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ArCticles

A NEW LEGAL REGIME FOR THE PROTECTION OF ARCTIC MARINE BIODIVERSITY IN THE ABNJ?



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The huge Arctic marine area, consisting of around 14 million square kilometers, which is equal to the size of Antarctica, is the habitat of around 21,000 known species. These include around 5,000 animal species, such as marine mammals, birds, fish, and similar kinds of living organisms, as well as 2,000 types of algae and tens of thousands of ecologically critical microbes. These species are highly adaptive to the Arctic's cold climate. They are also crucial to its marine ecosystem. The Arctic is one of the earth's last pristine environments, with a rich biodiversity that offers stability to its critical ecosystem; today, however, it is threatened due to a number of factors.

The earth's ongoing and rapid temperature rise is regarded as one of the major reasons for the changes occurring in the Arctic. In 2005, the Arctic Climate Impact Assessment reported that the temperature rise in the Arctic is twice faster than that of the rate of global climate change, but more recent research suggests an even greater acceleration, as much as three times. A number of published studies have mapped and compared the changes in ice thickness. Ice in the Arctic Ocean in recent years has become progressively thinner and is leaving more open water, especially during the summer months. This has opened access to more Arctic marine areas, probably including some parts of the very

central Arctic Ocean. As a result, human activities, such as navigation, oil and gas activities, marine fisheries catches, and tourism are apparently on a gradual rise. In addition to these activities, new possibilities for marine scientific research, bio-prospecting, laying of pipelines and cables, the creation of artificial islands, and other similar installations in the marine area are likely to increase in the future. All of these activities will create adverse consequences for Arctic marine biodiversity.

It is however, suggested that in recent years, the potential for human activities has been considered rather low. For example, maritime navigation on the Arctic Northern Sea Route (NSR), although having increased sometime between 2010 and 2013, has been minimal in the last two years. It is a shorter transit than the traditional routes between the Far East and Europe, but several factors prevent increased use. The cold and harsh climate causes unpredictability in terms of safe journeys. Some factors that make it a less attractive alternative are a lack of port facilities, undeveloped surveillance, difficulties pertaining to potential search and rescue operations, higher expenses for Arctic class ice-strengthened vessels, and the reluctance of insurance companies to insure ships operating in Arctic waters.

Similar arguments are relevant to the discussions on offshore hydrocarbon developments. An estimated 13 percent of world's oil reserves—representing 90 billion barrels—and 30 percent of the natural gas are in this area, but the feasibility of their extraction remains uncertain, again due to a number of factors. The cost-effectiveness of potential extraction has not been clearly assessed. The gradual decrease in oil prices indicates that Arctic resources, which will certainly be expensive to extract, will not be competitive with existing supplies. Thus, companies are seemingly reluctant to carry out Arctic drilling. Long winters, the presence of ice, and thus far inadequate technological means to operate in Arctic conditions will make the exploitation of these resources impractical. Thus, the alluring media coverage framing the Arctic “rush for resources” seems far away from the reality. But certainly, activity in the Arctic will continue, probably on a lower profile. In the Russian Barents region in the Pechora Sea, for

example, the Prirazlomnoye oil field began extraction already in 2013.

On the other hand, exploitation of marine fisheries is already increasing. Fish populations in the Arctic are expected to be threatened in the future as fleets move north into areas beyond national jurisdiction (ABNJ) due to expanding open water. The amount of illegal, unregulated, and unreported fishing is expected to increase. In addition, other kinds of human activities, such as tourism, will also probably rise. The combined effect of these maritime usages surely calls for action to protect marine biodiversity. Proactive legal measures, especially in the marine Arctic, which is clearly sensitive compared to any other marine area, will be needed.

While there are regulatory tools at several levels, they leave gaps in the protection of marine biodiversity in the Arctic. Overarching legal frameworks are provided by the UN Convention on the Law of the Sea (UNCLOS) and the UN Convention on Biological Diversity (CBD) that well-address the importance of protecting marine biodiversity. However, the rules within the framework of the UNCLOS and the CBD are rather rudimentary, and they require further action on the part of the states to be effective. Other legal tools exist both at international and regional levels to address issues concerning marine biodiversity, and they apparently include the Arctic marine area. These regulations include, for example, the measures adopted by the International Maritime Organization (IMO), such as the Polar Code (amendments to Annexes I, II, IV, and V of MARPOL and the endorsement of a new Chapter XIV within the framework of SOLAS with a specific focus on the Polar Regions) to be effective from early 2017 addressing rules regarding safe ships operation and the protection of the marine environment in polar waters, which is particularly relevant for the Arctic, the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) to control and reduce pollution after oil disaster, and the London Convention to deal with dumping. In addition, treaties concluded within the auspices of the Arctic Council (AC) – the regional high level inter-governmental forum – such as the SAR Agreement or Oil Spill Agreement, offer tools relevant to Arctic marine biodiversity.

Moreover, the soft-law tools offered by the IMO and the AC present non-legally-binding obligations. While these legal tools offer mechanisms to govern sector-specific rules concerning marine biodiversity, they do not suggest any comprehensive legal regime for the protection of Arctic marine biodiversity, in particular in the area beyond national jurisdictions, hence an effective governance structure is called for.

Some discussions have addressed a proposed governance regime for the Arctic Ocean as a whole, in particular during the end of the last decade. The European Parliament in 2008 in its resolution on Arctic governance highlighted the importance of an Arctic-specific treaty similar to the one extant for the other pole—the Antarctic. However, in the same year, the five Arctic coastal states expressed reluctance toward any new governance regime for the Arctic. According to these states, the existing governance regime within the framework of the UNCLOS and the law of the sea provides an effective governance structure along with the ongoing cooperation within the Arctic Council's initiatives. The two poles – the Antarctic and the Arctic – are not, in effect, comparable. The Antarctic is land surrounded by ocean and has no permanent human settlements with clear sovereign regimes, and the Arctic is an ocean and parts of surrounding nation states with permanent populations with clear sovereign jurisdictions. Thus, an Antarctic style treaty is not a realistic model to govern the Arctic. Moreover, the Arctic states have shown no political willingness for such a regime. Even if they did, negotiating such a treaty would be lengthy and arduous and would require legal commitments from a large number of states. Such an initiative would likely be unrealistic.

Other options discussed have included an implementing agreement within the UNCLOS for the protection of Arctic biodiversity, or a protocol within the framework of the CBD. One can find legal bases to create such regimes within these conventions. There are also examples of implementation agreements under UNCLOS, such as the UN Fish Stock Agreement, and protocols under the CBD, such as the biosafety protocol. However, creating such regimes would still require legal commitments from a large number of ratifying states, which would entail

huge efforts and many years of negotiation, assuming the actors are willing. Thus, these two options also do not offer any realistic solution for the protection of marine biodiversity in the high Arctic, in particular in the ABNJ.

Nevertheless, the importance of protecting Arctic biodiversity is well recognized. An amicable solution for its protection could be a regional agreement concluded by the Arctic states within the auspices of the Arctic Council. The question is whether such a legal regime, when established, would be capable of offering effective legal protection for the marine biodiversity in the ABNJ. There are clearly articulated freedoms for all states under the law of the sea to use the marine area in the ABNJ, including for fishing. Thus, a regional agreement by the Arctic states will not necessarily bind the states that are not parties to the obligations set forth by the regional agreement. Nevertheless, the Arctic states—in particular the five coastal states that possess large portions of the maritime areas in the Arctic Ocean as part of the exclusive economic zones (EEZs)—are the primary actors with clear stewardship roles to protect the Arctic marine area, even in the ABNJ.

The Arctic Council could be an appropriate venue where such an agreement can be negotiated by the Arctic states. It has previously hosted similar kinds of agreements, such as the Cooperation on Oil Spill Agreement concluded in 2013, the jurisdiction of which extends to the ABNJ. Concerning biodiversity protection, the coverage of a legal regime might offer the creation of Marine Protected Areas (MPAs) in the ABNJ in the Arctic Ocean. Such a regime would adopt an ecosystem-based approach: an integrated management system in which restricted human activities are to be complemented with specific measures for marine environmental protection. The particular provisions embodied in the UNCLOS and the CBD, when combined, proved a clear legal basis for creating MPAs in the ABNJ. Creating such a legal regime in the Arctic would limit the lengthy process of treaty negotiation, as it will include only a limited number of states that have a clear stake in the Arctic Ocean and that will perform stewardship roles to protect the Arctic. Moreover, these states' political willingness concerning biodiversity management will probably be less constrained, given that the

Arctic Council has already carried out extensive studies through its working group, the Protection of the Arctic Marine Environment (PAME), and its report titled “Arctic Biodiversity Assessment” (ABA). The working group has also established the Pan-Arctic MPA Network, a network of marine protected areas requiring coastal states to cooperate to protect marine biodiversity within the national jurisdiction.

Creating the legal regime would then offer an extension of cooperation in the ABNJ. However, would such a regime be effective if legal compliance from other states is not achieved? While no legal obligations are to be expected from non-Arctic states, it may be argued that, such a regional treaty would provide a strong normative precedent for them to cooperate with the primary Arctic states—which are regionally highly institutionalized, for example, by way of having the Arctic Council. Thus, the non-Arctic influential actors, such as China, which are involved as observers, probably would not want to disregard the Arctic Council's institutional norms despite their non-legal commitment. To sum-up, therefore, I believe that a regional agreement is the most amicable solution for better governance of biodiversity in the high Arctic marine area.



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