MARTINUS
NIJHOFF
PUBLISHERS

The International Journal of Marine and Coastal Law 27 (2012) 553–595

THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW
brill.nl/estu

Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea

E.J. Molenaar[1]
Senior Research Associate, Netherlands Institute for the Law of the Sea (NILOS), Utrecht University, Utrecht, The Netherlands;
Adjunct Professor, University of Tromsø, Tromsø, Norway

Abstract
This article examines the current and prospective roles of the Arctic Council System (ACS) within the context of the (international) law of the sea. Its first part focuses on the role of regional cooperation under the law of sea, with special attention to the way in which the *pacta tertiis* principle has shaped some regional regimes. The second part examines current features of the Arctic Council, including its mandate and main approaches, participation and institutional structure. The new concept of the ACS is offered to clarify the connection between the Arctic Council and the 2011 Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic and future legally binding instruments negotiated under the Council's auspices, but not adopted by it. The article concludes with a synthesis of the current and prospective roles of the ACS under the law of the sea.

Keywords
Arctic; Arctic Council System (ACS); law of the sea; regional oceans governance; *pacta tertiis*

Introduction

The impacts of climate change in the Arctic in the past decade have been so apparent and dramatic that it has generated wide support for strengthening the international regime for the governance and regulation of the marine Arctic. The Arctic Council's Ministerial Meeting in Nuuk (May 2011) forms one of the most recent steps in that process. Agreement was, inter alia, reached on

[1] E-mail: e.j.molenaar@uu.nl. Writing this article was facilitated by funding from the Netherlands Polar Programme. An earlier version of this article was presented at the Conference *The Arctic Council: its Place in the Future of Arctic Governance*, Toronto, Canada, 17–18 January 2012, and will be published in its proceedings under the editorship of T. Axworthy, T. Koivurova and W. Hasanat. The author is very grateful for comments on earlier drafts and other assistance by Olav S. Stokke, Anne Christine Brussendorf, Erik Gant, Inuuteq Holm Olsen, David Johnson, Alex G. Oude Elferink, Andrew Serdy, Yoshi Takei and an anonymous reviewer.

© Koninklijke Brill NV, Leiden, 2012
DOI: 10.1163/15718085-12341234
Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

a standing Arctic Council secretariat in Tromsø—to be formally established at the 2013 Ministerial Meeting in Kiruna—and the establishment of a Task Force for Institutional Issues (TFII) "to implement the decisions to strengthen the Arctic Council" and a Task Force on Marine Oil Pollution Preparedness and Response (MOPPR Task Force).[2] In addition, the Arctic Council adopted the 'Framework for Strengthening the Arctic Council'—which includes 'The criteria for admitting observers and role for their participation in the Arctic Council' (hereinafter Nuuk Observer Rules)—as well as its 'Communication and Outreach Guidelines,' and instructed Senior Arctic Officials (SAOs) to develop a Strategic Communications Plan for the Arctic Council.[3]

The Nuuk Ministerial Meeting was also used as the occasion for the signature of the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic (Arctic SAR Agreement).[4] Even though the Arctic SAR Agreement was merely negotiated under the auspices of the Arctic Council—and therefore not adopted by it—it is nevertheless the first legally binding international instrument negotiated by the eight members of the Arctic Council. The successful conclusion of this negotiation reflects a clear determination to strengthen the international regime for the Arctic. A further step in that regard is the newly established MOPPR Task Force, which has commenced negotiations similar to those for the Arctic SAR Agreement, even though it is not yet clear whether these will also lead to a legally binding instrument.[5]

This article examines the current and prospective roles of the Arctic Council System (ACS)—a concept that is introduced by this author and explained in the subsection 'Mandate and Main Approaches' of the section 'Features of the Arctic Council'—within the context of the (international) law of the sea. With the receding and thinning sea-ice in the marine Arctic, maritime

[2] Cf. 'Nuuk Declaration on the occasion of the Seventh Ministerial Meeting of the Arctic Council, 12 May 2011, Nuuk, Greenland'; and the Report of the November 2011 Senior Arctic Officials (SAOs) Meeting, at pp. 7–8. All Arctic Council Declarations and Reports of SAOs Meetings are available at <www.arctic-council.org>.

[3] Although the 2011 Nuuk Declaration only mentions the adoption of the Nuuk Observer Rules, it is assumed that the intention was to adopt the 'Framework' as contained in Annex 1 to the Report of the May 2011 SAOs Meeting in its entirety. Furthermore, although the 'Communication and Outreach Guidelines'—which were adopted at the March 2011 SAOs Meeting (cf. Report of the March 2011 SAOs Meeting, p. 3; doc. 2.2)—should have been appended to the 2011 Nuuk Declaration (cf. Report of the May 2011 SAOs Meeting, p. 4), this has not occurred.

[4] Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, Nuuk, 12 May 2011. Not in force (as of 19 March 2012 three states still had to complete their ratification processes); <www.arctic-council.org>.

[5] Cf. Report of the November 2011 SAOs Meeting, p. 8.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

activities—in particular offshore hydrocarbon activities, shipping and fishing—will expand and intensify. The Arctic SAR Agreement was mainly negotiated in response to these prospects and the same is true for the envisaged Arctic MOPPR Instrument. This article focuses in particular on the role of regional cooperation under the law of sea. It examines which obligations in relation to regional cooperation the law of the sea imposes, which types of regional marine regimes have been established so far and how the fundamental international law principle of *pacta tertiis* has shaped some of these regimes. This principle stipulates that states cannot be bound by rules of international law unless they have in one way or another consented to them.[6] After an in-depth analysis of the current features of the Arctic Council, the article concludes with a synthesis of the current and prospective roles of the ACS under the law of the sea.

For the purpose of this article, the term 'role' is used broadly, including by comprising the term 'mandate'. The term 'regime' is used to denote both an instrument and its institutional component. As there is no generally accepted geographical definition of the term 'Arctic', for the purpose of this article it has an identical meaning as the term 'AMAP area', as adopted by the Arctic Monitoring and Assessment Programme (AMAP) of the Arctic Council. The waters within the AMAP area are referred to in this article as the 'marine Arctic'. Finally, the term 'Arctic Ocean' is here defined as the marine waters north of the Bering Strait and north of Greenland and Svalbard, excluding the Barents Sea. Five states have coasts on the Arctic Ocean, namely Canada, Denmark/Greenland, Norway, the Russian Federation and the United States (or: 'the Arctic Five').[7]

The article is structured as follows. The next section is entitled 'Regional Regimes and the Law of the Sea'. This is followed by a section on 'Features of the Arctic Council'. The article ends with a section entitled 'Conclusions'.

Regional Regimes and the Law of the Sea

Introduction

The international law of the sea is made up of a multitude of global, regional and bilateral instruments, decisions by international (intergovernmental)

---

[6] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. In force 27 January 1980, 1155 *United Nations Treaty Series* 331; <www.un.org/law/ilc>. See Art. 34.

[7] Norway is an Arctic Ocean coastal state exclusively on account of Svalbard and not on account of mainland Norway.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

organizations and international rules from other sources, including customary international law. The Law of the Sea (LOS) Convention[8] functions as the cornerstone instrument at the global level. After its entry into force in 1994, two implementation agreements entered into force: namely the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (Part XI Deep-Sea Mining Agreement)[9] and the 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 (Fish Stocks Agreement).[10] The LOS Convention currently has 162 parties, the Part XI Deep-Sea Mining Agreement 141 parties and the Fish Stocks Agreement 78 parties. All Arctic states are parties to these three treaties, except for the United States, which is not a party to either the LOS Convention or the Part XI Deep-Sea Mining Agreement.[11]

All the global instruments that are part of the law of the sea apply to the marine environment of the entire globe, including therefore the entire marine Arctic, however defined. The mandate of the global bodies associated with these instruments has the same geographical scope. This situation is in fact true for global international law in general. The perception that there is an international law vacuum in the Arctic, which only became apparent due to the melting of ice and the planting of a Russian flag on the seabed of the North Pole in August 2007, is therefore incorrect. The real problems are the gaps and shortcomings in adherence to global instruments and their implementation at the national and regional levels.

The LOS Convention and the Fish Stocks Agreement are in many ways framework conventions and do not contain the substantive standards that are necessary for actual regulation, such as, for instance, safety standards to deal with cases like the sinking of the *Titanic* or restrictions to prevent overfishing of target species or by-catch of non-target species like dolphins, turtles or birds. Regulation by states individually cannot provide effective solutions for

---

[8] 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>.

[9] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994. In force 28 July 1996, 1836 *United Nations Treaty Series* 42 (1994); <www.un.org/Depts/los>.

[10] 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, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; <www.un.org/Depts/los>.

[11] Information obtained from <www.un.org/Depts/los> on 15 March 2012.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

human activities with an inherent or potential transboundary dimension, and multilateral cooperation at the appropriate level is therefore essential. This is actually true for most human activities, both at sea and on land, such as, for instance, international shipping, fisheries and offshore hydrocarbon activities, as well as for cities, industrial activities and agriculture that produce pollutants that end up in the sea through rivers or the atmosphere.

Which level of regulation—bilateral, (sub-)regional or global—is appropriate depends mainly on the activity itself. Activities that are not confined to the regional level, such as, for instance, international merchant shipping and activities that produce greenhouse gases, are often best regulated at the global level. Regional regulation can, for instance, be necessary due to the spatial distribution of particular species or habitats, or the spatial reach of land-based and/or marine pollution. Enclosed or semi-enclosed seas, like the Black and Mediterranean Seas, are candidates for regional approaches, and this is also reflected in Article 123 of the LOS Convention (see the subsection on 'Enclosed or semi-enclosed seas' below). Regional regulation may also be able to create a level playing field and regional uniformity, which could, *inter alia*, be attractive to companies that operate in multiple jurisdictions or consider doing so.

Nevertheless, regional regulation has disadvantages as well. Often, regulation can only be applied on an *inter se* basis—as between the regional states—due to the *pacta tertiis* principle. States that have not consented therefore enjoy 'free rider' benefits. The *pacta tertiis* problem can manifest itself in various ways, for instance, by vessels of third states that operate in the region itself or by transboundary impacts from outside the region. More stringent regional regulation can also create competitive disadvantages in comparison with other regions.

The next subsection focuses on 'Obligations in Relation to Regional Cooperation', followed by a subsection on 'Regional Marine Regimes and the *Pacta Tertiis* Principle'.

Obligations in Relation to Regional Cooperation

Introduction

The ensuing subsections devote attention to obligations in relation to regional cooperation under the international law of the sea with respect to 'Merchant shipping', 'Marine environmental protection', 'Conservation and management of marine living resources', 'Enclosed or semi-enclosed seas', 'Marine scientific research' and 'Search and rescue'.

The subsections contain examples of existing regional marine regimes but do not attempt to provide an overview of all existing regional marine regimes

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

that apply fully or partly to the marine Arctic.[12] The Antarctic Treaty System (ATS) is a *sui generis* regional regime and will therefore not be examined separately or in detail here, but it does contain regional (sub)regimes on, *inter alia*, merchant shipping, (marine) environmental protection, conservation and management of marine living resources and (marine) scientific research.

Merchant Shipping

The LOS Convention does not require or encourage regional standard-setting in the domain of merchant shipping, as this would undermine the LOS Convention's objective of globally uniform minimum[13] standards and the related primacy of the International Maritime Organization (IMO). At the same time, however, customary international law and Articles 25(2) and 211(3) of the LOS Convention implicitly acknowledge the right of port states to prescribe—unilaterally or collectively—more stringent standards than "generally accepted international rules and standards". This so-called 'residual' jurisdiction is also recognized in several IMO instruments and has on some (crucial) occasions been exercised by the United States and the European Union (EU).[14]

Although the LOS Convention does not encourage regional cooperation on enforcement either, the 1991 IMO Assembly Resolution A.682(17) 'Regional Co-operation in the Control of Ships and Discharges' does, triggering the creation of a global network of regional arrangements on port state control modelled on the then already almost decade-old Paris Memorandum of Understanding (MOU).[15]

Other examples of regional merchant shipping standards are those applied on an *inter se* basis to ships flying the flag of parties—for instance, Annex IV on 'Prevention of Marine Pollution' to the Antarctic Treaty[16] Protocol on Environmental Protection[17]—and regional standards for ships engaged in

---

[12] For such an overview see *The Arctic Ocean Review Project. Phase I Report 2009–2011*, available at <www.pame.is>, accessed 1 December 2011. On fisheries see also E.J. Molenaar, "Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework", 1 *Yearbook of Polar Law* 427–463 (2009).

[13] For coastal states these are in many instances maximum standards.

[14] Cf. E.J. Molenaar, "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage", 38 *Ocean Development & International Law* 225–257 (2007), at p. 231.

[15] Memorandum of Understanding on Port State Control, Paris, 26 January 1982. In effect 1 July 1982, as regularly amended. Updated version at <www.parismou.org>.

[16] Antarctic Treaty, Washington D.C., 1 December 1959. In force 23 June 1961, 402 *United Nations Treaty Series* 71; <www.ats.aq>.

[17] 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 XVI-10), 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.aq>.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

regular scheduled services between the region's ports—for instance, the Stockholm Agreement.[18]

Marine Environmental Protection

As regards marine environmental protection, Part XII of the LOS Convention, entitled 'Protection and Preservation of the Marine Environment,' contains frequent references to regional cooperation. Except for vessel-source pollution (see above), and pollution from activities in the Area[19]—which is subject to the mandate of the International Seabed Authority—such references are included in the other four sources of marine pollution, namely:

- pollution from land-based sources;[20]
- pollution from seabed activities subject to national jurisdiction;[21]
- pollution by dumping;[22] and
- pollution from or through the atmosphere.[23]

Obligations to cooperate also feature prominently in Part XII's Section 2, entitled 'Global and Regional Cooperation'. While Article 198 contains a general obligation to cooperate "as appropriate, on a regional basis", Articles 199 and 200 contain specific obligations with respect to notification, contingency plans, scientific research and information exchange.

It is important to note, however, that these obligations are commonly subject to qualifiers (e.g., "shall endeavour" or "appropriate"), offer alternatives to regional cooperation (e.g., "global" or "directly"), and do not provide guidance on the form of such regional cooperation (e.g., an international organization or a legally binding or non-legally binding instrument).

As regards contingency plans, reference must also be made to the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC 90)[24] developed within IMO. This global treaty acknowledges the

---

[18] Agreement concerning Specific Stability Requirements for Ro-Ro Passenger Ships Undertaking Regular Scheduled International Voyages Between or To or From Designated Ports in North West Europe and the Baltic Sea, Stockholm, 28 February 1996. In force 1 April 1997, 2010 *United Nations Treaty Series* 176 (1998).

[19] Art. 209.

[20] Art. 207(3) and(4).

[21] Art. 208(4) and (5).

[22] Art. 210(4).

[23] Art. 212(3).

[24] International Convention on Oil Pollution Preparedness, Response and Cooperation, London, 30 November 1990. In force 13 May 1995, 1891 *United Nations Treaty Series* 77 (1995).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

importance of regional cooperation in its Preamble and Article 6. As regards dumping, reference must be made to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and its 1996 Protocol.[25] While the 1972 London Convention merely encourages the establishment of regional regimes (Article VIII), the Preamble to the 1996 Protocol also recognizes the desirability of more stringent regional measures.

Examples of regional marine environmental protection regimes include the United Nations Environment Programme (UNEP)'s Regional Seas Agreements, bodies and coordinating units. These commonly consist of a framework instrument complemented by protocols on specific issues, for instance, on contingency planning for oil spills, pollution by dumping, land-based pollution, pollution from seabed activities, and specially protected areas.[26] Particular reference should be made to two regional regimes established outside the framework of UNEP, namely the OSPAR Commission established by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)[27] and the Helsinki Commission (or: HELCOM) established by the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention).[28] Annexes to both Conventions deal, *inter alia*, with land-based pollution, pollution by dumping and incineration, pollution by offshore activities, and specially protected areas. Noteworthy is also that the OSPAR Commission can exercise a residual authority in the absence of a competent international body. A last example is provided by regional agreements on monitoring, surveillance and contingency planning, e.g., the Agreement for Cooperation in Dealing with Pollution of

[25] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, Mexico City, Moscow, Washington D.C., 29 December 1972. In force 30 August 1975, 11 *International Legal Materials* 1294 (1972); as amended, consolidated version available at <www.imo.org>. 1996 Protocol, London, 7 November 1996. In force 24 March 2006, *Law of the Sea Bulletin* No. 34 (1997), p. 71; as amended in 2006, consolidated version at <www.imo.org>.

[26] See R. Dopplick, "Regional Oil Spill Preparedness and Response Agreements: Lessons for the Arctic", *Oil, Gas & Energy Law Intelligence Journal* (forthcoming in November/December 2011); obtained from <www.ssrn.com>, accessed 30 November 2011. See in particular Annexes A and B.

[27] 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>. Annex V, Sintra, 23 September 1998. In force 30 August 2000; amended and updated text available at <www.ospar.org>.

[28] Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992. In force 17 January 2000, as amended; consolidated version at <www.helcom.fi>.

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

the North Sea by Oil and Other Harmful Substances (Bonn Agreement)[29] and the Agreement Between Denmark, Finland, Iceland, Norway and Sweden Concerning Cooperation in Measures to Deal with Pollution of the Sea by Oil or Other Harmful Substances (Copenhagen Agreement).[30,31]

Conservation and Management of Marine Living Resources

The LOS Convention obliges relevant states to cooperate with respect to transboundary fish stocks and discrete high seas fish stocks but does not prescribe the form that such cooperation should take.[32] The Fish Stocks Agreement, however, stipulates that straddling and highly migratory fish stocks are to be managed at the regional level through regional fisheries management organizations (RFMOs).[33] The duty to cooperate in relation to such transboundary fish stocks means in fact a duty to cooperate with the relevant RFMO.[34]

Many RFMOs have already been established, both within and outside the framework of the Food and Agriculture Organization (FAO).[35] In relation to straddling and highly migratory fish stocks, RFMOs are to be established where they do not exist.[36] More generally, there is broad support in the international community to ensure that all areas beyond national jurisdiction where any type of fish stocks occur in commercially significant abundance or where that may be imminent, are covered by RFMOs. These developments have, *inter alia*, led to the 'filling' of gaps in such coverage in the Indian Ocean, the South Pacific and, most recently, the North Pacific.[37]

---

[29] Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, Bonn, 13 September 1983. In force 1 September 1989, *OJ* 1984, L 188/9; <www.bonnagreement.org>.

[30] Agreement Between Denmark, Finland, Iceland, Norway and Sweden Concerning Cooperation in Measures to Deal with Pollution of the Sea by Oil or Other Harmful Substances, Copenhagen, 29 March 1993. In force 16 January 1998, 2084 *United Nations Treaty Series* 324.

[31] See also Dopplick, *supra* note 26.

[32] E.g., Art. 63(1).

[33] For the purpose of this article, RFMOs also comprise arrangements as defined in Art. 1(1)(d) of the Fish Stocks Agreement.

[34] Cf. Art. 8(3) of the Fish Stocks Agreement.

[35] See the information at <www.fao.org/fishery>, accessed 15 March 2012.

[36] Cf. Art. 8(5) of the Fish Stocks Agreement.

[37] Although the English version of the text of the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (on file with author) was adopted in March 2011, the Convention will only be opened for signature once the French version has been adopted (information up-to-date as of end November 2011).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

As regards marine mammals, Article 65 of the LOS Convention stipulates the following:

> [...] States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Article 65 contains a number of intricacies, but the main point in our case is that while it does not require cooperation to be at the regional level, it also does not prohibit it, not even in the case of cetaceans. Even though the global International Whaling Commission (IWC) was established several decades prior to the adoption of the LOS Convention, Article 65 does not stipulate that "appropriate international organizations" have to be global organizations, and the use of the plural indicates that other organizations than the IWC may have competence as well. Consequently, not only the North Atlantic Marine Mammal Commission (NAMMCO), but also the Conferences of the Parties (CoPs)[38] pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[39] and the Convention on Migratory Species (CMS)[40] are relevant under Article 65. As regards the CMS, its Article IV requires "Range States" to conclude regional agreements for "migratory species which have an unfavourable conservation status" and are listed in Appendix II. Many regional agreements on marine mammals and other marine species have already been adopted within the framework of the CMS.[41] An example of a stand-alone regional agreement is the Agreement on the Conservation of Polar Bears and their Habitat (Polar Bear Agreement).[42]

Enclosed or Semi-enclosed Seas

The LOS Convention contains a separate Part IX, entitled 'Enclosed or Semi-Enclosed Seas'. It consists of Article 122, containing a definition of the term 'enclosed or semi-enclosed sea', and Article 123, entitled "Cooperation of States bordering enclosed or semi-enclosed seas". Article 123 reads:

---

[38] Even though they are not international organizations.

[39] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, D.C., 3 March 1973. In force 1 July 1975, 993 *United Nations Treaty Series* 243; <www.cites.org>.

[40] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979. In force 1 November 1983, 1651 *United Nations Treaty Series* 355; <www.cms.int>.

[41] See the information at <www.cms.int>, accessed 15 March 2012.

[42] Agreement on the Conservation of Polar Bears and Their Habitat, Oslo, 15 November 1973. In force 26 May 1976; text at <pbsg.npolar.no>.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

The following observations can be made here. First, it is not evident that the Arctic Ocean falls within the definition of an 'enclosed or semi-enclosed sea' laid down in Article 122. Second, even if the Arctic Ocean would qualify, the obligation to cooperate pursuant to Article 123 is considerably softened by the words "should" and "endeavour". Third, even if the Arctic Ocean would qualify, this would not give cooperating coastal states—either as a collective or by means of an established regional organization—additional rights to impose restrictions on the rights and freedoms of third (flag) states than they would be allowed to do unilaterally outside enclosed or semi-enclosed seas.

Several of UNEP's Regional Seas Agreements, bodies and coordinating units relate to enclosed or semi-enclosed seas. The regional marine environmental protection regime for the Mediterranean Sea exists in parallel with an RFMO—the General Fisheries Commission for the Mediterranean—and a regional science body—the Mediterranean Science Commission (CIESM).

Marine Scientific Research

The LOS Convention's Part XIII on 'Marine Scientific Research' contains a separate Section 2 entitled 'International Cooperation', but does not specifically require or encourage regional cooperation. As noted above, however, such obligations nevertheless exist in relation to marine environmental protection[43] and enclosed or semi-enclosed seas.[44] Moreover, Part XIV on 'Development and Transfer of Marine Technology' promotes not only the development of marine technology but also of marine science. Its Section 2 on 'International Cooperation' requires international cooperation to be

[43] Art. 200.
[44] Art. 123(c).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

carried out through existing and new programmes and explicitly mentions the regional level in this regard.

Reference must also be made here to the International Hydrographic Organization (IHO) Convention,[45] which includes the encouragement of regional cooperation in its objectives in Article II. A number of Regional Hydrographic Commissions (RHCs)—including the Arctic Region Hydrographic Commission (ARHC) established in 2010[46] and the Hydrographic Commission on Antarctica—have been established for that purpose.

A large number of other international intergovernmental bodies exist, some of the most relevant of which are the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES). Reference must also be made to the OSPAR Commission, which adopted the 2008 Code of Conduct for Responsible Marine Research in the Deep Seas and High Seas of the OSPAR Maritime Area[47] based on its residual mandate.

Search and Rescue

As regards search and rescue, Article 98(2) of the LOS Convention stipulates:

> Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Reference must in this context also be made to the International Convention on Maritime Search and Rescue (SAR Convention)[48] developed under the aegis of IMO when the LOS Convention was still under negotiation. Although paragraphs 2.1.4 and 2.1.5 of the Annex to the SAR Convention mainly assume that search and rescue regions shall be established, in the early 1980s IMO's Maritime Safety Committee (MSC) divided the world into thirteen maritime SAR areas—with the 'Arctic Ocean' designated as area 13—and

[45] Convention on the International Hydrographic Organization, Monaco, 3 May 1967. In force 22 September 1970. Nov. 2005 amendments not in force. Consolidated version at <www.iho.int>.
[46] Statutes of the Arctic Regional Hydrographic Commission, Ottawa, 6 October 2010. In force on the same day; <www.iho.int>.
[47] OSPAR Doc. Summary Record, OSPAR 2008, OSPAR 08/24/1-E, at Annex 6; www.ospar.org.
[48] International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979. In force 22 June 1985, as amended.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

invited all coastal states to develop SAR arrangements or agreements.[49] Some of these are established by treaties, for instance, the Arctic SAR Agreement.

Regional Marine Regimes and the Pacta Tertiis *Principle*

The constraints inherent in the *pacta tertiis* principle have shaped some regional marine regimes, but played hardly any role or none at all in other regional marine regimes. As a general rule, the *pacta tertiis* principle does not play a role if measures do not interfere with the rights of third states under the general international law of the sea. In order to determine if this is the case, it is first of all necessary to know what these rights are. The following list contains the main rights enshrined in the LOS Convention:

1. Navigation: the rights of (non-suspendable) innocent passage, transit passage and archipelagic sea lanes passage in marine areas under coastal state sovereignty[50] and the freedom of navigation within exclusive economic zones (EEZs) and on the high seas. Apart from the high seas, these rights and freedoms are all subject to coastal state jurisdiction;[51]
2. Overflight: the freedom of overflight within EEZs and on the high seas;[52]
3. Submarine cables and pipelines: the freedom to lay submarine cables and pipelines on continental shelves—in that case the activity is subject to coastal state jurisdiction—and on the high seas;[53]
4. "Other internationally lawful uses of the sea related to" the freedoms listed under Nos. 1–3, such as "those associated with the operation of ships, aircraft and submarine cables and pipelines",[54] to be exercised within EEZs and on the high seas;
5. Artificial islands: the freedom to construct artificial islands and other installations on the high seas and, in very limited scenarios, on continental shelves;[55]
6. Fishing: the freedom of fishing on the high seas;[56] and
7. Marine scientific research: the freedom of marine scientific research on the high seas.[57]

---

[49] Cf. IMO Doc. COMSAR 5/INF.2, 17 April 2000, at pp. 6–7: www.imodocs.org.
[50] As regards transit passage, this can occasionally also apply beyond 12 nautical miles.
[51] Arts. 8(2), 17, 38(1), 45, 52, 53, 58(2) and 87(1)(a).
[52] Arts. 58(2) and 87(1)(b).
[53] Arts. 58(2) and 87(1)(c).
[54] Arts. 58(1) and 87(1).
[55] Arts. 60, 80 and 87(1)(d).
[56] Arts. 87(1)(e) and 116.
[57] Art. 87(1)(f).

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

This list indicates, for example, that regional fisheries conservation and management measures adopted by coastal states that apply to all states but exclusively within their own maritime zones, are not inconsistent with the *pacta tertiis* principle for the simple reason that third states have no fishing rights in the maritime zones of coastal states under the general international law of the sea.

An important conclusion that can be deduced from this list is that third states do not just have rights and freedoms on the high seas but also within the maritime zones of coastal states. Regional measures that are spatially confined to the maritime zones of coastal states may therefore still be inconsistent with the *pacta tertiis* principle. The opposite is also true: regional measures that apply to the high seas do not necessarily have to be inconsistent with the *pacta tertiis* principle. Inconsistency can, for instance, be avoided by pursuing an *inter se* approach. As noted above, this approach is taken by Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty for measures that apply to the high seas or marine waters that are *de facto* high seas, due to the agreement to disagree on the issue of sovereignty over the Antarctic continent.

Port state jurisdiction adds another layer of complexity. In light of the absence of a right of access to foreign ports under the international law of the sea—but not necessarily under international trade law—a port state can require that, as a condition for obtaining access to its ports, foreign vessels comply with measures that it would be unable to impose in its capacity as a coastal state, such as, for instance, high seas fisheries restrictions. Such an exercise of residual port state jurisdiction is consistent with the *pacta tertiis* principle as long as non-compliance is only penalized with denial of access to ports and in principle not, for instance, by monetary penalties. This view is in line with the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO Port State Measures Agreement).[58]

Participation in existing regional marine regimes with regulatory mandates[59] is mostly limited to coastal (and port) states. The main example—apart from

[58] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009. Not in force; <www.fao.org/Legal>). See Arts. 4(1)(b) and 18(3), and E.J. Molenaar, "Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement", in D.A. Russell and D.L. VanderZwaag (eds.) *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers, Leiden: 2010), pp. 369–386, at p. 382.

[59] This thus excludes the ARHC. Note that Art. 3(b)–(c) of the ARHC Statutes, *supra* note 46, provides for Associate Membership.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

the *sui generis* ATS—of regional marine regimes that also allow for participation by non-coastal states are RFMOs with regulatory areas made up entirely or partly of high seas. Non-coastal states mainly participate in such RFMOs in a flag state capacity. In some exceptional cases, however, they participate even though they are either not interested or unable to engage in high seas fishing.

Participation in a flag state capacity is based on the freedom of high seas fishing. While the LOS Convention recognizes that freedom and requires high seas fishing states to cooperate and, as appropriate, establish RFMOs, it does not explicitly grant a right to participate in RFMOs. The practices within most RFMOs on participation, allocation of fishing opportunities and combating illegal, unreported and unregulated (IUU) fishing make it in fact extremely difficult for new entrants to exercise their right to engage in high seas fishing. Whereas Article 8(3) of the Fish Stocks Agreement contains an explicit right to become a member of RFMOs, this is only granted to states with a "real interest". The purpose and meaning of this concept is not clear, however, and it does not seem to have led to significant changes in the practices of RFMOs referred to above.

Examples of states that are not interested in engaging in high seas fishing are several Members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)—for instance, Belgium, Germany, India, Italy and Sweden—that have so far never engaged in fishing in CCAMLR's regulatory area and currently also do not seem to intend to do so in the foreseeable future. It must be acknowledged, however, that CCAMLR is a special case because it is part of the ATS and therefore 'something more than an RFMO'. Another possible example was identified by the United States in the context of the Northwest Atlantic Fisheries Organization (NAFO), where it argued that:

> [a] state could in principle have a real interest in a managed fishery that did not include a direct fishing interest, such as concern for a bycatch species or for the environmental effects of using a particular fishing gear.[60]

A somewhat different example is that of Canada's participation as a cooperating non-contracting party (NCP) in the North-East Atlantic Fisheries Commission (NEAFC). As NCPs cannot participate in decision-making, they depend on the full members to make fishing opportunities available to them.

[60] NAFO/GC Doc. 99/4 (*Report of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties*, 13–15 April 1999, Halifax, N.S., Canada), Annex 6 (on file with author).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

This situation is similar to other RFMOs that use a status that is similar or identical to cooperating NCPs. As regards NEAFC, however, Canada is not interested in fishing opportunities, at least not at the moment.[61]

Two other minor exceptions to the abovementioned general rule are provided by the OSPAR and Helsinki Conventions. Finland, Luxembourg and Switzerland are not coastal states of the OSPAR Maritime Area, but are parties to the OSPAR Convention due to the fact that they are located upstream along watercourses that reach the OSPAR Maritime Area. Also, Article 27(2) of the OSPAR Convention and Article 35(2) of the Helsinki Convention allow other states to be invited to accede, provided all existing parties so agree. While no such accession has yet occurred, the OSPAR Commission has had some discussions on accession by the Russian Federation.[62] As regards the Helsinki Commission, Belarus and the Ukraine have been observers since around 1997 and the Czech Republic and the United States have occasionally attended meetings.[63] Belarus in particular has been interested in becoming a party and its accession and that of Ukraine and other states with territory in the catchment area of the Baltic Sea were discussed during the 2009 Annual Meeting of the Helsinki Commission.[64]

Features of the Arctic Council

Introduction

The features of the Arctic Council are examined in subsections on the 'Founding Instrument and Other Key Instruments', 'Mandate and Main Approaches', 'Geographical Scope', 'Participation', 'Institutional Structure', 'Decision-making' and 'Funding'.

[61] Cf. Report of the 2011 Meeting of NEAFC (available at <www.neafc.org>, accessed 15 March 2012), at Annex D.

[62] Information provided by D. Johnson, Executive Secretary of the OSPAR Commission, to the author by email on 14 December 2011.

[63] Based on a review of the Minutes of the Annual HELCOM Meetings, available at <www.helcom.fi>.

[64] Minutes of the 30th Meeting of the Baltic Marine Environment Protection Commission (HELCOM 30/2009; available at <www.helcom.fi>, accessed 26 January 2012), at paras. 6.13–6.17.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

Founding Instrument and Other Key Instruments

The Arctic Council was established in 1996 as a high-level forum by the Declaration on the Establishment of the Arctic Council (Ottawa Declaration).[65] The choice of a non-legally binding instrument is a clear indication that the Council was not intended to be an international organization. Canada in particular advocated in the mid-1990s that the Council should be an international organization,[66] but in the end could not convince the United States.

At its First Ministerial Meeting in Iqaluit, Canada, 1998, the Council adopted its Rules of Procedure.[67] The Rules of Procedure apply to all bodies of the Council and are considerably detailed, especially in view of the fact that the Council is not an international organization. This detail can at least in part be attributed to the United States, which submitted draft Rules of Procedure modelled on those for Antarctic Treaty Consultative Meetings (ATCMs).[68] One of the tasks of the TFII, established by the Nuuk Ministerial Meeting, is to amend the Rules of Procedure, *inter alia*, to incorporate the new rules on the admission of Observers and their rights and obligations (see below).

Mandate and Main Approaches

The Council's mandate (or: objective) broadened pre-existing cooperation under the 1991 Arctic Environmental Protection Strategy (AEPS) to:

> promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous peoples and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.[69]

While the substantive mandate of the Council thus relates in particular to sustainable development and environmental protection, it is otherwise only subject to the restriction of "common Arctic issues". A footnote to Article 1

[65] 'Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996'. See note 2 *supra* for information on sources.
[66] Cf. D.R. Rothwell, *The Polar Regions and the Development of International Law* (Cambridge, Cambridge University Press: 1996), at p. 243.
[67] Cf. 'Iqaluit Declaration, Iqaluit, 18 September 1998'. The Rules of Procedure are contained in Annex 1 to the Report of the September 1998 SAOs Meeting.
[68] E.T. Bloom, "Establishment of the Arctic Council", 93 *American Journal of International Law* 712–722 (1999), at p. 717, n. 23.
[69] Art. 1 of the 1996 Ottawa Declaration.

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

specifies, however, that the Council "should not deal with matters related to military security". The use of the voluntary term "should"—which is appropriate for a non-legally binding instrument—nevertheless indicates that the Council could deal with such matters anyway, provided there is consensus to do so. In fact, as the Ottawa Declaration is not legally binding, it does not pose much of an obstacle to the Members if they would wish to go even beyond the already very broad mandate of the Council.

The reverse is clearly also true: the Ottawa Declaration does not create an obligation to undertake efforts on issues that clearly fall within the Council's mandate. The Council has, for instance, decided, until now, not to become involved in certain marine mammal issues[70] and fisheries management.[71] As the Council's decision-making occurs by "consensus of all eight Arctic States",[72] one or more Members may have felt that these issues were too contentious and would thereby have jeopardized the functioning of the Council, or that they would be better dealt with outside the Council, whether or not by existing international bodies.

The terms of reference of the six working groups of the Arctic Council and their bi-annual work plans, as well as the incidentally established Task Forces, Expert Groups and other subsidiary bodies,[73] shed more light on the substantive areas in which the Council undertakes efforts. These efforts are conducted through specific projects rather than as part of a permanent governance or regulatory task and agenda. That is not to say, however, that the Council does not respond to current and future challenges. The negotiations on the Arctic SAR Agreement and the Arctic MOPPR Instrument and the steps towards the strengthening of the Arctic Council bear witness to that.

As regards the Council's main approaches, the Ottawa Declaration refers to "cooperation, coordination and interaction". In addition, the 'Framework for the Strengthening of the Arctic Council' states:

> The Arctic Council will continue to work towards solutions to address emerging challenges in the Arctic utilizing a wide range of approaches, including: scientific assessments; policy statements; guidelines; recommendations; best practices; and new legally binding instruments.[74]

[70] Cf. Bloom, *supra* note 68, at p. 720.
[71] Cf. Report of the November 2007 SAOs Meeting, at p. 12.
[72] Rule 7 of the Rules of Procedure, *supra* note 67. See the subsection on 'Decision-making' below.
[73] See the subsection on 'Institutional Structure' below.
[74] Report of the May 2011 SAOs Meeting, at p. 49.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

The Council thus regards these "approaches" as its output. As regards new legally binding instruments, this must be read in conjunction with the phrase "to work towards solutions". As the Arctic Council is an inter-governmental forum established by a non-legally binding instrument, it does not have the competence to adopt legally binding instruments. For this reason the Arctic SAR Agreement was also not formally adopted by the Arctic Council, but by a collective decision by its Members at the last session of the SAR Task Force and opened for signature in conjunction with the Nuuk Ministerial Meeting. However, as this collective decision was a culmination of the negotiations in the SAR Task Force—which was established by the Council and thereby operated under its auspices—it is submitted that it is indeed justifiable to regard the Arctic SAR Agreement as part of the Council's output. Arguably, this is also reflected in the Preamble of the Arctic SAR Agreement, which refers to both the Ottawa Declaration and the establishment of the SAR Task Force by the Tromsø Ministerial Meeting. Finally, those interested in promoting the Arctic Council are also likely to present it like this to the media and the general public, which are not likely to be aware of or interested in these subtleties. This will strengthen the perception and the opinion that the Arctic SAR Agreement is the Council's output.

The November 2011 SAOs Meeting had a separate agenda item on 'Search and Rescue Agreement—Follow up'. The Annotated Agenda for that meeting noted the following under that item:

> The Search and Rescue agreement was an important and historic Nuuk outcome, and it is important that the Arctic Council now ensures that the agreement is implemented and followed up. [....][75]

The word "ensures" plays a key role here. It most likely reflects the so-called decision-shaping function of the Council, but it cannot be ruled out that the Council's efforts to ensure implementation and follow-up of the Arctic SAR Agreement go beyond that function (see also the subsection on 'Institutional Structure' below). A good example of the Council's decision-shaping function relates to the development of a mandatory Polar Shipping Code within IMO. The decision to develop the Code was to a considerable extent shaped by the Council's Arctic Marine Shipping Assessment (AMSA). As the Code will ultimately be adopted by the IMO, however, it will be regarded as that body's output and not as the Council's.

The connection between the Polar Shipping Code and the Council is clearly very different from the connection between the Council and the Arctic SAR

[75] Annotated Agenda of the November 2011 SAOs Meeting, at p. 5.

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

Agreement. It is submitted that this requires a concept that clarifies that the Arctic SAR Agreement—and thereby also the institutional component established by it—can be part of the Council's output even though it was not—and in fact could not be—formally adopted by it. The need for such a concept is even more apparent in light of the ongoing negotiations on the Arctic MOPPR Instrument—which may have an institutional component as well—and other such instruments that may follow. The concept of the Arctic Council System (ACS) offered in this article could serve that purpose.

The concept of the ACS consists of two basic components. The first component is made up of the Council's constitutive instrument (i.e., the Ottawa Declaration), other Ministerial Declarations, other instruments adopted by the Arctic Council—for instance, its Arctic Offshore Oil and Gas Guidelines[76]—and the Council's institutional structure. The second component consists of instruments negotiated under the Council's auspices—but not adopted by it—and their institutional dimension.

The ACS concept can be accepted or rejected on its own merits or lack thereof. While the concept of the ACS was inspired by the ATS, there are fundamental differences between the international regimes for the Arctic and the Antarctic. These differences, however, are not a valid and sufficient argument for rejecting the validity and usefulness of the ACS concept. No attempt is therefore made to even just identify the main differences between the international regimes for the Arctic and the Antarctic A few observations are nevertheless offered here. First, while the ATS concept developed from a treaty, the ACS concept is linked to a non-legally binding declaration. Second, not all of the legally binding instruments that are part of the ATS were adopted by regular or special ATCMs. Both the Convention for the Conservation of Antarctic Seals (CCAS Convention)[77] and the Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention)[78] were—for various reasons—adopted by stand-alone diplomatic conferences.[79] The fact that the Arctic SAR Agreement was not adopted by the Council as such is therefore not unique. Third, the ATS concept first obtained intergovernmental endorsement in 1979 by means of its incorporation in ATCM

[76] Last updated in 2009, available at <www.pame.is>.

[77] Convention for the Conservation of Antarctic Seals, London, 1 June 1972. In force 11 March 1978, 1080 *United Nations Treaty Series* 176 (1978); <www.ats.aq>.

[78] Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 1329 *United Nations Treaty Series* 47 (1983); <www.ccamlr .org>.

[79] See F.M. Auburn, *Antarctic Law and Politics* (Bloomington, Indiana University Press: 1982), at pp. 115, 131–134 and 147–153.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

Recommendation X-1.[80] Later it also found its way into Article 1(e) of the 1991 Protocol on Environmental Protection to the Antarctic Treaty. The Argentine scholar and diplomat Roberto Guyer is credited with using the ATS concept first, in 1973.[81] When the Antarctic Treaty was adopted in 1959, few will have imagined that it would lead to the enormously expanded ATS that exists today.

The ACS concept can also be put in a broader context. The two-tiered approach of negotiating (non-)legally binding international instruments under the auspices of the Council—thereby giving rise to the ACS—as well as strengthening the Arctic Council through, *inter alia*, a standing Arctic Council secretariat, shapes the evolving international regime for the governance and regulation of the (marine) Arctic. This two-tiered approach is preferred by the Arctic Eight and in particular the Arctic Five[82] over a new regional framework instrument;[83] at least for now and the immediate future.

Geographical Scope

The Ottawa Declaration does not specify the geographical mandate of the Arctic Council and no generally accepted geographical definition of the term 'Arctic' exists otherwise either. Accordingly, different components and outputs of the Arctic Council may be subject to different geographical scopes. For instance, the geographical scope of the Arctic SAR Agreement is laid down in its Article 3(1) in conjunction with paragraph (1) of its Annex, and uses in part 60° North latitude and the Arctic Circle, but also includes substantial marine areas south thereof. However, the choice of this spatial scope does not mean that future legally binding instruments of the ACS, such as, for instance, the envisaged Arctic MOPPR Instrument, must have an identical

[80] ATCM Recommendation X-1 (1979) 'Antarctic Mineral Resources'; available at <www.ats.aq>, accessed 21 March 2012.

[81] See R. Guyer, "The Antarctic System", 139–II *Hague Recueil des Cours* 149–226 (1973), at p. 156. On the ATS concept see the discussion in D. Vidas, "The Antarctic Treaty System in the International Community: An Overview", in O.S. Stokke and D. Vidas (eds.) *Governing the Antarctic. The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge, Cambridge University Press: 1996), pp. 35–60, at pp. 37–39.

[82] See the 'Ilulissat Declaration, Arctic Ocean Conference, 28 May 2008'; available at <www.arctic-council.org>, accessed 17 October 2011.

[83] See in this regard T. Koivurova and E.J. Molenaar, *International Governance and Regulation of the Marine Arctic. A Proposal for a Legally Binding Instrument* (WWF: 2010, available at <www.panda.org/arctic>). Critics of such a regional instrument include O.S. Stokke, "Protecting the Arctic Environment. The Interplay of Global and Regional Regimes", 1 *Yearbook of Polar Law* 349–369 (2009) and O.R. Young, "If an Arctic Ocean Treaty is Not the Solution, What is the Alternative?" 47 *Polar Record*, 327–334 (2011).

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

spatial scope. A similar approach has been pursued in the ATS, where the spatial scope defined in Article 1 of the CAMLR Convention comprises a large, more northerly marine area than the spatial scope defined in Article VI of the Antarctic Treaty.

Participation

Members

Current participation in the Council consists of three categories: Members, Permanent Participants and Observers. The Members are the eight states that adopted the AEPS and established the Council in 1996, namely Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States. According to Rule 1 of the Council's Rules of Procedure, these eight are the "Arctic States". All are coastal states but only five—Canada, Denmark/Greenland, Norway, the Russian Federation and the United States—are coastal states of the Arctic Ocean. Whereas the Rules of Procedure address the possibility of new Permanent Participants or Observers, the admission of new Members—either states or entities like the EU—is not envisaged. To a large extent, therefore, the Council is currently a 'closed' body. If there were consensus among the Members to change this—which seems extremely unlikely both currently and in the near future—the Rules of Procedure would allow for relatively speedy amendment compared to treaty-based rules on adherence.

It needs to be emphasized that the current closed nature of the Council is not inconsistent with current international law. Assumptions of inconsistency are sometimes caused by incorrect assumptions about the similarity between the Arctic Council and the ATS. Article XIII of the Antarctic Treaty in principle allows any state to accede and the status of Antarctic Treaty Consultative Party can, pursuant to Article IX(2) of the Antarctic Treaty, in principle be granted to any state as well. However, in view of the Council's current mandate and main approaches, current international law does not provide a clearly applicable and unqualified entitlement to non-Arctic states and entities to become a Member. Even if the Arctic Ocean would qualify as an enclosed or semi-enclosed sea—which is certainly not obvious—Article 123(d) of the LOS Convention only requires participation by "other interested States" as "appropriate" (see above). Which states would qualify is not a matter that can be exclusively determined by the coastal states.

The situation would be different, however, if the Council were to engage in regulation in a manner that would be inconsistent with the *pacta tertiis* principle (see above). An alternative basis for participation by non-Arctic states

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

and entities might arise if a view were to become generally accepted that inadequate regional implementation of global obligations affects the non-user rights and interests of other states and the international community, and that non-regional states are entitled to participate to safeguard these non-user rights and interests. An example of a regional body that allows participation in a non-user capacity is CCAMLR (see above).[84]

It is noteworthy that the Arctic SAR Agreement does not contain a provision that would allow adherence by other states or entities than those that participated in its negotiation (i.e., non-Arctic states or entities). This possibility was, *inter alia*, suggested in the 2009 AMSA Report[85] and may have been discussed during its negotiation. The expressions of interest by several non-Arctic states with Observer status within the Arctic Council—including apparently the United Kingdom—to participate in the negotiations, were in any event not followed up.[86]

It is not evident that non-Arctic states or entities had/have an entitlement under international law to participate in the negotiation of the Arctic SAR Agreement or to become a party thereto. Reference must here be made to Article 98(2) of the LOS Convention, cited earlier. Whereas the United Kingdom is certainly a 'neighbouring state' *vis-à-vis* the Arctic SAR Agreement, the Agreement's outer limits must be established somewhere. If the United Kingdom had been included, this would have created several more neighbouring states. It is also significant that Article 98(2) of the LOS Convention does not refer to states in other capacities than neighbouring states, such as, for instance, flag states. This is presumably in line with other regional SAR Agreements negotiated in the context of the SAR Convention and the Convention on International Civil Aviation,[87] very few or none of which allow non-coastal states to become parties.

---

[84] See also the discussion in E.J. Molenaar, "Managing Biodiversity in Areas Beyond National Jurisdiction", 21 *International Journal of Marine and Coastal Law* 89–124 (2007), at pp. 107–118.

[85] *Arctic Marine Shipping Assessment 2009 Report* (available at <www.pame.is>, accessed 3 November 2011), at p. 6.

[86] See Report of the November 2009 SAOs Meeting, at pp. 6–7. Note also that the European Parliament Resolution of 20 January 2011 on 'A sustainable EU policy for the High North' (2009/2214(INI)) (available at <www.europarl.europa.eu>), at para. 11 "Suggests that important non-Arctic shipping nations using the Arctic Ocean should be included in the results of the Search and Rescue Work Initiative of the AC".

[87] Convention on International Civil Aviation, Chicago, 7 December 1944. Entry into force 4 April 1947, 15 *United Nations Treaty Series* 295 (1948). For a consolidated version see <www.icao.int>.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

A different matter is whether or not the exclusion of Observers from the negotiation on the Arctic SAR Agreement is consistent with the Council's own Rules of Procedure. The first sentence of Rule 37 stipulates that "Observers shall be invited to the Ministerial meetings and/or to other meetings and activities of the Arctic Council." It seems reasonable to argue that the phrase "other meetings and activities" is intended to be all-encompassing and that negotiations established by the Council and held under its auspices should be regarded as an 'activity' of the Council.

It is nevertheless important to emphasize that the debate in 2009–2010 on participation by non-Arctic states in the Arctic SAR Agreement and its negotiation had to be placed in the broader context of the debate among Members and Permanent Participants on the strengthening or reform of the Council in general, as well as on the role therein for non-Arctic states and entities in particular. That debate was already in full swing at the start of the negotiations on the Arctic SAR Agreement and will probably continue for some time to come. The negotiation of the first legally binding instrument under the auspices of the Arctic Council was in essence a litmus test and confidence-building exercise for the ACS. Participation by non-Arctic states or entities might well have endangered this.

The question that nevertheless arises is whether the Arctic SAR Agreement and its negotiation have set a precedent. Will future legally binding instruments of the ACS and their negotiations involve participation by non-Arctic states and entities or not? This issue would be especially important if the substance of these instruments were to affect the rights of non-Arctic states and entities under international law (of the sea). Reference must be made here to the section 'Role of observers' in the Nuuk Observer Rules, which stipulates in its first bullet that "Observers shall be invited to the meetings of the Arctic Council once observer status has been granted". This wording is more restrictive than the wording in current Rule 37 cited above and could thus be intended to bar Observers from negotiations such as those on the Arctic SAR Agreement and the Arctic MOPPR Instrument. This would suggest that Members do not view such negotiations as Arctic Council meetings, but as meetings outside the scope of the Council and therefore not subject to the Council's Rules of Procedure. It should be emphasized, however, that current Rule 37 continues to apply until the Nuuk Observer Rules have been incorporated—through amendments—in the Council's Rules of Procedure. The 2013 Kiruna Ministerial Meeting would be the first opportunity to adopt the amended Rules of Procedure.

Similar to the negotiations on the Arctic SAR Agreement, the negotiations on the Arctic MOPPR Instrument lack transparency. Hardly any information

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

on the process is publicly available, for instance, summary reports of separate sessions or draft versions of the envisaged instrument. So far, nothing seems to suggest that non-Arctic states or entities will be allowed to participate in the negotiations on the Arctic MOPPR Instrument or that any have actually expressed an interest to participate. However, at least one non-governmental organization (NGO) requested to participate in these negotiations, as well as in the Arctic Ecosystem-based Management (EBM) Expert Group established by the Nuuk Ministerial Meeting. When this request was denied, a legal opinion on the consistency of this denial with the Council's Rules of Procedure was commissioned. The legal opinion—which concluded that this denial was inconsistent—was submitted to the appropriate persons within Arctic States. While this did not lead to a reversal of the denial of the request, several Arctic states have included staff from one or more NGOs within their national delegations to the negotiations.[88] Note that Permanent Participants have so far not participated in the negotiations either. As this seems first of all to be due to a lack of expertise and resources, the issue of their entitlement to participate has not been dealt with.[89] It is submitted that the practice of the Arctic states with regard to the NGO's request supports the view that the Arctic states do not regard the negotiations on the Arctic MOPPR Instrument as a 'meeting of the Arctic Council' and that the Rules of Procedure are therefore not applicable.

Permanent Participants

The involvement of representatives of the Arctic's indigenous peoples in a forum like the Arctic Council is quite unique.[90] They are normally accorded the status of NGOs in different inter-governmental organisations and fora, but the Council has created the status of 'Permanent Participants' for them. There are currently six Permanent Participants, namely the Arctic Athabaskan Council (AAC), the Aleut International Association (AIA), the Gwich'in Council International (GCI), the Inuit Circumpolar Council (ICC), the Russian Arctic Indigenous Peoples of the North (RAIPON) and the Saami Council. The ICC, the Saami Council and RAIPON (then under a different name) were approved as Permanent Participants at the Council's inception in 1996,[91]

[88] Information provided by a representative from an NGO by phone to the author on 25 January 2012. The legal opinion is on file with the author.
[89] *Ibid.*
[90] Another example is the participation of representatives of indigenous peoples in the Barents Regional Council (BRC), established in 1993. See also O.S. Stokke and O. Tunander (eds.), *The Barents Region: Cooperation in Arctic Europe* (London, Sage: 1994).
[91] Cf. the 1996 Ottawa Declaration.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

the AIA in 1998[92] and the AAC and GCI in 2000.[93] Article 2 of the Ottawa Declaration opens the door to new Permanent Participants, provided that two criteria are met and that the number of Permanent Participants remains less than the number of Members. This means that there is at present room for one more Permanent Participant.

Observers

Admission of Observers

The current Rules of Procedure devote considerable attention to the admission of Observers and their roles, rights and obligations. These Rules build on the practice with respect to Observers that developed during the operation of the AEPS.[94] As noted above, however, the Rules are currently under review by the TFII, which is, *inter alia*, charged with incorporating the Nuuk Observer Rules adopted by the Nuuk Declaration.

Current Rule 36 reads as follows:

> Observer status in the Arctic Council is open to:
> (a) non-Arctic States;
> (b) inter-governmental and inter-parliamentary organizations, global and regional;
> (c) non-governmental organizations
>
> that the Council determines can contribute to its work.
>
> Accreditation of Observers shall be in accordance with the provisions of Annex 2.

The sentence "that the Council determines can contribute to its work" clarifies that the ability to contribute to the Council's work is the only criterion for admission as Observer. While this criterion does not constitute a high threshold, it would benefit from guidance on its implementation. The only guidance that the Rules of Procedure currently offers is in fact the ground for the suspension contained in Rule 37, namely engaging "in activities which are at odds with the Council's Declaration". As discussed below, further guidance is envisaged to be included in the amended Rules of Procedure.

[92] Cf. the 1998 Iqaluit Declaration.
[93] Cf. the 'Barrow Declaration, on the occasion of the Second Ministerial Meeting of the Arctic Council, Barrow, 13 October 2000'.
[94] See the extensive discussion in P. Graczyk, "Observers in the Arctic Council—Evolution and Prospects", 3 *Yearbook of Polar Law* 575–633 (2011), at pp. 586–599.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

The decision on accreditation lies with "the Council". As Rule 36 does not contain special arrangements for formal decision-making, the general rule laid down in Rule 7 applies. As discussed in more detail below, formal decisions are made by consensus among the Members without any formal involvement of Permanent Participants. But because Permanent Participants are to be consulted in the decision-formation stage, their strong opposition to applications for the status of *ad hoc* or permanent Observer could well transform a consensus that had more or less already crystallized among Members into a lack of consensus.

The last sentence of Rule 36 ensures the applicability of the rules on accreditation that are contained in Annex 2 to the Rules of Procedure. Paragraph 1 of Annex 2 contains a list of 'Accredited Observers'—more commonly referred to as 'permanent Observers'—in contrast with '*ad hoc* Observers' mentioned in Rule 37. The difference between them is that the status of *ad hoc* Observer only allows attendance at specific meetings, while the status of permanent Observer, once accorded, in principle allows participation in all Arctic Council meetings. The qualification "in principle" is clearly warranted here because Observers are barred from participating in certain SAOs Meetings or parts thereof,[95] Task Forces—including the SAR Task Force, the MOPPR Task Force and the TFII—and the Arctic EBM Expert Group (see subsection 'Members' above).

Nine Observers are currently in the second category and eleven in the third.[96] As regards non-Arctic states, the list in Annex 2 includes Germany, the Netherlands, Poland and the United Kingdom. France was accepted as a permanent Observer in 2000[97] and Spain in 2006.[98] Prior to the 2009 Tromsø Ministerial Meeting, applications for the status of permanent Observer were submitted by China, Italy, South Korea and the EU. The EU application was submitted by the European Commission on behalf of the EU. If the EU were to obtain the status of permanent Observer, it would be under category (b)—and not under (a)—as the EU is not a state. As the Council was unable to reach consensus on how the new requests had to be handled, consideration of all these applications was deferred to the Danish Chairmanship and all applicants participated as *ad hoc* Observers in the 2009 Tromsø Ministerial Meeting.[99]

---

[95] Cf. *ibid.*, at p. 603.

[96] Information obtained from <www.arctic-council.org>, accessed 19 March 2012.

[97] Cf. the 2000 Barrow Declaration.

[98] Cf. the 'Salekhard Declaration, on the occasion of the tenth anniversary of the Arctic Council [&] the Fifth AC Ministerial Meeting, the 26th of October 2006, Salekhard, Russia'.

[99] Cf. the Report of the April 2009 SAOs Meeting, at p. 3.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

The inability to reach consensus was caused by a number of reasons. Prominent among these was the then already ongoing debate on the strengthening or reform of the Council in general, as well as on the role therein for non-Arctic states and entities in particular. Concerns existed that premature steps might prejudice progress. Moreover, as regards China and the EU, there were concerns that participation by these large global players might lead to the subordination of Permanent Participants to Observers within the Council.[100] Members and Permanent Participants are also likely to have had concerns on the geopolitical implications of the involvement of these two large global players, others that might follow in their footsteps, and a scenario where Members would be outnumbered by non-Arctic states and entities. The latter scenario may also play a crucial role in years to come, due to the strong sentiments and anxieties it triggers about changes affecting the *status quo* and who 'belongs' in the Arctic and who not. Furthermore, as became clear during the Danish chairmanship, larger numbers of delegations posed considerable challenges for the convening of meetings.

Finally, the EU's request was handled during the same period when the EU was considering imposing further restrictions on the import of seal products into the EU. This EU initiative did not receive a warm welcome—to put it mildly—as harvesting of marine mammals occurs throughout the Arctic region and export of seal products is often important for sustaining the livelihoods of Arctic indigenous peoples. The anti-whaling stance of many EU Member States as, *inter alia*, reflected in their participation in the IWC, undoubtedly also formed part of the context in which the EU's request was assessed. Later in 2009 the EU did in fact adopt import restrictions on seal products,[101] triggering requests by both Canada and Norway for consultations under the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization in November 2009. On 21 April 2011, the Dispute Settlement Body established a single panel that will deal with both the Canadian and the Norwegian complaints. By April 2012, however, the composition of the panel still had not been completed. A considerable number of other states—including Iceland and the United

[100] See also the Report and Background Brief entitled *Interests and Roles of Non-Arctic States in the Arctic*, (October 2011), on a seminar presented by the National Capital Branch of the Canadian International Council and the Munk-Gordon Arctic Security Program, Ottawa, 5 October 2011 (available at <www.opencanada.org>, accessed 19 March 2012).

[101] Regulation (EC) No 1007/2009 of the European Parliament and of the Council, of 16 September 2009, 'on trade in seal products' *OJ* 2009, L 286/36; and Commission Regulation (EU) No 737/2010, of 10 August 2010, 'laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products' *OJ* 2010, L 216/1.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

States—have reserved their third-party rights with respect to one or both complaints.

In addition to these circumstances and considerations, the course of action pursued at the 2009 Tromsø Ministerial Meeting must certainly also have been motivated by the fact that deferring an application is preferable to rejecting it. Also, to reject one or more, but approve the others, would have been regarded as unjustifiable discrimination unless the Council had been able to provide a reasoned explanation for distinguishing between the applications. The current Rules of Procedure would not have facilitated the formulation of such a reasoned explanation.

Some months after the Tromsø Ministerial Meeting, Japan applied for the status of permanent Observer and was accorded *ad hoc* Observer status at the November 2009 SAOs Meeting.[102] All pending applicants were accorded *ad hoc* Observer status for the 2011 Nuuk Ministerial Meeting, where it was also decided that their applications would be evaluated on the basis of the Nuuk Observer Rules (see further below). In December 2011, Singapore applied for the status of permanent Observer.[103] The intention would seem to be for all evaluations of applicants to be finalized at the upcoming 2013 Kiruna Ministerial Meeting.[104]

Continuation, Re-accreditation and Suspension of Observer Status

Whereas Rule 36 and Annex 2 to the Rules of Procedure deal with the admission of permanent Observers, Rule 37 deals, *inter alia*, with the continuation and suspension of that status. The relevant sentences read as follows:

> [. . .] Observer status shall continue for such time as consensus exists at the Ministerial meeting. Any Observer that engages in activities which are at odds with the Council's Declaration shall have its status as an Observer suspended. [. . . .]

As far as the author is aware, so far no Observer ever had its status suspended by the Council. Moreover, the Rules of Procedure do not contain arrangements for the suspension of the status of Members or Permanent Participants. As regards Members, such arrangements would not be able to rely on consensus decision-making because the Member in question could block consensus

[102] Cf. the Report of the November 2009 SAOs Meeting, at p. 2.
[103] Information provided by N. Buvang Vaaja to the author by email on 10 February 2012.
[104] In *The Guardian*, 25 January 2012 (available at <www.guardian.co.uk>), it was suggested that Norway may not support the Chinese application due to China's actions against Norway following the award of the 2010 Nobel Peace Prize to Chinese democracy activist Liu Xiaobo.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

on its own. It also seems that arrangements to suspend or expel Members—rather than suspension of voting rights or other privileges due to, for instance, non-payment of annual contributions—are very rare within international organizations or bodies and are applied even more rarely. The so far unused option of expulsion from the United Nations pursuant to Article 6 of the UN Charter[105] is a case in point.

The suspension of the status of Observer with the Council is not inconsistent with international law. This follows from the conclusion drawn above that the Council's current mandate and main approaches imply that current international law does not provide a clearly applicable and unqualified entitlement to non-Arctic states and entities to become a Member of the Council.

Rule 37 contains only one ground for suspension, namely engaging "in activities which are at odds with the Council's Declaration". While this ground is more likely to be invoked in relation to environmental NGOs, the wording does preclude activities carried out by states or entities, or that can be attributed to them. It may well be that this ground for suspension was invoked as the reason for the rejection of Greenpeace International's request for the status of *ad hoc* Observer for both the Tromsø and Nuuk Ministerial Meetings[106] and for an earlier request by the International Fund for Animal Welfare (IFAW).[107]

While the duration of the status of *ad hoc* Observer is commonly specified in either the initial request or the decision on that request, Rule 37 is ambiguous about the continuation of the status of permanent Observer. Does continuation require an actual decision (re-accreditation) or can the status continue tacitly if no decision is made to withdraw it? The choice of one or the other has important implications due to consensus decision-making. If continuation would require an actual decision, this could be blocked by just one Member. Pursuant to the alternative approach, however, suspension could be blocked by just one Member.

This issue will be examined in detail here with respect to non-Arctic states. The 1998 Iqaluit Declaration welcomed and approved the status of permanent Observer for Germany, the Netherlands, Poland and the United Kingdom; these non-Arctic states were also listed in Annex 2 to the Rules of Procedure. It seems that discontinuation or suspension of their status would have required the Rules of Procedure to be amended. Paragraph 24 of the

---

[105] Charter of the United Nations, San Francisco, 26 June 1945. In force 24 October 1945, 1 *United Nations Treaty Series* xvi; <www.un.org>.

[106] Information on these requests was provided by a representative of Greenpeace International by email to the author on 9 November 2011.

[107] Cf. Graczyk, *supra* note 94, at p. 605, n. 137.

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

2000 Barrow Declaration uses the phrase "welcome and approve the status of Observer for the period until the next Ministerial Meeting for France". No reference is made to Germany, the Netherlands, Poland and the United Kingdom; Annex 2 to the Rules of Procedure was also not amended to include France. Whereas the status of France is thus granted for a specified period and is thereby subject to re-accreditation, the other four non-Arctic states are still subject to tacit continuation.

A different approach was pursued in the 2002 Inari Declaration, by which the Ministers "approve the status as observers of the Arctic Council for the period of time until the 4th Ministerial Meeting" and list all five non-Arctic states just mentioned.[108] The approach of re-accreditation was thereby applied equally to all, even though Annex 2 to the Rules of Procedure was not amended to either include France or delete all the others. Yet another approach was pursued in the 2004 Reykjavík Declaration,[109] which uses the phrase "approve as observers to the Arctic Council", followed by listing all five non-Arctic states. Strictly speaking, they were thus re-accredited for an indefinite period, even though Annex 2 to the Rules of Procedure remained once again unchanged. An identical approach was pursued in the 2006 Salekhard Declaration, even though Spain's Observer status was approved for the first time and the other five had already been accredited for an indefinite period. The 2009 Tromsø Declaration[110] did not accredit or re-accredit Observers because—as explained above—the Council had been unable to reach consensus on how to handle the new applications. Likewise, the 2011 Nuuk Declaration did not accredit, re-accredit or suspend Observers, but decided to apply the Nuuk Observer Rules (see below) to pending applications. As noted earlier, the Nuuk Observer Rules can only be formally applied once they have been incorporated in amended Rules of Procedure adopted by a Ministerial Meeting. This cannot occur sooner than in 2013.

This overview of the Council's practice on according Observer status reveals a considerable lack of uniformity and consistency, both on the need for re-accreditation and the duration of Observer status. It is quite likely that this was caused by the fact that Observers were not regarded as a significant issue by Members and Permanent Participants. This changed abruptly in the run-up

[108] Cf. para. 13 of the 'Inari Declaration, on the occasion of the Third Ministerial Meeting of the Arctic Council, Inari, 10 October 2002'.

[109] 'Reykjavík Declaration, on the occasion of the Fourth Ministerial Meeting of the Arctic Council, Reykjavík, 24 November 2004'.

[110] 'Tromsø Declaration [o]n the occasion of the Sixth Ministerial Meeting of [t]he Arctic Council, [t]he 29th of April, 2009, Tromsø, Norway'.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

to the Tromsø Ministerial Meeting, when several global players applied for Observer status and global media zoomed in on the Arctic.

The Nuuk Observer Rules

The Nuuk Observer Rules commence with a short introductory section, followed by three short substantive sections with the following titles: 'Criteria for admitting observers', 'Role of observers' and 'Accreditation and review of observers of the Arctic Council'. The final section on the 'Observer manual' is only meant to announce that such a manual will be published. As regards the role of Observers, the reader is referred to the discussion in the subsection on 'Members' above.

The section 'Criteria for admitting observers' clarifies that the status of Observer will continue to be available to the three categories mentioned in Rule 36 of the current Rules of Procedure. A change is nevertheless contained in the section 'Accreditation and review of observers of the Arctic Council', which announces the abolition of the status of *ad hoc* Observer. A temporary exception is made for the "present applicants" (then China, Italy, Japan, South Korea and the EU), which may be given this status for "specific meetings [. . .] until the Ministers have decided upon their applications". Presumably, Singapore will be treated equally. As the status of *ad hoc* Observer will therefore no longer provide a solution for special situations, it will be interesting to see if the TFII will propose the creation of a new participatory status with a lower ranking than a regular Observer. Reference can in this context be made to the practice in the ATS where Malaysia has been "invited to observe" several ATCMs[111] and to the earlier practice of the Arctic Council to allow the European Commission to participate as an 'Invited Guest'.[112]

The section 'Criteria for admitting observers' also clarifies that the core criterion for admission as Observer continues to be 'the ability to contribute to the work of the Council'. This is then complemented by guidance on its implementation through the following text:

> In the determination by the Council of the general suitability of an applicant for observer status the Council will, *inter alia*, take into account the extent to which observers:

[111] Final Report of the Thirty-fourth Consultative Meeting, Buenos Aires, 20 June–1 July 2011 (available at <www.ats.aq>, accessed 26 January 2012), at para. 459. As Malaysia became a party to the Antarctic Treaty on 31 October 2011, such invitations will no longer be necessary for Malaysia.

[112] Graczyk, *supra* note 94, at p. 607, n. 150.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

- Accept and support the objectives of the Arctic Council defined in the Ottawa declaration.
- Recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic.
- Recognize that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean.
- Respect the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants.
- Have demonstrated a political willingness as well as financial ability to contribute to the work of the Permanent Participants and other Arctic indigenous peoples.
- Have demonstrated their Arctic interests and expertise relevant to the work of the Arctic Council.
- Have demonstrated a concrete interest and ability to support the work of the Arctic Council, including through partnerships with member states and Permanent Participants bringing Arctic concerns to global decision-making bodies.

Instead of a separate discussion on each of these seven criteria, some general comments are offered here. First, the criteria apply to all three categories of Observers. Second, admission is only possible when all seven criteria are met. A considerable margin of appreciation is nevertheless offered by the words "the extent to which" in the chapeau. While the first three criteria can probably be easily satisfied by all applicants, the last three criteria are quite specific and concrete, and constitute a considerably higher threshold in comparison with the current Rules of Procedure, which only contains the core criterion of "the ability to contribute to the work of the Council".

Third, the fact that the last three criteria use the term "demonstrated" means that applicants actually have to prove compliance with these criteria by (recently) undertaken concrete action. The use of the term "demonstrated" in conjunction with the terms "financial ability" in the fifth criterion thus constitutes a mandatory minimum level of funding. A maximum level of funding exists in principle as well, since the section 'Role of observers' stipulates that Observers:

> may propose projects through an Arctic State or a Permanent Participant but financial contributions from observers to any given project may not exceed the financing from Arctic States, unless otherwise decided by the SAOs.

The purpose of this maximum level of funding—which the SAOs can suspend if desirable—seems to be to constrain the prominence of Observer participation. It is submitted, however, that the mandatory minimum level of

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

funding may prove to be much more significant. In conjunction with the introduction of other new obligations without their being balanced by new rights or benefits, this new obligation may give rise to a sentiment reminiscent of that underlying the famous 18th century slogan 'No taxation without representation'. The joint statement made by the Observer states at the November 2008 SAOs Meeting reflects such a sentiment as well.[113]

Fourth, while these criteria are in principle only meant for admission and re-accreditation (see below), they might in one way or another also operate as grounds for suspension under the amended Rules of Procedure. Fifth and last, even though it cannot be denied that these more specific and concrete criteria are useful, the task of applying them for concrete applications will remain a challenge. Most importantly, except in cases at both ends of the spectrum of compliance—namely obvious compliance and obvious non-compliance—the criteria do not allow for a largely factual or technical, and thereby objective, assessment. The Council's credibility and legitimacy will be at stake if applications are not handled equally—particularly in terms of robustness and thoroughness—and if the criteria are not applied consistently and without discrimination. Provided that steps have been taken to avoid this, it should not be a problem for the Council to provide a reasoned explanation if an application for Observer status is rejected. Such a reasoned explanation would in fact constitute further evidence of the soundness and robustness of the procedure for admission of Observers.

The section 'Accreditation and review of observers of the Arctic Council' sheds more light on the procedures for accreditation, continuation and re-accreditation of Observer status. The section consists of four bullets, the first three of which read as follows:

- Not later than 120 days before a ministerial meeting, the host country shall circulate, to all Arctic states and Permanent Participants, a list of entities that have applied for observer status.
- Observers are requested to submit to the Arctic Council, not later than 120 days before a Ministerial meeting, up to date information about relevant activities and their contributions to the work of the Arctic Council should they wish to continue as an observer to the Council.
- Every four years, from the date of being granted observer status, observers should state affirmatively their continued interest in observer status. Not

[113] The Report summarizes part of this statement as follows: "[...] Observers wish to cooperate not only on science but also [on] decision making. The possibility of Observers to co-fund AC projects is more likely if Observers are involved early at the project development phase. Observers would like to participate in AC discussions on the role and level of engagement for Observers" (p. 12).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

> later than 120 days before a Ministerial meeting where observers will be reviewed, the SAO Chair shall circulate to the Arctic States and Permanent Participants a list of all accredited observers and up to date information on their activities relevant to the work of the Arctic Council.

The first bullet thus deals with accreditation of new applicants, the second with continuation of Observer status and the third with re-accreditation of that status. For entities with Observer status, the procedures for continuation and re-accreditation will in practice alternate every two years. As regards the procedure for continuation, they have to submit information "about relevant activities and their contributions to the work of the Arctic Council". Even though the procedure for re-accreditation uses different wording on this point and the procedure for accreditation none at all, it seems that they are intended to be essentially similar in this respect.

Note that the Council already has some experience with reviewing Observer status. In mid-2010 the Arctic Council requested all existing Observers and applicants to submit information on their activities, and to state their interest in remaining/becoming an Observer. In the end, this information only seems to have been used for the deliberations on the Nuuk Observer Rules.[114]

The text cited above dispels any ambiguity on the period for which Observer status is granted: once Observer status is granted or approved by means of accreditation, continuation or re-accreditation, it lasts until the next Ministerial Meeting. As Ministerial Declarations will probably contain a list of entities with approved Observer status, the current list of Observers in Annex 2 to the Rules of Procedure will therefore no longer be necessary. As regards decision-making, approval of both accreditation and re-accreditation requires an actual decision, which could thus be blocked by a single Member. Conversely, it seems logical to assume that approval of continuation does not require an actual decision but can be done tacitly, unless the Council adopts an actual decision to suspend it, which could then be blocked by a single Member. This may at first sight seem odd, but it should not be forgotten that the alternative procedure applies at the next Ministerial Meeting.

As noted earlier, the TFII is charged with preparing amendments to the Rules of Procedure based, *inter alia*, on the Nuuk Observer Rules. These amendments are scheduled to be adopted at the 2013 Kiruna Ministerial Meeting. But while the Nuuk Declaration specifies that the Nuuk Observer Rules will be applied to pending applicants, it does not explicitly say that this should be finalized at the 2013 Kiruna Ministerial Meeting. Similarly, it is not clear whether entities that currently hold Observer status will already be

[114] Cf. the Report of the March 2011 SAOs Meeting, at p. 2.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

subject to the procedure for continuation at the 2013 Kiruna Ministerial Meeting or whether this procedure will be applied for the first time at the 2015 Ministerial Meeting, to be held in Canada.

Institutional Structure

The operation of the Arctic Council revolves around the bi-annual Ministerial Meetings where, *inter alia*, the Council's output is formally approved or endorsed, new projects and future work plans are adopted and other important decisions, for instance on Observers, are made. The rotating Chair of the Council and SAOs are responsible for preparing the next Ministerial Meeting—in particular to ensure that targets agreed at the previous Ministerial Meeting are met—as well as for the day-to-day operation of the Council. SAOs commonly meet twice each year. In May 2010, the first Deputy Ministers' Meeting took place and the second meeting is scheduled to take place on 15 May 2012.[115] The exact role and mandate of such meetings still need clarification.[116]

Most of the substantive work of the Council takes place within its six Working Groups, namely:

- Arctic Contaminants Action Program (ACAP);
- Arctic Monitoring and Assessment Programme (AMAP);
- Conservation of Arctic Flora and Fauna (CAFF);
- Emergency Prevention, Preparedness and Response (EPPR);
- Protection of the Arctic Marine Environment (PAME); and
- Sustainable Development Working Group (SDWG).

All Working Groups commonly meet once or twice each year, are supported by their own secretariats, have their own websites and logos and operate quite independently. This independence can to some extent be attributed to the large representation of scientists and the predominantly scientific nature of their work.

As is noted in the Framework for Strengthening the Arctic Council, if the Council decides to undertake "specific initiatives that require unique expertise", it may establish Task Forces. The competence to do so is explicitly enshrined in Rule 28 of the Rules of Procedure. The Arctic SAR Task Force, and the TFII and MOPPR Task Force established at the Nuuk Ministerial, are examples. It may well be that the Council will resort to more frequent use

[115] Information obtained from <www.arctic-council.org>, 20 March 2012.
[116] Cf. the Report of the October 2010 SAOs Meeting, at p. 3.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

of Task Forces once the Council develops into a more operational body. Rule 28 also empowers the Council to establish "other subsidiary bodies". A recent example is the Arctic EBM Expert Group established by the Nuuk Ministerial Meeting. Finally, the Arctic Council will have its own secretariat, based in Tromsø, once it has been formally established by the 2013 Kiruna Ministerial Meeting.

The preceding discussion only relates to the institutional structure of the Council but not to the broader ACS concept. As the subsection 'Mandate and Main Approaches' above postulated that the Arctic SAR Agreement could be viewed as part of the ACS, the Meetings of Parties (MoPs) envisaged in Article 10 of the Arctic SAR Agreement are then part of the institutional structure of the ACS. Article 10, entitled 'Meetings of the Parties' reads:

> The Parties shall meet on a regular basis in order to consider and resolve issues regarding practical cooperation. At these meetings they should consider issues including but not limited to:
> (a) reciprocal visits by search and rescue experts;
> (b) conducting joint search and rescue exercises and training;
> (c) possible participation of search and rescue experts as observers at national search and rescue exercises of any other Party;
> (d) preparation of proposals for the development of cooperation under this Agreement;
> (e) planning, development, and use of communication systems;
> (f) mechanisms to review and, where necessary, improve the application of international guidelines to issues concerning search and rescue in the Arctic; and
> (g) review of relevant guidance on Arctic meteorological services.

Even though the chapeau indicates that the mandate of MoPs is "to consider and resolve issues regarding practical cooperation", some of these issues, in particular paragraphs (d) and (f), may move MoPs beyond implementation into the domain of progressive development. The list's non-exhaustive nature ("including but not limited to") may contribute to this as well.

How MoPs will exercise its mandate remains to be seen, as no MoPs have taken place so far. At least as interesting will be the Council's efforts to ensure implementation and follow-up of the Arctic SAR Agreement. As signalled in the subsection on 'Mandate and Main Approaches' above, these efforts may go beyond the Council's decision-shaping function. If that would indeed occur, it would—in light of EPPR's mandate and its past, current[117] and

[117] See 'EPPR Working Group, Report to the SAO Meeting, Luleå, 8–9 Nov 2011' (doc 6.2).

Downloaded from Brill.com04/03/2019 01:09:26PM via Universiteit Utrecht

future work—probably take place in the context of EPPR. A more likely scenario relates to the role of EPPR *vis-à-vis* the future Arctic MOPPR Instrument, assuming the latter will also have an institutional component. EPPR is currently already deeply involved in assisting the MOPPR Task Force.[118]

Decision-making

The rules on formal decision-making in the Council are laid down in Rule 7 of the Rules of Procedure. It provides, where relevant for this article, that:

> In accordance with the Declaration, all decisions of the Arctic Council and its subsidiary bodies, including with respect to decisions to be taken by SAOs, shall be by a consensus of all eight Arctic States. [. . .]

While it is standard practice within international organizations and bodies that Observes are not entitled to participate in formal decision-making, Rule 7 indicates that Permanent Participants do not have such an entitlement either. Permanent Participants nevertheless have considerable influence on formal decision-making as a consequence of the two purposes for which their status was created.[119] Rule 5 stipulates in this regard:

> In accordance with the Declaration, the category of Permanent Participation[120] is created to provide for active participation [by][121] and full consultation with the Arctic indigenous representatives within the Arctic Council. This principle applies to all meetings and activities of the Arctic Council.

The purpose of "active participation" concerns participation in a literal sense, for instance by means of attendance and full engagement by representatives of Permanent Participants in meetings. The words "active participation" are not intended to apply to formal decision-making, as such an interpretation would be inconsistent with the clear meaning and purpose of Rule 7. The principle set out in Rule 5 is furthermore subject to Rule 6, which stipulates that the Heads of Delegation of the Arctic States "may meet privately at their discretion".

---

[118] *Ibid.*

[119] Cf. T. Koivurova and D.L. VanderZwaag, "The Arctic Council at 10 Years: Retrospects and Prospects" 40 *University of British Columbia Law Review* 121–194 (2007), at p. 130.

[120] While the term "Participant" is more consistent with the Rules of Procedure, the term "Participation" may have been chosen because it had also been used in Art. 2 of the 1996 Ottawa Declaration. See in this regard also Rule 1 of the Rules of Procedure.

[121] It is submitted that without the word "by" this sentence is confusing.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

In light of this interpretation of the meaning and purpose of active participation, it can be concluded that the purpose of "full consultation" is to give Permanent Participants a role in the decision-formation phase prior to formal decision-making, for instance through providing information or opinions. This conclusion is consistent with the 'Framework for Strengthening the Arctic Council' adopted in Nuuk, which stipulates: "Decisions at all levels in the Arctic Council are the exclusive right and responsibility of the eight Arctic States with the involvement of the Permanent Participants".[122]

Note here as well that Rule 5 is not formulated in a manner that makes full consultation an explicit entitlement for Permanent Participants or an explicit obligation that Members must comply with. Implicitly, however, the purpose of full consultation creates an entitlement for Permanent Participants that Members are not only expected to respect but presumably also to more proactively safeguard and facilitate. Finally, in addition to the general rule contained in Rule 5, several Rules of Procedure—namely Rules 13, 15, 19 and 25—refer to the consultation of Permanent Participants in wording that is similar to that used in Rule 5.

It is also important to realize that with consensus decision-making it is often very difficult to determine when the decision-formation phase has ended and formal decision-making has commenced. Contrary to decision-making by unanimity, consensus decision-making does not involve actual voting. No standard procedure is followed by all international organizations and bodies for determining whether or not consensus exists. A chairperson may in some cases feel that it is so apparent that consensus either does or does not exist, that he/she will simply lead the meeting to the next issue for consideration. In other cases, however, a chairperson may feel that it is unclear whether consensus exists and may request those entitled to participate in decision-making to provide clarity. Both the timing and the way in which this request is formulated by a chairperson can have a significant influence on the outcome of decision-making.

In the context of the Arctic Council, these considerations mean that there could be instances during the decision-formation stage where consensus seems to have more or less crystallized among the Members, but one or more Permanent Participants express such strong objections that one or more Members change their view and oppose consensus after all. A Member may, for instance, decide to change its view if the objections are made by Permanent Participants that (also) represent Arctic indigenous peoples with the Member's nationality, which are thereby also its constituents.

[122] Report of the May 2011 SAOs Meeting, at p. 50.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

Funding

So far, all Council activities have been funded through voluntary contributions, predominantly by the Members and incidentally by others. The costs for the day-to-day operation of the Working Group secretariats and the temporary Arctic Council Secretariat have been largely born by their host countries and new activities can only be undertaken after sufficient *ad hoc* financial contributions have been secured. The 2013 Kiruna Ministerial Meeting is not expected to fundamentally change this, except that the Administrative Budget of the (permanent) Arctic Council Secretariat based in Tromsø is scheduled to be adopted. The TFII is charged with developing an indicative budget which, as stipulated in the Framework for Strengthening the Arctic Council, "should not exceed USD 1 million" and "will be divided into eight equal parts financed by all eight Arctic States".[123] Members are free to make additional contributions.

Observers will also be subject to mandatory financial contributions once the Nuuk Observer Rules are applied. As concluded in the subsection on 'The Nuuk Observer Rules', one of the new criteria for admitting Observers constitutes a mandatory minimum level of funding. This could be implemented by means of a Fund established for the benefit of Permanent Participants and other Arctic indigenous peoples, and administered by the Arctic Council Secretariat.[124]

Conclusions

The law of the sea's global instruments often depend on adequate regional implementation and therefore include obligations in relation to regional cooperation, for instance for the regulation of human activities with an inherent or potential transboundary dimension or in relation to ecosystem components with a transboundary range of distribution. In certain scenarios regional states do not need such obligations as they regard such cooperation to be fully in line with their own interests. In addition to avoiding transboundary impacts, these interests could include the capacity of regional regulation to create a regional level playing field and regional uniformity.

Obligations in relation to regional cooperation under the international law of the sea exist, *inter alia*, in the following domains:

[123] *Ibid.*, at p. 49.

[124] As suggested by D. Pearce, Senior Policy Advisor, Crowell & Mooring, and former Alaskan Senate President, at the January 2012 Toronto Conference, *supra* note 1.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

1. Merchant shipping;
2. Marine environmental protection;
3. Conservation and management of marine living resources;
4. Enclosed or semi-enclosed seas;
5 Marine scientific research; and
6. Search and rescue.

Within some of these domains, a role is already carried out by the Arctic Council *per se* and in other domains within the broader ACS concept put forward in this article. The traditionally strongest role of the Arctic Council is in the domain of scientific research, in particular through monitoring and assessment. In performing this role, the Arctic Council has been active in the domains of merchant shipping (e.g., AMSA), as well as in marine environmental protection and conservation and management of marine living resources (e.g., ACIA, SWIPA (Snow, Water, Ice and Permafrost in the Arctic), and the still ongoing ABA (Arctic Biodiversity Assessment)).

In some cases the Arctic Council complemented its monitoring and assessment role with a decision-shaping role or a limited regulatory role. The AMSA is an example of the former and the Arctic Council's non-legally binding Arctic Offshore Oil and Gas Guidelines[125] an example of the latter.[126]

This article proposes the concept of the ACS to clarify that the Arctic SAR Agreement—and the Meetings of the Parties established by it—can be part of the Council's output even though it was not—and in fact could not be—formally adopted by it. The concept of the ACS consists of two basic components. The first component comprises the Council's constitutive instrument (the Ottawa Declaration), other Ministerial Declarations, other instruments adopted by the Arctic Council—for instance, its Arctic Offshore Oil and Gas Guidelines—and the Council's institutional structure. The second component consists of instruments negotiated under the Council's auspices—but not adopted by it—and their institutional dimension. The envisaged Arctic MOPPR Instrument and its institutional dimension—if relevant—will belong to this second component as well. Pursuant to the concept postulated here, the Arctic Council is part of the broader ACS which performs roles in addition to the roles of the Arctic Council *per se*. Since the adoption of the Arctic SAR Agreement, the ACS also performs a regulatory role for search and rescue and a regulatory role is envisaged for contingency planning for oil pollution incidents.

[125] Last updated in 2009, available at <www.pame.is>.

[126] However, according to Stokke, *supra* note 83, at p. 406, the normative force of these guidelines is "low".

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

The ACS concept can also be put in a broader context. The two-tiered approach of negotiating (non-)legally binding international instruments under the auspices of the Council—thereby giving rise to the ACS—as well as strengthening the Arctic Council through, *inter alia*, a standing Arctic Council secretariat, shapes the evolving international regime for the governance and regulation of the (marine) Arctic. This two-tiered approach is currently preferred by the Arctic Eight and in particular the Arctic Five over a new regional framework instrument; at least for now and the immediate future.

Several domains require or would benefit from (enhanced) regional cooperation in the marine Arctic, and the ACS may expand to address them. In considering some domains, the Arctic Council will be confronted with the constraints inherent in the *pacta tertiis* principle, for instance, the domain of marine capture fisheries.[127] These constraints can be resolved in basically two ways: by broadening participation or by keeping participation as it is, but tailoring the scope and extent of regulation to ensure consistency with the *pacta tertiis* principle.

The Nuuk Observer Rules certainly do not reflect a desire to pursue the former strategy. Their core purpose is to clarify which entities are entitled to the status of Observer, which rights and obligations that status entails and how accreditation and re-accreditation should occur procedurally. Further clarity on this will require several two-year cycles during which the Nuuk Observer Rules are actually applied. Even at this stage, however, it will be interesting to see how eager current Observers—those that have been actively involved in the Council in recent years, as well as those that have not—and new applicants are to remain or become Observers. In particular in light of the current financial and economic crisis in many parts of the world, several will undoubtedly conduct a cost-benefit analysis on this decision, which will surely reveal that Observer status provides few tangible benefits but considerable tangible costs. The mandatory minimum level of funding introduced by the Nuuk Observer Rules may play a critical role in that respect. In conjunction with the introduction of other new obligations without their being balanced by new rights or benefits, this new obligation may give rise to a sentiment reminiscent of that underlying the famous 18th-century slogan 'No taxation without representation'.

Decisions on applying or re-applying for the status of Observer are also likely to be influenced by the way in which the Nuuk Observer Rules and the

[127] See in this regard E.J. Molenaar, "Arctic Fisheries and International Law. Gaps and Options to Address Them", *Carbon & Climate Law Review* (forthcoming).

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht

treatment of Observers and applicants during recent past years are perceived. It seems that the prevailing perception is that this treatment is not welcoming or inclusive, but rather unwelcoming and exclusive. But perceptions can change. Such change can be brought about by the Arctic Council's practice on the implementation and application of the Nuuk Observer Rules or the treatment of Observers more in general. The TFII could, for instance, address some of the concerns of existing Observers and applicants in its proposals for amendments to the Council's Rules of Procedure scheduled for adoption by the Kiruna Ministerial Meeting in 2013.

A change in perception may also be brought about by a more widespread recognition that the current closed nature of the Council is not inconsistent with current international law. The opposite is also possible, for instance, if it would become a generally accepted view that inadequate regional implementation of global obligations affects the non-user rights and interests of non-regional states and the international community and that non-regional states are entitled to participate to safeguard these non-user interests. The latter view may also gain ground within the Arctic Council if it develops in tandem with a better appreciation of the benefits that broader participation can bring in terms of, *inter alia*, legitimacy, global adherence to regional regulations and broader support in other regional or global bodies to regulate human activities that have an impact on the Arctic region even though these activities take place outside it.

Downloaded from Brill.com04/03/2019 01:09:26PM
via Universiteit Utrecht