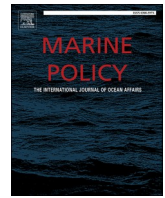


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A B S T R A C T

The aim of this article is to explore the question of ecosystem governance in the Arctic, in light of the potential implications of the ongoing negotiations towards a new global treaty on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction for ecosystem governance of the Arctic. A new global treaty will have inevitably significant implications for Arctic governance, given that a significant portion of the marine Arctic is located in areas beyond national jurisdiction. The article explores challenges and options for articulating an effective ecosystem approach to marine Arctic biodiversity conservation against the background of diverging negotiating positions on the role of the global treaty in filling governance and regulatory gaps; on the role of regional and sectoral bodies in implementing global rules; on the relationship among them, especially in light of the question of overlapping mandates and competences; as well as in consideration of the work done within the context of the Arctic Council on the ecosystem approach.

1. Introduction

The existence of important legal and governance gaps related to marine biodiversity in areas beyond national jurisdiction (BBNJ) has been the focus of a UN process for almost two decades. In 2003, the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) underlined the urgency of developing norms and mechanisms aimed at protecting vulnerable marine ecosystems, especially in areas beyond national jurisdiction.¹ In 2004, the General Assembly of the United Nations (UNGA) established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ WG).² In its 2011 report the BBNJ WG recommended that a ‘process be initiated’ by UNGA that could include,

among other options, the development of a multilateral agreement under UNCLOS on marine biodiversity in areas beyond national jurisdiction.³ The report identified four substantive areas to address urgently, ‘together and as a whole’⁴: marine genetic resources (MGRs), including questions on the sharing of benefits; measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); environmental impact assessments (EIAs); and capacity-building and the transfer of marine technology.⁵ On the basis of the final report of the BBNJ WG, submitted in 2015,⁶ UNGA decided to ‘develop 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’ (ILBI).⁷ UNGA launched thus a preparatory committee (PREPCOM) to ‘make substantive recommendations’ to UNGA on

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¹ Report of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 26 June 2003, UN Doc. A/58/95, para 98ss.

² Resolution adopted by the General Assembly on 17 November 2004, UN Doc. A/RES/59/24, para 73.

³ Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc. A/66/119, Annex, Section I “Recommendations”, para 1(a) (hereinafter BBNJ WG 2011 Report).

⁴ This expression indicates the goal of pursuing the negotiating agenda as a package deal, that is, either there is agreement on all the elements or no agreement at all.

⁵ BBNJ WG 2011 Report, para 1(b).

⁶ Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Annex, Section I “Recommendations”, UN Doc. A/69/780, para 1(e) (hereinafter BBNJ WG Recommendations).

⁷ UNGA Res. A/69/292 ‘Development 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’, 19 June 2015.

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elements of an ILBI.⁸ The PREPCOM submitted its report in July 2017.⁹ The report had two sections, and, importantly, did not reflect consensus.¹⁰ On the contrary, on many crucial topics there remained partial or total divergence of views. Finally, on the basis of the recommendation of the PREPCOM,¹¹ UNGA launched an intergovernmental conference (IGC) on December 24, 2017.¹² At the time of writing, the IGC has held two of the four substantive sessions scheduled in the resolution. A third session was concluded on August 30, 2019. IGC-3 represented a significant change of pace as text-based negotiations finally started, on the basis of a draft treaty text prepared by the President of the IGC,¹³ Ambassador Rena Lee. However, this change of pace was not matched by substantive progress. This article was written before IGC-3 took place. It will thus reflect IGC-3 only as necessary to incorporate any relevant and/or significant development.

The ILBI, whose geographical scope is likely to include the high seas water column and the seabed beyond the limits of national jurisdiction (i.e. the Area),¹⁴ will have potentially significant implications for the marine Arctic, as a large portion of the Central Arctic Ocean lies beyond the jurisdiction of any State. Some of these implications will derive from substantive rules adopted under the new treaty, especially in relation to ABMTs, including MPAs, and EIAs. Others will regulate the relationship between the ILBI and existing instruments and frameworks, bodies and institutions that have competence or jurisdiction in the Arctic due to their regional and/or sectoral scope. Importantly, these implications may have significant effects on the options available for articulating and implementing ecosystem governance in the Arctic, for the role of Arctic coastal States (Norway, Denmark with respect to Greenland, Canada, Russian Federation and United States)¹⁵ and for the 'Arctic Council System' in the region.¹⁶ Ecosystem governance in particular, while important in general for achieving the global objectives of biodiversity conservation, is absolutely paramount in the Arctic, given its special ecological circumstances and vulnerabilities.¹⁷ The Arctic marine environment is in fact simultaneously rich in biodiversity and extremely vulnerable to human activities and environmental change.¹⁸ The

ecosystem approach is an increasingly important framework for the conservation of biodiversity in international law,¹⁹ but it has also been identified as the key conservation framework by the Arctic Council.²⁰ In parallel, the ecosystem approach is also indicated as one of the general principles and/or approaches that should guide the new ILBI.²¹ Yet, the institutional arrangements for a new BBNJ treaty remain contested.²² The Arctic coastal States, additionally, resist a global legal and governance framework for BBNJ, favoring by contrast a regional approach that shall not undermine existing regional and sectoral bodies and institutions.²³ They also remain committed to their role of regional Arctic stewards.²⁴ A similar position is held by some of the other members of the Arctic Council (notably Iceland), and by States with an active Arctic interest, such as China, Japan and South Korea.²⁵ However, there is no regional organization dedicated to the protection and preservation of the marine environment or biodiversity conservation in the Arctic such a regional seas organization (RSO).²⁶ The situation is, in other words, complex.

Against this background, the aim of this article is to explore the question of ecosystem governance in the Arctic, in light of the ongoing BBNJ negotiations, and of their potential implications. The article is structured in the following manner. The next section offers an overview of the ecosystem approach, first in general, then in the context of the BBNJ process. Section three discusses the ecosystem approach as articulated by the Arctic Council, and outlines some challenges to its implementation. Section four reflects on various options to address such challenges, and section five offers concluding remarks.

2. The ecosystem approach

2.1. The ecosystem approach in general

The ecosystem approach is the key management framework for biodiversity conservation²⁷ and for fisheries management (which

⁸ Ibid.

⁹ Report of the Preparatory Committee established by General Assembly resolution 69/292: Development 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, A/AC.287/2017/PC.4/2 (hereinafter PREPCOM Report).

¹⁰ This was explicitly mentioned in the report.

¹¹ PREPCOM Report, Section III.

¹² UNGA Res. A/RES/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'.

¹³ UN Doc. A/CONF.232/2019/6 (hereinafter Draft Text).

¹⁴ But the question is not yet settled, *ibid*.

¹⁵ By which I refer, for the purposes of this article which focuses on the marine Arctic, to the Arctic coastal States plus Iceland, as a subarctic coastal state and Arctic Council member.

¹⁶ E. Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea', 27:3, *The International Journal of Marine and Coastal Law*, 2012, 553.

¹⁷ Including those deriving from lack of sufficient knowledge, see Primicerio et al., this issue.

¹⁸ SWIPA Report, AMAP, *Snow, Water, Ice and Permafrost in the Arctic. Summary for Policymakers*, 2017; P. Wassmann, 'Arctic Marine Ecosystems in an Era of Rapid Climate Change', 90 *Progress in Oceanography* 2011, 1–4; M. Fosheim et al., 'Recent Warming Leads to a Rapid Borealization of Fish Communities in the Western Arctic', 5 *Nature Climate Change* 2015, 673–677; Primicerio et al., this issue.

¹⁹ See e.g. V. De Lucia, 'Competing Narratives and Complex Genealogies. The Ecosystem Approach in International Environmental Law', 27:1 *Journal of Environmental Law*, 2015, 91; V. De Lucia, *The Ecosystem Approach in International Environmental Law. Genealogy and Biopolitics*, Routledge, 2019a.

²⁰ Arctic Council Arctic Marine Strategic Plan 2014–2024. Protecting Marine and Coastal Ecosystems in a Changing Arctic, (Protection of the Arctic Marine Environment (PAME), 2013).

²¹ See e.g. PREPCOM Report and President's Aid to Negotiations, UN Doc. A/CONF.232/2019/1.

²² K. Kraabel, this issue; Prip this issue.

²³ See on these points e.g. V. De Lucia, 'Reflecting on the meaning of "not undermining" ahead of IGC-2', March 21, 2019, online: <http://site.uit.no/jc/los/files/2019/03/JCLOS-Blog-21.3.2019-Reflecting-on-the-meaning-of-not-undermining-ahead-of-IGC-2-3.pdf>. Other Arctic Council Members however, such as Sweden and Finland, consistently with their EU membership, have a different view.

²⁴ 'The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting', Illulissat Declaration, 2008. For more details on this aspect of Arctic governance see Kraabel, this issue and Prip, this issue.

²⁵ Which are observers in the Arctic Council, and original signatories of the Central Arctic Ocean Fisheries Agreement (CAOFA). On the latter see Balton, this issue.

²⁶ There is a regional agreement for fisheries, the CAOFA, see Balton, this issue. There is also a RSO such as OPSAR which has competence to a small portion of the CAO high seas, but for the purposes of this article OSPAR does not have a sufficiently central role in relation to CAO governance. It is however a useful model, as I will discuss in some more detail in section 4.

²⁷ Decision V/6 "Ecosystem Approach" adopted by the Conference of the Parties to the Convention of Biological Diversity at its Fifth meeting, Nairobi, 15–26 May 2000, UNEP/COP/5/23; see also.

however has a significantly narrower scope),²⁸ and is also an increasingly important concept in other areas of international law.²⁹

While the ecosystem approach is an ambiguous concept susceptible of contestations,³⁰ it can be generally described as a 'strategy for the integrated management of land, water and living resources'.³¹ The concept translates a number of central insights of the science of ecology into law, and it rests, broadly speaking, on four interrelated elements: integration, integrity, information and iteration. *Integration* reflects the ecological insight that 'everything is connected with everything else'³² and that thus any ecosystem, governance or management regime must heed this fact and take a holistic approach.³³ This includes, importantly, the integration of all cumulative impacts in any management of governance regime.³⁴ From an ecosystem perspective, additionally, knowledge must extend to the cumulative impacts on an ecosystem from activities and/or events located at different spatial and/or temporal scales. By focusing on integration, the ecosystem approach also challenges the traditionally fragmentary approach of (international) law. It promises to integrate laws that regulate living resources with laws that regulate pollution and degradation of the physical environment; it aims at integrating, within a transversal ecosystem perspective, fragmented jurisdictional and political boundaries; and it typically aims at integrating the social and the ecological dimensions into a single conceptual and operative framework.

Ecological – or ecosystem – *integrity* is in many ways the underlying goal of the ecosystem approach. While integrity is not always easy to concretely identify³⁵ and operationalize,³⁶ it aims at maintaining certain key functions, structural elements and composition of ecosystems in order to ensure the conservation of biodiversity. *Information*, in turn, refers to the crucial role that knowledge has for the implementation of the ecosystem approach. Detailed knowledge of ecosystem processes and of baseline conditions are paramount in order to understand key stressors and for assessing whether a measure or plan is working (this is a significant challenge in the Arctic).³⁷ This last aspect links to the final element, *iteration*. Any conservation measure needs to be iteratively assessed so as to respond and adapt to changes in existing conditions, to the variability of natural processes and to the responses of ecosystems to

various stressors and to conservation measures themselves.³⁸

2.2. The ecosystem approach in the BBNJ process

Not surprisingly, the ecosystem approach appeared very early in the BBNJ context. Already the report of the ICP-7 recognized that the ecosystem approach would be invaluable to avoid fragmentation,³⁹ and to 'build a global legal regime that allowed for an integrated assessment of human activities and their interactions with the marine environment'.⁴⁰ The BBNJ WG also reported that several delegations agreed on the importance of incorporating widely accepted principles of ocean governance, such as the ecosystem approach.⁴¹ It was however the PREPCOM that more concretely recommended that the text of a future ILBI 'would set out the general principles and approaches guiding' an ILBI, and indicated specifically the ecosystem approach among those.⁴² The IGC offers further indication as to the potential role of the ecosystem approach in the ILBI, but it is the PREPCOM phase that offers the most relevant documentation to date (such as submissions, chair's documents, PREPCOM report).⁴³ In the Chair's Overview of PREPCOM II, the ecosystem approach is mentioned twice under the heading 'possible areas of convergence of views' in relation to ABMTs and cross-cutting issues.⁴⁴ Both the February 2017 Chair's non-paper and the Streamlined Chair's non-paper, which summarizes the former, prepared respectively prior to PREPCOM III and PREPCOM IV to assist delegations, include a definition (taken from a submission by WWF).⁴⁵ The ecosystem approach is also included as guiding principle and/or approach under two agenda items, ABMTs and EIAs. The extent of the inclusion of the ecosystem approach in the PREPCOM report, however, which forms the substantive platform for the IGC negotiations, is limited to its being one of the possible guiding principles and/or approaches the ILBI 'could include'.⁴⁶

³⁸ Adaptive management is for example one of the four operational guidelines adopted within the context of the CBD as an annex to the Malawi Principles in Recommendation V/10 on 'Ecosystem approach: further conceptual elaboration', in the Report of the Fifth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice Montreal, 31 January - 4 February 2000, Canada, UNEP/CBD/COP/V/10.

³⁹ ICP-7, para 79.

⁴⁰ ICP-7, para 90.

⁴¹ "Outcome of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs' summary of discussions", UN Doc. A/69/780, paragraph 22 of the document observed how "[s]everal delegations noted that a legally binding agreement should incorporate widely accepted principles of ocean governance, such as the precautionary principle, integrated ocean management and an ecosystem approach".

⁴² PREPCOM Report, Section III, para 1.

⁴³ Though there is a dearth of submissions that do little more than mentioning the ecosystem approach as a suitable guiding principle. Norway is the only State that has to date indicated its interest in a detailed elaboration of the ecosystem approach in the ILBI. Norway's submission suggested in fact that the ecosystem approach be one of the overall *objectives* of the ILBI and that it 'should be clearly defined', Norwegian input December 2016, PREPCOM III, p. 2, http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Norway.pdf.

⁴⁴ Chair's overview of the second session of the Preparatory Committee, Appendix 2 and 5 respectively relating to ABMTs and to cross-cutting issues, http://www.un.org/depts/los/biodiversity/prepcom_files/Prep_Com_II_Chair_overview_to_MS.pdf.

⁴⁵ Chair's streamlined non-paper on elements of a draft text of an international legally-binding instrument under UNCLOS, p. 6 (http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf), drawing on the submission by WWF Proposed framework and key elements of a third UNCLOS Implementing Agreement WWF submission to the BBNJ PrepCom Chair and to DOALOS for PrepCom3, 5 December 2016 (https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf).

⁴⁶ PREPCOM Report, Section III/1, p. 11.

²⁸ See in general FAO, *Fisheries Management. The Ecosystem Approach to Fisheries*. FAO Technical Guidelines for Responsible Fisheries. No 4, Suppl. 2. Rome, Food and Agriculture Organizations of the United Nations, 2003.

²⁹ See e.g. O. McIntyre, 'The Emergence of an "Ecosystem Approach" to the Protection of International Watercourses under International Law', 13:1 (2004) RECIEL, 1; Ecosystem-based adaptation to climate change is being promoted by UNEP, UNDP and IUCN, see <http://www.ebaflagship.org/>.

³⁰ V. De Lucia, 2015, op. cit; De Lucia, 2019a, op. cit.

³¹ Decision V/6 'Ecosystem Approach', Nairobi, 15–26 May 2000, UNEP/CBD/COP/DEC/V/6.

³² B. Commoner, *The Closing Circle: Nature, Man and Technology*, New York, Alfred Knopf, 1971, p. 16.

³³ On the need for considering holistically the entire set of complex ecological interactions within and across ecosystems see, e.g. Primicerio et al., this issue.

³⁴ By which it is meant changes to ecosystems determined by a combination of past, present and future actions or events, Secretariat of the Convention of Biological Diversity, *The Ecosystem Approach*, CBD Guidelines, 2004.

³⁵ See in this respect G. De Leo and S. Levin, 'The Multifaceted Aspects of Ecosystem Integrity', 1:1, *Conservation Ecology* 1997, 3 and more recently G. Steinhoff, 'Ecological Integrity in Protected Areas: Two Interpretations', *Seattle Journal of Environmental Law*, 3, 2013, 155. There is however a significant literature that tries to do precisely that, primarily stemming from the work of the Global Ecological Integrity Group, see e.g. L. Westra, 'Ecological Integrity', in C. Mitcham (ed.) *Encyclopedia of Science, Technology, and Ethics*, Vol. 2, Detroit: Macmillan Reference USA, 2005.

³⁶ For an attempt see R. Kim, and K. Bosselmann 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law', *Review of European, Comparative & International Environmental Law*, 24:2, 2015, 194.

³⁷ Primicerio et al., this issue.

The IGC has already held three of the four scheduled substantive sessions. During the first and second substantive sessions (respectively IGC-1 and IGC-2) not much progress was made with respect to the ecosystem approach, as the attention of the delegations focused elsewhere. However, the ecosystem approach remained one of the possible guiding principles, both in general, and in relation to specific topics such as ABMTs,⁴⁷ EIAs,⁴⁸ or MGRs.⁴⁹ The ecosystem approach received especially little attention at IGC-2,⁵⁰ while its inclusion in the President's Aid to Negotiations (the document that formed the basis of the negotiations at IGC-2),⁵¹ merely reflected earlier documents and was rather limited.⁵² Additionally, the President's draft treaty text circulated ahead of IGC-3 no longer mentioned the ecosystem approach in the section on guiding principles and approaches, now listed under draft article 5.⁵³ Article 5 mentions instead an 'integrated approach', which may or may not be understood as somewhat equivalent to an ecosystem approach, considering the importance of the notion of integration for the latter, as discussed in section 2.1. What must be noted, though is that in the discussion at IGC-3, there was broad consensus in reintroducing the ecosystem approach in draft article 5.⁵⁴

However, some of the key elements of an ecosystem approach were discussed individually across the negotiating agenda. For example, in the context of the working group on EIAs, the question of when an assessment would be required attracted much debate. Some delegations argued that any EIAs rules adopted in the ILBI should only be applicable to activities that take place in ABNJ (the activity-oriented approach); others by contrast insisted that every activity that has impacts on ABNJ should be covered by the EIAs rules (the impact-oriented approach). This is clearly an important question from the perspective of an ecosystem approach, as in one case the legal framework would be inclusive and cut across maritime zones, and in the other it would remain constrained by jurisdictional lines.⁵⁵ A second example that further illustrates how, even if explicit discussion on the ecosystem approach was

lacking, some of its elements have been discussed individually under different items, relates to cumulative impacts. Cumulative impacts were discussed especially in relation to ABMTs and EIAs. The importance of the concept of cumulative impacts, which is a crucial element of the ecosystem approach, was concisely expressed by the delegation of the Federate States of Micronesia, which observed how it is not possible to conserve ocean biodiversity without taking into consideration cumulative impacts.⁵⁶ Yet debates on these points are still open and while some positive convergence exists on cumulative impacts (with some notable exceptions),⁵⁷ significant resistance remained in relation to the scope of EIAs, to strategic environmental assessment and to inclusive ecosystem-oriented language on the part of key delegations.

For our purposes however, the point to be made is that the ecosystem approach remains one of the possible guiding principles that should frame the ILBI. The main question then is whether these separate discussions may lead to a coherent articulation of an ecosystem approach in the ILBI. A mere mention as a guiding principle would entail inevitably a reference to the concept of ecosystem approach as articulated in international law. Yet the ecosystem approach is marred by contestations and complexities,⁵⁸ and its role, scope and legal status within the context of the law of the sea is not entirely clear.⁵⁹ Additionally, a question can be raised as to how an ecosystem approach in the ILBI may dovetail or otherwise conflict with the idea of ecosystem approach articulated within the context of the Arctic Council, which, as we shall see in the next section, has done important work in that respect.

3. The ecosystem approach in the arctic: framework and challenges

Regardless of the applicability of the ecosystem approach to the marine Arctic as a result of global or regional regimes,⁶⁰ the ecosystem approach has found a specific articulation within the context of the Arctic Council. The Arctic Council is an 'essential'⁶¹ yet "soft"⁶² forum for Arctic cooperation on matters related to sustainable development and environmental protection. Members are the five Arctic coastal States (USA, Russian Federation, Norway, Canada and Denmark/Greenland) as well as Iceland, Sweden, and Finland.⁶³ Additionally, six indigenous peoples organizations have permanent participant status, and a number of States have been admitted as observers. In relation to the ecosystem approach, the Arctic Council, which conducts its activities

⁴⁷ Thus e.g. the interventions of the EU, Switzerland and Senegal of 7 September 2018 in relation to agenda item 4.1 of the President's aid to discussions ('Objectives of area-based management tools, including marine protected areas'), personal notes taken during participation as observer to the 3rd substantive session of the BBNJ (on file with author).

⁴⁸ Thus e.g. the interventions of Egypt of 11 September 2018 in relation to agenda item 5.8.3 of the President's Aid to Discussions ('General principles and approaches'), personal notes.

⁴⁹ See e.g. Statement by the President of the conference at the closing of the first session, UN Doc. A/CONF.232/2018/7, p. 21.

⁵⁰ IGC-2 indeed focused mostly on 'the mechanisms to be built, the processes to be developed and the roles of the various actors', Intergovernmental conference on 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 Second session, 25 March – 5 April 2019 Statement by the President of the conference at the closing of the second session, p. 3, https://www.un.org/bbnj/sites/www.un.org/bbnj/files/bbnj_-_igc2_-_presidents_closing_statement_-_advance_unedited_version.pdf.

⁵¹ Aid to Negotiations.

⁵² And it was limited to inclusions in the list of possible general principles and approaches for the whole ILBI (air to negotiations, p. 8) or in relation to area-based management tools and environmental impact assessments (ibid. respectively p. 9 and 10), as one of the possible principles and approaches guiding benefit-sharing (ibid. p. 16), and as a reference for the designation of marine protected areas (ibid. p. 27).

⁵³ 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 (hereinafter Draft Text), A/CONF.232/2019/6, p. 7.

⁵⁴ IGC-3, Informal working group on cross-cutting issues (arts. 4–6 and 53), 3–6 p.m., 28 August 2019, personal observation.

⁵⁵ UNCLOS however, contains already general rules on impact assessment that are applicable across maritime zones, see articles 204–206.

⁵⁶ Intervention of the Federated States of Micronesia, 28 March 2019, personal notes.

⁵⁷ Such as China, April 1, 2019, personal notes.

⁵⁸ V. De Lucia, "Competing Narratives and Complex Genealogies. The Ecosystem Approach in International Environmental Law" 27:1 Journal of Environmental Law, 91.

⁵⁹ For a detailed discussion of this question see V. De Lucia, 'The Ecosystem Approach and the BBNJ Negotiations' (July 10, 2019b). Available at SSRN: <https://ssrn.com/abstract=3420988>.

⁶⁰ For example, by virtue of the Convention on Biological Diversity, the Fish Stocks Agreement, the Convention on Migratory Species, and possibly UNCLOS itself (on this see De Lucia, 2019b, op. cit.), as well as the OSPAR Convention, to mention the most immediately relevant frameworks.

⁶¹ However, the Arctic Council has increasingly 'contributed to the development of international law relating to the Arctic in terms of law-making and implementation', Y. Takei, 'The Role of the Arctic Council from an International Law Perspective: Past, Present and Future', The Yearbook of polar law VI (2015) 349–374, p. 349.

⁶² In the sense that it is not a treaty-based international organization, but a soft cooperative arrangement, notwithstanding recent developments, such as the creation of a permanent Secretariat; on this see e.g. Takei, op. cit., p. 354–355; see also Molenaar, 2012, op. cit. for the role and significance of the Arctic Council System.

⁶³ See Declaration on the Establishment of the Arctic Council, Joint Communique of the Governments of The Arctic Countries, Ottawa, Canada, 26 September 1996.

through six working groups, has done important work. In 2004, it adopted its Arctic Marine Strategic Plan, and the ecosystem approach was therein indicated as the core principle.⁶⁴ In line with the key elements presented in section 2.1, the Arctic Marine Strategic Plan defined the ecosystem approach in terms of integrative thinking ‘across environmental, socio-economic, political and sectoral realms’.⁶⁵ In 2007, the Arctic Council established an expert group on the Ecosystem Approach to Management (EA-EG).⁶⁶ At first the EA-EG’s work proceeded under the Working Group on the Protection of the Marine Environment (PAME),⁶⁷ but it was later broadened into a joint expert group including the participation of other Arctic Council working groups. In 2009, PAME presented a report to the Senior Arctic Officials (SAOs) in which it outlined the importance of the ecosystem approach, including, importantly, the need to coordinate Arctic conservation measures across jurisdictions.⁶⁸ Later still, in 2013 the Arctic Council adopted the Kiruna Principles, which constitutes one part of the concluding report of the EA-EG to the SAOs.⁶⁹ One important notion the Kiruna Principles put forward is that the ecosystem approach is ‘place-based’. Accordingly, the relevant geographical areas, that is the units of governance or management, should be identified on the basis of ecological criteria (this is an important point on which I will return in section 4). Relatedly, strong emphasis is placed on transboundary perspectives, both in relation to international cooperation (transboundary arrangements and/or regional mechanisms for cooperation) and in relation to ecological linkages (i.e. arctic-non-arctic linkages). In this respect, the report, recognizing the need for transboundary cooperation at multiple scales, recommended the development of an overarching Arctic goal for the ecosystem approach, and to ‘explore ways in which Arctic States can cooperate to advance conservation and management of biologically, ecologically, and culturally significant areas’.⁷⁰ Another principle, also in line the key elements outlined in section 2.1, underscores the importance of cumulative impacts.

In parallel, PAME developed a map of Large Marine Ecosystems (LMEs).⁷¹ LMEs should form the basis of, and the key platform for, an effective implementation of an ecosystem approach in the Arctic. Among these, PAME has identified the Central Arctic Ocean (CAO) LME.

The CAO LME brings however to the fore an important challenge to the effective implementation of an ecosystem approach in the marine Arctic (and elsewhere), as it raises questions relating to the different spatial delineations descending from ecological criteria and from the maritime zoning enshrined in UNCLOS. The CAO LME, in fact, is not a one-to-one match with the high seas portion of the Central Arctic Ocean.

⁶⁴ Arctic Council Arctic Marine Strategic Plan 2014–2024. Protecting Marine and Coastal Ecosystems in a Changing Arctic, (Protection of the Arctic Marine Environment (PAME), 2013), p.8-9.

⁶⁵ Ibid., p. 8.

⁶⁶ PAME, *The Ecosystem Approach to Management of Arctic Marine Ecosystems*, https://pame.is/images/03_Projects/EA/Brochure/EA_brochure.pdf.

⁶⁷ Nuuk Declaration. The Seventh Ministerial Meeting of the Arctic Council. May 12, 2011. Nuuk, Greenland.

⁶⁸ PAME Progress Report on the Ecosystem Approach to Arctic Marine Assessment and Management 2006–2008. See also, A. Hoel (ed.), *Best Practices in Ecosystem-based Oceans Management in the Arctic*, NPI Report Series n. 129, 2009, which reviews the ways in which the ecosystem approach is being articulated and implemented in the Arctic council Member States 8 except Sweden) in order to extract best practices.

⁶⁹ Arctic Council, *Ecosystem-Based Management in the Arctic*, Report submitted to Senior Arctic Officials by the Expert Group on Ecosystem-Based Management, May 2013, Annex III, ‘Proposed Recommendations of the Expert Group on Arctic EBM’.

⁷⁰ Ibid., p. 5.

⁷¹ PAME, ‘Large Marine Ecosystems (LMEs) of the Arctic Area. Revision of the Arctic LME Map’, 15th of May 2013, Second Edition, PAME-led Group of Experts on the Ecosystem Approach to Management, http://www.pame.is/images/03_Projects/EA/LMEs/LME_revised.pdf.

That is, not all CAO LME water column lies in areas beyond national jurisdiction, which in turn means not all of it falls under the geographical scope of the future BBNJ treaty. The CAO is larger and includes portions of the Exclusive Economic Zones (EEZ) of Canada, Norway, Denmark/Greenland, and Russia. Additionally, the International Seabed Authority (ISA), pursuant to Part XI of UNCLOS, has competence in matters of environmental protection for activities in the seabed beyond the limits of national jurisdiction,⁷² an area also within the expected geographical scope of the ILBI. However, a large portion of the seabed underlying the CAO is or will be under national jurisdiction by way of the UNCLOS rules pertaining to the extended continental shelf.⁷³ This poses further questions of complex institutional cooperation between a future BBNJ body, the ISA and coastal States, something indeed envisioned in the Kiruna Principles and in the related recommendations of the EA-EG to the Arctic Council in matter of international cooperation.⁷⁴

This geographical/jurisdictional fragmentation affecting the Arctic (but also other regions, *mutatis mutandis*) is compounded by a second type of fragmentation that comes into play: material scope fragmentation. This refers to the fact that there exist many global, regional and sectoral regimes with limited subject matter applicable in the marine Arctic.⁷⁵ The coordination among them (and between them and the BBNJ framework) is another important challenge. Given this challenge, a BBNJ Treaty may offer an opportunity to fill regulatory and governance gaps, and indeed the BBNJ process was initiated precisely with this goal. However, Arctic coastal States have repeatedly maintained that UNCLOS provides a sufficient legal framework for the marine Arctic.⁷⁶

IGC-3 was concluded at the end of August 2019, and marked a critical point, as delegations engaged for the first time in negotiations on the basis of a Draft Treaty text prepared by the President and circulated at the end of June.⁷⁷ The question of finding a balance between a global and a regional approach however (one that respects both the need for a globally harmonized regime and the mandates, rights and interests of regional and sectoral actors – be that international bodies and institutions or coastal States), has not found yet a solution in the BBNJ negotiations.⁷⁸ Additionally, institutional relations between the BBNJ Treaty and existing instruments and frameworks remain unclear and contested.⁷⁹

One important question in this respect is what role the Arctic Council may retain once the ILBI becomes a reality. The production and dissemination of scientific knowledge would remain in all likelihood an important task of the Arctic Council, and perhaps that is sufficient. However, if the Arctic Council is to retain a central role within the new architecture set up with the ILBI, it would require a significant transformation. If one considers in fact the current options in the BBNJ negotiations as regards regional governance arrangements, it appears clear how, notwithstanding any possible hybrid solution,⁸⁰ there are

⁷² UNCLOS, article 145.

⁷³ As Arctic coastal States have made submissions to the Commission on the Limits of the Continental Shelf pursuant to art. 76 UNCLOS and which are still pending.

⁷⁴ For a visualization of this complex jurisdictional picture I refer the reader to the maps prepared at the Centre for Borders Research of the University of Durham, <https://www.dur.ac.uk/resources/ibru/resources/Arcticmap2019/Simplified200NMArcticmapJune2019.pdf>.

⁷⁵ e.g. UNCLOS, CAOFA, NEAFC, OSPAR, IMO, CBD, CMS etc.; see Prip this issue for more details.

⁷⁶ Arctic Council, *Ilulissat Declaration*, 2008.

⁷⁷ Draft text, cit.

⁷⁸ Kraabel, this issue.

⁷⁹ On this question, see e.g. V. De Lucia, ‘Reflecting on the meaning of “not undermining” ahead of IGC-2’, March 21, 2019, online: <http://site.uit.no/jclos/files/2019/03/JCLOS-Blog-21.3.2019-Reflecting-on-the-meaning-of-not-undermining-ahead-of-IGC-2-3.pdf>.

⁸⁰ Kraabel, this issue.

primarily two scenarios envisioned in the draft text in cases where no relevant regional instrument or framework exists. Either the ILBI will directly fill existing governance gaps, or a new regional body may be set up. In fact, the draft treaty text contains a general provision in draft article 6 (3) which sets out that 'States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary, to fill governance gaps'.⁸¹ Furthermore, the draft text for article 15 of the ILBI in fact, which deals with 'international cooperation and collaboration' in the context of the topic of area-based management, contains a suggested paragraph 2 (alternative to 1(b) (ii)) that reads as follows:

Where there is no [existing] relevant legal instrument or framework or relevant global, regional or sectoral body to [establish] [designate] area-based management tools, including marine protected areas, States Parties shall cooperate to establish such an instrument, framework or body and shall participate in its work to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.⁸²

This is all bracketed text, which means it remains a negotiating text to be further debated and refined. However, what is of special interest is that Arctic States are generally strong supporters of these provisions, as indeed are strong supporters of a regional approach to the institutional arrangements of the ILBI.⁸³

The question then becomes whether there currently is a relevant regional body that can implement ecosystem-based governance in the Arctic within the context set out in the ILBI. Arctic marine governance is very fragmented.⁸⁴ The only organization that have competence – or rather that provides a framework – to adopt ABMTs in the CAO is currently the International Maritime Organization (IMO), with regards to particularly sensitive sea areas (PSSAs).⁸⁵ PSSAs are however, sectoral measures aimed at mitigating impacts on the marine environment from shipping. There is no instrument or framework for adopting cross-sectoral MPAs in the CAO. The Arctic Council has done important work on ABMTs and MPAs,⁸⁶ but only in terms of scientific knowledge production and policy recommendations. The Arctic Council, has in fact, no legal personality or formal status as an international organization. As such, and regardless of its important role in normative development and in facilitating the implementation of international law in the Arctic,⁸⁷ it is highly doubtful, at least prima facie, that it could be considered as one of the bodies referred to by the idea of not undermining that has an important place in the BBNJ negotiations.⁸⁸ The Arctic Council is indeed not competent to adopt any measures in the high seas portion of the

CAO, and can only offer recommendations to Arctic States to take action in areas within their jurisdiction. In this respect the ILBI would have nothing to undermine. Indeed, it is precisely this sort of legal and regulatory gap that has been the *raison d'être* of the BBNJ process.

OSPAR and NEAFC have only competence in a tiny portion of the CAO, and the newly adopted CAO Fisheries Agreement⁸⁹ is a regional fisheries arrangement⁹⁰ that only sets out a moratorium which only applies to fisheries (which is to a large extent outside the scope of the ILBI).⁹¹ There is, in other words, an institutional and legal gap in relation to marine protected areas. The role of the Task Force on Arctic Marine Cooperation set up in 2015 was precisely to assess potential 'needs for a regional seas program or other mechanism [...] for increased cooperation in Arctic marine areas', as well as 'to make recommendations on the nature and scope of any such mechanisms'.⁹² The Task Force report recommended that one such mechanism could be a subsidiary body.⁹³ It appears however now that the Task Force will not fulfil its mandate in this particular respect.⁹⁴ This creates in turn a paradoxical situation. The Arctic States maintain on the one hand, that UNCLOS offers a sufficient legal framework for Arctic governance, on the other, are negotiating an ILBI and within that context insist on a regional approach to biodiversity governance. This includes the position that, when no regional instruments or bodies exist, relevant States should set one up. And yet this is precisely what Arctic States do not want to, nor manage to do.

To summarize, the legal, regulatory and institutional fragmentation in the marine Arctic remains acute, and the opportunities offered by an ILBI are to a significant extent resisted by relevant Arctic States. The same States seem however incapable, if not entirely unwilling, to address the institutional gap for the CAO. What are the options, against this background, for an effective implementation of the ecosystem approach in the CAO then?

4. Options for an ecosystem approach in the arctic in light of a future global treaty on BBNJ

An effective program of conservation of Arctic biodiversity must be able to include within its purview all relevant activities in all ecologically relevant zones, regardless of jurisdictional fragmentation, in line with the inherently integrative logic of the ecosystem approach. Since the final institutional arrangements that will underpin the ILBI remain subject to negotiation and contestations, and since the Arctic Council offers important but merely recommendatory advice in relation to the implementation of the ecosystem approach in the Arctic, there is space and opportunity for reflecting on options for an effective ecosystem governance of the marine Arctic across jurisdictional lines. Integration is

⁸¹ Draft text, cit., p. 7.

⁸² Ibid., p. 14.

⁸³ The draft provisions of the President's draft reflect indeed positions expressed during IGC-2. The US for example made it very clear that a global overarching framework would not be welcome, and would rather support the creation of new organizations where they do not already exist (28 March, personal notes); Norway expressed a similar position albeit in a softer tone (March 29, personal notes); Iceland suggested a strengthening of the role of Regional Seas Organizations (March 29, personal notes). See also Kraabel, this issue.

⁸⁴ Prip, this issue.

⁸⁵ IMO, *Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSAs)*, Resolution A.982(24) Adopted on 1 December 2005. Neither the guidelines nor the designation is binding. Individual measures may be however, I. Jakobsen, *Marine Protected Areas in International Law: An Arctic perspective*, BRILL 2016, p. 390. The Polar Code might also be considered an area-based management tool, insofar as it regulates shipping in a specific geographical area.

⁸⁶ AMSA II(C)/AMSA II(D) Bridging Workshop Report 12–13 June 2013; PAME, *Framework for a Pan-Arctic Network of Marine Protected Areas*, April 2015.

⁸⁷ Takei, op. cit., p. 356.

⁸⁸ Aid to Negotiations, para 3.

⁸⁹ Balton, this issue.

⁹⁰ V. Schatz, A. Proelss and N. Liu, 'The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis' 34:2 *The International Journal of Marine and Coastal Law*, 2019.

⁹¹ However, see Balton, this issue, which considers CAOFA as effectively an ABMT.

⁹² That should offer "complementary enhancements to existing Arctic Council mechanisms", Arctic Council Task Force on Arctic Marine Cooperation, *Report to Ministers of the Task Force on Arctic Marine Cooperation*. Arctic Council Task Force on Arctic Marine Cooperation (TFAMC), 2017, p. 1.

⁹³ Ibid.

⁹⁴ D. Balton, 'Will the Task Force on Arctic Marine Cooperation deliver?', *The Circle: Arctic biodiversity in the spotlight*, 2018, <https://arcticwwf.org/newsroom/the-circle/arctic-biodiversity/will-the-task-force-on-arctic-marine-cooperation-deliver/>; C. Prip, "A global treaty on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction: threat or opportunity for Arctic Ocean governance?", (November 7, 2018), on-line: http://site.uit.no/jclos/files/2018/11/JCLOS-Blog_A-global-treaty-on-the-conservation-and-sustainable-use-of-marine-biodiversity-of-areas-beyond-national-jurisdiction.pdf.

the operative keyword. However, levels and modalities of integration that can be legitimately framed under the framework of the ecosystem approach may vary significantly.⁹⁵ The rest of this section will offer a number of options, with varying degrees of integration.

4.1. Ecosystem governance through coordination

One option is to adopt an ecosystem approach that aligns with the jurisdictional map of the marine Arctic. In that case, the ILBI would adopt an ecosystem approach in the limited sense that conservation measures and procedures regulated under its provisions – and especially ABMTs/MPAs and EIAs – would have effect only within areas beyond national jurisdiction. This would be complemented by an array of other measures also reflecting an ecosystem approach but addressing specific sectors such as fisheries or adjacent marine areas, such as areas within the jurisdiction of Arctic coastal States, that all have some form of ecosystem approach.⁹⁶ This would also reflect the strong version of the idea that the ILBI should not undermine existing legal instruments and frameworks, as well as global, regional and/or sectoral bodies and institutions. Additionally, it would reflect the position of Arctic coastal States of maintaining the institutional status quo. Yet, while perhaps the most feasible option on the table, it raises significant problems insofar as the issue of recognition under the ILBI of measures taken by other bodies and institutions remains a hotly debated point.⁹⁷ It also raises a number of problems of future coordination. Additionally, this would arguably be a missed opportunity for achieving a comprehensive and effective ecosystem governance of the CAO. Thus a second, and more strongly integrative, option could focus on the idea of compatibility.

4.2. Ecosystem-based governance through compatibility

While the ecosystem approach is capable of being implemented sectorally and/or regionally, an ecosystem-based governance⁹⁸ would be conceptually closer with the Kiruna principles and the ecological idea of LMEs and take a step further towards a stronger coordination across jurisdictional lines. The key in this respect is to ensure that conservation measures, regardless of the distribution of competences for their adoption in different maritime zones or jurisdictional areas, encompass the entirety of the relevant ecological areas. This is the idea of compatibility. The BBNJ draft text (as well as earlier iteration of the negotiating documents since the PREPCOM),⁹⁹ already contains the notion of compatibility.¹⁰⁰ However, it is primarily approached from the point of view of adjacent coastal States. Article 15 of the draft text, which regulates international cooperation with regards to ABMTs/MPAs, reads in fact that ‘Measures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction [...]’. This reflects the idea of compatibility already contained in the Fish Stocks Agreement,¹⁰¹ which sets out that

‘Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible’¹⁰² to be able to address what is considered a ‘biological unity’¹⁰³ from the point of view of conservation.

For an effective implementation of the idea of compatibility however, it would be important to transform it in a key principle of the ILBI. In this respect, compatibility would need to entail not only a duty to ‘take into account’¹⁰⁴ measures taken in other maritime zones and/or by other instruments and bodies, but a clear duty to adopt compatible conservation measures that attaches to all bodies and institutions (States, IGOs, global regional and sectoral bodies, etc.) that have competence in relation to an identified ecological area, such as LMEs. In this respect, compatibility would reflect a particular concretization of the general international legal duty to cooperate, and of the more specific duty to cooperate in ocean matters contained in UNCLOS.¹⁰⁵

In this respect, however, an important variable is the institutional architecture that will come out of the negotiations, as it will establish the rules and mechanisms for the coordination and interaction among existing relevant bodies, instruments, frameworks and mechanisms, whether regional, global or sectoral.

4.3. Thinking like the ocean?¹⁰⁶

But is compatibility enough?¹⁰⁷ Perhaps not if the goal is to achieve a fully integrated ecosystem governance rather than merely cooperation, albeit enhanced, among relevant instruments, bodies and institutions. If the relations between a variety of instruments, frameworks and bodies operating with a multiplicity of geographical and material scopes is approached with the view of ensuring the ILBI does not undermine the mandate or competence of other such instruments and bodies, we may well be a looking at a lost opportunity. Yet interventions such as the statement jointly issued by the International Seabed Authority (ISA) and the International Maritime Organization (IMO) at IGC-2, with the goal of asserting their exclusive competence vis-à-vis the ILBI in matters related to their respective areas of competence is precisely an example of that. The real opportunity is arguably to *rethink* governance from the perspective of ecosystems.¹⁰⁸ This would not entail rewriting the principles, rules, rights and obligations of UNCLOS, including its formal maritime zoning architecture. It would rather entail rendering effective existing rules and principles, such as those contained in Part XII,¹⁰⁹ through their implementation in relation to marine biodiversity across sectors of economic activity (including, importantly, fisheries) and

¹⁰² Ibid., article 7(2).

¹⁰³ Ibid., article 7(2) (d).

¹⁰⁴ As per FSA wording, article 7.

¹⁰⁵ See e.g. UNCLOS, articles 118, 123 and 197.

¹⁰⁶ I am paraphrasing the expression of famous conservationist Aldo Leopold, ‘thinking like a mountain’, which is also the title of one of the essays in A. Leopold, *A Sand County Almanac*, Ballantine Books (1949) 1986

¹⁰⁷ This section draws on and partly reproduces what already articulated in De Lucia, 2019c, op. cit.

¹⁰⁸ OR, as WWF suggests, from a bioregional perspective, S. Grant et al., *Bioregionalisation of the Southern Ocean: Report of Experts Workshop*, Hobart, September 2006. WWF-Australia and ACE CRC.

¹⁰⁹ E.g. art. 192, which sets out the general obligation to protect and preserve the marine environment, and art. 194(5), which sets out special obligations to protect and preserve “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

⁹⁵ See eg De Luca 2015, op. Cit.

⁹⁶ Hoel, 2009, op. cit.

⁹⁷ On this see V. De Lucia, ‘Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction – From ‘Not Undermine’ to Ecosystem-Based Governance’ 8:4 ESIL Reflections, 2019c.

⁹⁸ For the overlapping terminological and conceptual distinctions alluded to here see Garcia et al., *The Ecosystem Approach to Fisheries: Issues, Terminologies, Principles, Institutional Foundations, Implementation and Outlook*, FAO Fisheries Technical Paper 443, Food and Agriculture Organization of the United Nations Rome, 2003, 21 as well as De Lucia 2019a, op. cit.

⁹⁹ See e.g. De Lucia., 2019b, op. cit.

¹⁰⁰ Albeit the term compatibility does not appear any longer in the text, see art. 15(5) of the Draft text.

¹⁰¹ Fish Stocks Agreement, article 7 ‘Compatibility of conservation and management measures’.

across jurisdictional lines, precisely in the way that an ecosystem-based governance framework would demand.

In this respect, some attempts exist at institutional integration with the view of ensuring compatibility of measures and to address governance gaps taking an ecosystem rather than a merely jurisdictional perspective in the face of a fragmented legal and regulatory landscape. The Collective Arrangement (CA) adopted in 2014 by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the North-East Atlantic Fisheries Commission (NEAFC),¹¹⁰ is a useful reference in this respect. As organizations with limited subject matter competence, OSPAR and NEAFC realized that their goals – which include for both the implementation of an ecosystem approach – could be achieved more effectively through cooperation with other regional and global bodies that have competence in the North East Atlantic. OSPAR in particular has signed several Memoranda of Understanding (MOUs) to facilitate cooperation and coordination, including with NEAFC, the International Maritime Organization (IMO) and the International Council for the Exploration of the Sea (ICES). The CA however is a more comprehensive and ambitious cooperation arrangement. Its ultimate aim is to become a collective and multilateral forum composed of all competent instruments, frameworks and bodies addressing the management of human activities in the ABNJ of the North-East Atlantic.¹¹¹ In other words, it is a framework aimed at integrating the regional, sectoral and global dimensions in a coherent arrangement for decision-making with the view of fostering coordination, complementarity, compatibility and consistency. This significantly exceeds the idea of ‘cooperation’ included in the Draft text,¹¹² which offers a range of bracketed options, including the establishment of regional or sectoral bodies, consultation processes, unspecified coordination and collaboration mechanisms,¹¹³ yet with all options delimited by the constraint of “not undermining”.

Integrating and aligning existing and new bodies and instruments within the same institutional framework, and under the ‘constitutional’ umbrella of UNCLOS, would ensure not only cooperation among them, but also the compatibility of measures adopted under the individual regimes through an *ex ante* as well as *ex post* coordination. If the ILBI were to adopt one such model, it would strengthen the capacity of individual organizations to achieve their objectives and of individual States to fulfil several of their obligations under UNCLOS.¹¹⁴ Additionally, this may facilitate progress in the discussions on the institutional arrangements, and ‘help deliver’¹¹⁵ an ecosystem-based governance of the oceans – and of the CAO – both within and beyond national jurisdiction, in line with both the general premises of the ecosystem

¹¹⁰ ‘Collective arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic’, OSPAR Agreement 2014-09 (hereinafter CA Agreement) <https://www.ospar.org/about/international-cooperation/collective-arrangement>.

¹¹¹ See CA Agreement, Annex II. However, OSPAR and NEAFC remain still the only two participants.

¹¹² And even the more comprehensive language on “enhanced cooperation” that was included in the Aid to Negotiations, p. 24.

¹¹³ See e.g. Draft Text, article 15.

¹¹⁴ Such as the protection and preservation of the marine environment (article 192) and of cooperation (e.g. articles 118 and 197).

¹¹⁵ Indeed, OSPAR considers the institutional cooperation reflected in the CA as a way to “help deliver an ecosystem approach to the management of all relevant human activities in the marine environment”, <https://www.ospar.org/about/international-cooperation/collective-arrangement>.

approach and the specific framework adopted by the Arctic Council. For effective ecosystem-based governance however, any form of CA would need to be open to adjacent coastal States in those cases where an ecosystem may straddle jurisdictional lines, both horizontally and vertically,¹¹⁶ and thus extend to areas located in areas within national jurisdiction. Only the participation of coastal States – where relevant – would ensure ecosystem-based governance. Such arrangements would operate primarily on the basis of ecosystem boundaries and interconnections, rather than of jurisdictional delineations. This would however need to be coupled with collaborative, plural and participatory decision-making processes, so as to safeguard the rights and facilitate the discharge of duties of all existing competent instruments, bodies and actors within the general framework set out by, and consistently with, UNCLOS. It would probably also facilitate the convergence, over time and within coherent ecosystem boundaries, on a number of points that remain today incoherent and inconsistent, such as the typologies and nomenclature of ABMTs, relevant and effective networks of MPAs and criteria for identifications of MPAs – at least where warranted and relevant.

It would also need to facilitate the meaningful participation of indigenous peoples, today represented, albeit perhaps imperfectly, within the context of the Arctic Council. Within the BBNJ negotiations, indigenous peoples’ knowledge about, material engagement and cultural connection with the oceans has received significant attention. Nauru, speaking on behalf of the Pacific Islands Forum, “called for the ILBI to include the role of traditional knowledge (TK) and indigenous peoples in the conservation and sustainable use of BBNJ”,¹¹⁷ while the Federated States of Micronesia asked for “the connectivity of TK and its holders to marine species” to be acknowledged.^{118 119} There is no space for considering how the participation of indigenous peoples could be imagined in an ecosystem-based model of governance, but it is important to insist on its importance.

This ecosystem-based model of governance would, finally, take an important step towards elaborating a different legal space, an oceanic ‘lawscape’,¹²⁰ aligned with ecological realities¹²¹ such as have been already elaborated in the vision of ecosystem conservation that guides the work of the Arctic Council on the ecosystem approach. However,

¹¹⁶ Such is the case of the Arctic Large Marine Ecosystem identified by PAME, whose area includes the EEZ of four coastal States as well as the high seas, PAME, ‘Large Marine Ecosystems (LMEs) of the Arctic Area. Revision of the Arctic LME Map’, 15th of May 2013, Second Edition, PAME-led Group of Experts on the Ecosystem Approach to Management, http://www.pame.is/image/s/03_Projects/EA/LMEs/LME_revised.pdf, accessed 26 November 2018.

¹¹⁷ Earth Negotiations Bulletin (ENB), BBNJ IGC-2 Highlights, Volume 25 Number 186 | Tuesday, 26 March 2019, p. 1.

¹¹⁸ Ibid, p. 2.

¹¹⁹ Important contribution in this respect came from Pacific Small Islands States, as well as from the intervention of observers such as the personal observations at IGC-2 and IGC-3. Indeed there is even a Friends of Traditional Knowledge Group, which includes Norway, Australia, Canada, New Zealand, and Maldives, Earth Negotiations Bulletin, Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction, Volume 25 Number 218 | Monday, 2 September 2019.

¹²⁰ See N. Graham, *Lawscape. Property, Environment, Law*, Routledge, 2011.

¹²¹ Primicerio et al., this issue.

such oceanic lawscape would need to take into account the “wet ontology” of the oceans,¹²² that is their fluidity, mobility, becoming, their capacity to defy territorial delineations,¹²³ as well as the oceanic “excesses”, that “more than wet” ontological space that includes ice and air as well as rocks, islands, hydrothermal vents and the ocean floor, as, finally, the land-sea interface.¹²⁴ If we take seriously the view that the “ocean provides a fertile environment for reconceptualising understandings of space, time, movement, and experiences of being”,¹²⁵ governance arrangements must be imagined that also accommodate the ontological reconsiderations prompted by the oceans. These pose significant challenges for the current structure and philosophy of international law. UNCLOS offers however a starting point where it recognizes how ‘the problems of ocean space are closely interrelated and need to be considered as a whole’.¹²⁶ This preambular language, some suggest, may implicitly and *in nuce* articulate an ecosystem vision.¹²⁷ Additionally, while UNCLOS reflects, in important ways, a traditional view of international law, it also contains an “underlying change of consciousness”,¹²⁸ a potential for its own overcoming, the seeds of a novel legal imaginary.¹²⁹ But can we really imagine a governance model that thinks like the ocean, that *moves* and that reflects oceanic fluidity and at the same time takes into account existing institutional and legal constraints?

5. Conclusions: a “Regional Ecosystem Organization”?

This article has discussed Arctic marine ecosystem governance and the BBNJ negotiations. While the Arctic has never been an explicit topic during the BBNJ process – save in the corridors and in some side events¹³⁰ – the BBNJ treaty will have inevitably significant implications for Arctic governance, given that a significant portion of the marine Arctic is located in areas beyond national jurisdiction. Ecosystem governance in the Arctic touches upon a set of issues that span the role of a global treaty for a jealously protected regional cooperation framework that pivots on the Arctic Council; the role of the latter vis-à-vis the BBNJ treaty; the contradictory position of Arctic States with regards to new regional bodies in the Arctic; and the options for articulating ecosystem approaches to marine Arctic biodiversity conservation. Of the options discussed, the CA offers a useful and concrete model for thinking about ecosystem governance. With specific reference to the CAO, however, where there is no RSO, and only a preliminary fisheries arrangement

¹²² K. Peters, and P. Steinberg, “Volume and Vision: toward a Wet Ontology”, 39 *Harvard Design Magazine*, 2014, 124; P. Steinberg and K. Peters, “Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking”, 33:2, *Environment and Planning D: Society and Space*, 2015, 247.

¹²³ What Henry Jones calls “the practice of territory”, H. Jones, “Lines in the Ocean: Thinking with the Sea about Territory and International Law”, 4:2, *London Review of International Law* 2016, 307, p. 308.

¹²⁴ K. Peters and P. Steinberg, “The Ocean in Excess: Towards a more than Wet Ontology”, *Dialogues in Human Geography*, 2019, <https://doi.org/10.1177/2043820619872886>.

¹²⁵ Peters and Steinberg, 2019, p. 13.

¹²⁶ UNCLOS, preamble, 3rd recital.

¹²⁷ For a review of the literature and a discussion of whether and to which UNCLOS actually contains such ecosystem vision, see De Lucia, 2019b, op. cit.

¹²⁸ P. Allott, “Mare Nostrum: A New International Law of the Sea”, 86:4 *The American Journal of International Law*, 1992, 764, p. 784.

¹²⁹ *Ibid.*, p. 766.

¹³⁰ See Introduction, this issue.

(the CAOFA), that may take a similar initiative as the CA, the question then comes back to two points raised in the course of this paper. On the one hand, Arctic coastal States and States with active Arctic interest clearly favours a regional approach. This means that the ILBI should contain provisions encouraging relevant coastal States to set up regional bodies in regions where there currently is none – such as the CAO – so as to reduce the role of a global ILBI body. On the other, they also seem unable and/or unwilling – especially the Arctic coastal States – to agree on stepping up the institutional framework for Arctic cooperation, as evidenced by the expected failure of the Task Force on Marine Arctic Cooperation with regards to the part of its mandate related to developing new institutional capacity, although the adoption of the CAOFA (which was however negotiated outside of the Arctic Council) may signal a shift in orientation. By contrast, the transformation of the Arctic Council – or the *ex novo* constitution of a CAO RSO – could strengthen CAO ecosystem governance and, simultaneously, ensure that CAO ecosystem governance is overseen and implemented through regional institutions, albeit within the global framework set up under the ILBI.

In this respect, the Arctic States have perhaps a unique opportunity to fully concretize their stewardship claim expressed in the Ilulissat Declaration,¹³¹ and consider with seriousness the idea – and need – to establish a RSO – or, even better, a *Regional Ecosystem Organization* (REO) – with a full mandate to implement an ecosystem-based conservation framework across all relevant jurisdictional zones. An REO could be conceived as a fluid governance arrangement. An REO should thus be able to adapt its participatory base and its decision-making geometry to relevant oceanic and ecosystem circumstances. It would also be reflective of a federative model where incommensurable jurisdictional lines and mandates could be integrated and yet could be bridged by particular decision-making processes modeled on the idea of concurrent majority.¹³² There is no space to articulate in full this idea, but the mechanism of concurrent majority, described in details by John Calhoun in 1851 in the context of the US federal architecture, “excludes the possibility of oppression, by giving to each interest, or portion, or order [...] the means of protecting itself, by its negative, against all measures calculated to advance the peculiar interests of others at its expense”.¹³³ In other words, concurrent majority aims at ensuring that individual or minority interests in a federal system of government are not trumped by the majority. In the case of an REO, imagined as a federal organization whose competence is superimposed, but does not substitute (and thus does not undermine) existing jurisdictions and competences, minority interests remain able to decide whether to implement rules and measures adopted at federal level within their jurisdiction. If an MPA is thus identified on the basis of global criteria set in the ILBI and operationalized by an REO that straddles several jurisdictional boundaries, each of the competent bodies or actors participating in the REO would then have to concur for its designation, each for the part that falls under their jurisdictional space. However, both participation in the REO and the general framework set out in UNCLOS would impose certain obligations on each federated body, institution or entity that could be procedurally and substantively spelt out in the ILBI or in an REO agreement. This would not be perhaps such a leap from the current situation, where the Arctic Council’s “soft” policy shaping role exerts significant normative

¹³¹ “The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting”, Ilulissat Declaration, 2008.

¹³² See e.g. V. Kuic, ‘John C. Calhoun’s Theory of the Concurrent Majority’, 69 *American Bar Association Journal*, 1983, 482.

¹³³ J. Calhoun, *A Disquisition on Government*, in *Works*, I (Columbia, 1851), p. 38, as cited in G Heckscher “Calhoun’s Idea of ‘Concurrent Majority’ and The Constitutional Theory of Hegel”, XXXIII:4 *The American Political Science Review*, 1939, 585, p. 585.

pull towards domestic action.¹³⁴ However, an REO would entail a tighter integration of the normative and regulatory levels, and a stronger legal anchoring for the REO and its policy making competence. Perhaps the future of the Arctic Council could be precisely that of an REO?

To conclude, by catalysing all relevant actors in the region, a CAO REO would go a long way towards enacting the integrative vision underlying the work of the Arctic Council on ecosystem-based

management, as well as UNCLOS' seeds of a novel consciousness. It would, moreover, begin to reflect ontological wetness of oceanic spaces and the plurality of Arctic constituencies beyond the State, by articulating an oceanic version of a post-sovereign environmental governance, characterized by being non-exclusive, non-hierarchical, and post-territorial.¹³⁵ It would, in fact, take us in the direction of a model of governance that tries to think like the ocean.

¹³⁴ See on this e.g. I. Soltvedt, "Soft Law, Solid Implementation? The Influence of Precision, Monitoring and Stakeholder Involvement on Norwegian Implementation of Arctic Council Recommendations", 8 *Arctic Review of Law and Politics*, 2017, 73.

¹³⁵ B. Karkkainen, "Post-Sovereign Environmental Governance", 4:1 *Global Environmental Politics* 2004, p.72-96.