



***The BBNJ Treaty:
The decisive opportunity for the European Union and
China to be key players in the Arctic?***

Marco Volpe and Ana Belén López-Tárraga

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1. Introduction

Conventionally, the Arctic region is identified as the territories and marine areas above the Arctic Circle. While territorial sovereignty is well-defined and most respected by all Arctic Countries, delimitation of maritime rights has been a source of competition and contentions. However, thanks to bilateral agreements on those contentious parts, decennial disputes have been resolved. One remarkable example is the Agreement between Norway and Russia about the division of the area in the Barents Sea reached in 2010. One trigger point is represented by the "high seas", which consist of the open ocean not subject to the jurisdiction of any state, i.e., not part of the internal waters, territorial sea or exclusive economic zone (EEZ) of any state. The Central Arctic Ocean is the largest part of the High Seas of the Arctic Ocean, where all states enjoy equal rights to navigation and conducting scientific research and lay submarine cables and pipelines (Art. 87 UNCLOS).

Climate change and the shrinking of the polar ice cap are opening new opportunities for the development of commercial routes and chances to ease access to natural resources and critical minerals for the energy transition. Even though massive fishery activities in the Central Arctic Ocean are not yet carried out, many Arctic States have also applied for an extension of the continental shelves, which could provide them with additional rights in areas beyond national jurisdiction. The ban negotiated in 2018 on preventing unregulated fishing in the Central Arctic Ocean established a 16-year ban for unregulated fishing in the Central Arctic Ocean. The temporal horizon of the agreement leaves space for future commercial activities carried out by the big fishery powers.

After two decades of negotiations, United Nations members agreed on The United Nations High Seas Treaty, officially named the Treaty on Biodiversity Beyond National Jurisdiction (BBNJ). The agreement aims at enhancing international cooperation to tackle global issues related to oceans, such as climate change, pollution and biodiversity loss.

The relevance of the Treaty lies in the successful outcome of creating a common understanding of the High Seas marine resources management. The BBNJ Treaty has four main objectives:

- Establish marine protected areas (MPAs) to safeguard marine biodiversity.
- Regulate commercialisation of marine genetic resources.
- Equitable access to international waters to conduct scientific research.

- Set global standards for environmental impact assessments on commercial activities in the ocean.

2. The impact on the Arctic Ocean

First of all, it should be noted that the BBNJ treaty is the global consensus reached by UN member states after more than two decades of negotiations. It could harmonize previous agreements that have been adopted in this area, such as the 1992 Convention on Biological Diversity; the UN General Assembly agreement on Part XI of the United Nations Convention to Combat Desertification (UNCCD) on amendments to the deep seabed mining regime in 1994; and the agreement on straddling and highly migratory fish stocks, articles 63 and 64 of the UNCCD in 1995 (Tsuru, 2017). As well as the most recent agreement reached in 2018, by the EU, Canada, China, Denmark, Iceland, Japan, South Korea, Norway, Russia and the United States, to prevent unregulated fishing. The main objective of this agreement was to prevent illegal fishing in the Central Arctic Ocean through conservation and management measures to ensure the conservation and sustainable use of fish stocks within the framework of a strategy of cooperation and conservation of all signatory parties (European Commission, 2019).

Secondly, it must be stressed that the seas and oceans and their security are a resource of vital importance for the continuation of development for future generations. More than 80% of world trade is conducted by sea, two-thirds of oil and gas supplies are extracted from the sea or transported by sea and up to 99% of global data flows are transmitted by undersea cables (European Commission, 2023b). Thus, the BBNJ comes to establish that all future actions in waters beyond the jurisdiction of states will at all times respect the biodiversity of the oceans. The treaty establishes benefit-sharing for marine genetic resources and establishes clear rules for conducting environmental impact assessments. Most importantly, the treaty brings together all major parties in the international political sphere under the auspices of the United Nations (United Nations, 2023).

The ongoing relevance that the BBNJ will have for the Arctic Ocean will be vital. And around it, the EU seeks to be a leading actor because of the interests it has beyond the EU treaties that express the organisation's commitment to protect and improve the environment's quality and the management of the world's natural resources. For the EU and its member states, the seas and oceans mean the preservation of the economy and the feeding of its population. On the one hand, the EU-27 ranks seventh in the world in terms of fisheries production, ahead of the United States and Norway, and is therefore a very important economic activity. As an example of this, we can cite the case of Spain that during 2022 obtained the largest cod fishing quota in the waters of the Svaldbard archipelago of the entire European Union (Ministry of Agriculture, Fisheries and Food of Spain, 2022). On the other hand, the population of the countries that make up the EU, headed by Portugal and Spain, has a high

consumption of fish from the Arctic waters, especially salmon and cod (European Market Observatory for Fisheries and Aquaculture Products, 2022).

In view of this, and prior to the approval of the BBNJ, the European Commission launched COM(2023) 103 final communication on "The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management", in which it assesses the functioning of the Common Fisheries Policy, initiating a new phase of debate and cooperation between all parties in the fisheries sector (European Commission 2023a). And following the adoption of the BBNJ, it published its strategy on Maritime Security (European Commission 2023b), in which it states the need to raise awareness of the maritime situation in the Arctic and support bilaterally and through multilateral fora for the implementation of the Arctic policy.

In line with the EU, the new chairship of the Arctic Council puts the preservation of the Arctic Ocean marine environment at the forefront. Among the six measures proposed by the new Norwegian chairship are to develop tools for ocean management, protect ice-dependent species and ecosystems, organize an international conference on ecosystem-based ocean management, develop Arctic observation systems, take actions to combat marine litter, strengthen cooperation on emergency preparedness and safe shipping in the Arctic (Ministry of Foreign Affairs, Norway, 2023).

3. From a regional to a global perspective

The trans-regionality of the climate change-induced effects has facilitated many non-Arctic states to look at the Arctic as a global matter rather than a regional one. While regional and highly-disputed governance mechanisms have been created (such as the Ilulissat Declaration), room for non-Arctic stakeholders has consistently enlarged in the last few years. In these terms, the EU and China, as case studies, offer a nice opportunity to discuss non-Arctic stakeholder engagement from two very distant perspectives.

The European Union seeks to occupy a greater strategic position than it has had so far. China has constantly worked on enhancing its influence in the region and its stance in the Arctic governance.

But how does the implementation of the BBNJ impact the Arctic strategies of non-Arctic stakeholders?

To understand the European Union's perspective and its position in the Arctic and the BBNJ, we have to take into account four key points:

1. **Common Fisheries Policy:** fish is one of the essential elements in feeding the European population. That is why the European Union has exclusive competence in this area and carries out an exhaustive work on the distribution of fishing quotas among the different member states. Prior to the

approval of the BBNJ, the European Commission published COM(2023) 103 final *The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management* (European Commisison 2023a). Here it mentions the key role that the organization has played in the BBNJ agreement and the urgent need to protect the seas and oceans. The EU has committed to implementing this treaty through the EU Global Ocean Program with a budget of €40 million. The political situation has changed and the Arctic, besides being one of the areas that is suffering the greatest consequences due to climate change, is now suffering the effects of the conflict that Russia maintains with Ukraine and, by extension, with the Western bloc. It seeks to close an oceans and fisheries pact with member states, the scientific community and the fishing sector to ensure greater transparency on governance; full compliance with existing rules to ensure sustainable fishing; recognize the essential role of fishermen by showing them more support; and all oriented towards a future where relevance is given to research and innovation, thus contributing to climate neutrality. This document is a statement of intent that the EU says it will implement between 2023 and 2024.

2. **Maritime Safety:** the intentions expressed on the Common Fisheries Policy could not be carried out without considering maritime safety. Even more so in the current situation. Following what was already stated in the document published on March 21, 2022 *A Strategic Compass for Security and Defence For a European Union that protects its citizens, values and interests and contributes to international peace and security*, where it mentions that maritime security will be reinforced, the European Commission, a few days after the BBNJ was approved, published the communication JOIN (2023) 8 final *on the update of the EU Maritime Security Strategy and its Action Plan "An enhanced EU Maritime Security Strategy for evolving maritime threats"* (European Commisison 2023b). This lists ten strategic threats facing the EU at maritime level, articulated around maritime transport, environmental sustainability and resilience in the face of climate change. It presents six lines of action that will correct these threats, such as: stepping up activities at sea; cooperating with partners; leading in maritime domain awareness; managing risks and threats; enhancing capabilities; educating and training. Specifically in the Arctic, the EU will seek through this strategy to ensure sufficient satellite observation of new Arctic sea routes, in particular through Copernicus capabilities to improve situational awareness between now and 2025; and to participate in the work of the Arctic Council and related fora, as appropriate.
3. **European Arctic Policy:** since 2008 the EU has been developing its European Arctic policy. A series of policy documents that the organization has adapted to the evolution of events. Although environmental protection and indigenous communities are two priority factors, the current geopolitical situation has marked the policy, anticipating the Russia-Ukraine conflict. In the communication JOIN 21(final) *A stronger EU engagement for a peaceful,*

sustainable and prosperous Arctic, it points out that Russia and China are the two potential actors to keep an eye on. Because of their growing interest in the Arctic Ocean and the possibilities opening up there due to the effects of climate change. Already in this document, it expresses its commitment and work to reach the BBNJ agreement and underlines its desire to definitively obtain the official status of permanent observer in the Arctic Council. A position it has not yet obtained.

4. **Participation in the Arctic Council:** Participation in the Arctic Council is key to the European Union's position. While several EU member states are observer members (France, Germany, Italy, the Netherlands, Poland and Spain), the EU is not a full observer member. However, since the Kiruna ministerial meeting in 2013, it has been able to observe the council's work until the Arctic states' ministers make a final decision on its observer status. At subsequent meetings, there has been no concrete decision on the EU. The new Norwegian presidency of the Arctic Council in the next two years could be the final entry of the European Union into the Council. Initially, it seems that joining new observer members to the Arctic Council is not one of Norway's intentions during its presidency. The strategy published by Norway for the next two years does not mention the intention to grant observer status to any country or international organization. It may follow that the EU will have to wait until the 2025 ministerial meeting to find out if it will finally achieve permanent observer status. As far as the Oceans, particularly the Arctic Ocean, are concerned, Norway will be one of the factors where it will focus during the duration of its presidency.

China's position is also developed under four main points (Nong, 2023):

1. **Consistency with UNCLOS principles**
The BBNJ Treaty should be consistent with the object and purpose of UNCLOS freedoms and rights with respect to navigation, scientific research, and fishing. Rights and obligations of coastal States, including those concerning the continental shelf beyond 200 nautical miles, should not be affected.
2. **Marine genetic resources (MGRs)**
Genetic resources include microorganisms, plant varieties, animal breeds, genetic sequences, nucleotide and amino acid sequence information, traits, molecular events, plasmids, and vectors. They can be used to increase knowledge or understanding of the natural world, with activities ranging from taxonomic research to ecosystem analysis. This work is usually conducted by academic and public research institutes. China endorses the promotion of marine scientific research and innovation and sustains access to genetic resources.
3. **Area-based management tools (ABMTs),** including marine protected areas (MPAs). China insists that the object of the protection of MPAs should be marine biodiversity, and MPAs should be established based on the best available scientific evidence in areas that should be identified on a case-by-case basis.

4. **Environmental impact assessments (EIAs)**

China objects to including the so-called “adjacency principle” which is “a legal principle that could give coastal States additional rights or responsibility in relation to biodiversity in BBNJ proximate to their own national maritime jurisdictions” (Mossop and Schofield, 2020). China rather insists on applying the “due regard” concept which, basically, expresses an obligation. In UNCLOS the expression is used sixteen times and, for example, regarding the high seas, an obligation to have due regard is mentioned in the art. 87, where after listing freedom of navigation and scientific research on the high seas, it states: *“These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of freedom of the high seas”* (Hamamoto, 2019).

4. **Policy recommendations**

The BBNJ Treaty creates an international mechanism to improve the protection of marine biodiversity in areas beyond national jurisdiction and, pertaining to the Arctic region, empowers non-Arctic States to participate in maritime governance in the Central Arctic Ocean.

The EU knows that cooperation with China in the future is necessary and is therefore recalibrating its cooperation strategy. As stated by the High Representative of the European Union, Josep Borrell, these changes must be aligned on three elements: fundamental values, economic security and strategic security (Borrell, 2023). Cooperation to protect the Central Arctic Ocean can be a starting point showing the commitment of the European Union and China to establish new ties of cooperation. Therefore we strongly encourage the EU and China to take under consideration the following points:

- Actively participate in the COPs regarding the negotiation of mechanisms of the BBNJ Treaty to enhance their role in Arctic governance.
- China and the European Union should put aside current differences and work together on Central Arctic Ocean issues in coherence with the main objectives of the BBNJ Treaty.
- The European Union and China should work closely under the aegis of the Arctic Council in order to improve synergy among non-Arctic stakeholders.
- Strengthen and advance the “due regard” concept, which privileges the global perspective over the regional one.

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About the authors: **Marco Volpe** is PhD Researcher at the University of Lapland and Visiting Researcher at the Arctic Centre, University of Lapland. Email: mvolpe@ulapland.fi . **Ana Belén López-Tárraga** is PhD Researcher at the University



of Salamanca and Visiting Researcher at the Arctic Centre, University of Lapland.
Email: ablopez@usal.es / ana.tarraga@ulapland.fi

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