Challenges of the Changing Arctic

Continental Shelf, Navigation, and Fisheries

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CHAPTER 19

International Regulation of Central Arctic Ocean Fisheries

Erik J. Molenaar[1]

Abstract

Due in particular to the impacts of climate change, the adequacy of the international regulation of Central Arctic Ocean fisheries has come under increasing scrutiny in recent years. As shown in this chapter, however, international regulation of Central Arctic Ocean fisheries is by no means entirely absent. The global component of international fisheries law applies to the entire (Central) Arctic Ocean, however defined. Furthermore, even the Central Arctic Ocean is already subject to actual regional or subregional fisheries regulation.

After providing a concise overview of the global component of international fisheries law and Arctic fisheries instruments and bodies, the chapter focuses on the evolving regional law on Arctic Ocean fisheries. Particular attention is devoted to the efforts of the Arctic Ocean coastal States (Arctic Five) on Arctic Ocean fisheries so far—including their key meeting in Nuuk, in February 2014, and their 'Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean' signed in Oslo on 16 July 2015—and the "broader process" involving "all interested States" envisaged in the 2015 Oslo Declaration. Among the issues examined are the relationship between the Arctic Five's commitments and existing regional fisheries management organizations or arrangements, and the consistency of the Arctic Five's process, including the 'lead role' claimed by them, with applicable international fisheries law.

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1 Introduction

The international law on Arctic fisheries has—in particular due to climate change—attracted ever more attention in recent years. Climate change may give rise to new fishing opportunities in the Arctic due to receding sea-ice and poleward shifts of fish stocks as well as projected species invasions. At the same time, receding sea-ice could also have negative impacts on some Arctic fish stocks. Moreover, increased fresh-water inflow and pollution—in particular from Russian rivers—as well as the possibility of ocean-acidification, could act as a counterbalance to new fishing opportunities that may arise, leading potentially to an actual decrease.[2] Sea-ice regression in the Arctic means at any rate that the North Pacific and the North Atlantic Oceans will become increasingly connected.[3] Together with merchant shipping, this creates a pathway for the introduction of invasive species. One of these pathways has facilitated the settlement and rapid increase in the abundance of snow crab (*Chionoecetes opilio*) in the Barents Sea in recent years.[4]

The potential for large-scale, commercially viable fisheries in the Arctic Ocean, defined below, including in its high seas part (further: 'Central Arctic Ocean'), has been debated in recent years.[5] In early 2014, the five Arctic Ocean coastal States—Canada, Denmark/Greenland, Norway, the Russian Federation, and the United States (also: Arctic Five)—took the view that such fisheries in

2 J.S. Christiansen, C.W. Mecklenburg and O.V. Karamushko, "Arctic Marine Fishes and their Fisheries in Light of Global Change", 20 *Global Change Biology* 352–359 (2014); M.C. Jones and W.W.L. Cheung, "Multi-model Ensemble Projections of Climate Change Effects on Global Marine Biodiversity", *ICES Journal of Marine Science*, of 10 October 2014. See also *Arctic Biodiversity Assessment. Status and Trends in Arctic Biodiversity* (CAFF: 2013; available at <www.caff.is>), Ch. 1, pp. 22–23.

3 M.S. Wisz et al., "Arctic Warming Will Promote Atlantic-Pacific Fish Interchange", *Nature Climate Change*, 26 January 2015.

4 J.H. Sundet and S. Bakanev, "The Invasive Snow Crab (*Chionoecetes opilio*), A New and Expanding Component of the Barents Sea Ecosystem" (forthcoming in 2015). In September 2014, the Lithuanian-flagged fishing vessel *Jūros Vilkas* was arrested by the Russian Federation for allegedly fishing without a license for snow crab in the Russian Exclusive Economic Zone (EEZ). This eventually led to an Extraordinary Meeting of the North-East Atlantic Fisheries Commission (NEAFC) on 22 October 2014.

5 A.B. Hollowed, B. Planque and H. Loeng, "Potential Movement of Fish and Shellfish Stocks from the Sub-Arctic to the Arctic Ocean", 22 *Fisheries Oceanography* 355–370 (2013). See also *Report of a Meeting of Scientific Experts on Fish Stocks in the Arctic Ocean. Anchorage, Alaska, June 15–17, 2011* (on file with author); *Report of 2nd Scientific Meeting on Arctic Fish Stocks, Tromsø, 28–31 October 2013* (on file with author); and *Final Report. Third Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean* (on file with author).

the Central Arctic Ocean were "unlikely to occur in the near future".[6] As this chapter will show, however, this expectation has not stopped the Arctic Five from engaging in multilateral discussions on Central Arctic Ocean fisheries.

This chapter will focus on marine capture fisheries in the Arctic, without devoting attention to freshwater fisheries, aquaculture, and marine mammals as target species. A number of (potentially) significant commercial fish species currently occur in the marine Arctic (defined below). While the ranges of distribution of some of these are confined to the North Pacific or the North Atlantic, others have a circumpolar distribution. Important North Pacific fish species include Alaska pollock (*Theragra chalcogramma*), Pacific cod (*Gadus macrocephalus*), snow crab and various Pacific salmon species (*Oncorhynchus* spp.). As regards the North Atlantic, important fish species include North-East Arctic cod (*Gadus morhua*), haddock (*Melanogrammus aeglefinus*), Norwegian spring-spawning (Atlanto-scandian) herring (*Clupea harengus*), Atlantic salmon (*Salmo salar*) and red king crab (*Paralithodes camtschaticus*). Significant circumpolar fish species 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.

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 (see Figure 19.1 below). 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. 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 Central Arctic Ocean.[7]

6 *Meeting on Arctic Fisheries. Nuuk, Greenland, 24–26 February 2014, Chairman's Statement* (2014 Nuuk Meeting; available at <naalakkersuisut.gl/en/Naalakkersuisut/News/2014/02/Arktisk-hoejsoefiskeri>), at p. 1. See also 'Summary Report Prepared for the "Devising Seminar on Arctic Fisheries", hosted by the Program on Negotiation at Harvard Law School, September 18–19, 2014' (available at <publicdisputes.mit.edu/arctic-fisheries-devising-seminar> at p. 4 which comes to a similar conclusion.

7 However, the Arctic Ocean coastal States use the phrase "high seas area of the central Arctic Ocean" (cf. the *Meeting on Future Arctic Fisheries. Washington, DC April 29–May 1. Chairman's Statement* (2013 Washington Meeting; available at <www.state.gov/e/oes/rls/pr/2013/209176.htm>) and the Chairman's Statement of the 2014 Nuuk Meeting, note 6 *supra*; see also

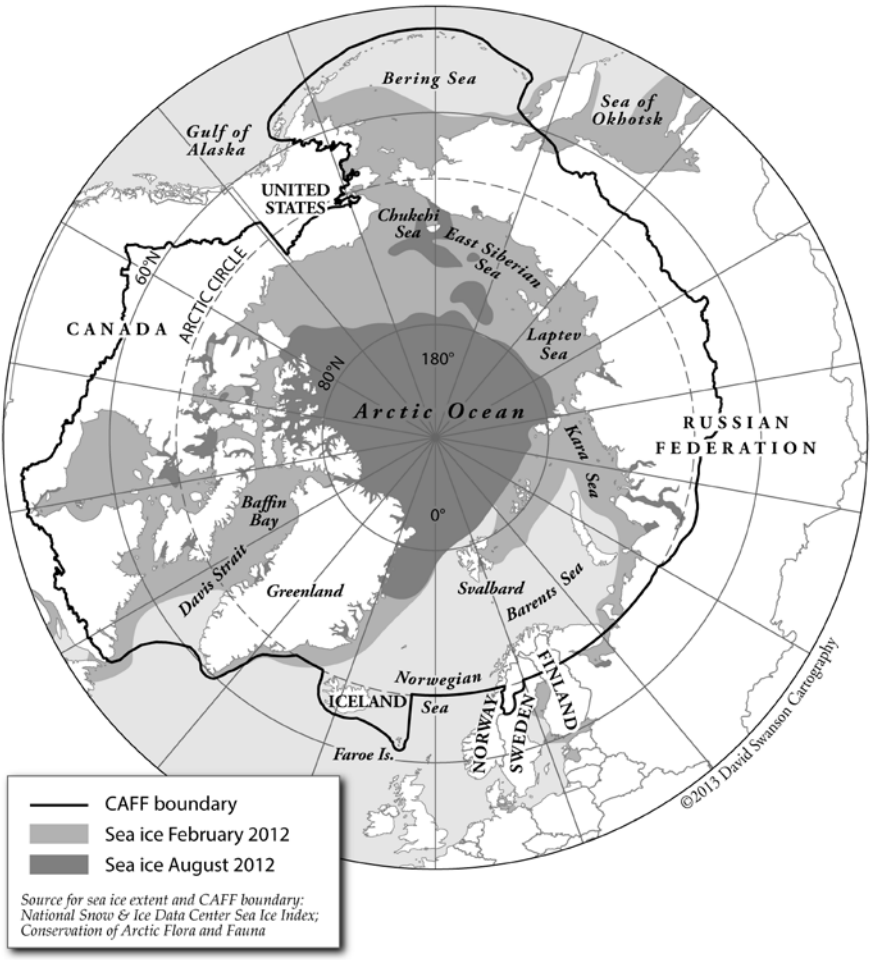

FIGURE 19.1 *The Arctic Region: General Overview. Map prepared by David Swanson and reproduced here with his permission.*

In addition to the five Arctic Ocean coastal States, Finland, Iceland, and Sweden are 'Arctic States' on account of their membership in the Arctic Council. As Iceland is a coastal State to the marine Arctic as defined in this chapter, it qualifies as an 'Arctic coastal State'. The Arctic Five obviously also qualify as such.

Some specific comments on Denmark are warranted here. The Kingdom of Denmark consists of three parts: 'mainland' Denmark, the Faroe Islands and

note 82 *infra*). Accordingly, their definition of the Central Arctic Ocean comprises a considerably larger area than this chapter's definition.

Greenland. These three parts constitute the Danish Realm. The Kingdom of Denmark is an Arctic Ocean coastal State exclusively on account of Greenland, and an Arctic coastal State on account of the Faroe Islands. As a Member State of the European Union (EU), the Kingdom of Denmark is bound to the EU's exclusive competence in the conservation and management of marine capture fisheries. However, its EU Membership does not extend to the Faroe Islands and Greenland, and these two parts of the Kingdom are to a large extent autonomous with regard to marine capture fisheries. Treaties and membership in international organizations are nevertheless negotiated and entered into by the Kingdom in respect of all or parts of the Kingdom. While Greenlandic fishing vessels operate predominantly in the maritime zones off Greenland, Faroese fishing vessels also operate to a significant extent beyond the maritime zones off the Faroe Islands. This is not limited to the North-East and North-West Atlantic,[8] but also includes the South Pacific. Here, Faroese fishing vessels operate in the regulatory area of the South Pacific Regional Fisheries Management Organization (SPRFMO),[9] of which the Kingdom of Denmark is a Member in respect of the Faroe Islands.[10] In 2010–2011, the Faroe Islands also expressed an interest in fishing in the high seas of the North Pacific and claimed to have a right to become a Member—through the Kingdom—of the North Pacific Fisheries Commission (NPFC).[11]

At the time of writing in August 2015, large-scale commercial fisheries were taking place in the Barents and Bering Seas. The fisheries that occurred in the Arctic Ocean were essentially limited to small-scale subsistence fisheries in

8 For this purpose, Denmark participates in respect of the Faroe Islands (and Greenland) in NEAFC as well as in the Northwest Atlantic Fisheries Organization (NAFO). Denmark is also a Member of the North Atlantic Salmon Conservation Organization (NASCO) in respect of the Faroe Islands and Greenland. NASCO Members are prohibited from engaging in high seas fishing for Atlantic salmon.

9 Established by the SPRFMO Convention (Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Auckland, 14 November 2009. In force 24 August 2012; <www.sprfmo.int>).

10 Information available at <www.sprfmo.int>.

11 The NPFC was established upon the entry into force of the NPFC Convention (Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, Tokyo, 24 February 2012. In force 19 July 2015; text available at <nwpbfo.nomaki.jp>). The Faroe Islands participated in the 8th and 9th Multilateral Meetings on the Management of High Seas Fisheries in the North Pacific Ocean (Jan. and Sep. 2010), which culminated in the adoption of the NPFC Convention (see Records of these Meetings available at <nwpbfo.nomaki.jp>).

coastal State maritime zones. No fisheries occurred at all in the Central Arctic Ocean.

This chapter continues with a concise overview of the international fisheries law context by means of sections 2 and 3 on 'The Global Component of International Fisheries Law' and 'Arctic Fisheries Instruments and Bodies' respectively. Subsequently, the discussion focuses on 'The Evolving Regional Law on Arctic Ocean Fisheries' in section 4, which contains subsections entitled 'In Search of a Suitable Mechanism', 'The Arctic Ocean Coastal States Process on Arctic Ocean Fisheries', 'The Substantive Outcome of the 2014 Nuuk Meeting', 'The 2015 Oslo Declaration'—which was included just prior to the editing stage—and 'The Envisaged Broader Process on Central Arctic Ocean Fisheries'. The chapter ends with section 5 on 'Conclusions'.

2 The Global Component of International Fisheries Law

International fisheries law is the body of international law that relates specifically to the conservation, management and/or development of capture fisheries. It consists of substantive norms (e.g. rights and obligations), substantive fisheries standards (e.g. catch restrictions) as well as institutional rules and arrangements (e.g. mandates and decision-making procedures of international bodies). International fisheries law is part of general international law and can also be seen as a branch or part of the international law of the sea.

The global component of international fisheries law applies to the marine Arctic and the (Central) Arctic Ocean, however defined. The cornerstone in the global jurisdictional framework for marine capture fisheries is provided by the LOS Convention,[12] which provides for the division of seas and oceans in maritime zones and specifies the basic rights and obligations of States therein. Apart from archipelagic waters, all the common maritime zones also occur in the Arctic. The division of the marine Arctic in maritime zones is therefore essentially the same as in other seas and oceans, except for the Southern Ocean due to the dispute on sovereignty over Antarctic territory. A maritime zone that is unique to the Arctic is the Fisheries Protection Zone (FPZ) established by Norway off Svalbard.[13]

12 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; <www.un.org/Depts/los>.

13 While Libya and Spain have also established FPZs, these are really *de facto* exclusive fishery zones (EFZs) (see E.J. Molenaar, "New Maritime Zones and the Law of the Sea", in H. Ringbom (ed.) *Jurisdiction over Ships—Post-UNCLOS Developments in the Law of the Sea* (Brill/Nijhoff: 2015), pp. 249–277, at pp. 256–258.

The LOS Convention regulates the exercise of entitlements to fishing that States have in their capacities as coastal or flag States, through various key obligations. Due to the adoption of other global fisheries instruments, in particular the Fish Stocks Agreement,[14]—an implementation agreement of the LOS Convention—several legally binding and non-legally binding instruments adopted by the United Nations Food and Agriculture Organization (FAO) as well as certain (parts of) United Nations General Assembly (UNGA) Resolutions, these key obligations have gradually developed into the following:

1. To avoid over-exploitation of target species by means of setting a science-based total allowable catch (TAC), which strives for maximum sustainable yield (MSY) as qualified by the precautionary approach;
2. To strive for the optimum utilization of target species within the EEZ or exclusive fishery zone (EFZ) by providing other States with access to the surplus of the TAC;
3. To pursue an ecosystem approach to fisheries (EAF), which often focuses in particular on (a) predator-prey relationships; (b) impacts of fisheries on non-target species and the ecosystem as a whole; and (c) impacts of oceanographic or climate processes, or pollution, on fish stocks;
4. To cooperate in relation to transboundary fish stocks and fish stocks that occur exclusively on the high seas; and
5. To exercise effective jurisdiction and control over a State's own vessels.

The LOS Convention, the Fish Stocks Agreement and the FAO's fisheries instruments are primarily concerned with establishing the jurisdictional framework. They do not contain substantive fisheries standards such as catch restrictions through TACs, allocations of fishing opportunities through national quotas, gear restrictions or temporal/seasonal or spatial measures (e.g., closed areas). Actual fisheries regulation is carried out by States individually or collectively. The primary means for collective regulation is through regional fisheries management organizations (RFMOs) or arrangements (RFMAs), which have the mandate to impose legally binding fisheries conservation and management measures on their members. The Fish Stocks Agreement designates RFMOs and RFMAs as the preferred vehicles for the conservation and management of straddling fish stocks (i.e., stocks occurring within the maritime zones of

14 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; <www.un.org/Depts/los>.

one or more coastal States and on the high seas) and highly migratory fish stocks (e.g., tuna).

3 Arctic Fisheries Instruments and Bodies

3.1 *Introduction*

As explained in more detail elsewhere,[15] a considerable number of regional, sub-regional and bilateral fisheries instruments and bodies apply to parts of the marine Arctic. Two of these are of particular relevance for the Central Arctic Ocean, namely the North-East Atlantic Fisheries Commission (NEAFC) and the Joint Norwegian-Russian Fisheries Commission (Joint Commission). These two bodies are examined in the subsequent subsections, followed by a discussion on 'A Gap in the Central Arctic Ocean's Coverage with RFMOs or RFMAs?' in subsection 3.4.

3.2 *NEAFC*

NEAFC is an RFMO that was established by the NEAFC Convention[16] and had five members and five cooperating non-contracting parties (cooperating NCPs) at the time of writing. Current members are Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway and the Russian Federation. Cooperating NCP status for 2015 was granted to the Bahamans, Canada, Liberia, New Zealand and Saint Kitts and Nevis.[17] 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.[18]

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15 E.J. Molenaar, "Arctic Fisheries Management", in E.J. Molenaar, A.G. Oude Elferink and D.R. Rothwell (eds.), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Martinus Nijhoff Publishers: 2013), pp. 243–266, at pp. 248–258.

16 Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 *United Nations Treaty Series* 129; <www.neafc.org>. 2004 Amendment (art. 18bis), London; 12 November 2004. Not in force due to objection by the Russian Federation (cf. Status of the NEAFC Convention as of 5 November 2014, on file with author). 2006 Amendments, London (Preamble, arts 1, 2 and 4), 11 August 2006. In force 29 October 2013 (cf. Status of the NEAFC Convention as of 5 November 2014, on file with author). Consolidated version of 'London Convention' available at <www.neafc.org>.

17 Based on information available at the NEAFC website, accessed on 6 August 2015.

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

Apart from Lithuania's application in 2003,[19] which was withdrawn or became irrelevant once it became an EU Member State in 2004, no applications for membership seem to have been made. This can to a considerable extent also be explained by the minimal fishing opportunities that membership would bring. None of the current cooperating NCPs have fishing opportunities specifically allocated to them, even though NEAFC reserved small allocations for them in the past.[20] In 2003, NEAFC adopted 'Guidelines for the expectation[s] of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area'.[21] These indicate that new entrants should not expect too much because allocations may only be granted for new fisheries.[22]

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)[23] 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.

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 TAC 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. They 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

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

20 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.

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

22 See also the Report of the 2014 NEAFC Performance Review Panel, at pp. 113–116 (available at <www.neafc.org>). 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.

23 As amended at the 2014 Annual NEAFC Meeting.

jurisdiction. NEAFC is then charged with setting and allocating the high seas TAC. Even though there appears to be limited room for maneuvering, 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.

The relevance of NEAFC Recommendations for the Arctic Ocean should not be overestimated. While most of the species-specific NEAFC Recommendations apply within the entire Regulatory Area and occasionally also within the entire Convention Area, none of the species involved currently occur in commercially significant numbers in the Arctic Ocean. More relevant are the NEAFC Scheme and several non-species-specific Recommendations, which also apply to the Arctic Ocean segment of the Regulatory Area or the Convention Area. NEAFC's 'Recommendation on the protection of vulnerable marine ecosystems in the NEAFC Regulatory Area'[24]—which is aimed at ensuring protection from the impacts of bottom fishing—also applies to the Arctic Ocean segment of the NEAFC Regulatory Area. It subjects exploratory bottom fishing outside existing bottom fishing areas and outside areas closed for bottom fishing activities to the need to conduct impact assessments and to obtain approval from NEAFC.

3.3 *Joint Commission*

Bilateral cooperation on fisheries between Norway and the Russian Federation takes place predominantly within the Joint Commission established by the bilateral Framework Agreement.[25] 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 Agreement[26] and the Grey Zone Agreement.[27]

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24 Recommendation 19: 2014. The newly amended version will be Recommendation 9: 2015.

25 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, Moscow, 11 April 1975. In force 11 April 1975; 983 *United Nations Treaty Series* 7 (1975). It should be noted that art. III of the 1975 Agreement speaks of the "Mixed Commission".

26 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, Moscow, 15 October 1976. In force 21 April 1977; 1157 *United Nations Treaty Series* 146 (1980).

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

As the Murmansk Treaty[28] resolved the maritime delimitation dispute, the Grey Zone Agreement was not renewed and is therefore no longer in force. The Murmansk Treaty deals with fisheries in its article 4 and Annex I, which, *inter alia*, maintain the status quo on the allocation of fishing opportunities but embrace the precautionary approach. Neither the Framework Agreement nor the Murmansk Treaty contain provisions on new members of the Commission. Subsection 3.4 discusses the qualification of the Joint Commission as an RFMO or an RFMA.

A special feature of the practice of the Joint Commission is its encouragement for third States and entities (i.e. the EU) to discontinue, or not to commence, fishing for 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.[29] In return, Norway and the Russian Federation have granted these third States and entities fisheries access to their own maritime zones and discontinued withholding benefits such as access to and use of their ports. This practice, which has among other things culminated in the trilateral Loophole Agreement between Iceland, Norway and the Russian Federation,[30] 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 its Preamble refers to the North-East Atlantic Ocean, the Framework Agreement does not explicitly define its spatial scope.[31] The Framework Agreement

28 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Murmansk, 15 September 2010. In force 7 July 2011; *United Nations Treaty Series* Reg. No. 49095. English text available at <www.un.org/Depts/los>.

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

30 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 the Russian Federation respectively, which are currently in force. 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 p. 471 that Iceland rejected an earlier proposal by Norway and the Russian Federation for a dedicated regime for the Loophole.

31 The reference in art. I to the area of competence of NEAFC's predecessor does not amount to a definition of spatial competence either. The Joint Commission's website consistently mentions the Barents Sea and the Norwegian Sea as the spatial reach of the Joint Commission (see information at <www.jointfish.com>).

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 Joint Commission's competence over the Arctic Ocean has been asserted repeatedly, including through the inclusion of the Arctic Ocean in the full title of the Murmansk Treaty.[32] Such an assertion does not raise any concerns over its general consistency with international law when it relates to those segments of the maritime zones of Norway and the Russian Federation that are part of the Arctic Ocean. Nor do such concerns exist with respect to the Central Arctic Ocean in case the Joint Commission regulates on a flag State basis. And even if the Joint Commission were to also apply its unique Loophole practice to some or all Central Arctic Ocean fisheries, this would not necessarily be inconsistent with international law. This conclusion is principally based on the unresolved question on consistency of port State jurisdiction with, particularly, international trade law.[33] It is thereby also assumed that no at-sea high seas enforcement measures would be undertaken and that in-port enforcement measures relating to Central Arctic Ocean fisheries would not be more onerous than denial of access or use of port. It is nevertheless considered to be unlikely that the Joint Commission will apply its unique Loophole practice also to some or all Central Arctic Ocean fisheries. The main reason for this is that it would have only limited effectiveness without the support of the other three Arctic Ocean coastal States. Such support is very unlikely to materialize as neither Canada nor the United States currently give foreign vessels fisheries access to their maritime zones and there is no indication that this policy will change in the foreseeable future.[34]

32 For other assertions see Molenaar 2013, note 15 *supra*, at pp. 254–255.

33 A recent opportunity to shed some light on this arose in 2013 when Denmark—in respect of the Faroe Islands—instituted against the EU two separate but related dispute settlement procedures on Atlanto-Scandian herring; one under the World Trade Organization (WTO) and one under the LOS Convention. However, both procedures were terminated in 2014 (for information see <www.wto.org> and <www.pca-cpa.org>).

34 Note, for example, that the United States and the Russian Federation have for a number of years negotiated a comprehensive fisheries agreement for the Northern Bering Sea within the bilateral Intergovernmental Consultative Committee (ICC). These negotiations do not seem headed for a successful result due to a large extent to Russia's preference for reciprocal fisheries access and the lack of support for this by the United States

For most species, the Joint Commission determines TACs based on advice provided by ICES upon 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 processes, the Joint Commission has also allocated fishing opportunities to third States and entities on cod, haddock, and Greenland halibut.

While there is significant competence-overlap between NEAFC and the Joint Commission—both spatially and on species—there was no, or hardly any, actual conflict between the management and conservation measures of the two bodies at the time of writing. Their current relationship can therefore be regarded as complementary. 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 NEAFC[35] 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.

3.4 *A Gap in the Central Arctic Ocean's Coverage with RFMOs or RFMAs?*

The analysis above has shown that NEAFC's spatial competence only applies in a segment of the (Central) Arctic Ocean, while the Joint Commission's spatial competence is not explicitly defined and its members assert that it also extends to the Central Arctic Ocean. The question is therefore whether a gap in the Central Arctic Ocean's coverage with RFMOs or RFMAs in fact exists.

It is submitted that as the Arctic Ocean coastal States take the view that there is "no need at present to develop any additional" RFMO for the Central Arctic Ocean,[36] they implicitly agree that a gap in the Central Arctic Ocean's coverage with RFMOs or RFMAs exists. They also agree that "at least one" existing RFMO—NEAFC—has competence over a portion of the Central Arctic Ocean.[37]

(for information see <www.nmfs.noaa.gov/ia/index.htm>, under 'Agreements' and then 'Bilateral Arrangements').

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

36 The 2013 Chairman's Statement, note 7 *supra*, only mentions RFMO while the 2014 Chairman's Statement, note 6 *supra*, mentions RFMO as well as RFMA. It is submitted that this is at odds with the last sentence of the 2014 Chairman's Statement, which supports a broader process involving non-Arctic Ocean coastal States (and entities) whose "final outcome could be a binding international agreement". It is submitted that such an agreement would in fact be an RFMA. The 2015 Oslo Declaration, note 49 *infra*, at p. 1 reverts again to the correct terminology of the 2013 Chairman's Statement.

37 This is mentioned in both Statements.

This raises the question if the uncertainty or disagreement reflected in the phrase "at least one" relates to anadromous and/or highly migratory species—and thereby the North Atlantic Salmon Conservation Organization (NASCO) and the International Commission for the Conservation of Atlantic Tunas (ICCAT)—or the Joint Commission. In the latter case, the uncertainty or disagreement among the Arctic Five could relate to the Joint Commission's spatial competence in the Central Arctic Ocean but also on whether or not the Joint Commission qualifies as an RFMO.[38]

Determining whether or not international bodies qualify as RFMOs or RFMAs is unfortunately not a straightforward matter due to the lack of generally accepted definitions for RFMOs and RFMAs, as well as for international organizations in general. As regards the term 'international organization', the International Law Commission (ILC) agreed in 2003 that this refers to

> an international organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to states, other entities.[39]

As this definition was developed in the context of the issue of international responsibility of international organizations, however, some commentators regard it as inadequate. Schmalenbach therefore defines international organizations as

> entities a) established by a treaty or other instruments governed by international law, and b) capable of generating through its organs an autonomous will distinct from the will of c) its members".[40]

The Joint Commission was established by a treaty between subjects of international law and thereby satisfies criterion a), but it is submitted that it fails

38 Or both Statements should have linked the phrase "at least one" with RFMO as well as RFMA.

39 'Report of the International Law Commission. Fifty-fifth Session' (5 May–6 June and 7 July–8 August 2003] *General Assembly Official Records* 58th Session Supp 10), at p. 38.

40 K. Schmalenbach, "International Organizations or Institutions, General Aspects", *Max Planck Encyclopedia of Public International Law* (December 2006), at para. 3. R.R. Churchill and G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *American Journal of International Law* 623–659 (2000), at pp. 632–633 use a similar definition developed by Schermers and Blokker.

to meet criteria b) and c). Even though the Joint Commission has established various subsidiary bodies,[41] it neither has a budget nor is it served by a secretariat. Almost all international organizations have their own secretariat or are able to use that of another international organization. The EU is a well-known exception as it does not have a centralized secretariat; rather, each of its institutions has its own staff.[42] The absence of a permanent secretariat therefore commonly means that an international body is not an international organization. On the other hand, the presence of a permanent secretariat does not necessarily imply that an international body is an international organization. The Antarctic Treaty Secretariat and the Arctic Council Secretariat are cases in point. In conclusion, the fact that the Joint Commission is not served by a secretariat is a very strong indication that it is not an international organization. Another strong indication that Norway and the Russian Federation do not intend the Joint Commission to have a 'will of its own', is that the Protocols of the Commission's Annual Meetings consistently indicate that decisions are made by the "parties" rather than by the members or the Commission.[43] This suggests that the two States regard the Joint Commission as a Meeting of the Parties (MoP) or a Conference of the Parties (CoP), and thereby an RFMA (see below), rather than an international organization, and thereby an RFMO.

As noted above, there are no generally accepted definitions for RFMOs and RFMAs either. While no definitions are included in the LOS Convention for either concept, article 1(1)(d) of the Fish Stocks Agreement defines an RFMA as

> a cooperative mechanism established in accordance with the [LOS] Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.

One of the most well-known RFMAs is the CoP established by the CBS Convention.[44] A noteworthy feature of the Fish Stocks Agreement's definition of an RFMA is that it can also have just two participating States (or entities),

41 See the information at <www.jointfish.com>.

42 Cf. N.M. Blokker, "International Organizations or Institutions, Secretariats", *Max Planck Encyclopedia of Public International Law* (January 2008), at para. 1.

43 See the information at <www.jointfish.com>.

44 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Washington, 16 June 1994. In force 8 December 1995, 34 *International Legal Materials* 67 (1995); <www.afsc.noaa.gov/REFM/CBS>.

which means the Joint Commission could in principle qualify as well. In fact, it has been argued that the term 'arrangement'—and thereby the concept of the RFMA—was proposed by Norway during the negotiations on the Fish Stocks Agreement, specifically with the Joint Commission in mind.[45] It is in this context useful to highlight that Norwegian legislation uses the generic term 'international fisheries management body', which comprises international organizations as well as agreements.[46]

Irrespective of the issue as to whether or not the Joint Commission would also actually qualify as an RFMA for the purpose of the Fish Stocks Agreement,[47] it is clear that the concepts of RFMAs and RFMOs can also be used in a more general sense. For instance for mechanisms that (also) deal with other categories of fish stocks, such as anadromous, shared and discrete high seas fish stocks. It is submitted that the Chairman's Statements of the 2013 Washington and 2014 Nuuk Meetings[48] and the 2015 Oslo Declaration[49] also use RFMOs and RFMAs in this more general sense. Illustrative in this regard is FAO's broad concept of regional fishery bodies (RFBs), which cover mechanisms through which States or entities cooperate on the conservation and management of marine living resources (fish as well as marine mammals) and/or the development of marine capture fisheries.[50] RFBs can

1. be international organizations or CoPs/MoPs;
2. be established within or outside the framework of the FAO Constitution;
3. relate to inland and/or marine fisheries;

45 Cf. I. Dahl, "Maritime Delimitation in the Arctic: Implications for Fisheries Jurisdiction and Cooperation in the Barents Sea", 30 *International Journal of Marine and Coastal Law* 1–28 (2015), at pp. 17–18, relying on a report by the Norwegian delegation to the 5th session of the negotiations on the Fish Stocks Agreement.

46 Cf. Sec. 2(3) of the Regulations on licensing for fishing outside Norwegian fisheries jurisdiction (*Forskrift om konsesjonsordning for fiske utenfor norsk fiskerijurisdiksjon*; FOR-2007-03-02-232, of 2 March 2007, as amended; available at <lovdata.no>).

47 Dahl, note 45 *supra*, at p. 20 concludes that the Joint Commission is an RFMA for the purpose of the Fish Stocks Agreement.

48 See notes 6 and 7 *supra*.

49 Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, Oslo, 16 July 2015. The text of the Declaration as well as its 'accompanying text' can be found at <www.regjeringen.no/en/aktuelt/fishing-arctic-ocean/id2427705>.

50 See the information at <www.fao.org/fishery/topic/16800/en>. It should be noted that while this page distinguishes a 'regional fishery arrangement' from an RFB, FAO's list of RFBs on <www.fao.org/fishery/rfb/search/en> does not use this distinction.

4. relate to anadromous (e.g. the bilateral Pacific Salmon Commission (PSC)), shared (e.g. the bilateral International Pacific Halibut Commission (IPHC)), straddling, highly migratory or discrete high seas fish stocks; and
5. be mandated to impose legally binding conservation and management measures on its members or participants (i.e. RFMOs and RFMAs) or merely have an 'advisory' mandate, whether primarily science-oriented or primarily management-oriented.

As of 6 August 2015, the Joint Commission was included in FAO's list of RFBs, which does not distinguish RFMOs/RFMAs from other RFBs.[51] FAO's list of RFBs made such a distinction not so long ago, however, and categorized the Joint Commission as an RFMO then.[52] Such a categorization could nevertheless not be regarded as a form of multilateral recognition of the status of these international bodies under international law. Unless explicitly provided otherwise, the competence to make such determinations lies with States and entities, whether individually or collectively. This may well be the reason as to why FAO's list of RFBs no longer distinguishes RFMOs/RFMAs from other RFBs.

Returning now to the Chairman's Statements of the 2013 Washington and 2014 Nuuk Meetings and the 2015 Oslo Declaration, it is clear that these reflect agreement among the Arctic Five that NEAFC qualifies as an RFMO. This is hardly surprising, as NEAFC is generally accepted to be an RFMO. As neither Statement mentions the Joint Commission, however, each of the Arctic Five retains the competence to determine whether or not the Joint Commission qualifies as an RFMO, an RFMA or neither. This determination could be exclusively for the purpose of the Statements or in general. The implications of this will be examined further in subsection 4.2.

Finally, it should be noted that even if each of the Arctic Five were to agree that the Joint Commission is an RFMO or an RFMA for the purpose of the Statements, or in general, this does not necessarily imply that they also agree that no gap exists in the Central Arctic Ocean's coverage with RFMOs or RFMAs. Canada, Denmark (in respect of the Faroe Islands and Greenland) and/or the United States may for instance take the view that such a gap exists on account of the limited membership/participation in the Joint Commission.

51 See note 50 *supra*, 2nd sentence.

52 A version of the list dated 2 July 2014 was used for the envisaged publication authored by R. Billé, L. Chabason, P. Drankier, E.J. Molenaar and J. Rochette, *Regional Oceans Governance. Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together* (UNEP; forthcoming in 2016), at section 3.3.

4 The Evolving Regional Law on Arctic Ocean Fisheries

4.1 *In Search of a Suitable Mechanism*

One of the first intergovernmental discussions of Arctic Ocean fisheries occurred at the November 2007 meeting of the Arctic Council's Senior Arctic Officials (SAOs). The discussion had been triggered by the United States, in response to its 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."[53] The ensuing discussion at the SAOs meeting was summarized as follows: "There was strong support for building on and considering this issue within the context of existing mechanisms."[54]

The search for a suitable mechanism—existing or new—took place largely in 2008 and 2009. The European Commission proposed NEAFC in November of 2008,[55] but this did not attract sufficient support among the Arctic Five.[56] Next, the United States delegation to the 28th Session of FAO's Committee on Fisheries (COFI) in March 2009, hosted a side event on Arctic fisheries.[57] The discussion paper circulated for this purpose proposed the convening of an intergovernmental meeting sometime in 2009 or 2010, at which the participants could adopt a non-legally binding instrument on Arctic fisheries.[58] It did not clarify if the envisaged meeting ought to take place outside or within the framework of FAO or any other existing mechanism. No further indication on potential participants was included either.

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53 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.

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

55 COM (2008) 763, of 20 November 2008, 'Communication from the Commission to the European Parliament and the Council on The European Union and the Arctic Region', at p. 8.

56 For a discussion on potential reasons for this lack of support, see E.J. Molenaar, "Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework", 1 *Yearbook of Polar Law* 427–463 (2009), at pp. 456–458.

57 "FAO Committee on Fisheries. Side Event on Arctic Fisheries. Hosted by the United States Delegation. 4 March 2009. Mexico Room, 13:00–14.15. Discussion Paper" (on file with author). It is noteworthy that this discussion paper was developed in tandem with an Expert Policy Brief entitled "Policy Options for Arctic Environmental Governance. Prepared by the Fisheries Working Group", of 5 March 2009, drafted in the context of the Arctic TRANSFORM project (for information see <arctic-transform.org>).

58 Ibid.

Towards the end of 2009, the regulation of Arctic (Ocean) fisheries surfaced during the negotiations on the 2009 UNGA 'Ocean' and 'Sustainable Fisheries' Resolutions as a consequence of various EU proposals for paragraphs relating to the Arctic and Arctic Ocean fisheries. The Arctic Ocean coastal States, apart from the United 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 in raising the need for their establishment *per se*.[59] On 4 December 2009, during the plenary debates on these resolutions, Norway indicated that the Arctic Five "have a special responsibility" in "balancing the protection of the Arctic environment with the orderly and sustainable use of its resources".[60] A few months later, the Chair's Summary of the second Arctic Ocean coastal States ministerial (Foreign Affairs) meeting in March 2010, Chelsea, Canada, echoed a similar message by emphasizing that the Arctic Five have "a unique interest and role to play in current and future efforts for the conservation and management of fish stocks" in the Arctic Ocean.[61] These two statements suggest that, already by the end of 2009 or at least by early 2010, the Arctic Five agreed that if a new international instrument on Arctic Ocean fisheries should be developed at all—which was not yet evident for all five by then[62]—its development should be initiated and led by the Arctic Five outside the framework of (other) existing mechanisms.

So far, the only real challenge to the role claimed by the Arctic Five seems to have come from Iceland,[63] which took/takes the view that it is entitled to join the Arctic Five, apparently on account of the possibility that the distributional range of fish stocks that occur in the Arctic Ocean also overlaps with Iceland's maritime zones.[64] The crux is nevertheless that, based on geography, Iceland is simply not an Arctic Ocean coastal State. If the Arctic Five were to allow Iceland to join them, they would not only have difficulty in finding a convincing common denominator but would also stimulate 'applications' by

59 See Molenaar 2013, note 15 *supra*, at pp. 246–248.

60 UNGA *Official Records*, doc. A/64/PV.56, at p. 16.

61 On file with author; also available at <www.mid.ru/brp_4.nsf/0/5E2FEF2614D7AE2BC32576F600592DE5>.

62 See the discussion by N. Wegge, "The Emerging Politics of the Arctic Ocean. Future Management of the Living Marine Resources", 51 *Marine Policy* 331–338 (2015), at pp. 335–336.

63 Ibid., at p. 335.

64 Cf. "A Parliamentary Resolution on Iceland's Arctic Policy", approved by the Althingi at its 139th legislative session, on 28 March 2011 (on file with author), at Principles No. 2 and 3 (see also Commentary in relation to Principles No. 2, 3 and 7). This argument would then be based on art. 63 of the LOS Convention.

other 'nearby' States or entities, or renewed calls to convene the envisaged broader process on Central Arctic Ocean fisheries under the auspices of the Arctic Council. As regards the latter, some Arctic Council involvement on fisheries resources was proposed in drafts of the Arctic Council's Arctic Ocean Review (AOR) Phase II Report, but these proposals did not make it to the final text of May 2013.[65]

4.2 *The Arctic Ocean Coastal States Process on Arctic Ocean Fisheries*

In their capacity as coastal States to the Arctic Ocean, the Arctic Five share certain rights, interests and concerns as well as obligations, and it is therefore perfectly understandable—and often in fact required—that they cooperate and coordinate on various issues at one level or another. One of the earliest instances of cooperation among the Arctic Five, although not necessarily conceived as belonging to the domain of the international law of the sea, is the 1973 Polar Bear Agreement.[66]

In 1991, the Arctic Eight became the principal group for pan-Arctic cooperation due to the creation of the Arctic Environmental Protection Strategy (AEPS)[67] and its associated institutional process. Subsequently, the AEPS was incorporated within the Arctic Council established in 1996, which gradually evolved into the principal intergovernmental body for pan-Arctic cooperation. This status achieved by the Arctic Council was during a brief period under challenge due to the Russian Federation's planting of its flag on the geographical North Pole's deep sea-bed in 2007 and the ensuing events it elicited. The flag-planting was incorrectly perceived by many to inevitably lead to the last land-grab on earth and a resource bonanza, unchecked due to a legal vacuum. This incorrect perception was then followed by the incorrect assumption that the vacuum logically had to be filled by a treaty modeled on the Antarctic Treaty.[68] A number of proposals were made to that effect.[69] The Arctic Five felt compelled to reject these incorrect perceptions and dismiss such proposals by

65 See Molenaar 2013, note 15 *supra*, at pp. 259–260. The AOR Final Report is available at <www.pame.is>.

66 Agreement on the Conservation of Polar Bears, Oslo, 15 November 1973. In force 26 May 1976; 13 *International Legal Materials* 13; <pbsg.npolar.no>.

67 Rovaniemi, 14 June 1991; 30 *International Legal Materials* 1624 (1991); <arctic-council.org>.

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

69 See, *inter alia*, the European Parliament's Resolution on 'Arctic governance' (*Official Journal* 2010, C 9/7; doc. P6_TA(2008)0474), para. 15.

means of their May 2008 Ilulissat Declaration adopted at the first Arctic Five ministerial (Foreign Affairs) meeting.[70]

The convening of the Ilulissat ministerial meeting and the adoption of its declaration was criticized by the Arctic Council's other three members and its permanent participants for undermining the Arctic Council.[71] The Arctic Five nevertheless convened once again at ministerial level in March 2010, in Chelsea, Canada. At that meeting, however, the United States Secretary of State Clinton expressed doubts and concerns over the appropriateness of ministerial (Foreign Affairs) meetings of the Arctic Five,[72] and no such further meetings have since taken place. The high-level participation at the Arctic Council's 2011 Nuuk Ministerial Meeting—in particular by the United States, which was represented not only by Clinton but also by the Secretary of the Interior Salazar—was another clear sign of the Arctic Five's renewed full support for the Arctic Council.

The fact that no Arctic Five ministerial (Foreign Affairs) meetings have been held since March 2010, does not mean that the Arctic Five are not willing, or in fact required, to cooperate and coordinate. As regards Arctic Ocean fisheries, the Arctic Five have, since March 2010, convened a number of policy/governance meetings at the senior officials level, alongside a series of science meetings. The former includes four meetings on which information was made publicly available, namely the June 2010 Oslo Meeting,[73] the 2013 Washington and 2014 Nuuk Meetings already mentioned, and the Meeting at ambassadorial level on 16 July 2015 in Oslo, which was convened to sign the 2015 Oslo Declaration. Other meetings on which information was not made publicly available have also been held, both before June 2010 and after February 2014.[74] Science meetings have been convened in June 2011 (Anchorage), October 2013 (Tromsø) and April 2015 (Seattle).[75]

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70 "Ilulissat Declaration, Arctic Ocean Conference of 28 May 2008" (48 *International Legal Materials* 362 (2009); <www.arctic-council.org>.

71 See e.g. the Report of the April 2010 SAOs Meeting (available at <www.arctic-council.org>), at para. 20; and Iceland's 2011 Parliamentary Resolution on Arctic Policy, note 64 *supra*, at Principle No. 1 (including Commentary, at pp. 4–6).

72 T. Pedersen, "Debates over the Role of the Arctic Council", 43 *Ocean Development & International Law* 146–156 (2012), at p. 152.

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

74 One such meeting was convened by Norway, in March 2009, in New York and another by Canada, in June 2014, somewhere in Canada.

75 See note 5 *supra*.

The next subsection examines the output of the 2014 Nuuk Meeting. From a policy/governance standpoint, it is notable that the 2010 Oslo Meeting had a different spatial focus compared to the 2013 Washington and 2014 Nuuk Meetings and the 2015 Oslo Declaration. Whereas the former related to Arctic Ocean fisheries in general, the latter three focused exclusively on Central Arctic Ocean fisheries; namely the high seas. This is in principle consistent with the *spatial foci* of essentially all RFMOs and RFMAs that deal with non-tuna fish stocks. However, most—if not all—these address the need to ensure compatibility between fisheries conservation and management measures relating to the high seas and coastal State maritime zones in one way or another.[76] The compatibility issue could nevertheless be taken up by the broader process involving other interested States (and entities) to which the Arctic Five committed at the 2014 Nuuk Meeting as well as by means of the 2015 Oslo Declaration.[77] This broader process would, at least *prima facie*, also address concerns over any potential inconsistency with international law arising from the Arctic Five's exclusive focus on the high seas without involving flag States and entities (see subsection 4.5 further below).

The evolving spatial focus of the Arctic Ocean coastal States process on Arctic Ocean fisheries also warrants some observations on Denmark. Whereas the Chair's summary of the 2010 Oslo Meeting refers to representatives from "Denmark/Greenland", the Chairman's Statements of the 2013 Washington and 2014 Nuuk Meetings as well as the 2015 Oslo Declaration refer to (officials from) "the Kingdom of Denmark". As the spatial focus is not limited to the coastal State maritime zones of the Arctic Ocean but is rather limited to the high seas, Denmark has the competence to agree on non-legally binding commitments or legally binding obligations in respect of both the Faroe Islands and Greenland. Not, however, in respect of 'mainland' Denmark, in view of its EU membership.

4.3 *The Substantive Outcome of the 2014 Nuuk Meeting*

Although the Chairman's Statement of the 2014 Nuuk Meeting contains a section entitled 'Interim Measures', in actual fact the Arctic Five merely agreed on the desirability of interim measures, rather than formally adopting them.[78]

76 Cf. art. 7 of the Fish Stocks Agreement.

77 Cf. Chairman's Statement of the 2014 Nuuk Meeting, note 6 *supra*, at p. 2, and Oslo Declaration, note 49 *supra*, at p. 2.

78 Cf. S. Ryder, "The Nuuk Meeting on Central Arctic Ocean Fisheries", post of 15 October 2014 on the blog of the K.G. Jebsen Centre for the Law of the Sea (available at <site.uit.no/jclos/>).

The 2014 Nuuk Meeting therefore fell short of generating a non-legally binding commitment on substantive aspects of Central Arctic Ocean fisheries. This is underscored by the fact that the Arctic Five "agreed to develop a Ministerial Declaration for signature or adoption by the five States based on the provisions described above".[79] As confirmed by the 2015 Oslo Declaration, these "provisions" refer mainly to the bulleted text in the section on 'Interim Measures'.

As reflected in the text preceding the bulleted text, the most important of the five envisaged interim measures relates to avoiding unregulated fishing. This envisaged interim measure would commit the Arctic Five to:

> authorize their vessels to conduct commercial fishing in this high seas area only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with modern international standards.[80]

The envisaged commitment therefore only applies to commercial fishing, thus allowing vessels flying the flag of the Arctic Five to engage in other types of fishing, for instance for subsistence—whether or not by Arctic indigenous peoples—scientific or recreational purposes.[81]

The spatial scope of the envisaged commitment is limited to "this high seas area". The definition included in the Chairman's Statement for this phrase corresponds to the Central Arctic Ocean defined in this chapter.[82] Accordingly, the envisaged commitment also applies to the Arctic Ocean segment of the NEAFC Regulatory Area.

Two conditions must be met before the Arctic Five can authorize their vessels to engage in commercial fishing in the Central Arctic Ocean. These are that such fishing can only occur (a) pursuant to one or more RFMOs or RFMAs that (b) "are or may be established to manage such fishing in accordance with modern international standards". As regards the first condition, it has been

79 Chairman's Statement of the 2014 Nuuk Meeting, note 6 *supra*, at p. 2.

80 Ibid.

81 The 4th bullet nevertheless envisages a commitment to "ensure that any non-commercial fishing in this area does not undermine the purpose of the interim measures, is based on scientific advice and is monitored, and that data obtained through any such fishing is shared".

82 This definition is: "the single high seas portion of the central Arctic Ocean that is entirely surrounded by waters under the fisheries jurisdiction of Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America".

observed in subsection 3.4 that NEAFC is generally accepted to be an RFMO. In addition, the 2013 and 2014 Chairman's Statements explicitly state that NEAFC is an RFMO.

As the Joint Commission is not explicitly mentioned in either Statement, its situation is different from NEAFC's. Subsection 3.4 concluded that there are no generally accepted definitions for RFMOs or RFMAs and that no international body is currently mandated by the international community to determine whether or not international bodies qualify as RFMOs or RFMAs. Unless explicitly provided otherwise, the competence to make such determinations lies with States and entities; whether individually or collectively. As the 2014 Chairman's Statement does not provide otherwise, Norway and the Russian Federation are entitled to regard the Joint Commission as an RFMO or RFMA for the purpose of this Statement. As concluded earlier, the two States are likely to regard the Joint Commission as an RFMA; not necessarily for the purpose of the Fish Stocks Agreement, but probably more in general, and at any rate for the purpose of the 2014 Chairman's Statement. And in case one or more of the other three Arctic Ocean coastal States disagrees with such a position for the purpose of the 2014 Chairman's Statement, Norway and the Russian Federation would still be able to rely on the following savings clause included in the beginning of the section on 'Interim Measures':

> The interim measures will neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries, including NEAFC.

There can be no doubt that the Joint Commission qualifies as an "existing international mechanism relating to fisheries" and that it is thereby covered by the savings clause.

The second condition included in the earlier citation—"are or may be [. . . .] standards"—links fisheries management by RFMOs and RFMAs to the phrase "modern international standards". The wording chosen for this linkage is "established to manage" rather than, for instance, 'established *and* manage'. The literal meaning of the chosen wording is therefore that existing and future RFMOs or RFMAs are 'merely' required to have the mandate to manage fishing in accordance with "modern international standards". Rather than *actually managing* fishing in accordance with international standards, it would thus be sufficient for RFMOs or RFMAs to have the *ability to manage* fishing in

this way.[83] Even though the 2015 Oslo Declaration uses identical wording, one wonders if this is really what the Arctic Five had in mind.

Reference should nevertheless also be made to distinctions between existing RFMOs and RFMAs. The constitutive instruments of RFMOs commonly have a framework character and do not contain actual fisheries conservation and management measures. This can be different for RFMAs. The CBS Convention, for instance, not only contains its objectives and the functions of its annual conference, but also a procedure for establishing the annual harvest level, which should be set at zero if the Aleutian Basin pollock biomass is less than a certain amount.[84] Future RFMAs relating to Central Arctic Ocean fisheries may therefore contain actual fisheries conservation and management measures as well.

The phrase "modern international standards" is likely to be intended to comprise the key obligations set out at the end of section 2, in particular the EAF and the precautionary approach to fisheries management. Furthermore, in view of the particular characteristics of the Arctic Ocean, the phrase is likely to require specific attention to new and exploratory fisheries.[85]

The above analysis means that the envisaged commitment to avoid unregulated fishing is in part given shape by abstaining from unilateralism. The Arctic Five intend not to authorize their vessels to engage in commercial fishing in the Central Arctic Ocean merely pursuant to their own laws and regulations. This is consistent with, and perhaps also inspired by, Norwegian law, which prohibits Norwegian vessels to engage in commercial fishing on the high seas unless such fishing is regulated by an international fisheries management body.[86] The Arctic Five's commitment therefore does not preclude commercial fishing by vessels flying the flag of members/participants of NEAFC, the Joint Commission or future RFMOs or RFMAs.

As regards NEAFC, vessels flying the flag of the Faroe Islands, Greenland, Norway and the Russian Federation can therefore still engage in commercial fishing in the Central Arctic Ocean segment of the NEAFC Regulatory Area

83 Note that the definition of 'arrangement' in art. 1(1)(d) of the Fish Stocks Agreement, cited in the main text *supra*, takes a similar approach.

84 See arts III, IV and VII, and Part 1 of the Annex.

85 See, e.g., art. 6(6) of the Fish Stocks Agreement and the recent steps taken by NEAFC on exploratory bottom fishing discussed in note 24 *supra* and accompanying text.

86 Cf. sec 2(2) of the 2007 Licensing Regulations, note 46 *supra*.

pursuant to NEAFC's conservation and management measures. Similarly, Norwegian and Russian vessels could still engage in commercial fishing in the Central Arctic Ocean pursuant to the Joint Commission's conservation and management measures. The significance of this scenario as well as its likelihood to materialize should not be overstated, however. After all, the Arctic Five have a clear preference for a new RFMO or RFMA for that part of the Central Arctic Ocean that is outside the NEAFC Regulatory Area. This multilateral preference is implied in their collective efforts on the governance of Central Arctic Ocean fisheries and the broader process they envisage in this regard. The involvement of Norway and the Russian Federation in the Arctic Five's process on Arctic Ocean fisheries implies that they have no objection to a new RFMO or RFMA and thereby its *lex specialis* status vis-à-vis the Joint Commission as such. The Joint Commission is then likely to become relevant only if the multilateral solution takes too long to establish or is not established at all. Even then, the Joint Commission may only be willing to regulate fisheries by Norwegian and Russian vessels in high seas areas immediately adjacent to the maritime zones of Norway and the Russian Federation in the Arctic Ocean.

It is clear that the envisaged commitment to avoid unregulated fishing is a fundamentally different approach than that pursued by the CBS Convention discussed above, or by the United States' Arctic Fisheries Management Plan (FMP) for its EEZ off Alaska in the Arctic Ocean. The latter prohibits an expansion of commercial fishing until sufficient information is available, to ensure that fisheries can be conducted in accordance with the EAF and in recognition of the interests of local residents and communities.[87] The United States must have had and may still have a preference for something similar or with similar effectiveness. An earlier United States proposal for an international instrument relating to Central Arctic Ocean fisheries is reported to have been inspired by the CBS Convention.[88] The failure to attract sufficient support for this proposal could be due to one or more of the Arctic Five objecting to mechanisms which would give a single State or a minority of States the power to block commencement of fishing in the Central Arctic Ocean, even though this would be in accordance with, for instance, the EAF. Opposition to the International Whaling Commission's moratorium on commercial whaling, which can only

87 C.f. the Arctic 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.npfmc.org>).

88 Cf. Wegge, note 62 *supra*, at p. 336.

be lifted with the support of a three-fourths majority,[89] may well have played an important role in this respect. One or more of the Arctic Five may have also felt that proposals like these would ultimately not be able to attract sufficient support among non-Arctic States and entities in the envisaged broader process anyway. Finally, one or more of the Arctic Five may have taken the view that proposals like these require, due to the notion of compatibility, a similar approach in their coastal State maritime zones in the Arctic Ocean, which they could not support.

4.4 *The 2015 Oslo Declaration*

The Declaration that was eventually signed in Oslo on 16 July 2015 was already foreseen in the 2014 Chairman's Statement, but was at that time scheduled to be signed at ministerial level in June 2014. The Russian Federation's annexation of Crimea and the subsequent events in Eastern Ukraine disrupted these plans, and for a while it was uncertain if these and the broader process envisaged in Nuuk would ever come to fruition. The 2015 Oslo Declaration, signed at ambassadorial rather than ministerial level—probably instigated by Canada in view of the many Canadians with Ukrainian descent—brought an end to this uncertainty and confirmed that the consensus that existed in Nuuk had remained largely intact. While the wording and structure of the 2015 Oslo Declaration are not identical to that of the 2014 Chairman's Statement, it is submitted that most differences are relatively insignificant.

Most importantly, the key commitment on unregulated high seas fishing that was discussed at length in the previous subsection, is included almost identically in the 2015 Oslo Declaration. The only difference is the substitution of the phrase "modern international standards" with "recognized international standards". The new phrase may have been preferred because it is more closely aligned with the terminology used in other so-called 'rules of reference' in international fisheries law.[90] In terms of substance, it seems that also the new phrase covers the EAF and the precautionary approach to fisheries management, as well as specific attention to new and exploratory fisheries. As regards

89 Cf. arts III(2) and V of the International Convention for the Regulation of Whaling (Washington D.C., 2 December 1946. In force 10 November 1948, 161 *United Nations Treaty Series* 72; <iwc.int>).

90 Cf. Ryder, note 78 *supra*. For instance the phrase "generally recommended international minimum standards" in arts 61(3) and 119(1)(a) of the LOS Convention and arts 5(b) and 10(c) of the Fish Stocks Agreement.

the precautionary approach, this is supported by a reference to it elsewhere in the 2015 Oslo Declaration (see further below).

The various savings clauses of the 2014 Chairman's Statement were redrafted somewhat and are grouped together immediately after the commitments. As the text contains the key sentence "These interim measures will neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries, including [NEAFC]", the previous subsection's conclusions on NEAFC and the Joint Commission remain intact.

The 2014 Chairman's Statement envisaged five commitments, but the 2015 Oslo Declaration only contains four. The text of the commitment that was omitted—"to encourage other States to take measures in respect of vessels entitled to fly their flags that are consistent with these interim measures"—is nevertheless still included unchanged in the Declaration, closer to the text on the broader process at the end, where it is actually placed better. While the text of the fourth interim measure has remained the same, the texts of the second and third interim measures have been expanded. They read:

- We will establish a joint program of scientific research with the aim of improving understanding of the ecosystems of this area and promote cooperation with relevant scientific bodies, including but not limited to the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES).
- We will promote compliance with these interim measures and with relevant international law, including by coordinating our monitoring, control and surveillance activities in this area.
- We will ensure that any non-commercial fishing in this area does not undermine the purpose of the interim measures, is based on scientific advice and is monitored, and that data obtained through any such fishing is shared.

The second interim measure has been enlarged with the phrase "and promote (. . . .) (PICES)", which the 2014 Chairman's Statement also included elsewhere. A reference to the Arctic Council could not be expected here, as it is not a scientific body. It is nonetheless striking that neither the 2015 Oslo Declaration nor the 2014 Chairman's Statement mention cooperation with the Arctic Council at all. This despite, *inter alia*, the Council's very broad mandate with its explicit inclusion of "environmental protection"[91] and its general acceptance as the principal intergovernmental body for pan-Arctic cooperation.

91 'Declaration on the Establishment of the Arctic Council' (Ottawa, 19 September 1996; text available at <www.arctic-council.org>), at p. 1.

A new aspect of the 2015 Oslo Declaration compared to the 2014 Chairman's Statement is the clarification of its rationale and international legal basis, including an explicit reference of the precautionary approach. After noting that commercially viable high seas fishing is unlikely to occur in the near future and that a new RFMO is therefore not needed, the Declaration continues as follows:

> Nevertheless, recalling the obligations of States under international law to cooperate with each other in the conservation and management of living marine resources in high seas areas, including the obligation to apply the precautionary approach, we share the view that it is desirable to implement appropriate interim measures to deter unregulated fishing in the future in the high seas portion of the central Arctic Ocean.

Whereas the second part of the sentence—"we share [...] central Arctic Ocean"—is virtually identical to text already included in the 2014 Chairman's Statement, the first part is new. In addition to clarifying the rationale as well as the international legal basis of their commitments, the explicit acknowledgement that the precautionary approach forms part of their obligations under international law implies that it is also covered by the phrase "recognized international standards" included in the first interim measure.

Interestingly, the 2014 Chairman's Statement contained a clarification of the Arctic Five's claim to a lead role on the international regulation of Central Arctic Ocean fisheries, noting "that it is appropriate for the States whose exclusive economic zones border the high seas area in question to take the initiative on this matter". The 2015 Oslo Declaration is silent about this. To some extent, this may also be regarded as unnecessary due to the clarification of the rationale and international legal basis of their commitments. But it may well be that the Arctic Five also decided that it was undesirable to explicitly assert, and draw attention to, their lead role and its appropriateness. As advanced in the next subsection, however, this does not mean that the Arctic Five have renounced their lead role. They are likely to maintain full control on the crucial and sensitive issue of participation in the broader process. Moreover, the 2015 Oslo Declaration stipulates that the outcome of this process must be "consistent with" the Declaration.

4.5 *The Envisaged Broader Process on Central Arctic Ocean Fisheries*

Both the 2014 Chairman's Statement and the 2015 Oslo Declaration are supportive of developing international regulation of Central Arctic Ocean fisheries further among a more inclusive group than just the Arctic Five. The relevant texts nevertheless contain many differences and read as follows:

2014 Chairman's Statement	2015 Oslo Declaration
The meeting also reaffirmed that other States may have an interest in this topic and looked forward to a broader process involving additional States beginning before the end of 2014. The purpose would be to develop a set of interim measures, compatible with the Ministerial Declaration, that would include commitments by additional States. The final outcome could be a binding international agreement.	We acknowledge the interest of other States in preventing unregulated high seas fisheries in the central Arctic Ocean and look forward to working with them in a broader process to develop measures consistent with this Declaration that would include commitments by all interested States.

Rather than a comprehensive analysis of these differences, a few observations are offered on some more important differences. First, the 2015 Oslo Declaration's text is arguably more welcoming, cooperative and inclusive. Whereas the 2014 Chairman's Statement opts for "may have an interest", "a broader process involving" and "additional States", the 2015 Oslo Declaration does not question that other States may have an interest and looks "forward to working with" not just additional States but "all interested States". Second, the last sentence of the citation of the 2014 Chairman's Statement—"The final [. . .] agreement"—did not make it to the 2015 Oslo Declaration. As a minimum, this reflects a lack of consensus on the need or desirability of its inclusion. However, the root cause for this could also be a lack of support by one of more of the Arctic Five for a legally binding outcome. On the other hand, the significance of the non-inclusion of this sentence should also not be overstated, as a legally binding outcome is not ruled out. It is finally submitted that even if the outcome would be non-legally binding, it would still constitute an RFMA. As regards its spatial scope, it would be logical for it not to overlap with the NEAFC Regulatory Area.

At the time of writing, the envisaged broader process still seemed to be in a design-phase without agreement on rules of procedure, date and venue of a first meeting, and who will participate besides the Arctic Five. Some time ago the intention seemed to be that participation in the broader process would be exclusively based on invitation by the Arctic Five, and that the following non-Arctic States and entities would be invited: China, the EU, Iceland, Japan and South Korea.[92] Participation by States and entities in the broader process

92 Based on communications between the author and government officials from Norway and the United States. These five participated indeed in the first meeting of the broader

would thus consist of 'Five-plus-Five'. However, the substitution of "additional States" by "all interested States" raises the question if the Arctic Five perhaps considered more inclusive participation at the time of writing.[93]

The 2015 Oslo Declaration recognizes the interests of Arctic indigenous peoples "in the proper management of living marine resources in the Arctic Ocean". However, participation of their representatives in their own right, rather than as part of the delegations of the Arctic Five, is probably not able to secure consensus among the Arctic Five, and may also be opposed by non-Arctic States that have concerns relating to indigenous peoples, in particular China. Participation by non-governmental organizations—both green and industry—may be less controversial.

The selection of the abovementioned five non-Arctic Ocean coastal States and entities may be motivated by various reasons. The inclusion of the EU and Iceland ensures representation of all Arctic States, as Finland and Sweden would be represented by the EU. The significant distant-water fleets and interests of China, the EU, Japan and South Korea are likely to have played a role as well. The selection moreover ensures the inclusion of all members or parties to NEAFC and the 'nearby' CBS Convention.[94] However, this is not the case for the 'nearby' Northwest Atlantic Fisheries Organization (NAFO; Cuba and the Ukraine) and the 'nearby' NPFC (Taiwan (Republic of China)). Inviting the Ukraine would, at the time of writing, be unlikely to be supported by the Russian Federation. Due to the improved relations between Cuba and the United States, however, the latter may not object to inviting Cuba. On the other hand, Cuba may simply not be interested in participating.[95] A reason

process, which took place in December 2015. See E.J. Molenaar, "The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean", post dated 5 February 2016 for The JCLOS Blog <http://site.uit.no/jclos/2016/02/05/the-december-2015-washington-meeting-on-high-seas-fishing-in-the-central-arctic-ocean/>.

93 As advocated for instance by T. Heidar in his presentation entitled "The Legal Framework for Central Arctic Ocean Fisheries" at the conference *International Marine Economy: Law and Policy*, co-organized by the Center for Oceans Law and Policy, University of Virginia School of Law, and the Center for Polar and Deep Ocean Development, Shanghai Jiao Tong University, in Shanghai, on 24–26 June 2015 (available at <www.virginia.edu/colp/annual-conference.html>).

94 The EU and Iceland represent the 'missing' members of NEAFC, and China, Japan and South Korea the 'missing' parties to the CBS Convention. Poland is also a party to the CBS Convention but as it is also an EU Member State, it would be represented by the EU. The EU will seek to become a party to the CBS Convention "in due time" (cf. Report of the 18th Annual Conference of the CBS Convention (2013), at Appendix 1).

95 See also note 18 *supra* and accompanying text on Cuba's unused right to become a party to the NEAFC Convention.

for not inviting Taiwan despite its significant distant-water fleet and interests could be to avoid having to address the difficulties associated with its disputed status under international law in the presence of China. Finally, limiting participation in the broader process to Five-plus-Five may also serve to ensure that the Arctic Five are not outnumbered by non-Arctic Ocean coastal States and entities.

If participation in the broader process would be limited to Five-plus-Five, it would be open to challenges of inconsistency with the freedom of high seas fishing[96] and the concept of 'real interest'.[97] The difficulty for such challenges is the current overall practice on membership or participation and the related issue of allocation of fishing opportunities in RFMOs and RFMAs that have a partial or exclusive high seas mandate. The existing membership or participation is commonly dominated by regional coastal States or entities, and developed distant water fishing States or entities. New entrants generally face considerable, and often insurmountable, obstacles to becoming members or participants and, if they nevertheless succeed, often have no prospect of significant (equitable) allocations of fishing opportunities. SPRFMO—one of the newest RFMO at the time of writing—is a notable exception to this overall practice. Not only was its negotiation entirely open, but any State or entity "having an interest in fishery resources"—which is thus much broader than a fishing interest—can become a member as well.[98] This did not set a new trend, however, as the more recent negotiation of the NPFC was far less transparent and open, and new entrants need to be invited by consensus by the existing members.[99]

Therefore, even if more inclusive participation than Five-plus-Five in the broader process is presently considered by the Arctic Five but does not attract the necessary support, participation based on Five-plus-Five would still be largely consistent with the overall practice on membership and participation in RFMOs or RFMAs. No indication exists yet as to how the broader process will deal with new entrants or the allocation of fishing opportunities, if at all. For all these issues, it should be kept in mind that there are currently no commercially viable fisheries in the Central Arctic Ocean and this may remain unchanged for a considerable number of years to come.

96 Art. 116 of the LOS Convention.

97 Arts 8(3 and 5) and 9(2) of the Fish Stocks Agreement.

98 Art. 37(1) of the SPRFMO Convention, note 9 *supra*.

99 Art. 24(2) of the NPFC Convention, note 11 *supra*. See, however, the procedure in para. (3) of art. 24.

Finally, as regards the substance of the broader process, the 2015 Oslo Declaration stipulates that the resulting measures are to be "consistent with" the 2015 Oslo Declaration. This reflects the Arctic Five's intention to significantly shape the substance of the future international regulation of Central Arctic Ocean fisheries. The question should therefore be raised as to how much flexibility among the Arctic Five, and room for maneuvering and negotiation, there eventually will be? Or, to put it differently, to what extent will the substance of the Oslo Declaration amount to a *fait accompli* and preclude the newly invited States and entities from participating in the broader process in a way that would be both meaningful and consistent with their rights under international law? Here too, however, it must be emphasized that there are currently no commercially viable high seas fisheries and that the Oslo Declaration does not propose a 'moratorium', 'ban' or 'freeze of fishing effort'.

5 Conclusions

As this chapter has shown, international regulation of Central Arctic Ocean fisheries is by no means entirely absent. The global component of international fisheries law applies to the entire (Central) Arctic Ocean, however defined. Furthermore, even the Central Arctic Ocean is already currently subject to actual regional or subregional fisheries regulation. The North-East Atlantic Fisheries Commission (NEAFC) is generally accepted to be a regional fisheries management organization (RFMO) and exercises competence in the Atlantic segment of the Arctic Ocean. The Joint Norwegian-Russian Fisheries Commission (Joint Commission) appears to be viewed by Norway and the Russian Federation as a regional fisheries management arrangement (RFMA) in general, as well as for the purpose of the 2015 Oslo Declaration. The Joint Commission's spatial competence is not explicitly defined and its two members/participants have asserted repeatedly that it also encompasses the Arctic Ocean. As argued in this chapter, such an assertion does not necessarily raise concerns on consistency with international law.

However, even if all of the Arctic Five would agree that the Joint Commission is an RFMO or an RFMA for the purpose of the 2015 Oslo Declaration, or in general, this does not necessarily imply that they also agree that no gap exists in the Central Arctic Ocean's coverage with RFMOs or RFMAs. Canada, Denmark (in respect of the Faroe Islands and Greenland) and/or the United States may for instance take the view that such a gap exists on account of the limited membership/participation in the Joint Commission.

Following intergovernmental discussions related to Arctic Ocean fisheries between 2007–2009 in, among others, the Arctic Council and the United Nations General Assembly, the Arctic Five agreed that if a new international instrument on Arctic Ocean fisheries should be developed at all—which was not yet evident for all of them by late 2009 or early 2010—its development should be initiated and led by the Arctic Five outside the framework of (other) existing mechanisms. The Arctic Ocean coastal States process on Arctic Ocean fisheries has thus far culminated in three science meetings, and four policy/governance meetings on which information was made publicly available. The most recent of the latter involved the signature of the 2015 Oslo Declaration, which contains commitments to implement several interim measures and envisages a broader process involving non-Arctic States (and entities) that could lead to the adoption of an RFMA on Central Arctic Ocean fisheries.

The key commitment of the 2015 Oslo Declaration is that the Arctic Five will not authorize their vessels to engage in commercial fishing in the Central Arctic Ocean merely pursuant to their own laws and regulations, and that international regulation must be in accordance with 'recognized international standards'. This abstention from unilateralism does not affect commercial high seas fishing by vessels flying the flag of members/participants of NEAFC, the Joint Commission or future RFMOs or RFMAs. Such fishing would then have to take place within their regulatory areas as well as pursuant to their substantive regulations, which must be in accordance with 'recognized international standards'. This latter phrase is likely to be intended to comprise key obligations of international fisheries law, such as ecosystem and precautionary approaches to fisheries management, with specific attention to new and exploratory fisheries.

This key commitment has been criticized for being 'utilization-oriented',[100] presumably because the critics preferred an indefinite ban or moratorium on Central Arctic Ocean fishing. Such criticism is to some extent understandable as the chosen approach involves a *potentially* higher risk for, *inter alia*, Arctic fish stocks and ecosystems. On the other hand, however, this criticism insufficiently credits the envisaged action for its pro-active and precautionary stance and implicit dismissal of a *lassez-faire, lassez-aller* attitude. While the key commitment is not framed as a ban, moratorium or freeze of fishing effort, it nevertheless constitutes an indefinite prohibition of high seas fishing, which can be lifted when certain procedural and substantive conditions are met. The procedural condition is multilateral agreement through RFMOs or RFMAs, and the

100 Wegge, note 62 *supra*, at p. 337 observes that "Finland, the European Parliament as well as various NGOs" have voiced such criticism.

substantive condition is regulation in accordance with 'recognized international standards'. In view of the current shortcomings in scientific knowledge and fisheries data relating to the Central Arctic Ocean, the threshold created by this substantive condition should not be underestimated. The procedural condition also implies that more conservation-oriented States have some leverage over more utilization-oriented States. Finally, a ban, moratorium or freeze of fishing effort on Central Arctic Ocean fisheries which would be both indefinite and unconditional is unlikely to have been acceptable for most of the Arctic Five, due to the precedent-setting effects for the regulation of high seas fishing in general.

The prediction that large-scale (commercial) fishing in the Central Arctic Ocean is unlikely to be commercially viable in the near future is very plausible. A prediction that is not merely plausible but extremely likely to prove correct is that large-scale fisheries will become commercially viable within coastal State maritime zones of the Arctic Ocean earlier than in its high seas area. The more immediate challenge is thus for Arctic Ocean coastal States to ensure that commercial fishing in their own maritime zones is also regulated in accordance with 'recognized international standards', with particular reference to new and exploratory fisheries. Such practice will—for reasons of credibility and in light of the notion of compatibility—be crucial for securing support among non-Arctic States and entities to participate in the envisaged broader process and its eventual adoption of a regional instrument on Central Arctic Ocean fisheries.

At the time of writing, only the Arctic Five had, through the 2015 Oslo Declaration, made clear commitments regarding Central Arctic Ocean fisheries and the envisaged broader process still seemed in a design-phase without agreement on rules of procedure, date and venue of a first meeting, and who will participate besides the Arctic Five. All non-Arctic ocean coastal States and entities nevertheless continue to be bound to their obligations under the global component of international fisheries law and are required to exercise the necessary jurisdiction in relevant capacities, including as flag, coastal and port States.