the Arctic states. The Arctic states does not have to follow the guidelines they receive; they are only suggestions. This also creates gaps as the Arctic Council cannot impose policies on the states, they can only provide recommendations and guidelines. With the encouragement to work closely on managing environmental issues and the consequences of climate change, much of the work happens within the national jurisdiction of the Arctic states, and the ABNJ falls outside this scope.

The Arctic Council is the leading intergovernmental forum promoting cooperation in the Arctic. The reason the Arctic Council uses soft law is because of the flexibility. Soft law is more about preferences than about the obligations.<sup>44</sup> The Arctic Council provides guidelines, recommendations, and political agreements instead of treaty obligations. Soft law helps the Arctic Council update guidelines and recommendations after how the climate is changing. It is easier to fill in gaps in an agreement without international obligations. The Arctic Council needs to act fast with the dramatic changes in the region, and this is easier with soft law since it is

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<sup>40</sup> David Armstrong (ed), *Routledge Handbook of International Law* (1st edn, Dinah Shelton 2009) p. 70

<sup>41</sup> *Ibid* p. 69

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid* p. 75

<sup>44</sup> *Ibid* p. 3

faster to adopt and more accessible to change.<sup>45</sup> Even though the Arctic Council cannot make legally binding agreements, it serves as a platform for international policy throughout the Arctic for policy discussion.<sup>46</sup> The implementation and enforcement are up to each of the Arctic states individually.<sup>47</sup>

### **2.3 Mandate**

The process to establish the Arctic Council started with the eight Arctic states surrounding the Arctic; Canada, Denmark, Norway, Russia, Iceland, Sweden, Finland and The United States adopted the Arctic Environmental Protection Strategy (AEPS) in 1991 in Rovaniemi, Finland.<sup>48</sup> AEPS was the first circumpolar cooperative non-binding agreement started by Finland in the 1980s, to make the Arctic a region for peace, cooperation, and protection for the marine environment.<sup>49</sup> The strategy established four working groups to reach their goals on developing environmental monitoring, gaining a better scientific understanding of pollution, and detecting threats to the ecosystem. The working groups were; The Arctic Monitoring and Assessment Programme (AMAP), Conservation of Arctic Flora and Fauna (CAFF), Emergency, Preparedness, Prevention and Response (EPPR) and Protection of Arctic Marine Environment (PAME), and each had their separate mandate and the independence to develop and conduct their goals.<sup>50</sup> The Arctic Council is an outcome of the cooperation in the AEPS. The Arctic states wanted to establish a more comprehensive structure for cooperation and sustainable development and a broader concept than only environmental protection, but still oversee and coordinate the programs established under the AEPS.<sup>51</sup> This agreement merged into the creation of the Arctic Council and was signed in Ottawa, Canada in 1996. The Arctic Council is an international forum for cooperation and Arctic affairs, and it is project driven with its working groups, task forces and expert groups. Instead of making a treaty or a convention, the Arctic states decided to establish a high-level intergovernmental forum. The Arctic Council is

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<sup>45</sup> Ibid p. 14-15

<sup>46</sup> Timo Koivurova, 'Governance of protected areas in the Arctic' (2009) 5 Utrecht law review 44 p. 45

<sup>47</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 571

<sup>48</sup> Timo Koivurova, 'Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance' (2010) 46 Polar record 146

<sup>49</sup> Malgorzata Smieszek, 'Informal International Regimes', University of Lapland 2019) p. 47-48

<sup>50</sup> Ibid p. 48

<sup>51</sup> Arctic Council, 'Ottawa Declaration' (1996) Art. 1(b)

not a treaty-based organization, which means it has no regulatory power.<sup>52</sup> The Creation of the Arctic Council was for cooperation and coordination on the region's interests and challenges. The mandate of the Arctic Council is laid out in Article 1(a) of the Ottawa Declaration; *“Provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues. In particular issues of sustainable development and environmental protection in the Arctic.”*<sup>53</sup>

The Arctic Council is an important international forum for cooperation on Arctic challenges and opportunities. It is a crucial area for scientific production and development, this is why collaboration between all the participants in the Arctic Council is vital.

## 2.4 Structure

The Arctic Council has three groups of participants; The eight Arctic states members, permanent participants, and observers.

Indigenous people in the Arctic have been given permanent participant's status as a part of the Arctic Council. As of meetings and activities, it gives them the right to participate in the discussions but does not give them the right to vote.<sup>54</sup> Climate change and threats to the Arctic environment affect the indigenous people's traditions, culture, health, and economy. They are an essential part of the work of the working groups since the Arctic is their home, and they have the knowledge and an understanding of the Arctic region that is essential for the Arctic Council. Today there are six groups of permanent participants in the Arctic Council: Arctic Athabaskan Council (AAC), The Aleut International Association (AIA), The Gwich'in Council International (GCI), The Inuit Circumpolar Council (ICC), The Russian Arctic Indigenous Peoples of the North (RAIPON), The Saami Council.<sup>55</sup>

The non-Arctic states are global and regional inter-governmental and inter-parliamentary organizations, and non-governmental organizations that want to participate in the Arctic

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<sup>52</sup> Christian Prip, 'Biodiversity governance under the Arctic Council: The role of science, business and NGOs' (2020) Polar record 1 p. 2

<sup>53</sup> Arctic Council, 'Ottawa Declaration' p. 5

<sup>54</sup> Rottem, 'The Arctic Council: vision, structure and participation ' p. 5

<sup>55</sup> Arctic Council, 'Permanent Participants' 2020) <<https://arctic-council.org/en/about/permanent-participants/>> accessed 27.06



Council can get a status as observers.<sup>56</sup> They can be a part of the Arctic Council by observing and contributing to the Arctic Council's work, but their participation is limited. They are invited to the meetings and are encouraged to make relevant contributions through the working groups.<sup>57</sup> The conditions to become an observer is set out in supporting the Arctic Councils goals that is set out in the first section of the Ottawa Declaration, mainly, acknowledgment of sovereignty of the Arctic states.<sup>58</sup> As well as set out in the Rules of procedures Rule 36-38.<sup>59</sup>

Most of the work of the Arctic Council takes place in the six working groups of the Arctic Council; Arctic Contaminants Action Program; Arctic Monitoring and Assessment Programme; Conservation of Arctic Flora and Fauna; Emergency Prevention, Preparedness and Response; Protection of the Arctic Marine Environment; Sustainable Development Working Group.<sup>60</sup> The working groups address and manage the environmental challenges that the region is facing, with an Ecosystem Approach that balances conservation and sustainable use of the Arctic marine environment.

Lastly, there are task forces and expert groups that can be established according to Rule 28 of the Arctic Council Rules of Procedures temporarily for specific matters to prepare and carry out projects when it is needed.<sup>61</sup> Three legally binding agreements have been a result of the negotiations in taskforces established by the Arctic Council.<sup>62</sup> The legally binding agreements are; The Arctic SAR agreement<sup>63</sup>, The Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA)<sup>64</sup>, and The Agreement on Enhancing International Arctic Cooperation.<sup>65</sup> Nevertheless, their formal adoption and signature took place by ad-hoc diplomatic conferences

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<sup>56</sup> Arctic Council, 'Ottawa Declaration' Art. 3 p. 6

<sup>57</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 578

<sup>58</sup> Arctic Council, 'Ottawa Declaration'

<sup>59</sup> Arctic Council, *Arctic Council Rules of Procedure* (1998) Art. 36-38. p. 9

<sup>60</sup> Arctic Council, 'Working Groups' 2020) <<https://arctic-council.org/en/about/working-groups/>> accessed 27.06

<sup>61</sup> Arctic Council, *Arctic Council Rules of Procedure Rule 28*

<sup>62</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 47

<sup>63</sup> Arctic Council, 'Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic' (2011)

<sup>64</sup> EPPR, 'Agreement on Cooperation on Marine Oil Pollution Preparedness And Response In the Arctic' (2019)

<sup>65</sup> Arctic Council, 'The Agreement on Enhancing International Arctic Cooperation' (2017)

between the eight Arctic states to adopt multilateral legally binding instruments.<sup>66</sup> As all of these agreements are products of negotiations and decision-making between the Arctic states, the processes are an essential part of the Arctic Council's daily operations.

## 2.5 Negotiations and Decisions-making

As an alternative to comprehensive reform, the Arctic Council decided to have a two-tiered approach of adaptation to strengthening them with, for instance, establishing the Arctic Council secretariat, and the use of assessed contributions, and by rising the Arctic Council system (ACS).<sup>67</sup> The ACS consists of two components; first, the Ottawa Declaration, other Ministerial Declarations, Instruments adopted by the Arctic Council, and the Arctic Council's institutional structure. The second one being the instruments negotiated under the Arctic Council's auspices. Here the legally binding agreements negotiated under the Arctic Council can be categorized.<sup>68</sup>

The Rules of Procedures, adopted at the first Ministerial meeting in Canada in 1998, made Rule 7 and is the formal rule for decision-making in the Arctic Council. This Rule states that all decisions “*shall be a consensus of all eight Arctic States.*”<sup>69</sup> According to this rule, the Permanent participants and observers are not a part of the decision-making process, though Rule 5 gives the Permanent Participants “*active participation and full consultation.*”<sup>70</sup>

A bi-annual rotating chairmanship formally leads the Arctic Council. The chairmanship rotates between the eight-member states, and the usual procedure is that a presidency period lasts for two years.<sup>71</sup> The chairmanship is in charge of the Arctic Council's daily operation, as well as preparing the next Ministerial meeting, ensuring that targets agreed upon are up to date from previous meetings and that the Senior Arctic Officials (SAO) meeting is happening twice a year. The work of the Arctic Council takes place at three levels, the ministerial, SAO, and working group level.

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<sup>66</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 47

<sup>67</sup> Ibid p. 61

<sup>68</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 572

<sup>69</sup> Arctic Council, *Arctic Council Rules of Procedure* Rule 7

<sup>70</sup> Ibid Rule 5

<sup>71</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 48

The ministers are the highest body of the Arctic Council.<sup>72</sup> At the Arctic Council's ministerial meetings, the ministers approve and review the work done under the presidencies. In connection with the ministerial meetings, states also change presidencies. At the ministerial meeting, the new presidency country launches its ambitions, and here the states have the opportunity to make a personal impression.

However, the daily work takes place further down the levels; this is the SAO's. All of the Arctic states and the permanent participates select their representatives to the SAO's. They are the representative of the government, usually from a Member State's Foreign Ministry. They meet at least twice a year, and each state appoints a SAO to promote its interests in the Arctic Council. The SAOs receives and discusses reports from the working groups and other subsidiary bodies.<sup>73</sup> Formally, they will guide and monitor the activities of the Arctic Council in line with decisions and instructions from the ministerial meetings. They also act as the link between the ministerial and the working groups. It is those who, on behalf of their country's governments, have the daily responsibility to follow up the Arctic Council's work.<sup>74</sup> Decisions on the SAO meetings shall be made according to Rule 7 of the procedures.<sup>75</sup>

Two of the critical elements in the Arctic Council's decision-making process are that there has to be a consensus among the member states<sup>76</sup>, and that it is only the members and permanent participants that can submit proposals for new projects.<sup>77</sup> The third and last level is the working groups, where most of the Arctic Council's work takes place.

## **2.6 The Working Groups**

The working groups are established under the Arctic Council by consensus of all the Arctic states as described in Rule 8 of the Rules of Procedure.<sup>78</sup> Most of the international cooperation in the Arctic is between the Arctic states, and the working groups are the instruments that help put this into force. There are six working groups in the Arctic Council today, and they are all working towards different areas of expertise and goals. The working groups are where vital

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<sup>72</sup> Rottem, 'The Arctic Council: vision, structure and participation ' p. 4

<sup>73</sup> Arctic Council, *Arctic Council Rules of Procedure* p. 6

<sup>74</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 48

<sup>75</sup> Arctic Council, *Arctic Council Rules of Procedure* p. 4

<sup>76</sup> Arctic Council, 'Ottawa Declaration' Art. 7

<sup>77</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 47

<sup>78</sup> Arctic Council, *Arctic Council Rules of Procedure* Rule 8

knowledge production and the work in the Arctic Council takes place. Since all of the main work in the Arctic Council is through the working groups, they all have an individually important part of the protection and preservation of the marine environment. It is essential to mention all the working groups and their primary focus while going into depth especially on the working groups, CAFF and PAME, and the areas that will be relevant for future cooperation with the new BBNJ agreement. The Arctic Council has since the very beginning focused on cooperation and developing partnerships with other international bodies and legal frameworks. Some of these are important to mention in the working groups as it could be a way for the Arctic Council and the new ILBI could cooperate.

### **2.6.1 The Arctic Contaminants Action Program**

The Arctic Contaminants Action Program (ACAP) was established in 2006 and focus on the prevention and reduction of pollution and environmental risks in the Arctic.<sup>79</sup> They work hard on encouraging states to take action and have stricter policies on reducing risks to the environmental, human health and socio-economic. Cooperation between ACAP and national authorities in the Arctic is essential for exchanging information and knowledge when it comes to best practices, technologies, regulation, and other measures.

### **2.6.2 Arctic Monitoring and Assessment Programme**

The Arctic Monitoring and Assessment Programme (AMAP), established in 1991, is responsible for monitoring and assessing pollution and climate change challenges in the Arctic.<sup>80</sup> The AMAP working group has produced a lot of scientific reports and strategic plans. Considering the changes and challenges the Arctic is facing, monitoring and assessing are essential to keep track of current changes and for predictions of future threats. AMAP has been a working group in the front for bringing awareness to the challenges the Arctic is facing. As a working group, they are researching and identifying the threats and risks to the ecosystem, the indigenous people, and communities in the Arctic.

AMAP works with a five strategic goals plan, starting with the knowledge and understanding of the Arctic changes, for the science assessments to be as much up to date as possible. The second goal is a coordinated and robust network. It is crucial to have robust cooperation in the

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<sup>79</sup> Arctic Council, 'Arctic Contaminants Action Program' (2019)

<sup>80</sup> AMAP, *Strategic Framework* (2019)

Arctic because of the size of the region. There is a need to have a lot of interaction and sharing of information and data to monitor the marine environment in the long term. Goal number three focuses on understanding the challenges and changes that the Arctic faces through the indigenous people. The indigenous and local people in the Arctic are affected directly by environmental changes in the region and have knowledge and understanding on a deeper level. That is why AMAP works closely with the indigenous people in all their activities. Goal number 4 is about communication in regard to Arctic challenges. Here they work on promoting information and results to raise awareness on a global level. And the last goal is supporting international processes, and here they are delivering data and other relevant information to other international organizations for a better Arctic.

### **2.6.3 The Conservation of Arctic Flora and Fauna**

The Conservation of Arctic Flora and Fauna (CAFF) working group is one of the core working groups that was established in 1991 in the AEPS. The working groups' main target is the changes that are happening in the Arctic ecosystem.<sup>81</sup> The CAFF working group gives data and recommendations to tackle the issues that are consequences of climate change. Here, they focus on the cooperation between all the branches of the Arctic Council on maintaining a stable ecosystem and foresee the challenges it is facing, and the importance of ensuring the sustainability of biodiversity. With tracking and locating, collecting, integrating, and interpreting all the existing marine biodiversity and understanding the challenges and changes it is going through. Moreover, how the species are adapting to the changes in the Arctic. The Arctic marine environment is vast, and all areas are slightly dissimilar. This is why cooperation between the Arctic states is essential; It is crucial to have information and data on the region's specific areas to predict the changes and needs for that area. Southern species are moving into the Arctic waters because of the rising sea temperature and spreading new biodiversity in the Arctic waters which will affect arctic food webs and ecology. Arctic marine species and ecosystems are undergoing pressure from cumulative changes in their environment. Some of these changes can be gradual, but some also may be large and sudden and affect the ecosystem considerably. CAFFs work is important to be ready for the stressors and potential thresholds to prepare for sudden changes adequately. The Arctic is going through a drastic transformation with the sea ice melting. The Arctic ocean is more accessible because of climate change and

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<sup>81</sup> Arctic Council, 'Conservation of Arctic Flora and Fauna' <<https://arctic-council.org/en/about/working-groups/caff/>> accessed 24.07.20

the sea ice melting, which is increasing human activities and the infrastructure.<sup>82</sup> CAFF has undertaken several programs to reach their goals, including prepared strategy and action plans.<sup>83</sup> In the early years of the Arctic Council, CAFF had to identify the elements that was needed to monitor circumpolar biological diversity and to assess the effects of climate change, this together with the AMAP and PAME working groups.<sup>84</sup>

Biodiversity in the Arctic has always been on the priority list for CAFF and the Arctic Council. Ever since the CBD came into force, CAFF has based its work on the biodiversity concept defined in the CBD as diversity of ecosystems, species, and genetic diversity.<sup>85</sup> CAFF and the Arctic Council have recognized the Ecosystem Approach (EA) as a tool for managing biodiversity.<sup>86</sup> This approach was adopted by the CBD Conference of the Parties (COP) 5 as “*a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefit’s arising out of the utilization of genetic resources*”.<sup>87</sup> Biodiversity is much a cross-cutting issue in the Arctic Council, and that is why CAFF cooperates closely with most of the working groups on this matter.<sup>88</sup> The new BBNJ agreement will closely relate to this working group, as it has scientific knowledge on Arctic biodiversity. Moreover, the Arctic Council would benefit from an ILBI that would help also covering the ABNJ.

In a cooperation between AMAP, CAFF, PAME and SDWG, they have established “*EA guidelines for Implementing an Ecosystem Approach to management of Arctic Marine*

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<sup>82</sup> Koivurova, 'Governance of protected areas in the Arctic' p. 49

<sup>83</sup> Ibid p. 45

<sup>84</sup> Ibid p. 48

<sup>85</sup> Prip, 'Biodiversity governance under the Arctic Council: The role of science, business and NGOs' p. 1

<sup>86</sup> Ibid p. 1

<sup>87</sup> Convention on Biological Diversity, 'Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its Fifth Meeting' 2000)

<<https://www.cbd.int/decision/cop/?id=7148>> accessed 05.08.20

<sup>88</sup> Prip, 'Biodiversity governance under the Arctic Council: The role of science, business and NGOs' p. 2

*Ecosystems.*”<sup>89</sup> The Arctic Council developed this framework of EA to manage human activities in the Arctic marine environment. The EA framework consists of six elements; 1. *Identify the geographic extent of the ecosystem*; 2. *Describe the biological and physical components and processes of the ecosystem including humans*; 3. *Set ecological objectives that define sustainability of the ecosystem*; 4. *Assess the current state of the ecosystem (Integrated Ecosystem Assessment)*; 5. *Value the cultural, social and economic goods produced by the ecosystem*; and 6. *Manage human activities to sustain the ecosystem.*<sup>90</sup> The EA is the foundation for sustainable development, and needs to be implemented not only on a regional level but also a global one. The EA has been mentioned and suggested as one of the new BBNJ agreement's primary approaches. For this reason, the relevant working groups would benefit being a part of the BBNJ process, as this could be a possible area to cooperate with implementing EA in the Arctic region from a global level.

With the need for measures to protect particularly vulnerable sea areas, and the CBD having a biodiversity strategy, the CAFF working group established the Circumpolar Biodiversity Monitoring Program (CBMP). This for the importance of having a strategic plan related to the goals of the convention for activities and changes in the ecosystems, habitats, and species specifically in the Arctic.<sup>91</sup> Most of the work on protected area policies among the Arctic states have been compiled in the Circumpolar Protected Areas Network (CPAN). CPAN follows Article 8(a) of the CBD, to “*establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity*”.<sup>92</sup> The goal of the CPAN was to provide a framework for the Arctic states to select and manage the MPAs and make sure that there is protection in these areas at national, regional, and circumpolar levels.<sup>93</sup> With the focus on MPAs in the BBNJ agreement, it can work as a global body for identifying the gaps in existing MPAs in the Arctic, while expanding and help create MPAs in the ABNJ. MPAs can contribute to rebuilding biodiversity in vulnerable areas as well as affecting the ecosystems around the MPAs.

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<sup>89</sup> Arctic Council, *EA Guidelines, Implementing an Ecosystem Approach to Management of Arctic Marine Ecosystems*, (2019)

<sup>90</sup> *Ibid* p. 3

<sup>91</sup> Koivurova, 'Governance of protected areas in the Arctic' p. 48

<sup>92</sup> United Nations, *Convention on Biological Diversity Art. 8(a)*

<sup>93</sup> Ingvild Ulrikke Jakobsen, 'MPAs under the Arctic Council', *Marine Protected Areas in International Law*, vol 25 (2016) p. 234

#### 2.6.4 Emergency Prevention, Preparedness, and Response

The Emergency Prevention, Preparedness, and Response (EPPR) working group was one of the working groups that started in AEPS and established in 1991. EPPR is the working group for the prevention, preparedness, and response to environmental and other emergencies, accidents, and search and rescue (SAR).<sup>94</sup> The working group does not have a response team, but is still a part of addressing the gaps, make strategies, research and share information and data, and cooperate on these matters. With such an extreme and harsh environment like the Arctic, it increases threats and risks. Here there must be taken measures on prevention, preparedness, and response to handle the conditions in the Arctic. When wanting to travel to the most remote resources, it is needed international cooperation for who can get to the area fastest in case of an emergency. In this working group, they have three expert groups on the different matters, and there is Search and Rescue Expert Group, Marine Environmental Response Expert Group, and the Radiation Expert Group. Their task is to make recommendations, and also coordinate all training for the response teams and maintain the guidelines for two binding agreements that was established after the recommendation from the Arctic Council; SAR and Cooperation on Marine Oil Pollution Preparedness and Response (MOSPA).

The International Maritime Organization (IMO) and the working groups in the Arctic Council cooperate on search and rescue, pollution response and maritime safety and on the protection of the marine environment.<sup>95</sup> The EPPR working groups have developed in coordination with the IMO, the "*Guide to Oil Spill Response in Ice and Snow Conditions*",<sup>96</sup> working closely with the PAME working group. The Arctic states also supported the development of the Polar code, in the IMO. This cooperation has strengthened their relationship. The IMO identified the Arctic Council as "a partner in ocean governance"<sup>97</sup> and has gotten the status as an observer in the Arctic Council since 2019. Thus, the Arctic Council is already a part of promoting regional cooperation with a global approach. For now, there are no framework to adopting cross-

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<sup>94</sup> Arctic Council, 'Emergency Prevention, preparedness and Response' (2019)

<sup>95</sup> Arctic Council, 'Interview with Arctic Council Observer: International Maritime Organization' (2020) <<https://arctic-council.org/en/news/interview-with-arctic-council-observer-international-maritime-organization/>> accessed 13.09.20

<sup>96</sup> Ole Kristian Bjerkemo, 'Summary: Guide to Oil Spill Response in snow and Ice Conditions in the Arctic' (2015) EPPR p. 3

<sup>97</sup> Yoshinobu Takei, 'The Role of the Arctic Council from an International Law Perspective: Past, Present and Future' (2014) 6 *The Yearbook of Polar Law Online* 349 p. 371



sectorial MPAs in the Central Arctic ocean. The Arctic Councils work on ABMTs and MPAs is important but does only provides policy recommendations. To the adoption of ABMTs in the Arctic high seas today there is the IMO, that can provide a framework, with regards to particularly sensitive sea areas (PSSA).<sup>98</sup> The IMO contributes to the Arctic Council's working groups with scientific expertise, project proposals, and financial contributions.<sup>99</sup>

### **2.6.5 Protection of the Arctic Marine Environment**

The Protection of the Arctic Marine Environment (PAME) working group was established in 1991 and is the working group that focuses on activities concerning the protection and sustainable use of the marine environment.<sup>100</sup> PAME makes strategy plans, recommendations, and guidelines for the Arctic states, focusing on Arctic shipping, MPAs, resource exploration and development, ecosystem approach to management (EA-EG), and Arctic marine pollution.

In PAME's work plan, they have four main goals. The first goal in the plan is to improve the Arctic marine environment's knowledge and continue to research and monitor the current and future challenges of the ecosystems. Taking into account the local and traditional knowledge, they come out with science-based assessments. The working group want to reduce threats by catching the challenges early and track the progress. PAME has many different ongoing projects in different areas, but their main priorities are; Arctic marine shipping, invasive species, Arctic marine pollution, and strategic documents. In all the areas, PAME want to ensure that the projects are up to date. Goal number two focuses on the conservation and protection of the ecosystem and marine biodiversity. Because the ecosystem is changing and faces challenges, it is crucial for cooperation on a local, regional, and global level. Moreover, using the EA ensures that the ecosystem is well protected and managed through scientific research. The Arctic Council established an expert group on the EA-EG under PAME. As the EA became more and more important it became a cross-cutting cooperation with other Arctic Council working groups.<sup>101</sup> It applies to preserve the ecosystem for potential harm. PAME has been focusing on implementing the EA in the Arctic for a long time. PAME developed a map for Large Marine Ecosystems (LME), to create a planform for effective implementation of the

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<sup>98</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 6

<sup>99</sup> Arctic Council, 'Interview with Arctic Council Observer: International Maritime Organization'

<sup>100</sup> Arctic Council, *PAME Work Plan* (2019)

<sup>101</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 5

EA in the Arctic.<sup>102</sup> LMEs defines geographic scale and boundaries for EA, and its aim is to use the map for ecosystem descriptions and assessment of vulnerable areas.<sup>103</sup> The Arctic ocean are facing numerous threats through climate change and human activities, and would benefit from MPAs, with the aim of conservation and sustainable use of the Arctic marine environment. The third goal is to develop and promote the safe and sustainable use of the marine environment. With the sea ice melting, there are resources in the ocean that are much easier access, and more shipping activities will be available. There must be a safe and sustainable use of the ecosystem for the benefit of the Arctic region. Furthermore, to minimize the consequences of pollution. The fourth and last goal is to enhance the economic, social, and cultural well-being of the indigenous people and Arctic communities. The indigenous people and the Arctic communities rely on a healthy ecosystem for food and cultural needs.

MPAs are focused a lot on in CAFFs CPANs strategy and has PAME developed the Arctic Marine Strategic Plan (AMSP), which has its own framework for MPAs inside national jurisdiction of the Arctic states. Recognizing that individual Arctic states pursue MPA development based on their own authorities and priorities, with the EA.<sup>104</sup> The Pan-Arctic network for MPAs focuses on the idea of international cooperation in MPA network development and management. This based on the practices and initiatives taken by the Arctic Council. However, this framework only focuses on the MPAs located inside the national jurisdiction of the Arctic states. The BBNJ agreement could be a tool here helping the Arctic Council to the identification and implement MPAs in the ABNJ, and not just under national jurisdiction. As these frameworks are also relevant for the whole Arctic ocean, even though they are not specific to the ABNJ.<sup>105</sup> The Arctic Council already has provided knowledge and recommendations that the BBNJ agreement could benefit from. Considering if the BBNJ process focused on the work that has already been in place for MPAs in the Arctic, it would cooperate better and avoid duplication and undermining of the Arctic Council.

The Pan-Arctic MPA network was made to protect and restore marine biodiversity, ecosystem function, unique natural features, and preserve cultural heritage and subsistence resources for

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<sup>102</sup> Ibid p. 5

<sup>103</sup> Arctic Council, *Large Marine Ecosystems (LMEs) of the Arctic area Revision of the Arctic LME map* (2013) p. 3

<sup>104</sup> PAME, *Area-based conservation measures and ecological connectivity* (2017) p. 3

<sup>105</sup> Arctic Council, *Framework for a Pan-Arctic Network of Marine Protected Areas* (2015) p. 5

present and future generations.<sup>106</sup> The development of a Pan-Arctic network of MPAs contributes to being more productive and comprehensive when it comes to maintaining the ecosystem and localizing threats and hazards, including climate change. The Pan-Arctic framework was brought forward by an MPA network expert group that was working under PAME, and helps the Arctic states in implementing their obligations to protect and preserve the marine environment, especially biodiversity.<sup>107</sup> It is also contributing on work for the EA-EG expert group, also working under PAME, as well as giving advice on prior work in the CAFF working group.<sup>108</sup> The goals of the Pan-Arctic MPA network is to strengthen the ecological resilience to direct human pressures and climate change impact, to promote the long-term protection of the marine biodiversity and make awareness for the Arctic marine environment, conservation and management of the living marine resources, and to make cooperation on MPAs between the Arctic states more effective.<sup>109</sup> The Pan-Arctic network of MPAs is also a tool for the Arctic states on implementing their global obligations to protect and preserve the marine environment.<sup>110</sup>

The PAME working group released two publications on protected areas in the Arctic in 2017. The first report, “*Area-based Conservation Measures and Ecological Connectivity*,” gives an overview of how other measures can improve MPA networks. Since most of the Arctic states are using different approaches to implement MPAs, there is a need for different tools for the different states. This report suggests other measures for safeguarding the biodiversity as exclusion zones for different human activities during critical seasons and gear restrictions.<sup>111</sup> The other report is the “*Arctic Protected Areas Indicator Report*,” in cooperation with the CAFF working group. It gives an overview of the status and trends of Arctic protected areas.<sup>112</sup>

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<sup>106</sup> Ibid p. 5

<sup>107</sup> Jakobsen, 'MPAs under the Arctic Council' p. 242

<sup>108</sup> Council, *Framework for a Pan-Arctic Network of Marine Protected Areas* p. 5

<sup>109</sup> Ibid p. 9

<sup>110</sup> Jakobsen, 'MPAs under the Arctic Council' p. 242

<sup>111</sup> PAME, *Area-based conservation measures and ecological connectivity* p. 9

<sup>112</sup> Conservation of Arctic Flora and Fauna (CAFF) Protection of the Arctic Marine Environment (PAME), *Arctic Protected Areas; Indicator Report*, 2017) p. 1

### 2.6.6 Sustainable Development Working Group

The Sustainable Development Working Group, established in 1998, is a working group for the indigenous and local people in the Arctic.<sup>113</sup> Some of the areas they focus on are to strengthen the economic assessment, develop educational opportunities, and to keep the heritage and cultural life of the Arctic communities. Human health is also in focus because of the environmental risks of living in the Arctic. The Arctic infrastructure is essential to cover the needs of the people living there and have a sustainable economic development while making job opportunities for the local community. Their main goal from their work plan is to have sustainable development and understanding of the indigenous people and Arctic communities. They have two expert groups, the Arctic Human Health Expert Group and the Social, Economic, and Cultural Group. The group aims to provide sustainable growth in the Arctic, including opportunities to protect and preserve the environment and the economy, culture, the health of indigenous people, and the Arctic communities. The SDWG focuses on the human aspects of the Arctic and pursues programs to protect and strengthen the culture, economy, climate, and the health of the indigenous people and Arctic communities.

The working groups show that the Arctic Council's scope is broad, as they do the scientific research and data analysis and gives it as guidelines and recommendations to the Arctic states. The working groups consist of scientists and experts in the fields, all working together. The scientists and experts in the working groups make the research more productive, and with everyone working together, the reporting and cooperation make a fast response to the changes in the Arctic. Because of the size of the Arctic marine environment, it is important to cooperate when it comes to monitoring to keep the marine environment safe and healthy. The working groups are exploring and collaboration with each other on a range of projects and activities. The working groups continue to prepare many reports describing environmental challenges in the Arctic region.<sup>114</sup> The Arctic Council has improved the environmental governance in many ways, and the cooperation works.<sup>115</sup> The Arctic Council's role in the Arctic region is essential for the negotiations and cooperation, because of the drastic changes and the increasing interest in the region. Like all the working groups in the Arctic Council, international cooperation is

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<sup>113</sup> Arctic Council, 'SDWG Work Plan 2019-2021' (2019)

<sup>114</sup> Molenaar, *The Arctic, the Arctic Council, and the Law of the Sea* p. 53

<sup>115</sup> Olav Schram Stokke, 'Protecting the Arctic Environment: The Interplay of Global and Regional Regimes' (2009) 1 *The Yearbook of Polar Law Online* 349

crucial for reducing environmental threats, and the profoundly changed biodiversity has become a matter of global concern.<sup>116</sup>

The working groups are forums for scientific cooperation, generating knowledge on Arctic issues for the benefit of the Arctic region. The cross-cutting issues on biodiversity makes the working groups work in close collaboration with each other and other international bodies and regimes.<sup>117</sup> The Arctic Council established the Task Force on Arctic Marine Cooperation (TFAMC) in 2015.<sup>118</sup> The purpose of the Task Force is to consider the possibilities for closer collaboration between the members of the Arctic Council on maritime issues. The International Council for the Exploration of the Sea (ICES) is a global organization that advances research and guidance to support the sustainable use of the ocean. The ICES and the Arctic Council is cooperating and coordinating on developing science and monitoring in the Arctic. The Arctic Council and ICES are working closely on coordinating marine science in the Arctic marine area to get a better understanding of the region, and to prevent duplication on these matters. ICES have the expertise and experience to assist the Arctic Council in developing and coordinating marine science, as well as give guidance on the impacts on the ecosystem because of human activities and climate change.<sup>119</sup> ICES received the observer status in the Arctic Council in 2017, and especially in the working group of PAME and AMAP, the Arctic Council uses ICES as a provider for collection of data on marine science. ICES is continuing to advance the cooperation to address science gaps in the Arctic region.<sup>120</sup> And the EA is a key principle that the Arctic Councils working groups and ICES agreed to start cooperation on.

The working group of PAME has also teamed up with the North Pacific Marine Science Organization (PICES) which too is an intergovernmental organization that works to promote and coordinate marine research in the North Pacific.<sup>121</sup> Including the ICES, the three bodies cooperate to get a better understanding of the Central Arctic Ocean, as well as contributing to

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<sup>116</sup> Prip, 'Biodiversity governance under the Arctic Council: The role of science, business and NGOs' p. 1

<sup>117</sup> Ibid p. 2

<sup>118</sup> Baker Betsy, 'ICES, PICES, and the Arctic Council Task Force on Arctic Marine Cooperation' (2016) 6 UC Irvine L Rev 1 p. 1

<sup>119</sup> Arctic Council, 'NEW OBSERVER: ICES' 2017) <<https://arctic-council.org/en/news/new-observer-ices/>> accessed 01.09.20

<sup>120</sup> CIEM ICES, 'Teaming up for the Arctic' 2014) <<http://ices.dk/news-and-events/news-archive/news/Pages/Teaming-up-for-the-Arctic.aspx>> accessed 01.09.20

<sup>121</sup> Betsy, 'ICES, PICES, and the Arctic Council Task Force on Arctic Marine Cooperation' p. 2

implementing EA in the Central Arctic Ocean. PAMEs development of AMSP is a guidance on cooperation in the Arctic, with four goals on assisting achieving this; Goal 1: *Improve knowledge of the Arctic marine environment, and continue to monitor and assess current and future impacts on Arctic marine ecosystems.* Goal 2: *Conserve and protect ecosystem function and marine biodiversity to enhance resilience and the provision of ecosystem services.* Goal 3: *Promote safe and sustainable use of the marine environment, taking into account cumulative environmental impacts.* Goal 4: *Enhance the economic, social and cultural well-being of Arctic inhabitants, including Arctic indigenous peoples and strengthen their capacity.*<sup>122</sup> Cooperation between the Arctic Council and other instruments and bodies are important for support and participation. The ICES and PICES are essential to the Arctic council to reach these goals and get scientific knowledge.<sup>123</sup>

There has been doubt about the Arctic Council and its effectiveness without a legally binding status with the increasing pressure on the environment and interests of non-Arctic states. The consequences of the lack of control of unregulated activities in the Arctic ocean are drastic, which is why there is a need for a more legally binding framework to regulate marine areas. The Arctic Council should continue its work on monitoring, evaluation, and interpretation of Arctic climate change and its impacts, and also cooperate with legal frameworks and other scientific bodies. The Arctic Council and the new BBNJ agreement could cooperate on filling in regulatory gaps and provide common goals for management of the EA and MPAs in the Arctic region, especially since the regulatory gaps in governance of marine biodiversity in ABNJ have been the focus of the BBNJ process for almost a decade.<sup>124</sup>

Since UNLCOS does not contain the substantive standards that are necessary for the actual regulation when it comes to biodiversity in the ABNJ, regional regulation have played an important role in the regional Arctic cooperation. Although, without any legally binding force it could be a challenge. The Arctic Council has several programs relating to protection of the Arctic marine environment, though it has no regulatory authority.<sup>125</sup>

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<sup>122</sup> PAME, 'Arctic Marine Strategic Plan' (2015)

<sup>123</sup> Betsy, 'ICES, PICES, and the Arctic Council Task Force on Arctic Marine Cooperation' p. 10

<sup>124</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 1

<sup>125</sup> Rayfuse, 'Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction' p. 7

### 3 The BBNJ agreement

The aim of this chapter will be to take on existing legal framework in the ABNJ today, and address the process towards an ILBI on the conservation and sustainable use of marine biodiversity beyond national jurisdiction that started in 2004.<sup>126</sup> The BBNJ agreement aims to focus on the marine biodiversity in the high seas, which also includes the high seas of the Central Arctic Ocean.<sup>127</sup> The High seas are the largest area on earth, but also the least protected since it is outside national jurisdiction. This new ILBI, would protect and resolve threats to the biodiversity in the ABNJ, through a global framework filling in existing gaps to ocean governance.

#### 3.1 Existing Legal Framework in ABNJ

The ABNJ covers more than half the world's surface<sup>128</sup>, yet there is currently very little legal protection for biodiversity. Because of the location, it is difficult to monitor the increasing activities in the Arctic region, and also because the high seas belong to no-one and everyone. Since everyone has the responsibility to protect and preserve the marine environment, it is not easy to control. No individual state has jurisdiction over this area, and international communities govern it. UNCLOS and the CBD give the general obligations and the fundamental rules for protecting and preserving the marine environment in the world's ocean today. Although UNCLOS does not have a specific reference to marine biodiversity, it is considered the ocean's legal framework.<sup>129</sup> UNCLOS has the legal framework on the rights and obligations of states when it comes to the right to use the high seas<sup>130</sup>, conservation, and management of the living resources<sup>131</sup> and the protecting of the marine environment.<sup>132</sup> The

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<sup>126</sup> Christian Prip, 'Arctic Ocean governance in light of an of an international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction' (2019) *Marine policy* 103768 p. 2

<sup>127</sup> Vito De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' (2017) 86 *Marine Policy* 234 p. 234

<sup>128</sup> Blasiak and others, 'The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction' p. 2

<sup>129</sup> IISD REPORTING SERVICE, *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018* (2018)

<sup>130</sup> United Nations, 'Law of the Sea Convention' Art. 87

<sup>131</sup> *Ibid* Art. 116-120

<sup>132</sup> *Ibid* Art. 192

obligations for living resources in UNCLOS have essential laws for the high seas, but they give minimal guidance on marine environmental conservation.<sup>133</sup> UNCLOS sets out the rights and obligations for states in all the maritime zones, and then it is up to the states to protect and preserve the marine environment, including fragile ecosystems.<sup>134</sup>

Article 87 refers to the freedom of the high seas, and gives all states the right of freedom of navigation, lay submarine cables and pipelines, to construct artificial islands and other installations permitted under international law, freedom of fishing, scientific research.<sup>135</sup> And though Article 118 says that states shall cooperate in the conservation and management of living resources in the high seas,<sup>136</sup> but does not come with frameworks on how to achieve these obligations.<sup>137</sup> The purpose of this new convention under UNCLOS is to fill the gaps, and deal with new threats to the marine biodiversity.

CBD is the only place where there is a definition of biodiversity.<sup>138</sup> Article 2 defines it as: «*Biological diversity*" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.»<sup>139</sup> CBD was the first global agreement on conservation and sustainable use of biological diversity, which makes it closely related to the BBNJ process.<sup>140</sup> The goals of the CDB is the conservation of biological diversity, the sustainable use of the components of

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<sup>133</sup> Stewart M. Patrick, 'Why the U.N. Pact on High Seas Biodiversity is too important to fail' (*World Politics Review* 2019) <<https://www.worldpoliticsreview.com/articles/28011/why-the-u-n-pact-on-high-seas-biodiversity-is-too-important-to-fail#:~:text=Late%20last%20month%2C%20a%20United,and%20living%20organisms%20in%20the>> accessed 06.07.2020

<sup>134</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' p. 235

<sup>135</sup> United Nations, 'Law of the Sea Convention'

<sup>136</sup> Ibid p. 893

<sup>137</sup> Ines Aguiar Branco, 'INSIDER: What to look for in the latest round of BBNJ negotiations' <<https://www.wri.org/blog/2019/08/insider-what-look-latest-round-bbnj-negotiations>> p. 2

<sup>138</sup> United Nations, *Convention on Biological Diversity*

<sup>139</sup> Ibid Art. 2

<sup>140</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 147



biodiversity, and the fair and equitable sharing of benefit's arising from the use of genetic resources.<sup>141</sup>

When it comes to processes and activities in the ABNJ, the CBD applies in Article 4(b), and that it is under the state's jurisdiction or control.<sup>142</sup> The CBD is already related to the BBNJ process because of the conservation of the biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits of the utilization of genetic resources. As of article 22(2) in the CBD, it shall comply with the rights and obligations under UNCLOS.<sup>143</sup> The convention also contributes to the BBNJ negotiations especially on the element on ABMTs concerning the CBDs development of a process to describe ecologically or biologically significant marine areas.<sup>144</sup>

The existing ocean governance framework lacks a complete set of overarching principles and guidance for biodiversity in ABNJ. In 2003 an Open-ended informal Consultative Process for Oceans and Law of the Sea recognized significant legal governance gaps related to marine biodiversity to underline the urgency of developing norms and mechanisms to protect vulnerable marine ecosystems, especially in ABNJ. For this reason, the ad-hoc informal working group was established.

### **3.2 Ad-Hoc Informal Working Group**

The process to establish a new BBNJ agreement started with the establishment of the Ad-hoc informal working group by United Nations General Assembly resolution 69/24 (UNGA resolution 69/24) of 2004.<sup>145</sup> The working group focused on researching the threats and problems of conservation and sustainable use of biodiversity beyond national jurisdiction in the past and the future. They had goals to study and exchange information when it comes to unregulated activities like fishing, marine genetic resources (MGR), and marine scientific research (MSR) on marine biodiversity, MPA, and environmental impact assessments (EIA).<sup>146</sup>

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<sup>141</sup> United Nations, *Convention on Biological Diversity Art. 1*

<sup>142</sup> Ibid Art 4(b)

<sup>143</sup> Ibid Art. 22(2)

<sup>144</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' p. 6

<sup>145</sup> IISD REPORTING SERVICE, *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018*

<sup>146</sup> Ibid

The working group found a lack of a global framework for these elements, and especially for establishing MPAs and rules for EIAs.<sup>147</sup>

However, the elements of the package deal were not the only discussion in the PrepCom. In the early stages of the discussions for a new ILBI the questions of the relationship between other instruments and bodies.<sup>148</sup> One of the key issues was how the new ILBI would cooperate with existing instruments and bodies. Though, it appeared to be no easy way for the participants to reach consensus on the meaning of “*not to undermine*”.<sup>149</sup> In this regard, the BBNJ agreement can promote and coordinate integrated conservation measures and formulate a legal framework allowing for an EA on biodiversity conservation issues.<sup>150</sup>

The working group had nine meetings from when it was established to 2015 to find options and approaches for a legal agreement in ABNJ.<sup>151</sup> In the fourth meeting of the working group, they agreed on some recommendations towards an ILBI. The plan was to identify the gaps in governance framework and develop further on existing instruments, and to develop an agreement for the conservation and sustainable use of BBNJ under UNCLOS. The recommendations include what they call the package, which was their primary focus. In 2014-2015 the working group was active in different discussions on the possibility of the ILBI. The working group reached consensus on recommendations on the ninth meeting and brought it to UNGA's 69th session.<sup>152</sup>

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<sup>147</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 152

<sup>148</sup> Vito De Lucia, *Reflecting on the meaning of “not undermining” ahead of IGC-2* (2019)

<sup>149</sup> Vito De Lucia, 'Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From “Not Undermine” to Ecosystem-Based Governance' (2019) p. 2

<sup>150</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' p. 238

<sup>151</sup> Blasiak and others, 'The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction'

<sup>152</sup> IISD REPORTING SERVICE, *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018*

### 3.2.1 The Package Deal

The package deal agreed upon in the Ad-hoc informal working group consists of four elements.<sup>153</sup> Because of their goals and issues, they are all discussed separately in the negotiations, but should be addressed together and as a whole.<sup>154</sup> Part I, general provisions of the revised draft text of the BBNJ agreement, gives the definitions of the elements in the package deal.<sup>155</sup> Marine genetic resources and benefit-sharing (MGRs) are the material of marine plant, animal, microbial or other origin containing functional units of heredity.<sup>156</sup>

Area-based management tools (ATMs) are a tool in which human activities are regulated in a specific geographical area to achieve particular conservation and sustainable use of resources.<sup>157</sup> These tools give higher protection to this specific area, compared to the surroundings. A specific area could be an MPA, a geographically defined marine area for conservation and sustainable use objectives.<sup>158</sup> The BBNJ agreement refers to enhance cooperation and coordination in the use of ABTM's, including MPAs between states.

For the importance of effectively protect and preserve marine biodiversity. Part 3 of the draft text of the new BBNJ agreement focuses on the measures on ABMTs and MPAs, and article 15 of the ILBI deals with international cooperation and coordination. Article 15(1): *“To further international cooperation and coordination with respect to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, States Parties shall promote coherence and complementarity in the [establishment] [designation] of area-based management tools, including marine protected areas, through: “ (i) “Adopting conservation and management measures to complement measures designated under [existing] relevant legal instruments and frameworks and relevant global, regional or sectoral bodies.”*<sup>159</sup> Here the working groups CAFF and PAME should be a part of the negotiations to promote and start the

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<sup>153</sup> Prip, 'Arctic Ocean governance in light of an of an international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction' p. 2

<sup>154</sup> Elizabeth Mendenhall and others, 'A soft treaty, hard to reach: The second inter-governmental conference for biodiversity beyond national jurisdiction' (2019) 108 Marine Policy 103664

<sup>155</sup> United Nations General Assembly, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2019) Art. 1

<sup>156</sup> Ibid Art. 1(9)(1)

<sup>157</sup> Ibid Art. 1(3)

<sup>158</sup> Ibid Art. 1(10)

<sup>159</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 6

cooperation in the Arctic and help the new ILBI to not duplicate the work that has already been made on MPAs in the Arctic Councils working groups.

Environmental impact assessments (EIAs) are a process of evaluating the environmental impact of activity in or affecting the ABNJ, taking into account the socio-economic, cultural, and human health impacts and both beneficial and adverse.<sup>160</sup> Like activities that can cause substantial pollution and make harmful changes to the marine environment.<sup>161</sup> EIAs are essential to prevent and identify possible threats to the marine environment.

Capacity building and the transfer of marine technology (CB&TT) is the process of obtaining and improve the information and data on marine sciences, including guidelines, criteria, and standards.<sup>162</sup> The transfer of marine technology refers to the transfer of the instruments, equipment, vessels, processes, and methodologies required for the production on use of knowledge to improve the studies and understanding of nature and resources in the ocean.<sup>163</sup> There was also added the fifth element on cross-cutting issues. Here they address such matters as the scope of the new legal agreement, and how it's relationship will be with other instruments and bodies.<sup>164</sup>

### **3.3 The Preparatory Committee**

Before the negotiations started, the PrepCom was established by UNGA resolution 69/292 in 2015, here they decided to develop an ILBI under UNCLOS.<sup>165</sup> The PrepCom made recommendations to the General Assembly for the draft text of the ILBI, taking into consideration the studies made by the Ad-hoc working group. All member states of UNCLOS

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<sup>160</sup> United Nations General Assembly, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' Art 1(7)(1)

<sup>161</sup> Ibid Art. 1(7)(2)

<sup>162</sup> Ibid Art. 1(11)

<sup>163</sup> Ibid Art. (1)(14)

<sup>164</sup> Harriet Harden-Davie Catherine Redgwell, Angel Horna, Penelope Nevill, Robin Warner, 'Regulating the global commons: the BBNJ negotiations and ocean spaces beyond national jurisdiction' (2017) 111 Proceedings of the annual meeting - American Society of International Law 241

<sup>165</sup> Oceans & Law of the Sea United Nations, 'Preparatory Committee established by General Assembly resolution 69/292'

were welcome to join. In 2016 and 2017, there were held four sessions to develop a zero-draft text for the new ILBI.<sup>166</sup> The sessions focused on the topics in the package agreed on in 2011.

After the first session of the PrepCom, they established five informal working groups, one for each of the different elements of the package deal, and one for cross-cutting issues.<sup>167</sup> The Chair made an overview of every session with a description of views on the different topics in the package and possible issues for further discussions.<sup>168</sup> They also considered the relationship between the new agreement and other existing instruments during the second session, however, it was still unclear how this new ILBI could fill in the gaps without undermining existing instruments and frameworks.<sup>169</sup> In the early sessions of the PrepCom, there was a suggestion from some of the delegations that the agreement would need to establish a global executive body where the members could make decisions, coordinate, perform evaluations, and assess implementation and compliance. Other delegates meant that a global approach would undermine the existing bodies and framework, and the regional and sectoral approach would benefit. At the third meeting of PrepCom, the suggestion of a hybrid approach came up.<sup>170</sup> The hybrid approach would have a COP, who would set the standards and obligations agreed upon on a global level. Then the regional and sectoral groups would be working on reporting implementation and the bodies implementing the legal agreement.<sup>171</sup>

The EA was recognized early in the PrepCom sessions, as it was agreed upon by several delegated that the future ILBI should incorporate accepted principles of ocean governance, like the EA.<sup>172</sup> The EA has been included in the discussions on the BBNJ process as early as the PrepCom.<sup>173</sup> In the PrepCom, it was set out general principles and approaches to conserving and the sustainable use of marine biological diversity in ABNJ, and the EA was explicitly

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<sup>166</sup> Oceans & Law of the Sea, *Chair's overview of the first session of the Preparatory Committee* (2016)

<sup>167</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 155

<sup>168</sup> Oceans & Law of the Sea, *Chair's overview of the first session of the Preparatory Committee*

<sup>169</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 155

<sup>170</sup> Ibid

<sup>171</sup> Ibid p. 142

<sup>172</sup> Vito De Lucia, 'The Ecosystem Approach and the negotiations towards a new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' (2019) p. 10

<sup>173</sup> Ibid p. 10

indicated as a protentional approach in the BBNJ agreement.<sup>174</sup> The EA was mentioned under the PrepCom under two agenda items, ABMTs and EIAs<sup>175</sup>, and mention on the IGC sessions as one of the necessary guiding principles, not only in general but also on the topics of the package deal, specifically.<sup>176</sup> The PrepCom submitted its report to UNGA at its fourth and last session,<sup>177</sup> UNGA passed Resolution 72/249.<sup>178</sup> They decided to arrange an intergovernmental conference to consider the recommendations and guidelines in a draft text<sup>179</sup> of an ILBI of the PrepCom and to elaborate the text of the new legal agreement.<sup>180</sup>

### 3.4 Intergovernmental Conference

The BBNJ negotiations started in 2018 and was the first out of four scheduled meetings of the IGC scheduled. Session two and three happened in 2019, while the fourth and last session was supposed to be in March 2020, but due to the COVID-19 pandemic, the session had to be postponed.<sup>181</sup> The President, Ambassador Rena Lee, organized the negotiations into four informal working groups, the four elements in the package deal.<sup>182</sup> The delegates have agreed on making a zero draft trough consensus.<sup>183</sup>

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<sup>174</sup> Ibid p. 10

<sup>175</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 3

<sup>176</sup> De Lucia, 'The Ecosystem Approach and the negotiations towards a new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' p. 8-9

<sup>177</sup> David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction' (2019) 99 Marine Policy 21

<sup>178</sup> United Nations General Assembly, 72/249. *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (2017)

<sup>179</sup> Oceans & Law of the Sea, 'Chair's streamlined non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2017)

<sup>180</sup> United Nations General Assembly, 72/249. *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*

<sup>181</sup> Vito De Lucia, 'Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction' <<https://site.uit.no/nclos/files/2020/05/Vito-De-Lucia-Regional-Governance-BBNJ-.pdf>>

<sup>182</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' p. 4

<sup>183</sup> IISD REPORTING SERVICE, *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the*

The First session of the IGC on an ILBI under UNCLOS on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction took place in September 2018. The IGC President had prepared a document with the different elements that needed discussion. The delegates exchanged views on the different focus areas, even though it was not as effective as expected. The draft text submitted by the PrepCom remained unclear. This most likely because some states were still not convinced that an ILBI was needed.<sup>184</sup>

The IGC-2 session happened in April 2019, and after this session, many of the delegates had mainly stated their preferences and did not suggest concrete ideas. Because of this, the interaction in IGC-2 very little.<sup>185</sup> The common heritage of humankind and freedom of the high seas has been a topic that is not agreed upon. The delegates that support the high seas' freedom insist that access should be unhindered, while proponents of the common heritage highlight the need for oversight and benefit-sharing.<sup>186</sup> Freedom of the high seas goes hand in hand with different regional and sectoral bodies, while the common heritage would need a global legal agreement. Another matter that has been a topic is "*not to undermine*" other existing bodies and frameworks.<sup>187</sup>

Furthermore, the IGC-3 session was in September 2019. In this session, the delegates were ready to discuss the zero draft on the BBNJ agreement.<sup>188</sup> After this, the draft text was more comprehensive and getting closer to the final shape of the new agreement. At the end of this session, the delegates finally had reached consensus on a draft treaty text.<sup>189</sup> Even though some of the Arctic states, specifically Norway, Iceland, Russia, and the United States, have been skeptical of the BBNJ agreement.<sup>190</sup> The Arctic states and the countries that are active and have

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*Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018*

<sup>184</sup> Ibid

<sup>185</sup> IISD REPORTING SERVICE, *Summary of the Second Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March - 5 April 2019* (2019) p. 17

<sup>186</sup> Ibid p. 17

<sup>187</sup> Ibid p. 18

<sup>188</sup> IISD REPORTING SERVICE, *Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19-30 August 2019* (2019)

<sup>189</sup> Ibid

<sup>190</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science'

a strong interest in the region prefer a regional approach. For the benefit of not undermining the regional and sectoral instruments that are already working in the region.<sup>191</sup>

After the PrepCom and the ongoing IGC sessions, the draft text of the ILBI cooperation and coordination are essential to fill in gaps in existing frameworks. However, it is a chance that a new ILBI could weaken existing agreements and instruments with new provisions and interference with processes that are already in place. Article 4 focuses on the relationship between other relevant instruments and frameworks, and according to Article 4(3): “*This Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, and that promotes coherence and coordination with those instruments, frameworks and bodies, provided that they are supportive of and do not run counter to the objectives of the Convention and this Agreement.*”<sup>192</sup>

Therefore, the new ILBI should not undermine existing instruments and bodies, including UNCLOS. Also, in the draft text of the new BBNJ agreement, part 1 on general provisions, Article 6 sets out the international cooperation. Firstly, Article 6(1): “*State Parties shall cooperate for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation among existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies in the achievement of the objective of this Agreement.*”<sup>193</sup> And secondly, Article 6(3) “*States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary, to fill governance gaps.*”<sup>194</sup> For this, the new ILBI should be strengthening the existing frameworks on how the agreement can complement and strengthening the Arctic Council in using all the information and recommendation that the Arctic Council already have in place. However, with the wording “*shall*” in the provisions, it indicates that it is not an

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<sup>191</sup> De Lucia, 'Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction'

<sup>192</sup> United Nations General Assembly, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' Art. 4(3)

<sup>193</sup> United Nations General Assembly, *Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (2019) Art. 6 (1)

<sup>194</sup> *Ibid* Art. 6 (3)



absolute not to undermine, but rather to work in good faith and take into consideration the existing instruments, like the Arctic Council.<sup>195</sup>

For the new BBNJ agreement to be able to fill in regulatory gaps in the Arctic, it should take into consideration the work of the working groups in the negotiations for it to be as flexible as possible for the future cooperation with the Arctic Council. The Arctic Council already has expertise in the Arctic region and the issues that need to be addressed, the BBNJ process would benefit on taking into account as it does not want to undermine or duplicate the work already in place.<sup>196</sup> The Arctic Council should contribute to the marine biodiversity research through the BBNJ process and cooperate on data collection to support the marine biodiversity in the Arctic. Furthermore, consider the cooperation that the Arctic Council has with other instruments that can provide a pathway for the cooperation between the Arctic Council and the BBNJ agreement.

While the meaning of the provision not to undermine has been heavily debated in the BBNJ process. The BBNJ agreement should not duplicate the material of existing agreements. As an ILBI being negotiated under UNCLOS, it is being created to develop specific provisions on the conservation and sustainable use of marine biodiversity of ABNJ. The Arctic Council would benefit being a part of the BBNJ process to find the balance on the cooperation in the Arctic. As the BBNJ agreement could promote ABMTs and MPAs establishment by regional bodies, and greater coordination and cooperate, including through global standards and principles.<sup>197</sup> The new BBNJ agreement could make it possible to establish MPAs, and have the global framework for carrying out ABMTs and MPAs in ABNJ. ABNJ constitute the world's greatest ecosystems, however the least managed and cared for.

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<sup>195</sup> De Lucia, *Reflecting on the meaning of "not undermining" ahead of IGC-2*

<sup>196</sup> Ibid

<sup>197</sup> IISD REPORTING SERVICE, *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018*



## 4 Future Cooperation and Interaction

This chapter of the thesis will discuss and areas for future cooperation and interaction between the Arctic Council and the new BBNJ agreement. In the findings throughout the thesis, MPAs are a big part of both the Arctic Council and the BBNJ agreement, as well as the EA. Even though only mentioned in the BBNJ process, it would benefit the biodiversity in the Arctic region and the future cooperation to establish MPAs. These are protentional areas for cooperation, but the new BBNJ agreement should not undermine or duplicate work already in place in the Arctic. The BBNJ agreement should consider the Arctic Council as one of the main actors in the Arctic region and use their knowledge of the region.

### 4.1 Interaction

As for now, there is no clear vision of how the BBNJ agreement will cooperate with existing regional bodies and instruments.<sup>198</sup> However, the BBNJ agreement should complement the existing legal frameworks in the ABNJ, in which the agreement also clarifies in Article 4 of the revised draft text.<sup>199</sup> The agreement should address the gaps as it strengthens and implements the legal framework already set out in UNCLOS.<sup>200</sup> Moreover, it should be strengthening the cooperation between states on both regional and a global level, as described in Article 197 in UNCLOS.<sup>201</sup>

As the topic of not undermining existing instruments and bodies has been a big part of the BBNJ process. The importance of choosing which approach should be the tool to help provide a clear and integrated framework for the BBNJ agreement, and to strengthen the cooperation with the Arctic Council is vital. Three approaches have been on the table for cooperation between the institutional arrangements. Firstly, a global approach that establishes a global agreement to consider and decide. Secondly, a regional approach that recognizes the regional and sectoral bodies' full authority for decision making and providing recommendations and guidelines

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<sup>198</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?'

<sup>199</sup> United Nations General Assembly, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' Art. 4

<sup>200</sup> Oceans & Law of the Sea, *Chair's overview of the first session of the Preparatory Committee*

<sup>201</sup> United Nations, 'Law of the Sea Convention' Art. 197

without any global agreements overseeing. Thirdly, the hybrid approach, which strengthening regional and sectoral organizations mandates through regional cooperation, with also providing global guidance and oversight.

Throughout the BBNJ negotiations, the focus has been on whether there should be a global approach, which would be a natural outcome for the BBNJ as a global framework, however, the new BBNJ agreement should not undermine regional and sectoral institutions like the Arctic Council. The global approach would have a strong mandate with competence to measure, especially on the package deal elements.<sup>202</sup> In the PrepCom sessions, there were many different views on the global vs. regional approach. Some delegates wanted a global approach that was used as a global mechanism to employ a centralized, comprehensive approach over activities in ABNJ.<sup>203</sup> For the reason of not undermining, it is necessary to find the balance between an overarching global framework and a regional approach.

The Arctic environment is unique and requires regional cooperation for the conservation and protection.<sup>204</sup> The people in the Arctic depend on the marine environment for food, traditions, and income, which has been on the agenda of the Arctic Council since the start. The ocean is essential for the whole world because of natural resources. However, the marine environment faces much pressure from increasing human activities such as shipping, dumping, offshore oil, gas. Indigenous people are an important part of conservation in the Arctic because the marine environment is vital for their livelihood. The preferred approach to use for the Arctic states is the regional and sectoral approach. Only the general guidance and obligations are provided on a global level, while the regional and sectoral organizations have full authority. The international obligations in UNCLOS and the CBD are to be implemented on a national level. The problem with this is that ecosystems in the Arctic are large and crossing numerous maritime zones of the coastal states in the Arctic. For this reason, the Arctic states need to conserve and cooperate on a regional and sectoral level to protect the marine environment.<sup>205</sup> Also, the Arctic

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<sup>202</sup> De Lucia, 'Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction'

<sup>203</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' p. 3

<sup>204</sup> Koivurova, 'Governance of protected areas in the Arctic' p. 49

<sup>205</sup> Ingvild Ulrikke Jakobsen, 'Extractive Industries in Arctic : The International Legal Framework for the Protection of the Environment' (2016) p. 47

coastal states favor a regional approach that shall not undermine existing regional and sectoral bodies, meaning the Arctic Council.<sup>206</sup>

The Arctic Council is an essential actor for regional cooperation in the Arctic. Still, they do not only serve as a facilitator for negotiations between the Arctic states but also concerning other regional or global instruments that are addressing issues in the Arctic region. Problems that are caused by activities outside the region also affects the Arctic, but these cannot be resolved by regulation that take place in the Arctic states' maritime zones.<sup>207</sup> Therefore a global approach is necessary, also as the Arctic Council is supporting and contributing to other treaty negotiations.

The hybrid approach was first mentioned in New Zealand's papers on cross-cutting issues in the PrepCom. It got much attention for the matters on ABMTs, so the ILBI could set out internationally agreed standards and obligations at a global level. After that, the ABMTs and MPAs can be implemented by states on the regional or sectoral level.<sup>208</sup> This means that the BBNJ agreement would provide the general guidance and objectives that would be developed on a global level to improve cooperation and coordination for the decision-making and implementation by the Arctic Council and the Arctic states. The Arctic states are a bit skeptical of the new BBNJ agreement because their concerns about the institutional agreements and their cooperation in the Arctic heavily rely on the existing bodies and frameworks.<sup>209</sup>

The hybrid approach could be a part of making better global coordination and cooperation through a comprehensive set of obligations that would guide the Arctic Council and the Arctic states. The proposal from the PrepCom on the hybrid approach proposed that a global body in the ILBI would be established and would have the responsibilities for; the identifications of priority areas for the establishment of ABMTs and MPAs, establishing processes for cooperation and coordination with existing bodies, administering a global informal repository,

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<sup>206</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 2

<sup>207</sup> Takei, 'The Role of the Arctic Council from an International Law Perspective: Past, Present and Future' p. 369

<sup>208</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 161

<sup>209</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' p. 2

and undertaking regular review of the implementation of the ILBI.<sup>210</sup> The hybrid approach is not only a good option for providing a coherent and integrated framework for regional and cross-sectoral coordination, regulation, and cooperation for BBNJ, but also for not undermining existing relevant legal instruments and frameworks.<sup>211</sup>

The hybrid approach might be a tool to help provide a coherent and integrated framework for the BBNJ and be a part of not undermine the Arctic Council in their cooperation. This will also help the BBNJ agreement with its main focuses to fill the existing gaps and strengthening the effectiveness of existing regional and sectorial organizations to address threats and problems in the ABNJ, integrating existing instruments, improve cooperation and coordination, and ensuring compatibility ecosystem management.<sup>212</sup>

## **4.2 Future MPAs governance in the Arctic**

As of the development of a Pan-Arctic network of MPAs in the PAME working group, there is more protection in areas within national jurisdiction. This means that there is a need for more regulation of MPAs in ABNJ. The BBNJ agreement would be an effective legal framework in resolving this issue, and the Arctic Council may play an important role in that, and being a platform for scientific knowledge and negotiations.<sup>213</sup> The main focus of the new BBNJ agreement is to fill in the regulatory and governance gaps, even though the Arctic states have made it clear the UNCLOS provides enough framework for the marine Arctic.<sup>214</sup> For the process of establishing ABMTs and MPAs, a global overarching framework could be working to enable the identification, designation, management and enforcement of the AMBTs in ABNJ.

The relationship between the BBNJ agreement and existing regional and sectoral instruments and bodies was a key element in the BBNJ process since the beginning.<sup>215</sup> The BBNJ agreement cannot undermine existing agreement or duplicating ongoing efforts.<sup>216</sup> The Arctic Council has

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<sup>210</sup> Kraabel, *The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach* p. 161

<sup>211</sup> *Ibid* p. 171

<sup>212</sup> Kraabel, 'Institutional arrangements in a BBNJ treaty: Implications for Arctic marine science' p. 3

<sup>213</sup> Loukacheva, 'The Arctic Council and "Law-Making"' p. 127

<sup>214</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 5

<sup>215</sup> *Ibid* p. 2

<sup>216</sup> De Lucia, 'Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From "Not Undermine" to Ecosystem-Based Governance' p. 4

done important work regarding ABMTs and MPAs, but in the areas of scientific knowledge and recommendations.<sup>217</sup> The working group of CAFF is already focusing on making a framework for the Arctic states to select and manage the MPAs in the Arctic, and the working group of PAME has developed the AMSP and its own framework for MPAs inside national jurisdiction for the Arctic states. The Pan-Arctic network for MPAs in the Arctic region should be of interest of the BBNJ agreement, as the agreement can implement these frameworks into the ABNJ. Even though, the Pan-Arctic network is focusing on MPAs inside national jurisdiction, although also relevant for the ABNJ. Here the cooperation would be that the decision-making body of the new agreement could adopt the measures made for making MPAs in the Arctic and work together to fill in the gaps instead of duplicating work what already exists in the Arctic.

It would also be beneficial for the working groups in the Arctic Council to become a part of the BBNJ process. There are some options on how the BBNJ process and agreement can cooperate with the Arctic Council. There could be an Arctic provision, a special article for the Arctic environment like article 234<sup>218</sup> of UNLCOS. Another option is an Arctic Annex, this would ensure a dynamic and would be an adaptive way to face the specific challenges of the Arctic environment.<sup>219</sup> An annex only for the Arctic could contribute to ensure that the issues in the Arctic are being dealt with within the specific areas, using the EA. A last option could be an Arctic working group working under the BBNJ agreement, specializing in the Arctic biodiversity. The Arctic Council's working groups; CAFF and PAME, could have an important role in scientific knowledge production of the Arctic ecosystem in the new BBNJ agreement.

Since the Arctic Council's framework is used for MPAs inside national jurisdiction of the Arctic states, the BBNJ agreement could be a tool to implement this framework to ABNJ.<sup>220</sup> With the framework focusing on establishing MPAs within the EEZ of the Arctic states<sup>221</sup>, the BBNJ agreement should take the acknowledge to the high seas and implement the already work on MPAs that have been done and make it to ABNJ. Because of the lack of legal basis for establishing MPAs in the Arctic high seas, and no global rules for regulations, and here the

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<sup>217</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 6

<sup>218</sup> United Nations, 'Law of the Sea Convention' Art. 234

<sup>219</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' p. 239

<sup>220</sup> Council, *Framework for a Pan-Arctic Network of Marine Protected Areas* p. 5

<sup>221</sup> Jakobsen, 'MPAs under the Arctic Council' p. 236

BBNJ agreement could help fill in these gaps and implement the work already done by the working groups in the Arctic Council. The Pan-Arctic framework focus on the cooperation on establishing and managing MPAs but comes with little guidance on how this should take place. Therefore, the BBNJ agreement would be useful to ensure the implementation of the framework and achieve the goals of the Pan-Arctic network.<sup>222</sup> To set up a network of MPAs in the Arctic region takes a lot of states and international organizations because it is so large and complex. There is a need for cooperation and coordination in establishing and managing the MPAs, however there is little guidance on how such cooperation should occur. As a future global convention, the BBNJ agreement could provide these guidelines.<sup>223</sup>

It was in CPAN that the use of protected areas was recognized as an effective and necessary tool to ensure the conservation and sustainable use of biodiversity. CPANs goal is to establish “*an adequate and well managed network of protected areas that has a high probability of maintaining the dynamic biodiversity of the Arctic region.*”<sup>224</sup> This framework offers guidance to develop MPAs that are located within the national jurisdiction of the Arctic states. To develop a well-managed network of MPAs to ensure the protection of significant areas at national, regional and circumpolar levels.<sup>225</sup> For this reason it is up to each state in the Arctic to manage and develop the MPAs based on their own authorities and priorities in their maritime zones.<sup>226</sup>

The Pan-Arctic network of MPAs contributes to several objects in the Arctic Council, including the protection of the marine environment and implementing the EA.<sup>227</sup> As CAFF have increasingly based their work on the biodiversity concept defined in the CBD<sup>228</sup>, and recognized the EA as a tool for biodiversity management of the marine resources in the Arctic.

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<sup>222</sup> Ibid p. 243

<sup>223</sup> Ibid p. 243

<sup>224</sup> CAFF, *Circumpolar Protected Areas Network (CPAN) - Strategy and Action plan*, 1996)

<sup>225</sup> Jakobsen, 'MPAs under the Arctic Council' p. 234

<sup>226</sup> Ibid p. 240

<sup>227</sup> Ibid p. 235

<sup>228</sup> Prip, 'Biodiversity governance under the Arctic Council: The role of science, business and NGOs' p. 1



### 4.3 Ecosystem approach

With the EA being a main principle in the Arctic Council, and also one of the guiding principles for the BBNJ agreement<sup>229</sup>, it is essential to establish the importance on how the EA can help identifying and take action on influences that are critical to the health of ecosystems. Thereby achieving sustainable use of ecosystem goods and services and maintaining ecosystem integrity.<sup>230</sup> The ecosystem is threatened and under a lot of pressure by a series of global, regional and local processes which are a part of changing the ecosystem, and climate change can cause major changes to the ecosystem.<sup>231</sup> There is a need to keep track of changes in the environment and a monitoring system needs to be developed. The EA is a strategy to manage and solve the issues affecting the ecosystems.

The EA is comprehensive, integrated human activity management based on available scientific and traditional knowledge about the ecosystem and its dynamics. The EA has four essential elements<sup>232</sup>; the first one is ecological integrity, which is the underlying goal of the EA. Here the focus is on maintaining the critical functions and structural components of ecosystems to protect and preserve the ecosystems themselves and to conserve biological diversity. The second one is; integration, which focuses on the need for conservation activities and approaches to be holistic and consider ecological interdependencies and connections. The third is how the information and knowledge are being put into action in the EA. Knowledge of the ecosystem processes is vital to understand the stressors in an ecosystem and how to handle these problems. The fourth and last element is iteration, which is essential for the ecosystem conservation measures that need to be iteratively assessed. This means responding to the changes happening, the reactions to the different stressors and how to manage them.

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<sup>229</sup> United Nations General Assembly, 'Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' Art 5(f)

<sup>230</sup> Arctic Council, *EA Guidelines, Implementing an Ecosystem Approach to Management of Arctic Marine Ecosystems* p. 5

<sup>231</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' p. 235

<sup>232</sup> De Lucia, 'The Ecosystem Approach and the negotiations towards a new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' p. 2-3

The EA directs the oceans managers' attention to the need to regulate marine uses concerning the ecological reality of the marine environment. And it is a central concept for addressing the conservation and sustainable use of biological diversity.<sup>233</sup> Furthermore, several ABMTs are working to achieving this, including marine spatial planning (MSP), MPAs, and PSSAs. MSP is cross-borders work that ensure that human activities at sea are efficient, safe, and in a sustainable way. MPAs are biologically rich areas that come with ecological, social, and economic benefits, and contributes to the resilient marine ecosystems to hazards like climate change.<sup>234</sup> There is no default regulatory mechanism to fill such gaps today in the Arctic. In UNCLOS there is only one provision that mention the ecosystem, but it is very general with “*to protect and preserve rare or fragile ecosystems*”<sup>235</sup>, and applies to reduce and control marine pollution. However, Article 119 established the conservation of the living resources of the high seas,<sup>236</sup> represents the concept of the EA.

The CBD defines EA as “*a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.*”<sup>237</sup> The EA is a central concept for addressing the conservation and sustainable use of biological diversity and is recognized as the CBD's initial framework of action.<sup>238</sup> And as mentioned before the CBD recognizes the EA as the overarching principle<sup>239</sup>, for sustainable and equitable natural resource management, and to be implemented trough the principles and operational guidelines set out in the decisions adopted by the COP.<sup>240</sup> On a workshop for the EA, twelve principles of the EA to biodiversity management was identified to enhance the visibility and increase environmental protection.<sup>241</sup>

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<sup>233</sup> Ibid p. 7

<sup>234</sup> Donald R. Rothwell and Tim Stephens, *The international law of the sea* (2nd ed. edn, Hart 2016) p. 510

<sup>235</sup> United Nations, 'Law of the Sea Convention' Art. 194(5)

<sup>236</sup> Ibid Art. 119

<sup>237</sup> Diversity, 'Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its Fifth Meeting' A 1

<sup>238</sup> De Lucia, 'The Ecosystem Approach and the negotiations towards a new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' p. 7

<sup>239</sup> Prip, 'Arctic Ocean governance in light of an of an international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction' p. 2

<sup>240</sup> Diversity, 'Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its Fifth Meeting'

<sup>241</sup> Vito De Lucia, 'Competing narratives and complex genealogies: The ecosystem approach in international environmental law' (2015) 27 *Journal of Environmental Law* 91 p. 112

The EA have been an important framework for biodiversity in international law, that is also why it has been identified as the main conservation framework for the Arctic Council.<sup>242</sup> The concept of EA is an overarching principle and approach that the Arctic Council have been focusing on in the AMSP since 2004. PAME established an EA expert group with the cooperation with AMAP, CAFF, and SDWG.<sup>243</sup> The expert group addressed the main aspects of implementing EA in the Arctic. It is necessary to know the geographic scope over where human activities are making threats to the marine environment. These threats need to be identified, assessed, and addressed.<sup>244</sup> The two working groups CAFF and PAME have provided knowledge and guidelines on Arctic Biological diversity for years.<sup>245</sup> Since PAME has identified a set of large LMEs and focused on implementing the EA in the Arctic for a long time with the development of a map for LME, it could be a foundation of the key platform for the BBNJ agreement to implement EA in the ABNJ.<sup>246</sup> Many Arctic LMEs are cross-borders, including waters under the national jurisdiction several Arctic states. Some of them also contain ABNJ, like the Central Arctic Ocean, which includes a large high sea area. Consideration of the transboundary nature of LMEs and interactions between adjacent LMEs requires cooperation between Arctic states and organizations with jurisdiction and management competence within a given LME.<sup>247</sup>

Moreover, since in the new ILBI on BBNJ the EA has been suggested to be the guiding principles. The BBNJ agreement would be a part of filling in the gaps and uncertainties for a comprehensive environmental agreement on biodiversity beyond national jurisdiction. Even though UNCLOS and the CBD have general obligations, they are implemented with more specific obligations on a regional level. The BBNJ agreement will help to ensure the protection of a vulnerable environment and the Arctic states must cooperate with each other under auspices

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<sup>242</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 2

<sup>243</sup> Arctic Council, *EA Guidelines, Implementing an Ecosystem Approach to Management of Arctic Marine Ecosystems* p. 2

<sup>244</sup> Arctic Council, *Large Marine Ecosystems (LMEs) of the Arctic area Revision of the Arctic LME map* p. 1

<sup>245</sup> Jakobsen, 'Extractive Industries in Arctic : The International Legal Framework for the Protection of the Environment' p. 50

<sup>246</sup> De Lucia, 'Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From "Not Undermine" to Ecosystem-Based Governance' p. 8

<sup>247</sup> Arctic Council, *EA Guidelines, Implementing an Ecosystem Approach to Management of Arctic Marine Ecosystems* p. 6

of the Arctic Council.<sup>248</sup> Even though under the BBNJ process the EA has been identified as a one of the potential guiding approaches for the BBNJ agreement, it is still unclear what role the EA will have in the ILBI. Since the Arctic Council already have EA guidelines<sup>249</sup>, and the six related elements of the framework for EA implementation. Starting with the identifying the LMEs in the Arctic region, and applying the elements of EA guidelines, the BBNJ agreement would have a foundation to start with implementing EA in the Arctic high seas. It will help the BBNJ agreement get a better understanding of the Arctic marine environment, and to identify legal gaps, as well as sharing data and contribute to the work already in place.

The Arctic states have not wanted the Arctic Council to be an area of extensive legal framework, but rather to address the legal gaps through cooperation between other bodies and instruments in the Arctic region.<sup>250</sup> The Arctic Council has taken a variety of significant measures to improve and strengthen Arctic governance, such as developing legal agreements and the Polar Code. There are some conventions and agreements in the Arctic region that the Arctic Council cooperates with as of the potential overlap. These are; The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the African Eurasian Waterbird Agreement (AEWA) under the Convention on Migratory Species (CMS).<sup>251</sup> These two bodies are working on strategies on Arctic seabirds, so is the CAFF working group. Both OSPAR and AEWA are collaborating with CAFF to use their work better and prevent duplication or overlap. As the situation would be similar to this and mentioned earlier, the cooperating between PAME, ICES, and PICES. Also adding the EPPR working group and the IMO. There is already cooperation amongst the Arctic Council and other instruments working in the Arctic region to guide cooperation between the Arctic Council and the new ILBI.

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<sup>248</sup> Jakobsen, 'Extractive Industries in Arctic : The International Legal Framework for the Protection of the Environment' p. 52

<sup>249</sup> Arctic Council, *EA Guidelines, Implementing an Ecosystem Approach to Management of Arctic Marine Ecosystems*

<sup>250</sup> Tom Barry and others, 'The Arctic Council: an agent of change?' (2020) 63 *Global environmental change* 102099 p. 6

<sup>251</sup> Ibid

## 5 Concluding remarks

The Arctic Council has, for many years, addressed the issues on conservation of biological diversity and protection of the marine environment. It is essential for cooperation in the Arctic between the Arctic states and other international actors. The ecosystem is vulnerable, and with the sea ice melting, it is here that climate change is most visible. The Arctic Council may lack legal status and regulatory powers, but that does not mean as a governance framework they are weak. However, The BBNJ agreement could be the body to implement recommendations and guidelines into the legal frameworks. As seen earlier in the thesis, the Arctic Council already cooperates with other international bodies and regimes, and that could be helpful when seeing how the Arctic Council will cooperate with the new BBNJ agreement. The Arctic Councils existing work and accomplishments of the working groups have contributed to partnerships with several Intergovernmental and interparliamentary organizations, that have later received the status as observers.

A range of new threats and problems to the ABNJ in the Arctic are not being regulated and managed by a specific regime for the conservation and sustainable use of individual components of marine biodiversity. The working groups are the main operational bodies of the Arctic Council, and they all have an important role. Still the principles and management for ABMTs and MPAs have not been consistently incorporated into existing agreements or applied in practice to a full range of human activities in the ABNJ.<sup>252</sup> It is vital to focus on strengthening the cooperation between the Arctic states and the new BBNJ agreement. The strongest role of the Arctic Council is scientific research, trough monitoring and assessment.<sup>253</sup> The BBNJ agreement can benefit on the areas of common interest. As the Arctic Council already has established groundwork in the Arctic, the BBNJ agreement should make it a part of the BBNJ process. The BBNJ agreement is important for biological diversity in the Arctic, as it can provide the legal basis that is needed for adopting conservation measures in the Arctic ABNJ, unlike the Arctic Council. However, the Arctic Council can still be a central actor in the Arctic as it may, and should, function as the main provider for recommendations and guidelines also to the BBNJ agreement.

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<sup>252</sup> Rayfuse, 'Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction' p. 7

<sup>253</sup> Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' p. 594

Where the Arctic states have adopted soft law in the Arctic Council, the commitment is driven by the cooperation on interest for the Arctic region and the states involved. Even though soft law is a quick solution to fix the threats and issues in the Arctic, there is a need for global solutions and mandatory commitments with compliance procedures. Even though UNCLOS is the existing overarching convention, it does not come with exclusively responsibilities in the high seas, it is up to the individual states to manage. Which means that there are gaps in the high seas that are not being filled. Both the new BBNJ agreement and the Arctic Council therefore could be active in improving and filling in the gaps of existing global instruments.

The BBNJ agreement was intended to fill regulatory and governance gaps, however, the Arctic coastal states continue to repeat that UNCLOS provides the necessary legal framework for the marine Arctic.<sup>254</sup> The BBNJ agreement needs to find the perfect balance between a global and regional approach to not undermine the Arctic Council and find a way to strengthening each other for the cooperation in the Arctic region. The production of scientific knowledge and recommendations would remain as an important task of the Arctic Council, especially with regards to the identification of MPAs and the implementation of the EA.<sup>255</sup> The effective governance of marine ABNJ requires strong participation of regional instruments and bodies, like the Arctic Council.<sup>256</sup> The BBNJ agreement should provide common goals as a global framework and adopt the measures already in place for the Arctic region, as climate change will continue at a rapid pace. The new BBNJ agreement must have an understanding of the Arctic region and use the science and traditional knowledge that the Arctic Council already has provided. Considering the findings in this thesis, one also has to remember that the new BBNJ agreement is still under negotiations, which means that there is still no clear vision of how it will cooperate and relate to existing regional bodies and institutions.<sup>257</sup>

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<sup>254</sup> De Lucia, 'The BBNJ negotiations and ecosystem governance in the arctic' p. 5

<sup>255</sup> Ibid p. 5

<sup>256</sup> De Lucia, 'Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction' p. 1

<sup>257</sup> De Lucia, 'The Arctic environment and the BBNJ negotiations. Special rules for special circumstances?' p. 235

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