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# International Governance and Regulation of the Marine Arctic

## A PROPOSAL FOR A LEGALLY BINDING INSTRUMENT

A report prepared for the WWF  
International Arctic Programme by

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## Foreword

As climate change causes the sea ice to melt and new ocean areas to open up, the unique environment of the Arctic Ocean is facing unprecedented changes and serious threats from increased activities such as shipping, oil and gas and fishing. It is apparent that a new multilateral arrangement for the protection and preservation of the arctic marine environment is urgently needed to respond to this crisis.

WWF's goal is to work with arctic states and arctic Indigenous peoples to promote the protection and preservation of the Arctic Ocean and sustainable ecosystem-based management of its resources.

WWF has commissioned three reports under the common main title "International Governance and Regulation of the Marine Arctic" to examine the current governance regime, identify governance and regulatory gaps and analyze options for improvements. The reports, which are authored by international legal experts Timo Koivurova and Erik J. Molenaar, are part of WWF's contribution to the ongoing discussion on arctic governance.

The present report "A Proposal for a Legally Binding Instrument" concludes that the best option from a legal and regulatory perspective is to develop a new international framework agreement covering the entire Arctic, across all sectors and offers a rationale, basic features and elements of such an agreement.

Such a legally binding agreement for the marine Arctic would address the regulatory and governance gaps identified in the Report "Overview and Gap Analysis". This option would allow for management on an ecosystem level, which is the best tool for ensuring sustainable management of marine resources in the Arctic. The new Arctic Sea emerging from the melting ice requires a regional regime tailor-made for arctic conditions developed under the overarching framework of the United Nations Convention on the Law of the Sea. Such a regional regulatory and governance framework should ensure:

- Protection and preservation of the ecological processes in the arctic marine environment
- Long-term conservation and sustainable and equitable use of marine resources
- Socio-economic benefits for present and future generations, in particular for Indigenous peoples of the Arctic region
- Action to address the unprecedented natural changes the Arctic is facing

A new legally binding comprehensive agreement with a new institutional setup which will be able to ensure protection and preservation of the Arctic Ocean and sustainable ecosystem-based management of its resources would be an optimal solution in WWF's view. However, WWF would welcome any comprehensive and binding solution that achieves the same goals.

Dr. Tatiana Saksina, LL.M.

## Executive Summary

### Introduction

This report was commissioned by the WWF International Arctic Programme in response to the inadequacies of the current international governance and regulatory regime of the marine Arctic in light of current and future effects of climate change. This report complements two other reports with the same main title but with different subtitles, namely 'Overview and Gap Analysis' and 'Options for Addressing Identified Gaps'. The present report contains a Proposal for a Legally Binding Instrument as one of the most convincing options to address the gaps identified in the latter report.

### Rationale

The basic rationale for the envisaged proposal is, first, that few – if any – seriously question any longer that the Arctic Ocean meltdown has by now become largely irreversible. The governance and regulatory regime that currently exists in the Arctic may have been adequate for a hostile environment that allows very little human activity for most of the year. But when the Arctic Ocean becomes increasingly similar to regional seas in other parts of the world for longer and longer parts of the year, adequacy cannot be assumed and reform of the regime is indispensable.

Given the pace of change in the Arctic, it is especially difficult to see how the Arctic and its ocean could be sustainably and coherently managed without dedicated institutions. This means that the gaps in the Arctic Council and its constitutive instrument that were identified in the 'Overview and Gap Analysis' report have to be addressed. As pointed out in that report as well, relying solely on the LOS Convention<sup>1</sup> is also inadequate. The LOS Convention is primarily a framework convention and does not provide all the necessary institutions and substantive standards. The 'Options for Addressing Identified Gaps' report explains that the envisaged instrument is likely to attract more support if it is regional in scope and complementary to and compatible with the LOS Convention.

The envisaged instrument would fulfill relevant obligations to cooperate under international law for Arctic Ocean coastal states and others in addition to addressing transboundary issues and effects, enabling a regional level playing-field with regional uniformity and being conducive to, or pursuing, integrated, cross-sectoral ecosystem-based ocean management.

In addition, the proposal responds to two main challenges with which the Arctic Council has recently been confronted, namely the cooperation between the five Arctic Ocean coastal states as reflected in the Ilulissat Declaration of 28 May 2008 and various initiatives of non-arctic states and the European Community (EC) with respect to the Arctic. It is submitted that these challenges contribute to a political environment conducive to change.

### Basic features

The basic features of the envisaged instrument proceed from a strong preference to build on the achievements of the Arctic Council so far and to retain its viable parts and

<sup>1</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 United Nations Treaty Series 396; <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

bodies. There are a variety of vested interests – especially by arctic indigenous peoples’ organizations – to maintain the institutional functioning of the Council as it presently stands. Proposals that ignore such interests would face fierce opposition.

One of the overarching objectives of the new Arctic Council would be to pursue integrated, cross-sectoral ecosystem-based ocean management. The spatial mandate of the Arctic Council would be limited to the marine environment of the Arctic. Retaining a terrestrial component for a body or bodies operating under an instrument as ambitious and open as the envisaged one would be unlikely to secure the required backing among arctic states. Moreover, a large majority of existing members of the Arctic Council are parties to one or more regional marine environmental protection regimes and are therefore at least familiar with such cooperation. Limiting the spatial scope to the marine environment would not exclude the future body or bodies operating under the envisaged instrument from considering external impacts, for instance land-based or atmospheric pollution.

While limited to the marine environment of the Arctic, the spatial scope would – in line with the arguments set out in subsection 2.5 of the ‘Options for Addressing Identified Gaps’ report – consist of areas within as well as areas beyond national jurisdiction (including therefore the high seas and the “Area” – the deep sea-bed). As pointed out there also, the challenge is to balance the rights, interests and obligations of coastal states on the one hand with those of other states and the international community on the other hand. The envisaged governance and regulatory regime should therefore not be uniform – both substantively and spatially – for all sectors. The use of Annexes or Protocols to a framework instrument would therefore be an appropriate solution for sectoral governance and regulation. This should be combined with including in the framework instrument a provision that requires the negotiation of Protocols in relation to the three main human activities that are likely to be more intensively used in the marine Arctic in the near future, namely offshore hydrocarbon activities, fishing and shipping.

The preceding features should be complemented by a safety net that would apply until the Protocols on sectoral governance and regulation have been negotiated and adopted and have duly entered into force. This safety net would lay down a minimum level of protection in case negotiations take longer than expected and human activities commence earlier or expand at a faster pace than foreseen, in the absence of the necessary scientific information or with potentially higher risks to the protection and preservation of the marine environment, marine biodiversity and the rights and interests of arctic indigenous peoples.

In view of the above, the suggested approach would therefore consist of:

1. an adequate governance arrangement established by means of a regional framework instrument, complemented by Annexes relating to specific issues, such as monitoring and assessment;
2. Protocols to that regional framework instrument relating to sectoral governance and regulation; and
3. One or more safety nets that would apply until the Protocols on sectoral governance and regulation have been negotiated and adopted and have duly entered into force.

The following would be the basic features of the framework instrument:

- It would be a regional, legally binding framework instrument that complements and is compatible with the LOS Convention<sup>2</sup>;
- The Arctic Council would become the primary body or forum of this instrument, with a mandate focused on providing strategic guidance rather than on regulation;

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2 Even though not formally linked to it, for instance by means of a Protocol or an Implementation Agreement.

- The spatial mandate of the Arctic Council would be limited to the marine environment of the Arctic within (a) the area north of 60° North, (b) left undefined, or (c) the Arctic Ocean, as defined;<sup>3</sup>
- The Arctic Council would be empowered to adopt non-legally binding decisions (recommendations) and – if desirable – legally binding decisions (resolutions) for several strictly defined purposes. Decision-making would be based on consensus or give a preferential role to arctic states or Arctic Ocean coastal states. Permanent participants would have to be consulted;
- Membership of the Arctic Council would be open to (a) arctic states, (b) any state or regional economic integration organization (REIO) provided the existing members agree by consensus that a certain qualifying criterion is met, or (c) any state or REIO;
- The regional legally binding framework instrument would be complemented by several Annexes and – at a later stage – by various Protocols. As already mentioned, the spatial scope of the Annexes and the Protocols would not have to be identical to that of the framework instrument;
- The Annexes would relate to specific issues, for instance (a) monitoring and assessment, (b) environmental impact assessments (EIAs) and strategic environmental assessments (SEAs), (c) marine protected areas (MPAs) and (d) integrated, cross-sectoral ecosystem-based ocean management. The Annexes would also establish bodies (committees) with an advisory function to the Arctic Council and the bodies (commissions) established by the Protocols; and
- The Protocols would relate to sectoral governance and regulation of the marine Arctic and would establish regulatory bodies (commissions) with the power to impose legally binding obligations on their members. While the competence of the bodies will have to be clearly delimited vis-à-vis the competence of the Arctic Council and other competent international organizations, the bodies would not be strictly subordinate to the Arctic Council.

The Annex to this Executive Summary contains a ‘Possible Title, Structure and Main Elements of the Envisaged Instrument’.

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3 Definitions for a spatial scope would nevertheless be needed for the Annexes and/or Protocols.

## Annex: Possible Title, Structure and Main Elements of the Envisaged Instrument

### Title: Arctic Ocean Framework Convention

#### Preamble

Could concisely describe the following aspects:

- The impact of global climate change on the Arctic;
- The need to adapt the current governance and regulatory regime in the Arctic as a consequence of this change, while taking account of the unprecedented pace of change and the uncertainty of its consequences;
- The impact of arctic climate change on the rest of the world;
- The expansion of human activities in the Arctic region and their actual or potential impact on the environment and biodiversity in the Arctic;
- The important role of the original occupants of the region – the arctic indigenous peoples – in promoting sustainable development in the region;
- The need for regional cooperation in order to fulfill obligations under international law, including those relating to the protection and preservation of the marine environment and the conservation and sustainable use of marine living resources in the Arctic;
- The need for peace, order and stability in the Arctic;
- The desire to protect and preserve the marine environment and to conserve and sustainably use marine biodiversity in the Arctic;
- The desire to pursue integrated, cross-sectoral ecosystem-based ocean management;
- The rationale of a safety net, namely the desire to have a minimum level of governance and regulation in place before a significant expansion of human activities occurs in the Arctic; and
- An acknowledgment of the consistency of the envisaged instrument with selected international instruments, in particular the LOS Convention.

#### Objective

The following elements would seem to be suitable:

- The protection and preservation of the Arctic marine environment;
- The long-term conservation and sustainable and equitable use of Arctic marine resources and marine ecosystems and their functions;
- Maintaining peace, order and stability in the Arctic; and
- Ensuring socio-economic benefits for present and future generations, with special reference to indigenous arctic peoples.

#### General principles

The following would seem to be suitable:

- A precautionary approach or principle;
- An adaptive management that acknowledges that change in the Arctic is rapid and that trends and directions are unclear;
- An ecosystem approach (integrated, cross-sectoral ecosystem-based ocean management);
- Various applications of the principle of good governance, including transparency, accountability and broad participation (including indigenous peoples and non-governmental organisations);
- A polluter pays principle;
- The use of best available techniques and best environmental practice including, where appropriate, clean technology; and
- The use of traditional knowledge of arctic indigenous peoples and other local communities embodying traditional lifestyles.

#### Spatial scope

The marine environment of the Arctic according to the following three options:

- a) north of 60° North;
- b) no definition; and
- c) the Arctic Ocean defined, for instance, as the marine areas north of the Bering Strait and north of the most northern land territory.

#### Main obligations

The following could be the main obligations:

- To pursue the objective(s) of the instrument; to apply its general principles and to cooperate with other contracting parties to these ends;
- To actively participate in the Arctic Monitoring and Assessment Committee (AMAC) and fulfill the obligations laid down in Annex I 'Monitoring and Assessment';
- To conduct EIAs and SEAs in accordance with Annex II 'Environmental Impact Assessments and Strategic Impact Assessments';
- To establish an arctic network of marine protected areas in conformity with Annex III 'Marine Protected Areas';
- To advance integrated, cross-sectoral ecosystem-based ocean management on the basis of Annex IV 'Integrated, cross-sectoral ecosystem-based ocean management';
- To commence negotiation processes for Protocols on the governance and regulation of fisheries, shipping and offshore hydrocarbon activities;

- To continuously examine the adequacy of the institutional structure of the framework instrument and its Annexes and Protocols; and
- Some or all of the basic elements of the safety net(s), or their rationales, may also be incorporated.

#### **Institutional Structure**

- The name 'Arctic Council' would be retained for the primary body or forum;
- The Arctic Council's ministerial meeting would be convened every year. Senior Arctic Officials (SAOs) will continue their current work;
- The Arctic Council would be empowered to establish new bodies;
- Membership of the Arctic Council would be open to (a) Arctic states, (b) any state or REIO provided the existing members agree by consensus that a certain qualifying criterion is met, or (c) any state or REIO;
- The rules on permanent participants would be more relaxed and the status of observer would be available for non-governmental and inter-governmental organizations;
- Annex committees would take over the most valuable functions of the six existing working groups of the Arctic Council;
- Protocols would have their own regulatory bodies; and
- A dedicated secretariat would be established.

#### **Mandate and Decision-making**

- The Arctic Council's mandate would be focused on providing strategic guidance rather than on regulation, and could be defined as "any common issue facing the marine Arctic";
- The Protocol commissions are not strictly subordinate to the Arctic Council;
- The Arctic Council would be empowered to adopt non-legally binding decisions (recommendations) and – if desirable – legally binding decisions (resolutions) for several strictly defined purposes. Decision-making would be based on consensus or give a preferential role to arctic states or Arctic Ocean coastal states. Permanent participants will have to be consulted; and
- Observers are entitled to speak in the ministerial meeting, and receive non-confidential material.

#### **Final and Other Provisions**

The framework instrument could contain the following other and final provisions:

- Annexes, which shall form an integral part of the framework instrument;
- Protocols;
- Peaceful settlement of disputes;
- Review conference;
- Signature;
- Ratification, acceptance or approval (for the signatories);
- Accession (for other than signatories);

- REIOs;
- Entry into force;
- Reservations, which would not be allowed;
- Declarations and statements, which would be allowed;
- Provisional application, which would be allowed;
- Amendments;
- Withdrawal, which would be allowed;
- Depositary (United Nations); and
- Authentic texts (e.g. English and Russian).

#### **Annexes**

The following are suggestions:

- Annex I 'Monitoring and Assessment', which establishes the Arctic Monitoring and Assessment Committee (AMAC). AMAC will be the new home of the AMAP Working Group;
- Annex II 'Environmental Impact Assessments and Strategic Impact Assessments';
- Annex III 'Marine Protected Areas'; and
- Annex IV 'Integrated, cross-sectoral ecosystem-based ocean management'.

#### **Protocols**

The instrument would contain an obligation to commence negotiation processes for Protocols on the governance and regulation of

- fisheries;
- shipping; and
- offshore hydrocarbon activities
- and, possibly, other human activities.

This would be complemented by prescriptions on the issues of participation and the safety net(s).

In light of the primacy of the International Maritime Organization (IMO), the Protocol on shipping could focus on the following issues:

- monitoring, contingency planning and preparedness for pollution incidents, as well as on search and rescue, including designating places of refuge;
- enforcement and compliance; and
- more stringent standards for vessels flying the flag of contracting parties to the Protocol.



## List of abbreviations

ACIA	Arctic Climate Impact Assessment
AMAC	Arctic Monitoring and Assessment Committee (proposal)
AMAP	Arctic Monitoring and Assessment Programme (working group)
EC	European Community
EIA	environmental impact assessment
IMO	International Maritime Organization
IPCC	Intergovernmental Panel on Climate Change
IWC	International Whaling Commission
LME	large marine ecosystem
MPA	marine protected area
NEAFC	North-East Atlantic Fisheries Commission
NPFMC	North Pacific Fishery Management Council
PAME	Protection of the Arctic Marine Environment (working group)
REIO	regional economic integration organization
SAOs	Senior Arctic Officials
SEA	strategic impact assessment
UNGA	United Nations General Assembly

# 1. Introduction

This report was commissioned by the WWF International Arctic Programme in response to the inadequacies of the current international governance and regulatory regime of the marine Arctic in light of current and future effects of climate change. This report complements two other reports with the same main title but with different subtitles, namely ‘Overview and Gap Analysis’<sup>4</sup> and ‘Options for Addressing Identified Gaps’<sup>5</sup>. The present report contains a Proposal for a Legally Binding Instrument as one of the most convincing options to address the gaps identified in the latter report.

In drafting this report, inspiration has been sought from several international instruments – including those listed in Appendix I and the Draft PSM Agreement<sup>6</sup> – and various publications,<sup>7</sup> including the 1991 Draft Arctic Treaty drawn up by Pharand<sup>8</sup>.

The structure of the report is as follows. The rationale for the legally binding instrument is explained in section 2, followed by an explanation of its basic features in section 3. Section 4 then focuses on the pivotal issue of participation in the framework instrument and its Annexes and Protocols. Subsequently, section 5 devotes attention to the negotiation process for the legally binding instrument and the safety net that is intended to complement it. A discussion on the basic elements of the envisaged instrument is incorporated in section 6, with subsections focusing on the title, preamble, objective and general principles, spatial scope, main obligations, institutional structure, mandate and decision-making, other and final provisions and Annexes and Protocols. Appendix I to the report contains a table displaying objectives and principles of selected international instruments.

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4 Final version of January 2009, available at <[www.panda.org/arctic](http://www.panda.org/arctic)>.

5 To be published in conjunction with the current report (see <[www.panda.org/arctic](http://www.panda.org/arctic)>).

6 Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, as contained in FAO doc. TC PSM/2008/2, of April 2008.

7 For instance K.M. Gjerde et al., “Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction (IUCN Marine Law and Policy Paper No. 2: 2008; available at <[cms.iucn.org](http://cms.iucn.org)>) and the “Suggested Draft High Seas Implementing Agreement for the Conservation and Management of the Marine Environment in Areas Beyond National Jurisdiction” of March 2008 drawn up by Greenpeace (available at <[www.greenpeace.org/international](http://www.greenpeace.org/international)>).

8 D. Pharand, “Draft Arctic Treaty: An Arctic Region Council”, in *The Arctic Environment and Canada’s International Relations* (Canadian Institute of International Affairs, National Capital Branch, (Ottawa: Canadian Arctic Resources Committee, 1991)), pp. AI–A10.



## 2. Rationale

The proposal for a legally binding instrument for the governance and regulation of the marine Arctic presented in this report responds to the vast challenges that are taking place in the Arctic, especially in its marine areas. In drafting the proposal, account has among other things been taken of the views of the Arctic Ocean coastal states as expressed in the Ilulissat Declaration of 28 May 2008<sup>9</sup> as well as of the general principles and considerations set out in section 2 of the ‘Options for Addressing Identified Gaps’ report. The latter are: necessity, timing and comprehensiveness of reform (pro-active/precautionary, fair and equitable and cost-effective), type, level and proposals for reform and balancing rights, interests and obligations.

The basic rationale for the envisaged proposal consists of the following elements: First, it is submitted that few, if any, seriously question any longer that the Arctic Ocean meltdown has by now become largely irreversible. In addition, the more recent empirical research tends to show that the Arctic Ocean will not be seasonally ice-free by the end of this century, as projected by the 2004 Arctic Climate Impact Assessment (ACIA), but much earlier. The governance and regulatory regime that currently exists in the Arctic may have been adequate for a hostile environment that allows very little human activity for most of the year. But when the Arctic Ocean becomes increasingly similar to regional seas in other parts of the world for longer and longer parts of the year, adequacy cannot be assumed and reform of the regime is indispensable. In fact, the analysis in the ‘Overview and Gap Analysis’ report has revealed various governance and regulatory gaps that have to be addressed in one way or another.

Even if there would be sufficient substantive rules applicable to the marine Arctic, it is clear that rules alone – and in particular non-legally binding rules – cannot manage the sea that will soon emerge from underneath the arctic sea ice. Hence, a new governance arrangement with a new institutional set-up is needed, which will be able to counter the vast challenges now facing the marine Arctic.

It is submitted that the envisaged proposal is better suited to respond to the vast challenges ahead than the approach that currently prevails among the Arctic Council members and the Commission of the European Community (EC), namely that comprehensive reform is unnecessary because the existing legal and political framework (especially the LOS Convention<sup>10</sup> and the Arctic Council) is in principle adequate. However, the level of support for maintaining the status quo is likely to be directly related to the extent in which the ACIA and the Intergovernmental Panel on Climate Change (IPCC)’s Fourth Assessment Report in 2007 will be regarded as ‘old science’. The status quo is also under pressure due to the cooperation between the five Arctic Ocean coastal states as reflected in the Ilulissat Declaration and various initiatives of non-Arctic states and the EC with respect to the Arctic.<sup>11</sup> The proposal envisaged in this report offers a credible alternative for the status quo.

Second, the envisaged instrument would fulfill relevant obligations to cooperate under international law for Arctic Ocean coastal states and others in addition to addressing transboundary issues and effects, enabling a regional level playing-field with regional uniformity and being conducive to, or pursuing, integrated, cross-sectoral ecosystem-based ocean management.

9 Ilulissat, 28 May 2008 (available at <arctic-council.org>).

10 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 United Nations Treaty Series 396; <www.un.org/Depts/los>.

11 COM (2008) 763, of 20 November 2008, ‘Communication from the Commission to the European Parliament and the Council on The European Union and the Arctic Region’.

## 3. Basic Features

### 3.1. General

As the Arctic Council is currently the main inter-governmental forum for the entire Arctic, any new governance and regulatory arrangement for the region needs to address its relationship with the Arctic Council. The envisaged instrument's structure and elements laid down in the ensuing subsections reflect a strong preference to build on the achievements of the Arctic Council so far and to retain its viable parts and bodies. Radically throwing out everything that has been gradually and painstakingly created and maintained during a period of almost 20 years would make no sense. The Arctic Council has become increasingly ambitious in its work agenda – especially in recent years – so it would be very bold to propose its replacement by a completely new governance and regulatory arrangement. Moreover, there are a variety of vested interests, especially from the part of arctic indigenous peoples' organisations, to maintain the institutional functioning of the Council as it presently stands. Proposals that ignore such interests would face fierce opposition. Yet, certain elements of the Arctic Council need to be revised in order to enable it to respond adequately to the vast challenges faced by the Arctic region.

The spatial mandate of the Arctic Council under the envisaged instrument would be limited to the marine environment of the Arctic. Retaining a terrestrial component for a body or bodies operating under an instrument as ambitious and open as the envisaged one would be unlikely to secure the required backing among arctic states. Moreover, a large majority of existing members of the Arctic Council are party to one or more regional marine environmental protection regimes and therefore at least familiar with such cooperation.<sup>12</sup> Limiting the spatial scope to the marine environment would not exclude the future body or bodies operating under the envisaged instrument from considering external impacts, for instance land-based or atmospheric pollution.<sup>13</sup> One of the overarching objectives of the new Arctic Council would be to pursue integrated, cross-sectoral ecosystem-based ocean management.

While limited to the marine environment of the Arctic, the spatial scope would – in line with the arguments set out in subsection 2.5 of the 'Options for Addressing Identified Gaps' report – consist of areas within as well as areas beyond national jurisdiction (including therefore the high seas and the "Area" – the deep sea-bed). As pointed out there also, the challenge is to balance the rights, interests and obligations of coastal states on the one hand with those of other states and the international community on the other hand. The envisaged governance and regulatory regime should therefore not be uniform – both substantively and spatially – for all sectors. The use of Annexes or Protocols to a

<sup>12</sup> Canada is a party to the Antarctic Treaty (Antarctic Treaty, Washington D.C., 1 December 1959. In force 23 June 1961, 402 United Nations Treaty Series 71; <[www.ats.aq](http://www.ats.aq)>) and its Environmental Protocol (Protocol on Environmental Protection to the Antarctic Treaty; Annexes I-IV, Madrid, 4 October 1991. In force 14 January 1998; Annex V (adopted as Recommendation XVI10), Bonn, 17 October 1991. In force 24 May 2002; Annex VI (adopted as Measure 1(2005)), Stockholm, 14 June 2005. Not in force. All texts available at <[www.ats.org.ar](http://www.ats.org.ar)>), even though Canada does not have the status of 'Antarctic Treaty Consultative Party'. Denmark, Finland and Sweden are parties to the OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992. In force 25 March 1998, <[www.ospar.org](http://www.ospar.org)>). Annex V, Sintra, 23 September 1998. In force 30 August 2000; amended and updated text available at <[www.ospar.org](http://www.ospar.org)>) and the 1992 Helsinki Convention (Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992. In force 17 January 2000; <[www.helcom.fi](http://www.helcom.fi)>); Iceland and Norway are parties to the OSPAR Convention; the Russian Federation is party to the 1992 Helsinki Convention; and the United States is party to the Cartagena Convention (Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena de Indias, 24 March 1983. In force 11 October 1986, 22 International Legal Materials 221 (1983); <[www.unep.org/regionalseas](http://www.unep.org/regionalseas)>).

<sup>13</sup> Note in this regard that several regional marine environmental protection regimes have Annexes or Protocols on, for instance, land-based pollution (e.g. Annex II 'On the Prevention and Elimination of Pollution from Land-Based Sources' to the OSPAR Convention).

framework instrument would therefore be an appropriate solution for sectoral governance and regulation.

The choice between Annexes and Protocols depends on various considerations. Annexes are commonly an integral part of the main instrument, negotiated in parallel with the main instrument and commonly also enter into force at the same time. Conversely, Protocols are commonly negotiated after the entry into force of the main instrument and complement or implement the substance of the main instrument. The predominant reason for choosing Protocols in relation to sectoral governance and regulation is that negotiating these in parallel with the framework instrument would probably prolong the negotiations too much and lead to undesirable effects caused by unregulated human activities. This approach should nevertheless be combined with including in the framework instrument a provision that requires the negotiation of Protocols in relation to the three main human activities that are likely to be more intensively used in the marine Arctic in the near future, namely offshore hydrocarbon activities, fishing and shipping.<sup>14</sup> This provision should moreover explicitly refer to the possibility of negotiating other Protocols.

The preceding features should be complemented by a safety net that would apply until the Protocols on sectoral governance and regulation have been negotiated and adopted and have duly entered into force. This safety net would lay down a minimum level of protection in case negotiations take longer than expected, human activities commence earlier or expand at a faster pace than foreseen, in the absence of the necessary scientific information or with potentially higher risks to the protection and preservation of the marine environment, marine biodiversity and the rights and interests of arctic indigenous peoples. It is submitted, however, that the use of the term 'moratorium' in connection with this safety net would trigger more opposition than support and should therefore be avoided. The term 'moratorium' has for several arctic states and for many of its indigenous peoples negative connotations with the 1982 decision by the International Whaling Commission (IWC) to adopt a temporary ban on commercial whaling that is still in force today even though some commercial whaling for some stocks of some whale species would – arguably – not be unsustainable.

In view of the above, the suggested approach would therefore consist of a regional framework instrument – plus Annexes and/or Protocols – and a safety net. The safety net is therefore not – at least not initially – intended to be an integral part of the framework instrument or even its negotiation process.<sup>15</sup> The basic features of the framework instrument and the safety net are explained in the subsections below.

### 3.2. Framework instrument

The basic features of the framework instrument would be:

- It would be a regional, legally binding framework instrument that complements and is compatible with the LOS Convention<sup>16</sup>;
- The Arctic Council would become the primary body or forum<sup>17</sup> of this instrument, with a mandate focused on providing strategic guidance rather than on regulation;

14 See also Art. 16 of the Environmental Protocol to the Antarctic Treaty, note 11 supra.

15 In case the option of the negotiation process would be pursued, this would envisage the safety net to be adopted as an interim measure with non-legally binding status (e.g. the interim measures adopted in May 2007 in the context of the negotiations to establish the South Pacific Regional Fisheries Management Organization; for info see <[www.southpacificrfmo.org](http://www.southpacificrfmo.org)>).

16 Even though not formally linked to it, for instance by means of a Protocol or an Implementation Agreement.

17 Note that the United States Arctic Region Policy (National Security Presidential Directive/NSPD-66 & Homeland Security Presidential Directive/HSPD-25, of 9 January 2009. In effect same day; text at <[www.whitehouse.gov](http://www.whitehouse.gov)> (press release of 12 January 2009)), observes that the "Arctic Council should remain a high-level forum devoted to issues within its current mandate and not be transformed into a formal international organization, particularly one with assessed contributions" (section III(C)(2)).

- The spatial mandate of the Arctic Council would be limited to the marine environment of the Arctic within (a) the area north of 60° North, (b) left undefined, or (c) the Arctic Ocean, as defined;<sup>18</sup>
- The Arctic Council would be empowered to adopt non-legally binding decisions (recommendations) and – if desirable – legally binding decisions (resolutions) for several strictly defined purposes. Decision-making would be based on consensus or give a preferential role to arctic states or Arctic Ocean coastal states. Permanent participants will have to be consulted;
- Membership of the Arctic Council would be open to (a) arctic states, (b) any state or regional economic integration organization (REIO) provided the existing members agree by consensus that a certain qualifying criterion is met, or (c) any state or REIO (see section 4);
- The regional legally binding framework instrument would be complemented by several Annexes and – at a later stage – by various Protocols. As already mentioned, the spatial scope of the Annexes and the Protocols would not have to be identical to that of the framework instrument;
- The Annexes would relate to specific issues, for instance (a) monitoring and assessment, (b) environmental impact assessments (EIAs) and strategic environmental assessments (SEAs), (c) marine protected areas (MPAs) and (d) integrated, cross-sectoral ecosystem-based ocean management. The Annexes would also establish bodies (committees) with an advisory function to the Arctic Council and the bodies (commissions) established by the Protocols; and
- The Protocols would relate to sectoral governance and regulation of the marine Arctic and would establish regulatory bodies (commissions) with the power to impose legally binding obligations on their members. While the competence of the bodies will have to be clearly delimited vis-à-vis the competence of the Arctic Council and other competent international organizations, the bodies would not be strictly subordinate to the Arctic Council.

### 3.3. Safety net

The basic features of the safety net could be similar to the basic features of the paragraphs of United Nations General Assembly (UNGA) Resolution No. 61/105<sup>19</sup> that deal with the impact of bottom fisheries on vulnerable marine ecosystems.<sup>20</sup> As pointed out in subsection 3.3.5 of the ‘Overview and Gap Analysis’ report, the main elements of this approach are

- Conducting prior EIAs;
- Identifying the location of vulnerable marine ecosystems;
- Freezing the footprint of bottom fishing in areas where vulnerable marine ecosystems are known to occur or likely to occur, until adequate conservation and management measures are in place; and
- Publication of information on action taken pursuant to these elements.

These elements essentially operationalize the precautionary approach, the need for science-based fisheries management and accountability. For parts of the Arctic marine area, these paragraphs of UNGA Resolution No. 61/105 have already been implemented

18 Definitions for a spatial scope would nevertheless be needed for the Annexes and/or Protocols.

19 UNGA Resolution No. 61/105, of 8 December 2006, ‘Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments’.

20 Paras 83–87.

by the North-East Atlantic Fisheries Commission (NEAFC)<sup>21</sup> and the North Pacific Fishery Management Council (NPFMC)<sup>22</sup> as well as by flag states pursuant to these decisions or at their own instigation.

As already pointed out above, the safety net is not – at least not initially – intended to be an integral part of the framework instrument or even its negotiation process (but see below). If it were, a considerable number of years could pass before it would become operational and that is precisely what it seeks to avoid. In view of the need for speedy action, it may be opportune to aim for a safety net that is not legally binding. An important choice that would have to be made is that between a single safety net for all sectors or several safety nets; for instance for each sector. It is in this context important to mention recent efforts by the United States aimed at commencing a process to culminate in a general statement or declaration on present and future Arctic fisheries.<sup>23</sup> If such a process would be pursued, this would seem to rule out the likelihood of a single safety net.

As mentioned above, initially the safety net(s) is/are not intended to be part of the framework instrument or its negotiations process. However, it seems inevitable that some or all of the basic elements of the safety net(s), or their rationales, are eventually also incorporated in interim measures adopted by the negotiation process<sup>24</sup> of the framework instrument and eventually also into the framework instrument, Annexes or even Protocols.

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21 Established by Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 United Nations Treaty Series 129; <[www.neafc.org](http://www.neafc.org)>. 2004 Amendments (Art. 18bis), London; 12 November 2004. Not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <[www.neafc.org](http://www.neafc.org)>. 2006 Amendments, London (Preamble, Arts 1, 2 and 4), 11 August 2006. Not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <[www.neafc.org](http://www.neafc.org)>. See, inter alia, NEAFC Recommendations VII: 2008 and XVI: 2008.

22 Motion of 10 June 2007 on Bering Sea Habitat Conservation (available at <[www.fakr.noaa.gov/npfmc](http://www.fakr.noaa.gov/npfmc)>). It should be noted that, in contrast with NEAFC, the NPFMC is not a multilateral body.

23 See subsection 4.2.2 of the 'Options for Addressing Identified Gaps' report.

24 See note 14 supra.

## 4. Participation in the framework instrument and its Protocols

If the spatial scope of the envisaged instrument – while limited to the marine environment – is to encompass not only areas within but also areas beyond national jurisdiction, there seem to be four basic options for membership in the future Arctic Council, namely:

- a) Arctic Ocean coastal states;
- b) arctic states;
- c) any state or REIO provided the existing members agree by consensus that a certain qualifying criterion is met, or
- d) any state or REIO;

It is submitted that option (a) – limiting membership to Arctic Ocean coastal states – is not compatible with the wish for the envisaged framework instrument to become the ‘home’ of a new, transformed Arctic Council as this would mean excluding the three other current members of the Arctic Council. This option is therefore not discussed any further.

Pursuing option (b) would exclude all other states and REIOs. This may have the advantage of higher performance in case the views and interests of the eight states are more similar or compatible than in a scenario where other players would be brought in. The main disadvantage of option (b) is that it does not provide a role to other states and REIOs even though they have rights, obligations and interests in the spatial area over which the future Arctic Council would have a mandate. Such rights, obligations and interests do not just exist in areas beyond national jurisdiction (e.g. freedom of fishing in the high seas) but also within national jurisdiction (e.g. navigational rights and freedoms). Excluding other states and REIOs would preclude them from making positive contributions to the work of the future Arctic Council, for instance in terms of expertise, research, data sharing and funding (including through membership fees). Not including them would also limit the effectiveness of the future Arctic Council if its efforts in governance and regulation would depend in part on compliance by vessels and natural and legal persons of such other states. The principle of *pacta tertiis*<sup>25</sup> would seriously curtail the eight states’ ability to impose obligations on other states and REIOs as well as on their nationals. Attempts by the arctic states to affect the rights and interests of other states and REIOs would also lack legitimacy and credibility if the latter would not be given a participatory role. It goes without saying that such a participatory role does not necessarily have to be on the same footing as the arctic eight or the arctic five, for instance in decision-making.

It is submitted that broader participation in the Protocols does not always resolve the *pacta tertiis*, legitimacy and credibility issues that arise from narrow participation in the framework instrument. Assume, for instance, that the arctic states designate an area of the high seas as an MPA pursuant to criteria agreed by themselves and a procedure open only to themselves. It is clear that an international fisheries management authority with spatial competence over the area would as a minimum be expected to consider the regulation of fishing there; even if the arctic states would not dictate this. However, it is evident that other states and REIOs could object that they were not involved in the process that adopted the criteria or in the procedure that designated the area. These arguments could for instance be raised by a state that is a member of NEAFC but a non-member of the OSPAR Commission in response to proposals for MPAs in areas beyond national

<sup>25</sup> This fundamental principle of international law provides that States cannot be bound by rules of international law unless they have in one way or another consented to them.



jurisdiction originating from the OSPAR Commission.<sup>26</sup> In the context of the Arctic, why would China, the EC, Japan and South Korea – as members of the envisaged commission of the Fisheries Protocol to the framework instrument – be prepared to accept decisions by a body in which they are not allowed to participate?

The OSPAR Commission is useful to illustrate other points as well. Its membership consists exclusively of coastal states, states located upstream on watercourses reaching the OSPAR Maritime Area (Finland, Luxembourg and Switzerland) and the EC. Due to its efforts in recent years to pursue the ecosystem approach and to act as a regulatory body by default,<sup>27</sup> however, the OSPAR Commission has been repeatedly confronted within its limited competence vis-à-vis other intergovernmental organizations and non-members; for instance in its efforts on MPAs in areas beyond national jurisdiction and on marine scientific research. Why repeat such fundamental shortcomings in the Arctic if there is an opportunity to start from scratch and get it right?

The disadvantages of option (b) would be avoided under options (c) and (d). The qualifying criterion could be related to scientific research – like in the Antarctic Treaty<sup>28</sup> – or could have a more general focus, for instance a ‘real interest in’ or ‘genuine commitment to’ the Arctic, its environment, biodiversity and/or indigenous peoples. It would then be up to the existing members to determine by consensus or otherwise if a state or REIO seeking membership qualifies or not. Potential challenges on legitimacy and credibility should ensure that existing members take this task seriously.

Option (d) would not give existing members any control on participation. However, there is no reason to assume that a very large number of states would avail themselves of the opportunity to participate. Participation in the future Arctic Council would after all only provide a role in providing strategic guidance. Also, it would not give access to resources but would still bring costs related to membership (e.g. fees, human resources and travel). Moreover, it was noted above that the arctic eight or arctic five could be given a preferential role in decision-making and, anyway, the Arctic Council does not necessarily have to be empowered to adopt legally binding decisions.

Finally, it is possible that the Arctic Ocean coastal states or the arctic states propose yet another option, namely to limit participation initially to themselves and to allow broader participation at a later stage. While it is not excluded that this would work, there is of course a possibility that – for whatever reason – they eventually cannot agree on broader participation amongst themselves.<sup>29</sup>

Permanent participants would still be those that represent one indigenous people in many arctic states or an organization that represents many indigenous groups in a single arctic state. The change would be that there should be no limit to the number of permanent participants, given that the Arctic Council’s membership would considerably broaden (now their number cannot exceed the number of members). The observer category would consist of those non-governmental and inter-governmental organizations that want to participate in the meetings of the Council, manifesting a relaxed attitude to entry and promoting wider participation for all stakeholders. Finally, it would seem to be too ambitious to create a separate participatory status for sub-units of (federal) states, as envisaged in Pharand’s proposal.<sup>30</sup>

26 See the discussion in Report of the June 2008 Meeting of the Permanent Committee on Management and Science (PECMAS) of NEAFC, at pp. 5 and 9.

27 See the Overview and Gap Analysis report, at p. 6.

28 See Art. IX(2).

29 Note, for instance, the debate on broader participation in the United Nations Security Council.

30 See Art. 3. Pharand thereby tried to make the Arctic Council as much as possible an ‘open’ political forum, and hence all kinds of administrative units could participate as observers to the ministerial meetings. This would also bring in the regional voices to the debates over the future of the larger region. It would still seem justified to uphold the position of international organizations of Arctic indigenous peoples as permanent participants, given their important role in the Arctic Council, and their symbolic importance as representatives

## 5. Negotiation Process

It is submitted that a negotiation process for a regional legally binding instrument cannot commence without:

- a) Basic agreement on the envisaged instrument's main objective(s), spatial scope, elements and relationship vis-à-vis other instruments and institutions; and
- b) Rules of procedure for the negotiation process, in particular on participation in the process and adoption of the envisaged instrument.

Which players are entitled to decide these issues and in which manner, is directly connected with the issue of participation in the framework instrument and its Protocols, which is discussed in the previous section. This issue depends in turn partly on the spatial scope of the envisaged instrument and whether or not it would become the new 'home' of the Arctic Council.

In the case that sufficient support exists for the preferred spatial scope (namely areas within and beyond national jurisdiction), making the envisaged instrument the new home of the Arctic Council, and allowing participation by non-arctic states and REIOs, it would arguably be appropriate to allow the current members of the Arctic Council – in consultation with the permanent participants – to develop the above mentioned elements further before consulting non-arctic states, REIOs and representatives of indigenous peoples.

As regards the adoption of the envisaged instrument, it seems that this should be done by consensus while specifying that in case consensus cannot be reached, the instrument shall be adopted by a qualified majority, provided it includes all existing Arctic Council members.

The negotiation process(es) for the safety net(s) does/do not have to be identical to that of the framework instrument. In fact, when the delegation of the United States initiated a discussion on United States Senate joint resolution (SJ Res.) No. 17 of 2007<sup>31</sup> on Arctic fisheries at the Senior Arctic Officials (SAOs) meeting in November 2007, it was met with very little enthusiasm.<sup>32</sup> The initiative therefore remained with the United States, which is likely to further develop the issues mentioned above in consultation with other Arctic Ocean coastal states and key players beyond that group.

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of the original occupants in the region with some influence in decision-making. These organizations are also well versed in influencing international policies, so this would further justify their position in this international governance arrangement. It can be presumed that given the international nature of the focus, regional units and local indigenous organizations of the region would not contribute to the work of the Council as much as current permanent participants.

31 Passed by the Senate on 4 October 2007. The House of Representatives voted in favor of SJ Res. No. 17 in May 2008 and the President signed it on 4 June 2008.

32 Final Report of the Meeting of Senior Arctic Officials, 28–29 November 2007, Narvik, Norway (available at <[www.arctic-council.org](http://www.arctic-council.org)>), at p. 12.

## 6. Elements

### 6.1. Introduction

As explained in section 1, the ensuing discussion focuses on the envisaged instrument's title, preamble, objective and general principles, spatial scope, main obligations, institutional structure, mandate and decision-making, other and final provisions, Annexes and Protocols.

### 6.2. Title

The title of an international instrument should ideally give a concise but accurate impression of its main objective(s) and scope. However, in case the main objective(s) and scope are complex and cannot be concisely captured, a shorter title may be preferable. The 'Options for Addressing Identified Gaps' report notes that a proposal for an 'Arctic Treaty' may trigger considerable knee-jerk opposition<sup>33</sup> in view of associations with the Antarctic Treaty<sup>34</sup>; or, rather, some of its special features (e.g. the agreement to disagree on the question of sovereignty). Even if none of these special features are incorporated in the envisaged arctic instrument, the title 'Arctic Treaty' will for many trigger an assumption of similarity with the Antarctic Treaty and should for that reason be avoided.

The table below provides some examples of titles of relevant instruments. It is noteworthy that the 1995 revision of the 1976 Barcelona Convention also led to a new title due to its broader focus.

Instrument	Full title
Antarctic Treaty	Antarctic Treaty
Environmental Protocol to the Antarctic Treaty	Protocol on Environmental Protection to the Antarctic Treaty
1976 Barcelona Convention	Convention for the Protection of the Mediterranean Sea against Pollution
1995 Barcelona Convention	Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean
1992 Helsinki Convention	Convention on the Protection of the Marine Environment of the Baltic Sea Area
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic

The title of the envisaged instrument should as a minimum contain a reference to its legal status. This could be complemented by a reference to its spatial scope and a concise description of its objective(s). An alternative to the latter two elements would be to emphasize the incorporation of the Arctic Council. The box below lists possible wording for such elements.

<sup>33</sup> T. Koivurova and E.J. Molenaar, Options for Addressing Identified Gaps, WWF, 2009, at pp. 14 and 31–34, <[www.panda.org/arctic](http://www.panda.org/arctic)>.

<sup>34</sup> See note 11 supra.

Legal status	Objective(s) or other	Spatial scope
- Agreement - Convention - Treaty	- Arctic Council - Framework - for the Governance and Regulation - for the Protection of the Marine Environment and Marine Biodiversity	- None - Arctic - Arctic Ocean - Arctic Ocean Area - Arctic Maritime Area

As a consequence, quite a few combinations of the suggestions for each of the three elements can be made, for instance ‘Arctic Council Agreement’, ‘Arctic Ocean Framework Convention’ or ‘Convention for the Protection of the Marine Environment and Marine Biodiversity of the Arctic Maritime Area’.

### 6.3. Preamble

As the Preamble does not contain rights, obligations or institutional/procedural issues, its purpose is commonly to explain the context and basic rationale(s) or objective(s) of the instrument. The Preamble to the envisaged instrument could concisely describe the following aspects:

- The impact of global climate change on the Arctic;
- The need to adapt the current governance and regulatory regime in the Arctic as a consequence of this change, while taking account of the unprecedented pace of change and the uncertainty of its consequences;
- The impact of arctic climate change on the rest of the world;
- The expansion of human activities in the Arctic region and their actual or potential impact on the environment and biodiversity in the Arctic;
- The important role of the original occupants of the region – the arctic indigenous peoples – in promoting sustainable development in the region;
- The need for regional cooperation in order to fulfill obligations under international law, including those relating to the protection and preservation of the marine environment and the conservation and sustainable use of marine living resources in the Arctic;
- The need for peace, order and stability in the Arctic;
- The desire to protect and preserve the marine environment and to conserve and sustainably use marine biodiversity in the Arctic;
- The desire to pursue integrated, cross-sectoral ecosystem-based ocean management;
- The rationale of a safety net, namely the desire to have a minimum level of governance and regulation in place before a significant expansion of human activities occurs in the Arctic; and
- An acknowledgment of the consistency of the envisaged instrument with selected international instruments, in particular the LOS Convention.

### 6.4. Objective and General Principles

For the purpose of this section, a short survey has been carried out of selected international instruments. The Table in Appendix I – which contains the objectives and principles of these instruments – illustrates that there is a considerable lack of uniformity in the way in which the selected international instruments express their objectives. Some, like the Antarctic Treaty, the 1995 Barcelona Convention and the OSPAR Convention, do not have a provision entitled ‘Objective’. Rather, their objectives have to be inferred from certain provisions or from the Preamble. The more recent of the selected instruments all contain a specific provision entitled ‘Objective’. Most of the selected instruments also

contain principles that the contracting parties have to apply individually or collectively in the context of the bodies established by the instruments.

In light of this short survey, it would be consistent with current practice in treaty drafting to include a provision entitled 'Objective' as well as a provision entitled 'Principles'. The following elements would seem to be suitable for the objective(s) of the envisaged instrument:

- The protection and preservation of the Arctic marine environment;
- The long-term conservation and sustainable and equitable use of Arctic marine resources and marine ecosystems and their functions;
- Maintaining peace, order and stability in the Arctic; and
- Ensuring socio-economic benefits for present and future generations, with special reference to indigenous arctic peoples.

The following general principles would seem to be suitable for the envisaged instrument:

- A precautionary approach or principle;
- An adaptive management that acknowledges that change in the Arctic is rapid and that trends and directions are unclear;
- An ecosystem approach (integrated, cross-sectoral ecosystem-based ocean management);
- Various applications of the principle of good governance, including transparency, accountability and broad participation (including indigenous peoples and non-governmental organisations);
- A polluter pays principle;
- The use of best available techniques and best environmental practice including, where appropriate, clean technology; and
- The use of traditional knowledge of arctic indigenous peoples and other local communities embodying traditional lifestyles.

## 6.5. Spatial Scope

As a preliminary matter, it should be recalled that according to subsection 3.1 above the spatial scope would be limited to the marine environment of the Arctic, but would consist of areas within as well as areas beyond national jurisdiction. Moreover, the presumption is that the spatial scope of the framework instrument is not identical to the spatial scopes of the Annexes or Protocols (see subsections 6.10 and 6.11).

It is submitted that the issue of the spatial scope of the framework instrument is closely connected with the issue of participation, the main obligations and the regulatory powers conferred on its body or bodies, if any. Reference can here be made to Pharand's Draft Arctic Treaty, whose area of application is north of 60° North.<sup>35</sup> This would not only include territory of the current eight Members of the Arctic Council but also of the United Kingdom (namely the Shetland Islands).

The eight members of the Arctic Council would not likely support such a spatial scope if states with territory or maritime zones included in the spatial scope of the envisaged instrument would have a preferential participatory status. Conversely, such a broad spatial scope would not be problematic in the absence of such a preferential participatory status.

The main obligations and regulatory powers – if any – conferred on the body or bodies established by the framework instrument are of crucial importance as well. A broad spatial scope would be more acceptable in combination with less onerous obligations and few or

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35 See Art. 1 (note 7 above).

no regulatory powers. As mentioned above, sectoral regulation would not be pursued by the framework instrument but by its Protocols.

An alternative to north of 60° North is not to define the spatial scope of the framework instrument at all. After all, the Arctic Council has so far managed without a definition. On the other hand, this may be more difficult in the context of a legally binding instrument. All the Protocols and perhaps some of the Annexes would at any rate need a defined spatial scope, however.

A final option would be available in case the instrument focuses mainly on the Arctic Ocean. The spatial scope could then basically comprise the marine areas north of the Bering Strait and north of the most northern land territory. The main challenge of a suitable definition for the spatial scope would then be the delimitation between the North-East Atlantic Ocean and the Arctic Ocean. This latter delimitation could take account of the large marine ecosystems (LMEs) of the Arctic marine area developed by the Arctic Council's Protection of the Arctic Marine Environment (PAME) working group and may necessitate adjustments in the spatial scopes of the OSPAR Convention and the NEAFC Convention.<sup>36</sup>

Based on the above, there seem to be three options:

- a) north of 60° North;
- b) no definition; and
- c) a definition of the Arctic Ocean: the marine areas north of the Bering Strait and north of the most northern land territory.

## 6.6. Main Obligations

The following could be the main obligations laid down in the framework instrument:

- To pursue the objective(s) of the instrument; to apply its general principles and to cooperate with other contracting parties to these ends;
- To actively participate in the Arctic Monitoring and Assessment Committee (AMAC) and to fulfill the obligations laid down in Annex I 'Monitoring and Assessment';
- To conduct EIAs and SEAs in accordance with Annex II 'Environmental Impact Assessments and Strategic Impact Assessments';
- To establish an Arctic network of MPAs in conformity with Annex III 'Marine Protected Areas';
- To advance integrated, cross-sectoral ecosystem-based ocean management on the basis of Annex IV 'Integrated, cross-sectoral ecosystem-based ocean management';
- To commence negotiation processes for Protocols on the governance and regulation of fisheries, shipping and offshore hydrocarbon activities and, when the Parties so decide – inter alia, based on available scientific information and the precautionary approach -, on other human activities. This should be followed by an assurance that all relevant states and REIOs are invited to participate as full members in the negotiation processes and that other stakeholders will be entitled to participate as observers. Moreover, it should specify that Parties continue to be committed to the safety net(s) until the Protocols have entered into force;
- To continuously examine the adequacy of the institutional structure of the framework instrument and its Annexes and Protocols; and
- Some or all of the basic elements of the safety net(s), or their rationales, may also be incorporated;

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36 See subsections 4.2.3 and 5.3 of the 'Options for Addressing Identified Gaps' report.

## 6.7. Institutional Structure

The institutional structure of the envisaged instrument would consist of the following main elements:

- The name ‘Arctic Council’ would be retained for the primary body or forum of this instrument, with a mandate focused on governance rather than on regulation;
- The Arctic Council’s ministerial meeting would be convened every year. SAOs will continue to act as focal points for co-ordinated action in-between the meetings of the Council and would prepare the ministerial meetings together with chairs of the Annex committees;
- The Arctic Council would be empowered to establish new bodies;
- Membership in the Arctic Council would follow the selected option on participation as discussed in section 4;
- During the transition period from the currently functioning Arctic Council to its becoming operational under the envisaged framework instrument, the most valuable functions of the six existing working groups will become part of the activities of the four Annex committees. The body established under Annex I is intended to be the new home of the Arctic Monitoring and Assessment Programme (AMAP) working group and could be named ‘Arctic Monitoring and Assessment Committee’ (AMAC). The Annex bodies would regularly convene joint sessions between their chairs in view of the cross-sectoral implications of their work;
- The Protocols would have their own regulatory bodies (see subsection 6.11), the composition of which would reflect the different participation in each Protocol;
- Since there would already be a fairly heavy institutional machinery in the framework instrument, it would be imperative to have a dedicated secretariat to service the members and the numerous bodies operating under the framework instrument and its Annexes and Protocols; and
- As noted above, there would also be an obligation for the Arctic Council and its sub-bodies to revise the institutional structure on regular basis, which would further enhance its adaptability to changing circumstances. A major revision<sup>37</sup> of the institutional structure should be carried out when the Protocol commissions commence their functioning (which can take quite some time), given that further co-ordination between all the bodies established by the framework instrument, Annexes and Protocols will then be needed.

## 6.8. Mandate and Decision-making

The Arctic Council’s mandate would also change from what it is now, for the reason that it would become a more operational body aimed at responding to the challenges confronting the region in change. Therefore, its mandate – which would be focused on providing strategic guidance rather than on regulation – could be defined as “any common issue facing the marine Arctic”.

The Arctic Council would be empowered to adopt non-legally binding decisions (recommendations) and – if desirable – legally binding decisions (resolutions)<sup>38</sup> for several strictly defined purposes. Decision-making would be based on consensus or give a preferential role to arctic states or Arctic Ocean coastal states. As are the rules now in the Arctic Council, permanent participants would need to be consulted before any decision-making by the members. This is not a right of veto but only a check that members take the

37 For instance by means of a review conference, see subsection 6.9.

38 This would require provisions stipulating how these legally binding decisions enter into force, whether there is a need for ratification, etc. Voting rules would need to be created also in cases when REIOs act or their members.

concerns of permanent participants seriously. Observers would be entitled to speak in the ministerial meeting, and receive non-confidential material.

Whereas the Annex committees would have an advisory function to the Arctic Council, the Protocol commissions would not be strictly subordinate to the Arctic Council. Annex committees as well as – later – Protocol commissions would all report annually to the ministerial.

## 6.9. Other and Final Provisions

The Draft PSM Agreement<sup>39</sup> has been used as the primary source of inspiration for this subsection. Accordingly, the framework instrument could contain the following other and final provisions:

- Annexes, which shall form an integral part of the framework instrument;
- Protocols;
- A mechanism for the peaceful settlement of disputes. In view of the broad scope of the framework instrument it seems opportune to aim for a provision that merely emphasizes the need for peaceful means of dispute settlement with a first step of consultations and subsequently consensual submission to a court or tribunal charged to provide for legally binding rulings. Compulsory dispute settlement – whereby a party to the dispute can institute proceedings without the consent of the other party or parties – is not likely to achieve the necessary support;
- A review conference, which would look at the performance of the instrument and the institutional set-up, perhaps soon after the commissions established by the three envisaged Protocols have become operational;
- Signature, which shall be possible for any state or REIO that participated in the negotiation process;
- Ratification, acceptance or approval (for the signatories);
- Accession (for other than signatories);
- REIOs, specifying particular issues on REIOs and their members;
- Entry into force, which should require as a minimum all current Arctic Council members. The instrument of ratification, acceptance, approval or accession of the EC shall not be counted as additional to those of its Member States;
- Reservations, which would not be allowed;
- Declarations and statements, which would be allowed;
- Provisional application, which would be allowed;
- Amendments;
- Withdrawal, which would be allowed;
- Depositary (United Nations); and
- Authentic texts (e.g. English and Russian).

## 6.10. Annexes

The following are suggestions for Annexes to the framework instrument:

- Annex I ‘Monitoring and Assessment’;
- Annex II ‘Environmental Impact Assessments and Strategic Impact Assessments’;
- Annex III ‘Marine Protected Areas’; and
- Annex IV ‘Integrated, cross-sectoral ecosystem-based ocean management’.

As already noted above, each Annex would establish its own body (committee). The body established under Annex I is intended to be the new home of the AMAP working group and could be named ‘Arctic Monitoring and Assessment Committee’ (AMAC). In view of the tasks with which these committees are charged, it seems inevitable for them

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39 See note 5 supra.



to determine the spatial scope of their mandate in general or for specific tasks or projects. For example, the committee established pursuant to Annex III may at some stage have to define the southernmost boundary of the Arctic network of MPAs.

It may also be desirable to reflect the different rights, interests and obligations of states in the structure, participation or decision-making of the Annex committees. For some committees – for instance the committee dealing with EIAs and SEAs – this could be done by establishing two branches or working groups; one with a mandate over areas within national jurisdiction and the other over areas beyond national jurisdiction. Participation in the first branch could then be limited to Arctic Ocean coastal states or allow some participation by other states or REIOs as well, for instance on a rotating basis. Provision for broader participation could be accompanied by tailor-made rules on decision-making.

### 6.11. Protocols

As explained in subsection 6.6, the framework instrument would contain an obligation to commence negotiation processes for Protocols on the governance and regulation of fisheries, shipping and offshore hydrocarbon activities and, possibly, other human activities. This would be complemented by prescriptions on the issues of participation and the safety net(s).

The Protocols should contain (an) objective(s) and general principles which are likely to be more specific – due to the focus on regulation – but still have to be consistent with those of the framework instrument. As already argued above, the spatial scope of each Protocol has to be clearly defined but does not have to be identical to that of other Protocols or of the framework instrument.<sup>40</sup>

In order to effectively pursue their regulatory objectives, the Protocols will establish regulatory bodies (commissions) with the power to impose legally binding obligations on their members. While the competence of the bodies will have to be clearly delimited vis-à-vis the competence of the Arctic Council and other competent international organizations (see further below), the bodies will not be strictly subordinate to the Arctic Council.

Many of the final provisions of the Protocols would be more or less identical to those of the framework instrument (see subsection 6.9), but some not. For instance, the right to participate in the negotiation process of a Protocol or to become a contracting party thereto is not necessarily granted to any state or REIO for each Protocol. This is particularly obvious for the Protocol on offshore hydrocarbon activities. The spatial scopes and core elements of the Protocols on fisheries and shipping would largely determine the scope of participation. Furthermore, the provisions on entry into force and amendments should be tailored to the issue of participation.

As regards the Protocol on shipping, a few observations are warranted in light of the existence of competent international organizations, most importantly the International Maritime Organization (IMO). The substance of the Protocol on shipping should take account of IMO's primacy in the regulation of shipping for purposes that are within its mandate, as well as of the extent to which this mandate has been utilized so far. The extensive list of options in subsection 4.3 of the 'Options for Addressing Identified Gaps' report acknowledges this and distinguishes in part between various capacities in which a state can act, e.g. as a coastal, port or flag state. Accordingly, the Protocol on shipping could focus on the following issues:

- monitoring, contingency planning and preparedness for pollution incidents, as well as on search and rescue, including by designating places of refuge;
- enforcement and compliance; and
- more stringent standards for vessels flying the flag of contracting parties to the Protocol.

<sup>40</sup> In case the framework instrument contains a definition of the spatial scope (see subsection 6.5). If it does, the spatial scope of a Protocol should logically not extend beyond the spatial scope of the framework instrument.

## Appendix I: Objectives and Principles of Selected International Instruments

Instrument	Objective(s)	Principles
Antarctic Treaty	No provision that bears that title, but: <ul style="list-style-type: none"> <li>· “Antarctica shall be used for peaceful purposes only” (Art. I(1))</li> <li>· “Freedom of scientific investigation in Antarctica and cooperation toward that end” (Art. II(1))</li> </ul>	None
Environmental Protocol to the Antarctic Treaty	“the comprehensive protection of the Antarctic environment and dependent and associated ecosystems” (Art. 2)	“The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area” (Art. 3(1)). This is operationalized in paragraphs (2), (3) and (4).
1995 Barcelona Convention	No provision that bears that title, but: <p>“to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development” (Art.4(1))</p>	<p>“In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall:</p> <p>(a) apply, in accordance with their capabilities, the precautionary principle, by virtue of which where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;</p> <p>(b) apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest;</p> <p>(c) undertake environmental impact assessment for proposed activities that are likely to cause a significant adverse impact on the marine environment and are subject to an authorization by competent national authorities;</p> <p>(d) promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse effect on the marine environment of other States or areas beyond the limits of national jurisdiction, on the basis of notification, exchange of information and consultation;</p> <p>(e) commit themselves to promote the integrated management of the coastal zones, taking into account the protection of areas of ecological and landscape interest and the rational use of natural resources” (Art. 4(3)).</p>

Instrument	Objective(s)	Principles
OSPAR Convention	<p>No provision that bears that title, but:</p> <ul style="list-style-type: none"> <li>· “to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected”(Art.2(1)(a))</li> <li>· “to protect and conserve the ecosystems and the biological diversity of the maritime area which are, or could be, affected as a result of human activities, and to restore, where practicable, marine areas which have been adversely affected, in accordance with the provisions of the Convention, including Annex V and Appendix 3” (OSPAR Agreement 2003–21, Chapter I, para. 1.1).</li> </ul>	<ul style="list-style-type: none"> <li>· “The Contracting Parties shall apply:</li> <li>· (a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects;</li> <li>· (b) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter” (Art. 2(2)).</li> <li>· “best available techniques”, “best environmental practice” “including, where appropriate, clean technology” (Art. 2(3)(b))</li> <li>· the ‘ecosystem approach’, defined as “The comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity” (Statement on the Ecosystem Approach to the Management of Human Activities (Joint Meeting of the Helsinki &amp; OSPAR Commissions 2003, Record of the Meeting, Annex 5), para. 5).</li> </ul>
CCAMLR Convention	<p>“The objective of this Convention is the conservation of Antarctic marine living resources” (Art. II(1)) and “For the purposes of this Convention, the term ‘conservation’ includes rational use” (Art. II(2)).</p>	<p>“Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:</p> <ul style="list-style-type: none"> <li>(a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;</li> <li>(b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above; and</li> <li>(c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources” (Art. II(3)) </li></ul>

Instrument	Objective(s)	Principles
Fish Stocks Agreement	<p>“The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention” (Art. 2).</p>	<p>“In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:</p> <ul style="list-style-type: none"> <li>(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;</li> <li>(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;</li> <li>(c) apply the precautionary approach in accordance with article 6;</li> <li>(d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;</li> <li>(e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;</li> <li>(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;</li> <li>(g) protect biodiversity in the marine environment;</li> <li>(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;</li> <li>(i) take into account the interests of artisanal and subsistence fishers;</li> <li>(j) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes;</li> <li>(k) promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and</li> <li>(l) implement and enforce conservation and management measures through effective monitoring, control and surveillance” (Art. 5).</li> </ul>

Instrument	Objective(s)	Principles
2007 NAFO Convention	“The objective of this Convention is to ensure the long term conservation and sustainable use of the fishery resources in the Convention Area and, in so doing, to safeguard the marine ecosystems in which these resources are found” (Art. II).	Art. III contains various principles that shall be applied in giving effect to the objectives of the Convention. These are clearly inspired by Article 5 of the Fish Stocks Agreement and include the obligation to apply the precautionary approach, the need to preserve marine biological diversity and to take account of a broad range of ecosystem considerations.
NEAFC Convention	“The objective of this Convention is to ensure the long-term conservation and optimum utilisation of the fishery resources in the Convention Area, providing sustainable economic, environmental and social benefits” (Art. 2)	“When making recommendations in accordance with Article 5 or 6 of this Convention the Commission shall in particular: a) ensure that such recommendations are based on the best scientific evidence available; b) apply the precautionary approach; c) take due account of the impact of fisheries on other species and marine ecosystems, and in doing so adopt, where necessary, conservation and management measures that address the need to minimise harmful impacts on living marine resources and marine ecosystems; and d) take due account of the need to conserve marine biological diversity” (Art. 4(2))

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