Regulating Fisheries in the Central Arctic Ocean: Much Ado About Nothing?

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Abstract In July 2015 the five Arctic Ocean coastal states adopted the Oslo Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean in which they voluntarily agreed to refrain from commercial fishing in the Central Arctic Ocean unless and until appropriate science based management measures are in place. Like the Ilulissat Declaration before it, the Oslo Declaration was both hailed as a major achievement and criticised as an act of Arctic exceptionalism. This chapter interrogates the claim of Arctic exceptionalism and demonstrates that the Oslo Declaration, by itself, constrains neither the rights and interests of the Arctic Ocean coastal states nor the rights and interests of the rest of the international community. Of greater import will be the outcome of the subsequent 'Broader Process' negotiations the Declaration has spawned involving non-Arctic Ocean states. Given the uncertainties and extremely limited scientific knowledge regarding existing and potential Central Arctic Ocean fisheries resources, particularly when combined with the current lack of activity in the area, these negotiations provide a valuable opportunity to implement a truly precautionary approach to their future conservation and management based on sound science and modern international fisheries management principles and practices.

Keywords High seas • High seas fisheries • Central Arctic Ocean • Oslo Declaration • Broader process • Arctic Ocean governance • Arctic fisheries • Fisheries management • Fisheries conservation and management

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N. Vestergaard et al. (eds.), *Arctic Marine Resource Governance and Development*,
Springer Polar Sciences, https://doi.org/10.1007/978-3-319-67365-3_3

Introduction

An object of human desire and endeavour, the Arctic has long fascinated and perplexed. While the history of human habitation in the Arctic stretches back more than twelve thousand years (Vaughan 1994), thanks largely to its perennial ice cover, the waters of the high Arctic Ocean have remained inaccessible to all but a few hardy scientists and adventurers and, in recent years, the nuclear powered submarines of a few states. However, at least since the 1980s, international interest in the Arctic has been growing, fuelled by the prospects of a warming and climate changed Arctic delivering up its potentially vast and as yet untapped resources. Even before Russian scientists planted the now infamous titanium Russian flag on the seabed at the North Pole (Blomfield 2007), other states were eyeing-off the opening of new trans-polar shipping routes between Europe and Asia and salivating over the prospect of a new resource bonanza, predicted by some, at least, to lead to new scrambles for wealth and power, the revival of international security tensions and, possibly, international conflict in the Arctic region (see, e.g., Reynolds 2007; Cressey 2007; Borgerson 2008; Sale and Potapov 2010). Given the near fever-pitch of international interest in the Arctic, it was perhaps hardly surprising that the five Arctic Ocean coastal states, Canada, Denmark in respect of Greenland, Norway, Russia and the United States (the Arctic 5 or A5) felt compelled in 2008 to adopt the Ilulissat Declaration in which they reminded the international community that there already exists an 'extensive international legal framework [that] applies to the Arctic Ocean'. There was thus 'no need to develop a new comprehensive international legal regime to govern the Arctic Ocean'.

The Ilulissat Declaration raised the ire of the other member states of the Arctic Council who felt the A5 were undermining it (Molenaar 2016a, p. 449). Others suggested that, in asserting their special role as 'stewards' of the Arctic, the A5 were asserting rights over the Arctic Ocean they might not possess (Young 2016, p. 274). However, like it or not, the A5 were correct. The international law of the sea, including the 1982 United Nations Convention on the Law of the Sea (Law of the Sea Convention, or LOSC) together its two implementing agreements, the 1994 Implementing Agreement on Part XI of the LOSC (Part XI IA) and the 1995 Fish Stocks Agreement (FSA) does, indeed, provide an extensive legal framework for the governance of the earth's oceans – including the Arctic Ocean. Coastal states such as the A5 have sovereignty over their territorial seas, subject only to the right of other states to innocent passage. Within the exclusive economic zone coastal states have jurisdiction over the conservation and management of living and non-living resources and their jurisdiction extends to their continental shelf, even where that shelf physically extends beyond 200 nautical miles. Any interests that the international community – including the non-Arctic Ocean coastal states in the Arctic Council – might have in the Arctic Ocean are thus limited to the rights of innocent passage in the territorial sea, freedom of navigation in the exclusive economic zone and the rights to navigate, fish, lay submarine cables and pipelines, construct artificial islands and conduct marine scientific research in areas beyond

national jurisdiction, these are activities all governed already by a plethora of international legal regimes. Moreover, the Arctic Council does not concern itself with matters of sovereignty. In short, both the calls by the international community for some sort of comprehensive Arctic agreement and the adverse reactions by other states to the Ilulissat Declaration were misconceived.

Nevertheless, while extensive, the law of the sea is not exhaustive – as illustrated by current international negotiations on a possible regime for the protection of marine biodiversity in areas beyond national jurisdiction (for information see, e.g. ENB 2016). In the Arctic context, in particular, one significant gap that has been identified is the emerging need for an effective regional fisheries conservation and management regime, applicable to the high seas area of the Central Arctic Ocean which lies beyond the national jurisdiction of the A5 (Rayfuse 2007; Koivurova and Molenaar 2009). In July 2015 the A5 adopted the Oslo Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (Oslo Declaration) in which they agreed voluntarily to refrain from commercial fishing in the Central Arctic Ocean unless and until appropriate science based management measures are in place. Like the Ilulissat Declaration before it, the Oslo Declaration once again caused consternation among other states worried that their rights and interests in the Arctic, including in access to and long-term conservation and sustainable management of Arctic fisheries resources, were being ignored. Iceland, in particular, objected to having been excluded from the discussions, apparently on the basis that fish species occurring within its exclusive economic zone may also occur in the Arctic Ocean thus making it also an Arctic Ocean coastal state (Quinn 2015; Wegge 2015).

It has been suggested that the Oslo Declaration, like the Ilulissat Declaration before it, constitutes some sort of Arctic exceptionalism, aimed at ensuring the A5 retain the 'upper hand' in the unfolding political processes in the Arctic (Wegge 2015, p. 337). A close reading of the Oslo Declaration suggests that this may well have been its intent. However, while its political effect should not be underestimated, *as a legal matter* the Oslo Declaration does relatively little to fill the regulatory gaps relating to high seas fishing in the Central Arctic Ocean. Moreover, even if that was the intent of the Declaration, this has been rather ameliorated by subsequent events, including the convening of a 'Broader Process' as envisaged in the Oslo Declaration involving other Arctic and non-Arctic states.

This chapter examines the emerging regime for the regulation of high seas fisheries in the Arctic. In particular it interrogates the notion that in adopting the Oslo Declaration the A5 have somehow done something that is anathema to the interests of the international community in the fish resources of the Central Arctic Ocean. It begins with a brief description of the fisheries resources of the Central Arctic Ocean and the challenges that warming oceans might present for their regulation. It then describes the international legal framework for the regulation of fisheries in the Central Arctic Ocean before turning to an analysis of the Oslo Declaration and the Broader Process. It will be concluded that the Declaration itself constrains the rights and interests of neither the A5 nor the international community. Of greater import will be the outcome of the subsequent negotiations it has spawned.

The Fish Resources of the Central Arctic Ocean and the Challenge of Warming Oceans

While many geographical definitions of the Arctic and of the Arctic Ocean exist (Rayfuse 2007, pp. 197–198), the Oslo Declaration is only concerned with 'high seas fishing in the central Arctic Ocean'. According to Molenaar, this suggests that the central Arctic Ocean consists of both high seas areas and adjacent areas (Molenaar 2016b). As a geographical matter this interpretation makes perfect sense. However, as a legal matter it is critically important to distinguish between the two areas. Thus, for present purposes, the terminology of 'Central Arctic Ocean' is used here to refer to the area of high seas covering approximately 2.8 million square kilometres which lies in the centre of the Arctic Ocean both beyond and completely surrounded by the exclusive economic zones of the A5. In other words, this chapter concerns itself only with the high seas and only with high seas fishing in the Central Arctic Ocean, and not in the other 'Arctic' high seas areas such as the 'Banana Hole' in the North East Atlantic, the Barents Sea 'Loophole', or the 'Donut Hole in the Central Bering Sea.

According to the Census of Marine Life, more than 200 species of fish are found in Arctic waters (COML 2010). However, when it comes to the fishery resources of the Central Arctic Ocean, precious little is known (Bluhm et al. 2015). Whether this is because the polar ice cap has thus far made fishing impossible or because there are simply no fish there has been a matter of conjecture, with most evidence supporting the latter conclusion (FiSCAO 2015b; Shephard et al. 2016). In recent years, however, increasing ocean temperatures coupled with decreasing sea ice coverage caused by climate change have been linked with the northward expansion of sub-arctic and temperate fish species (Wassmann et al. 2011; Christensen et al. 2014) with six stocks in particular being identified as having a 'high potential' to expand into the Arctic Ocean (Hollowed et al. 2013). Of particular interest is the polar cod (*Boreogadus saida*), the most abundant Arctic fish, first and second year juveniles of which are known to be found under the pack ice in the Eurasian basin (David et al. 2016). While nearly all such migration or expansion is expected to occur within the exclusive economic zones of the A5, the possibility clearly exists for their eventual expansion into the Central Arctic Ocean. Scientists remain sceptical of any such northwards expansion into the Central Arctic Ocean in the short term (FiSCAO 2015a, b). However, with approximately 40% of the Central Arctic Ocean, primarily in the Beaufort, Chuchki and East Siberian Seas north of Canada, Russia and the United States, now ice free in summer (Overland and Wang 2013) and warming trends set to continue, and with extensive fishing industries already operating in some Arctic and sub-Arctic regions, the potential also exists for fishing vessels to move into the Central Arctic Ocean to explore for and, if found, commercially exploit fishery resources.

Unfortunately, the history of commercial exploitation of fish stocks is replete with instances of over-exploitation and stock collapse. Particularly in situations where little is known about a species or a particular fish stock, unregulated

expansion into new fisheries may effectively wipe out a species or stock before its existence is even formally recognised or understood. A classic, but by no means the only, example is the rapid expansion of the pollock fishery in the high seas of the Central Bering Sea in the 1980s, which started when the United States expelled foreign fishing fleets from its newly declared exclusive economic zone. Within less than a decade the catch taken rose from 18,000 mt in 1980 to a high of 1,448,000 mt in 1989. In 1992 the stock crashed yielding only 10,000 mt of Pollock (Rayfuse 2004, pp. 284–285). To this day, stocks have not recovered sufficiently to allow the moratorium put in place in 1993 by the CBS Convention to be lifted and, while stocks within the exclusive economic zones of Russia and the United States are generally in good shape, the high seas fishery is effectively *functus*.

The risk of stock collapse due to over-exploitation will only be exacerbated by climate change induced changes in stock composition, distribution and resilience should species with an as yet tenuous relationship with their new environment be heavily targeted by commercial fishing (Rayfuse 2012). Within the exclusive economic zone, stock migration will pose difficult issues for national fisheries management authorities seeking to prevent conflict between commercial and artisanal fishers and different gear types and to balance the need to protect vulnerable new fisheries against the desire to exploit the resource to provide income to coastal communities (Ayles et al. 2016). In the case of transboundary or shared stocks (those shared between two states), climate induced stock migration may affect the share of a stock in each state. As both states seek to maintain their share of the catch, this may have adverse implications for stock management and for stock status. If the state with the diminishing percentage of the stock fails to reduce its catch then it may undermine conservatory efforts and catch limits in the other country. In a worst case scenario, continued take by the state losing the stocks coupled with increased take by the state acquiring more of the stock could lead to the stock being fished to extinction.

The problem is even more acute in the case of high seas fisheries where a range shift away from the coastal state will weaken its conservation incentives and aggravate management as between that state and any relevant high seas fishery regime. If no high seas regime exists, new or increasing fishing pressure in high seas areas adjacent to areas under national jurisdiction may have devastating consequences for conservation and management within areas under national jurisdiction and lead to conflict between coastal states and high seas fishing states. A range shift to a coastal state will similarly aggravate management and conservation status if it leads to increased fishing pressure within areas under national jurisdiction and no corresponding reduction in the high seas area. Dramatic shifts in migration could be particularly problematic in the case of highly migratory species, such as anadromous species and tuna, in areas where pockets of high seas are interspersed with or surrounded by areas under national jurisdiction. These considerations are particularly relevant to the Central Arctic Ocean where, absent any current discrete high seas fish stocks, future fish stocks will all arrive via migration through one or more of the EEZs of one or more of the A5.

It is precisely because of the lack of scientific data and uncertainty surrounding the existence and/or potential migration of fish stocks into the Central Arctic Ocean and the effect of any fishery on what is thought to be the extremely fragile marine ecosystem of the Central Arctic Ocean that by 2007 academics and NGOs were calling for a ban on commencement of any commercial fishing in the Central Arctic Ocean pending the establishment of scientifically sound baselines and management measures (Rayfuse 2007). Amidst growing concern, in 2012 an open letter from 2000 scientists from 67 countries identified the need for biological information to understand the presence, abundance, structure, movements and health of fish stocks and the role they play in the broader ecosystem of the Central Arctic Ocean in order to enable the adoption of a robust management system and to better understand the effects of fishing removals on other components of that ecosystem (An 2012; Baker 2012). Inuit leaders, too, called for a moratorium on fishing in the Central Arctic Ocean until fish stocks have been adequately assessed and a sustainable management regime – which involves the Inuit – is in place (Kitigaaryuit Declaration 2014). As discussed in the following section, far from mere novelty, the legal basis for such measures is clearly found in the law of the sea.

The International Legal Framework for Fisheries in the Central Arctic Ocean

It is important to remember that within the exclusive economic zone (EEZ) it is the coastal state that has jurisdiction over the conservation and management of fisheries. While the LOSC provides that any 'surplus' resources not harvested by national fleets should be made available for harvest by foreign fleets, the determination of the existence of any surplus is wholly within the power of the coastal state (LOSC, Art. 62). This is particularly relevant in the Arctic Ocean where, unless and until fish stocks are found to exist in the Central Arctic Ocean, it is the A5 who will have sole jurisdiction over any fisheries located within their EEZs.

With respect to the Central Arctic Ocean, the basic legal framework governing fisheries is set out in the provisions of the LOSC dealing with the conservation and management of marine living resources in the high seas (LOSC, Arts. 116–119) and its implementing agreement on straddling and highly migratory fish stocks, the 1994 Fish Stocks Agreement (FSA), as well as a number of other instruments that have been adopted under the UN FAO such as the 1992 Compliance Agreement, the various international plans of action, and the 2009 Port State Measures Agreement and certain United Nations General Assembly Resolutions such as those relating to large scale high seas driftnet fishing and the protection of vulnerable marine ecosystems from destructive fishing practices such as bottom trawling.

As a basic proposition, all states have the right for their nationals to fish on the high seas. However, this right is subject to the duties to conserve and to cooperate with other states in the conservation and management of the resources. Importantly, the right is also subject to the rights, duties and interests of coastal states in, among other things, straddling and highly migratory species (LOSC, Art. 116).

The duty to conserve requires states to adopt appropriate conservation and management measures both individually and in cooperation with other states whose nationals exploit similar resources or different resources in the same area (LOSC, Arts. 117 and 118). These measures are to be based on the best scientific evidence available and aimed at maintaining or restoring populations of harvested species at levels which can produce the maximum sustainable yield (LOSC, Art. 119). Regular exchange of available scientific information and relevant data through appropriate international organisations is required and catch limits and conservation measures are to take into consideration the effects on dependent and associated species with a view to ensuring they, too, are maintained at or restored to levels above which their reproduction may be seriously threatened. In other words, an ecosystem approach is required. The Fish Stocks Agreement builds on this by requiring both an ecosystem and a precautionary approach to conservation and management for the purpose of ensuring long-term sustainability and promoting optimum utilisation (FSA, Arts. 5 and 6).

The duty to cooperate requires all exploiting states to agree on, and implement, measures to regulate exploitation. The recognised *modus operandi* for this cooperation is through the establishment of subregional or regional fisheries management organisations (RFMO) although it is also recognised that there may be some cases where a formal organisational structure is unnecessary and the objectives of conservation and management can be met through an 'arrangement' (RFMA) (LOSC, Arts 117, 118). The Fish Stocks Agreement further institutionalises the duty to cooperate by requiring its exercise through RFMO/As (FSA, Art. 8). States are to enter into consultation in good faith and without delay to reach agreement on arrangements, particularly where evidence exists that fish stocks may be under threat of over-exploitation or where a new fishery is being developed. Where an RFMO/A already exists coastal and fishing states are obliged either to become members of the organisation or to agree to apply its conservation and management measures and all states having a 'real interest' in the fisheries concerned may join the relevant RFMO/A. Where no RFMO/A exists, states are obliged to cooperate to establish one, or to establish other appropriate arrangements to ensure conservation and management of the stocks concerned, and to participate in the work of these organisations or arrangements. Importantly, the LOSC particularly singles out states bordering areas of high seas that are wholly or partially enclosed by the exclusive economic zones of one or more states and in which fishing activities take place, specifically requiring these states to cooperate with each other in the performance of their rights and duties under the Convention and to invite other interested states to join them in doing so (LOSC, Art 123).

In terms of the Arctic Ocean as a whole, commentators regularly refer to a range of existing RFMO/As as relevant (see, e.g., Molenaar 2013). However, when it

comes to the Central Arctic Ocean the only currently relevant RFMO/As are the North East Atlantic Fisheries Commission (NEAFC) and the Joint Norwegian-Russian Fisheries Commission (Joint Commission). The geographic scope of NEAFC includes the portion of the Central Arctic Ocean between 44° West and 51° East up to the North Pole (NEAFC Convention, Art. 1). While the precise geographical area of application of the Joint Commission is unclear (Molenaar 2016a, pp. 440–445), even if, as Molenaar suggests, it can be assumed to apply to species whose distributional ranges may extend into the Central Arctic Ocean, as a bilateral arrangement between Norway and Russia it only applies to those states and their nationals.

Two other RFMOs which may become relevant in the future are the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the North Atlantic Salmon Conservation Organisation (NASCO). However, the ICCAT convention area is defined as 'all waters of the Atlantic Ocean including its adjacent seas' (ICAAT Convention, Art. 1). The map of the convention area on the Commission's website indicates its area of competence as extending only to 70° North. While this map may not be determinative, the accepted official characterisation of the Arctic Ocean as an *ocean* and not a mere *sea* adjacent to the Atlantic leaves the convention's application to any Atlantic tuna or tuna-like species that may appear in the Central Arctic Ocean in serious doubt. The NASCO convention, for its part, applies to all Atlantic salmon species originating in waters north of 35° North throughout their migratory range and prohibits all fishing for salmon on the high seas (NACSO Convention, Art. 2). This prohibition, however, adds nothing to the globally applicable prohibition on high seas salmon fishing set out in Article 66 of the LOSC and any management of such species will thus be the sole reasonability of the coastal states.

In short, according to the law of the sea, the A5 are under a positive obligation to cooperate both amongst themselves and with other 'interested states' in the conservation and management of the fish stocks of the Central Arctic Ocean. At least in the case of straddling and highly migratory fish stocks – which it is expected any Central Arctic Ocean fish stocks will be – this cooperation is to be carried out either directly on a bilateral basis or through the establishment of one or more RFMO/As. The only existing RFMO/A relevant to the Central Arctic Ocean that enjoys any sort of international participation is NEAFC, whose parties are limited to Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway and Russia. As a matter of basic treaty law, NEAFC regulations do not apply to any non-member states. Moreover, the sector of the NEAFC convention area which lies in the Central Arctic Ocean represents only 8% of the total area of the Central Arctic Ocean (Pew 2012). Thus, the A5, remain under an obligation to cooperate both amongst themselves and with other 'interested states' to conserve whatever fisheries resources might exist in the remaining 92% of the Central Arctic Ocean. Of course who might constitute an 'interested state' is something of an open question given that no state has ever fished in the Central Arctic Ocean (Molenaar 2004). However, given this context, it is hardly surprising that the A5 moved first collectively to adopt the Oslo Declaration before opening the negotiating doors to others.

The Oslo Declaration on High Seas Fishing in the Central Arctic Ocean

International discussions on the future management of Central Arctic Ocean fisheries have their origins in a joint resolution passed by the United States Senate in 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' (US Senate 2007). In 2008, with increasing European interest in the Arctic, the European Union proposed the expansion of NEAFC to cover the entire Central Arctic Ocean (EU 2008). However, this was rejected by some of the A5, particularly given that not all of the A5 are members of NEAFC (Molenaar 2009).

In 2009 the United States raised the possibility of convening an intergovernmental meeting aimed at adopting a non-legally binding instrument on Arctic fisheries during a side event at the meeting of the FAO Committee of Fisheries, and the question of the regulation of Arctic Ocean fisheries was broached during negotiations on the UNGA annual resolutions on Oceans and 'Sustainable Fisheries' during 2008 and 2009 (Ryder 2015). However, no tangible outcomes were produced from these discussions due to objections by at least some of the A5 to what was perceived as external meddling in their area of special interest. Nevertheless, these discussions did serve to consolidate the conviction, expressed in the Chair's Summary of the second Arctic Ocean Foreign Ministers Meeting which took place in 2010, that the A5 'have a unique interest and role to play in current and future efforts for the conservation and management of fish stocks' in the Arctic Ocean and that the development of any new international instrument on Arctic Ocean fisheries should be both initiated and led by them outside the framework of any other existing mechanisms (A5 2010). In the event, between June 2010 and July 2015 the A5 convened a number of policy and science meetings which culminated in the adoption of the Oslo Declaration on 16 July 2015 (described in Wegge 2015; Molenaar 2016b; and Shephard et al. 2016).

In the Oslo Declaration the A5 'recognise that, based on scientific information, commercial fishing in the high seas portion of the Central Arctic Ocean is unlikely to occur in the near future and, therefore, that there is no need at present to establish any additional RFMO for this area. Nevertheless, given the obligation to cooperate in the conservation and management of marine living resources in high seas areas, including the obligation to apply a precautionary approach, [they] share the view that it is desirable to adopt interim measures to deter unregulated fishing in the future in the high seas portion of the Arctic Ocean.' To that end they agree to implement measures authorizing commercial high seas fishing by their vessels 'only pursuant to any regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards'. They undertake to establish a joint program of scientific research aimed at improving the understanding of the ecosystems in the area, to cooperate with relevant scientific bodies, to promote compliance by, inter alia,

coordinating monitoring, control and surveillance activities in the Central Arctic Ocean, and to ensure that non-commercial fishing is based on scientific advice, and is monitored, and that data obtained through that fishing is shared. Importantly, they specifically note that nothing in the Declaration is intended to undermine existing bodies like NEAFC, or to prejudice the rights and duties of other states pursuant to the LOSC, the FSA and other relevant international agreements.

A sanguine reading of the Declaration suggests the articulation of a precedent setting, precautionary approach to the management of fish stocks in the Central Arctic Ocean (Shephard et al. 2016). However, upon closer reading the Declaration appears to do little more than preserve the status quo. To begin with, the Declaration is only relevant and applicable to the A5. There is nothing to stop other states from engaging in the freedom to fish in the Central Arctic Ocean, as guaranteed by the LOSC, should the environmental conditions allow. Moreover, the Declaration is only applicable to the high seas of the Central Arctic Ocean. Nothing in the Declaration purports to restrict the ability of the A5 to exploit fish stocks within their EEZs, where new fishing opportunities are more likely to occur in the short to medium term and where over-exploitation will have adverse consequences for the eventual migration of stocks into the Central Arctic Ocean. Furthermore, it must be remembered that neither the Declaration nor the measures it prescribes are legally binding. The measures are thus non-enforceable even as between and against the A5. In addition, the measures only apply in respect of commercial fishing. Thus, scientific, subsistence, recreational and other non-commercial fishing activities remain permitted. As the example of Japanese 'scientific whaling' in the International Whaling Commission makes clear, exceptions in respect of scientific (and other) fishing leave open the possibility of abuse.

Even leaving aside the possibility of abuse, however, the Declaration does not, in fact, prohibit all commercial fishing. Rather, it makes it subject to measures adopted by existing and future RFMO/As and specifically stipulates that 'these interim measures will neither undermine nor conflict with the role and mandate of any existing international mechanisms relating to fisheries, including [NEAFC]'. Thus, those of the A5 who are also members of NEAFC can authorize their vessels to fish commercially in the portion of the NEAFC regulatory area that lies in the Central Arctic Ocean subject, of course, to any relevant conservation and management measures adopted by NEAFC. Similarly, while the status of the Norway – Russia Joint Commission as an RFMO/A may be subject to some doubt it is clearly an 'international mechanism relating to fisheries', the parties to which consider its geographical scope to encompass the entire Arctic Ocean and not just the Barents Sea (Molenaar 2016a). The argument can thus be made that Norway and Russia remain entitled to authorize commercial fishing by their vessels in the Central Arctic Ocean.

In short, the Declaration does very little to avert the possibility of future commercial fishing in the Central Arctic Ocean. Since neither Canada nor the United States authorize their vessels to fish on the high seas, and vessels flagged in Greenland, Norway and Russia will be regulated under either NEAFC or the Joint Commission (or both), its only effect appears to be to possibly inhibit commercial

fishing by Greenlandic vessels in the non-NEAFC area of the Central Arctic Ocean. As Ryder puts it, 'at best, the Declaration can be seen as a political agreement among the [A5] to prevent *unregulated* commercial fishing by their vessels' (Ryder 2015, p. 6). This may of course be a not inconsiderable result, particularly given the possibility of operations by Russian fishing vessels in areas of the Central Arctic Ocean outside the jurisdiction of NEAFC or the Joint Commission. However, its limited significance does rather beg the question as to why the A5 bothered adopting the Declaration at all.

This question is particularly relevant given the ill-will the Declaration provoked on the part of other states. Even the limited scope of the Declaration did not stop Iceland from vociferously objecting to having been left out of the process (Quinn 2015). However, even if the distributional ranges of fish stocks that occur in the southern areas of the Arctic Ocean overlap with Iceland's maritime zones, no such stocks exist in the Central Arctic Ocean. Moreover, as a simple matter of geography, it is very clear that Iceland is not a coastal state in respect of the Central Arctic Ocean. For their part, Finland, the EU and others have criticized the 'utilization oriented' (Wegge 2015, p. 337) approach of the A5 which, rather than positively articulating a moratorium on commercial fishing, merely establishes an interim prohibition on unregulated fishing and a process to find out what is there with a view to the eventual regulation of its eventual exploitation. In this respect the Oslo Declaration adopts a fundamentally different approach to that applied in the Central Bering Sea where the annual harvest limit is to be set at zero if the biomass of pollock in the Aleutian Basin is less than a certain amount (CBS Convention, Arts III, IV and VII). As Molenaar notes, the reason for this difference probably lies in the unease of one or more of the A5 in adopting a mechanism that would give a single state the power to block commencement of commercial fishing operations or which would commit them in advance to adopting compatible measures in their own exclusive economic zone (Molenaar 2016a, 454).

Regardless of these criticisms, however, and despite the carefully crafted wording of the Declaration and the manner in which the A5 have occupied the moral and political, if not legal, high ground in respect of the regulation of high seas fishing in the Central Arctic Ocean (Wegge 2015; Shephard et al. 2016), it is clear that the Declaration represents a first step in the fulfillment by the A5 of their positive obligations of cooperation and conservation under the LOSC. Importantly the Declaration recognises the need to expand that cooperation, explicitly acknowledging the interests of other states and expressing the desire to work with other states in a 'broader process to develop measures consistent with this Declaration that would include commitments by all interested States'.

Moving Beyond the Oslo Declaration: The 'Broader Process'

The 'Broader Process' envisaged in the Oslo Declaration commenced in Washington DC in December 2015 when the United States initiated, hosted and chaired a

meeting of the A5 along with delegations from China, the European Union (EU), Iceland, Japan and South Korea (colloquially referred to as the A5 + 5) (FiSCAO 2015a). Subsequent meetings have taken place in April, July and November 2016 and in March 2017 in Washington, DC, Iqaluit, Tórshavn and Reykjavik, respectively (see FiSCAO 2016b, c, d and FiSCAO 2017). These meetings have been informed by the reports of the Third and Fourth Meetings of Scientific Experts on Fish Stocks in the Central Arctic Ocean which took place in Seattle, USA, in April 2015 and in Tromsø, Norway, in September 2016 (see FiSCAO 2015b, 2016a). These scientific meetings have included participants representing the 10 governments of the A5 + 5 as well as interested organizations such as the Arctic Council, PICES and ICES (FiSCAO 2016c).

From the outset, the working assumption of the A5 + 5, based on the scientific advice received, has been that 'it is unlikely that there will be a stock or stocks in the high seas area of the central Arctic Ocean sufficient to support a sustainable commercial fishery in that area in the near future' (FiSCAO 2015a). Whether use of the word 'sustainable' refers to economic sustainability or to environmental sustainability based on an ecosystem approach to fisheries management is an open question. However, in any event, concerns regarding the rapid changes occurring in the Arctic region have given a certain impetus to the discussions and it is clear that this assumption equally implies a belief that such fishing will, eventually, occur in the future. The discussions are thus said to be based on the recognition by all participants of the need for a precautionary approach. To that end, the ongoing commitment to the broader scientific meetings and the joint program of scientific research and monitoring they are developing is indicative of a serious desire to improve scientific understanding of both the future fisheries potential and the broader ecosystem of the Central Arctic Ocean. Nevertheless, it is the adoption and implementation of both interim and permanent measures to prevent unregulated commercial high seas fishing that will be the test of their mettle. According to the Chairmans' Statements from the meetings, all delegations have committed to taking interim measures to prevent unregulated commercial fishing in the Central Arctic Ocean, to promoting the conservation and sustainable use of the living marine resources there and to safeguarding a healthy ecosystem in the Central Arctic Ocean (FiSCAO 2015a, 2016b, c). What is not yet clear is the form and content that these commitments will take.

In terms of form, three approaches have been on the table: adjusting the Oslo Declaration to adopt a broader non-binding statement; negotiating a binding international agreement that would, among other things, commit parties to essentially the same measures expressed in the Oslo declaration; or establishing one or more new RFMO/As for the area. None of these approaches has been considered to be mutually exclusive and it has been accepted that they might be combined in a 'step-by-step or evolutionary fashion' (FiSCAO 2015a). Negotiations have revolved around a continually updated draft Chairman's text which, as circulated in October 2016 prior to the Tórshavn meeting, 'was in the format of a legally binding agreement' (FiSCAO 2016d). According to the Chairman's Statement from that meeting, 'there was general belief that these discussions have the possibility

of concluding successfully in the near future'. Reading between the lines, it thus appears likely that the outcome of the Broader Process will be a legally binding agreement, although as of October 2017 no such agreement has been reached (FiSCAO 2017).

In terms of the content of any new agreement, it is clear that the Broader Process is not concerned with negotiating the establishment of any new RFMO/As. Rather, the envisaged agreement will likely merely make binding the currently voluntary interim measures articulated in the Oslo Declaration. This is implicit in the Chairman's Statements from the Tórshavn and Reykjavik meetings which note that one of the key issues still under discussion is 'the conditions under which a decision might be made to commence negotiations on an agreement to establish one or more additional RFMO/As'. Other issues still under consideration include the manner in which the agreement addresses exploratory fishing, and decision-making procedures (FiSCAO 2016d and FiSCAO 2017). The first issue is critically important to the efficacy of the agreement in that consideration of exploratory fisheries as non-commercial could lead to widespread abuse by states carrying out essentially commercial fishing under the guise of exploratory operations. The second issue is relevant to questions such as when and how to move to establish an RFMO/A, or to amend the interim measures adopted in the agreement.

Regardless of whether a binding agreement is ultimately adopted, it must be remembered that any such agreement will only be binding on its parties which, at the moment would be, at most, the A5 + 5. To date, the A5 have been careful about who they have invited to the negotiating table. Participation by Iceland in its own right and Denmark, Finland and Sweden as part of the EU, has ensured that all Arctic states are represented, thereby alleviating the concerns about A5 exceptionalism. The presence of China, Japan and Korea is reflective of their status as major global distant-water fishing states.

The presence of China, in particular, is clearly intended to act both as a check on its growing Arctic aspirations as well as a lever for ensuring provision of the hardware necessary for the conduct of research in the Central Arctic Ocean. While China's claim to special status as a 'near-Arctic' state (Pan and Huntington 2016) is both geographically and legally meaningless, like all other states it does have a legitimate interest in the living marine resources of the high seas and in the freedoms of navigation and the conduct marine scientific research in areas beyond national jurisdiction. Critically, China possesses ice breakers and other materiel which scientists are anxious to access to assist in their investigations of the marine living resources of the Central Arctic Ocean (FiSCAO 2015b; Bertelsen and Gallucci 2016). Whether, as some political scientists suggest, the inclusion of China in the negotiations is indicative of a power transition occurring in the Arctic involving a challenge to US hegemony (see Bertelsen's chapter in this volume), it is clear that accommodating China as one of the A5 + 5 provides a benign space in which 'new opportunities for collaboration based on better relations and better mutual understanding' can be forged (Pan and Huntington 2016, p. 156).

Admittedly, other states may also consider they have a 'real interest' in Central Arctic Ocean fisheries. However, with the exception of the negotiations for the South

Pacific RFMO which were open to any state or entity having an interest in the fishery resources in the convention area, state practice in the negotiation of RFMO/As in the past evidences a clear trend towards limited participation. The limitation on participation in the Broader Process is thus wholly consistent with state practice and international law, although some mechanism may ultimately be needed to deal with new entrants in the event any viable fisheries are ever established in the Central Arctic Ocean (Molenaar 2016a, p. 460).

Moreover, it must be remembered that non-parties to any new binding agreement will not be bound and will, if and when physical conditions permit, enjoy an unfettered freedom to fish in the Central Arctic Ocean. Admittedly any fishing vessels will always have to pass through waters under the jurisdiction of the coastal states, however; the possibility exists that, like the fish, the scourge of illegal, unreported and unregulated (IUU Fishing), so prevalent throughout the world's oceans, will simply migrate to the Central Arctic Ocean. Incentives will therefore be necessary to ensure participation by other states in the agreement and in any subsequent RFMO/A that is negotiated. What such incentives might be is not entirely clear. The most obvious might be an expectation of the eventual allocation of fishing opportunities. Existing fisheries agreements generally allocate fishing opportunities on the basis of historic fishing practices (Rayfuse 2015). However, since no such practice exists in the Central Arctic Ocean, it is arguable that *all* states have an equal interest in the conservation and management of the marine living resources there and that the agreement and any subsequent RFMO/A should therefore be freely open to all. Provision for such broad participation may, however, have implications for the future of the agreement. On the one hand, an increase in participation by distant-water fishing states could challenge the interests of the A5, particularly where measures adopted within their EEZs might be less stringent than those applicable in the Central Arctic Ocean. On the other hand, an increase in participation by non-fishing states could strengthen the hand of the A5 in restricting future fishing opportunities in the Central Arctic Ocean. While Article 7 of the Fish Stocks Agreement requires coastal state measures and those adopted in respect of adjacent high seas areas to be compatible, no indication is given of whose measures are to be compatible with whose. It is thus an open question as to whether it will be the A5 or other states that will have the loudest voice in the regulation of any future fishery.

Conclusion

To the casual observer it might seem that there are many more pressing issues when it comes to the Arctic than expending valuable time and resources negotiating an agreement to manage an activity that has not yet commenced in respect of a resource that may not even exist. In other words, the whole process may be much ado about nothing. However, as the negotiation of the deep-seabed mining regime demonstrates, precautionary-minded international agreements are easier to

reach before vested interests have become entrenched (Rayfuse 2007). Given the uncertainties and extremely limited scientific knowledge regarding existing and potential Central Arctic Ocean fisheries resources, particularly when combined with the current lack of activity in the area, a valuable opportunity exists to implement a truly precautionary approach to their future conservation and management based on sound science and modern international fisheries management principles and practises. In this respect, the Oslo Declaration might be said to represent a 'precautionary moment' in the governance of the natural resources of the Central Arctic Ocean.

However, lest we forget, the Oslo Declaration is neither binding nor does it commit the A5 to do or refrain from doing anything they are not already doing or refraining from doing. While a benign reading of the Declaration's focus on science and cooperation evidences the A5's intention to fulfil their obligation to the international community to cooperate in the conservation and management of the living resources of the Central Arctic Ocean, it is the Broader Process which holds more precautionary promise. At the time of writing, it remains to be seen whether the 'moment' will become a lasting one.

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