The CAOF Agreement: Key Issues of International Fisheries Law

Erik J. Molenaar*

Abstract

This Chapter is devoted to issues relating to the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean and its negotiation that are of key importance to international fisheries law. It provides an overview of the Arctic Five and Five-plus-Five processes that culminated in the Agreement, as well as the Agreement's institutional set-up and setting. These negotiation processes were confronted with a unique scenario in international fisheries law: they were in a position to collectively determine the conditions under which a future high seas fishery would be allowed to commence. The final package deal that led to the successful conclusion of the Five-plus-Five process was not only driven by the fundamentally different central Arctic Ocean fisheries interests of the Arctic Five on the one hand, and those of the Other Five on the other hand, but also by their broader interests in the domains of international fisheries law, the international law of the sea and the international law relating to the Arctic. Other key features of the Five-plus-Five process that are examined in detail are its exploratory phase, the stepwise approach and the evolving nature of the Agreement.

Keywords

Arctic, fisheries, precaution, law of the sea, Arctic Council

1. Introduction

The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement)[1] was opened for signature on 3 October 2018, in Ilulissat,

* Deputy Director, Netherlands Institute for the Law of the Sea (NILOS), Utrecht University & Professor, Norwegian Centre for the Law of the Sea (NCLOS), UiT The Arctic University of Norway. Email: e.j.molenaar@uu.nl. Writing this paper was made possible by funding from the Netherlands Polar Programme, and the Research Council of Norway (project *STOCKSHIFT*). The author participated in all except the first of the six rounds of negotiations on the CAOF Agreement; some as the representative of the Netherlands in the delegation of the European Union (EU); some as a legal expert of the European Commission in the delegation of the EU. The views in this Chapter are those of the author and not necessarily those of the Netherlands Government or the European Commission. The author is very grateful for comments received from David Balton, Andreas Papaconstantinou and Ramon van Barneveld on an earlier version.

Greenland. All of the ten participants (see below) in the negotiation process on the CAOF Agreement – the so-called "Five-plus-Five process" – have since signed the Agreement, without any reservations or other declarations.[2]

The need for a multilateral instrument on central Arctic Ocean fisheries was initially advocated above all by the Government of the United States, which was acting pursuant to its Senate joint resolution No. 17 of 2007, directing the United States "to initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean."[3] This eventually led to the convening of the so-called "Arctic Five process" on Arctic Ocean fisheries between the five central Arctic Ocean [4] coastal States (Canada, Denmark in respect of the Faroe Islands and Greenland, Norway, the Russian Federation and the United States; the "Arctic Five"). The Arctic Five process occurred outside the scope of the Arctic Council or another existing intergovernmental body, and had its first meeting in June 2010.[5] The process concluded in July 2015 with the adoption of the Oslo Declaration.[6]

The Arctic Five process can be regarded as a *de facto* preparatory process for the subsequent Five-plus-Five process. This latter process also took place outside the scope of the Arctic Council or another existing intergovernmental body, and was formally initiated by the Arctic Five. The leadership and perseverance of the Chair of both processes – United States Ambassador David Balton – played a critical role in the initiation of both processes. Based on the Arctic Five's discussions in Nuuk in February 2014 on what was then still called the "broader process", the United States invited the four other central Arctic Ocean coastal States and five other participants (China, the European Union (EU), Iceland, Japan and South Korea[7]; "the Other Five") to participate in the Five-plus-Five process.

The main drivers for both processes were the receding sea-ice in the Arctic Ocean,[8] as well as spatial shifts in the distributional ranges of many fish stocks from tropical

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1 Ilulissat, 3 October 2018, as included in the Annex to European Union (EU) doc. COM(2018) 453 final, of 12 June 2018.

2 The EU signed the CAOF Agreement on 26 October 2018 and the other nine participants on 3 October 2018. The Kingdom of Denmark signed in respect of the Faroe Islands and Greenland (cf. signed version of the Agreement on file with author). To the surprise of all, the Russian Federation was the first to notify its formal adherence to the CAOF Agreement (by means of an instrument of acceptance) – on 29 January 2019 – followed by the EU's instrument of approval, on 4 March 2019.

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

4 For an explanation of terminology, see below.

5 See Table 1 in Section 3 for an overview of all meetings during the Arctic Five and Five-plus-Five processes.

6 Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, Oslo, 16 July 2015 (available at www.regjeringen.no/en/aktuelt/fishing-arctic-ocean/id2427705/). See also E.J. Molenaar, "International Regulation of Central Arctic Ocean Fisheries", in M.H. Nordquist, J.N. Moore and R. Long (eds), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (Brill/Nijhoff, 2016), 429-463.

7 Republic of Korea (ROK).

8 See, for instance, the 2017 Snow, Water, Ice and Permafrost in the Arctic (SWIPA) Report, "Summary for Policy-makers" (available at www.amap.no/swipa2017), at 3, which notes that

regions towards the polar regions,[9] against a background of increasing global demand in fish and a continued troublesome overall status of global fish stocks.[10] At the time of writing, however, no fishing in the high seas portion of the central Arctic Ocean had taken place at all, and practically no large-scale commercial fisheries in the portions of the coastal State maritime zones (e.g. territorial seas and exclusive economic zones (EEZs)) adjacent to this high seas area. From a normative perspective, therefore, the aforementioned processes were above all aimed at pursuing precautionary, science-based and ecosystem approaches to fisheries management, and avoiding unregulated high seas fishing by ensuring full high seas coverage with regional fisheries management organizations or arrangements (RFMO/As).[11]

Uncertainties on the future of fisheries in the (central) Arctic Ocean nevertheless abound, for instance due to the potential impacts of increased fresh-water inflow, land-based pollution, and ocean acidification. These could reduce or eliminate any new fishing opportunities that may arise in this area.[12] Sea-ice regression in the Arctic means at any rate that the North Pacific and the North Atlantic Oceans will become increasingly connected.[13] Together with merchant shipping, this creates a pathway for the introduction of invasive species. One of these pathways has facilitated the settlement and rapid increase in the abundance of snow crab (*Chionoecetes opilio*) in the Barents Sea in recent years.[14]

This Chapter focuses on issues of the CAOF Agreement and its negotiation that are of key importance in international fisheries law. This focus was chosen to minimize overlap and optimize complementarity with the other Chapter on the CAOF

"[t]he Arctic's climate is shifting to a new state" and the "Arctic Ocean could be largely free of sea ice in summer as early as the late 2030s".

9 See, e.g. T. Haug *et al*., "Future harvest of living resources in the Arctic Ocean north of the Nordic and Barents Seas: A review of possibilities and constraints", (2017) 188 *Fisheries Research*, 38-57; and the Reports of the "Meetings of Scientific Experts on Fish Stocks in the Central Arctic Ocean" (FiSCAO Meetings), available at www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/default.htm; www.afsc.noaa.gov/Arctic_fish_stocks_fourth_meeting/default.htm; and www.afsc.noaa.gov/Arctic_fish_stocks_fifth_meeting/.

10 See "The State of World Fisheries and Aquaculture 2018" (FAO, 2018) (available at www.fao.org/fishery/sofia/en), at 6.

11 See Art. 2 of the CAOF Agreement. The concepts of an RFMO and an RFMA are explained in the literature listed in *infra* note 16.

12 See T. Haug *et al*., *supra* note 9. See also J.S. Christiansen, C.W. Mecklenburg and O.V. Karamushko, "Arctic Marine Fishes and their Fisheries in Light of Global Change", (2014) 20 *Global Change Biology*, 352-359; V.W.Y. Lam, W.W.L. Cheung and U.R. Sumaila, "Marine Capture Fisheries in the Arctic: Winners or Losers under Climate Change and Ocean Acidification?", (2016) 17 *Fish and Fisheries*, 335-357; M.C. Jones and W.W.L. Cheung, "Multi-model Ensemble Projections of Climate Change Effects on Global Marine Biodiversity", *ICES Journal of Marine Science* of 10 October 2014; *Arctic Biodiversity Assessment. Status and Trends in Arctic Biodiversity* (CAFF, 2013) (available at www.caff.is), Ch. 1, 22-23.

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

14 J.H. Sundet and S. Bakanev, "Snow crab (*Chionoecetes opilio*) – a new invasive crab species becoming an important player in the Barents Sea ecosystem" (doc. ICES CM 2014/F:04: 2014).

Agreement in this Volume,[15] as well as with this author's other publications on the CAOF Agreement and central Arctic Ocean fisheries.[16] The remainder of this Chapter is structured as follows: the next Section is devoted to "Terminology", followed by Section 3 entitled "The Arctic Five and Five-plus-Five Processes and their Institutional Set-up and Setting". Section 4 then focuses on the unique scenario with which the Arctic Five and Five-plus-Five processes were confronted. Section 5 examines "The Participants in the Five-plus-Five Process and their Interests", and Section 6 "Key Features of the Five-plus-Five Process". The Chapter ends with "Conclusions".

2. Terminology

For the purpose of this Chapter, the term "marine Arctic" corresponds to the marine waters included within the boundary agreed by the Arctic Council's Conservation of Arctic Flora and Fauna (CAFF) working group (see Figure 1 below). Figure 2 shows the four high seas pockets of the marine Arctic, namely the so-called "Banana Hole" in the Norwegian Sea, the so-called "Loophole" in the Barents Sea, the so-called "Donut Hole" in the central Bering Sea, and the "high seas (portion) of the central Arctic Ocean". The last is approximately 2.8 million square kilometres in size, roughly the size of the Mediterranean Sea.[17]

As Iceland is located in the marine Arctic as defined above, it qualifies at any rate as an Arctic coastal State. The Arctic Five obviously also qualify as such. These six States plus Finland and Sweden are Arctic States on account of their membership of the Arctic Council. The CAOF Agreement uses the terms "Arctic Ocean" and "central Arctic Ocean" without defining them. They appear above all in a context of broader ecosystems and their marine living resources as well as related scientific research and monitoring.[18] The term "high seas portion of the central Arctic Ocean" appears in the definitions of the geographical scope of the Oslo Declaration and the CAOF Agreement.[19] Its consistent use implies two agreements. First, the central Arctic Ocean consists of a high seas portion as well as adjacent coastal State maritime zones. Second, the "broader" Arctic Ocean consists of the central Arctic Ocean as well as some undefined adjacent waters.[20] These agreements provide comfort to Iceland,

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15 See the Chapter by David Balton.

16 In particular E.J. Molenaar, "Participation in the Central Arctic Ocean Fisheries Agreement", in A. Shibata *et al*. (eds), *Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors* (Routledge, 2019), 132-170; E.J. Molenaar, "The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean", post dated 5 February 2016 for the JCLOS Blog; and Molenaar 2016a, *supra* note 6.

17 Chairman's Statement of the 6th Meeting (of the Five-plus-Five process), available at www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/index.htm.

18 See in particular the preamble and Art. 4(1).

19 At p. 1 and Art. 1(a) respectively.

20 See also the use of "Central Arctic Ocean" in the context of the OSPAR Commission's consideration of an "Arctic Ice High Seas MPA" (see Summary Record of the 16th OSPAR Commission Meeting (2016; doc. OSPAR 16/20/1-E), at para. 6.27(c)).

which regards itself as an Arctic Ocean coastal State and repeatedly requested to join the Arctic Five process.[21] Finally, there is agreement among all of the Five-plus-Five that only the Arctic Five are central Arctic Ocean coastal States.

The seabed of the Banana Hole, Loophole and Donut Hole consists entirely of so-called "outer continental shelves" of coastal States. While most of the seabed "underlying" the high seas portion of the central Arctic Ocean will consist of outer continental shelves, there will be one or more pockets of the Area – the deep-seabed beyond the continental shelves of coastal States.[22] It will take a considerable number of years to obtain clarity in this respect, *inter alia*, due to the heavy workload of the Commission on the Limits of the Continental Shelf (CLCS) in processing submissions by coastal States.

Figure 1: The Arctic Region: General Overview[23]

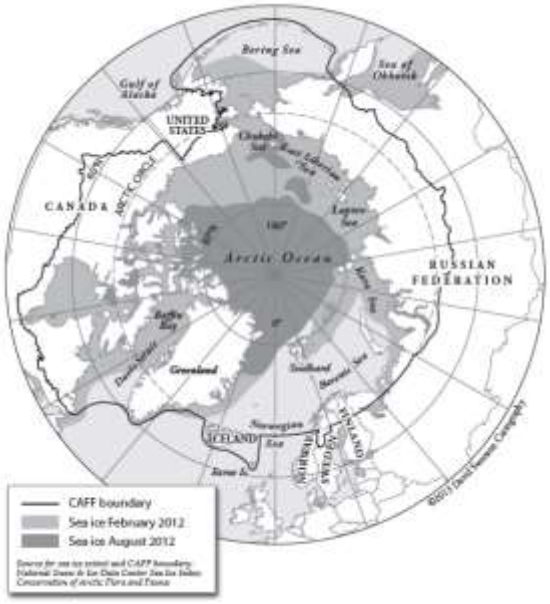

Figure 2: High Seas Pockets in the Marine Arctic[24]

21 See Molenaar 2016a, *supra* note 6, at 447.

22 Art. 1(1)(1) of the LOS Convention (United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994 (1833 UNTS 396)).

23 Map prepared by David Swanson and reproduced here with his permission.

24 Map used with permission of the Pew Charitable Trusts.

3. The Arctic Five and Five-plus-Five Processes and their Institutional Set-up and Setting

3.1. Introduction

As discussed in detail elsewhere,[25] one of the first intergovernmental discussions on Arctic Ocean fisheries occurred at the November 2007 meeting of the Arctic Council's Senior Arctic Officials (SAOs), which was summarized as follows: "There was strong support for building on and considering this issue within the context of existing mechanisms."[26] The search for a suitable mechanism – existing or new – largely took place during 2008 and 2009 and involved, *inter alia*, the Food and Agriculture Organization of the United Nations (FAO) and the United Nations General Assembly (UNGA). It is important to note that this occurred during a very turbulent period for the Arctic, in particular due to the dramatic sea-ice loss in 2007, the planting of the Russian Federation's flag on the geographical North Pole's deep

25 See Molenaar 2016a, *supra* note 6, at 446-450.

26 Report of the November 2007 SAOs Meeting (available at www.arctic-council.org), at 12. Some Arctic Council involvement on fisheries resources was proposed in drafts of the Arctic Council's Arctic Ocean Review (AOR) Phase II Report, but these proposals did not make it to the final text of May 2013 (See E.J. Molenaar, "Arctic Fisheries Management", in E.J. Molenaar, A.G. Oude Elferink and D.R. Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Martinus Nijhoff Publishers, 2013), 243-266, at 259-260). The AOR Phase II Final Report is available at www.pame.is.

sea-bed in 2007, and the subsequent adoption by the Arctic Five of the famous Ilulissat Declaration.[27]

Building also on their enhanced cooperation during that period, the Arctic Five agreed by the end of 2009, or at least by early 2010, that if a new international instrument on Arctic Ocean fisheries should be developed at all – which was not yet evident for all five by then[28] – its development should be initiated and led by the Arctic Five outside the framework of existing mechanisms. The Arctic Five process eventually began in June 2010 and comprised a number of policy/governance meetings at senior officials' level as well as science meetings. The latter have become known as the "FiSCAO Meetings".[29] The 3rd FiSCAO Meeting also involved scientists from China, Iceland, Japan and South Korea, in anticipation of the commencement of the Five-plus-Five process. The latter process started in December 2015, although some of the delegations that lacked a formal negotiation mandate at the time do not regard that meeting as a genuine negotiation session.[30] Table 1 below provides a chronological overview of all these meetings.

Table 1: Meetings of the Arctic Five and Five-plus-Five Processes

	Policy/governance Meeting	FiSCAO Meeting
Arctic Five process	1st: Oslo, 22 June 2010[31]	
		1st: Anchorage, 15-17 June 2011[a]
	2nd: Washington D.C., 29 April - 1 May 2013[32]	
		2nd: Tromsø, 28-31 October 2013[a]
	3rd: Nuuk, 24-26 February 2014[33]	
		3rd: Seattle, 14-16 April 2015[a]
	Oslo, 16 July 2015 (signing ceremony)[34]	
Five-plus-Five process	1st: Washington D.C., 1-3 December 2015[b]	
	2nd: Washington D.C., 19-21 April 2016[b]	
	3rd: Iqaluit, 6-8 July 2016[b]	
		4th: Tromsø, 26-28 September 2016[a]
	4th: Tórshavn, 29 November - 1 December	

27 Ilulissat Declaration, Arctic Ocean Conference of 28 May 2008, (2009) 48 *International Legal Materials*, 362.

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

29 See *supra* note 9.

30 Cf. the Chairman's Statement of the 1st Meeting, *supra* note 17.

31 Chair's summary available at www.regjeringen.no/upload/UD/Vedlegg/Folkerett/chair_summary100622.pdf.

32 Chairman's Statement (on file with author).

33 Chairman's Statement available at http://naalakkersuisut.gl/en/Naalakkersuisut/News/2014/02/Arktisk-hoejsoefiskeri.

34 See *supra* note 6.

	2016[b] 5th: Reykjavik, 15-18 March 2017[b] 6th: Washington D.C., 28-30 November 2017[b] Legal and technical review: Washington D.C., 7 February 2018 Signing ceremony: Ilulissat, 3 October 2018[35]	5th: Ottawa, 24-26 October 2017[a]

[a] For all Reports of FiSCAO Meetings, see *supra* note 9.
[b] For all Chairman's Statements during the Five-plus-Five process, see *supra* note 17.

3.2. Institutional Set-up

The signing ceremony in Ilulissat marked the end of the Five-plus-Five process. A new institutional phase will commence once the CAOF Agreement enters into force, after all of the Five-plus-Five have formally adhered to it.[36] The Parties will then be required to convene at least once every two years a Meeting of Parties (MOP),[37] which will act as the Agreement's principal decision-making body. At least two months before an MOP, the Parties are to convene a joint scientific meeting (JSM),[38] which will formalize the FiSCAO Meetings under a different name. Furthermore, the MOP may "form committees or similar bodies in which representatives of Arctic communities, including Arctic indigenous peoples, may participate".[39]

Subsection 6.3 describes how the MOP became the CAOF Agreement's principal decision-making body and how its mandate evolved during the Five-plus-Five process. During the 2nd and 3rd Meeting, delegations also exchanged views as to whether the prospective instrument should have its own scientific body or whether it should make use of existing bodies. At the 2nd Meeting, several European delegations preferred the prospective instrument to rely exclusively on the International Council for the Exploration of the Sea (ICES). Some other delegations argued that the North Pacific Marine Science Organization (PICES) should also be involved, among other things to ensure a Pacific perspective. In the end, all delegations agreed that account should not only be taken of cost-efficiency, but also of the ability of all of the Five-plus-Five to participate on an equal footing in the scientific body that would support the prospective instrument.

The draft of 1 June 2016 used for the 3rd Meeting not only included a preambular paragraph on the role and relevance of ICES, but also the first reference to JSMs in Article 3bis(4). At the 3rd Meeting, a proposal to also include a reference to PICES in that preambular paragraph led delegations to agree to use a generic reference to

35 See https://naalakkersuisut.gl/en/Naalakkersuisut/News/2018/10/0310_fiskeriaftaleunderskrevet.
36 Art. 11(1) of the CAOF Agreement.
37 *Id.*, Art. 5(1).
38 *Id.*, Art. 4(6).
39 *Id.*, Art. 5(2).

cooperation with "international scientific bodies and programs" instead. That wording eventually ended up in the paragraph (cited in the next subsection) that also referred to the North-East Atlantic Fisheries Commission (NEAFC). The creation of JSMs in what eventually became Article 4(6) of the CAOF Agreement did not raise any opposition at the 3rd Meeting, or afterwards.

As the Five-plus-Five process did not discuss the need or desirability of the CAOF Agreement's provisional application or the establishment of a preparatory conference,[40] and also did not instruct the FiSCAO to convene after its 5th Meeting in October 2017, there were, at the time of writing, no formally agreed institutional arrangements for the period until the Agreement's entry into force. Assuming that entry into force will occur in the foreseeable future – not later than a decade or so from the signing ceremony – there will be no need for the interim regulation of commercial or exploratory fishing by vessels flying the flag of any of the Five-plus-Five, as their signature of the CAOF Agreement requires them to refrain from acts that would defeat the object and purpose of the Agreement.[41] The significant pace in which climate change occurs in the Arctic nevertheless means that the momentum in the ongoing cooperation on fisheries science should not be lost. A continuation of the FiSCAO Meetings is in that context the most logical way forward, and nothing prevents the Signatories of the CAOF Agreement from deciding to do so at any time. In fact, at the signing ceremony several delegations proposed the convening of an "informal" MOP in the near future – possibly during the first half of 2019 – as well as a 6th FiSCAO Meeting.[42]

3.3. Institutional Setting

As already noted, the Arctic Five and Five-plus-Five processes were initiated and conducted outside the Arctic Council or another existing intergovernmental body, and the MOPs under the CAOF Agreement will also operate as a stand-alone body. For RFMO/As in the domain of international fisheries law this is in fact the general rule, and there are also good arguments for categorizing the CAOF Agreement as a regional fisheries management arrangement (RFMA).[43]

There are two main exceptions to this general rule. The first is the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which is part of

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40 Conversely, see, for instance, the resolutions establishing Preparatory Conferences adopted in conjunction with the signing ceremonies of the constitutive instruments of the two most recent RFMOs: the South Pacific Regional Fisheries Management Organization (SPRFMO) and the North Pacific Fisheries Commission (NPFC).

41 Vienna Convention on the Law of Treaties (VCLT; Vienna, 23 May 1969. In force 27 January 1980, 1155 UNTS 331), art. 18(a).

42 Information provided by an official from the European Commission to the author on 7 November 2018. In its capacity as Depositary of the CAOF Agreement, Canada invited all Signatories to the CAOF Agreement to an informal preparatory meeting in Ottawa, to be held towards the end of May 2019. Also, the Russian Federation organized a (mainly science-oriented) conference for the Signatories to the CAOF Agreement on 12-13 April 2019, in Archangelsk (see https://arctic-agreement.ru/en/).

43 See *infra* note 95 and accompanying text.

the Antarctic Treaty System. Its constitutive instrument – the CAMLR Convention[44] – was largely negotiated by the Antarctic Treaty Consultative Parties in the context of the Second Special Antarctic Treaty Consultative Meeting. For various reasons, however, its final text was adopted by a stand-alone diplomatic conference.[45] The debates on the categorization of CCAMLR have led to broad agreement that CCAMLR is "more than an RFMO".[46] The second exception are RFMOs established under the FAO Constitution,[47] which concerns at present the General Fisheries Commission for the Mediterranean and the Indian Ocean Tuna Commission.[48]

The relationship between NEAFC and the CAOF Agreement was extensively debated during the Five-plus-Five process. Just like the Oslo Declaration, the first draft of 2 November 2015 circulated in advance of the 1st Meeting of the Five-plus-Five process had a geographical scope that created an overlap with the NEAFC Convention Area.[49] This overlap was discussed during the early stages of the Five-plus-Five process, but no delegation felt strongly about avoiding it.

While the preamble of the first draft recognized the competence of NEAFC in the "NEAFC/CAOF Agreement overlap area", it did not otherwise devote attention to its relationship with NEAFC. This was a marked difference with the Oslo Declaration, which contains an assurance that its interim measures "neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries, including [NEAFC]". This assurance was eventually still included in the draft of 1 June 2016 used for the 3rd Meeting, by adding the following sentence to its Article 9(2): "This Agreement shall neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries management." This sentence remained unchanged in what became Article 14(4) of the CAOF Agreement.

A similar assurance, but specifically in relation to NEAFC, was included in a preambular paragraph of the draft used for the 3rd Meeting. At that Meeting, one delegation proposed to rephrase this paragraph in a more positive manner, by emphasizing the need for coordination with NEAFC. This was taken up in the draft of 19 October 2016 used for the 4th Meeting, which also merged it with the other

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44 Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982 (1329 UNTS 47).

45 See J.N. Barnes, "The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean", in J.I. Charney (ed.), *The New Nationalism and the Use of Common Spaces* (Allanheld, Osmun Publishers, 1982), 239-286.

46 See E.J. Molenaar, "Participation in Regional Fisheries Management Organizations", in R. Caddell and E.J. Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019), 103-129.

47 Constitution of the Food and Agriculture Organization of the United Nations, Quebec City. Opened for signature and entered into force on 16 October 1945, as amended. Consolidated version available at www.fao.org/Legal.

48 The Western Central Atlantic Fishery Commission (WECAFC) is currently engaged in a process to transform itself as an RFMO (Report of the 2016 WECAFC Meeting, para. 55).

49 Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982 (1285 UNTS 129), as amended. Consolidated version available at www.neafc.org.

preambular paragraph that mentioned NEAFC (see further below). A proposal to also add "cooperation" secured broad support at the 4th Meeting. Since then, the relevant preambular paragraph remained essentially unchanged, and reads as follows:

> Underlining the importance of ensuring cooperation and coordination between the Parties and the North-East Atlantic Fisheries Commission, which has competence to adopt conservation and management measures in part of the high seas portion of the central Arctic Ocean, and other relevant mechanisms for fisheries management that are established and operated in accordance with international law, as well as with relevant international bodies and programs;

At its 37th Annual Meeting in 2018, NEAFC adopted a statement on the conclusion of the negotiations on the CAOF Agreement.[50] This statement repeats part of the relevant preambular paragraph of the CAOF Agreement as well as its Article 14(4), contains a commitment by NEAFC to cooperate with the parties to the CAOF Agreement, and lists those NEAFC conservation and management measures that apply to the NEAFC/CAOF Agreement overlap area. As argued elsewhere,[51] however, the overlap area nevertheless poses a risk of inconsistencies between, on the one hand, NEAFC's recommendations and other decisions and, on the other hand, the conservation and management measures and other decisions adopted by the MOP under the CAOF Agreement. It may therefore be opportune for the MOP under the CAOF Agreement to exclude the overlap area from some or all of its future conservation and management measures.

While the cited paragraph explicitly mentions NEAFC, it also refers to "other relevant mechanisms for fisheries management that are established and operated in accordance with international law". As noted above, the Oslo Declaration uses the phrase "existing international mechanism relating to fisheries, including [NEAFC]". The wording in the preamble to the CAOF Agreement could only be agreed on after extensive debate during the first half of the Five-plus-Five process. The Joint Norwegian-Russian Fisheries Commission (JNRFC) was at the very heart of this multifaceted debate.

Whereas the final wording only recognizes that NEAFC has competence in part of the CAOF Agreement Area, the preamble to the first draft recognized that "at least one existing [RFMO] – [NEAFC] –" has competence in part of the CAOF Agreement Area. The phrase "at least one existing [RFMO]" was removed from the draft of 20 January 2016 following the 1st Meeting, presumably pursuant to a request from one of the delegations at that Meeting. At the 2nd Meeting, however, another delegation requested the phrase to be reinserted, as this would also ensure coverage of the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the North Atlantic Salmon Conservation Organization (NASCO). Even though this delegation made no mention of JNRFC, in response to a question from another delegation, it subsequently confirmed that JNRFC could be an RFMO/A, thereby also

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50 Available at www.neafc.org/basictexts.

51 Molenaar 2019, *supra* note 16, at Section 5.2.

implying that JNRFC has competence in the CAOF Agreement Area. This led another delegation to state that it does not regard JNRFC as an RFMO/A.

The issue resurfaced again during discussions on the draft Chairman's Statement of the 2nd Meeting, when one delegation proposed including a specific reference to NEAFC. [52] This prompted another delegation to state that this would only be acceptable if ICCAT, NASCO and JNRFC would be explicitly mentioned as well. This latter proposal would have been unacceptable to at least one delegation, as listing JNRFC together with NEAFC, ICCAT and NASCO would in its view have amounted to international recognition of JNRFC as an RFMO or RFMA. No other interventions were made after this and the draft Chairman's Statement remained unchanged on this point.

This debate at the 2nd Meeting must be understood in the light of JNRFC's geographical competence in the high seas of the central Arctic Ocean by virtue of the absence of an explicit geographical mandate in its constitutive instrument, as well as its explicit assertions of such geographical competence and its unorthodox regulation of fishing in the Loophole.[53] It was therefore for some delegations important to ensure that nothing in the future instrument would amount to recognition of JNRFC as an RFMO or an RFMA in general as well as specifically in relation to the high seas of the central Arctic Ocean. Their efforts on the latter aspect were aimed at ensuring that fishing pursuant to the JNRFC's conservation and management measures would not constitute an exception to the abstention from commercial fishing that was eventually laid down in Article 3(1)(a) of the CAOF Agreement. To this end, at the 2nd Meeting one delegation proposed adding to this provision the phrase "in accordance with international law" after "established", which met with no opposition. In response to written text proposals on the draft following the 2nd Meeting, the words "and operated" were added thereto in the draft of 1 June 2016 used for the 3rd Meeting, thereby also covering issues relating to participation and allocation of fishing opportunities. Similar wording was included in a new preambular paragraph that contained an "assurance of not undermining" as discussed above.

As noted above, the draft of 19 October 2016 used for the 4th Meeting merged the two preambular paragraphs relating to NEAFC into one, which remained virtually unchanged since then. This new paragraph is devoted to cooperation and coordination between the Parties to the CAOF Agreement and "relevant mechanisms for fisheries management", and does not attempt to clarify which mechanisms have competence in the CAOF Agreement Area. The importance of cooperation and coordination underlined by this paragraph would also seem to apply to JNRFC in relation to its competence in the maritime zones of Norway and the Russian Federation adjacent to the CAOF Agreement Area, which is not contested *per se*.[54]

Finally, the preambular paragraph under examination also refers to "relevant international bodies and programs". This generic wording originated from a

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52 To be inserted in the second of "the key points that remain under discussion for future meetings", namely "the relationship [….] subjects or areas".

53 See Molenaar 2016a, *supra* note 6, at 438-441 and 454.

54 Possibly except for the maritime zones seaward of the outer limit of the territorial sea around Svalbard.

preambular paragraph relating to ICES, as discussed in the previous subsection. The word "scientific" was subsequently removed in order to expand its scope, thereby also covering such bodies as the Arctic Council and the OSPAR Commission[55]. These bodies would arguably be "relevant" in the context of this preambular paragraph on account of the growing support within the international community for an ecosystem approach to ocean governance, and the consequential need for cooperation and coordination between different types of competent international organizations and bodies at the regional and global level. These related aspects are key drivers for the currently ongoing negotiation process on an "international legally binding instrument under the LOS Convention[56] on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction" (ILBI process).[57]

4. A Unique Scenario

As no fishing in the high seas portion of the central Arctic Ocean had ever occurred, the participants in the Arctic Five and Five-plus-Five processes were confronted with a unique scenario in international fisheries law: they were in a position to collectively determine the conditions under which a future high seas fishery would be allowed to commence.

Some similarities nevertheless exist with the negotiations on the CAMLR Convention, the CBS Convention[58] and the non-time bound moratorium on commercial whaling within the International Whaling Commission (IWC).[59] The CAMLR Convention was negotiated in anticipation of large-scale fishing for krill in the waters adjacent to the Antarctic continent. However, the Convention did not embrace the fundamental principle that fishing in the CAMLR Convention Area would be prohibited unless CCAMLR would authorize it. Rather, CCAMLR subjected existing fisheries to more stringent regulations in an incremental manner. Conversely, the CBS Convention and the IWC moratorium were negotiated when the relevant species had (almost) entirely collapsed. Since their adoption, harvesting pollock in the Central Bering Sea has not recommenced and the IWC moratorium has not been lifted, as the substantive and procedural conditions for these have not been satisfied.

The Arctic Five had set forth the conditions under which their vessels would be allowed to commence a future fishery by means of their non-legally binding Oslo

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55 Established pursuant to the Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992. In force 25 March 1998 (2345 UNTS 67), as amended. Consolidated text available at www.ospar.org.

56 *Supra* note 22.

57 Established by UNGA Res. 72/249 of 24 December 2017.

58 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Washington D.C., 16 June 1994. In force 8 December 1995 (34 ILM 67 (1995); also available at www.afsc.noaa.gov/REFM/CBS).

59 The moratorium is laid down in para. 10(e) of the Schedule to the ICRW (International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946. In force 10 November 1948 (161 UNTS 72), as amended) and became effective in the season 1985-86.

Declaration. In their position as initiators of the Five-plus-Five process, they were subsequently able to use the Oslo Declaration as the basis for the initial draft text in a legally binding format for the Five-plus-Five process. Two key elements of the Oslo Declaration are of crucial importance in this regard: its geographical scope – the high seas portion of the central Arctic Ocean – and its qualified abstention from commercial high seas fishing.[60] By means of the latter, the Arctic Five committed to authorize their vessels to conduct such fishing only pursuant to existing or new RFMO/As.

The Other Five agreed to use these two key elements as a point of departure and they were eventually also laid down in the CAOF Agreement.[61] While the Other Five managed to include a reference to the notion of compatibility in Article 3(6) of the CAOF Agreement,[62] this provision relates exclusively to transboundary fish stocks and will therefore only trigger constraints on fishing by the Arctic Five in their maritime zones adjacent to the CAOF Agreement Area sometime in the future, once the northward migration of fish stocks reaches the high seas portion of the central Arctic Ocean. The significance of the abovementioned two elements will be examined in the next Section.

5. The Participants in the Five-plus-Five Process and their Interests

5.1. Fisheries Interests

It is important to emphasize that a division of the participants in the Five-plus-Five process in two camps – namely: central Arctic Ocean coastal States vs non-central Arctic Ocean coastal States, or: the Arctic Five vs the Other Five – obscures other interests. This is especially striking with respect to Denmark. The Kingdom of Denmark consists of three parts: "mainland" Denmark, the Faroe Islands and Greenland. The Kingdom of Denmark is a Member of the Arctic Council and thereby an Arctic State in respect of the entire Kingdom, not just in relation to Greenland, as is occasionally suggested. The latter is not fundamentally different from claiming that the United States is only an Arctic State in respect of the State of Alaska.

The Kingdom is a central Arctic Ocean coastal State exclusively on account of Greenland, and an Arctic (Ocean) coastal State on account of the Faroe Islands. The Kingdom's EU membership only applies to mainland Denmark. Due to the EU's exclusive competence in "the conservation of marine biological resources under the common fisheries policy",[63] it represents mainland Denmark at the external level,

60 Cf. the 5th preambular paragraph and its first interim measure.

61 Arts. 1(1), 3(1) and (3), and 5(1)(c) and (d) of the CAOF Agreement. See Molenaar 2019, *supra* note 16, at Sections 5.2 and 5.3.

62 Art. 3(6) reads: "Consistent with Article 7 of the 1995 Agreement, coastal States Parties and other Parties shall cooperate to ensure the compatibility of conservation and management measures for fish stocks that occur in areas both within and beyond national jurisdiction in the central Arctic Ocean in order to ensure conservation and management of those stocks in their entirety."

63 Art. 3(1)(d) of the Treaty on the Functioning of the European Union (TFEU; consolidated version available at http://eur-lex.europa.eu/collection/eu-law/treaties.html).

including in the Five-plus-Five process. The hybrid status of Denmark in the Arctic Five process is also reflected in the fact that it signed the Oslo Declaration only in respect of Greenland, and not also in respect of the Faroe Islands.[64] The appropriate acronym for the Danish delegation in the Arctic Five and Five-plus-Five processes was DFG (Denmark in respect of the Faroe Islands and Greenland). Not all delegations got this right at all times, however, and occasionally threw in a KFC (Kentucky Fried Chicken), to the amusement of all.

While being mindful of the special case of the Kingdom of Denmark, it is submitted that the two key elements discussed in the previous Section create a fundamental difference between the central Arctic Ocean fisheries interests of the Arctic Five on the one hand, and those of the Other Five on the other hand. The fisheries interests of the Arctic Five are derived from their sovereignty, sovereign rights and jurisdiction over fisheries resources in their adjacent coastal State maritime zones[65] as well as from their right to fish on the high seas.[66] Conversely, the fisheries interests of the Other Five are solely derived from their right to fish on the high seas. This essentially means that, while there will be different scenarios leading to the occurrence of a fish stock in the high seas portion of the central Arctic Ocean that would allow for the commencement of a commercially viable fishery, the Other Five can be expected to be overall more inclined to vote in favour of a commencement of high seas fishing than the Arctic Five. The Arctic Five may only be supportive of such a commencement if they intend to participate in the fishery themselves or, if they do not intend to do so, if this would not significantly conflict with their coastal State interests.

These coastal State interests could be predominantly utilization-oriented or conservation-oriented. Conflict with utilization-oriented coastal State interests of the Arctic Five could for instance arise in case of a straddling fish stock, which is a fish stock occurring in one or more EEZs and the adjacent high seas. Those of the Arctic Five that would allow fishing for such a stock in their own maritime zones adjacent to the CAOF Agreement Area have a clear interest to withhold support for the commencement of fishing for the high seas component of the stock. The high seas would then act as a *de facto* reserve for the replenishment of the stock's coastal component. Moreover, before a northward expansion of a fish stock reaches the high seas portion of the central Arctic Ocean, the stock will first have to traverse the adjacent coastal State maritime zones. The Arctic Five could therefore be in a position to stifle this northward expansion by increasing fishing effort in their own maritime zones.[67]

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64 Signed version of the Oslo Declaration (on file with author).

65 Arts. 2(1), 49(1), 56(1)(a) and 77(4) of the LOS Convention, *supra* note 22.

66 Art. 116 of the LOS Convention. The flag State entitlement to the surplus of the total allowable catch (TAC) pursuant to art. 62(2) of the LOS Convention did not play a role in the Five-plus-Five process, mainly because Canada and the United States do not provide foreign vessels with fisheries access to their maritime zones, save for some minor exceptions.

67 See also L. Zou and H.P. Huntington, "Implications of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea for the management of fisheries in the Central Arctic Ocean", (2018) 88 *Marine Policy*, 132-138, at 135.

Conflict with conservation-oriented coastal State interests of the Arctic Five could also arise in relation to a straddling fish stock. Those of the Arctic Five that would prohibit fishing for such a stock in their own maritime zones adjacent to the CAOF Agreement Area – for various reasons – are unlikely to support the commencement of fishing for the high seas component. Moreover, those of the Arctic Five that would prohibit fishing more generally in their own maritime zones may also be hesitant to support the commencement of fishing in the high seas for stocks that do not also occur in their own maritime zones. They could for instance be concerned about the broader ecosystem effects that high seas fishing might have on ecosystems in their own maritime zones.

It is finally worth noting that the Arctic Five also have utilization-oriented as well as conservation-oriented interests in relation to the natural resources of their outer continental shelves underlying the high seas portion of the central Arctic Ocean.[68]

5.2. Broader Interests in the Law of the Sea

At least as important as these "fisheries interests" of the participants in the Five-plus-Five process, in relation to the central Arctic Ocean, are their broader interests in the domains of international fisheries law, international law of the sea and international law relating to the Arctic. Very prominent among these were the concerns that some of the Other Five had regarding the possible occurrence of so-called "multilateral creeping coastal State jurisdiction" in the Five-plus-Five process and the ILBI process[69].

The phenomenon of "creeping coastal State jurisdiction" has been one of the principal drivers in the development of the international law of the sea.[70] This process was significantly constrained by the LOS Convention's recognition of the sovereignty, sovereign rights and jurisdiction of coastal States in their broader and new maritime zones, at least as regards unilateral coastal State claims to new maritime zones. One of the manifestations of creeping coastal State jurisdiction, which continues to be relevant today, occurs at the multilateral level through intergovernmental organizations pursuant to their mandate as "competent international organizations" under the LOS Convention. Examples of this multilateral creeping coastal State jurisdiction[71] include the mechanism of "cooperative legislative competence" between the International Maritime Organization (IMO) and its Members in scenarios where the LOS Convention does not explicitly provide for this, and the coastal State jurisdiction beyond the outer limit of the territorial sea relating to

68 See, *inter alia*, Art. 1(b) of the CAOF Agreement and arts. 77(1) and 78(2) of the LOS Convention.

69 See *supra* note 57 and accompanying text.

70 See R.Y. Jennings, "A Changing International Law of the Sea", (1972) 31 *Cambridge Law Journal*, 32-49, at 34-36; and B.H. Oxman, "The Territorial Temptation: A Siren Song at Sea", (2006) 100 *American Journal of International Law*, 830-851.

71 See a more extensive analysis in Molenaar 2019, *supra* note 16, at Section 3.

underwater cultural heritage created by the UCH Convention,[72] and relating to the removal of wrecks created by the Wreck Removal Convention.[73]

Some States have concerns about multilateral creeping coastal State jurisdiction in the ILBI process on account of coastal State assertions of their special roles, interests or rights in areas beyond national jurisdiction (ABNJ; i.e. the high seas and the Area), adjacent to their maritime zones. These assertions have arisen in particular in relation to the identification and designation of area-based management tools – including marine protected areas – and environmental impact assessments.[74] Some of these concerned States also participated – or were represented – in the Five-plus-Five process and were determined to avoid a scenario where successful assertions of special roles, interests or rights of "adjacent coastal States" in the Five-plus-Five process would be used as a precedent in the ILBI process. The concerns of these States were in part also based on the Arctic Five's assertion in the Ilulissat Declaration that they are in "a unique position" in relation to the central Arctic Ocean in general. At their second ministerial (Foreign Affairs) meeting in 2010, the Arctic Five also specifically asserted "a unique role and interest" in the conservation and management of central Arctic Ocean fisheries.[75] It is acknowledged that while these assertions certainly have merit in view of their coastal State maritime zones in the central Arctic Ocean, this is less obvious in the context of the Arctic Five and Five-plus-Five processes, as they were spatially confined to the high seas portion of the central Arctic Ocean. This means that both high seas fishing States and coastal States have roles, interests and rights. It should be noted that the three other Arctic States strongly criticized the Arctic Five ministerial (Foreign Affairs) meetings in 2008 and 2010 on the ground that these undermined the Arctic Council. Of these three, only Iceland participated in its own right in the Five-plus-Five process.

5.3. Broader Interests in International Law Relating to the Arctic

Finally, viewing the Five-plus-Five process only as a clash between coastal and non-coastal State rights and interests also ignores the diverging interests of the participants in the domain of international law relating to the Arctic. While Iceland belongs to the Other Five, it is also an Arctic State on account of its membership of the Arctic Council. The EU, which is not a State but an intergovernmental organization *sui generis*, represented all of its 28 Member States, including three Arctic States, namely

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72 Convention on the Protection of the Underwater Cultural Heritage, Paris, 1 November 2001. In force 2 January 2009 (2562 UNTS 3). See in particular arts. 9 and 10.

73 Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007. In force 14 April 2015 (IMO Doc. LEG/CONF.16/19, of 23 May 2007). See arts. 8-10.

74 See the multiple references to "adjacent coastal States" in the Report of the PrepCom (doc. A/AC.287/2017/PC.4/2 of 31 July 2017). See also A.G. Oude Elferink, "Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC", (2018) 33 *International Journal of Marine and Coastal Law*, 437-466. The notion of adjacency should in this context be interpreted broadly and also comprises the scenario of areas of high seas lying above continental shelves.

75 Cf. the Chair's Summary of the Arctic Five's meeting in Chelsea, Canada, in March 2010, available at www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/257162.

mainland Denmark, Finland and Sweden. The EU therefore acted in a *de facto* capacity as high seas fishing State, with three of the 28 Member States represented by it being Arctic States. Finally, it should be noted that China, Japan and South Korea were granted Observer status in the Arctic Council in 2013, while the EU could be said to have been granted *de facto* Observer status then as well.[76]

The fact that membership of the Arctic Council is limited to the eight Arctic States is not inconsistent with general international law. The situation would, for example, be different if the Council were to engage in regulation that interferes with rights of third States or entities (e.g. the freedoms of fishing and navigation on the high seas) in a manner that would be inconsistent with the *pacta tertiis* principle (e.g. by means of at-sea high seas enforcement).[77]

The balance between the rights and obligations of Arctic Council Observers – in particular non-Arctic States and the EU – has nevertheless been a sensitive issue for many years. In light of the inferior participatory status of non-Arctic States and entities in the Arctic Council, the "Arctic Council System",[78] and the new, more peripheral Arctic bodies established in 2014 and 2015,[79] it is understandable that China, the EU, Japan and South Korea welcomed the opportunity to participate on an equal footing with Arctic States in the Five-plus-Five process. Similarly, these three States and the EU shared a clear interest in bringing the Five-plus-Five process to a successful conclusion, as that would offer the prospect of obtaining an equal participatory status as Arctic States in a legally binding Arctic governance instrument and its decision-making body. As the Five-plus-Five process took place outside the scope of the Arctic Council, there would not be a formal hierarchical relationship with the Council either. In fact, as the CAOF Agreement is a legally binding instrument and its MOP competent to adopt legally binding decisions, an international lawyer would regard it as superior to the Arctic Council, which is "merely" a high-level intergovernmental forum without the competence to adopt legally binding decisions.

As a concluding observation, it is important to highlight that the successful conclusion of the Five-plus-Five process demonstrates that, irrespective of their different interests and positions, the participants also share many interests.

6. Key Features of the Five-plus-Five Process

6.1. The Exploratory Phase

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76 See the 2013 Kiruna Ministerial Declaration, available at https://arctic-council.org.

77 See E.J. Molenaar, "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea", (2012) 27 *International Journal of Marine and Coastal Law*, 553-595, at 565-568.

78 See *id*.

79 The Arctic Economic Council, the Arctic Offshore Regulators Forum and the Arctic Coast Guard Forum. For an analysis see E.J. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea", in R. Beckman, T. Henriksen, K. Dalaker Kraabel, E.J. Molenaar and J.A. Roach (eds), *Governance of Arctic Shipping. Balancing Rights and Interests of Arctic States and User States* (Brill/Nijhoff, 2017), at 24-67, 53 and 57-59.

The 1st Meeting of the Five-plus-Five process was successful and decisive in several ways.[80] First, all the delegations that were invited also actually attended and thereby expressed their support for the principal objective of the process, namely to prevent unregulated fishing in the high seas portion of the central Arctic Ocean. The attendance of the Russian Federation was especially significant, in light of rumours and concerns that it would not accept the involvement of non-Arctic States and entities in fisheries regulation in an area that it regards as its backyard.

Second, while the 1st Meeting was described as "exploratory in nature" and a number of delegations made clear they had no mandate to negotiate any instrument – whether legally binding or not[81] – it is submitted that its design was of crucial importance to the final result of the process. While all delegations were aware that the process would build on the Oslo Declaration, the United States took the opportunity to use its role as initiator and host to circulate its own proposal for a draft Agreement one month in advance of the Meeting,[82] and a Provisional Agenda that reserved most of the available time to discuss that proposal. The strategic potential of such an approach is evident. By way of contrast, reference can be made to the ILBI process, where most of the initial three-day organizational meeting in April 2018 was devoted to the election of a President and a Bureau (composed of the President and 15 Vice-Presidents), and the "process for the preparation of the zero draft of the instrument".[83] In the end, the President was requested "to prepare a concise document, as an aid to discussions", while ensuring that it "will not contain any treaty text" and on the understanding that the document "will put the Conference on a path to the preparation of a zero draft of the instrument but will not constitute, in itself, the zero draft".[84]

Even though the approach pursued by the United States merely had strategic potential, and could also have encountered strong resistance and opposition, the 1st Meeting did in fact engage in a substantive discussion on the United States proposal. Some delegations also made text suggestions, which the United States subsequently incorporated in a revised draft circulated on 20 January 2016. From the very outset therefore, the Five-plus-Five process worked with a draft text "in the format of a legally binding instrument".[85] While support for a legally binding outcome steadily broadened during the course of the Five-plus-Five process, consensus on this only materialized at the last meeting.[86] Up until then, Russia consistently emphasized that it did not necessarily prefer a legally binding outcome above a non-legally binding outcome, or even preferred the latter. As part of this position, Russia insisted that also the more advanced draft texts would continue to be formally attributed to the Chairman as "Chairman's Draft Texts".[87]

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80 For an analysis see Molenaar 2016b, *supra* note 16.

81 Chairman's Statement of the 1st Meeting, *supra* note 17.

82 Dated 2 November 2015.

83 Docs. A/CONF.232/2018/L.1/Rev.1 of 6 March 2018, and A/CONF.232/2018/2 of 19 April 2018.

84 Doc. A/CONF.232/2018/2 of 19 April 2018, at 2.

85 See the Chairman's Statements of the 2nd, 4th and 5th Meetings, *supra* note 17.

86 This lack of consensus is reflected in different ways in many Chairman's Statements. For instance, "Some but not all" in the 2nd Statement, and "Opinions differed" in the 3rd Statement.

87 All drafts prior to the draft of 1 June 2016 were submitted as proposals of the United States.

6.2. The Stepwise Approach

The choice between a legally binding and a non-legally binding instrument – with both building on the Oslo Declaration – was from the very outset presented with another option: "negotiating in the foreseeable future an agreement or agreements to establish one or more additional [RFMO/As] for the area".[88] As implied by the phrase "in the foreseeable future", the majority of the delegations was not supportive of commencing such negotiations immediately. It is submitted, however, that what all delegations are likely to have had in mind here was a fully-fledged RFMO; meaning an intergovernmental organization supported by a secretariat and capable of regulating an ongoing fishery. That would indeed not have been cost-effective as no commercially viable fishery was expected to be possible in the high seas portion of the central Arctic Ocean in the near future.[89]

Consistent with this line of reasoning, the Oslo Declaration only mentions "that there is no need at present to establish any additional [RFMO]", without also referring to an RFMA as an alternative. However, the preamble of the draft of 2 November 2015 reflected the belief that "at present, there is no need to establish any additional [RFMO/A]" thereby using "organization" alongside "arrangement". All subsequent drafts maintained this approach and an essentially similar text also ended up in a preambular paragraph of the CAOF Agreement (see next subsection).

It is not evident that this was a deliberate and carefully considered choice, however. While it is possible that, during the initial stages of the Five-plus-Five process, many or most of the delegations understood that the negotiations were aimed at establishing something else than an RFMA, this does not seem to have been discussed in plenary during the 1st Meeting, and certainly not in the subsequent two meetings. Moreover, even those delegations that operated on such an understanding are unlikely to have carefully considered what would need to be included in or excluded from the text of the instrument to ensure that it would not amount to an RFMA. As the definition of an RFMA included in article 1(1)(d) of the Fish Stocks Agreement[90] is quite short and general, it only provides minimal guidance on its meaning. This provision defines "arrangement" as:

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

It is submitted, however, that this also means that the threshold for classifying an instrument as an RFMA is quite low. It may well be that delegations merely had the

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88 See the Chairman's Statements of the 1st, 2nd and 3rd Meeting, *supra* note 17.

89 See Chairman's Statement of the 1st Meeting, *supra* note 17.

90 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001 (2167 UNTS 3).

CBS Convention and the SIOFA,[91] which are generally accepted to be the two main examples of RFMAs in the context of the Fish Stocks Agreement, in their minds as a benchmark for RFMAs. Their usefulness as a benchmark is nevertheless quite limited due to the very significant differences between the constitutive texts and institutional dimension of these two RFMAs.

The option of future negotiation of one or more additional (new) RFMO/As was from the outset presented as part of the possibility of a "stepwise" or "step-by-step" approach. Article 5 of the first draft - entitled "Review and Further Implementation" – just like the final version of Article 5 of the CAOF Agreement – stipulated that Parties would meet "to determine whether changing circumstances warrant the establishment of one or more additional [RFMO/As]". As the draft also included the two key elements of the Oslo Declaration – namely its geographical confinement to the high seas and a qualified abstention from high seas fishing – Article 5 arguably became the single most important provision of the Agreement. The Other Five were only prepared to accept these two elements if the abstention from high seas fishing would not become a *de facto* non-time bound moratorium. They therefore took the view that the establishment of one or more additional RFMO/As should not only be a possibility, but the final result.

The debate between the Arctic Five and the Other Five on this issue continued until the last stages of the 6th Meeting,[92] when the final package deal that is discussed in subsection 6.4 was adopted. Up until then, the preambular paragraph that starts with "Desiring, consistent with the precautionary approach" still contained additional bracketed text on the future establishment of one or more additional RFMO/As. This text was in the end withdrawn in exchange for the acceptance of other bracketed text in Article 14(3), which reads: "including the right to propose the commencement of negotiations on the establishment of one or more additional regional or subregional fisheries management organizations or arrangements for the Agreement Area." This wording only has symbolic value, of course. It is a bit like recognizing that every child has the right to ask any present it wants for its birthday, but without any guarantee of also actually getting it.

Far more important was the debate on the "trigger" for the commencement of negotiations to establish an additional RFMO/A, and its associated decision-making procedure. As the citation from Article 5 of the first draft shows, the trigger ("changing circumstances") lacked specificity. Moreover, because the draft did not include any provisions on decision-making, it had to be assumed that decision-making would occur by consensus or unanimity. That would have given any Party a *de facto* veto to reject a proposal to commence negotiations, and thereby the power to prolong

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91 Southern Indian Ocean Fisheries Agreement, Rome, 7 July 2006. In force 21 June 2012; text available at www.fao.org/legal.

92 While the 1st, 2nd, 3rd and 4th Chairman's Statements refer to the stepwise approach in conjunction with the words "possibly" and "could be combined", the 5th Statement contains the phrase "Most delegations view this as part of a "stepwise" process in advance of establishing in the future one or more additional regional or subregional fisheries management organizations or arrangements for this area", without the inclusion of "possibly" before "establishing".

the abstention from high seas fishing indefinitely.[93] As clarified in Section 5, this would have been favourable to coastal State interests. While the text on the trigger that was eventually included in the chapeau to Article 5(1)(c) gradually developed with each subsequent draft, delegations understood that the applicable decision-making procedure would ultimately be of crucial importance. Agreement on this issue only materialized at the very final stages of the 6th Meeting.

6.3. The Evolving Nature of the CAOF Agreement

As noted in the previous subsection, even if, during the initial stages of the Five-plus-Five process, many or most of the delegations understood that the negotiations were aimed at establishing something else than an RFMA, this is unlikely to have had much influence – if at all – on the substance of the negotiations. The question nevertheless arises if, during the more advanced stage of the negotiations, a change may have taken place in the position or perception of these delegations as to what they were negotiating, with the result that they were from then on operating on the understanding that the negotiations would culminate in an RFMA.

At first sight, the preamble to the CAOF Agreement seems to suggest that no such changes occurred. The two relevant paragraphs read as follows:

> Believing that commercial fishing is unlikely to become viable in the high seas portion of the central Arctic Ocean in the near future and that it is therefore premature under current circumstances to establish any additional regional or subregional fisheries management organizations or arrangements for the high seas portion of the central Arctic Ocean;
>
> Desiring, consistent with the precautionary approach, to prevent the start of unregulated fishing in the high seas portion of the central Arctic Ocean while keeping under regular review the need for additional conservation and management measures;

While it is clear that these paragraphs do not explicitly state that the CAOF Agreement is not an RFMA, it cannot be denied that they amount to an implicit recognition to that effect. The juridical significance of this is nevertheless quite limited because, as a general rule, preambular paragraphs do not have operative effect and do not create legal obligations.[94] Moreover, as the paragraphs under examination merely imply something and thereby lack sufficient precision, they arguably do not give cause to deviate from this general rule. This means that the question as to whether or not the CAOF Agreement classifies as an RFMA within the meaning of the Fish Stocks Agreement must be determined solely on the basis of an analysis of the operative part of the CAOF Agreement, in the context of the relevant provisions

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93 The entitlements to withdraw from the future Agreement and engage in exploratory fishing – and eventually also limited commercial fishing – were insufficient to address the concerns of the Other Five.

94 Cf. M.M. Mbengue, "Preamble", *Max Planck Encyclopedia of Public International Law*, September 2006. See also art. 31(2) of the VCLT, *supra* note 41.

of the Fish Stocks Agreement. The analysis undertaken by this author elsewhere provides strong arguments in favour of an affirmative answer to that question.[95]

As alluded to above, it is also possible that, during the more advanced stage of the Five-plus-Five process, there were delegations whose positions or perceptions with regard to the nature of the instrument under negotiation had changed, and subsequently operated on the understanding that the negotiations would culminate in an RFMA. It is submitted that this is indeed what happened. During the course of the negotiations, a significant evolution took place from the initial – relatively concise and rudimentary – draft of 2 November 2015 to the much more extensive and sophisticated final version of the CAOF Agreement. This evolution occurred to a considerable extent in an incremental and organic manner, which meant that few – if any – delegations at all times had a clear vision on what the final outcome would look like. At least in part this was caused by the fact that the negotiations took much longer than was initially anticipated. The 3rd Meeting in July 2016 ended with a general belief that the negotiations could be successfully concluded at the 4th Meeting,[96] which was to be held sometime later that year. In the end, however, it took two more Meetings and a year to complete the negotiations. Several delegations also used this additional time to advance parts of the text that were not directly connected to the key outstanding issues. The MOP and its mandate were among these.

Article 5(1) of the first draft required Parties to meet in order to review implementation of the Agreement and determine whether one or more additional RFMO/As should be established. The initial exchange of views on the trigger at the 1st Meeting was merely highlighted by a "marker" in Article 5(1) of the draft of 20 January 2016. At the 2nd Meeting, however, one delegation suggested that there might be a need for two types of triggers: one for the establishment of one or more additional RFMO/As, and one for the authorization of commercial fishing.

It may well have been this intervention that eventually led to the more mandate-oriented structure of Article 5(1) that was included in the draft of 1 June 2016 used for the 3rd Meeting. Paragraph (1)(c) distinguished between the following two decisions: (i) the establishment of one or more additional RFMO/As; and (ii) the establishment of "additional or different interim measures with respect to fishing". Moreover, Article 3 of the same draft contained proposals to give Parties a mandate in relation to exploratory fishing. All these changes secured broad support at the 3rd Meeting. The MOP and its mandate first came to the fore during discussions on the preambular paragraph that contained an "assurance of not undermining" NEAFC (see subsection 3.3). A proposal by one delegation to reformulate this as a need for coordination with NEAFC led another delegation to ask if the instrument would establish a body. There was general agreement that the instrument would establish an MOP. While discussions on Article 5(1) related mostly to the trigger – and ignored the new

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95 An early postulation of this argument by this author can be found in Molenaar 2016b, *supra* note 16. An updated version is included in Molenaar 2019, *supra* note 16, at Section 5.5. A similar conclusion is embraced by V. Schatz, A. Proelss and N. Liu, "The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis", (2019) 34 *International Journal of Marine and Coastal Law*, 1-50.

96 See the Chairman's Statement of the 3rd Meeting, *supra* note 17.

paragraph (1)(c)(i) – one delegation nevertheless proposed to give the MOP a non-exhaustive mandate by adding the words "in particular" to the chapeau of paragraph (1). A suggestion by the Chair to change this to "*inter alia*" raised no objections and ended up in the final text of the Agreement.

The draft of 19 October 2016 used for the 4th Meeting further broadened the mandate of the MOP by including a new subparagraph (d) on exploratory fishing in Article 5(1). At the 4th Meeting, one delegation raised the question whether or not Article 5(1)(c)(i) would allow limited commercial fishing to occur under the scope of the future CAOF Agreement. While the initial responses of delegations displayed diverging views, towards the very end of the 4th Meeting this had evolved to broad agreement that this would indeed be possible. When discussing the need for a reference to the stepwise approach in the preamble, one delegation even argued that this was unnecessary and that, in fact, there would no longer be any need for a future RFMO because all delegations now recognized that commercial fishing could also occur under the current instrument. This intervention led another delegation to propose that the preambular paragraph starting with, "Desiring, consistent with the precautionary approach", be amended by inserting the phrase "additional conservation and management measures" immediately before the phrase relating to one or more additional RFMO/As, thereby mirroring the structure of Article 5(1)(c). This proposal elicited broad support and also ended up in the final text of the preamble (see above). Finally, during the discussions on this proposal, one delegation explicitly stated that the draft text had developed into an RFMA, and probably also qualified as such. No delegation took the floor to respond to this statement. This in itself does not necessarily mean that any or all of the other delegations agreed with this statement. However, by the end of this discussion, there was a clear sense in the room that the delegations' perception of – or even position on – the nature of the instrument they were negotiating had significantly changed.

As this discussion took place at the very end of the 4th Meeting, delegations did not have an opportunity to consider the need or desirability of a proposal to delete the words "or arrangements" from the relevant preambular paragraph. In the end, no such proposal was made at the next two meetings either. This is likely to have been a matter of oversight, which can in part be explained by the fact that efforts were from then on mainly aimed at obtaining consensus on the text as a whole. Submitting, in the final stages of negotiations, proposals aimed at resolving non-essential issues such as these, and especially those relating to the preamble, consumes time that can be spent better. More importantly, submitting such proposals also encourages other delegations to reopen unbracketed text on which agreement had in principle already been reached.

6.4. The Final Package Deal

The negotiations in the Five-plus-Five process followed the common pattern of the gradual resolution of key issues on the understanding that "nothing is agreed until

everything is agreed".[97] The Chairman's Statements adopted at the end of each Meeting provide a useful summary of the key options that remained on the table, and the key issues that remained unresolved. Most of these have already been discussed in varying degrees of detail above.

As examined in depth elsewhere,[98] the Chairman's Compromise Proposal of 23 March 2017 following the 5th Meeting sought to offer a package deal on three key unresolved issues: the CAOF Agreement Area, decision-making and the conditions for the Agreement's entry into force. As this Compromise Proposal did not secure consensus, delegations were once again required to try to resolve these issues themselves at the 6th Meeting.

The disagreement on the wording and placement of the definition of the CAOF Agreement Area was primarily related to the ongoing dispute on the geographical scope of the Spitsbergen Treaty.[99] After negotiations in plenary proved fruitless, the Chair requested the three delegations directly involved to find a compromise and present it for endorsement to plenary. This approach proved in the end successful.

The negotiations in plenary subsequently focused on the two remaining issues: decision-making and the conditions for the Agreement's entry into force. These issues mainly revolved around the role of the Arctic Five in the context of the diverging interests of the delegations discussed in Section 5. The final package deal consisted of four components: (1) decision-making; (2) the conditions for the Agreement's entry into force; (3) the duration of the Agreement; and (4) an acknowledgment of the role of the Arctic Five.

As regards decision-making, the negotiations evolved from multiple decision-making procedures to a single procedure, and from decision-making by qualified majority with a special role for the Arctic Five to consensus decision-making (Article 6). Somewhat similarly, the requirements for entry into force evolved from a qualified majority with a special role for the Arctic Five, to all Five-plus-Five (Article 11(1)). The option that eventually prevailed is quite unique in international fisheries law, and may mean that entry into force could not just take a considerable period of time, but could possibly not occur at all.

The idea of having a "sunset clause", or some other limitation on the duration of the CAOF Agreement, had been floated in advance of the 6th Meeting and quickly gained traction once progress on decision-making stalled. In the end, delegations agreed on an initial period of duration of 16 years after entry into force plus automatic extensions of five years each, unless any Party objects (Article 13(1) and (2)). Once agreement had in essence been reached on these three components – literally in the last minutes of the negotiations – some of the Arctic Five demanded an additional preambular paragraph acknowledging the special responsibilities and interests of the Arctic Five in the central Arctic Ocean. Subject to one crucial adjustment – namely removing the words "high seas of the" – a proposal for such a paragraph was accepted by all and brought the negotiations to a successful result.

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97 See the Chairman's Statement of the 5th Meeting, *supra* note 17.

98 Molenaar 2019, *supra* note 16, at Sections 5.2, 5.4 and 5.7.

99 Treaty concerning the Archipelago of Spitsbergen, Paris, 9 February 1920. In force 14 August 1925 (2 LNTS 7 (1920)).

7. Conclusions

As demonstrated in this Chapter, the CAOF Agreement and its negotiation processes are unique in many ways. Their uniqueness was first of all shaped by the scenario with which the negotiators were confronted; they were in a position to collectively determine the conditions under which a future high seas fishery would be allowed to commence. Their decision to seize this opportunity has made the CAOF Agreement a landmark agreement. Its abstention from high seas fishing – even though qualified and temporary – ensures that such fishing will only commence after the necessary scientific research and monitoring to ensure precautionary and ecosystem-based fisheries management have been undertaken, and the associated institutional framework and substantive conservation and management measures are in place.

Equally unique was the amalgamation of interests that eventually shaped the final package deal that led to the successful conclusion of the Five-plus-Five process. These were not limited to central Arctic Ocean fisheries interests but also comprised broader interests in the domains of international fisheries law, international law of the sea and international law relating to the Arctic. A pertinent example of the interaction between these domains, and the multiple levels – global and regional – at which they operated, were the interactions between the ILBI process and the Five-plus-Five process.

Unique as well were the two negotiation processes that culminated in the CAOF Agreement. The Arctic Five process can be regarded as a *de facto* preparatory process for the subsequent Five-plus-Five process. The first draft submitted during the Five-plus-Five process built upon the outcome of the Arctic Five process – the Oslo Declaration – and contained its two key elements: the geographical scope – the high seas portion of the central Arctic Ocean – and the qualified abstention from commercial high seas fishing. While the Other Five agreed to use these two key elements as a point of departure, and these elements were eventually also laid down in the CAOF Agreement, the Other Five were able to participate in the negotiations in a meaningful manner and on an equal footing with the Arctic Five.

Other key features of the Five-plus-Five process can also be regarded as unique, including its stepwise approach and the way in which the nature of the CAOF Agreement evolved during the negotiations. It is submitted that there are good arguments for classifying the CAOF Agreement as an RFMA within the meaning of the Fish Stocks Agreement. The fact that the preamble to the CAOF Agreement implies the opposite should not be attributed much weight, if any. In light of the significant change in the perception of the nature of the instrument under negotiation that occurred at the 4th Meeting, in the future more Signatories may take the position that the CAOF Agreement is indeed an RFMA, and eventually this view may become generally accepted.