

PCRC WORKING PAPER SERIES



PCRC 2nd Symposium
“The Future Design of the Arctic Ocean Legal Order”
July 28-29, 2016

PCRC Working Paper No. 10 (May, 2017)

**“A Pan-Arctic Network of MPAs:
Assessing the Challenges Ahead”**

Suzanne Lalonde

© Suzanne Lalonde 2017

Polar Cooperation Research Centre (PCRC)
Graduate School of International Cooperation Studies (GSICS)
Kobe University, Japan

<http://www.research.kobe-u.ac.jp/gsics-pcrc/index.html>

A Pan-Arctic Network of MPAs: Assessing the Challenges Ahead

Suzanne Lalonde

University of Montreal

Suzanne Lalonde is Professor of International Law and the Law of the Sea at the Law Faculty of the University of Montreal and a research associate with the ArcticNet network of excellence in Canada. She holds a PhD in Public International Law from the University of Cambridge, King's College obtained in 1997 under the supervision of Professor James Crawford. Her current research focuses on core international legal principles, especially those pertaining to sovereignty and the determination of boundaries on land and at sea, with a particular emphasis on the Arctic. She is the Canadian member of the International Law Association Committee currently investigating State practice in relation to straight baselines.

1. Marine Protected Areas and Networks of MPAs

Any attempt to assess the challenges to be overcome in creating an effective network of MPAs across the Arctic region must begin with a clear understanding of the very concept of “marine protected areas”. According to the World Conservation Union [IUCN] definition, a marine protected area is

“Any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.”¹

What must be emphasized is that the term “marine protected area” is generic; it is used to refer to all kinds of marine sites or areas that benefit from some type of legal protection or arrangement. Thus, for example, “sanctuary areas” established by the International Whaling Commission under Article 5(1) of the *International Convention for the Regulation of Whaling* (1946) are marine protected areas. A number of other existing international instruments also provide for the creation of “marine protected areas” in

¹ Resolution 17.38 (1988) adopted by the General Assembly of the IUCN and reconfirmed in Resolution 19.46 (1994), available at <data.iucn.org/dbtw-wpd/html/BP3%20Guidelines_for_marine_protected_areas/Pag-003/Annex%204%20Resolutions%2017.38%20And%2019.46%20of%20The%20Iucn%20General%20Assembly.html>.

sensitive marine environments: Ramsar sites under the *Convention on Wetlands of International Importance* (1971); world heritage sites, natural and cultural, under the *World Heritage Convention* (1972); MARPOL special areas under the *Convention for the Prevention of Pollution from Ships* (1972/78), among others.

At the national level, the Arctic States have all adopted legislative mechanisms to give effect to their international commitments to safeguard the Arctic marine environment. Indeed, Annex 4 to PAME's 2015 "Framework for a Pan-Arctic Network of MPAs"² provides detailed information on existing and planned MPAs in the Arctic EEZs of the A6 (Canada, Greenland/Denmark, Iceland, Norway, Russia and the United States) and attests to the progress that has been achieved.³

Country	Existing MPAs	Existing "other measures"	Planned MPAs Or measures	Approx marine area <u>now</u> covered (km ²)
Canada	37		5	29,892
Greenland/Den	5	2		98,030
Iceland	30			3,421
Norway	8	10		821,038
Russia	55		11	100,700
United States	15	36		2,994,463

However, the Annex 4 Tables, which are based on information provided by the States themselves, reveal that existing Arctic MPAs within the coastal States encompass a broad range of protection objectives, from multiple use areas to "no take" areas where extractive uses are prohibited. Nationally devised MPAs inevitably reflect differing priorities, investments and governance structures.

This is a critical point: individual MPAs can accommodate a wide variety of aims and will also therefore be subject to a wide range of management mechanisms. Unfortunately, there is still today a pervasive and pernicious perception that establishing a marine protected area automatically means turning the targeted area into a pristine nature reserve.

² PAME, "Framework for a Pan-Arctic Network of Marine Protected Areas", April 2015, available at <https://oaarchive.arctic-council.org/bitstream/handle/11374/417/MPA_final_web.pdf?sequence=1&isAllowed=y>.

³ Table represents summary of statistics provided in Annex 4.

In actual fact, the IUCN has developed a typology of seven different categories of protected areas: from a “strict nature reserve” (category Ia), protected from all but light human use, all the way to a “protected areas with sustainable use of natural resources (category VI) which is based on a mutually beneficial relationship between nature conservation and the sustainable management of natural resources.⁴ It is precisely because of the flexibility in their design, which promotes ocean stewardship that can be representative, comprehensive and balanced, that MPAs have become an essential instrument in the ecosystem management toolbox.⁵

However MPAs’ inherent flexibility also present a substantial challenge. For in light of the varying aims they can promote (strict conservation versus sustainable use) and the very different legal protective mechanisms that can be devised in support, establishing MPAs necessarily involves establishing priorities and sometimes, making difficult choices or trade-offs. It necessitates having a clear vision of what are the management aims for a given marine space, agreeing on common priorities and reconciling competing interests. This can be an arduous process and one that is further complicated when attempting to build or create coherent *networks* of individual marine protected areas.

The Preamble to the 1992 *Convention on Biological Diversity* [CBD], after declaring “the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere”, asserts that “the conservation of biological diversity is a common concern of humankind”. Tanaka in his 2008 volume on ocean governance, along with other experts, believes that this reference to the “common concern of humankind” in the Preamble signals that the management of biological diversity under a State’s control is no longer simply an internal matter for that State. And indeed, the preamble to the CBD goes on to stress the importance of, and the need to promote, international and regional cooperation among various key actors.

The principal substantive obligations flowing from the Convention for its 196 State Parties (including Japan and seven of the Arctic States, the United States are signatories only) are listed in Article 8 of the Convention. At the head of the list of actions required of the Parties is the establishment of a “system of protected areas”. A number of high level meetings and soft law instruments have since taken up the call for the creation of a

⁴ See the IUCN’s Global Protected Areas Program, available at <www.iucn.org/about/work/programmes/gpap_home> and “Table 5:1: IUCN Protected Area Management Categories” reproduced in Appendix I.

⁵ The expression is borrowed from F. Côté and J. Finney, “Marine Protected Areas: An Essential Element of the Fisheries Management Toolbox” (2006), available at <www.parl.gc.ca/Content/LOP/ResearchPublications/prb0616-e.htm>.

system or network of protected areas including in the world's oceans and seas (see for example, among others, the 2002 Johannesburg Plan of Implementation or the 2003 Durban Action Plan).

The growing emphasis on the notion of a network or a system of MPAs is intrinsically linked to the international community's strengthened commitment to an ecosystem or holistic approach to ocean management. As the authors of the UNEP 2008 "Progress Report on National and Regional Networks of MPAs" comment, "[t]here is a particular need for networks of protected areas in the marine environment. Marine ecosystems and species, as well as coastal communities, are more closely connected in a number of ways than those on land."⁶

As the 2008 Report explains, networks represent a "scaling up" of protection and bring potential benefits that include, but are not limited to:

- Ensuring that all types of biodiversity (both species and ecosystems) are protected;
- Helping to maintain the natural range of species;
- Ensuring that protection of unique, endemic, rare and threatened species is spread over a fragmented habitat;
- Enabling adequate mixing of the gene pool to maintain natural genetic characteristics of the population;
- Bringing sectoral agencies together, and helping conservationists, fishery managers and other stakeholders with diverse interests to find a common goal;
- Allowing for a more efficient use of resources, through cost sharing.

Of course, while comprehensive and representative MPA networks undoubtedly provide an optimal framework around which decisions can be taken without compromising ecosystem sustainability, the concept does present huge challenges in terms of designing, coordinating, implementing and managing such complex systems. Where should the decision-making power reside? Is an oversight agency an essential ingredient for success? With what power or authority?

Instruments such as the 1982 *Law of the Sea Convention*, the CBD as well as declarations resulting from the Rio Earth Summit, the Durban Congress and other high profile

⁶ Summary provided by UNEP-WCMC, "National and Regional Networks of Marine Protected Areas: A Review of Progress" (2008), available at <www.unep.org/regionalseas/publications/otherpubs/pdfs/MPA_Network_report.pdf>.

meetings, may hold the key to overcoming these very real obstacles. Indeed, these multilateral international instruments, while promoting the global objective of conserving the oceans' natural wealth, have also repeatedly emphasized the need to envisage the protection of marine ecosystems at the regional level. Regional implementation, it appears, holds the best promise of converting noble global principles into concrete action while at the same time overcoming a patchwork of inconsistent and therefore ineffective national initiatives.

2. A Pan-Arctic Network of Marine Protected Areas

From the very outset in 1991, the Arctic Environment Protection Strategy [AEPS]⁷ identified the development of a network of protected areas as a “guiding principle”. And this important task was assigned to the Conservation of Arctic Flora and Fauna [CAFF] Working Group at the ministerial meeting held in Nuuk in 1993. In 1996, the Arctic States agreed to formalize their collaborative efforts through the creation of the Arctic Council. The Ottawa Declaration⁸ of September 1996, a framework document, does not specifically refer to the idea of protected areas but does reaffirm in its preamble, the commitment of the A8 to protecting the Arctic environment. And the preamble also refers to the important role of the Arctic Environmental Protection Strategy, a fact reinforced by the Joint Communiqué adopted at the same time as the Ottawa Declaration and which identifies the “integration or effective transition” of the AEPS into the Council as a top priority. In this way, the initial commitment to a “network of protected areas” under the AEPS was integrated as a core or guiding principle of the new Arctic Council.

In 1996, the CAFF Working Group presented a Circumpolar Protected Areas Network [CPAN] Strategy and Action Plan⁹ that included 5 action items relating specifically to MPAs. At the same time, CAFF adopted a set of CPAN Principles and Guidelines for Site Selection¹⁰ that addressed issues of governance and effectiveness and proposed a common set of guidelines for selecting sites. CAFF's Circumpolar Protected Areas Network was operational until 2010 at which point its work on protected areas was picked

⁷ “Arctic Environmental Protection Strategy”, Canada, Denmark, Finland, Iceland, Norway, Sweden, Union of Soviet Socialist Republics and United States, 14 January 1991, 30 *I.L.M.* 1624.

⁸ Arctic Council, “Declaration on the Establishment of the Arctic Council”, 19 September 1996, available at <oaarchive.arctic-council.org>.

⁹ < <https://oaarchive.arctic-council.org/handle/11374/154>>.

¹⁰ < <http://www.caff.is/expert-groups-series/93-cpan-principles-and-guidelines>>.

up by other Arctic Council projects and programs. Indeed since 2010, the Protection of the Arctic Marine Environment [PAME] Working Group has essentially taken the lead.

The Arctic Council's Working Groups have produced an impressive array of important and influential reports, documents and assessments: for example, CAFF's 1996 "Proposed Protected Areas in the Circumpolar Arctic"; CAFF's 2004 "CPAN Country Updates Report"; or AMAP/CAFF/SDWG's 2013 "Identification of Arctic Marine Areas of Heightened and Ecological and Cultural Significance" among many other reports and assessments. However, the primary focus of most of the documents is to evaluate, assess and identify marine areas including seascapes in need of some measure of protection. Indeed, for the last two decades, the Working Groups of the Arctic Council have been largely engaged in scientific fact gathering - a crucial task but only the first step in building a comprehensive and effectively managed regional network of marine protected areas.

Unfortunately, PAME's recent "Arctic Marine Strategic Plan 2015-2015"¹¹ is largely in the same vein. One need only look at Strategic Action 7.2.10: "Develop a pan-Arctic network of MPAs, based on the best available knowledge, to strengthen marine ecosystem resilience and contribute to human well-being, including traditional ways of life". As noted above, all eight Arctic States agreed 25 years ago on the need to develop an Arctic network of MPAs when they adopted the Arctic Environmental Protection Strategy in Rovaneimi, Finland.

So much of the focus of the last few decades seems to have been on selecting and designating MPAs while insufficient thought seems to have been devoted to the substance of the network and its management. There hasn't yet been much energy devoted to crafting a common vision and the difficult choices that will inevitably need to be made, to the trade-offs that will need to be carefully weighed. In the Arctic, despite all the various assessments and reports, we do not as yet have

"[a]n ecologically representative and well-connected collection of individual marine protected areas and other effective area-based conservation measures in the Arctic *that operate cooperatively*, at various spatial scales, and with a range of protection levels, in order to achieve the long-term conservation of the marine environment with

¹¹ PAME, "Arctic Marine Strategic Plan 2015-2025: Protecting Marine and Coastal Ecosystems in a Changing Arctic", approved in April 2015 at the 9th ministerial meeting in Iqaluit, Canada, available at <<http://www.pame.is/index.php/projects/arctic-marine-strategic-plan>>.

associated ecosystem services and cultural values more effectively and comprehensively than individual sites could alone."¹² [Emphasis added]

Yet PAME's 2015 "Framework for a Pan-Arctic Network of Marine Protected Areas", from which the above quote is taken, offers the promise of progress at long last. In this recent document, PAME, as the lead Working Group, appears to recognize that the Arctic Council and its various organs can no longer simply be in the business of identifying, listing and assessing. Rather, that the Arctic Council also needs to be in the business of coordinating, implementing and managing the emerging pan-Arctic network of MPAs. Indeed, the Table of Contents of the document specifically refers to "4.5 Steps for Network *Development*" and "6.0 Arctic Council *Implementation*".

PAME's Framework document acknowledges that "key" challenges will need to be overcome and they are fairly daunting: diverse and widely-dispersed stakeholder communities, variability in governance regimes and national priorities, sustainable funding, etc. However, the OSPAR Network of Marine Protected Areas may provide some guidance on the critical design component needed to help overcome these and other important obstacles.

The OSPAR¹³ Network of Marine Protected Areas in the North-East Atlantic is hailed, according to differing factors and indicia, as a success. It has, for example, thus far met the Aichi Biodiversity 2020 Target of having 10% of its coastal and marine areas within effectively managed and well-connected systems of protected areas in regards to the territorial waters of its State Parties and globally within its Region II (Greater Northern Sea); progress is steadily being made in other areas. It has also succeeded in establishing MPAs in marine areas beyond national jurisdiction.¹⁴

There are similarities between the evolution of the concept of a network of marine protected areas within the Arctic and in the North-East Atlantic. Whereas the Arctic 8 had already identified a "network of protected areas" as a guiding principle in 1991, it was only at the 1998 meeting of the OSPAR Commission that member States agreed to "promote the establishment of a network of MPAs to ensure the sustainable use and

¹² PAME, "Arctic Marine Strategic Plan 2015-2025: Protecting Marine and Coastal Ecosystems in a Changing Arctic", approved in April 2015 at the 9th ministerial meeting in Iqaluit, Canada, available at <<http://www.pame.is/index.php/projects/arctic-marine-strategic-plan>>.

¹³ *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, entered into force 25 March 1998, 2354 *U.N.T.S.* 67.

¹⁴ K. Hübner and M. Hauswirth, *2014 Status Report on the OSPAR Network of Marine Protected Areas* (2015), available at <<http://www.ospar.org/documents?v=33572>> .

protection and conservation of marine biological diversity and its ecosystems”.¹⁵ Since this commitment, the OSPAR network of MPAs has largely evolved through the work of the OSPAR Commission. Much like the Arctic Council Working Groups, the Commission has over the years, drafted a number of documents to help guide Member States. The 2003 OSPAR “Guidelines for the identification, selection and *management* of MPAs”¹⁶, for instance, echo CAFF’s 1996 “CPAN Principles and Guidelines for Site Selection”.

Yet, there are telling differences in the development of the MPA network in the two regions. For instance, it is noteworthy that the title of the 2003 OSPAR Guidelines specifically refers to the critical concept of management whereas the CPAN document does not. There is no equivalent Arctic Council document to the 2006 OSPAR “Guidance on Developing an Ecologically Coherent *Network* of MPAs”¹⁷. Perhaps most significantly, there is also no Arctic equivalent to the reporting obligations imposed on the OSPAR Member States. Since the adoption of Recommendation 2003/3, OSPAR Contracting Parties are obligated to report at the end of each calendar year to the Commission on any OSPAR MPAs selected and on any corresponding management plans adopted or amended during the year. Nor does PAME or any other Arctic Council Working Group prepare each year a review of the status of the actual network.

One of the key factors contributing to the progress and relative success of the OSPAR network of MPAs vis-à-vis the Arctic appears to be the role played by the OSPAR Commission as an effective and efficient centralized coordinating body. Indeed, a robust institutional framework is an essential element of success; there must be a clear allocation of a mandate, preferably a legal mandate, for MPA purposes to a designated agency or institution. This is certainly one of the key take-away messages from the IUCN World Commission on Protected Areas’ 2008 report: “Special authorities are needed to coordinate overlapping and complex jurisdictional arrangements.”¹⁸

The OSPAR Commission is the forum through which the parties cooperate¹⁹; it can adopt legally binding decisions as well as recommendations and guidelines. It should be noted however that OSPAR’s Executive Secretary emphasizes that OSPAR works “collaboratively and by consensus, with a work programme driven and delivered by its

¹⁵ *Ibid.*, at 7.

¹⁶ Available at <<http://www.ospar.org/work-areas/bdc/marine-protected-areas>>.

¹⁷ Available at <<http://www.ospar.org/work-areas/bdc/marine-protected-areas>>.

¹⁸ *Supra*, note 6.

¹⁹ <<http://www.ospar.org/about/how>>.

Contracting Parties”²⁰. Article 10 of the OSPAR Convention stipulates that the Commission has duties (a) to supervise the implementation of the Convention, and (b) generally to review the condition of the maritime area, the effectiveness of the measures being adopted, the priorities and the need for any additional or different measures.

The OSPAR Commission has played a critical role in defining clear and measurable objectives for the OSPAR MPA Network, which in turn, have allowed progress and individual State performance to be tracked. It has also provided Member States with *detailed* design principles for the network itself to help guide Member States in making some of those difficult choices and trade-offs. But perhaps most importantly, it has acted as a clearinghouse for Member State proposals; it has ensured ‘quality control’ as the network has evolved.

The 2003 OSPAR Guidelines set out a clear, 4-step process for the identification, selection and management of MPAs. Step 4 is absolutely vital and nothing like this type of vetting occurs at the Arctic Council: “Information to support the selection of a MPA within national jurisdiction should be compiled on the proforma given in Appendix 4. The information should be submitted to the OSPAR Commission”.

The proforma requires detailed information from member States under multiple headings, not only in terms of the ecological or cultural importance of a potential marine protected area but also, critically, how its designation will further the objectives of the network as a whole. Information must also be provided in regards to the degree of acceptance of a proposed MPA, “whether the establishment of the MPA has a comparatively high level of support from stakeholders and political acceptability”. Parties must also comment on the probability for success of proposed management measures and on their “ability to implement them such as legislation, relevant authorities, funding and scientific knowledge”.

The OSPAR Commission provides much needed clarity and cohesion; it helps harmonize priorities, governance structures and management tools. It plays a concrete and effective role in transforming what might be a morass of patchy and inconsistent national initiatives into an ecologically coherent and well-managed network of marine protected area. PAME’s 2015 “Framework” report acknowledges that developing a pan-Arctic network of MPAs will require “designated points of contact within each Arctic State and a mechanism within the Arctic Council to facilitate ongoing coordination”. The report

²⁰ OSPAR Commission, “Introduction from the Executive Secretary”, available at <<http://www.ospar.org/about/introduction>>.

identifies PAME's MPA Network Expert Group as the relevant mechanism to serve this ongoing coordination and network development function.

However, to achieve a truly coherent network of MPAs in the Arctic and thus ensure a holistic and integrated management of the region's ecosystems, PAME and its Expert Group will have to embrace a more proactive role. Much like the OSPAR Commission, it will have to become an effective coordinating body, responsible for the integrity and cohesion of the Arctic network itself. It will need to devise a robust centralized process that can yield improved physical, informational and managerial linkages. It must also provide the necessary clarity to avoid "competing mandates, overlaps, gaps and inefficiencies" which undermine the effectiveness of an MPA network. And in this process, it must ensure that the needs, concerns and knowledge of indigenous peoples are integrated in the evolving pan-Arctic marine strategy.