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Fisheries in the high seas area of the central Arctic Ocean

An analysis of the existing legal regime in the Arctic Ocean

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ABBREVIATIONS

AMAP	Arctic Monitoring and Assessment Programme
CIL	Customary International Law
EEZ	Exclusive Economic Zone
EU	European Union
FSA	1995 Fish Stocks Agreement
GAIRAS	Generally Accepted International Rules and Standards
ICJ	The International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
LOS	Law of the Sea
LOSC	1982 United Nations Convention on the Law of the Sea
MSY	Maximum Sustainable Yield
NM	Nautical Miles
PAME	Protection of Arctic Marine Environment
PSA	Port State Agreement
TAC	Total Allowable Catch
UNGA	United Nations General Assembly

PART I

1. INTRODUCTION

1.1 Introduction

The 1982 United Nations Convention on the Law of the Sea (the LOSC)¹ is referred to as the constitution of the seas and covers all aspects in the field international of law of the sea.² In its preamble it establishes the desirability of establishing a legal order for the oceans, as well as efficient and equitable use of its resources.³ The LOSC is a framework convention and as such establishes general rules and standards, while other instruments give further details to them.

The renowned legal scholars Rothwell and Stephens identified climate change, marine environmental security and creeping jurisdiction as the main challenges for the international law of the sea, stating that climate change may prove to be the most significant.⁴ The impact of climate change is evident in the Arctic, which has been closely monitored in the last decades. The Arctic is warming and there is decrease in both the extent and duration of snow cover.⁵ Furthermore, the thickness of the sea-ice is decreasing and becoming more vulnerable to melting as the sea-ice cover is largely made up of younger, thinner ice.⁶ This is clearly evident by the fact that the extent of the sea-ice in August 2016 was the third lowest recorded (5.61 million km²).⁷ Marine environmental security becomes a more pressing issue in the face of climate change. As environmental concern grows it calls for more protection of the marine environment and biodiversity, which extends to the issue of fisheries.⁸

A part of the Arctic Ocean is subject to the national jurisdiction of Arctic coastal States, while a significant part of the water column constitutes high seas. As such it is subject to the freedoms of the high seas provided for in article 87 of the LOSC. Although the central Arctic Ocean is ice-covered, the melting of the sea-ice has opened up a possibility of future

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

² LOSC Preamble, paragraph 1.

³ Ibid, paragraph 4.

⁴ Rothwell and Stephens, *International Law of the Sea*, p. 25-26.

⁵ SWIPA Assessment (2011), available at <http://www.amap.no/documents/doc/arctic-climate-issues-2011-changes-in-arctic-snow-water-ice-and-permafrost/129> (accessed 22.08.2016).

⁶ SWIPA Assessment (2011), p. vi.

⁷ National Snow & Ice Data Center, "Late summer in the Arctic, ice melt continues", 2016. Available at <http://nsidc.org/arcticseaicenews/2016/08/late-summer-in-the-arctic-sea-ice-melt-continues/> (accessed 22.08.2016).

⁸ Supra n. 4, p. 26.

commercial fisheries in the area. Along with navigation, fisheries are among the most significant of the freedoms granted to States by virtue of article 87. Many States rely heavily on commercial fisheries to this day and on high seas fisheries in particular. While the LOSC grants all States a right to fish on the high seas, it does not provide much more detail to that right.⁹ Regulation of high seas fisheries has therefore been made through other means, such as regional instruments. Due to its permanent ice-coverage, the central Arctic Ocean has to a large degree been left out of these instruments, rendering the area vulnerable to illegal, unregulated and unreported fishing (IUU fishing). IUU fishing poses a serious problem for the sustainable conservation and preservation of fish stocks and marine environment in general. Although the nature of IUU fishing renders it hard to quantify, the existing information indicates that it accounts for up to 30% of total catches, possibly more in some instances.¹⁰ In light of the aforementioned, it is vital to analyse the legal regime that governs the central Arctic Ocean.

1.1.1 Defining the Arctic

In order to analyse the legal regime it is necessary to define the Arctic Ocean, and subsequently the Arctic States. Although the Arctic Ocean is a highly discussed area, there does not exist a universal definition of its geographic area. The aim of this thesis is to look at the legal regime of the whole of the Arctic Ocean. Therefore the definition adopted by the Arctic Monitoring and Assessment Programme (AMAP) is best suited as its geographical scope includes a large area. The AMAP defines the Arctic as including “northern seas that extend as far south as 51.1 degrees (James Bay, Canada)”¹¹ and includes the whole of Greenland, Iceland and the Faroe Islands. Under the AMAP definition there are eight States that are linked to the Arctic: Canada, the Kingdom of Denmark (Denmark) (on behalf of Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation (Russia), Sweden and the United States of America (the US). The aforementioned States are all members of the Arctic Council, an intergovernmental forum that promotes cooperation, coordination and communication on common Arctic issues.¹² All but Sweden and Finland have coasts in the Arctic Ocean, however only five of them claim maritime zones in the

⁹ Article 116 of the LOSC establishes it as a right. This will be discussed in chapter 2.1.2.

¹⁰ FAO information on IUU fishing, available at <http://www.fao.org/docrep/005/y3536e/y3536e04.htm> (accessed 30.08.2016).

¹¹ AMAP geographical coverage, available at <http://www.amap.no/about/geographical-coverage> (Accessed 20.06.2016).

¹² Discussed in chapter 3.3.

central Arctic Ocean, where they exercise their national jurisdiction. These are Canada, Denmark (on behalf of Greenland), Norway, Russia and the US, and are often referred to as ‘the Arctic five’. The Arctic five have held meetings and issued joint declarations on the affairs of the Arctic, the most recent of which is the Oslo Declaration, from 16 July 2015.¹³

1.2 Objective and research questions of the thesis

The objective of the thesis is to analyse the existing legal regime with regard to fisheries in the central Arctic Ocean. In order to pursue this objective it is necessary to first look at the legal regime regarding fisheries in the Arctic Ocean and:

- identify what rights and obligations States have in relation to fisheries in the Arctic according to existing legal regimes, particularly in high seas areas.
- look at the geographical scope of the existing instruments, both international and regional, and analyse to what extent they apply to the high seas area of the central Arctic Ocean.

Based on the results of the aforementioned, the effectiveness of the fisheries management regime for the central Arctic Ocean will be evaluated, in particular where it may be lacking.

1.3 Scope and structure of the thesis

The thesis is divided into five Parts. Part I is this introduction, which aims to give the reader the background information necessary to understand the issues that are connected to fisheries in the central Arctic Ocean.

Part II looks at the international conventions that govern fisheries in the Arctic Ocean, such as the LOSC, the 1995 Fish Stocks Agreement (the FSA),¹⁴ the FAO Compliance Agreement¹⁵ and the Port State Agreement (PSA) which recently entered into force.¹⁶ The main focus will be on identifying the rights and obligations these instruments place upon their member States in relation to fisheries on the high seas.

¹³ Declaration Concerning the prevention of unregulated high seas fishing in the central Arctic Ocean. Available at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf> (Accessed 17.08.2016).

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 (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

¹⁵ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Adopted 24 November 1993, entered into force 24 April 2003), 2221 UNTS 120.

¹⁶ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (Adopted 22 November 2009, entered into force 5 June 2016). Available online at http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf (accessed 28.07.2016).

Part III looks at regional instruments connected with the Arctic Ocean, such as regional fisheries management organisations (RFMO's) and bilateral agreements, as well as identifying the instruments that govern the Arctic region. There are several RFMO's that are relevant to Arctic fisheries, either through geographical scope or through membership of the Arctic States. Furthermore, a number of different bilateral agreements exist between the Arctic States in relation to Arctic fisheries. The discussion will be limited to these instruments, look at their scope and the rights and obligations they confer to their parties in relation to fisheries. Finally, it is necessary to look briefly at other instruments related to Arctic governance, namely the Arctic Council, the Nordic Council and the EU. Although not directly related to fisheries, the Arctic Council and the Nordic Council are an important part of the matters of the Arctic. The EU is an influential institution and highly involved in the matters of the Arctic, including fisheries.

Part IV provides an overall assessment of the legal regime in the Arctic Ocean through analysis of Parts II and III in chapter 4.1. It analyses the effectiveness of the existing legal regime in the Arctic Ocean, with particular emphasis on the central Arctic Ocean, identifying its weaknesses and suggests potential remedies to these shortcomings. Chapter 4.2. goes on to discuss the potential future development regarding fisheries in the light of the work of the Preparatory Committee established through United Resolution no.69/292 (Res. 69/292).¹⁷

Finally, Part V will provide a general conclusion to the thesis, summarising the findings to the research questions that were posed, with the aim of connecting the analysis of the material of the thesis.

1.4 Legal sources and methodology

This thesis will provide a doctrinal analysis of the agreements governing fisheries in the Arctic Ocean, following the method set out in article 38 of the Statute of the International Court of Justice (the ICJ).¹⁸ In light of the objective of this thesis, special focus was given to the international conventions and regional instruments that govern fisheries in the Arctic Ocean. State practice in the form of bilateral agreement on fisheries in the Arctic Ocean was reviewed, as well as intergovernmental bodies that deal with governance in the Arctic.

¹⁷ Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/69/292. Available at http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm (accessed 23.08.2016).

¹⁸ Statute of the International Court of Justice, United Nations (adopted 26 June 1945, entered into force 24 October 1945).

An extensive review of legal theory and the existing literature in relation to the topic was applied, using both a descriptive and analytical method. The material was supplemented with case law when further interpretation was necessary. Finally, reference was made to scientific reports and available data related to the topic of the thesis.

Where applicable, interpretation of the legal sources was based on articles 31 and 32 of the 1969 Vienna Convention.¹⁹ Generally, the interpretation started by an analysis of the text, deciphering the ‘ordinary meaning’ pursuant to article 31(1). Subsequently the ordinary meaning was looked at in context with, and in light of the purpose and object of the convention in question.²⁰

¹⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²⁰ *Ibid*, article 31.

PART II

2. GLOBAL FRAMEWORK

Fisheries in the Arctic Ocean and consequently the central Arctic Ocean, are subject to several international conventions. The two most prominent ones are the 1982 United Nations Convention on the Law of the Sea and the 1995 Fish Stocks Agreement. Nevertheless, there are other instruments, such as the Port State Agreement, that will possibly be pivotal in preventing IUU fishing in the future.

2.1 The United Nations Convention on the Law of the Sea

The LOSC is an ambitious convention, aimed at providing a framework for matters pertaining to the sea, such as fisheries, navigation and pollution. It was adopted in 1982 and came into force in 1994. The LOSC currently has 168 member States and although widely ratified, there is a notable exception. The US has not ratified the LOSC although it played a major role in the negotiation of the instrument. This is an important exception in light of s not a member to the LOSC, which is interesting with the US being a member of the Arctic five and therefore a major player in the matters of the Arctic, as well as in matters of the Law of the Sea (LOS) in general. Importantly, the US accepts the provisions of the LOSC as customary international law, the exception of Part XI.²¹

The LOSC is comprehensive and provides states with ample rights as well as obligations, in different capacities depending on each situation. This means that the same State can have rights and duties in its capacity as a coastal State, as a flag State and as a port State. The following chapters will discuss the rights and obligations States have with regard to fisheries under the LOSC, both within and beyond their national jurisdiction.

2.1.1 *Obligations within national jurisdiction*

States have full sovereignty over their lands. Article 2 of the LOSC extends their sovereignty beyond the land territory and internal water, into the territorial sea, the air space over it, and the sea bed and subsoil. The territorial sea can extend up to 12 nautical miles (NM) measured from the determined baselines.²² States therefore have full sovereignty over their territorial sea, including fisheries, by virtue of article 2.

²¹ Koivurova and Molenaar, 2010, “*International Governance*”, p. 44.

²² Article 3 of the LOSC.

Beyond the territorial sea is the exclusive economic zone (EEZ) which can extend up to 200 NM measured from the baselines.²³ The EEZ is referred to as a *sui generis* zone, due to its unconventional mixture of rights and duties of coastal and flag states. Article 56 gives coastal states sovereign rights to explore and exploit, conserve and manage both living and non-living resources. What this means is that coastal States have full jurisdiction with regard to fisheries in their EEZ's. This is particularly important with regard to the Arctic five, whose EEZ's constitute part of Arctic waters. The coastal States' authority within the EEZ is limited by the wording of article 56, which only confers sovereign rights, not full sovereignty. Other States enjoy rights as flag States pursuant to article 58 but must have due regard to the rights of the coastal State. The coastal State must likewise have due regard to the rights of other States, when exercising its sovereign rights in the EEZ.²⁴

Although article 56 seems to give coastal States full discretion to decide on conservation measures and whether to adopt them, the coastal States do have specific responsibilities. Article 61 sets out a general obligation on coastal States to adopt conservation measures to prevent stocks from over-exploitation, and obligates them to cooperate "as appropriate" with international organisations to that end. Although Arctic coastal States have this obligation of cooperation, there is no international organisation that governs all Arctic waters. Article 61 further requires coastal States to maintain stocks at maximum sustainable yield (MSY). Article 62 requires States to promote the "optimum utilization" of their living resources. In conjunction, the two articles require States to maintain stocks at levels that allow for routine exploitation without depleting the stocks, allowing them to maximise the economic use of their stocks. Coastal states have enforcement powers in regard to their sovereign rights granted to them by virtue of article 56. Article 73 of the LOSC gives them the right to board, inspect, arrest and hold judicial proceedings in order to ensure compliance with the laws and regulation set in accordance with article 56.

Article 63 deals with stocks that occur within different maritime zones. In instances where target stocks or associated species occur within a coastal State's EEZ and the high seas, article 63(2) dictates that the coastal State and the flag States, fishing for the stocks in question, shall "seek to agree upon" the necessary conservation measures of those stocks. The States may choose to do so either directly or through an "appropriate" organization. A similar obligation exists for States when stocks occur within two adjacent EEZ's. In such instances the relevant coastal States shall seek to "agree upon the measures necessary to co-ordinate and

²³ Article 57 of the LOSC.

²⁴ *Ibid*, article 56(2).

ensure the conservation and development of such stocks.”²⁵ A similar obligation of cooperation, either direct or through RFMO’s, is contained in article 64(1), which pertains to highly migratory species that occur within and beyond the EEZ. The article requires states to cooperate “with a view” to ensure conservation and to promote the objective of optimum utilisation of the species, both within and beyond their EEZ’s. Articles 66 and 67 place certain obligations on coastal States with regard to anadromous and catadromous species.²⁶ Where such stocks occur, States are required to ensure their conservation and cooperate in the measures taken.

The obligation of cooperation in article 63(2) is of particular relevance to high seas fisheries. Although the provision establishes an obligation to cooperate, that obligation is unclear. The wording “shall seek” greatly dilutes the obligation, possibly to the extent of it being fully at the discretion of the coastal State in question to determine whether it deems it necessary to cooperate on such matters, or not. The same applies for the obligation in paragraph 1, which requires States with adjacent EEZ’s to “seek to agree upon” the necessary measures to coordinate the measures taken. This provision essentially aims to create consistency in the conservation measures States adopt within their jurisdictions. Undoubtedly, there is a general expectation that States cooperate in such instances, however, it is not clear, whether the wording of this provision places a *de facto* obligation on States. Although the obligation of cooperation is phrased in stronger terms in article 64, and additionally requires the promotion of optimum utilisation, it is not clear whether the article constitutes an actual obligation for States, or is merely a strong suggestion.

Although articles 63(2) and 64 do establish a general obligation of cooperation, neither the duty itself nor its extent is explained further in the LOSC. This renders the legal framework of the LOSC with regard to such measures seemingly weak. In spite of their weakly phrased obligation, the articles are imperative with regard to fisheries. With the effects of the global warming, such as the heating temperature of the oceans and as a result, the migration of the fish stocks, new stocks might occur in the EEZ’s of coastal States or start migrating between a coastal States’ EEZ and the high seas.

²⁵ Article 63(1) of the LOSC.

²⁶ Anadromous fish stocks, such as salmon, are born in freshwater, then migrate to the ocean where they live, but migrate back to fresh water to spawn. Catadromous fish, such as eels, are born in salt water, migrate to fresh water until they are adults, then return to the ocean to spawn.

2.1.2 Obligations beyond national jurisdiction

Beyond national jurisdiction is international waters, also referred to as the high seas. On the high seas all States, whether coastal or land-locked, enjoy the “freedoms of the high seas” granted to them by virtue of article 87 of the LOSC. These freedoms are *inter alia* the freedom of scientific research, the freedom of navigation, and the freedom of fishing. Section 2 of Part VII deals with high seas fisheries. While the freedom of fishing is one of the freedoms listed in article 87, article 116 establishes it as a right. The article subjects the right to fish to three restraints. First, the right might be subject to treaty obligations the State is subject to, be it bilateral, regional or global treaties. Second, the State must respect the rights, duties and interests of other States provided e.g. in articles 63 and 64-67 discussed above. Finally, the freedom is limited by the other provisions in Section 2 of Part VII of the LOSC.²⁷

While granted the right to fish, article 117 also gives States a general duty to adopt measures for the conservation of living resources on the high seas. These measures are to be adopted either unilaterally or in cooperation with other States. The key provision regarding fisheries in the high seas is article 118, which obligates States to cooperate in conserving and managing living resources on the high seas. It requires States that exploit the same sources, or different sources in the same area, to negotiate “with a view” to take the necessary measures in this respect, and “as appropriate” to cooperate to establish fisheries organisations to that end. Article 119 sets out requirements regarding the conservation measures, obligating States to base such measures, and decision on allowable catch, on the best scientific evidence available and aiming to maintaining the stocks at the MSY. Furthermore they must take the effects on associated and dependent species into consideration. While the LOSC establishes general conservation duties, these duties require further development in other agreements. Furthermore, the effectiveness of these measures can be underlined by the limits of the type of jurisdiction that governs these activities.

Although States have a right to fish in the high seas, articles 117-119 indicate that this right may be restricted to a certain point by the requirement of cooperation in conservation and management measures. Essentially, article 118 obligates states fishing on the high seas, either fishing for the same stocks or merely in the same area, to establish RFMO’s in order to ensure that proper conservation measures are set in place. The obligation is rather vague due to its wording of “as appropriate”, indicating that States have close to full discretion to decide whether such cooperation is necessary. The obligation is further diluted by only requiring

²⁷ Article 116 of the LOSC.

States to enter into negotiations “with a view” to taking the necessary measures. Essentially, States are only required to enter into negotiations, but there is no requirement of such negotiations yielding any specific results. Although that is expected to be the aim of negotiations, there is nothing that explicitly obligates States to reach an agreement.

The principal form of jurisdiction while fishing on the high seas, is flag State jurisdiction. Article 90 grants all States the right to sail ships on the high seas flying their flags. The flag State must set out requirements that ships must fulfil before obtaining the right to fly its flag and the State must keep a registry of the ships granted such right. A “genuine link” must exist between the ship and the flag State.²⁸ Exactly what constitutes a genuine link is unclear, and the LOSC does not provide any explanation. Nevertheless, the International Tribunal for the Law of the Sea (ITLOS) established in the *M/V Saiga* (no.2) case, that its purpose is to “secure implementation of the duties of the flag State.”²⁹ A genuine link therefore serves to assure that a State is responsible for ensuring the compliance of the vessel, e.g. with fisheries regulation, and gives it exclusive jurisdiction over the vessel. Flying the flag of a State gives the vessel nationality. This means that a ship is essentially a prolongation of the flagged State and consequently ships can only be flagged to one State.³⁰ Flag State jurisdiction entails that the ship and its crew are subject to the exclusive jurisdiction of that State, unless otherwise provided for in the LOSC.³¹ While flag States are granted exclusive jurisdiction over their ships, article 94(1) demands that they effectively exercise their jurisdiction in administrative, technical and social matters, providing a non-exhaustive list. The wording of the provision specifies both jurisdiction and control, indicating that it entails both prescriptive and enforcement jurisdiction. In fact, Yoshinobu Takei is of the opinion that the wording implies that it covers “all prescriptive, adjudicative and enforcement aspects”.³² The *Southern Bluefin Tuna* case furthermore served to extend the scope of Part XII to include living marine resources, meaning that the general obligation in articles 192 to protect and preserve the marine environment, also includes fish stocks.³³

Exclusive jurisdiction grants flag States an exclusive right to enforcement, e.g. in case of a violation, or suspicion thereof, only the flag State is allowed to board and inspect the

²⁸ Article 91 of the LOSC.

²⁹ *M/V Saiga* (No.2) (*Saint Vincent and the Grenadines v Guinea*) (admissibility and merits) (1999) 120 ILR 143, [83].

³⁰ *Supra* n.28, article 92.

³¹ *Ibid.*

³² Takei, “*Assessing Flag State Performance*,” p. 101-102.

³³ *Southern Bluefin Tuna* (*New Zealand v. Japan; Australia v. Japan*) (provisional measures) (1999) 117 ILR 148, [70].

vessel in question. The flag State may permit another State to board and inspect its vessels, however, such permission must be interpreted narrowly and seen only as a partial waiver of jurisdiction. This means that in order to be allowed to seize a vessel the State would have to get the express permission of the flag State.³⁴ Although the flag State is obligated to ensure the compliance of its vessels, this obligation is limited to the flag State exercising ‘due diligence’ in its execution of flag State control. The principle of due diligence requires the flag State to make the best possible efforts to exercise effective control over its flagged vessels. As long as it does everything in its power to achieve that goal, the flag State is considered to fulfil the requirement of exercising effective jurisdiction and control, and cannot be held responsible for the violation of individual vessels.³⁵

As the aforementioned shows, flag State jurisdiction means that the flag State has full control over its ships on the high seas. This means that the flag State is responsible for ensuring that its vessels comply with the obligations it has undertaken with regard to fisheries on the high seas, and is solely competent to enforce such measures if violations occur. This is one of the weaknesses of flag State jurisdiction. There is no overarching body that enforces the obligations related to fisheries. By giving each flag State the responsibility there is no uniformity in the level of enforcement with regard to fisheries on the high seas. It therefore creates a gap in the governance and exacerbates the problem of IUU fishing through “flags of convenience.” By flagging to States that are less stringent in the enforcement of the existing rules, vessels avoid reprimand for their violations. Unflagged vessels or those that have lost their nationality, engaged in IUU fishing, are not beyond all jurisdiction. It is held that any State can exercise diplomatic protection over its nationals aboard such vessels.³⁶ Although the loss of nationality seems to be a possibility, it goes against the purpose of the LOSC by granting nationality as well as establishing a genuine link, making it meaningless. In any case, it can be argued that the loss of a genuine link could result in the flag State losing the right to exercise diplomatic protection over its nationals on board.

While the LOSC does set out certain obligations in relation to fisheries there is no regulatory body, which leaves the flag State solely responsible for the enforcement. This has posed a particularly difficult problem with regard to IUU fishing because the level of enforcement is very different between the flag States. While vessels that engage in IUU

³⁴ Guilfoyle, *Shipping Interdiction*, p. 9-10.

³⁵ Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the AREA (Advisory Opinion) (2011) ITLOS Rep 10, [109].

³⁶ *Supra* n.34; Barnes, “*Flag States*” p. 315.

fishing are flagged to States and are thus “free” to fish on the high seas, such fishing activities undermine the efforts of the complying states to regulate fisheries and protect the living marine resources. The level of uncertainty and concern became very apparent in 2013 when the Sub-Regional Fisheries Commission sought an advisory opinion from ITLOS *inter alia* on what duties flag States have regarding IUU fishing, and to what extent the flag State shall be held accountable.³⁷ ITLOS published its opinion on 2 April 2015. In the opinion ITLOS stated that the obligation of exercising effective jurisdiction and control, in article 94, entails States adopting “the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention.”³⁸ The Tribunal goes on to establish that by reading articles 58(3), 62(4) and 192 of the LOSC in conjunction, that flag States are obligated to ensure that their vessels are not “engaged in IUU fishing activities”.³⁹

The LOSC does not provide any further detail to the obligation States have regarding conservation measures, leaving it open to interpretation by each State. This was mended to a certain extent with the adoption of the 1995 Fish Stocks Agreement that will be discussed in chapter 2.2.

States enjoy certain rights in their capacities as port States pursuant to the LOSC. There is no universal definition of the term of ‘port State’. For the purpose of this work the term will be used to refer to the obligations, rights and jurisdiction that a coastal State has over foreign vessels that enter its port voluntarily. General international law acknowledges that States have wide discretion to decide whether or not to grant foreign flagged vessels access to their port.⁴⁰ When a vessel enters a port voluntarily, the port State in question exercises jurisdiction over that vessel, although internal matters that do not affect the State, are usually left to the crew of the vessel.⁴¹

Port States have the power to adopt domestic laws to regulate in-port activities. Although article 218, which applies to vessel source pollution, is the only provision in LOSC that specifically mentions port States and gives them jurisdiction, it has been established that port States can exercise extraterritorial jurisdiction, pursuant to international law, against

³⁷ Request for an advisory opinion (Sub-Regional Fisheries Commission - SRFC) (advisory opinion) (2015) ITLOS, No. 21.

³⁸ Ibid, [119].

³⁹ Ibid, [124].

⁴⁰ Molenaar, “*Port State Jurisdiction*,” p. 227.

⁴¹ An exception from this rule is when vessels enter ports under *force majeure*, although in such instances States may have a right to deny them access.

vessels that have engaged in unregulated fisheries on the high seas.⁴² The role of port States has been gaining increasing attention in recent years with regard to fisheries. As already discussed, States have an exclusive right to determine whether or not they let a vessel enter their port. Furthermore, they can adopt domestic laws that prohibit the landing and transshipment of catch. Port state measures is a very effective way to combat IUU fishing and port States are in fact a key element in that sense. This has become more evident in recent years and a number of RFMO's and other legal instruments have adopted port state measures to this effect. The Port State Agreement was drafted with the aim of effectively fighting and preventing IUU fishing. The Port State Agreement and port State measures will be discussed in more detail in chapter 2.4.

2.2 The 1995 Fish Stocks Agreement

The FSA was established with the aim of implementing the obligation of cooperation laid out in article 118 of the LOSC. Its main objective is to promote cooperation in conservation measures, particularly through RFMO's. The objective of the FSA set out in article 2, is to ensure long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks. The FSA is intended to work in unison with the LOSC and article 4 gives the LOSC prevalence in cases where the FSA contradicts it. It provides that the FSA is to be applied and interpreted in context with the LOSC. The FSA applies to conservation and management measures in areas beyond national jurisdiction (ABNJ), but article 3 extends parts of it to apply to conservation measures adopted within national jurisdiction. The FSA not only adds to the relevant provisions of the LOSC, but significantly changes the international law of fisheries through its reforms.⁴³ Even though the FSA is aimed at implementing the LOSC, states are not obligated to be a member of one convention in order to become a member of the other. The FSA therefore is independent from the LOSC. An example is the US, which is a member to the FSA but not to the LOSC. This raises questions about the interrelationship of the rules in different agreement.

The FSA is a framework agreement whose objectives shall be obtained through the establishment of RFMO's. The States establish the RFMO's but the FSA sets out a list of requirements that the constitutive bodies of the RFMO's must fulfil, all aimed at ensuring the long-term sustainability and optimum use of straddling and highly migratory fish stocks. RFMO's are therefore independent organisations with their own constitutive body that shall

⁴² Supra n.40, p. 235.

⁴³ Supra n. 8, p. 316.

inter alia establish the target stocks, the geographical scope and general function of the RFMO.⁴⁴ In fulfilling their obligations, States shall *inter alia* agree and comply with conservation measures, agree “as appropriate” on participatory rights of States, adopt and apply minimum standards, and obtain and evaluate scientific advice.⁴⁵ The nature and extent of participation rights for either existing or new members, shall be based on, *inter alia*, the status of the stocks and the existing level of fishing effort, the respective interest, fishing patterns, and practices of the States, and respective contributions to conservation, collection of data, and conduct of scientific research.⁴⁶

2.2.1 *The Principles of the FSA*

Article 5 establishes general principles that member States shall abide by and apply in their conservation measures, including those adopted within their national jurisdiction.⁴⁷ These principles are e.g. ensuring long-term sustainability and optimum utilization of the target stocks, using the best scientific evidence available, the use of the precautionary approach, and the protection of biodiversity. One of the most important principles is the precautionary approach. It was developed after the adoption of the LOSC and has the purpose of encouraging precaution in the absence of scientific certainty. Article 6 deals specifically with its application to conservation, management, and exploitation of the target stocks. The precautionary approach requires States, when faced with scientific uncertainty or lack of information, not to act until the impact of the action can be evaluated. The purpose is to prevent actions that could possibly cause irreversible damage to the marine environment and its resources. Essentially it is a proactive method to protect and preserve the living marine resources and their environment. Annex II to the FSA contains guidelines for the application of the precautionary approach. It sets out “precautionary reference points” that are to be used to determine when conservation measures are needed. Essentially the intention is to establish uniformity in the application of the precautionary approach between the States. Furthermore, by virtue of article 3, coastal States are obligated to apply the precautionary approach to conservation measures they adopt within their EEZ’s.

Article 6(6) is essential to the discussion of the central Arctic Ocean, for it deals specifically with new or exploratory fisheries. The provision obligates States to adopt “cautious conservation and management measures” which must *inter alia* contain catch limits

⁴⁴ Article 9 of the FSA.

⁴⁵ *Ibid*, article 10.

⁴⁶ *Ibid*, article 11.

⁴⁷ *Ibid*, article 3(2).

and effort limits. These conservation measures must be adopted as soon as possible and remain in place until the State has gathered enough data to evaluate the effects of fisheries on the long-term sustainability of the stocks. The data is then used as basis for the State to determine the appropriate conservation measures and whether to allocate fishing right and to what extent. The application of the precautionary principle is especially important in the central Arctic Ocean, since the area is ice-covered and relatively unknown. Fisheries in the area could prove very important and lucrative, but due to lack of scientific data, the effects of fisheries are unknown and it is therefore essential to tread carefully.

2.2.2 Obligation to cooperate

The FSA requires compatibility in the conservation and management measures adopted by States. In order to achieve this goal, article 7 requires coastal and flag States to try and agree upon the conservation measures with respect to straddling fish stocks, and obligates them to cooperate “with a view” to ensure conservation and promoting optimum utilisation.⁴⁸ Paragraph 2 requires that the conservation measures within and beyond national jurisdiction be compatible, in order to ensure the conservation and management of the straddling- and highly migratory fish stocks. These measures are to be determined in accordance with an extensive list provided for in the paragraph. The scope of the article extends to the same stocks in areas within national jurisdiction by virtue of article 3(1). The dispute settlement procedures contained in Part VIII may be invoked by any of the States participating, if they are not able to agree on compatible measures within a reasonable period of time.⁴⁹ When Part VIII procedures are invoked, the States must attempt to enter into temporary provisional arrangements until the settlement procedures are concluded. If unable to agree on provisional measures, that dispute can be submitted to a court or tribunal to be settled.⁵⁰

While article 7 sets out a general requirement of compatibility of the conservation measures taken, article 8 gives effect to the obligation set out in article 118 of the LOSC. Article 8 expects States to fulfil their obligation to cooperate with regard to conservation measures through RFMO’s, taking the special circumstances of the area in question into account. When new fisheries are being developed, States are required to immediately enter into consultation “with a view” to establish arrangements to guarantee the conservation and management of the stocks. Until such agreement has been reached, the States must act in

⁴⁸ Article 7(1) of the FSA.

⁴⁹ Ibid, article 7(4).

⁵⁰ Ibid, article 7(5).

good faith, observing the provisions of the FSA. The same obligation applies to stocks in danger of over-exploitation. Paragraph 4 limits access to fishing resources to RFMO members, stating that only member States to the relevant RFMO, or those who agree to apply the measures adopted by that RFMO, are permitted to fish subject to its provisions. When a RFMO governing the stock in question already exists, States shall give effect to their duty to cooperate by becoming a member to that RFMO. Admission to RFMO's, however, is limited to states with a "real interest" in fishing. As to what constitutes real interest, there is no clear definition and one must interpret these provisions in accordance with article 31 of the Vienna Convention and interpret the term in light of its context, object and purpose. As the FSA is intended to regulate fishing on the high seas, one can argue that states must have an intention to actually fish on the high seas, in order to become members of RFMO's. If no RFMO exists for such stocks, the coastal State and the states fishing for such stocks are required to cooperate to establish one.⁵¹ Although States are required to cooperate through RFMO's, the aforementioned shows that States do not have an automatic right to join an existing RFMO. Furthermore, a membership to an RFMO does not guarantee States a right to fish, that right depends on whether it is allocating fishing rights or not.

Article 8(3) of the FSA is a key provision. It ties the obligation stated in articles 63(2) and 64(1) of the LOSC, discussed earlier, to the FSA. While the LOSC merely states the obligation, the FSA provides further detail to it, e.g. requiring the national measures to be compatible with the ones of the RFMO. The FSA places great emphasis on compatibility of measures within and beyond national jurisdiction, as compatibility is essential for the aim of the FSA to be successfully carried out.

2.2.3 Enforcement

The FSA does not establish an enforcement body, but relies principally on flag State enforcement. Article 18 obligates flag States to ensure their vessels comply with and do not undermine RFMO measures. To that end, the flag States may only allow their vessels to fish in areas where they can effectively exercise their jurisdiction over the vessels.⁵² Article 18(3) contains a list of requirements similar to the one in article 94 of the LOSC that States must fulfil. Article 19 of the FSA provides flag States with considerable enforcement powers in order to fulfil their duty of effective control. States must enforce RFMO measures, irrespective of where violations occur, fully investigate violations without delay, and refer

⁵¹ Article 8(5) of the FSA.

⁵² *Ibid*, article 18(2).

cases to the appropriate authorities for proceedings when investigations are complete. Furthermore, states must ensure compliance through cooperation, either through RFMO's or with other States directly. That entails that States render assistance to each other regarding investigation of potential violations, when requested.⁵³ When a vessel is reasonably suspected of a violation within the national jurisdiction of a coastal State, the flag State must undertake the investigation immediately at the request of the coastal State.⁵⁴ The FSA expands the flag State jurisdiction through article 20(7), allowing members to an RFMO to take action against violating vessels, until the flag State takes action. This provision allows for instant action in cases of violation, going much further than the LOSC.

States can enforce the provisions set out in the FSA in their capacity as port States. Article 23 gives them the right and the obligation to take action to promote the effectiveness of RFMO measures. Such measures must, however, be without prejudice to vessels of any State. When a vessel is voluntarily within its port, the port State may inspect its documents, fishing gear and catch. Furthermore, States may adopt domestic regulations that can be used to prohibit landing and/or transshipping catch obtained in violation of RFMO regulation.⁵⁵

2.2.4 Non-parties to the FSA

Non-parties to the FSA are not exempt from the obligation to cooperate. Article 17(2) requires States to not authorise their flagged vessels to engage in fishing for the target stocks of an RFMO. Parties to RFMO's shall endeavour to extend the application of the measures of the RFMO by requesting non-members to comply with them. In return, participating non-members will enjoy benefits in accordance with their commitment.⁵⁶ Article 33 of the FSA requires parties to the FSA to encourage non-members to become parties and adapt their domestic law to its provisions. Furthermore, parties are obligated to take action against "violations" of non-members. Such actions must, however, be within the parameters of the FSA and international law.⁵⁷

The FSA is a stand-alone agreement and membership to it is not contingent to membership to the LOSC. States can therefore be parties to both conventions or just one of them. It is a general rule in international law that states are only bound by what they consent

⁵³ Article 20(2) of the FSA.

⁵⁴ Ibid, article 20(6).

⁵⁵ Ibid, article 23(3).

⁵⁶ Ibid, article 17(3).

⁵⁷ Ibid, article 33(2).

to be bound by. Nevertheless, some consider the duty in article 8(3) to cooperate to have gained status as customary international law, allowing relevant members to take measures against non-members that would have been in violation of international law.⁵⁸

2.2.5 Gaps in the FSA

The FSA places emphasis on cooperation in conservation measures, and even expands that cooperation to enforcement measures, allowing all members to take action against violating vessels. While the convention goes further than the LOSC it is still subject to the same flaws to an extent, as enforcement is primarily with the flag State. The FSA is further limited by its scope, as it applies solely to straddling and highly migratory fish stocks, and discrete high seas fish stocks seem to fall outside its scope. Nevertheless, the convention introduces a more holistic approach to the regime of fisheries management by including the precautionary approach.

2.3 The FAO Compliance Agreement

The FAO Compliance Agreement (the Compliance Agreement) entered into force in 2003. It was initiated to enhance compliance in conservation and management measures in high seas fisheries, by strengthening the obligations of flag States. The Compliance Agreement applies to all fishing vessels used for or intended for fishing on the high seas.⁵⁹ Nevertheless, a Party can exempt fishing vessels that are less than 24 meters long, subject to the conditions set out in article II(2).

Article III requires flag States to take the necessary measures to ensure that their vessels do not engage in activities that undermine the effectiveness of conservation measures. This obligation extends to those vessels exempted from the Compliance Agreement in accordance with article II(2). Fishing vessels can only fish on the high seas subject to an authorisation of the competent authority of the flag State.⁶⁰ The flag State must keep an accurate record of the vessels authorised to fly its flag and to fish on the high seas.⁶¹ The Compliance Agreement sets out a requirement of international cooperation in article V. The purpose of the cooperation is to aid one another to identify non-complying vessels through e.g. exchanging information on the activities of fishing vessels, through port state measures. States are

⁵⁸ Molenaar, “*Status and Reform*,” p. 109-110.

⁵⁹ Article II(1) of the FAO Compliance Agreement.

⁶⁰ Article III(2) of the FAO Compliance Agreement.

⁶¹ Article IV of the FAO Compliance Agreement.

required to cooperate “as appropriate”, which greatly dilutes the effect of the obligation. Port States must notify the flag State if a vessel that is voluntarily in their port, is suspected of engaging in undermining activities. Article VI obligates States to exchange information. To this end States are obligated to provide the FAO with information and in return the FAO must circulate this information to all Parties periodically. Members to the Agreement must encourage non-members to become parties and adopt laws and regulations consistent with the Agreement.⁶²

The objective of the Compliance Agreement is to improve the regulation of fishing vessels. This aim is carried out through enhancing the obligations of the flag States, similar to the FSA, although some port State measures are introduced. Its effect and success is however limited by its low number of contracting parties. It has a total of 40 members of which five are Arctic States.⁶³ While other more effective agreements exist, the Compliance Agreement does show the consensus on the importance of flag State control. Furthermore, it may perhaps serve as a standard of conduct for flag States in carrying out their obligations in effective enforcement and due diligence of their duties with regard to fisheries in the Arctic.

2.4 The Port State Agreement

The Port State Agreement was adopted in 2009 by the FAO Conference and entered into force on 5 June 2016.⁶⁴ The PSA was drafted with the aim of providing a tool to address the gaps in flag State jurisdiction, created by the different levels of enforcement, thus addressing the problem of IUU fishing.

2.4.1 IUU Fishing

IUU fishing is a major problem on a global scale and is estimated to account for up to 26 million tonnes, the value of 23 billion dollars.⁶⁵ It is evident that IUU fishing undermines all efforts made to regulate fisheries, posing a serious threat of over-exploitation, as well as danger of damage to their habitat through the use of illegal, and possibly out-dated, fishing gear. The problem has become very pronounced in the last years and States’ concerns have grown accordingly.

⁶² Article VIII of the FAO Compliance Agreement.

⁶³ Those are Canada, the EU, Norway, Sweden and the US.

⁶⁴ FAO Conference Resolution no. 12/2009 on Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, available at http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf (accessed 01.09.2016).

⁶⁵ FAO news, “New era beckons with implementation of illegal fishing treaty”, 11 July 2016. Available at <http://www.fao.org/news/story/en/item/424284/icode/> (accessed 31.08.2016).

On 23 June 2001, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing (the FAO Plan of Action)⁶⁶ was endorsed by the FAO Council.⁶⁷ The FAO Plan of provides a definition of IUU fisheries in paragraph 3(1). There are three forms of illegal fisheries. The first is fisheries under national jurisdiction without the permission of the flag State or in violation of its domestic law. The second is fishing by a member to an RFMO in contravention of conservation measures or the relevant provisions of international law. The third is fisheries in violation of national law or international obligations, including those undertaken by States cooperating with an RFMO. Unreported fisheries are conducted by vessels that are flagged to member States of the relevant RFMO's, but act in violation of the conservation and management measures adopted by the RFMO's or the applicable international law. Unreported fishing includes both unreported and misreported fishing activities undertaken in the convention area of an RFMO.⁶⁸ Finally, unregulated fisheries are defined as activities that are in violation of national law or international obligations, including those taken by cooperating States to a relevant RFMO. Unregulated fisheries are activities conducted within the convention area of an RFMO by vessels that are either without nationality or are non-members to the RFMO. Furthermore, it can be by a fishing entity that violates the conservation measures of the RFMO or, in areas or for fish stocks that are not subject to any conservation or management measures, and such fishing activities are inconsistent with State responsibilities for the conservation of living marine resources under international law.⁶⁹

Although the PSA is based on this definition of IUU fishing, it has sustained criticism noting that illegal and unreported fisheries are a problem in enforcement, while unregulated fisheries are a governance issue, and should therefore be dealt with separately.⁷⁰ In terms of the Arctic Ocean fisheries could fall under all categories, depending on the area and the governing legal regime, as will be discussed in chapter 3.1.8.

2.4.2 The Function of the Port State Agreement

The aim of the PSA is to harmonise port State measures between the Parties, increase cooperation and prevent IUU catch from entering the market. It provides a set of rules that

⁶⁶ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2 March 2001.

⁶⁷ It was adopted by consensus at the 24th session of the Committee on Fisheries (COFI), and then endorsed by the 120th session of the FAO Council on 23 June 2001.

⁶⁸ Paragraph 3(2) of the FAO Plan of Action.

⁶⁹ Ibid, paragraph 3(3).

⁷⁰ Serdy, "Beyond the flawed concept(s) of IUU fishing."

States agree to be bound by and apply in their ports, in order to carry out the purpose of the PSA.⁷¹ The PSA is intended to work in unison with other international obligations and shall not prejudice any rights or duties States have under international law.⁷² It requires States to coordinate port State measures with regard to fisheries “to the greatest extent possible”, and to integrate them with other measures, taking the FAO Plan of Action into account.⁷³ The rules provided in the PSA serve as a minimum-standard and States are therefore free to adopt stricter regulation in their national legislation if they choose.⁷⁴ The aim of effective implementation is to be achieved through cooperation and exchange of information with relevant States, RFMO’s and the FAO.⁷⁵

Before granting a vessel access to its port, States must request and receive information about the vessel. The minimum standard of the information is listed in Annex A and relates *inter alia* to the registration of the vessel, its fishing and transshipment authorisation(s), and total catch on board.⁷⁶ After receiving the requested information, the port State is able to determine whether it believes the vessel has engaged in IUU fishing or not and, subsequently, whether to grant it access to port or not. If there is sufficient proof that the vessel has participated in IUU fishing, the port State must deny the vessel entry. The only exception is to allow it access in order to inspect the vessel. If a port State denies a vessel access it must notify the flag State of that decision.⁷⁷ Article 11 deals with vessels that are already in port. In instances where vessels that e.g. do not have the required authorisation for fishing, or the port State has reasons to believe that the vessel was engaged in IUU fishing, the port State cannot allow the vessel to land, tranship, pack or process the catch. The PSA requires port States to perform regular inspections of vessels in their port⁷⁸ and these inspections must be at least to the standard set out in Annex B, and carried out by properly trained personnel.⁷⁹ The results of each inspection shall be issued in a written report that is transmitted to the flag State of the vessel in question⁸⁰ and, as appropriate, to other relevant Parties, such as those where the vessel has engaged in IUU fishing.⁸¹ A vessels access to port is therefore contingent on it

⁷¹ Article 2 of the Port State Agreement.

⁷² Ibid, article 4.

⁷³ Ibid, article 5.

⁷⁴ The Port State Agreement as a minimum standard, available at <http://www.fao.org/fishery/psm/agreement/en> (accessed 28.08.2016).

⁷⁵ Ibid, article 6.

⁷⁶ Ibid, article 8.

⁷⁷ Ibid, article 9.

⁷⁸ Ibid, article 12.

⁷⁹ Ibid, article 13.

⁸⁰ Ibid, article 14.

⁸¹ Ibid, article 15.

providing the port State with certain information that becomes the basis on which the decision on granting or denying access to port is based. When there is even just a suspicion of illegal activities, the vessel cannot enter port, much less land or tranship catch. Port States cannot discriminate against non-members and must encourage them to become parties to the PSA.⁸²

The PSA supplements the regime of flag State jurisdiction that governs fisheries in the high seas. As already discussed, that enforcement regime has a severe gap created by the different levels of enforcement. The PSA addresses that gap through collective port state measures that aim to prevent vessels, engaging in IUU fishing, from entering ports. By closing the ports to violating vessels and preventing landing and transshipment, IUU catches are prevented from entering the market. By preventing the sale of IUU catches, they essentially become worthless. In order for the PSA to work properly, States must implement its provisions into national law and effectively enforce them. While the lack of enforcement in ports, or “ports of convenience”, might not be completely eliminated, that gap could be significantly diminished with regard to the Arctic. The central Arctic Ocean is a remote region and the closest ports are located in the Arctic coastal States. If these states all enforce the provisions of the PSA vigorously, they could help render IUU fishing in the central Arctic Ocean commercially unviable, since a “suitable port” would be too far away.

Although the PSA addresses the gap in flag State jurisdiction to an extent, it does not change the fact that enforcement remains exclusively with the flag State. This means that in cases of “flags of convenience” enforcement for violations remains unchanged. However, through the exchange of information on the violating vessels, the problem is addressed indirectly. If port States can easily identify violating vessels and close their port to them, they strip them of the possibility of selling their catch, rendering IUU fisheries essentially worthless, and thus might possibly solve the problem in the long run. This applies particularly to the Arctic coastal States.

⁸² Article 23 of the Port State Agreement.

PART III

3. REGIONAL INSTRUMENTS

There are a number of regional instruments that govern fisheries in the Arctic, such as RFMO's and bilateral agreements. The discussion on RFMO's will be limited to those connected to the Arctic either through geographical scope or through membership of the Arctic coastal States. The instrument, in chronological order, are the Northwest Atlantic Fisheries Organization (NAFO),⁸³ the North East Atlantic Fisheries Commission (NEAFC),⁸⁴ the International Commission for the Conservation of Atlantic Tunas (ICCAT),⁸⁵ the North Atlantic Salmon Conservation Organisation (NASCO),⁸⁶ the North Pacific Anadromous Fish Commission (NPAFC),⁸⁷ the Western and Central Pacific Ocean Fisheries Commission (WCPFC),⁸⁸ and the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP).⁸⁹ Many of them were established long before the FSA was adopted and while some have amended their constitutive bodies in order to be compatible with the provisions of the FSA, others have not. While the geographical scope of some of these RFMO's already extends to the Arctic Ocean, or parts of it, others could possibly be a suitable option to expand the geographical scope to cover the whole of the Arctic Ocean and the fisheries resources within it.

In addition to the RFMO's, other instrument related to the governance of the Arctic, such as the Arctic Council, the Nordic Council and the EU will be discussed. Although not directly involved with fisheries, they have the potential to be, and have been used as a venue for discussions in relation to matters of the Arctic.

⁸³ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978, UNTS 1135, 369, available at <http://www.nafo.int/about/overview/governance/convention.pdf> (accessed 30.08.2016).

⁸⁴ Declaration on the Interpretation and Implementation of the Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries, available at <http://www.neafc.org/system/files/Text-of-NEAFC-Convention-04.pdf> (accessed 16.07.2016).

⁸⁵ International Convention for the Conservation of Atlantic Tunas, 14 May 1966, UNTS 673, 63. Available online: <https://www.iccat.int/Documents/Commission/BasicTexts.pdf> (accessed 16.07.2016).

⁸⁶ Convention for the Conservation of Salmon in the North Atlantic Ocean, 2 March 1982, UNTS 1338, 33, available at http://www.nmfs.noaa.gov/ia/agreements/regional_agreements/atlantic/nasco.pdf (accessed 16.07.2016).

⁸⁷ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 11 February 1992, available at [http://www.npafc.org/new/publications/HandBook/English%20\(page1-44\).pdf](http://www.npafc.org/new/publications/HandBook/English%20(page1-44).pdf) (accessed 16.07.2016).

⁸⁸ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 20 May 1980, UNTS 1329, 47, available at <https://www.wcpfc.int/system/files/text.pdf> (accessed 31.08.2016).

⁸⁹ Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 16 June 1994, reprinted in: ILM 34 (1995), 67.

3.1 Regional Fisheries Management Organisations

3.1.1 *The Northwest Atlantic Fisheries Organization*

The NAFO is an intergovernmental body for fisheries science and management. It was founded in 1979, following the ICNAF that operated from 1949 to 1978.⁹⁰ The geographical scope is defined in article 1 of the Convention and includes the high seas area of the Northwest Atlantic Ocean north of 35°N and west of 42°W. The main objective of the NAFO is to achieve optimum utilization, rational management and conservation of the stocks of the convention area through consultation and cooperation.⁹¹ The Convention applies to all fish stocks in the Convention Area, with the exception of sedentary species on the Continental Shelf, salmon, tunas and marlins, and cetacean stocks managed by the International Whaling Commission.⁹² There are currently 12 member States, including all the Arctic five, as well as the EU, Iceland, Japan, the Republic of Korea and Ukraine.

The NAFO is made up of four pillars. The first is the Fisheries Commission, which is responsible for the conservation and management of the fish stocks in the regulatory area.⁹³ The second is the Scientific Council which provides advice to the coastal States and the Fisheries Commission upon their request.⁹⁴ The third is the General Council which manages internal affairs and external relations.⁹⁵ The chair of the General Council is also the President of NAFO.⁹⁶ The fourth is the NAFO Secretariat, which is the headquarters of NAFO. It is located in Canada, and provides services to the Organisation in the execution of its duties.⁹⁷

The Fisheries Commission is the main body and adopts proposals regarding gear restrictions, TAC and quotas, minimum fish size, and by-catch requirements.⁹⁸ A Precautionary Approach Framework was adopted in 2004 by the Fisheries Commission, intended to guide decision making in fisheries management. The contracting parties are required to apply it in the absence of scientific data, with the aim of providing improved protection of the target stocks.⁹⁹

⁹⁰ International Commission of the Northwest Atlantic Fisheries.

⁹¹ Article II of the NAFO Convention.

⁹² Ibid, article I(4).

⁹³ Ibid, article XI..

⁹⁴ Ibid, article VI.

⁹⁵ Ibid, article III.

⁹⁶ Ibid, article IV(2).

⁹⁷ Ibid, article XV.

⁹⁸ Ibid, article XI.

⁹⁹ NAFO Precautionary Approach Framework, available at <http://www.nafo.int/fisheries/frames/precautionary.html> (accessed 31.08.2016).

NAFO has developed several monitoring, control and surveillance, among which is the Vessel Monitoring System that tracks fishing vessels in the NAFO Regulatory Area. A part of the monitoring is maintaining an IUU list.¹⁰⁰ In 2009, NAFO adopted Port State Control Measures.¹⁰¹ These measures apply in ports of the member States, to both landings and transshipments of fish or fish products caught in the Regulatory Area, by vessels flagged to another member State. The port state measures contain four main principles that are all dependant on each other. Vessels must give prior notification to competent authorities of the port State, after which the flag State must confirm the legal status of the catch on board. After that confirmation is received the vessel must get authorisation from the port State to land or tranship. This process must be transparent and to this end the documents are posted on a secure part of NAFO's website.¹⁰²

In 2003 an Annual Compliance Review was established. It uses the different monitoring and surveillance activities established by NAFO to monitor the level of compliance.¹⁰³ NAFO is very invested in cooperation with other organisations and was represented by member States at various meetings of other RFMO's, such as ICCAT and CCAMLR.¹⁰⁴ While efforts have been made to strengthen the framework, e.g. by adopting port state measures, the NAFO has faced difficulties in harmonising to the political interests of its members in recent years.¹⁰⁵

3.1.2 The North East Atlantic Fisheries Commission

The NEAFC is a RFMO for one of the most abundant fishing areas in the world. It was established by the Convention on Multilateral Cooperation in North East Atlantic Fisheries, which entered into force in November 1982.¹⁰⁶ The contracting parties to the NEAFC are Denmark (for Greenland and the Faroe Islands), the EU, Iceland, Norway, and Russia. Cooperating non-contracting parties are the Bahamas, Canada, Liberia, New Zealand, St. Kitts and Nevis. Its geographical scope covers the whole of the high seas areas of the Northeast Atlantic, as defined in article 1(a) in the NEAFC Convention. It is interesting to

¹⁰⁰ Chapter VIII of the NAFO Conservation and Management measures. NAFO Conservation and Enforcement Measures 2016, (NAFO FC Doc. 16/1 Serial No. N6527).

¹⁰¹ NAFO Conservation and Management Measures, Chapter VII, available at <http://archive.nafo.int/open/fc/2016/fcdoc16-01.pdf> (accessed 17.07.2016).

¹⁰² NAFO Port State Measures, available at <http://www.nafo.int/fisheries/frames/psm.html> (accessed 04.07.2016).

¹⁰³ NAFO Annual Compliance Review, available at <http://www.nafo.int/fisheries/frames/compliance.html> (accessed 30.08.2016).

¹⁰⁴ <http://www.nafo.int/meetings/frames/meetings.html> (accessed 04.07.2016).

¹⁰⁵ Barnes, "International Fisheries Management," p. 214.

¹⁰⁶ Information on NEAFC, available at <http://www.neafc.org/page/18> (accessed 30.06.2016).

note that the wording “north of 36° latitude” in article 1 does not seem to set a boundary to the north. Nevertheless, the map provided on the NEAFC homepage, does not show an area in the central Arctic Ocean, indicating that it is not a part of its regulatory area.¹⁰⁷ The target stocks of the NEAFC are fish, molluscs, crustaceans –including sedentary species. However, it excludes highly migratory species listed in Annex I of the LOSC, and anadromous stocks, insofar as they are dealt with by other international agreements.¹⁰⁸

NEAFC’s objective is to ensure the long-term conservation and optimum utilization of the fishery resources in the Convention Area, providing sustainable economic, environmental and social benefits through adopting management measures for various fish stocks and control measures to ensure that they are properly implemented.¹⁰⁹ Additionally, NEAFC adopts measures to protect other parts of the marine ecosystem from potential negative impacts of fisheries. The activities are carried out by the Commission, which gives recommendations regarding fisheries in the high seas area.¹¹⁰ At the request of a party, the Commission can give a recommendation regarding fisheries within national jurisdiction.¹¹¹ The recommendations must be based on the best scientific evidence available, apply the precautionary approach and factor in the effects of fisheries on other species and marine ecosystems.¹¹² Recommendations made by the Commission are binding on the contracting parties.¹¹³

NEAFC regards IUU fishing as a threat to biodiversity, as well as the sustainability of both fish stocks and the communities dependent on them. NEAFC was the first organisation to introduce port state measures as an effort to combat IUU fishing.¹¹⁴ It actively combats IUU through port state measures, including monitoring and control surveillance and the “NEAFC Scheme of Control and Enforcement” Non-compliant vessels are considered to be participating in IUU fishing, and are consequently put on one of the IUU lists.¹¹⁵ The NEAFC IUU system is made up of two lists, A and B. List A is a provisional list and precludes ships from landing or transshipping when they enter ports. Additionally they will be thoroughly inspected and will not have access to services such as supplies or fuel. When violations are confirmed vessels are moved to the B-list. Vessels on the B-list are precluded from entering

¹⁰⁷ NEAFC Regulatory Area, available at <http://www.neafc.org/page/27> (01.02.2016).

¹⁰⁸ Article 1(b) of the NEAFC Convention.

¹⁰⁹ Ibid, article 2.

¹¹⁰ Ibid, article 5.

¹¹¹ Ibid, article 6.

¹¹² Ibid, article 4.

¹¹³ Ibid, article 12.

¹¹⁴ NEAFC Port State Control, available at <http://www.neafc.org/mcs/psc> (accessed 16.07.2016).

¹¹⁵ NEAFC IUU lists, available at <http://www.neafc.org/mcs> (accessed 16.07.2016).

into port, and to fish in the waters of a contracting party of the NEAFC. Furthermore, contracting parties are prohibited from granting their flags to B-list vessels and must advise importers and transporters not to contract with them.¹¹⁶ The problem of non-contracting States has been alleviated to an extent by the admission of Lithuania and Estonia into the EU, since they are now under NEAFC control.¹¹⁷

The enforcement of the provisions of the NEAFC is carried out by the flag States. Due to the effective implementation of its monitoring and compliance measures, NEAFC is considered to be among the more successful RFMO's. Part of the success may be contributed to the political cooperation of the members and relatively small regulatory area.¹¹⁸ The fact that most of the Arctic coastal States are parties to the NEAFC is likely a contributing factor in NEAFC's success as well, as their EEZ's connect to the convention area. In this respect it is notable that the US is not a member.

3.1.3 The International Commission on the Conservation of Atlantic Tunas

The ICCAT aims to conserve tuna, tuna-like species and pelagic sharks in the Atlantic. It was established by the International Convention for the Conservation of Atlantic Tunas of 1969.¹¹⁹ It currently has 50 contracting parties and additional four states have the status of "cooperating non-contracting party, entity or fishing entity." The geographical scope of the ICCAT covers all of the Atlantic Ocean, as well as its adjacent seas, i.e. both national and international waters. It currently covers about 30 species.¹²⁰

Article III establishes a Commission which carries out the purpose and objective of the Convention. The Commission is responsible for studying and managing the target stocks. It collects and analyses data, studying methods aimed at maintaining the stocks at maximum sustainable catch levels, and must publish its findings.¹²¹ The Commission may make recommendations of management measures based on its findings.¹²² Such recommendations become binding six months after the date of notification to the contracting parties, unless it is objected by one of the contracting parties according to the requirements set out in article

¹¹⁶ NEAFC Guide to IUU list, available at <http://www.neafc.org/mcs/iuu/guide> (accessed 16.07.2016).

¹¹⁷ Supra n. 105, p. 216.

¹¹⁸ Ibid, p. 215.

¹¹⁹ International Convention for the Conservation of Atlantic Tunas, 14 May 1966, UNTS 673, 63.

¹²⁰ Article I of the ICCAT Convention.

¹²¹ Ibid, article IV.

¹²² Ibid, article VIII.

VIII(3). The Commission is the main body but a number of different committees and panels support and aid it in carrying out its purpose.¹²³

A performance review was undertaken after the international community raised concerns about the sustainability level of tuna and tuna-like stocks.¹²⁴ The independent Panel established for this purpose found that the ICCAT had failed in meeting its objectives, mainly due to lack of compliance by its Cooperating Non-Contracting Parties. The Panel described the management performance on Bluefin tuna in the Eastern Atlantic and Mediterranean Sea as an international disgrace, and raised concerns about transparency with regard to decision making and resource allocation.¹²⁵

3.1.4 The North Atlantic Salmon Conservation Organisation

The NASCO was established by the Convention for the Conservation of Salmon in the North Atlantic Ocean. The Convention applies to salmon stocks in the high seas area in the Atlantic Ocean north of 36°N latitude.¹²⁶ Its geographical scope therefore overlaps with both NEAFC and NAFO, discussed earlier. It has six member States, which are the Arctic five and the EU, and thirty five non-governmental organisations with observer status.¹²⁷ NASCO is made up of a Council, a Secretariat, and three regional commissions that each covers an area of the Atlantic.¹²⁸ The regional commissions provides a forum for consultation and cooperation, proposes regulatory measures and makes recommendations to the Council regarding scientific research, taking into account *inter alia* the best scientific information available.¹²⁹ With its establishment NASCO created a fisheries protection zone for salmons beyond 12 NM in the North Atlantic, with the exceptions found in article 2(2)(a) and (b). Furthermore, the environment of salmons is protected by member States adopting and applying the precautionary approach in the measures regarding fisheries, habitat protection and restoration, and stock rebuilding programmes.¹³⁰

¹²³ ICCAT list of committees and panels, available at <https://www.iccat.int/en/organization.htm> (accessed 30.08.2016).

¹²⁴ ICCAT Report of the Independent Performance Review, available at http://www.iccat.int/Documents/Other/PERFORM_%20REV_TRI_LINGUAL.pdf (accessed 17.07.2016).

¹²⁵ See e.g. p.2 of the Performance review.

¹²⁶ Article 1 of the NASCO Convention.

¹²⁷ NASCO Information on member states, available at: <http://www.nasco.int/about.html> (accessed 07.07.2016).

¹²⁸ Supra n. 126, article 5.

¹²⁹ Ibid, articles 7 and 8.

¹³⁰ NASCO establishment of fisheries protection zone, available at <http://www.nasco.int/about.html> (accessed 07.07.2016).

The NASCO is considered to be successful in managing its target stocks, although that may in part be attributed to difficulty in new entrances, as well as a decrease in demand for wild salmon.¹³¹ Furthermore, contracting Parties have taken actively prevented illegal fishing, by establishing port state measures, aimed at discouraging such practices.¹³²

3.1.5 The North Pacific Anadromous Fish Commission

The NPAFC aims to protect the anadromous stocks in the sea area north of 33°N, beyond 200NM in the Pacific. Activities for scientific purposes may, however, extend further south into the North Pacific Ocean and its adjacent seas beyond 200NM.¹³³ There are currently five member States, Canada, Japan, Republic of Korea, Russian Federation, and the US. Three of the Arctic five are members to this instrument, which is the reason for its inclusion in this thesis. Article III of the Convention prohibits fishing for anadromous fish in the Convention area, except when fishing for scientific purposes approved by the Commission.¹³⁴ The article furthermore dictates that the incidental taking of anadromous fish shall be minimized and explicitly prohibits retaining such incidental by-catch on board. The Convention also contains trade related measures and obligates member States to prevent the trafficking of anadromous fish, caught in violation of the provisions of the NPAFC Convention. They can do so individually or in cooperation, and in accordance with both international law and their domestic law.¹³⁵ Article III(3) contains trade related measures and obligates Parties to prevent trafficking catch taken in violation of the Convention, as well as sanctioning the infringing party. The NPAFC encourages non-members to adopt measures consistent with the NPAFC measures into their legislation.¹³⁶

The focus of the NPAFC Convention is on at-sea enforcement and therefore it contains explicit obligations and enforcement powers. Article V deals with enforcement and obligates member States to take the necessary measures to ensure the compliance of their own national vessels. Furthermore, any member State may board and inspect vessels in instances where it is reasonably believed to have violated the terms of the convention.¹³⁷ Article VI requires member States to exchange information on activities that are contrary to the objective of the

¹³¹ Barnes, "International Regulation of Fisheries Management," p. 218.

¹³² Rayfuse, *Non-Flag State Enforcement*, p. 113.

¹³³ Article I of the NPAFC Convention.

¹³⁴ In accordance with article VII(6) of the NPACFC Convention.

¹³⁵ *Supra* n. 133, article III(3).

¹³⁶ *Ibid*, article IV.

¹³⁷ *Ibid*, article V.

Convention.¹³⁸ Article VIII establishes the Commission, which has the objective of promoting the conservation of anadromous stocks in the Convention Area. The Commission has a special legal personality and enjoys the legal capacity necessary to fulfil its obligations and purpose. Furthermore it has the authority to make recommendation of conservational measures of anadromous stocks and ecologically related species, and to promote the exchange of information on any activities contrary to the provisions of the Convention.¹³⁹

In a performance review in 2010, NPAFC was described as an overall success, virtually eliminating direct and indirect high seas fishing of anadromous stocks by the member States, and largely succeeding doing the same with regard to non-members. The NPAFC thereby meets ‘most of its convention objectives’ according to the review board.¹⁴⁰ In spite of the success of this instrument, it is limited by its target stocks and geographical scope.

3.1.6 The Western and Central Pacific Ocean Fisheries Commission

The WCPFC was established by the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. Its objective is to ensure the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean, in accordance with the LOSC.¹⁴¹ The constitutive body establishes a Commission to which the Contracting Parties are automatically members. The convention area covers “all waters of the Pacific Ocean bounded to the south” following the more detailed description in article 3(1) of the Convention. The article does not specify a limit to the north, stating the line goes “due north along the 150° meridian of west longitude”. However it is considered to include the Bering Sea.¹⁴² The Convention covers all highly migratory fish stocks in the Convention Area, with the exception of saury.¹⁴³ Of the Arctic States Canada, the EU, and the US are members to the WCPFC.¹⁴⁴ In light of its geographical scope, Russia’s non-participation is noteworthy.

The objectives of the WCPFC are to be reached through cooperation by adopting measures to ensure the long-term sustainability of the target stocks and promoting optimum

¹³⁸ Article VI of the NPAFC Convention.

¹³⁹ Ibid, article IX.

¹⁴⁰ NPAFC performance review, available at [http://www.npafc.org/new/about/Performance%20Review%20Report/Performance%20Review%20Report%20\(Final\).pdf](http://www.npafc.org/new/about/Performance%20Review%20Report/Performance%20Review%20Report%20(Final).pdf) (accessed 08.07.2016).

¹⁴¹ Article 2 of the WCPFC Convention.

¹⁴² Supra n. 105, p. 220.

¹⁴³ Article 3(3) of the WCPFC Convention.

¹⁴⁴ WCPFC Information on member states, available at <http://www.fao.org/fishery/rfb/wcpfc/en> (accessed 17.07.2016).

utilisation. Such measures shall be based on the best scientific evidence available and designed to keep stocks at MSY. Furthermore, members must apply the precautionary approach, as well as assessing the impacts of fishing on all fish stocks and their ecosystems.¹⁴⁵ It has an effective enforcement system, such as port state measures in article 27. The provision allows States to inspect the fishing gear, documents and catch of vessels that are voluntarily within their ports, and to adopt measures prohibiting the landing and transshipment of catch taken in violation of the Convention.

Although the WCPFC has a large number of participants it is limited in geographical scope, target species and participation of Arctic coastal States. As a result, it does not seem a suitable option for expansion.

3.1.7 The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea

The CCBSP was established by the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea. The objectives are set out in article II, namely to conserve and manage the Pollock stocks in the Bering Sea, and to maintain them at levels that permit their MSY. It furthermore aims to cooperate in gathering information on Pollock and other living marine resources in the Convention Area.¹⁴⁶ The CCBSP has six members, China, Japan, Poland, the Republic of Korea, Russia and the US. The geographical scope is the high seas area of the Bering Sea.¹⁴⁷

The objectives of the CCBSP are to be achieved through Annual Conferences of the Parties and establishing a Scientific and Technical Committee. The Annual Conference shall decide the allowable harvest level for each coming year and the individual national quota for each member State. Furthermore, it shall adopt appropriate conservation and management measures, and establish a plan of work for the Scientific and Technical Committee. Each Party shall give the Annual Conference a report on the measures taken with regard to violations of the Convention.¹⁴⁸ Each flag State is responsible for ensuring the compliance of its vessels and must ensure that its national legislation is in compliance with the CCBSP Convention.¹⁴⁹ Article XI(5) establishes a mandatory observer programme, under which each

¹⁴⁵ Article 5 of the WCPFC Convention.

¹⁴⁶ Article II(4) of the CCBSP Convention.

¹⁴⁷ Ibid, article I.

¹⁴⁸ Ibid, article IV.

¹⁴⁹ Ibid, article XI.

fishing vessel is obligated to have an observer on board, preferably from one of the other member States, to monitor the compliance of the vessel in question. Duly authorised officials of any State may board and inspect the vessels of any of the other contracting Parties. Only the flag State is competent to take any compliance action, however, and must therefore be duly notified.¹⁵⁰

The effectiveness of the CCBSP has not yet been tested, since the Pollock stocks have not reached levels that allow setting an AHL since it entered into force in 1995. The scope of the CCBSP is limited to Pollock and although it does have potentially effective enforcement procedures, its structure does not seem effective. Furthermore, the participation of Arctic coastal States is very limited. As a result the CCBSP does not seem a very suitable option for regulating all Arctic waters, as it would require extensive amendments.

3.1.8 Comparison

As the discussion above demonstrates, the current regime of the RFMO's in the Arctic is very fragmented. Each instrument has its own constitutive body, geographical scope and target stocks. Although the geographical scope of NASCO does overlap with that of both NEAFC and NAFO, there is no overarching instrument that governs the whole of the Arctic in terms of geographical scope, target stocks or participation of Arctic coastal States.

Of the instruments discussed above, NEAFC would seem the most suitable option for governing Arctic fisheries for several reasons. All the Arctic coastal States, except for the US, are already members. It has a broad scope in terms of target stocks, and has been successful in its mandate. It has already adopted the precautionary approach in accordance with the provisions of the FSA. In terms of geographical scope, it does not seem to have a northern boundary, as was discussed earlier. Although the NEAFC itself seems to consider itself limited to the Northeast Atlantic, there does not seem to be anything in its provisions that prevents the extension of its geographical scope.

3.2 Bilateral Treaties

In addition to RFMO's, there exist a number of bilateral arrangements that Arctic States have negotiated between themselves. The US and Canada have entered into different arrangements. The International Pacific Halibut Commission deals with the preservation of the Pacific

¹⁵⁰ Article XI(7) of the CCBSP Convention.

halibut.¹⁵¹ The conservation area is limited to the waters off the south and west coasts of Alaska, where both States exercise exclusive jurisdiction over fisheries. As the agreement is limited to waters within national jurisdiction its relevance to the central Arctic Ocean is very limited. The Pacific Salmon Treaty¹⁵² from 1985 is an agreement of cooperation in the management, research and enhancement of salmon stocks in the Pacific. While States are obligated to prevent overfishing and must aim for optimum use of the stocks, the treaty also provides for each State receiving benefits equivalent to the production from their respective waters.¹⁵³ The Yukon River Salmon Agreement was adopted as an annex to the Pacific Salmon Treaty¹⁵⁴ it has a regime specific for the salmon in Yukon river, and is therefore considered to be separate from it.¹⁵⁵ Its main goal is to rebuild and conserve the salmon stocks of the Yukon river.¹⁵⁶

In 1975 Norway and Russia established the Joint Norwegian-Russian Fisheries Commission (the Joint Commission) through the bilateral Framework Agreement.¹⁵⁷ The aim was to provide an efficient management of the most important joined stocks in the Norwegian Sea and the Barents Sea.¹⁵⁸ In 2010, the States concluded the Barents Sea Treaty,¹⁵⁹ which is intended to effectively replace the Joint Commission.¹⁶⁰ The Barents Sea Treaty resulted from a dispute between the two states regarding claims that each state had made, respectively, to an EEZ and to a Continental Shelf, both within and beyond 200 NM. Their claims overlapped to some extent, resulting in ongoing negotiations from the year 1974. The Barents Sea Treaty effectively concluded the negotiations, providing a joint solution to the overlapping claims.¹⁶¹

¹⁵¹ Convention Between Canada and the United States for the Preservation of Halibut Fisheries of the Northern Pacific Ocean, 2 March 1923, LNTS 32, 93; Convention for the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, 2 March 1953, Canada – United States of America, UST 5,5. This was amended by the Preservation of Halibut Fishery Protocol, 29 March 1979, Canada – United States of America, UST 32, 2483.

¹⁵² Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon. Available at <http://www.psc.org/pubs/Treaty/Treaty.pdf> (accessed 18.07.2016).

¹⁵³ Article III of the Pacific Salmon Treaty.

¹⁵⁴ Attachment B, Annex IV, Chapter 8 of the Pacific Salmon Treaty. Available at <http://yukonriverpanel.com/salmon/about/yukon-river-salmon-agreement/> (accessed 21.08.2016).

¹⁵⁵ Barnes, "International Regulation of Fisheries Management," p. 224.

¹⁵⁶ Paragraph 1(a) of the Yukon River Salmon Agreement.

¹⁵⁷ Agreement on Co-operation in the Fishing Industry, 11 April 1975, Norway-Union of Soviet Socialist Republics, UNTS 983, 7. Supplemented by the Agreement Concerning Mutual Relations in the Field of Fisheries, 15 October 1976, Norway-Union of Soviet Socialist Republics, UNTS 1157, 146; and the 'Grey Zone Agreement' of 11 January 1978, Norway-Union of Soviet Socialist Republics.

¹⁵⁸ Joint Commission aims, available at <http://www.jointfish.com/eng/THE-FISHERIES-COMMISSION> (accessed 21.08.2016).

¹⁵⁹ The Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 15 September 2010. Available at https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf (accessed on 18.07.2016).

¹⁶⁰ Annex 1, article 1 of the Barents Sea Treaty.

¹⁶¹ Henriksen and Ulfstein, "Maritime Delimitation in the Arctic," p. 2.

The US and Russia entered into the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations on 21 May 1988.¹⁶² This agreement has been extended several times, most recently through a joint statement¹⁶³ (the Statement) issued on 29 April 2013, that reaffirms the 1988 Agreement. In the Statement the States recognize the importance of science-based decision making and ensuring the long-term conservation of living resources through an ecosystem approach. They place specific emphasis on the high seas portion of the central Arctic Ocean in this respect. They state that accumulating sufficient data “to assess the ecosystem impacts” is critical, and further claim that they will ensure that the management of commercial fishing in that area will be based on “sound science”. Furthermore, they intend to identify areas for cooperation on scientific research in the Arctic Ocean.¹⁶⁴

Of the aforementioned bilateral treaties there are two that are of potential relevance to the central Arctic Ocean. The geographical scope of the Barents Sea Treaty does cover a part of the Arctic Ocean, and the Joint Statement of the US and Russia. These two instruments involve three of the Arctic coastal States, all of which are members of the ‘Arctic five’. Although they are only binding for the contracting States and cannot affect the rights and duties of third states, they could potentially prove an influence on the development of the legal regime.

3.3 Arctic governance

In addition to the conventions and regional instruments, there are institutions that have responsibility in the management of the Arctic and play a role in the governance of the area. Although the Arctic Council and the Nordic Council are not involved with Arctic fisheries, they do involve themselves with matters of the Arctic and have been identified as a possible solution in the matter of regulating Arctic fisheries.

One of the primary institutions with regard to Arctic matters is the Arctic Council. It was established in 1996 by the Ottawa Declaration¹⁶⁵ and is specifically aimed at promoting

¹⁶² Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations, 31 May 1988 UNTS 2191, 3.

¹⁶³ Joint Statement of the Under Secretary of Commerce for Oceans and Atmosphere and Administration for the National Oceanic and Atmospheric Administration (NOAA), United States of America, and the head of the Federal Agency for Fisheries of the Russian Federation on enhanced Fisheries Cooperation, Washington D.C 2013. Available at http://www.nmfs.noaa.gov/ia/slider_stories/2013/04/statement_signed.pdf (accessed 21.08.2016).

¹⁶⁴ The Joint Statement, 2013, paragraph 4.

¹⁶⁵ The Declaration on the Establishment of the Arctic Council (the Ottawa Declaration), Ottawa, Canada, (19 September 1996), available at <https://oarchive.arctic-council.org/handle/11374/85> (accessed 23.08.2016).

cooperation in Arctic matters, between the Arctic States, as well as the indigenous communities of the area, and other interested groups. Its primary object hitherto has been sustainable development and environmental protection in the Arctic. The Council operates mainly by producing assessments through its working groups. Although it cannot adopt binding instruments itself, it has provided a forum for discussion that resulted in binding legal agreements. It is noteworthy that the Arctic Council has explicitly refrained from all participation regarding fisheries, and has not even wished to provide a forum for discussion.

The Nordic Council is another body, aimed at increasing cooperation in the Nordic Region. The member states are Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland, and Aaland islands. It convenes twice a year and decides on issues that they call on the governments of the member States to implement.¹⁶⁶

Although the Arctic Council and the Nordic Council are not involved directly in Arctic fisheries, they do involve themselves with matters of the Arctic and the Arctic Council has been identified as a possible solution in the matter of regulating Arctic fisheries.¹⁶⁷

As the EU is a participant in several RFMO's and furthermore plays an indirect role in Arctic matters through its member States, it is necessary to mention it in the context of Arctic governance. It is very interested in the matters of the Arctic, including fisheries, and established a sustainable policy for the high north in 2011.¹⁶⁸ The EU is one of the main importer of fish products and participates actively in fisheries management in the Arctic through RFMO's. As a result the EU is and will be a major influence with regard to fisheries in the Arctic.

As aforementioned, there is no overarching institution that deals with Arctic governance. There is a great need for a single body to govern the Arctic marine area, one with actual powers of implementation and enforcement. The institutions mentioned above do not have the powers to make binding decisions with regard to fisheries. Nevertheless, there seems to be a general awareness in a global context of the importance of the Arctic. This is apparent by the mere number of States that have requested to receive an observatory status to the Arctic Council.

¹⁶⁶ The Nordic Council <http://www.norden.org/en/nordic-council/bag-om-nordisk-raad/the-nordic-council/the-nordic-council> (Accessed 20.06.2016).

¹⁶⁷ Supra n. 51, p. 113-114.

¹⁶⁸ The EU Sustainable Policy for the high north, 2011, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0024+0+DOC+XML+V0//EN> (accessed 17.08.2016).

PART IV

4. OVERALL ASSESSMENT AND FUTURE DEVELOPMENT

4.1 Assessment of the Arctic legal regime

Assessing the aforementioned it is clear that potential fisheries in the high seas area of the central Arctic Ocean under the current existing legal regimes pose a problem. As was discussed earlier, the LOSC grants States a general right to fish on the high seas which is then further implemented through the FSA. Although the FSA does have a more modern framework that incorporates the more recent developments in the field of the LOS, such as the precautionary approach and an ecosystem approach to fisheries, the fact remains that like the LOSC, it is a framework agreement and the actual fisheries regulation is carried out by flag States, mainly through RFMO's.¹⁶⁹

Although a number of RFMO's are connected to the Arctic Ocean either through its geographical scope or through participation of the Arctic States, there is no overarching instrument in place that governs the entire Arctic Ocean. The geographical scope of the existing RFMO's only overlaps to a small degree and this fragmented legal regime almost entirely excludes the central Arctic Ocean. In addition to the legal gaps in the regime, the enforcement of the regime is enforced through flag State jurisdiction which, as was established earlier, is very susceptible to IUU fishing due to the different levels of enforcement by flag States.

Inadequate domestic regulation by the Arctic coastal States is therefore another possible gap. One of the major factor regarding fisheries in the Arctic is the cooperation by the Arctic coastal States because as Barnes has noted, fisheries will likely first be possible within their national jurisdiction.¹⁷⁰ States are obligated under the FAO Plan of Action to prevent unregulated fisheries¹⁷¹ but as the environmental circumstances have hitherto rendered the necessity of such laws unnecessary, it is likely that the domestic regulation is not capable of sufficiently regulating "new Arctic fisheries" if, or when the diminishing ice-coverage leaves the sea-area available for commercial fisheries.

As a result, the central Arctic Ocean is extremely vulnerable to IUU fishing. Whether fisheries in that area would constitute illegal, unregulated or unreported fisheries would depend on the flag State in question and the living resource it was fishing. At any rate, the

¹⁶⁹ Supra n. 51, p. 109.

¹⁷⁰ Supra n.105, p. 225.

¹⁷¹ FAO Plan of Action, paragraph 3(2)(2).

problem remains that there is dire need for a uniform regulation for fisheries that applies to the whole of the Arctic Ocean.

4.2 Possible Solutions

Although commercial fisheries in the central Arctic Ocean may not be possible for many years to come, the gaps in the legal regime need to be addressed before they can begin. IUU fishing undermines all existing conservation and management efforts and poses a great risk of irreparable damage due to over-exploitation. In that respect there are two potential options. One is to create a new RFMO that would govern the whole Arctic and the other is to expand the geographical scope of an existing RFMO, to engulf the entire Arctic Ocean.

Although the establishment of a new instrument tailored to the Arctic would be the ideal option, there are arguments against it. First, the process of drafting and ratifying a new instrument could take a long time. Limiting the scope of a new RFMO to ABNJ has been suggested by Barnes, noting that it would prove easier to negotiate and could be based on an existing RFMO. However, he noted that whether the potential new fisheries were substantial enough to justify establishing an RFMO solely for that purpose, remained to be seen.¹⁷² The second factor is the cost of establishing a new instrument to regulate an area that does not yet allow for commercial fishing/yield any commercial profit could prove problematic. In light of the Ilulissat Declaration from 2008, it seems that the Arctic five do not want a new regime for the Arctic Ocean.¹⁷³ Nevertheless, both the US through its 'Joint Solution', and the EU, two major players in the matters of the Arctic, have shown interest in establishing a new instrument dealing specifically with new fisheries.¹⁷⁴

The other possibility would be to extend the scope of an existing RFMO. Both Molenaar and Barnes have noted that NEAFC would be the most suitable option, pointing out two major factors.¹⁷⁵ First, that article 19 of the NEAFC convention allows for adjustments to its constitutive body, and second, that the majority of the Arctic States are already members. Furthermore, Canada has status as a cooperating non-contracting party (hereafter NCP). However, the US is neither a member to NEAFC nor a NCP. In spite of the aforementioned, the Arctic States do not seem to favour this approach, with the exception of Iceland.¹⁷⁶

¹⁷² Supra n. 105, p. 227-228.

¹⁷³ Molenaar, "*Initial Steps of Reform*," p. 460.

¹⁷⁴ Supra n.172, p. 226.

¹⁷⁵ Molenaar, "*Initial Steps of Reform*," p. 452; Barnes, "International Regulation of Fisheries Management," p. 226.

¹⁷⁶ Supra n. 51, p. 116.

The development in the area of conservation measures has been towards an “integrated” approach, taking the precautionary approach into account. The lack of scientific data regarding Arctic fisheries makes the adoption of science based and ecosystem based conservation and management measures impossible yet. In light of the lacking data, applying the precautionary approach would entail adopting strict conservation measures, effectively banning fisheries until enough scientific data has been gathered to assess the status of the marine environment, and the potential impact of fisheries to it. The actions taken by coastal States could have an unknown effect on the living resources, although Molenaar has noted that the impact of Arctic fisheries is likely similar to the impact in other areas.¹⁷⁷

The Arctic five have shown their concern with regard to the central Arctic Ocean through declarations. The most recent one is the Oslo Declaration, where the Arctic five acknowledge the need to apply a precautionary approach in the Arctic, and declare to not allow their vessels to fish in the area until the mechanisms are in place that are necessary to manage fisheries in accordance with recognised international standards.¹⁷⁸ Nevertheless, only the US has actively taken measures and banned its nationals from fishing in the Arctic Ocean until the necessary scientific information is available.¹⁷⁹ One of the measures the Arctic coastal States could take is cooperation in marine scientific research pursuant to article 246(3) of the LOSC. In fact, many States already have developed plans to research, through regional bodies as well.¹⁸⁰ Molenaar has suggested, as a possible future solution to lack of scientific data, to establish an assessment and advisory body on Arctic fisheries, either as a stand-alone agreement or under the auspices of the Arctic Council.¹⁸¹

An alternative to the above mentioned would be to adopt measures through the Arctic Council. As the Arctic Council cannot issue legally binding decisions and its membership is limited to the Arctic States, Barnes rejected it as a viable option to adopt fisheries measures, unless undergoing extensive reform and restructure.¹⁸² Nevertheless, Molenaar has pointed out that adopting a non-legally binding Arrangement¹⁸³ would be within the current scope of the Arctic Council and the Arctic Council System¹⁸⁴. He notes that in order for an

¹⁷⁷ Supra n.51, p. 106.

¹⁷⁸ Such as the Oslo Declaration mentioned earlier and the Ilulissat Declaration from 2008. Ilulissat Declaration available at <http://www.arcticgovernance.org/the-ilulissat-declaration.4872424.html> (accessed 17.08.2016).

¹⁷⁹ US Senate Joint resolution no. 17 of 2007. Signed by the Senate on 4 October 2007. House of Representatives voted in favour of Res.17 in May 2008 and it was signed by the President on 4 June 2008. Available online at <https://www.congress.gov/bill/110th-congress/senate-joint-resolution/17/text> (accessed 30.08.2016).

¹⁸⁰ Supra n. 105, p. 225.

¹⁸¹ Supra n.177, p. 118.

¹⁸² Supra n. 180, p. 227.

¹⁸³ Arrangements are similar to RFMO's and likewise governed by the FSA.

¹⁸⁴ Supra n. 181, p. 113.

Arrangement to apply in a high seas area, such as the central Arctic Ocean, support from key non-Arctic states and entities is crucial, e.g. through a forum where they could take part the negotiation and express their consent to be bound.¹⁸⁵

While the idea of adopting an Arrangement seems to be the easiest solution in the current situation, it might not be viable. So far the Arctic Council has refrained from involving itself in matters of fisheries and it might not consent to this solution. Furthermore, the idea of allowing other States to participate in the negotiation of such an instrument might not appeal to the Arctic five.

4.3 Potential Development

In 2012 the idea of developing a legally binding international agreement on the conservation and sustainable use of marine biological diversity developed after a UN Conference in 2012.¹⁸⁶ This idea developed quickly and on 19 June 2015 the UN General Assembly (UNGA) adopted Resolution no.69/292 (Res. 69/292)¹⁸⁷ on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the Implementing Agreement). The Resolution established a preparatory committee (Preparatory Committee) intended to address the issue of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The Preparatory Committee met in the spring of 2016. The review from the first session contains an outline of the issues raised at the first session.¹⁸⁸ One of the issues connected with this thesis is the scope of the Implementing Agreement, i.e. whether fisheries should be included in the instrument or not. The issue of fisheries was discussed in the work of the Ad Hoc Open-ended Informal Working Group (BBNJ Working Group), in 2015.¹⁸⁹ While the suggestion of including fisheries had some support, there were others that were of the opinion that fisheries should not be included since they were already regulated by the FSA through

¹⁸⁵ Supra n.184, p. 118.

¹⁸⁶ United Nations Conference on Sustainable Development, Rio de Janeiro 20-22 June 2012. The outcome document entitled “The future we want”, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/288 (accessed 22.08.2016).

¹⁸⁷ Available at http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm (accessed 23.08.2016).

¹⁸⁸ The Preparatory Committee, “Chair’s overview of the first session of the Preparatory Committee,” available at http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf (accessed 23.08.2016).

¹⁸⁹ The Letter of the BBNJ Working Group, available at <https://treaties.un.org/doc/publication/unts/volume%201833/volume-1833-a-31363-english.pdf> (accessed 22.08.2016).

RFMO's.¹⁹⁰ Essentially, the issue is still being debated since participants have not yet reached consensus on this issue. Nevertheless, the Preparatory Committee is set to have their second session from 26 August to 9 September 2016 where the topic will likely be discussed further.

In light of the different opinions on the matters, the real question is whether fisheries should be included in the Implementation Agreement or not. The idea behind the Implementation Agreement is to adopt an international legally binding instrument under the LOSC, aimed at the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. The issue of conservation and sustainable use of marine living resources is connected to marine pollution which is addressed in Part XII of the LOSC. While Part XII does not specifically include fisheries, ITLOS has been considered to have essentially extended the scope of Part XII to include fisheries.¹⁹¹

The development in the Law of the Sea in the last couple of decades has been moving further away from the zonal and species-specific approach used in the LOSC, towards approaching the ecosystem as a whole. With the current global problem of over-exploitation of fish stocks, and IUU fishing in general, it seems almost counterproductive to exclude fisheries. The recent development therefore seems to be in favour of fisheries being included in the Implementing Agreement.

¹⁹⁰ The Letter of BBNJ Working group, paragraph 19. The view was expressed that there is not necessarily a gap in the legal regime, but in the enforcement of the existing instruments. Whether that applied specifically to fisheries or to the topic in general is not clear.

¹⁹¹ *Supra* n. 34.

PART V

5. CONCLUSIONS

The main objective was to analyse the existing legal regime with regard to fisheries in the central Arctic Ocean by looking at the rights and obligations States have in relation to fisheries in the Arctic Ocean pursuant to the legal regimes that currently govern it. This assessment concluded that the fisheries legal regime in the Arctic Ocean is very fragmented, leading to gaps in geographical coverage, in the central Arctic Ocean in particular. Furthermore, the enforcement of the existing regime, which is primarily by flag States, creates further gaps since the level of enforcement undertaken by the flag States can vary considerably. While efforts to supplement flag State jurisdiction have been made through the adoption of the Port State Agreement, which could prove effective, it does not allow other States than flag State to impose sanctions to violations and does not really create uniformity in flag State enforcement.

Although commercial fishing has not begun in the central Arctic Ocean, there is a general consensus of the need to address the gaps in the legal regime. Different possibilities have been suggested in this respect, such as expanding the scope of an existing RFMO or creating a new one specific to the Arctic Ocean. Adopting measures through the Arctic Council has furthermore been suggested as an option but in light of the fact that the Arctic Council does not want to involve itself with fisheries, this does not seem possible.

The most recent development is the legally binding instrument on the conservation and sustainable use of marine biological diversity that is currently being negotiated. If fisheries were to be included in this instrument, the problem regarding high seas fisheries in the Arctic Ocean would at the very least be diminished. While a holistic approach would propose that fisheries be included, there is no general consensus on this issue, although that might change at the session that is currently taking place.

Although a permanent solution has not yet been found yet, the developments discussed above can be considered advantageous for sustainable development for potential commercial fisheries in the central Arctic Ocean. This is not least reflected in the Oslo Declaration by the Arctic five. Although the declaration is not legally binding, it provides an indication of the obligations the States consider themselves to be bound by and could prove very influential to the development of future regimes for the central Arctic Ocean.

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