

CHAPTER ELEVEN

ARCTIC FISHERIES MANAGEMENT

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INTRODUCTION

Marine capture fisheries are among the maritime uses that are expected to expand and intensify in the Arctic. Fishing could intensify in existing fishing areas and expand into areas where marine capture fisheries have never taken place so far. According to some commentators, however, in the short term it is unlikely that abundance of fish stocks in the high seas portion of the Arctic Ocean will allow for commercially viable fisheries.² Others disagree while pointing to Polar cod (*Boreogadus saida*), which has a circumpolar distribution, both inshore and offshore, and may be highly abundant in view of the pivotal role it plays at the bottom of Arctic marine ecosystems.³ The adequacy of international law in light of the prospects of new Arctic fisheries has generated quite some literature in recent years.⁴

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² A.H. Hoel, "Living marine resources in the Arctic. Trends & opportunities", presentation dated 20 September 2011 at the 2nd Arctic Ocean Review (AOR) project workshop, Reykjavik (on file with the author).

³ See information available at <www.arcodiv.org>.

⁴ E.g. E.J. Molenaar "Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework" (2009) 1 *Yearbook of Polar Law* 427–463; D.A. Balton "Considering Future Arctic Fisheries" in M.H. Nordquist, T.H. Heidar and J.N. Moore (eds) *Changes in the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers, The Hague: 2010) 401–407; L. Ridgeway "Issues in Arctic Fisheries Governance: A Canadian Perspective", in *ibid*, 409–446; E.J. Molenaar "Perspective: Law and Policy Dimensions" in Proceedings of the *International Arctic Fisheries Symposium. Managing Resources for a Changing Arctic* (February 2010; available at <www.nprb.org/iafs2009>) 23–32; R. Barnes "International Regulation of Fisheries Management in Arctic Waters" (2011) 54 *German Yearbook of International Law* 193–230; and E.J. Molenaar

There are a number of (potentially) significant commercial fish stocks in the marine Arctic. The ranges of distribution of some of these are confined to the North Pacific or the North Atlantic, while others have a circumpolar distribution. Important North Pacific fish stocks include Alaska pollock (*Theragra chalcogramma*), Pacific cod (*Gadus macrocephalus*), snow crab (*Chionoecetes opilio*) and various Pacific salmon species (*Oncorhynchus* spp.). As regards the North Atlantic, important fish stocks include North-East Arctic cod (*Gadus morhua*), haddock (*Melanogrammus aeglefinus*), Norwegian spring-spawning (Atlanto-scandian (AS)) herring (*Clupea harengus*), Atlantic salmon (*Salmo salar*) and red king crab (*Paralithodes camtschaticus*). Significant circumpolar fish stocks include capelin (*Mallotus villosus*), Greenland halibut (*Reinhardtius hippoglossoides*) and northern shrimp (*Pandalus borealis*). Polar cod and Arctic char (*Salvelinus alpinus*) also have circumpolar distribution, but the former is only marginally targeted by commercial fisheries and the latter is predominantly fished for subsistence purposes.⁵

While Arctic marine ecosystems have always been highly dynamic and variable, both qualitatively and quantitatively,⁶ the impacts of climate change on the marine Arctic (e.g. increasing water temperature, reduced sea-ice coverage and thickness, reduced salinity and increasing acidification)⁷ are likely to make these changes both more extensive and probably also more difficult to predict. Some existing fish stocks may collapse and never recover, others may become more dominant, and new fish species may successfully establish themselves in the marine Arctic. The various assessments and projects currently undertaken within the Arctic Council, such as the Arctic Biodiversity Assessment, the Arctic Change Assessment and the Arctic Resilience Report, are expected to shed more light on this.

This chapter relates to marine capture fisheries that target 'fishery resources', which are defined as fish, molluscs, crustaceans and (other) sedentary species. Inland fisheries, aquaculture and harvesting of marine mammals are thus excluded. For the purpose of this chapter, the term regional fisheries management

"Arctic Fisheries and International Law. Gaps and Options to Address Them" (2012) *Carbon & Climate Law Review* No. 1, 63–77.

⁵ For information on fish and fisheries see, *inter alia*, Chs. 12 and 13 of the Scientific Report of the 2004 Arctic Climate Impact Assessment (ACIA; available at <www.amap.no/acia>); Phase I Report (2009–2011) of the AOR project (available at <www.pame.is>) 30–31; D. Zeller, S. Booth, E. Pakhomov, W. Swartz and D. Pauly "Arctic fisheries catches in Russia, USA, and Canada: baselines for neglected ecosystems" (2011) 34 *Polar Biology* 955–973; the information available at <arcticportal.org/fishing-portlet>; *Report of a Meeting of Scientific Experts on Fish Stocks in the Arctic Ocean. Anchorage, Alaska, June 15–17, 2011* (on file with the author); and R. Sumaila "Arctic fisheries—valuable resources" (2012) *The Circle* (WWF) No. 2, 6–9.

⁶ AOR Phase I Report, note 5 at 15.

⁷ Anchorage 2011 Science Meeting Report, note 5 at 1–2.

organization (RFMO) includes a so-called 'Arrangement'⁸ unless specifically indicated otherwise. As explained in chapter 1, there are no generally accepted geographical definitions for the terms 'Arctic', 'marine Arctic' and 'Arctic Ocean'. For the purpose of this chapter, the term 'marine Arctic' corresponds to the marine waters included within the boundary agreed by the Arctic Council's Conservation of Arctic Flora and Fauna (CAFF) working group; as shown in Figure 1.2 in chapter 1. The 'Arctic Ocean' is defined in this chapter as the marine waters north of the Bering Strait, Greenland, Svalbard, and Franz Josef Land, excluding the Barents Sea. Canada, Denmark/Greenland, Norway, the Russian Federation, and the United States are 'Arctic Ocean coastal states'. These five and Finland, Iceland, and Sweden are 'Arctic states' by virtue of their membership of the Arctic Council. There are four high seas pockets in the marine Arctic, namely 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 so-called 'Central Arctic Ocean'.

The common research framework of this book is in this chapter first of all pursued by means of the section 'Relevant International Fora and Instruments', with subsections on 'Global Fora and Instruments', 'Regional and Bilateral Fisheries Fora and Instruments' and the 'Arctic Council and Arctic Council System (ACS)'. This is followed by a section devoted to 'Gaps in International Fisheries Fora and Instruments relating to the Arctic Ocean and Potential Options to Address Them'. Finally, the section 'Conclusions' offers a synthesis.

RELEVANT INTERNATIONAL FORA AND INSTRUMENTS

Global Fora and Instruments

While chapter 10 contains an overview of global fora and instruments that are relevant for the conservation and management of marine capture fisheries in

⁸ See the definition in art. 1(1)(d) of the Fish Stocks Agreement (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (2167 UNTS 3)), whose main conditions are consistency with international law and a purpose that falls within the scope of the Fish Stocks Agreement. This does not prevent states from establishing an Arrangement with a purpose that extends beyond the scope of the Fish Stocks Agreement, for instance because it also deals with discrete high seas fish stocks. Such Arrangements must nevertheless comply with other rules of international law, including the LOS Convention (United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 396)) and customary international law. It is this broader meaning of the term Arrangement that is adopted in this chapter. The main differences between an RFMO's constitutive instrument and an Arrangement are that the latter (a) does not establish an international organization, (b) does not have to be legally binding and (c) can be bilateral.

general, this subsection examines their relevance for Arctic marine capture fisheries in particular. As regards participation in relevant global fora and instruments, it should be noted that all Arctic states, including the United States, are parties to the Fish Stocks Agreement.⁹ Among the (potentially) significant non-Arctic distant water fishing states, China is not a party to the Fish Stocks Agreement.

The instruments by which RFMOs are established are all 'stand-alone' instruments, and are not in one way or another attached to the LOS Convention¹⁰ or the Fish Stocks Agreement. A regional Implementing Agreement or a regional Protocol to the LOS Convention or the Fish Stocks Agreement does not exist and may also never have been proposed, but is theoretically possible. As these would be negotiated under the United Nations General Assembly (UNGA), however, it is extremely unlikely that they would be acceptable to not only regional coastal states but also key flag states, because participation in such negotiations would be open to all United Nations (UN) Members and would presumably be conducted pursuant to standard UN rules of procedure or rules of procedure agreed ad hoc by participants. Regional coastal states and key flag states would thus lose the principal role and influence they commonly have in negotiating-processes to establish RFMOs.

It is submitted, however, that this does not mean that issues relating to Arctic (Ocean) fisheries are entirely outside the mandate of the UNGA, the annual Informal Consultations of States Parties to the Fish Stocks Agreement (ICSPs) or the ongoing Review Conference of the Fish Stocks Agreement (FSA Review Conference). These bodies may for instance have a mandate in case the actions or inactions of all or certain groups or categories of states are actually or potentially inconsistent with applicable obligations under international fisheries law. This may have been the rationale behind various European Union (EU) proposals for the 2009 UNGA 'Oceans' and 'Sustainable Fisheries' Resolutions.¹¹ One of these was for an operative paragraph in the 2009 Sustainable Fisheries Resolution, the final version of which read:

OP 104bis: *Calls upon* States to conduct further research on fish resources and ecosystems in the high seas, in the context of climate change, including in the Arctic Ocean, and to consider the need to establish appropriate regulatory framework[s] in advance of establishing new fisheries or expanding current fisheries in areas affected by climate change.¹²

This text contains several elements of a French non-paper, but not its more far-reaching proposal for a moratorium on new fisheries until regulations are

⁹ Note 8.

¹⁰ *Ibid.*

¹¹ UNGA *Official Records*, doc. A/64/PV.56, at 3–4.

¹² Based on information provided by an official of the European Commission to the author by email on 20 January 2010. See also UNGA *Official Records*, doc. A/64/PV.56, at 4.

in place.¹³ It should be pointed out, however, that the latter proposal was also incorporated in the EU's 2009 'Council conclusions on Arctic issues'¹⁴ and is to some extent similar to the decision by the United States to prohibit commercial fishing in the exclusive economic zone (EEZ) off Alaska in the Arctic Ocean "until information improves so that fishing can be conducted sustainably and with due concern to other ecosystem components".¹⁵

Most of the Arctic Ocean coastal states—except possibly the United States in view of its own action on Arctic fisheries—strongly opposed the EU's proposals on a number of grounds, one of which was the inappropriateness of singling out a particular region. It is submitted, however, that references to a particular region are not precluded as such, and that earlier 'Sustainable Fisheries' Resolutions have also singled out particular regions in various ways and for various purposes.¹⁶ During the plenary debates on the 2009 'Oceans' and 'Sustainable Fisheries' Resolutions, Norway stated that climate change may lead to "new opportunities to exploit previously inaccessible resources", which would require "orderly and sustainable use", and that the five Arctic Ocean coastal states "have a special responsibility in that regard".¹⁷ No mention was made of a role for other states or the UNGA.¹⁸ In the end, only the 2009 'Oceans' Resolution included a very general preambular paragraph with no mention of fisheries issues.¹⁹ This result and the Norwegian statement indicate that, apart from the United States, Arctic Ocean coastal states took the view that the UNGA had no role in relation to Arctic fisheries; certainly not in developing regional Arctic fisheries regulations under its auspices but also not even in raising the need of their establishment

¹³ "non papier" de la délégation française: positions proposées pour le premier tour de négociations sur la résolution "pêches" AGNU 2010. Document interne', on file with the author.

¹⁴ 2985th Foreign Affairs Council Meeting, Brussels, 8 December 2009, at 3 (para. 10).

¹⁵ S. E.S. 1.2, at ES-2 of the Arctic Fishery Management Plan (FMP) adopted by the United States North Pacific Fishery Management Council on 5 February 2009, effective 3 December 2009 (50 *CFR* Part 679; Federal Register, Vol. 74, No. 211, of 3 November 2009, 56734 (all available at <www.fakr.noaa.gov/npfmc>).

¹⁶ E.g. the 2008 Sustainable Fisheries Resolution (Res. No. 63/112, doc. A/RES/63/112, of 24 February 2009), at paras. 83–84, 86–87, 105 and 115.

¹⁷ UNGA *Official Records*, doc. A/64/PV.56, at 16. See also the phrase "Arctic Ocean coastal states have a unique interest and role to play in current and future efforts for the conservation and management of fish stocks in this region" that is included in the Chair's Summary of the Arctic Ocean coastal states meeting in March 2010 (note 67).

¹⁸ It is assumed that the official records are correct on this point as such an omission would have been crucial and is highly likely to have been rectified by Norway.

¹⁹ It reads:

"Reiterating its deep concern at the vulnerability of the environment and the fragile ecosystems of the polar regions, including the Arctic Ocean and the Arctic ice cap, particularly affected by the projected adverse effects of climate change" (Res. No. 64/71, doc. A/RES/64/71, of 12 March 2010, at 3).

per se. While the EU may initially have considered to raise the issue of Arctic fisheries in the UNGA again, the official records of the plenary debates on the 2010–2012 ‘Oceans’ and ‘Sustainable Fisheries’ Resolutions do not indicate any discussion on it. The 2009 preambular paragraph was nevertheless retained in the 2010–2012 ‘Oceans’ Resolutions.²⁰

A role for the FAO is highly unlikely as well. Since 1993, when the IOTC Agreement²¹ was adopted, no constitutive instrument for an RFMO with a (partial) high seas mandate has been adopted within the framework of the FAO. Several parties to the IOTC Agreement currently prefer bringing it in one way or another outside the framework of the FAO in order to better facilitate the participation of Taiwan (Chinese Taipei).²² Arctic Ocean coastal states are also unlikely to be interested in the various types of assistance that FAO could offer to bodies established within its framework and their members. Finally, neither Arctic Ocean coastal states nor key high seas fishing states and entities would be supportive of negotiations within the framework of the FAO for reasons similar to those mentioned above in relation to negotiations under the auspices of the UNGA.

Regional and Bilateral Fisheries Fora and Instruments

Introduction

A considerable number of regional and bilateral fisheries fora and instruments apply to parts of the marine Arctic. A distinction can be made between fisheries fora and instruments that apply only to specific more southerly waters of the marine Arctic and those that also apply to the Arctic Ocean. This distinction is useful for several reasons. First, compared to the more southerly waters, there are considerable shortcomings in the data, knowledge and insight that is required for science-based and ecosystem-based fisheries management in the Arctic Ocean. Second, while there are large-scale commercial fisheries in the more southerly waters, there are currently mainly small-scale subsistence fisheries and no significant commercial fisheries in the Arctic Ocean, and no fisheries at all in the Central Arctic Ocean. Third, while the more southerly areas are adequately covered by regional and bilateral fisheries instruments and bodies, the ensuing discussion will show that there are significant gaps in the coverage of the Arctic Ocean.

²⁰ Res. No. 65/37, doc. A/RES/65/37, of 17 March 2011, at 3; Res. No. 66/231, doc. A/RES/66/231, of 5 April 2012, at 3; and 2012 draft ‘Oceans’ Resolution, doc. A/67/L.21, of 23 November 2012, at 3.

²¹ Agreement for the Establishment of the Indian Ocean Tuna Commission of 25 November 1993 (available at <www.iotc.org>).

²² See, *inter alia*, the Report of the 2011 IOTC Meeting (available at <www.iotc.org>), at 35 and 105.

The main regional and bilateral fisheries fora and instruments that apply to certain more southerly waters of the marine Arctic but not to the Arctic Ocean are:

1. the bilateral (Canada and the United States) International Pacific Halibut Commission (IPHC), established by the IPHC Convention;²³
2. the bilateral (Canada and the United States) Yukon River Panel of the bilateral Pacific Salmon Commission (PSC), established by the Pacific Salmon Treaty;²⁴
3. the North Pacific Anadromous Fish Commission (NPAFC), established by the NPAFC Convention;²⁵
4. the Western and Central Pacific Fisheries Commission (WCPFC), established by the WCPFC Convention;²⁶
5. the Conference of the Parties (COP) to the CBS Convention;²⁷
6. the North Atlantic Salmon Conservation Organization (NASCO) established by the NASCO Convention;²⁸
7. the International Commission for the Conservation of Atlantic Tunas (ICCAT) established by the ICCAT Convention;²⁹
8. the Northwest Atlantic Fisheries Organization (NAFO), established by the NAFO Convention;³⁰
9. the trilateral Loophole Agreement between Iceland, Norway and the Russian Federation;³¹ and

²³ Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea of 2 March 1953 (222 UNTS 78). Exchange of Notes Constituting an Agreement to Amend the [IPHC Convention] of 29 March 1979 (1168 UNTS 380).

²⁴ Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon of 28 January 1985 (1469 UNTS 358, as amended; consolidated version available at <www.psc.org>). The Yukon River Panel was established by means of the Yukon River Salmon Agreement of 4 December 2002, which added Ch. 8 to the Pacific Salmon Treaty.

²⁵ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean of 11 February 1992 (22 *Law of the Sea Bulletin* 21 (1993); <www.npafc.org>).

²⁶ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, of 5 September 2000 (2275 UNTS 46).

²⁷ Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea of 16 June 1994 (34 *ILM* 67).

²⁸ Convention for the Conservation of Salmon in the North Atlantic Ocean of 2 March 1982 (1338 UNTS 33).

²⁹ International Convention for the Conservation of Atlantic Tunas of 14 May 1966 (673 UNTS 63, as amended; consolidated version available at <www.iccat.int>).

³⁰ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, of 24 October 1978 (1135 UNTS 369). Lisbon Amendment of 28 September 2007. Not in force (at 27 November 2012), NAFO/GC Doc. 07/4.

³¹ Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation Concerning Certain Aspects of Co-operation in the Area of Fisheries of 15 May 1999 (41 *Law of the Sea Bulletin* 53 (1999)). This Agreement is complemented by two Protocols between Iceland and Norway and Iceland and

10. the numerous bilateral and multilateral agreements and arrangements establishing total allowable catches (TACs), allocations of fishing opportunities and mutual access to maritime zones between coastal states (including the EU) in the North-East Atlantic.³²

While the fora and instruments under Nos. 1–5 apply to certain more southerly waters of the marine Arctic in the Pacific, Nos. 6–10 apply to certain more southerly waters of the marine Arctic in the Atlantic.

The remainder of this subsection focuses only on the main regional and bilateral instruments that also apply to the Arctic Ocean. It begins with a subsection on 'NEAFC', followed by a subsection on the 'Joint Norwegian-Russian Fisheries Commission' (Joint Commission) and concludes with a subsection on 'Other regional and bilateral fora and instruments'. Bilateral and regional fora and instruments on anadromous or tuna and tuna-like species are not examined further. It can nevertheless be noted that significant occurrence of tuna and tuna-like species in the Arctic Ocean is not expected in the short or medium term, but that this may well be different for anadromous species.

While no separate subsection is devoted to a discussion of the Spitsbergen Treaty³³ and its application to the maritime zones of Svalbard, the following can be noted: due to the fundamental disagreement on the spatial scope of the Spitsbergen Treaty that exists between Norway and most other parties to the Treaty, Norway has not established an EEZ but a fisheries protection zone (FPZ) around Svalbard. Several states have fisheries access to the territorial waters and FPZ of Svalbard, which they regard as based on the provisions of equal access laid down in the Spitsbergen Treaty.³⁴

NEAFC

The North-East Atlantic Fisheries Commission (NEAFC) was established by the NEAFC Convention³⁵ and currently has five members and three cooperating

the Russian Federation respectively, which are currently in force (see E.J. Molenaar "Fisheries Regulation in the Maritime Zones of Svalbard" (2012) 27 *International Journal of Marine and Coastal Law* 3–58 at 35).

³² For a discussion on some of these see R.R. Churchill "Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages—but How Effective a Management?" in O.S. Stokke (ed.) *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford University Press, Oxford: 2001) 235–272, and Molenaar, note 31 at 26–45.

³³ Treaty concerning the Archipelago of Spitsbergen of 9 February 1920 (2 LNTS 7).

³⁴ For further discussion see, *inter alia*, Molenaar, note 31.

³⁵ Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries of 18 November 1980 (1285 UNTS 129). 2004 Amendments (Art. 18bis), London; 12 November 2004. Not in force (at 27 November 2012), but provisionally applied by means of the 'London Declaration' of 18 November 2005. 2006 Amendments, London (Preamble,

non-contracting parties (cooperating NCPs). Current members are Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway and the Russian Federation. Cooperating NCP status for 2013 was granted to Canada, New Zealand and Saint Kitts and Nevis.³⁶ Whereas Cuba can accede to the NEAFC Convention whenever it wishes, other states must apply for accession and obtain the backing of three-fourths of the membership.³⁷ Apart from Lithuania's application in 2003,³⁸ which was withdrawn or became irrelevant once it became an EU Member State in 2004, no applications seem to have been made.

NEAFC's Recommendations can apply to all or part of the 'Convention Area' or all or part of the much smaller 'Regulatory Area'. The term 'Convention Area' is defined in article 1(a) of the NEAFC Convention and comprises areas within national jurisdiction (or: maritime zones of coastal states) as well as areas beyond national jurisdiction. Pursuant to subparagraph (a)(1), the Convention Area covers a segment of the Arctic Ocean extending up to the geographical North Pole. The term 'Regulatory Area' is defined in article 1(b) of the NEAFC Scheme of Control and Enforcement (NEAFC Scheme)³⁹ as "the waters of the Convention Area, which lie beyond the waters under the fisheries jurisdiction of Contracting Parties". This high seas area includes not only the Banana Hole and the Loophole but also a part of the Central Arctic Ocean.

The NEAFC Recommendations on specific fish species in effect for 2012, concerned pelagic species (e.g. Norwegian spring-spawning (Atlanto-Scandian) herring and blue whiting), deep-sea species (e.g. orange roughy) and various shark species (for which directed fishing is prohibited).⁴⁰ Most of these recommendations are based on article 5 of the NEAFC Convention and thus relate exclusively to the Regulatory Area. The 2012 Annual NEAFC Meeting could not adopt recommendations on, *inter alia*, herring and blue whiting for 2013, as no coastal state agreements had been achieved for these species by that time.⁴¹

Arts 1, 2 and 4), 11 August 2006. Not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005. 2004 and 2006 Amendments, NEAFC Recommendations and NEAFC Reports are available at <www.neafc.org>. For a discussion see also Churchill, note 32.

³⁶ Report of the 2012 Annual NEAFC Meeting, at 10–11. Belize's re-application for 2013 was not approved by NEAFC. Japan and the Cook Islands decided not to re-apply for cooperating NCP status for 2012 (Report of the 2011 Annual NEAFC Meeting, at the Executive Summary).

³⁷ Paras. (1) and (4) of art. 20 of the NEAFC Convention. Cuba was a party to the NEAFC Convention's predecessor and is currently still a party to the NAFO Convention.

³⁸ Report of the 2003 Annual NEAFC Meeting, at Annex D.

³⁹ As amended at the 2012 Annual NEAFC Meeting; version in effect from 8 February 2013.

⁴⁰ Available at <www.neafc.org>.

⁴¹ Report of the 2012 Annual NEAFC Meeting, at 5–6.

For most regulated species, coastal states have a very dominant role in the process of the establishment of the TAC and its allocation. They first agree together on an overall coastal state TAC⁴² while taking account of the scientific advice provided by the International Council for the Exploration of the Sea (ICES). However, as the ICES advice relates to the entire stock, the coastal states effectively determine the high seas TAC as well. The coastal states also allocate the coastal state TAC between them without specifying which part of coastal state allocations should be caught within or beyond areas under national jurisdiction.⁴³ NEAFC is then charged with setting and allocating the high seas TAC.⁴⁴ Even though room for maneuvering seems limited, it should not be forgotten that there are only five members of NEAFC and almost all are regarded as coastal states with respect to all three main straddling fish stocks regulated by NEAFC.⁴⁵

None of the current cooperating NCPs have fishing opportunities specifically allocated to them, even though NEAFC reserved small allocations for them in the past.⁴⁶ In 2003, NEAFC adopted 'Guidelines for the expectation[s] of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area'.⁴⁷ These indicate that new entrants should not expect too much because allocations may only be granted for new fisheries.⁴⁸

The relevance of NEAFC Recommendations for the Arctic Ocean should not be overestimated, however. While most of the species-specific NEAFC Recommendations mentioned above apply within the entire Regulatory Area and occasionally also within the entire Convention Area, none of the species involved currently occur in significant numbers in the Arctic Ocean. More concretely relevant are

⁴² E.g. the 'Agreed Record of Conclusions of Fisheries Consultations between the Faroe Islands, the European Union, Iceland and Norway on the Management of Blue Whiting in the North-East Atlantic in 2011', London, 19 October 2010 (on file with the author). See also the "Performance Review Panel Report of the North East Atlantic Fisheries Commission, NEAFC" (November 2006), at 14 and 17.

⁴³ E.g. the Agreed Records on Blue Whiting for 2011, note 42 at Annex I, para. (4).

⁴⁴ With respect to blue whiting, see e.g. Recommendation I: 2011 'The North-East Atlantic Fisheries Commission at its Annual Meeting on 12 November 2010 Adopted, in accordance with Article[s] 5 and 6 of the Convention, Conservation and Management Measures for Blue Whiting (*Micromesistius poutassou*) in the NEAFC Convention Area in 2011.'

⁴⁵ The Russian Federation is not regarded as a coastal state for blue whiting and mackerel and Greenland is not regarded as a coastal state for blue whiting.

⁴⁶ Cf. E.J. Molenaar "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations" (2003) 18 *International Journal of Marine and Coastal Law* 457–480 at 470.

⁴⁷ Available at <www.neafc.org>, under 'Becoming a party'.

⁴⁸ Once a state is a contracting party, however, it is also entitled to use the 'opting-out' procedure laid down in art. 12(2) of the NEAFC Convention. Actual recourse to the procedure by a new contracting party is nevertheless expected to trigger substantial political pressure by the other contracting parties.

several non-species-specific recommendations and the NEAFC Scheme, which apply to the Arctic Ocean segment of the Regulatory Area or the Convention Area. While the recommendations on bottom fisheries⁴⁹ appear at first sight especially relevant, due to the considerable depth of the Arctic Ocean segment of the NEAFC Regulatory Area there may not be significant quantities of bottom species there. As regards the NEAFC Scheme, mention can be made of its Chapter V on 'Port State Control of foreign fishing', which applies to all "frozen catch [...] of fisheries resources that have been caught in the Convention Area"⁵⁰ and thereby includes species subject to specific regulation by NEAFC, the Joint Commission or neither.

Somewhat similar conclusions can be drawn about the relevance of NEAFC Recommendations for the Barents Sea, including the Loophole. None of the species for which NEAFC has adopted specific recommendations—and that allow targeted fishing—currently occur in significant quantities in the Barents Sea.⁵¹ Moreover, except for one area, most of the Loophole is categorized as 'Existing fishing area' under NEAFC's Recommendations on bottom fishing.⁵² The next subsection contains some further observations on the relationship between NEAFC and the Joint Commission.

Joint Norwegian-Russian Fisheries Commission

Bilateral cooperation on fisheries between Norway and the Russian Federation takes place predominantly within the Joint Commission established by the bilateral Framework Agreement.⁵³ This Agreement was adopted against the background of the failure to resolve the delimitation of the two states' maritime zones in the Barents Sea and was complemented by two other agreements, namely the Mutual Access Agreement⁵⁴ and the Grey Zone Agreement.⁵⁵ As the Murmansk

⁴⁹ See the consolidated 'Regulations on Bottom Fishing Activities in the NEAFC Regulatory Area', adopted in 2011 and last amended in 2012 (available at <www.neafc.org>).

⁵⁰ Art. 20.

⁵¹ Juveniles of some of these species nevertheless occur in the Barents Sea.

⁵² Regulations on Bottom Fishing Activities in the NEAFC Regulatory Area, note 49 at 10.

⁵³ Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry of 11 April 1975 (983 UNTS. 7). It should be noted that art. III of the 1975 Agreement speaks of the "Mixed Commission". More generally on the Joint Commission see O.S. Stokke *Disaggregating International Regimes: A New Approach to Evaluation and Comparison* (MIT Press, Cambridge (MA): 2012) and O.S. Stokke "The Loophole of the Barents Sea Fisheries Regime" in Stokke note 32, 273–301.

⁵⁴ Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Kingdom of Norway Concerning Mutual Relations in the Field of Fisheries of 15 October 1976 (1157 UNTS. 146).

⁵⁵ *Avtale mellom Norge og Sovjetunionen om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet* (Agreement between Norway and the Soviet Union on

Treaty⁵⁶ resolved the maritime delimitation dispute, the Grey Zone Agreement was not renewed and is therefore no longer in force.

The Framework Agreement consists of only six articles with the broad and general wording on cooperation and coordination that is often found in framework instruments. The Joint Commission is established pursuant to article III. The Agreement devotes no attention to decision-making but as the Joint Commission is a bilateral body, it is evident that this occurs by consensus. As regards the Agreement's spatial scope, nothing in its title, Preamble or body is explicitly devoted to this. The Agreement—and thereby the mandate of the Joint Commission—is therefore not exclusively confined to the maritime zones of the two states, the high seas or the Barents Sea. Fisheries for species whose distributional ranges extend into the Loophole or beyond the Barents Sea into the Norwegian Sea, the Greenland Sea or the Arctic Ocean—including the Banana Hole and the Central Arctic Ocean—therefore fall in principle within the Joint Commission's mandate. The Murmansk Treaty deals with fisheries in its article 4 and Annex I, which maintain the status quo on the allocation of fishing opportunities but embrace the precautionary approach. Neither the Framework Agreement nor the Murmansk Treaty contains provisions on new members of the Commission.

As regards the Loophole, the Joint Commission has actually exercised its competence over an extensive period of time, including by discouraging fishing by third states. This unique situation is discussed further below. The Banana Hole has not been subject to a similar exercise of competence, however. This is understandable because the Russian Federation is not a coastal state to the Banana Hole, while Denmark (in relation to both the Faroe Islands and Greenland) and Iceland are. The EU and other third states are also unlikely to accept the Joint Commission to exercise competence over the Banana Hole if this would be done similarly to the Loophole. The Joint Commission's management and conservation measures may nevertheless apply—or have been applicable already—to the Banana Hole on a flag state basis; meaning applicable to vessels flying the flag of Norway and the Russian Federation wherever they operate.

The Joint Commission's competence over the Arctic Ocean has been asserted on several occasions. First, the full title of the Murmansk Treaty confirms that bilateral cooperation also relates to the Arctic Ocean. Second, at its 2009 Annual Meeting, the Joint Commission decided to submit a request to ICES on the monitoring of the distribution in the Arctic Ocean of the stocks managed by

provisional practical arrangements on fishing in an adjacent area of the Barents Sea) of 11 January 1978 (*Overenskomst med fremmede stater* (1978), 436).

⁵⁶ Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010 (English text available at <www.un.org/Depts/los>).

the Commission.⁵⁷ ICES responded in June 2011 that it “is possible to monitor the geographic distribution of these stocks in the ice-free parts of the Arctic Ocean once a year, using existing survey methodology. This could be coordinated by existing ICES expert groups”.⁵⁸ At its 2012 Annual Meeting, the Joint Commission agreed to continue to monitor developments in the Arctic Ocean but did not decide on further steps vis-à-vis ICES.⁵⁹

It is submitted that the assertion of the Joint Commission’s competence over the Arctic Ocean relates first of all to areas adjacent to the Barents Sea that are part of the maritime zones of Norway and the Russian Federation. While its constitutive instrument would also allow the Commission to exercise competence over the Central Arctic Ocean, this would be problematic in view of the similarities with the Banana Hole. Canada, Denmark/Greenland and the United States are also coastal states to the Central Arctic Ocean and other third states and entities, including members of NEAFC, are unlikely to accept the Joint Commission to exercise competence over the Central Arctic Ocean if this would occur in ways similar to the Loophole.⁶⁰

The focus of the Joint Commission’s work is on demersal species, including cod (Norwegian Arctic cod and coastal cod), (North-East Arctic) haddock and Greenland (North-East Arctic) halibut, but its work also relates to (Barents Sea) capelin, harp seals, red king crab and several relatively small fish stocks. For most species, the Joint Commission determines TACs based on advice provided by ICES on the joint request by the two members. In addition to allocating fishing opportunities and access between the two members—including for stocks whose TACs have been established through other processes⁶¹—, the Joint Commission has also allocated fishing opportunities to third states (including the EU) on cod, haddock, and Greenland halibut. For 2013, third states were allocated 139,520 tonnes of cod, 12,692 tonnes of haddock (as by-catch) and 700 tonnes of Greenland halibut. Whereas the allocation of Greenland halibut is specifically earmarked for the ‘Svalbard area’, the other allocations are divided between the Svalbard area and the EEZs of mainland Norway and the Russian Federation.⁶²

A unique feature of the practice of the Joint Commission is its encouragement of third states and entities to discontinue, or not to commence, fishing for

⁵⁷ Para. 14.1 of the Protocol of the 2009 Annual Joint Commission Meeting (available at <www.jointfish.no>; translated with ‘Google translate’).

⁵⁸ Special request Advice June 2011, subject ‘Monitoring of Arctic Ocean fish stocks’; on file with the author.

⁵⁹ Para. 15.2 of the Protocol of the 2012 (42nd) Annual Joint Commission Meeting (on source see note 57).

⁶⁰ IAFS Proceedings, note 4 at 26.

⁶¹ E.g. blue whiting (see note 42).

⁶² Appendices 3 and 4 to the Protocol of the 2012 (42nd) Annual Joint Commission Meeting (on source see note 57).

particular species in the Loophole and thereby not to exercise their entitlements under international law to fish in the high seas and to be involved in high seas fisheries management.⁶³ In return, the two states have granted fisheries access to their maritime zones and discontinued withholding benefits such as access to ports. This practice—which has among other things culminated in the trilateral Loophole Agreement between Iceland, Norway and the Russian Federation⁶⁴—is aimed at avoiding unregulated high seas fishing and thereby undesirable effects on the two coastal states' rights and interests over straddling fish stocks.

While there is significant competence-overlap between NEAFC and the Joint Commission—both spatially and on species—it was already pointed out above that currently there seems to be no, or hardly any, actual conflict between the two bodies' management and conservation measures. Their current relationship can therefore be regarded as complementary. Reference can also be made to the Preamble to the Framework Agreement, which reaffirms the two parties' support to cooperation with the parties to the predecessor of the NEAFC Convention. As Norway and the Russian Federation form two-fifths of NEAFC's membership, they are also well-positioned to withstand challenges from the three other members of NEAFC⁶⁵ to downscale the role of the Joint Commission and enhance that of NEAFC. Norway and the Russian Federation are also highly unlikely to support broader participation in the Joint Commission, as this would fundamentally alter its nature.

Other Regional and Bilateral Fora and Instruments

The five Arctic Ocean coastal states have had two high-level (ministerial) meetings so far; the first in May 2008, in Ilulissat, Greenland, culminating in the famous Ilulissat Declaration,⁶⁶ and the second in March 2010, in Chelsea, Canada.⁶⁷ The convening of these high-level meetings has been criticized by the Arctic Council's three other members—Finland, Iceland and Sweden—as well as its Permanent Participants, on the ground that it undermines the functioning

⁶³ These entitlements are, *inter alia*, laid down in art. 116 of the LOS Convention and art. 8(3) of the Fish Stocks Agreement.

⁶⁴ See note 31. See in this context R.R. Churchill "The Barents Sea Loophole Agreement: A "Coastal State" Solution to a Straddling Stock Problem" (1999) 14 *International Journal of Marine and Coastal Law* 467–483. Interestingly, Churchill notes at 471 that Iceland rejected an earlier proposal by Norway and the Russian Federation for a dedicated regime for the Loophole.

⁶⁵ These ratios would change if, for instance, Iceland becomes an EU Member State or Greenland becomes fully independent.

⁶⁶ Ilulissat Declaration, Arctic Ocean Conference of 28 May 2008 (48 ILM 362).

⁶⁷ See Chair's Summary, available at <www.international.gc.ca/polar-polaire/arctic-meeting_reunion-arctique-2010_index>.

of the Arctic Council.⁶⁸ Arctic Ocean fisheries were specifically discussed at the 2010 meeting, but without culminating in concrete output.⁶⁹ In addition to these high-level meetings, Arctic Ocean coastal states also convened several dedicated fisheries meetings at the level of senior officials. One of these took place in June 2010, in Oslo, Norway.⁷⁰ The participants recognized the need to address shortcomings in available scientific information and agreed to organize a meeting of scientific experts, which eventually took place in June 2011, in Anchorage, the United States.⁷¹

As regards bilateral cooperation (other than between Norway and the Russian Federation discussed in the previous subsection), reference can be made to the bilateral cooperation between Greenland and Norway, pursuant to an Agreement on Mutual Fishery Relations,⁷² which is, *inter alia*, implemented through annual bilateral consultations. Bilateral cooperation between Greenland and the Russian Federation occurs pursuant to an Agreement on Mutual Fishery Relations,⁷³ presumably also implemented through annual bilateral consultations. The scope of these two instruments does not exclude the Arctic Ocean and also extends to areas beyond national jurisdiction.⁷⁴

Bilateral cooperation between Canada and Greenland is not formalized, even though meetings are held on an annual basis. While these used to be exclusively related to shared stocks in Baffin Bay and Davis Strait,⁷⁵ recent meetings had a much broader focus and addressed in principle all bilateral and regional fisheries, marine mammals and other pertinent issues.⁷⁶ Also, joint fisheries research is undertaken pursuant to a Memorandum of Understanding (MOU) on scientific collaboration between the Canadian Department of Fisheries and Oceans and the Greenland Institute of Natural Resources.⁷⁷

Bilateral cooperation between the Russian Federation and the United States takes place, *inter alia*, within the bilateral Intergovernmental Consultative

⁶⁸ See e.g. the Report of the April 2010 Senior Arctic Officials (SAOs) Meeting (available at <www.arctic-council.org>), 20.

⁶⁹ See Chair's Summary, note 67.

⁷⁰ See Chair's Summary, available at <www.regjeringen.no/upload/UD/Vedlegg/Folkerett/chair_summary100622.pdf>.

⁷¹ See the Anchorage 2011 Science Meeting Report, note 5. See also note 106.

⁷² Agreement between Greenland/Denmark and Norway concerning Mutual Fishery Relations of 9 June 1992 (1829 UNTS 223).

⁷³ Agreement between the Government of the Kingdom of Denmark and the Local Government of Greenland, on the one hand, and the Government of the Russian Federation, on the other hand, concerning Mutual Fishery Relations between Greenland and the Russian Federation of 7 March 1992 (1719 UNTS 89).

⁷⁴ See art. 6(b) of the 1992 Agreement, note 72, and art. 7 of the 1992 Agreement, note 73.

⁷⁵ Ridgeway 2010, note 4 at 417.

⁷⁶ Information provided by I. Holm Olsen by email to the author on 23 February 2012.

⁷⁷ Information available at <www.international.gc.ca/polar-polaire>.

Committee (ICC), established by an Agreement on Mutual Fisheries Relations.⁷⁸ As its mandate is not geographically delimited, the ICC has served as a forum to discuss a wide range of fisheries issues. Discussions have also related to Arctic Ocean fisheries, including at the 2011 ICC Meeting.⁷⁹ The ongoing negotiating-process on a comprehensive fisheries agreement for the Northern Bering Sea, that takes place within the context of the ICC, made no real progress in recent years and the envisaged agreement will at any event not apply to fisheries north of the Bering Strait.⁸⁰

In addition to this more formalized bilateral cooperation, there are without doubt also informal bilateral or trilateral meetings among Arctic Ocean coastal states and perhaps also with certain third states and the EU. The United States is particularly active in this regard due to Senate joint resolution No. 17 of 2007 directing the United States “to initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean.”⁸¹

Arctic Council and Arctic Council System (ACS)

As explained more thoroughly elsewhere in this book,⁸² the Arctic Council is a high-level forum established by means of the Ottawa Declaration.⁸³ So far, the Arctic Council has not explicitly involved itself in fisheries management issues; not as the Arctic Council *per se* and not through the Arctic Council System (ACS; see further below). There is nevertheless no juridical obstacle for this; not for the Arctic Council *per se* and also not for the ACS. The mandate of the Arctic Council is very broad and relates to “common Arctic issues” with special reference to “issues of sustainable development and environmental protection in the Arctic”.⁸⁴ A footnote in the Ottawa Declaration nevertheless specifies that the Council “should not deal with matters related to military security”.

In spite of this very broad mandate, however, the Council has so far avoided involvement in certain marine mammal issues⁸⁵ and at the November 2007

⁷⁸ Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations of 31 May 1988 (*Treaties and other International Acts Series* 11,422).

⁷⁹ See the information on bilateral arrangements available at <www.nmfs.noaa.gov/ia>.

⁸⁰ Information provided by a United States government official to the author by email on 10 January 2012.

⁸¹ Passed by the Senate on 4 October 2007. The House of Representatives voted in favor of SJ Res. No. 17 in May 2008 and President Bush signed it on 4 June 2008.

⁸² See in particular chapter 3.

⁸³ Declaration on the Establishment of the Arctic Council of 19 September 1996 (available at <www.arctic-council.org>).

⁸⁴ Ottawa Declaration, art. 1.

⁸⁵ E.T. Bloom “Establishment of the Arctic Council” (1999) 93 *American Journal of International Law* 712–722 at 720.

Meeting of the Senior Arctic Officials (SAOs) decided not to become involved in fisheries management issues either. The matter came up because the United States brought Senate joint resolution No. 17 of 2007⁸⁶ to the SAOs' attention. The ensuing discussion was summarized as follows: "There was strong support for building on and considering this issue within the context of existing mechanisms."⁸⁷

Even though the Council has not explicitly reversed its view since then, the issue of international fisheries management has come up in the context of the Arctic Ocean Review (AOR) project that is currently carried out within the Council's Protection of the Arctic Marine Environment (PAME) working group. Phase II of this project is intended to culminate in a final report adopted at the Council's May 2013 Kiruna Ministerial Meeting that will

summarize potential weaknesses and/or impediments in the global and regional instruments and measures for [the] management of the Arctic marine environment; outline options to address these weaknesses and/or impediments; and, make agreed recommendations to help ensure a healthy and productive Arctic marine environment in light of current and emerging trends.⁸⁸

The February 2013 draft AOR Phase II Report⁸⁹ contains a Chapter 4 on 'Marine Living Resources', with section 4.1 (Part A) on 'Fishery Resources'. Its last subsection entitled 'Opportunities' offers various proposals for policy recommendations at its very end, which are copied verbatim into Chapter 9 entitled 'Conclusions and Recommendations' and will be presented to SAOs for negotiation. These proposals consistently use either "Arctic Council States" or "Arctic Council States with coasts on the (Central) Arctic Ocean"—and do not explicitly recommend a role for the Arctic Council as such, but do not rule that out either. Among the options mentioned in the subsection 'Opportunities' that are not specifically retained at the end—and therefore also not in Chapter 9—are a Ministerial Declaration, statement "and so on".⁹⁰

As alluded to above, the Council could also pursue certain options through the ACS. The notion of the ACS has been introduced by the present author⁹¹ to clarify

⁸⁶ See note 81.

⁸⁷ Report of the November 2007 SAOs Meeting, (available at <www.arctic-council.org>), at 12.

⁸⁸ AOR Phase I Report, note 5 at 3.

⁸⁹ *The Arctic Ocean Review Project. PHASE II REPORT. 2011–2013*, consolidated version of 9 February 2013, on file with the author.

⁹⁰ *Ibid.*, 39. An earlier version of 16 October 2012 (doc. AC-SAO-NOV12-4.4a; available at <www.arctic-council.org>), at 39–40 also specifically left open the possibility of an Arctic Council body with a mandate related to fish research. A one-off assessment complemented by policy-recommendations on Arctic fisheries would have been an option as well (cf. Molenaar note 4 at 75), but is also not mentioned in this earlier version.

⁹¹ E.J. Molenaar "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea" (2012) 27 *International Journal of Marine and Coastal Law* 553–595.

that legally binding instruments such as the Arctic SAR Agreement⁹²—and their institutional components—can be part of the Council's output even though they are not—and in fact could not be—formally adopted by it.

The ACS notion consists of two basic components. The first component is made up of the Council's constitutive instrument—the Ottawa Declaration—, other Ministerial Declarations, other instruments adopted by the Arctic Council—for instance its Arctic Offshore Oil and Gas Guidelines⁹³—and the Council's institutional structure. The second component consists of instruments 'merely' negotiated under the Council's auspices and their institutional components. The Arctic SAR Agreement and the Meetings of the Parties envisaged under its article 10 belong to this category. Expansion of this category occurred at the 2013 Kiruna Ministerial Meeting, at which the Arctic MOPPR Agreement⁹⁴ was signed.

While the section 'Opportunities' in section 4.1 (Part A), Chapter 4 of the February 2013 draft AOR Phase II Report highlights that the Arctic Council "has been the catalyst" for the adoption of the abovementioned two treaties, it does not explicitly identify this among the various 'modes of delivery' further down that could be used for a treaty on Arctic fisheries.⁹⁵ But in light of the objections by at least one Arctic Council member to the text relating to the catalyst-role of the Arctic Council—and many other parts of section 4.1—it is not even certain if it ends up in the final report at all.⁹⁶

GAPS IN INTERNATIONAL FISHERIES FORA AND INSTRUMENTS RELATING TO THE ARCTIC OCEAN AND POTENTIAL OPTIONS TO ADDRESS THEM

Introduction

It is submitted that the main gaps in the existing regime of international fisheries fora and instruments relating to the Arctic Ocean are the following:

1. Science-based and ecosystem-based fisheries management cannot be ensured due to a lack of data;
2. Incomplete coverage of the Arctic Ocean by coastal state fora and instruments;

⁹² Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic of 12 May 2011 (text available at <www.arctic-council.org>).

⁹³ Last updated in 2009, available at <www.pame.is>.

⁹⁴ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic of 15 May 2013 (available at <www.state.gov/r/pa/prs/ps/2013/05/209406.htm>).

⁹⁵ Note 89, 39.

⁹⁶ These written comments on section 4.1 are on file with the author.

3. Incomplete coverage of the Central Arctic Ocean with RFMOs or Arrangements; and
4. Inadequate 'nesting' into more holistic ecosystem-based oceans management.

This chapter does not allow for an in-depth analysis of all these gaps and the potential options to address them. Gaps Nos. 2 and 3 are therefore selected for further elaboration.⁹⁷ In the scoping phase of considering potential options to address these gaps, several preliminary choices have to be made. The lead role for consultations or negotiations clearly lies with Arctic Ocean coastal states. This is not only evident for options that relate exclusively to coastal state maritime zones, but the debate on the 2009 UNGA Oceans and Sustainable Fisheries Resolutions (see above) suggests that Arctic Ocean coastal states also claim a lead role on options that include the high seas.

Other preliminary choices are highlighted by means of the following questions:

1. Should *new* instruments or bodies be established or should *existing* instruments and bodies be built upon? In case of new instruments, should these be *legally binding* or *non-legally binding*?
2. Except for the area covered by the NEAFC Convention: should there be *separate* bodies and/or instruments for coastal state maritime zones and the Central Arctic Ocean, or should there (also) be one *single* body and/or instrument for the entire Arctic Ocean?
3. Which states and entities should *participate*?
4. Which *other factors and considerations* need to be taken into account?

These preliminary choices are canvassed in the following two subsections, which discuss 'Options by the Arctic Council and within the ACS' and a 'Stand-alone Instrument on the (Central) Arctic Ocean'.

Options by the Arctic Council and within the ACS

As already noted, a non-legally binding instrument on Arctic fisheries or (Central) Arctic Ocean fisheries would not be precluded by the Council's constitutive instrument. If it would relate to Arctic fisheries in general, however, it may not be able to provide sufficient specificity to address the gaps identified. Conversely, the five Arctic Ocean coastal states may not support a specific focus on the Arctic Ocean or the Central Arctic Ocean—with the NEAFC Convention Area excluded—in view of the special role they claim for themselves there.

⁹⁷ See also the more comprehensive analysis in Molenaar, note 4.

In case the instrument would (also) relate to the Central Arctic Ocean—where the freedom of fishing applies—its effectiveness would benefit from support by key non-Arctic states and entities. Such support could be ensured through a format or mechanism that allows them to participate in the instrument's negotiation as well as to express their consent to be bound.⁹⁸ Involving only the current non-Arctic state observers to the Arctic Council would not work. This group consists of six EU Member States⁹⁹—which have transferred most of their competence on marine capture fisheries to the EU—and therefore does not include any key high seas fishing states and entities such as China, the EU, Japan, South Korea and Taiwan. While all of these except Taiwan have applied for observer status, it is by no means clear when and if these applications will be approved.¹⁰⁰ If all applications would be approved, however, involving observers could be an important component of the aforementioned format or mechanism.

In case a preference exists for a legally-binding instrument, this could be pursued within the ACS by means of a Task Force established by the Council but merely operating under its auspices. If pursued, its output could be an Arrangement, with an institutional component if desirable. A full-fledged RFMO seems unlikely, however, due to considerations of cost-effectiveness in light of the fact that significant commercially viable fisheries are not expected in the short term. The negotiating-process on the CBS Convention¹⁰¹ eventually decided not to push for a full-fledged RFMO for similar reasons.¹⁰² All of the observations made above on the spatial scope and participation by non-Arctic states and entities in a non-legally binding instrument of the Arctic Council would apply here as well.

The choice for the words “would [...] benefit from support by key non-Arctic states and entities” above, is intended to flag that not securing their support by means of participation would not necessarily be inconsistent with international law. This is examined further below.

Among the advantages of pursuing options within the Arctic Council or the ACS are the agreed mechanism for involving Arctic indigenous peoples, and the potential for optimal coordination with other activities of the Council and the ACS, thereby contributing to more successful integrated oceans management. However, Arctic states, Permanent Participants, non-Arctic states and entities, and international environmental non-governmental organizations may support or oppose options within the Arctic Council or the ACS for strategic reasons that have little

⁹⁸ For instance modeled on the formats devised for Taiwan in the context of international fisheries law.

⁹⁹ Namely France, Germany, the Netherlands, Poland, Spain and the United Kingdom.

¹⁰⁰ For a discussion see Molenaar, note 91. Other non-Arctic state applicants are India (application submitted on 6 November 2012; information provided by N. Buvang to the author by email on 7 February 2013), Italy and Singapore.

¹⁰¹ Note 27.

¹⁰² D. Balton “The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications” in Stokke, note 32, 143–177, at 158.

or nothing to do with Arctic fisheries, but are principally related to how they would like the Arctic Council and the ACS to evolve. Reference can in that context be made to the new rules on observers adopted at the 2011 Nuuk Ministerial Meeting,¹⁰³ which may not prove conducive to broader participation.

Stand-Alone Instrument on the (Central) Arctic Ocean

An alternative to pursuing options within the Arctic Council or the ACS would be to develop a stand-alone instrument for the Arctic Ocean or the Central Arctic Ocean, while excluding the NEAFC Convention Area. As noted above, in view of the need for cost-effectiveness, it seems that an Arrangement—whether legally binding or non-legally binding—is a more appropriate option than a full-fledged RFMO. Moreover, if the instrument's spatial scope and thereby the measures it contains would be limited to the Central Arctic Ocean—as advocated by some¹⁰⁴—, similar measures or measures with similar effectiveness need to be adopted by Arctic Ocean coastal states for their own maritime zones.¹⁰⁵ The need for compatibility is particularly evident as it is likely that new fishing opportunities will arise in coastal state maritime zones before arising in the high seas. An exception may nevertheless be granted in furtherance of the rights and interests of Arctic indigenous peoples.

As noted earlier, if the five Arctic Ocean coastal states would support such a stand-alone instrument, they are likely to claim a lead role in its negotiation. Once sufficient provisional support has crystallized among the Arctic five, they are likely to have preparatory consultations on the negotiating-process and its outcome. These consultations were already ongoing at the time of writing¹⁰⁶ and are understandable in view of the Arctic five's common rights and interests as coastal states and may continue during the formal negotiating-process. However, assuming that the Arctic five intend to involve other key states and entities in the formal negotiating-process as well, care should be taken to ensure that the preparatory consultations have not advanced to such an extent that these other

¹⁰³ Contained in Annex 1 to the Report of the May 2011 SAOs Meeting (available at <www.arctic-council.org>).

¹⁰⁴ For instance the Pew Environment Group's 'Oceans North' campaign, which also led to the submission of a letter signed by a large number of scientists to the International Polar Year Conference in Montréal, Canada (22–27 April 2012) (information available at <oceansnorth.org/international>).

¹⁰⁵ The issue of compatibility could also be raised with respect to the NEAFC Convention Area and the remainder of the Arctic Ocean.

¹⁰⁶ Based on the information in note 96 and other information provided by Arctic Ocean coastal state government officials to the author during the last several months prior to the time of writing. Between 29 April and 1 May 2013, the Arctic five convened a 'Meeting on Future Arctic Fisheries' in Washington D.C., the United States, which focused exclusively on future fisheries in the Central Arctic Ocean (see the Chairman's Statement available at <www.state.gov/e/oes/rls/pr/2013/209176.htm>).

key states and entities are essentially presented with a *fait accompli* and cannot participate in a meaningful way in the formal negotiating-process.¹⁰⁷

While the assumption is that other states and entities besides the Arctic five would be allowed to participate in the negotiation of a stand-alone fisheries instrument on the Arctic Ocean or the Central Arctic Ocean, and eventually become parties thereto, this assumption could of course be proven wrong. A coastal states-only (*inter se*) approach would not necessarily be inconsistent with international law. This would only occur if the exercise of the right to engage in high seas fishing by other states and entities would be interfered with in ways that would not be consistent with international law. At-sea high seas enforcement without a clear basis in international law would be an obvious example. The exercise of port state jurisdiction by the Arctic five to ensure compliance with their high seas conservation and management measures by other states and entities could be inconsistent with international (trade) law as well. Presumably, however, the Arctic five will prefer to avoid these issues as well as the lack of legitimacy that is associated with coastal states-only approaches.¹⁰⁸ In a worst-case scenario, such lack of legitimacy might even prompt high seas fishing states or entities to engage in high seas fishing in the Central Arctic Ocean in order to assert their right as such, even if such fishing would not be commercially viable. Fortunately, the Ilulissat Declaration implies also a commitment by the Arctic Ocean coastal states to avoid such a scenario.

CONCLUSIONS

The role of the global component of the international legal framework for the regulation of marine capture fisheries does in principle not extend beyond establishing the jurisdictional framework, stipulating the basic rights and obligations of states acting in different capacities and providing guidance on the role, functions and operation of RFMOs. It is submitted, however, that this does not mean that

¹⁰⁷ At the 2011 Annual ICC Meeting, note 79, the United States proposed to “develop a joint proposal for an Agreement to be presented initially to the other three Arctic coastal States for discussion. The Agreement would not create a specific management organization, but instead ensure fishing will not commence until such a regime has been established. Russia said it would consider the U.S. proposal.”

¹⁰⁸ Reference can in this context be made to the controversial Galapagos Agreement (Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific of 14 August 2000 (LOS No. 45, 70–78 (2001)), which never entered into force and has now essentially been replaced by the SPRFMO Convention (Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009 (text available at <www.southpacificrfmo.org>).

issues relating to fisheries in particular regions—including therefore the marine Arctic—are necessarily outside the mandate of global bodies like the UNGA in their entirety; for instance in case the actions or inactions of all or certain groups or categories of states are actually or potentially inconsistent with applicable obligations under international fisheries law. This may have been the rationale behind the EU's proposal for an operative paragraph in the 2009 UNGA Sustainable Fisheries Resolution calling for the consideration of the need for regulating Arctic Ocean fisheries. The EU's proposal received strong opposition from most of the Arctic Ocean coastal states, who took the view that the UNGA had no role in relation to specific regional fisheries and therefore also not Arctic fisheries. No attempt seems to have been made to raise this issue again in the UNGA or other relevant global bodies.

Particularly noteworthy is the large number of complementary regional, sub-regional and bilateral fisheries fora and instruments that apply to the marine Arctic. While the contrast with the Southern Ocean is obvious, no other region may parallel the marine Arctic in this respect either. It must be acknowledged, however, that this high number is also caused by the large size of the marine Arctic, its overlap with the maritime zones of many coastal states and the fact that it includes not only the Arctic Ocean but also parts of the northern Pacific and northern Atlantic Oceans.

The marine Arctic is also home to several unique fisheries practices. First, Norway's approach to the regulation of marine capture fisheries in the maritime zones of Svalbard in light of the disagreement on the spatial scope of the Spitsbergen Treaty that exists between Norway and most other parties to the Treaty. Second, the approach pursued by Norway and the Russian Federation through the Joint Commission to encourage third states and entities to discontinue, or not to commence, fishing for particular species in the Barents Sea Loophole and thereby not to exercise their entitlements under international law to fish in the high seas and to be involved in high seas fisheries management. This approach is for various reasons unlikely to be applied to the Central Arctic Ocean, even though this area is also covered by the Joint Commission's competence. Third, the significant competence-overlap between NEAFC and the Joint Commission, both spatially and on species. However, currently there seems to be no, or hardly any, actual conflict between the two bodies' management and conservation measures. Their current relationship can therefore be regarded as complementary. It is unlikely that NEAFC will be able to enhance its role at the expense of that of the Joint Commission. Fourth and last, the gap in high seas coverage of the Arctic Ocean with RFMOs or Arrangements. Similar gaps are absent in the Southern Ocean but not in other regions of the world, most notably the Central and South West Atlantic. The most likely option for addressing this gap is a stand-alone Arrangement for the (Central) Arctic Ocean.

Regional, sub-regional and bilateral fisheries fora and instruments relevant for the marine Arctic appear to be largely consistent with the global component of

the international legal framework for the regulation of marine capture fisheries. Arguably, however, consistency is questionable with regard to participation by, and allocation of fishing opportunities to, new entrants. No new entrants are envisaged for the Joint Commission, but at least some other states and entities are compensated for not fishing in the Loophole. Participation in the NEAFC Convention is essentially limited to coastal states and—apart from Cuba—new entrants wishing to accede must secure support of three-fourths of the membership and can expect minimal allocations of fishing opportunities. Accession to the CBS Convention requires consensus among the contracting parties.¹⁰⁹ It should nevertheless be acknowledged that few, if any, regions are fully compliant on these issues, not even the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).¹¹⁰

¹⁰⁹ CBS Convention, art. XVI(4). Note also that the CBS Convention does not allow the EU to participate on behalf of Poland.

¹¹⁰ After having acceded to the CAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (1329 UNTS 47)) in 2005, the Cook Islands repeatedly expressed an interest to become a member of CCAMLR and at least wanted to engage in fishing activities (some of this information can be found in publicly available documents (e.g. the Report of the 26th (2007) Annual CCAMLR Meeting (available at <www.ccamlr.org>), *inter alia*, at para. 13.16)).