THE HIGH SEAS TREATY: IMPLICATIONS AND OPPORTUNITIES FOR THE ARCTIC

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For a long time, the Arctic had been referred to as a region of genuine and stable cooperation, free from the influence of global political divides. This is how the term “Arctic exceptionalism” was coined. However, Russia’s invasion of Ukraine in February 2022 seriously challenged this notion, and many cooperative activities in the region came to a halt. While this rupture has affected multiple international arrangements, those based on international agreements have continued to be implemented in principle. A prominent example of the prospect for continued Arctic exceptionalism is the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (also known as the CAOFA), whose 10 active parties, including Russia, have agreed to stringent precautionary measures on fishing in the high seas portion of the Central Arctic Ocean.

Over the past two years, there have been encouraging developments for biodiversity conservation with the adoption of new international instruments. Two prominent ones are the Kunming-Montreal Global Biodiversity Framework, which sets comprehensive targets for conserving biodiversity, and the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The latter is commonly referred to as the High Seas Treaty. The Treaty establishes mechanisms for protecting biodiversity in the areas beyond national jurisdiction—both in the high seas and on the international seabed. These two new agreements represent significant commitments for countries globally and are highly relevant for the protection of the Arctic Ocean environment.

One year after its adoption, 90 states have signed the High Seas Treaty, and seven have ratified it. Another 53 ratifications are needed for the Treaty to enter into force, and many countries, including seven of the eight Arctic nations, are actively preparing for ratification.

This report aims to introduce the Treaty, explain its potential for integrating the fragmented Arctic governance framework, and outline the initial steps that Arctic countries and stakeholders can take to prepare for its implementation. As the report shows, this Treaty has the potential to significantly strengthen the stewardship of the Arctic Ocean. We hope that this analysis will serve as a valuable reference tool and guide for advancing Arctic environmental stewardship in the coming years.

**Vicki Lee Wallgren**
Director, WWF Global Arctic Programme
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### Abbreviations

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<tr>
<td>ABMT</td>
<td>area-based management tool</td>
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<tr>
<td>ABNJ</td>
<td>areas beyond national jurisdiction</td>
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<td>BBNJ</td>
<td>Biodiversity Beyond National Jurisdiction</td>
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<td>CAO</td>
<td>central Arctic Ocean</td>
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<td>CAOFA</td>
<td>Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean</td>
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<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CCAMLR</td>
<td>Commission for the Conservation of Antarctic Marine Living Resources</td>
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<td>CLCS</td>
<td>Commission on the Limits of the Continental Shelf</td>
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<tr>
<td>CMM</td>
<td>conservation and management measure</td>
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<td>COLREG</td>
<td>International Regulations for Preventing Collisions at Sea</td>
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<td>COP</td>
<td>Conference of the Parties</td>
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<td>EEZ</td>
<td>exclusive economic zone</td>
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<td>EIA</td>
<td>environmental impact assessment</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAO</td>
<td>United Nations Food and Agriculture Organization</td>
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<td>GBF</td>
<td>Kunming-Montreal Global Biodiversity Framework</td>
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<tr>
<td>IFBs</td>
<td>legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>ISA</td>
<td>International Seabed Authority</td>
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<td>IWC</td>
<td>International Whaling Commission</td>
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<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution from Ships</td>
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<td>MEPC</td>
<td>Marine Environment Protection Committee</td>
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<td>MGRs</td>
<td>marine genetic resources</td>
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<td>MPA</td>
<td>marine protected area</td>
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<td>NEAFC</td>
<td>North-East Atlantic Fisheries Organization</td>
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<td>PAME</td>
<td>Protection of the Marine Environment Working Group</td>
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<td>PrepCom</td>
<td>Preparatory Commission (for the High Seas Treaty)</td>
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<td>PSSA</td>
<td>Particularly Sensitive Sea Area</td>
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<td>RFMO</td>
<td>regional fisheries management organization</td>
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<td>RFMO/As</td>
<td>regional fisheries management organizations or arrangements</td>
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<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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Executive Summary

The High Seas Treaty is an important new addition to the intergovernmental architecture for the governance of the world's seas and oceans, and has the potential of significantly enhancing the conservation and sustainable use of marine biodiversity worldwide. The Treaty is the third Implementing Agreement under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It focuses on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ). ABNJ consist of the high seas (water column beyond exclusive economic zones), and the international seabed (the so-called ‘Area’, beyond (outer) continental shelves). The Treaty addresses various gaps and shortcomings in the UNCLOS and the law of the sea more generally, particularly in light of the deteriorating status of marine biodiversity and ecosystems worldwide. The climate crisis is among the main causes and drivers of this deterioration, and its impacts are especially pronounced in the Arctic.

The Treaty will enter into force once 60 states have formally adhered to it through ratification or otherwise. Seven states had done this at the time of writing. None of the eight Arctic states were among these, but all of them except Russia had signed the Treaty. The Arctic Seven were preparing to become parties to the Treaty.

The Treaty applies only to ABNJ. In the Arctic, there are four pockets (enclaves) of high seas and probably one pocket of the Area. The four high seas pockets are the so-called ‘Banana Hole’ in the Norwegian Sea, the so-called ‘Loophole’ in the Barents Sea, the so-called ‘Donut Hole’ in the central Bering Sea, and the ‘high seas portion of the central Arctic Ocean’. If the seabed underlying the high seas portion of the central Arctic Ocean (CAO) will have a pocket of the Area, how large it will be, and where it will be situated, remained unclear at the time of writing.

The Treaty has the following four substantive Parts:

- Part II: marine genetic resources (MGRs), including the fair and equitable sharing of benefits;
- Part III: measures such as area-based management tools (ABMTs), including marine protected areas (MPAs);
- Part IV: environmental impact assessments (EIAs); and
- Part V: capacity-building and the transfer of marine technology.

These four parts form the “package deal” between developed states—which are primarily interested in Parts III and IV—and developing states, which are primarily interested in Parts II and V. Part III provides a concrete new tool that can contribute to achieving target 3 of the 2022 Kunming-Montreal Global Biodiversity Framework to establish protected and conserved areas on 30% of land and sea by 2030.

These four substantive parts do not comprehensively govern all human activities in or impacts on ABNJ. For instance, Parts III and IV deal only with all human
activities through the tools of ABMTs, MPAs and EIAs. The “new regimes” in Parts II to V of the Treaty must align with the many global and regional regimes that already exist. This is reflected in the so-called “not-undermining clause” in Article 5(2) of the Treaty and is operationalized further in other parts. It stipulates that the Treaty must not undermine relevant “legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies” (IFBs) and must, at the same time, promote coherence and coordination with those IFBs.

It remains unclear what qualifies as an IFB and what does not. This lack of clarity is especially relevant for the Arctic Council, a high-level, intergovernmental forum established by the non-legal binding 1996 Ottawa Declaration. As is well-known, the Arctic Council currently does not have the competence to adopt decisions that impose legally binding obligations on its members. However, rather than having to qualify as an IFB under the High Seas Treaty as such, or as a whole, a body can also qualify as an IFB for certain roles under the Treaty, but not for other roles.

This report examines the competence of global regimes to adopt area-based measures in Arctic ABNJ and the competence of regional regimes to adopt these measures in ABNJ in the CAO. This is done in the context of Article 22(1)(c) of the High Seas Treaty in relation to measures under ABMTs and MPAs. The underlying intention of this provision seems to be that the Treaty’s Conference of the Parties (COP) must only refrain from adopting legally binding measures in case IFBs also have such competence, and not if IFBs can merely adopt non-legally binding measures.

Of the global regimes, only the International Maritime Organization (IMO), the International Seabed Authority, and the International Whaling Commission have the competence to adopt area-based measures in ABNJ that impose legally binding restrictions on human activities. However, neither has exercised that competence in Arctic ABNJ so far. Of the four regional regimes examined—the Arctic Council, the Central Arctic Ocean Fisheries Agreement (CAOFA), the North-East Atlantic Fisheries Commission (NEAFC), and the OSPAR Commission—all except the Arctic Council have competence to adopt area-based measures that impose legally binding restrictions on human activities. In ABNJ in the CAO, only NEAFC has exercised that competence so far.

This state of play reveals significant opportunities to make more optimal use of the competence of these global and regional regimes to adopt area-based measures in Arctic ABNJ. Initiatives to achieve this should be developed now; not only after the Treaty has entered into force. In parallel with the preparatory work on procedural and institutional matters that will soon be undertaken by the Treaty’s Preparatory Commission, initiatives should aim at anticipatory implementation of the Treaty on substantive matters. An example of such an initiative is developing a concrete ‘pilot’ proposal for a multi-sectoral ABMT or MPA in the high seas portion of the CAO. While awaiting the Treaty’s entry into force, the single-sectoral components (and measures) of an envisaged overarching (multi-sectoral) proposal could be submitted in a coordinated manner to all relevant global and regional bodies, including in particular IMO and the CAOFA COP. Once these sectoral processes have led to a harmonized outcome, and the High Seas Treaty has entered into force, the
overarching proposal with the sectoral outcomes could be submitted for consideration and adoption by the High Seas Treaty COP.

The active engagement by Arctic states in initiatives such as these would underscore their proactive leadership and stewardship in the marine Arctic and put the High Seas Treaty on a clear path towards fulfilling its promise of success.
1. Introduction

On 20 September 2023, after almost two decades of discussion and negotiation, the High Seas Treaty (also known as the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement) was opened for signature at the United Nations (UN) in New York. The High Seas Treaty is the third so-called “Implementing Agreement” under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It addresses various gaps and shortcomings in the UNCLOS and the law of the sea in general, in light of the deteriorating status of marine biodiversity and ecosystems worldwide. Among the main causes and drivers of this deterioration are various forms of marine and land-based pollution—leading to, among other things, climate change and ocean acidification, overexploitation of marine living resources, and the spread of invasive alien species.

In the Arctic, the impacts of climate change are especially pronounced. These have led to dramatic recession and thinning of sea ice, rising sea levels, receding coastlines, thawing permafrost, and many changes in the composition and functioning of ecosystems, including the abundance and distribution of species populations. These changes cause enormous stresses on biodiversity. The shifts in species distribution are predominantly towards the polar regions and deeper waters, at rates of tens to hundreds of kilometres per decade. All these changes are also making the marine Arctic more accessible and attractive for human activities, such as shipping, fishing and the exploitation of non-living resources on the seabed. This has enormous consequences for Arctic Indigenous Peoples, who have relied on Arctic ecosystems for their livelihoods and cultural identities for thousands of years.

Agreement on the text of the High Seas Treaty was achieved on 4 March 2023, less than three months after the adoption of another important milestone in addressing global biodiversity loss: the 2022 Kunming-Montreal Global Biodiversity Framework (GBF) under the Convention on Biological Diversity (CBD). Target 3 of the GBF requires the establishment of protected and conserved areas on 30% of land and sea by 2030. This target is directly relevant for Part III of the High Seas Treaty, which focuses on area-based management tools (ABMTs) and marine protected areas.

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3 CBD Conference of the Parties (COP) Decision 15/4, 19 December 2022.
The High Seas Treaty: Implications and Opportunities for the Arctic

(MPAs), because such ABMTs, MPAs and related measures are new tools that can contribute to achieving GBF Target 3.

At the time of writing, seven states had ratified the High Seas Treaty. None of the eight Arctic states were among these, but all except Russia had signed the Treaty. The Treaty will enter into force once 60 states have formally adhered to it through ratification, approval, acceptance or accession. Given that the European Union (EU) and its 27 members have been strong supporters of the Treaty since the start of the preparatory phase—and all have signed—their combined formal adherences alone would amount to almost half of the required 60. The exact date on which the Treaty will enter into force is difficult to predict.

To prepare for the Treaty’s entry into force, the UN General Assembly (UNGA) established a Preparatory Commission (PrepCom). This PrepCom will, among other things, develop rules of procedure for the Treaty’s main decision-making body, the Conference of the Parties (COP). The PrepCom’s first organizational meeting is scheduled to be held between 24 and 26 June 2024.

This paper provides an analysis of the High Seas Treaty, explores its relevance for Arctic states and other states, and examines what the Treaty means for the Arctic’s existing regimes. Special attention is given to area-based measures, a generic term used in this paper that also comprises ABMTs and MPAs.

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5 The seven are Belize, Chile, Mauritius, Micronesia, Monaco, Palau and Seychelles. Information on the status of participation in the High Seas Treaty is available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=en.

6 Art. 68(1) of the High Seas Treaty.

7 See Art. 68(3) of the High Seas Treaty.

8 UNGA Res. 78/272 of 24 April 2024 (currently available as doc. A/78/L/41, of 6 February 2024).

9 Art. 47(4) of the High Seas Treaty.
The law of the sea divides seas and oceans into maritime zones. On the one hand, there are coastal state maritime zones—also called “marine areas within national jurisdiction”—such the territorial sea, the exclusive economic zone (EEZ), and the (outer) continental shelf. Seaward from these are the two so-called marine “areas beyond national jurisdiction” (ABNJ): that is, the high seas (water column beyond EEZs)\(^{10}\) and the so-called “Area” (the international seabed beyond (outer) continental shelves).\(^{11}\)

The High Seas Treaty applies only to ABNJ.\(^{12}\) In the Arctic, there are four pockets (enclaves) of high seas and probably one pocket of the Area. The four high seas pockets are the so-called ‘Banana Hole’ in the Norwegian Sea, the so-called ‘Loophole’ in the Barents Sea, the so-called ‘Donut Hole’ in the central Bering Sea, and the ‘high seas portion of the central Arctic Ocean’ (Figure 1).

**Figure 1: High seas pockets in the marine Arctic**

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\(^{10}\) Or beyond other 200 nautical mile maritime zones derived from the EEZ (e.g., exclusive fishery zones) or, if no 200 nautical mile maritime zones have been established, then beyond the outer limits of territorial seas.

\(^{11}\) Art. 1(1)(1) of the UNCLOS.

\(^{12}\) Arts 1(2) and 3 of the High Seas Treaty. The only exception is laid down in Art. 28(2); discussed in subsection 3.6. See also Arts 18 and 22(6).
The wording “high seas portion of the central Arctic Ocean” is used consistently in the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOFA).\textsuperscript{13} It implies that the central Arctic Ocean (CAO) consists not only of a high seas portion, but also of adjacent coastal state maritime zones. That approach is also used in this paper.

As regards pockets of the Area in the marine Arctic: the seabed of the Banana Hole, the Loophole and the Donut Hole consists entirely of outer continental shelves of coastal states, and therefore contains no pockets of the Area. Whether the seabed underlying the high seas portion of the CAO will have a pocket of the Area, how large it will be, and where it will be situated, remained unclear at the time of writing. This seemed to depend in particular on the evolving submissions of Russia to the Commission on the Limits of the Continental Shelf (CLCS) – established under the UNCLOS – and the recommendations of the CLCS in response to these submissions.\textsuperscript{14}

As discussed in the next section, the High Seas Treaty contains several references to “areas that are entirely surrounded by the [EEZs] of States”, “surrounding States” and “adjacent coastal States”. Adjacency exists in “horizontal” scenarios—namely, the waters of the high seas and EEZs and the seabed of the continental shelf and the Area—and in “vertical scenarios,” when high seas waters lie above the (outer) continental shelf.\textsuperscript{15} All four high seas pockets in the Arctic are surrounded by EEZs or other 200 nautical mile maritime zones derived from the EEZ.\textsuperscript{16} This makes the relevant states both “adjacent coastal states” and “surrounding states” for the purposes of the High Seas Treaty. With regards to the Donut Hole, these states are Russia and the US; for the high seas portion of the CAO, these are Canada, Denmark/Greenland, Norway, Russia and the US; for the Loophole, these are Norway and Russia; and for the Banana Hole, these are Denmark/Faroe Islands and Greenland, Iceland and Norway.


\textsuperscript{14} A map of Russia’s evolving submission on the CAO to the CLCS is available at \url{https://www.durham.ac.uk/media/durham-university/research-/research-centres/ibru-centre-for-borders-research/maps-and-databases/arctic-maps-2024-january/Map-6a-e-IBRU-Arctic-map-04-01-24--(Russia-evolving-submission)-updated.pdf}.


\textsuperscript{16} Namely the 200 nm Fisheries Protection Zone around Svalbard (Norway) and the 200 nm Fishery Zone around Jan Mayen (Norway).
3. The High Seas Treaty

3.1 An overview

The High Seas Treaty consists of a preamble, 12 parts containing 76 articles, and two annexes. Part I, General Provisions, contains, among other things, a list of definitions in Article 1; the Treaty’s general objective in Article 2 (to “ensure the conservation and sustainable use of marine biological diversity of” ABNJ); and Article 7, which lists 14 general principles and approaches by which parties to the Treaty shall be guided in achieving the Treaty’s objectives. This list includes the ecosystem approach and the rights of Indigenous Peoples.

Parts II-V are the ‘substantive’ parts of the Treaty, and cover the following:

- Part II: marine genetic resources (MGRs), including the fair and equitable sharing of benefits;
- Part III: measures such as ABMTs, including MPAs;
- Part IV: environmental impact assessments (EIAs); and
- Part V: capacity-building and the transfer of marine technology.

More information on these four substantive parts is provided in subsections 3.4 to 3.7 of this report.

Two general observations can be made about these four parts. First, they formed the package deal that ensured the necessary support among UN members for commencing the preparations and negotiations of what eventually became the High Seas Treaty. From the outset of the initial discussions in the BBNJ Working Group in 2004, many developed states—including EU member states—were mainly interested in conservation issues. This eventually culminated in Parts III and IV of the package, which were balanced by Parts II and V to address the interests of developing states and secure their overall support. These latter parts offer a range of monetary and non-monetary benefits to developing states to be provided by developed states, either directly or through the various mechanisms of the Treaty. Moreover, the Treaty’s implementation burden is much lower for developing states than for developed states, given that it is mainly the nationals of the latter who are engaging in activities that involve MGRs or are subject to EIAs in ABNJ.

The sharing of these benefits with developing states is intricately connected to a fundamental disagreement during Treaty negotiations as to whether activities with respect to MGRs (e.g. bioprospecting) and the digital sequence information of MGRs of ABNJ are, or should be, governed by the principle of the freedom of the high seas or by the principle of the common heritage of humankind. There are significant differences between these principles in terms of the access to control and distribution of resources, at least as a point of departure.

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17 Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

18 These reasons explain, at least in part, why five of the seven current parties to the Treaty (see note 5) are developing states.
The second observation on the four substantive parts of the High Seas Treaty is that these do not comprehensively govern all human activities in, or impacts on, ABNJ. Only Part II deals with activities (on MGRs) that are not specifically regulated in the UNCLOS and its two earlier Implementing Agreements. Even though Parts III and IV deal with all activities in ABNJ, this is only through the tools of ABMTs, MPAs and EIAs.

Finally, Part V deals with capacity-building and transfer of technology as a tool rather than an activity. The implementation and application of the “new regimes” in these four substantive parts must align with existing regimes. This alignment is to be achieved by implementing and applying the so-called “not-undermining clause” that is set out in Article 5(2) of the Treaty and further operationalized in various provisions (see subsection 3.2).

The Treaty establishes the COP as its principal decision-making body, which will be supported by various bodies and a secretariat. The general rule for decision-making by the COP is that, except as otherwise provided, decisions and recommendations are to be adopted by consensus. However, if all efforts to reach consensus have been exhausted, then decisions and recommendations on questions of substance must be adopted by a two-thirds majority of the parties, and decisions on questions of procedure must be adopted by a simple majority of the parties.29 There are two exceptions to this general rule: (1) decisions under Part II on the modalities for the sharing of monetary benefits from the use of MGRs and digital sequence information on MGRs of ABNJ;20 and (2) decisions and recommendations under Part III on ABNJ, MPAs, related measures and emergency measures.21 In these instances, if all efforts to reach consensus have been exhausted, decisions and recommendations are adopted by a three-quarters majority of the parties. The second exception relating to Part III includes a separate step to determine if all efforts to reach consensus have been exhausted as well as a sophisticated opt-out procedure.

Neither coastal states nor other states in any other capacity have a preferential role in decision-making. Still, the analysis in subsections 3.4 to 3.6 of this report shows that there are many instances where the Treaty recognizes and addresses the rights and interests of adjacent coastal states and surrounding states by granting them rights to be notified and/or consulted as well as through due regard obligations and other requirements vis-à-vis coastal states. These new rights and obligations can be regarded as a further step in the phenomenon of “creeping coastal state jurisdiction”, which continues to be one of the principal drivers of the modern international law of the sea.22

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19 Art. 47(5) of the High Seas Treaty.
20 Ibid., Art. 14(7).
21 Ibid., Art. 23(2).
22 See Molenaar, note 15, at pp. 54-58.
3.2 The not-undermining clause

The relationship between international regimes and what would eventually become the High Seas Treaty played a key role during the negotiations and the preparatory phase. Initially, in particular states with significant interests in fishing were concerned that the new instrument would undermine international fisheries law and the key role of regional fisheries management organizations or arrangements (RFMO/As) thereunder. These concerns subsequently widened to other sectors and domains.

The not-undermining clause is set out in Article 5(2) of the Treaty and is operationalized further in other parts. Article 5(2) reads:

This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.

This provision deals with the interpretation and application of the Treaty and contains both a negative and a positive component. Interpretation and application must not undermine relevant “legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies” (IFBs) and must at the same time promote coherence and coordination with those IFBs.

It remains unclear what qualifies as an IFB and what does not. While the term “legal” seems to suggest that IFBs are limited to legally binding instruments and frameworks, the term “bodies” indicates that intergovernmental organizations are not the only ones covered. A pertinent example is the CAOFA, under which a COP was established as its principal decision-making body, rather than an intergovernmental organization. The CAOFA COP has the competence to impose legally binding fisheries conservation and management measures on CAOFA parties.

There are many bodies with a substantive and geographical mandate that is ‘relevant’ to the High Seas Treaty but that do not have the competence to adopt decisions that impose legally binding obligations on their members. These bodies include regional fisheries management advisory bodies established by the UN Food and Agriculture Organization (FAO) under Article VI of the FAO Constitution, which is a legally binding instrument. The Western Central Atlantic Fishery Commission and the ISAB.

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23 See, in particular, para. 7 of UNGA Res. 72/249, of 24 December 2017.
24 This is illustrated by Chile’s declaration, upon ratification of the Treaty, that the Treaty “shall in no way undermine the legal regimes to which Chile is a party”. The declaration explicitly mentions the Antarctic Treaty System, the South Pacific Regional Fisheries Management Organisation, the International Seabed Authority (ISA), and the International Maritime Organization (IMO). Chile’s declaration is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=en. The UK’s declaration upon signature also refers to the Antarctic Treaty System.
25 The text of the CAOFA does not refer to a COP but to “meetings of the Parties” (e.g. Art. 4(6)). Instead of a Meeting of the Parties (MOP), the Parties agreed to use COP as the name for its principal decision-making body (see the COP Rules of Procedure, included in Appendix 9 of the Report of the 1st (2022) in-person CAOFA COP (on file with author)).
26 Opened for signature and entered into force on 16 October 1945; www.fao.org/Legal.
Fishery Committee for the Eastern Central Atlantic are two examples. These bodies do not have the competence to impose legally binding fisheries conservation and management measures on their members, and thereby do not qualify as RFMOs. Another pertinent example is the Arctic Council, a regional, high-level, intergovernmental forum established by the non-legally binding 1996 Ottawa Declaration. As is well-known, the Council currently does not have the competence to adopt decisions that impose legally binding obligations on its members.

However, rather than having to qualify as an IFB under the High Seas Treaty as such, or as a whole, a body can qualify as an IFB for some roles under the Treaty, but not for other roles. As examined in more detail in subsections 3.4 to 3.7 of this report, IFBs can engage in consultations with Treaty parties and bodies or in broader processes to enhance cooperation and coordination among IFBs and between IFBs and Treaty bodies. More specific roles of IFBs exist in relation to ABMTs, MPAs and EIAs under Parts III and IV of the Treaty. Some IFBs have the competence to adopt legally binding measures that impose concrete area-based restrictions on human activities or to determine whether planned activities can proceed.

### 3.3 Indigenous Peoples

Representatives of Indigenous Peoples participated actively in the negotiations on the High Seas Treaty and its preparatory phase. The Preamble to the Treaty contains two paragraphs devoted to the UN Declaration on the Rights of Indigenous Peoples, and the text contains many references to Indigenous Peoples and their traditional knowledge. For example, the rights of Indigenous Peoples and the use of their traditional knowledge are included among the general principles and approaches in Article 7, and Indigenous Peoples have various rights to be involved in consultations on ABMTs and MPAs. Finally, Indigenous Peoples are included quite early on in the list of entities (set out in Article 48(3)) that are eligible to participate as observers in the meetings of the COP and its subsidiary bodies. This might lead to Indigenous Peoples being recognized as a distinct (sub)category of observers in the envisaged COP rules of procedure.

### 3.4 High Seas Treaty, Part II: Marine genetic resources

In substantive terms, Part II of the Treaty is limited to activities related to MGRs and to digital sequence information on the MGRs of ABNJ. Fishing and fishing-related activities are explicitly excluded. Prominent among the objectives of Part II in Article 9 is the fair and equitable sharing of MGRs activities, followed by capacity-

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29 ‘Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996’ (available at https://arctic-council.org/).
32 Cf. Art. 10(2).
building, knowledge generation, and transfer of marine technology. Article 12 requires parties to notify information on activities relating to MGRs to the Treaty’s clearing-house mechanism. Traditional knowledge associated with MGRs in ABNJ that is held by Indigenous Peoples and local communities shall be accessed only with the free, prior and informed consent or approval and involvement of these Indigenous Peoples and local communities (Article 13).

Article 14, which focuses on the fair and equitable sharing of benefits arising from MGRs activities, is probably the most pivotal provision in Part II and was among the most difficult to resolve during the Treaty negotiations. Its paragraph 1 stipulates that such benefits “shall be shared in a fair and equitable manner in accordance with this Part”. This obligation is further operationalized for non-monetary benefits in paragraphs 2 to 4 and for monetary benefits in paragraphs 5 to 10. Non-monetary benefits include access to samples, sample collections, digital sequence information, capacity-building, and transfer of marine technology.

Paragraphs 6 and 7 distinguish between the initial modalities on the sharing of monetary benefits and new modalities agreed to by the COP. The initial modalities require developed states, once the Treaty has entered into force, to make annual payments to the special fund in Article 52(4)(b). These payments will be 50% of their assessed contributions to the overall budget of the Treaty. The initial modalities remain in place until they are replaced by new modalities adopted by the COP. The COP must take into account recommendations by the Access and Benefit-Sharing Committee, whose recommendations may be based on consultations with IFBs (Article 15(5)). Such IFBs would presumably include those relating to the international law on patents and intellectual property rights.

3.5 High Seas Treaty, Part III: Area-based management tools, including marine protected areas

Part III of the Treaty deals with the establishment of ABMTs, including MPAs, measures applicable thereunder, and emergency measures. In view of the definitions for the terms ABMT and MPA in Article 1, MPAs are a subset of ABMTs with more holistic (multi- or cross-sectoral) coverage and longer duration; ABMTs can also be single-sectoral (e.g., relating only to shipping). The terms “measures”, “related measures”, and “emergency measures” are not defined in the Treaty, but can be understood to refer to concrete restrictions on human activities, such as fishing and shipping. The distinction between, on the one hand, the constructs or concepts of ABMTs and MPAs and, on the other hand, associated measures setting out restrictions on human activities, is used by many global and regional bodies. One of the oldest examples in this regard is the International Maritime Organization (IMO)’s construct of the Particularly Sensitive Sea Area (PSSA) and the associated protective measures (see subsection 5.1).33

Among the objectives of Part III set out in Article 17, the most prominent one is to conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of ABMTs, with ecologically representative

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33 Para. 1.2 of the PSSA Guidelines (IMO Assembly Res. A.982(24), 1 December 2005).
and well-connected networks of MPAs. Other objectives include cooperation and coordination among states and IFBs and support for developing states’ parties.

Articles 19 to 21 set out the procedures for developing and submitting proposals for ABMTs and MPAs. Parties must develop proposals on the basis of the requirements in Article 19, including the key elements listed in paragraph 4 and the indicative criteria in Annex I. Following their submission to the Treaty’s secretariat, proposals will be subject to a preliminary review by the Scientific and Technical Body, which the proponent must take into account. Article 21 instructs the secretariat to facilitate consultations on the (adjusted) proposal with all relevant stakeholders, including states; global, regional, subregional and sectoral bodies; and Indigenous Peoples. Adjacent coastal states are also explicitly mentioned in this regard. After considering the contributions to these consultations, the proponent must submit a revised proposal for assessment to the Scientific and Technical Body, which makes recommendations to the COP.

The COP’s mandate on the establishment of ABMTs, MPAs and related measures is governed by Article 22, and its mandate on emergency measures is set out in Article 24. Article 23 contains the decision-making rules and procedures for all decisions (legally binding) and recommendations (non-legally binding) under Part III. The main features of these rules and procedures were summarized in subsection 3.1 of this report. A special reference to adjacent coastal states is included in Article 22(5). It stipulates that decisions and recommendations by the COP shall not undermine the effectiveness of measures applicable to coastal state maritime zones. Moreover, measures applicable to high seas waters above (outer) continental shelves shall have due regard to the sovereign rights of coastal states. These stipulations—which are one-sided and benefit only coastal states—are to be met during the consultations phase.35

Article 22(1) gives the COP the competence to adopt decisions on ABMTs, MPAs and related measures.36 This includes measures compatible with those adopted by IFBs, provided this is done in cooperation and coordination with IFBs. Paragraphs (1)(c) and 2 of Article 22 operationalize the not-undermining clause in Article 5(2). In case proposed measures are “within the competences” of IFBs, the COP only has the competence to make recommendations to parties and IFBs to promote the adoption of the proposed measures through such IFBs.37

The meaning of the phrase “within the competences” is not defined or further clarified in the Treaty. One would nevertheless think that those negotiating the Treaty intended the COP to only refrain from exercising its competence to adopt legally binding decisions in case IFBs also have such competence, and not if IFBs can merely adopt non-legally binding instruments. The effectiveness of the Treaty would otherwise be significantly compromised. This would be consistent with the apparent rationale of Article 22(7), which envisages that the COP’s measures can remain in

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34 Art. 21(2)(a). See also Art. 19(4)(h) on consultations; Art. 21(4) on areas entirely surrounded by EEZs; and the stipulations in Art. 22(5) discussed in the text accompanying note 35 below.
35 See note 34 and accompanying text.
36 The use of “shall” can be understood either as an encouragement or as an obligation to adopt or reject proposals.
37 See also Art. 25(4).
place even in case the competences of such IFBs are subsequently amended to allow them to adopt legally binding decisions.

If this assumption is correct, this means that the competence of the Arctic Council and regional fisheries management advisory bodies—such as the Fishery Committee for the Eastern Central Atlantic and the Western Central Atlantic Fishery Commission—to adopt only non-legally binding instruments does not form an obstacle for the COP of the High Seas Treaty to adopt legally binding measures that fall within the substantive mandate of such IFBs.

In view of the lack of progress (or outright deadlock) in the adoption of ABMTs and MPAs in certain bodies—for instance, the lack of progress in the adoption of new MPAs by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) since the adoption of the Ross Sea region MPA in 2016—the question arises as to whether the phrase “within the competences” could also be interpreted in terms of the exercise of competence. Within CCAMLR, the adoption of new MPAs requires consensus, and this has been blocked by two members in recent years. As a result, qualified majority-voting under the High Seas Treaty may appear to be an attractive alternative to consensus decision-making under CCAMLR. However, actual recourse to the High Seas Treaty may have significant repercussions for the performance of CCAMLR and the broader Antarctic Treaty System. The mere possibility of such recourse may, nevertheless, help resolve matters “in-house” within CCAMLR. The Treaty COP’s mandate to adopt emergency measures under Article 24 (addressed below) could create additional pressure on the IFBs’ resolve to take action.

Article 22(3) requires the COP to make arrangements for regular consultations to enhance cooperation and coordination with and among IFBs on ABMTs, MPAs and related measures. This may well take account of the experience gathered in the Northeast Atlantic under the so-called “Collective Arrangement” that was initiated jointly by the North-East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission.

Article 24 gives the COP the mandate to adopt emergency measures “when a natural phenomenon or human-caused disaster has caused, or is likely to cause, serious or irreversible harm to marine biological diversity of [ABNJ], to ensure that the serious or irreversible harm is not exacerbated”. This mandate can be exercised only if the harm cannot be managed in a timely manner through regular procedures in the Treaty or by IFBs. The emergency measures will last no longer than two years. Articles 25 and 26 deal with the implementation, monitoring and review of ABMTs and MPAs under Part III, respectively.

38. “Collective arrangement between competent international organisations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic”, effective in 2014; text is included in OSPAR Agreement 2014-09 and available at [https://www.neafc.org/collective-arrangement](https://www.neafc.org/collective-arrangement).


3.6 High Seas Treaty, Part IV: Environmental impact assessments

Part IV deals mainly with EIAs—defined in Article 1(7)—in relation to the impacts that planned activities may have on ABNJ. The last provision in Part IV, Article 39, deals with strategic environmental assessments. The objectives of Part IV are listed in Article 27 and include operationalizing the EIA provisions in the UNCLOS 41 for ABNJ; ensuring that activities are assessed and conducted “to prevent, mitigate and manage significant adverse impacts for the purpose of protecting and preserving the marine environment”; and building and strengthening the capacity of parties, in particular developing states’ parties.

Article 28(1) requires parties to assess the potential impacts on the marine environment of planned activities in ABNJ that are under their jurisdiction or control—particularly in their capacity as flag states—before they are authorized. Such impacts could occur not only in ABNJ, but also in coastal state maritime zones. The particulars of this obligation and its associated procedures are set out in Articles 29 to 38.

A separate obligation to conduct EIAs is included in Article 28(2) and applies to planned activities in coastal state maritime zones that “may cause substantial pollution of or significant and harmful changes to the marine environment” in ABNJ. Parties with jurisdiction or control over such activities—often in their capacity as coastal states—can choose to conduct an EIA pursuant to Part IV or under their national process. In the latter case, they must make key information on this national EIA process, including EIA reports, available to the Treaty’s clearing-house mechanism.

Article 29 covers the relationship between EIAs under the Treaty and EIAs under IFBs. Its paragraph 4 exempts a party from conducting a screening or an EIA of a planned activity in ABNJ in case it determines that:

- the “potential impacts of the planned activity or category of activity have been assessed in accordance with the requirements of other” IFBs; and
- either (i) the assessment already undertaken is equivalent to the one required by Part IV and the results of the assessment are taken into account; or (ii) the regulations or standards of the IFBs arising from the assessment were designed to address potential impacts below the threshold for EIAs under Part IV, and they have been complied with.

In case these conditions are met, paragraph 5 still requires reports of EIAs conducted under IFBs to be published through the clearing-house mechanism, and paragraph 6 imposes requirements on monitoring.

The question is how the exemption in Article 29(4) relates to fishing, shipping and deep seabed mining regulated by RFMO/As, IMO and the International Seabed Authority (ISA). It seems that most existing and established fishing and shipping practices cannot be regarded as “planned activities” for the purpose of Part IV of the High Seas Treaty. The ISA’s Exploitation Regulations, which are still being negotiated, cannot be regarded as an EIA, but serve similar purposes. However, a

41 In particular those in Arts 204-206.
“plan of work for exploitation” and its assessment\(^{42}\) will have many similarities with EIA processes. Likewise, requirements by RFMO/As on exploratory fishing (for instance, to protect vulnerable marine ecosystems)\(^{43}\) show many similarities with EIAs, and stock assessments and Fisheries Operation Plans serve similar purposes.\(^{44}\) The practices of ISA, RFMO/As and other IFBs can be expected to play a key role in the envisaged collaboration between IFBs and the Scientific and Technical Body,\(^{45}\) as part of the latter’s task to develop standards and guidelines on EIAs under Article 38. The Treaty COP is required to develop mechanisms for such collaboration. All this converges in Article 29(1), which requires parties to promote the use of EIAs and the adoption and implementation of standards and guidelines developed under Article 38 in IFBs of which they are members.

The process for EIAs is set out in Article 31 and consists of the following four steps: screening; scoping; impact assessment and evaluation; and prevention, mitigation and management of potential adverse effects. If the screening phase leads to a determination that an EIA is not required, then other parties have the right to register their views and concerns. This “call-in mechanism” also provides a role for the Scientific and Technical Body and requires a response from the party that determined an EIA was not required.

Article 32 requires parties to ensure timely public notification of a planned activity and opportunities for states—particularly adjacent coastal states and other potentially most affected states—and other stakeholders, including Indigenous Peoples, to participate in consultations on the EIA process. Targeted and proactive consultations are required for small island developing states and high seas areas entirely surrounded by EEZs.

As stipulated in Article 34, the final decision on whether or not a planned activity may proceed lies with the party proposing the activity, not with the COP. The COP may advise and assist that party, but only on that party’s request. Articles 35 to 37 deal with the monitoring, reporting and review of authorized activities. Article 37 also includes a detailed “call-in mechanism”—with many similarities to the mechanism in Article 31(1)(a)—in the event of significant adverse impacts that were either not foreseen in the EIA or that arise from a breach of the conditions set out in the approval of the activity. Finally, Article 39 requires parties to consider conducting strategic environmental assessments for plans and programmes relating to activities in ABNJ under their jurisdiction or control. The COP may also conduct a strategic environmental assessment of an area or region itself, and is required to develop guidance on such assessments.

\(^{42}\) See Section 1(6) of the Deep Seabed Mining Agreement (note 2).
\(^{43}\) See the text accompanying note 81 for NEAFC and note 78 on the CAOFA.
\(^{45}\) Art. 29(3) of the High Seas Treaty.
3.7 High Seas Treaty, Part V: Capacity-building and transfer of marine technology

The objectives of Part V are listed in Article 40. The first overall objective is to assist parties, particularly developing states’ parties, in implementing the provisions of the Treaty, to achieve its objectives. This is followed by more specific objectives, including to develop marine scientific and technological capacity and to support developing states parties in achieving the objectives of Parts II-IV of the Treaty through capacity-building and transfer of marine technology.

Article 41 requires parties to cooperate to achieve the objectives of the Treaty through capacity-building and the transfer of marine technology, whether directly or through IFBs. The modalities for capacity-building and the transfer of marine technology are set out in Article 42. Parties shall, “within their capabilities”, ensure capacity-building, cooperate to achieve the transfer of marine technology, and provide resources to support capacity-building and the transfer of marine technology. Article 43 is devoted to more specific modalities for the transfer of marine technology, including the principles on which such transfer must be based. Paragraph 5 stipulates that marine technology transferred pursuant to Part V “shall be appropriate, relevant and, to the extent possible, reliable, affordable, up to date, environmentally sound and available in an accessible form for developing States Parties”.

The chapeau of Article 44(1) contains a non-exhaustive list of types of capacity-building and transfer of marine technology, including “support for the creation or enhancement of the human, financial management, scientific, technological, organizational, institutional and other resource capabilities of Parties”. This is followed by a list of examples and is complemented by the indicative and non-exhaustive list in Annex II to the Treaty. Article 45 requires the capacity-building and transfer of marine technology under Part V to be monitored and reviewed periodically by the Capacity-Building and Transfer of Marine Technology Committee established under Article 46.
4. Arctic States and the High Seas Treaty

As mentioned, at the time of writing, none of the eight Arctic states had formally adhered to the High Seas Treaty, but all except Russia had signed. The “Arctic Seven” are expected to become parties to the Treaty. Three are EU member states (i.e., mainland Denmark, Finland and Sweden) and have been strong supporters of the Treaty since the start of the preparatory phase.

All Arctic states would seem to have an interest in becoming parties to the Treaty. It is true that, because all are developed states, they would not be entitled to the Treaty’s monetary and non-monetary benefits relating to MGRs activities, nor to the benefits related to capacity-building and the transfer of marine technology. In fact, developed states will have to pay for these, and will also cover a large share of the Treaty’s budget. Also, the Treaty’s implementation burden is higher for developed states than for developing states.46

However, these costs of participation are balanced by various benefits, which can relate to a state’s more general or more specific interests. These interests are largely similar for Arctic and non-Arctic states. A first, more general interest, is that, by becoming a party, a state supports the interests of the international community in enhanced conservation and sustainable use of biodiversity in ABNJ worldwide. Remaining a non-Party may be regarded as a lack of support for the interests of the international community, and can reflect negatively on a state’s international reputation and stature.

Second, unlike the UNCLOS and the Fish Stocks Agreement,47 the High Seas Treaty has fully fledged institutional arrangements, including a COP as its principal decision-making body. Therefore, the Treaty will become a living instrument through decisions and other outputs of the COP and its subsidiary bodies in applying and further operationalizing the Treaty. Participation in these bodies and their decision-making processes will enable states to influence the substance of individual decisions and instruments—for instance, the envisaged standards and guidelines on EIAs under Article 38—as well as the Treaty’s wider evolution and possibly even the international law of the sea more broadly.

A state may also have more specific interests in becoming a party to the Treaty, such as in the case of ABMTs, MPAs or EIAs in relation to ABNJ in which the state or its nationals or vessels engage in activities,48 and/or ABNJ that are close or adjacent to their coastal state maritime zones. As explained in section 2, all Arctic states except Finland and Sweden are adjacent coastal states (or “surrounding” states) to one or more of the four Arctic high seas pockets. The Treaty recognizes and addresses the rights and interests of adjacent coastal states by granting them rights to be notified and/or consulted as well as through due regard obligations and other requirements

46 See the text accompanying note 18.
47 The main exception for the UNCLOS is ISA, whose mandate is limited to deep seabed mining.
48 See, inter alia, Arts 19(4)(c), 21(2)(a)(iii), 25(5) and 32(2).
vis-à-vis coastal states. (However, it may be that these rights and safeguards could also be exercised and invoked by non-parties to the Treaty.)

It is difficult to overstate the importance of the right to participate in the final decision-making on proposals on ABMTs, MPAs and related measures, or emergency measures in ABNJ close or adjacent to a state's coastal maritime zones. Non-parties obviously do not have such a right; nor do they have the associated right to opt out of a decision that has been adopted. For Russia, this may be a key consideration in deciding whether to become a party. At the same time, it must be emphasized that adjacent coastal states do not have a preferential role in submitting proposals on ABMTs, MPAs and related or emergency measures, or in final decision-making processes. This means that Arctic and non-Arctic states have equal rights and roles in this regard.

Arctic states could also have other specific interests in becoming parties to the Treaty—for example, to support and strengthen the rights and interests of their Indigenous Peoples (including to promote and safeguard the appropriate use of their traditional knowledge and their participation under a distinct (sub)category of observers). Arctic states may also wish to be involved in the event of a proposal for the Treaty COP to conduct a strategic environmental assessment relating to the Arctic in part or as a whole.

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49 This is based on the contrast between the use of “developing States Parties” in Arts 9(b), 17(e), 27(f), 51(5) and 52, and throughout Part V, and the use of “developing States” and “surrounding States” without also mentioning “Parties”.

50 See Art. 23(4). As adopted ABMTs, MPAs and related measures, and emergency measures, are not opposable to non-parties, however, this negatively affects the effectiveness of such tools and measures. See in this regard Art. 25(5).

51 See Art. 39(2).
5. Existing Regimes in Arctic ABNJ and their Competence to Adopt Area-Based Measures

This section discusses existing regimes (or: IFBs) whose mandates cover ABNJ in the Arctic and that have competence to adopt area-based measures. Global regimes are discussed in subsection 5.1 of this report; regional regimes, with a special focus on ABNJ in the CAO, are discussed in subsection 5.2.

5.1 Global regimes

All instruments adopted at the global level with a worldwide geographical scope of application also apply to Arctic ABNJ. Examples are

- the UNCLOS and its three Implementing Agreements;
- the main fisheries instruments adopted within FAO (e.g., the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing\footnote{Rome, 22 November 2009. In force 5 June 2016; \url{https://www.fao.org/treaties/en/}}); and
- global multilateral environmental agreements (e.g., the CBD).

Similarly, the geographical mandates of all the global bodies associated with, or established by, these and other instruments also cover Arctic ABNJ. Examples are UNGA, IMO, FAO, ISA, the International Whaling Commission (IWC) and the COPs under the CBD and the High Seas Treaty.

Of these global bodies, only IMO, ISA and IWC have the competence to adopt area-based measures in ABNJ that impose legally binding restrictions on human activities.\footnote{The potential application of the World Heritage Convention (Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972. In force 17 December 1975; 1037 United Nations Treaty Series 151; \url{www.unesco.org}) to ABNJ is being debated, but it is not clear which legally binding restrictions, if any, could be imposed on parties.} Therefore, all three qualify as IFBs for the purpose of Article 22(1)(c) of the High Seas Treaty and can also perform the other roles of IFBs under Part III of the Treaty—for instance, relating to consultations with Treaty parties and bodies or in broader processes to enhance cooperation and coordination among IFBs and between IFBs and Treaty bodies.
IWC is a global, intergovernmental organization with a mandate on the conservation and sustainable use of whales, and currently has 88 members. It has used its competence to establish Whale Sanctuaries in the Indian Ocean and the Southern Ocean in which commercial whaling is prohibited. Although the IWC could also establish a Whale Sanctuary in Arctic ABNJ in which commercial whaling would be prohibited, the actual exercise of that competence is highly unlikely. This is because of, among other things, the IWC’s existing global moratorium on commercial whaling, likely opposition from Arctic states, and repeated failed attempts over the last 25 years to secure the three-quarters majority needed to establish a South Atlantic Whale Sanctuary.

ISA is a global, intergovernmental organization with near-universal participation (169 members) and a single-sectoral mandate on deep seabed mining. This mandate includes the competence to adopt area-based measures, which has only been exercised outside the Arctic so far. For instance by establishing Areas of Particular Environmental Interest for the Clarion-Clipperton Zone and by including various area-based measures in the draft Regional Environmental Management Plan for the northern Mid-Atlantic Ridge.

IMO is a global, intergovernmental organization with near-universal participation (176 members) and a single-sectoral mandate on international shipping. It has a longstanding and extensive practice on area-based measures. MARPOL provides for the designation of Special Areas and Emission Control Areas in which stringent discharge and emission standards for various substances apply. Many such designations are already in place—often for semi-enclosed seas—and some of these also cover high seas areas, such as the Mediterranean Sea and the Antarctic area. Moreover, several of the discharge standards for Arctic waters set out in the Polar Code—whose mandatory parts have been integrated by amendment into MARPOL and SOLAS—are just as stringent as in MARPOL Special Areas. Arctic waters, as defined in the Polar Code, cover the CAO high seas, the Loophole and part of the Banana Hole.

COLREG and SOLAS provide for the establishment of ships’ routeing measures (e.g. Traffic Separation Schemes, Areas to be Avoided, recommended routes or speed restrictions), ship’s routeing systems consisting of multiple measures, and ship reporting systems. The most well-known IMO area-based measure is probably the

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64 See, for instance, paras 1.1.1 and 2.1.1 of Part II-A.
PSSA, in which one or more associated protective measures are made applicable. Examples of such measures are discharge or emission standards, ships’ routeing measures or systems, or ship reporting systems. A PSSA cannot be designated unless an associated protective measure has already been approved or adopted by an IMO body.\footnote{Para. 1.2 of the PSSA Guidelines.}

So far, IMO has not designated or adopted PSSAs, ships’ routeing measures or systems, or ship reporting systems that are partly or entirely on the high seas. Given that doing so is not precluded by the relevant instruments,\footnote{This includes the PSSA Guidelines (see para. 4.3), Regulations V/10 and V/11 of SOLAS, and the General Provisions on Ships’ Routeing (IMO Assembly Res. A.572(14), as amended).} IMO nevertheless has the competence to do so.\footnote{See the discussion in A. Todorov, “Potential Contributions of IMO Area-Based Shipping Management and Port State Jurisdiction to the Regulation of Ship-borne Tourism in Antarctica” Ocean Development and International Law (2024; forthcoming).} The main reason why it has not yet exercised this competence could be that, so far, there has not been a compelling proposal relating to the impacts and/or risks of navigation that would be significant enough to justify restrictions on navigation.\footnote{See the phrase “at risk from international shipping activities” in para. 5.1 of the PSSA Guidelines and the phrase “IMO will not adopt a proposed routeing system until it is satisfied that the proposed system will not impose unnecessary constraints on shipping” in para. 3.7 of the General Provisions on Ships’ Routeing.} The practice of consensus decision-making in IMO is also very relevant in this regard. The ideas put forward in section 6 might be compelling enough to overcome these hurdles.

5.2 Regional regimes, with a focus on ABNJ in the central Arctic Ocean

Due to the enormous size of the marine Arctic—which includes parts of the North Pacific and North Atlantic Oceans—there are many regional regimes that cover parts of it. Among the various overviews of these regimes are two reports developed by the Arctic Council’s Protection of the Marine Environment Working Group (PAME): the Final Report of the Arctic Ocean Review project,\footnote{Published in May 2013.} and the Synthesis Report on Ecosystem Status, Human Impact and Management Measures in the Central Arctic Ocean.\footnote{To be published.}

This section of the report focuses on the following four regional regimes whose mandates comprise (a part of) ABNJ in the CAO and which have or may have the competence to adopt area-based measures: the Arctic Council, the CAOFA, NEAFC and the OSPAR Commission.

The Arctic Council

The Arctic Council is a regional, high-level, intergovernmental forum established by a non-legally binding instrument (the Ottawa Declaration), which means it cannot adopt decisions that impose legally binding obligations on its members (i.e., the eight Arctic states). The Council has a distinct participatory status for Arctic Indigenous Peoples’ organizations: Permanent Participants. This status was created to provide

\footnote{Para. 1.2 of the PSSA Guidelines.}
for active participation by, and full consultation with, the Arctic Indigenous organizations within the Arctic Council.

The Ottawa Declaration does not define the Council’s geographical mandate, but the marine Arctic as defined by the Council’s Conservation of Arctic Flora and Fauna Working Group, includes all four high seas pockets in the Arctic. The Council’s substantive mandate is extremely broad and relates in particular to issues of sustainable development and environmental protection. A footnote in the Ottawa Declaration stipulates that the Council “should not deal with matters related to military security” and its practice indicates that it also does not deal with the management of marine mammals and fish populations. The significant under-utilization of the Council’s regional, multi-sectoral mandate is, generally, caused by the presence of many other existing global and regional bodies in which many or all Arctic states also participate.

The Council’s broad substantive mandate allows it to deal with area-based measures, and it has exercised that mandate—for instance, through the Framework for a Pan-Arctic Network of MPAs (2015), the 2015–2025 Arctic Marine Strategic Plan (which lists the development of a network of MPAs as a strategic action\(^{71}\)), and PAME’s MPA-Network Toolbox project, which provides states with implementation guidance. Even though the Council’s broad substantive mandate would perhaps allow it to actually adopt area-based measures, it has not done this so far, and, at the time of writing, there were no indications that it intended to do so in the future. However, if it were to adopt area-based measures, the decision would not be legally binding and would thereby not impose legally binding restrictions on human activities. At present, the Council therefore does not qualify as an IFB for the purpose of Article 22(1)(c) of the High Seas Treaty, but it can still perform the other roles of IFBs under Part III of the Treaty.

**The Central Arctic Ocean Fisheries Agreement**

The CAOFA is a regional, single-sectoral treaty on marine capture fishing. Because its principal decision-making body is a COP rather than an intergovernmental organization, it cannot be an RFMO. Still, there are many arguments to support the view that it is a regional fisheries management arrangement.\(^{72}\) The CAOFA COP has the competence to adopt legally binding conservation and management measures (CMMs) that impose restrictions on fishing and fishing-related activities (e.g., transshipment and bunkering) by CAOFA parties.

The geographical scope of the CAOFA—the “Agreement Area”—is primarily limited to the high seas portion of the CAO. However, for scientific purposes, account is also taken of adjacent coastal state maritime zones. At the time of writing, the CAOFA

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\(^{71}\) At p. 14.

\(^{72}\) This includes that the restrictions on exploratory fishing under Arts 3(3) and 5(1)(d) of the CAOFA qualify as “conservation and management measures” pursuant to the definition in Art. 1(1)(b) of the Fish Stocks Agreement. Moreover, in light of its objective in Art. 2, its qualified and temporary abstention from commercial high seas fishing, and its Joint Program of Scientific Research and Monitoring, the CAOFA as a whole should be regarded as a “cautious conservation and management measure” in the context of the obligations in Art. 6(6) of the Fish Stocks Agreement. See also the discussion in E.J. Molenaar, “The CAOF Agreement. Key Issues of International Fisheries Law”, in T. Heidar (ed.) *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill/Nijhoff: 2020), pp. 446–476, at section 6.3.
had 10 parties: Canada, Denmark (in respect of Greenland and the Faroe Islands), China, EU, Iceland, Japan, Republic of Korea, Norway, Russia and the US.

Unlike the founding instruments of many RFMO/As, the CAOFA does not explicitly provide for the competence to establish area-based measures. Arguably, however, such competence exists implicitly; both for commercial and exploratory fishing. As regards commercial fishing, Article 5(1)(c)(ii) of the CAOFA gives the COP competence “to establish additional or different interim [CMMs] in respect of those stocks in the Agreement Area”. This competence would, at any rate, include the competence to adopt area-based measures to protect target fish stocks from overexploitation, for instance by protecting spawning or nursing areas. However, at the time of writing, the abundance and distribution of fish in the Agreement Area did not allow for a commercially viable fishery, and there are also several reasons why it seems unlikely that the COP will authorize commercial fishing before 2037. The temporary and qualified abstention from commercial fishing in the high seas portion of the CAO can nevertheless be regarded as a single-sectoral ABMT under the High Seas Treaty.

As regards exploratory fishing, the chapeau to Article 5(1)(d) of the CAOFA gives the COP competence to establish CMMs “for exploratory fishing in the Agreement Area”. This competence is much broader than the competence on commercial fishing in Article 5(1)(c)(ii), given that it is not confined to target stocks, but applies to exploratory fishing in general. The broad nature of this competence is further emphasized by the non-exhaustive list of conditions or characteristics that the CMMs on exploratory fishing “shall provide”. This gives the COP competence to adopt area-based measures to protect target stocks and/or species as well as non-target species (e.g., fish, birds and marine mammals) and habitats (e.g., bottom fishing impacts on benthic habitats) from the impacts of exploratory fishing, and also take account of the needs of, or impacts on, Arctic Indigenous Peoples in this regard.

Support for the above position on exploratory fishing also exists in the questions on exploratory fishing formulated by the CAOFA COP and the answers to these provided by the Exploratory Fishing Questions Working Group established under the CAOFA’s Scientific Coordinating Group. At the time of writing, negotiations on a CMM on exploratory fishing were ongoing. Article 5(1)(d) of the CAOFA requires such a CMM to be adopted before 25 June 2024, but the 3rd CAOFA COP decided to

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74 These reasons include the arrangements on duration in Art. 13, consensus decision-making, and the utilization- and conservation-oriented fisheries interests of the Arctic Five. In a nutshell, these interests mean that the Arctic Five can be expected to be overall less inclined to vote in favour of the commencement of high seas fishing than the Other Five. For a discussion, see Molenaar, note 72, at pp. 461-463.
75 See the discussion in E.J. Molenaar, “The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous peoples”, 164 Marine Policy 106160 (June 2024), at section 4.3.
76 The initial draft is included in Doc. CAOFA-2023-VCOP1-01 (on file with author). The final version is included in the Report of the 1st (March 2023) Meeting of the Scientific Coordinating Group, at p. 5 (see also Doc. CAOFA-2023-VCOP1-01-REV03 [on file with author]). See in particular questions 7, 9b and 15.
extend this deadline until the 4th COP, due in June 2025. It seems likely that area-based measures will be included in this CMM in one way or another.\textsuperscript{78}

**The North-East Atlantic Fisheries Commission**

NEAFC is an RFMO: a regional, single-sectoral, intergovernmental organization with a mandate on marine capture fishing and competence to adopt legally binding decisions (referred to by NEAFC as recommendations) that restrict fishing and fishing-related activities by NEAFC members.

NEAFC’s geographical mandate applies to the Northeast Atlantic Ocean and extends all the way to the geographic North Pole,\textsuperscript{79} thereby comprising the so-called “Atlantic segment” of the high seas portion of the CAO. In this geographical area of overlap, NEAFC and the CAOFA COP also have overlapping species mandates with no primacy arrangements between them.\textsuperscript{80} At the time of writing, arrangements on the CAOFA-NEAFC overlap area were being considered within the CAOFA COP’s negotiations on a CMM on exploratory fishing. The overlap between participation in NEAFC and the CAOFA must be mentioned in this context as well. NEAFC currently has six members: Denmark (in respect of Greenland and the Faroe Islands), EU, Iceland, Norway, Russia and UK. All these except UK are also CAOFA parties.

NEAFC has competence to adopt area-based measures and has exercised that competence, in particular to protect vulnerable marine ecosystems from the impacts of bottom fishing, as governed by NEAFC Recommendation 19:2014.\textsuperscript{81} Article 5 prohibits bottom fishing in listed closed areas and Article 6 contains rules and procedures on exploratory bottom fishing outside: (a) closed areas under Article 5; and (b) existing bottom fishing defined in Article 4. In practice, this means that the entire Atlantic segment of the high seas portion of the CAO is governed by Article 6. Article 6(4) stipulates that exploratory bottom fishing shall commence only after having been assessed by NEAFC’s Permanent Committee on Management and Science and approved by NEAFC itself. So far, there have not been any plans to engage in bottom fishing in the Atlantic segment of the CAO high seas.

**The OSPAR Commission**

The OSPAR Commission is a regional, intergovernmental organization with a multi-sectoral mandate on the marine environment, ecosystems and biodiversity. It has the competence to adopt legally binding decisions that impose restrictions on activities carried out by its members.

The geographical scope of the OSPAR Convention (the “OSPAR Maritime Area”)\textsuperscript{82} is identical to that of the NEAFC Convention; as such, it also comprises the Atlantic

\textsuperscript{78} The most recent draft CMM (on file with author) requires CAOFA parties wishing to engage in exploratory fishing to submit an Exploratory Fishing Plan for comments by other parties and recommendations by the Scientific Coordinating Group. Whether or not the CAOFA COP will have the competence to approve or reject Exploratory Fishing Plans remains undecided.

\textsuperscript{79} Art. 1(a) of the NEAFC Convention.

\textsuperscript{80} Art. 1(b) of the NEAFC Convention and Art. 1(b) of the CAOFA.

\textsuperscript{81} NEAFC Recommendation 19:2014 “on area management measures for the protection of vulnerable marine ecosystems in the NEAFC Regulatory Area”, as repeatedly amended.

\textsuperscript{82} Art. 1(a) of the OSPAR Convention, note 40.
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segment of the high seas portion of the CAO. The commission has 16 members: Belgium, Denmark, EU, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and UK. Russia is not a member, despite the overlap between its coastal state maritime zones and the OSPAR Maritime Area.

The substantive mandate of the OSPAR Commission is reflected in the coverage of the five annexes to the OSPAR Convention: pollution from land-based sources (Annex I); pollution by dumping or incineration (Annex II); pollution from offshore sources (Annex III); assessment of the quality of the marine environment (Annex IV); and the protection and conservation of the ecosystems and biological diversity of the maritime area (Annex V). As a general rule, the OSPAR Convention applies to all human activities that can have adverse impacts on ecosystems and biodiversity in the OSPAR Maritime Area. However, there are specific primacy arrangements relating to fishing and shipping and a general primacy arrangement to avoid duplicating actions and measures by other international bodies. Through these arrangements and its subsequent practice, the OSPAR Commission recognizes the primacy of the competence of IMO, RFMO/As, ISA, IWC and other IFBs. In practice, this means that, in ABNJ, the OSPAR Commission has a “residual” competence for human activities, such as dumping, laying of cables and pipelines, marine scientific research, and the construction and placement of artificial installations and structures.

In 2003, the OSPAR Commission decided to establish an OSPAR Network of MPAs, which would also include MPAs in ABNJ. Since then, the Commission has adopted seven MPAs in ABNJ, two of which comprise both the water column and the seabed, and five of which comprise only the water column. None of these are situated in ABNJ in OSPAR Region I: Arctic Waters (see further below). In all seven cases, the adoption of the MPAs, as such, occurred by a decision (legally binding) and the adoption of their management plans by a recommendation (non-legally binding). Section 3 of these recommendations is titled “Programmes and Measures” and contains very general prescriptions in non-mandatory wording that is also largely unrelated to concrete human activities, except for marine scientific research.

So far, therefore, the Commission has exercised its residual competence on human activities through MPAs in ABNJ in a manner that is largely non-legally binding. Given that the adoption of the High Seas Treaty reflects universal support for the establishment of ABMTs and MPAs in ABNJ, the time has come for the members of the OSPAR Commission to consider how to use the Commission’s residual competence in a legally binding manner.

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83 Art. 2(1)(a).
84 See the Preamble to the Convention and Art. 4 of Annex V.
85 See the decision made together with the adoption of Annex V included in Annex 31 of the Summary Record OSPAR 98/14/1-E.
86 Cf. “OSPAR’s Regulatory Regime for establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area” included in Annex 6 to Summary Record OSPAR 09/22/1-E.
87 Ibid, para. 2.23.
88 Cf. the definition of “the OSPAR Network of Marine Protected Areas” in para. 1.1 of OSPAR Recommendation 2003/3, as amended.
89 See the information at https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction.
Finally, it should be mentioned that a draft proforma for a proposed “Arctic Ice High Seas MPA”—covering almost all of the Atlantic segment of the high seas portion of the CAO—could not be adopted at the 2016 Meeting of the OSPAR Commission’s Biodiversity Committee due to opposition by Denmark, Iceland and Norway. Although the draft proforma was subsequently shared with the Arctic Council Secretariat, this did not lead to any subsequent actions on the part of the Council. However, the draft proforma remains under consideration by the OSPAR Commission’s Arctic Outcomes Working Group (which was established to implement and deliver the 2022–2025 Arctic Outcomes Roadmap) and is included as one of the plethora of possible and desired actions and measures in Region I submitted for the OSPAR Commission’s meeting in June 2024.

**Conclusion**

All four regional regimes discussed in this subsection are relevant IFBs for the purpose of the High Seas Treaty due to their geographical and substantive mandates. All except the Arctic Council have competence to adopt area-based measures that impose legally binding restrictions on human activities. To date, only the NEAFC has exercised that competence in ABNJ in the CAO. Although the OSPAR Commission has exercised that competence outside ABNJ in the CAO, it has done so in a largely non-legally binding manner. All regimes except the Arctic Council qualify as IFBs for the purpose of Article 22(1)(c) of the High Seas Treaty. However, all four can also perform the various other roles of IFBs under Part III of the Treaty, for instance relating to consultations with Treaty parties and bodies or in broader processes to enhance cooperation and coordination among IFBs and between IFBs and Treaty bodies.

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90 Summary Record OSPAR 16/20/1-E, paras 6.24-6.30, in particular paras 6.27(c) and 6.30.
91 Summary Record OSPAR 16/20/1-E, para. 6.24. The draft proforma is included in doc. BDC 16/05/04 Rev.1.
92 See the Summary Record AOWG(1) 24/6/1, at para. 3.7.
6. The Way Forward for Biodiversity Conservation in the Central Arctic Ocean

The High Seas Treaty is an important new addition to the intergovernmental architecture for the governance of the world’s seas and oceans and has the potential to significantly enhance the conservation and sustainable use of marine biodiversity worldwide. Its Part III on ABMTs and MPAs provides a concrete new tool that can contribute to reaching Target 3 of the GBF to establish protected and conserved areas on 30% of land and sea by 2030.

Considerable work lies ahead to ensure that the Treaty’s full potential is used. To achieve the Treaty’s early entry into force, states must individually complete the necessary domestic processes to allow them to formally adhere to the Treaty by ratification or otherwise. Collectively, they must work together and with other stakeholders in the Treaty’s PrepCom—whose first organizational meeting is scheduled to be held from 24 to 26 June 2024—to prepare for the Treaty’s entry into force and the convening of the first COP meeting.

These preparations on procedural and institutional matters should be complemented by actions aimed at anticipatory implementation of the Treaty’s substantive matters. Part III on ABMTs and MPAs lends itself especially well to substantive preparations to ensure that its tools can be used shortly after the Treaty comes into force and that procedural and institutional arrangements are in place. Ideally, initiatives for such substantive preparations would be taken by consortia composed of a mix of stakeholders, particularly states, Indigenous Peoples, civil society, the private sector, and the scientific community. The success of such initiatives would depend especially on their conformity with Article 5(2) of the Treaty, which seeks not only to avoid undermining IFBs, but to promote coherence and coordination with them.

An example of an initiative on substantive preparations is to develop a concrete “pilot” proposal for a multi-sectoral ABMT or MPA in the high seas portion of the CAO. In developing such a proposal, account could be taken of WWF’s Arctic Ocean Network of Priority Areas for Conservation (ArcNet) and present and future “connectivity corridors” or “blue corridors” to protect migrating marine mammals from the adverse effects of maritime activities. The activities that appear to pose the greatest threats in the near future are shipping and fishing. As examined in section 5, imposing legally binding restrictions on shipping and fishing in the CAO high seas through area-based measures is within the competence of IMO and the CAOFA and NEAFC, respectively.

While awaiting the entry into force of the High Seas Treaty, the single-sectoral components (and measures) of an envisaged overarching (multi-sectoral) proposal

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could be submitted in a coordinated manner to IMO, the CAOFA COP and—where relevant—NEAFC. Once these sectoral processes have led to a harmonized outcome, and the High Seas Treaty has entered into force, the overarching proposal with the sectoral outcomes could be submitted for consideration and adoption by the High Seas Treaty COP. Assuming that the proposal would attract the necessary support (perhaps with some amendments), this would minimize the time spent between the COP recommending the adoption of sectoral measures to the relevant IFBs and the actual adoption of such measures. Moreover, this approach has the significant advantage that the regional outcomes adopted by the relatively few participants in the CAOFA COP (and, where relevant, NEAFC) would become legally binding for the much larger group of High Seas Treaty parties. This would, in essence, be an alternative to the procedure envisaged under Article 22(4) of the High Seas Treaty.

Such an initiative can be regarded as anticipatory implementation of the obligations on international cooperation to achieve the objectives of the High Seas Treaty, as set out in its Article 8. The experience gained in institutional cooperation and coordination could eventually also inform the arrangements that the Treaty COP is required to make pursuant to Article 22(3). In view of the different features this initiative would have, the consortium leading it would need to include Arctic as well as non-Arctic states, particularly CAOFA parties, NEAFC members, and major shipping states, in addition to other stakeholders.

Ideally, the first phase of this process should not be confined to IMO, the CAOFA COP and NEAFC, but should actively seek the engagement of other relevant IFBs—including the Arctic Council, IWC and the OSPAR Commission—and encourage them to adopt complementary measures and thereby ensure cross-sectoral coverage.

It should also be recognized that there are situations in which the effectiveness of area-based measures in ABNJ depends partially on actions taken by coastal states in their maritime zones—for instance, in cases where species or ecosystems occur partly in ABNJ and partly in adjacent coastal state maritime zones. Based on their sovereignty, sovereign rights and jurisdiction in their maritime zones, coastal states have broad discretion in adopting area-based measures on fishing and offshore mineral resource activities in those zones. For shipping, this is different (at least as a general rule), due to the freedom of navigation that applies beyond the outer limit of the territorial sea. However, in many parts of the CAO, Article 234 of the UNCLOS provides coastal states with competence to adopt certain restrictions on shipping in their own maritime zones without the need for IMO approval. Both Canada and Russia have made use of that competence.

As explained in section 4 of this report, Arctic states have both general and specific interests in becoming parties to the High Seas Treaty. Their active engagement in initiatives such as those described here would underscore their proactive leadership and stewardship in the marine Arctic and put the High Seas Treaty on a clear path towards fulfilling its promise of success.

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95 This advantage does not apply to IMO, which currently has 176 Members (see note 61).