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The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis

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Abstract

Following almost ten years of negotiations, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement) was concluded on 3 October 2018 in Ilulissat, Greenland. The CAOF Agreement is the first regional fisheries agreement adopted prior to the initiation of fishing in a specific area, and it has already been lauded as a science-based measure and a manifestation of the precautionary approach by representatives of States and Non-Governmental Organizations. This article provides a critical analysis of the content of the CAOF Agreement. It gives an overview of the negotiations which led to the conclusion of the CAOF Agreement and discusses its spatial and substantive scope. Particular attention is paid to the extent that the CAOF Agreement adopts a precautionary approach to conservation and management of high seas fisheries, and to the issue of participation in this regional fisheries treaty.

Keywords

Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement, CAOFA) – Ilulissat Agreement – high seas fisheries – central Arctic ocean (CAO) – precautionary approach – moratorium – regional fisheries management arrangement

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Introduction

On 3 October 2018 the so-called Arctic Five plus Five – which consist of five Arctic coastal States (Canada, Denmark,[1] Norway, Russia and the United States – the Arctic Five),[2] four other States (China, Iceland, Japan and South Korea) and the European Union (EU) – concluded the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement or CAOFA) in Ilulissat, Greenland.[3] The CAOF Agreement was negotiated in order to fill a lacuna in the legal regime for fisheries in the high seas portion of the Arctic by imposing a temporary moratorium on unregulated commercial fishing in the central Arctic Ocean (CAO) until the effects of climate change on fisheries in the CAO are better understood and science-based management is in place. As such, the CAOF Agreement has already been lauded as a science-based measure and a manifestation of the precautionary approach by representatives of the Arctic Five plus Five[4] as well as by non-governmental organizations (NGOs)[5] prior to its signature.

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1 Denmark negotiated on behalf of Greenland and the Faroe Islands.

2 Although Iceland considers itself an Arctic coastal State, it is not commonly considered an Arctic Ocean coastal State and, it is important to note, Iceland's maritime zones are not adjacent to the high seas area of the CAO.

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3.

3 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (Ilulissat, 3 October 2018, not yet in force). For a text of the CAOF Agreement, see European Commission, 'Annex to the Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement to prevent unregulated high seas Fisheries in the Central Arctic Ocean', 12.6.2018, COM(2018) 454 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0453&from=EN>; last accessed 5 October 2018. The delegation of the EU was unable to sign the CAOF Agreement on 3 October 2018, but did so soon thereafter.

4 European Commission, 'EU and Arctic partners enter historic agreement to prevent unregulated fishing in high seas' available at <https://ec.europa.eu/fisheries/eu-and-arctic-partners-enter-historic-agreement-prevent-unregulated-fishing-high-seas_en>; accessed 5 October 2018; Fisheries and Oceans Canada, 'Canada signs international agreement to prevent unregulated fishing in the high seas of the central Arctic Ocean' available at <https://www.canada.ca/en/fisheries-oceans/news/2018/10/canada-signs-international-agreement-to-prevent-unregulated-fishing-in-the-high-seas-of-the-central-arctic-ocean.html>; accessed 5 October 2018; NOAA Fisheries, 'U.S. Signs Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean' available at <https://www.fisheries.noaa.gov/international/international-affairs/us-signs-agreement-prevent-unregulated-commercial-fishing-high-seas-central-arctic>; accessed 5 October 2018. The term "precaution" is not, however, expressly mentioned in some statements. See Ministry of Foreign Affairs of the Republic of Korea, 'ROK Signs Agreement to Prevent Unregulated High Seas Fisheries in Central Arctic Ocean' available at <http://www.mofa.go.kr/eng/brd/m_5676/

It is true that the CAOF Agreement may be the first regional fisheries agreement adopted prior to the initiation of fishing in a specific area. It also differs from existing regional fisheries regimes in that it, for now, imposes a temporary ban on unregulated commercial fisheries rather than implementing a new management regime that involves exploitation. However, whether or not the CAOF Agreement can really be considered as a precautionary instrument that could reflect a paradigm shift in international fisheries law can only be answered on the basis of a detailed and critical assessment of its structural and substantial specificities.

Against this background, the present article undertakes to analyse whether the CAOF Agreement has been drafted in such a manner that provides for the degree of innovation, coherency, and accuracy necessary in order to achieve its objectives. The effectiveness of multilateral fisheries management regimes in promoting sustainable management and conservation of marine living resources in the high seas largely depends on the political will of all States involved. Thus, a legal assessment is naturally restricted to an analysis of how well a fisheries agreement can guide and constrain national interests in light of its stated objectives.

The article is structured as follows. First, it provides a brief overview of the circumstances that led to the adoption of the CAOF Agreement and the need to fill the existing legal lacuna in the Arctic regional fisheries regime. This is followed by an overview of the negotiations which led to the conclusion of the CAOF Agreement. The sections thereafter are devoted to a discussion of both the spatial and substantive scope of the CAOF Agreement. The main analytical part of the article provides an assessment of the extent to which the CAOF Agreement adopts a precautionary approach to conservation and

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view.do?seq=320114>; accessed 5 October 2018; Ministry of Foreign Affairs of Denmark, 'Historical agreement on fisheries in the Arctic to be signed in Greenland' available at <http://um.dk/en/news/newsdisplaypage/?newsid=10fd29d5-1968-428f-8963-aeaf9c22b072>; accessed 5 October 2018; Government of the Kingdom of Norway, 'Agreement on unregulated fishing in the Arctic Ocean' available at <https://www.regjeringen.no/en/aktuelt/agreement-on-unregulated-fishing-in-the-arctic-ocean/id2580484/>; accessed 5 October 2018.

5 The Pew Charitable Trusts, 'Pew Applauds International Agreement to Protect Central Arctic Ocean Ecosystem' available at <http://www.pewtrusts.org/en/about/news-room/statements/2017/11/30/pew-applauds-international-agreement-to-protect-central-arctic-ocean-ecosystem>; accessed 5 October 2018; Greenpeace USA, 'Historic agreement reached to protect the Arctic' available at <http://www.greenpeace.org/usa/news/historic-agreement-reached-to-protect-the-arctic/>; accessed 5 October 2018; Ocean Conservancy, 'Ocean Conservancy Welcomes Historic Agreement Reached to Protect Central Arctic Ocean' available at <https://oceanconservancy.org/news/ocean-conservancy-welcomes-historic-agreement-reached-protect-central-arctic-ocean/>; accessed 5 October 2018.

management of high seas fisheries in the CAO. The final substantive section deals with the issue of participation in the CAOF Agreement. It discusses whether the Agreement can be considered as constituting a Regional Fisheries Management Arrangement (RFMA), in which case its provisions on participation would have to be in conformity with participation requirements under international fisheries law.

High Seas Fisheries in the Arctic Ocean and Climate Change

Although there is no generally accepted spatial definition of the Arctic marine environment, the present article relies on the definition provided by the Arctic Monitoring and Assessment Programme of the Arctic Council (AMAP).[6] There are four high seas pockets left in the marine Arctic as per this definition. These are the "Banana Hole" in the Norwegian Sea, the "Loophole" in the Barents Sea, the "Donut Hole" in the central Bering Sea, and the CAO. The CAO is entirely surrounded by the maritime zones of the Arctic Five, i.e., their territorial seas and exclusive economic zones (EEZs), which cover most of the Arctic Ocean. Most of the high seas area of the CAO is likely to overlay portions of the continental shelves of Canada, Denmark/Greenland, Norway, Russia and the United States.

A strong decrease in Arctic sea ice during the summer months is happening as a consequence of climate change, which would make the CAO more accessible for human activities and affect its ecosystem.[7] In particular, climate change is expected to have significant impacts on the distribution, yield, catch quality and composition of fish stocks worldwide.[8] With respect to the Arctic Ocean, it is projected that rising sea temperatures and retreating summer-ice may cause a northward expansion of certain subarctic and temperate fish

6 A map is available at <http://www.amap.no/about/geographical-coverage>; accessed 5 October 2018.

7 DG Barber, WN Meier, S Gerland, CJ Mundy, M Holland, S Kern, Z Li, C Michel, DK Perovich and T Tamura, 'Arctic Sea Ice' in Arctic Monitoring and Assessment Programme (AMAP), *Snow, Water, Ice and Permafrost in the Arctic (SWIPA) 2017*, available at <https://www.amap.no/documents/doc/Snow-Water-Ice-and-Permafrost-in-the-Arctic-SWIPA-2017/1610>; accessed 5 October 2018, at p. 103–136.

8 See, with further references, LV Weatherdon, AK Magnan, AD Rogers, UR Sumaila and WWL Cheung, 'Observed and Projected Impacts of Climate Change on Marine Fisheries, Aquaculture, Coastal Tourism, and Human Health: An Update' (2016) *Frontiers in Marine Science* 1–21, at pp. 4 ff.

species, and increase pressure on species indigenous to the Arctic Ocean.[9] At the same time, rising sea temperature may lead to a poleward increase of stock sizes.[10] Notably, most of the detected northward expansion of species, with possible exceptions such as cod (*Gadus morhua*),[11] takes place in shallow waters, i.e., within the maritime zones of the five Arctic coastal States. In some locations, the parallel effect of hypoxia, i.e., reduced oxygen levels in the water, may outcompete temperature rise as a driver for poleward migration.[12] Combined with the overall decline in fisheries worldwide, the projected poleward expansion of some stocks such as cod will likely be followed by fishing efforts.[13] In any case, significant uncertainty remains with regard to the impacts of climate change on potential fisheries resources in the CAO, particularly due to a lack of reliable biological baseline data.[14] The lack of sufficient scientific data was recently re-emphasized by the "Scientific Experts on Fish Stocks in the Central Arctic Ocean" (FiSCAO). In the Final Report of the Fourth Meeting (2017), it is noted that "[b]aseline information, especially on fish populations, is lacking for many parts of the central Arctic Ocean and most notably for the High Seas region",[15] and that it is uncertain what, if any, species have sufficient

9 N Wegge, 'The Emerging Politics of the Arctic Ocean: Future Management of the Living Marine Resources' (2015) 51 *Marine Policy* 331–338, at pp. 333–334; Weatherdon *et al.* (n 8), at pp. 8–9.

10 Weatherdon *et al.*, *ibid.*

11 AB Hollowed, B Planque and H Loeng, 'Potential movement of fish and shellfish stocks from the sub-Arctic to the Arctic Ocean' (2012) 22(5) *Fisheries Oceanography* 355–370.

12 TA Okey, HM Alidina, V Lo and S Jessen, 'Effects of Climate Change on Canada's Pacific Marine Ecosystems: A Summary of Scientific Knowledge' (2014) 24 *Reviews in Fish Biology and Fisheries* 519–559.

13 See Weatherdon *et al.* (n 8), at p. 4: 'marine Klondike'; JS Christiansen, C Mecklenburg and OV Karamushko, 'Arctic Marine Fishes and their Fisheries in Light of Global Change' (2013) 20 *Global Change Biology* 352–359; WWL Cheung, VWY Lam, JL Sarmiento, K Kearney, R Watson and D Pauly, 'Projecting Global Marine Biodiversity Impacts under Climate Change Scenarios' (2009) 10 *Fish and Fisheries* 235–251, at pp. 245 ff.

14 TI Van Pelt, HP Huntington, OV Romanenko and FJ Mueter, 'The Missing Middle: Central Arctic Ocean Gaps in Fishery Research and Science Coordination' (2017) 85 *Marine Policy* 79–86; P Wassmann, CM Duarte, S Agustí and MK Sejr, 'Footprints of Climate Change in the Arctic Marine Ecosystem' (2011) 17 *Global Change Biology* 1235–1249; MM McBride, P Dalpadado, K Drinkwater, A Hobday, A Hollowed, T Kristiansen, E Murphy, P Ressler, S Subbey, E Hofmann and H Loeng, 'Krill, Climate, and Contrasting Future Scenarios for Arctic and Antarctic Fisheries' (2014) 28 ICES *Journal of Marine Science* 1934–1955.

15 Final Report of the Fourth Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean, January 2017, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_fourth_meeting/pdfs/FourthFiSCAOreportfinalJan26_2017.pdf>; accessed 5 October 2018, 14.

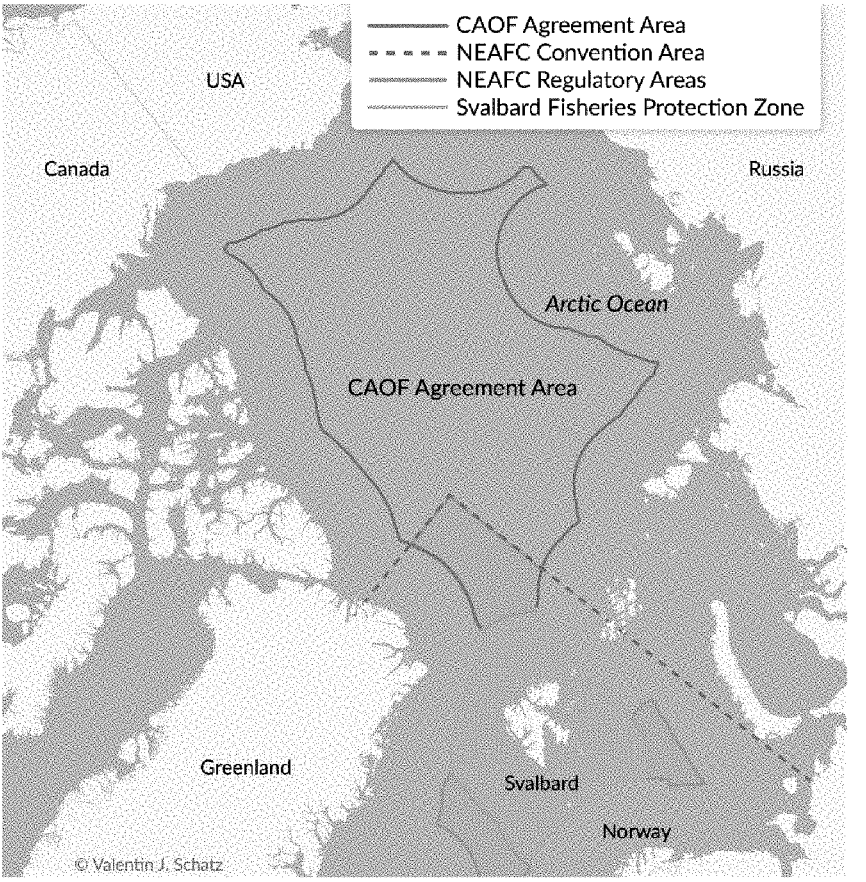

FIGURE 1 CAOF agreement area

abundance and productivity to warrant a fishery in the CAO.[16] As far as the impacts of climate change are concerned, the report states that "[i]nvestigations are needed to monitor the Pacific and Atlantic gateways to detect migrations and to identify key linkages from the shelves and deeper oceans of the High Seas, including modeling on a species basis".[17] It should be noted that a fishery collapse has already taken place in the Arctic when the Donut Hole stock of Alaska pollock (*Gadus chalcogrammus*), in the Aleutian Basin of the central

16 Fourth FiSCAO Report (n 19), at pp. 18–19.

17 *Ibid.*, at p. 26.

Bering Sea, collapsed during the 1990s – an event which has been described as the most spectacular fishery collapse in North American history.[18]

The International Legal Regime for High Seas Fisheries in the CAO

The international legal regime for the management and conservation of marine living resources in the Arctic high seas consists of global as well as bilateral and multilateral regional treaties[19] and the relevant rules and principles of customary international law.[20] The most important global treaties prescribing

18 N Liu, 'The European Union's Potential Contribution to the Governance of High Sea Fisheries in the Central Arctic Ocean' in N Liu, E Kirk and T Henriksen (eds), *The European Union and the Arctic* (Brill Nijhoff, Leiden, 2017) 274–295, at p. 279.

19 Relevant publications include: E Papastavridis, 'Fisheries Enforcement on the High Seas of the Arctic Ocean: Gaps, Solutions and the Potential Contribution of the European Union and Its Member States' (2018) 33 *International Journal of Marine and Coastal Law* 324–360; R Rayfuse, 'Regulating Fisheries in the Central Arctic Ocean: Much Ado About Nothing?' in N Vestergaard, BA Kaiser, L Fernandez and JN Larsen (eds), *Arctic Marine Resource Governance and Development* (Springer, Heidelberg, 2018) 35–51; J Tang, 'Conservation of Marine Living Resources in the Central Arctic Ocean: Five Arctic Coastal States Initiatives' in MH Nordquist, JN Moore and R Long (eds), *International Marine Economy: Law and Policy* (Brill Nijhoff, Leiden, 2017) 211–231; T Heidar, 'The Legal Framework for High Seas Fisheries in the Central Arctic Ocean' in Nordquist *et al., ibid.,* 179–203; EJ Molenaar, 'International Regulation of Central Arctic Ocean Fisheries' in MH Nordquist, JN Moore and R Long (eds), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (Brill Nijhoff, Leiden, 2016) 429–463; L Weidemann, *International Governance of the Arctic Marine Environment: With Particular Emphasis on High Seas Fisheries* (Springer, Berlin, 2014) 155 ff.; R Churchill, 'The Exploitation and Management of Marine Resources in the Arctic: Law, Politics and the Environmental Challenge' in LC Jensen and G Hønneland (eds), *Handbook of the Politics of the Arctic* (Edward Elgar, Cheltenham, 2015) 147–184, at pp. 151 ff.; EJ Molenaar, 'Status and Reform of Arctic Fisheries Law' in E Tedsen, S Cavalieri and RA Kraemer (eds), *Arctic Marine Governance: Opportunities for Transatlantic Cooperation* (Springer, Berlin, 2014) 103–125; EJ Molenaar, 'Arctic Fisheries Management' in EJ Molenaar, AG Oude Elferink and DR Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Brill Nijhoff, Leiden, 2013) 243–266; EJ Molenaar, 'Arctic Fisheries and International Law: Gaps and Options to Address Them' (2012) 6(1) *Carbon & Climate Law Review* 63–77; R Barnes, 'International Regulation of Fisheries Management in Arctic Waters' (2011) 54 *German Yearbook of International Law* 193–230; EJ Molenaar, 'Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework' (2009) *Yearbook of Polar Law* 427–463; EJ Molenaar, 'Climate Change and Arctic Fisheries' in T Koivurova, ECH Keskitalo and N Bankes (eds), *Climate Governance in the Arctic* (Springer, Berlin, 2009) 145–155.

20 For example, it has been argued that the duty to cooperate in the management of high seas fish stocks is part of customary international law. See M W Lodge, D Anderson,

rules and principles relevant to high seas fisheries are the 1982 United Nations Convention on the Law of the Sea (LOSC)[21] – particularly Articles 116-119, the 1995 United Nations 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 (UNFSA),[22] the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement),[23] and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA).[24] There is also a growing corpus of non-binding soft-law instruments adopted under the auspices of the Food and Agriculture Organization of the United Nations (FAO), such as the 1995 Code of Conduct for Responsible Fisheries (FAO Code of Conduct),[25] the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU),[26] the 2014 Voluntary Guidelines for Flag State Performance (FSP-Guidelines)[27] and the 2015 Voluntary Guidelines for

T Løbach, G Munro, K Sainsbury and A Willock, *Recommended Best Practices for Regional Fisheries Management Organizations. Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations* (Chatham House, London, 2007) 5–6; R Rayfuse, 'Article 118' in A Proelss (ed), *United Nations Convention on the Law of the Sea* (UNCLOS): *A Commentary* (C.H. Beck/Hart/Nomos, Baden-Baden/Oxford/Munich, 2017) MN. 14 ff.

21 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3.

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

23 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 24 November 1993, in force 24 April 2003) 2221 *UNTS* 91.

24 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (Rome, 22 November 2009).

25 FAO, *Code of Conduct for Responsible Fisheries*, 31 October 1995, available at <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM>; accessed 5 October 2018.

26 FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 23 June 2001, available at <http://www.fao.org/3/a-y3536e.pdf>; accessed 5 October 2018.

27 FAO, *Voluntary Guidelines for Flag State Performance*, 11 June 2014, available at <http://www.fao.org/3/a-i4577t.pdf>; accessed 5 October 2018.

Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF-Guidelines).[28]

As far as regional developments are concerned, the Arctic Five affirmed, in their 2008 Ilulissat Declaration, their support for the existing global framework provided by "the law of the sea [as] a solid foundation for responsible management by the five coastal States".[29] This statement is generally considered to implicitly refer to the general framework as a whole, thereby including the LOSC despite the fact that the United States is not a party to that treaty.[30] Bilateral and multilateral regional fisheries instruments are in place for the maritime zones of most of the Arctic Five, as well as the high seas pockets of the "Banana Hole" and the "Loophole", but not the CAO.[31] As a matter of spatial competence, four fisheries bodies could theoretically be relevant for fisheries management in the CAO but, in practice, have refrained from regulating fisheries in this area.[32] These are the Joint Russian-Norwegian Fisheries Commission,[33] whose spatial competence is not restricted to any specific area and could thus be interpreted as including the CAO; the North-East Atlantic Fisheries Commission (NEAFC),[34] whose spatial competence extends to the southern tip of the CAO (see figure 1); the International Commission for the Conservation of Atlantic Tuna (ICCAT),[35] whose spatial competence may implicitly also cover the CAO but is unlikely ever to do so unless an unprecedented and unexpected northward expansion of the highly migratory tuna fishery occurs;[36] and the

28 FAO, *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*, 2014, available at <http://www.fao.org/3/a-i4487e.pdf>; accessed 5 October 2018.

29 See para. 4 of the Ilulissat Declaration, adopted in Ilulissat, Greenland on 28 May 2008, available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2008-Ilulissat-Declaration.pdf>; accessed 5 October 2018.

30 All of the Arctic Five except the United States are parties to the LOSC. The United States, however, has traditionally regarded the LOSC (with the exception of Part XI on the International Deep Seabed Area) as representing customary international law.

31 Molenaar 2014 (n 19), at pp. 110 ff.; Weidemann (n 19), at pp. 164 ff.

32 Molenaar 2016 (n 19), at pp. 3–4.

33 See <http://www.jointfish.com/>; accessed 5 October 2018. The Commission was established by the *Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Cooperation in the Fishing Industry* (Moscow, 11 April 1975, in force 11 April 1975) 983 *UNTS* 1975.

34 See <https://www.neafc.org/>; accessed 5 October 2018. NEAFC was established by the *Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries* (London, 18 November 1980, in force 17 March 1982) 1285 *UNTS* 129 (NEAFC Convention).

35 *International Convention for the Conservation of Atlantic Tunas* (Rio De Janeiro, 14 May 1966, in force 21 March 1969) 673 *UNTS* 63.

36 EJ Molenaar and R Corell, 'Arctic Fisheries: Background Paper' (2009) *Arctic Transform* 1–28, at pp. 18 ff.; but see Rayfuse (n 19), at p. 42 who raises doubts as to whether the ICCAT

North Atlantic Salmon Conservation Organization (NASCO),[37] which regulates anadromous Atlantic salmon fisheries[38] – but whose constitutive treaty prohibits any fishing for salmon on the high seas,[39] as is also required by Article 66(3)(a) LOSC.[40] Thus, until the conclusion of the CAOF Agreement, the CAO lacked a specific regional fisheries regime of its own.

Negotiating History of the CAOF Agreement

The successful conclusion of negotiations on the CAOF Agreement took almost 10 years. The initial impulse came from the United States. Joint resolution No. 17 of 2007 of the Congress directed "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".[41] Although the United States was willing to engage in discussions on a multilateral level, there were difficulties in finding a suitable multilateral forum. On a regional level, the Arctic Council[42] decided in 2007 that fisheries

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Convention applies to the CAO at all. See also Weidemann (n 19), at pp. 165 ff. who argues that, in any case, future regulation by the ICCAT is not desirable given its failure to achieve its conservation goals in the past.

37 See <http://www.nasco.int/>; accessed 5 October 2018.

38 Weidemann (n 19), at pp. 174–175.

39 See Article 2 of the Convention for the Conservation of Salmon in the North Atlantic Ocean, (Reykjavik, 2 March 1982, in force 01 October 1983) 1338 *UNTS* 33 (NASCO Convention).

40 Rayfuse (n 19), at p. 42.

41 S. J. Res. 17, 110th Congress (2007–2008), available at <https://www.congress.gov/bill/110th-congress/senate-joint-resolution/17/text>; accessed 5 October 2018. The United States also implemented domestic measures applicable in its maritime zones. See Fishery Management Plan for Fish Resources of the Arctic Management Area (2009), available at <https://www.npfmc.org/wp-content/PDFdocuments/fmp/Arctic/ArcticFMP.pdf>; accessed 5 October 2018. The legislation "governs commercial fishing for all stocks of fish, including all finfish, shellfish, or other marine living resources, except commercial fishing for Pacific salmon and Pacific halibut, which is managed under other authorities". See Molenaar 2014 (n 19), at p. 117. For commentary on the negotiation process generally, see Tang (n 19), at pp. 220 ff.; Heidar (n 19), at pp. 191 ff.; Molenaar 2016 (n 19), at p. 446; Wegge (n 9), at pp. 335 ff.

42 See <http://www.arctic-council.org/>; accessed 5 October 2018. The Arctic Council is not an intergovernmental organization but was established in 1996 by a non-binding declaration of the Arctic Five, Finland, Iceland, and Sweden. See Declaration on the Establishment of the Arctic Council (Ottawa, 9 September 1996), available at <https://oaarchive.arctic-council.org/bitstream/handle/11374/85/EDOCS-1752-v2-ACMMCA00_

issues should be considered "within the context of existing mechanisms".[43] A proposal by the EU in 2008 to extend NEAFC's mandate to the entire CAO[44] was rejected by some of the Arctic Five – not all of which are members of NEAFC.[45] On a global level, the involvement of the United Nations General Assembly (UNGA) was considered by the EU in 2009[46] but appeared unacceptable to some of the Arctic Five.[47] Equally, one commentator has reported that early suggestions to assign to the FAO a major role in the negotiations failed due to opposition by the Arctic Five.[48] As a result, these fora were never seriously considered. Instead, the Arctic Five began discussing the issue of commercial fisheries in the CAO exclusively among each other in a series of meetings.

The first two such meetings took place on the ministerial level in Ilulissat (May 2008) and Chelsea (March 2010). In this regard, it should be highlighted that the Arctic Five stated in their Ilulissat Declaration that "[t]he Arctic Ocean is a unique ecosystem, which the five coastal States have a stewardship role in protecting".[49] This view is not necessarily shared by the remaining Arctic Council members who are advocating for a stronger role of the Arctic Council.[50] Nonetheless, the preamble of the CAOF Agreement reinforces the Arctic Five's claim by "[r]ecognizing the special responsibilities and special interests of the central Arctic Ocean coastal States in relation to the conservation and sustainable management of fish stocks in the central Arctic Ocean".

Ottawa_1996_Founding_Declaration.PDF?sequence=5&isAllowed=y>; accessed 5 October 2018.

43 Arctic Council, Final Report of the Meeting of Senior Arctic Officials (Narvik, 28–29 November 2007), available at <https://oaarchive.arctic-council.org/bitstream/handle/11374/380/ACSAO-NO02_Narvik_FINAL_Report.pdf?sequence=1&isAllowed=y>, para. 11.4; accessed 5 October 2018.

44 EU Commission, Communication from the Commission to the European Parliament and the Council on the European Union and the Arctic Region, COM (2008) 763, available at <http://eeas.europa.eu/archives/docs/arctic_region/docs/com_08_763_en.pdf>; accessed 5 October 2018, at para. 3.2.

45 See discussion by Molenaar 2009 (n 19), at pp. 454–458.

46 European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Staff Document: The Inventory of Activities in the Framework of Developing a European Union Arctic Policy (Brussels, 26 June 2012), available at <http://eeas.europa.eu/archives/docs/arctic_region/docs/swd_2012_182.pdf>; accessed 5 October 2018, at pp. 22–23.

47 Wegge (n 9), at p. 336.

48 Molenaar 2013 (n 19), at p. 248.

49 Para. 5 Ilulissat Declaration (n 29).

50 C Prip, 'The way towards strengthened marine cooperation in the Arctic' (2017) *The JCLOS Blog*, available at <http://site.uit.no/jclos/2017/11/03/the-way-towards-strengthened-marine-cooperation-in-the-arctic/>; accessed 5 October 2018, at p. 2.

Afterwards, a number of meetings (sometimes referred to as "preparatory process") were conducted on a senior officials level in Oslo (June 2010),[51] Washington D.C. (April-May 2013), Nuuk (February 2014).[52] In addition to these negotiations, meetings of FiSCAO were held in Anchorage (June 2011),[53] Tromsø (October 2013),[54] and Seattle (April 2015).[55] At a ceremonial meeting in Oslo (April 2015), the Arctic Five then adopted the "Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean" (2015 Oslo Declaration),[56] in which they voiced their commitment for the "implementation of interim measures to prevent unregulated fishing in the high seas portion of the central Arctic Ocean" and established a number of non-binding interim measures.[57] In addition, it acknowledged "the interest of other States in preventing unregulated high seas fisheries in the central Arctic Ocean and look[s] forward to working with them in a broader process to

51 Meeting on Arctic Fisheries (Oslo, 22 June 2010), Chair's Summary, available at <https://www.regjeringen.no/globalassets/upload/UD/Vedlegg/Folkerett/chair_summary100622.pdf>; accessed 5 October 2018.

52 Meeting on Arctic Fisheries (Nuuk, 24–26 February 2014), Chairman's Statement, available at <http://naalakkersuisut.gl/~/media/Nanoq/Images/Nyheder/250214/Chairmans%20Statement%20from%20Nuuk%20Meeting%20February%202014%202.docx>; accessed 5 October 2018. For commentary, see S Ryder, 'The Nuuk Meeting on Central Arctic Ocean Fisheries' (2014) *The JCLOS Blog*, available at <http://site.uit.no/jclos/2014/10/15/the-nuuk-meeting-on-central-arctic-ocean-fisheries/>; accessed 5 October 2018.

53 Report of a Meeting of Scientific Experts on Fish Stocks in the Arctic Ocean, Anchorage, Alaska, 15–17 June 2011, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/First%20Meeting%20Sci%20Experts%20Arctic%20Fisheries%2030%20Aug%202011.pdf>; accessed 5 October 2018.

54 Report of 2nd Scientific Meeting on Arctic Fish Stocks, Tromsø, Norway, 28–31 October 2013, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/Report%20of%202nd%20Scientific%20Meeting%20on%20Arctic%20Fish%20Stocks%2028%2031%20October%202013.pdf>; accessed 5 October 2018.

55 Final Report of the Third Meeting of FiSCAO (Seattle, April 14–16, 2015), available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/meeting_reports/3rd_Arctic_Fish_Final_Report_10_July_2015_final.pdf>; accessed 5 October 2018.

56 Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (Oslo, 16 July 2015), available at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>; accessed 5 October 2018.

57 For commentary, see S Ryder, 'The Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean' (2015) *The JCLOS Blog*, available at <http://site.uit.no/jclos/2015/08/11/the-declaration-concerning-the-prevention-of-unregulated-high-seas-fishing-in-the-central-arctic-ocean/>; accessed 5 October 2018; E J Molenaar, 'The Oslo Declaration on High Seas Fishing in the Central Arctic Ocean' (2015) *Arctic Yearbook* 427–431; Rayfuse (n 19), at pp. 43–45.

develop measures consistent with this Declaration that would include commitments by all interested States".[58]

This "Broader Process"[59] consisted of meetings in Washington D.C. (December 2015 and April 2016),[60] Nunavut (July 2016),[61] Tórshavn (November/December 2016),[62] Reykjavik (March 2017)[63] and, after some months of uncertainty, Washington D.C. (November 2017).[64] In addition to the negotiations, additional meetings of FiSCAO were held in Tromsø (September 2016)[65] and Ottawa (October 2017).[66] The signatories of the Oslo Declaration invited China,[67] the EU,[68] Iceland, Japan, and South Korea to the Broader

58 Oslo Declaration (n 56).

59 For discussion, see also Rayfuse (n 19), at pp. 45–48.

60 Meeting on High Seas Fisheries in the Central Arctic Ocean (Washington, D.C., 1–3 December 2015), Chairman's Statement, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_fourth_meeting/pdfs/Chairman%27s%20Statement%20from%20Washington%20Meeting%20December%202015.pdf>; accessed 5 October 2018; Meeting on High Seas Fisheries in the Central Arctic Ocean (Washington, D.C., 19–21 April 2016), Chairman's Statement, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_fourth_meeting/pdfs/Chairman's_Statement_from_Washington_Meeting_April_2016–2.pdf>; accessed 5 October 2018. For commentary, see E J Molenaar, 'The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean' (2016) *The JCLOS Blog*, available at <http://site.uit.no/jclos/files/2016/04/The-December-2015-Washington-Meeting-on-High-Seas-Fishing-in-the-Central-Arctic-Ocean.pdf>; accessed 5 October 2018.

61 Meeting on High Seas Fisheries in the Central Arctic Ocean (Iqaluit, 6–8 July 2016), Chairman's Statement, available at <http://www.dfo-mpo.gc.ca/international/media/statement-declaration-eng.htm>; accessed 5 October 2018.

62 Meeting on High Seas Fisheries in the Central Arctic Ocean, Tórshavn, 29 November–1 December 2016, Chairman's Statement, http://cdn.lms.fo/media/8760/chairman-s-statement-from-torshavn-meeting-2016.pdf; accessed 5 October 2018.

63 Meeting on High Seas Fisheries in the Central Arctic Ocean (Reykjavik, 27 March 2017), Chairman's Statement, available at <https://www.state.gov/e/oes/ocns/opa/rls/269126.htm>; accessed 5 October 2018.

64 Meeting on High Seas Fisheries in the Central Arctic Ocean (Washington, D.C., 28–30 November 2017), Chairman's Statement, available at <https://www.state.gov/e/oes/ocns/opa/rls/276136.htm>; accessed 5 October 2018.

65 Fourth FiSCAO Report (n 19).

66 Chair's Statement, 5th Meeting of Scientific Experts on Fish Stocks of the Central Arctic Ocean, (Ottawa, 24–26 October 2017), available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_fifth_meeting/pdfs/5th_FiSCAO_chair_statement_final.pdf>; accessed 5 October 2018.

67 On the role of China, see M Pan and H P Huntington, 'A precautionary approach to fisheries in the Central Arctic Ocean: Policy, science, and China' (2016) 63 *Marine Policy* 153–157.

68 On the role of the EU, see Liu (n 18); R Churchill, 'The European Union as an Actor in the Law of the Sea, with Particular Reference to the Arctic' (2018) 33 *International Journal of Marine and Coastal Law* 1–34, at pp. 26–28.

Process.[69] It seems that a number of considerations influenced the Arctic Five's decision to include these entities into the Broader Process. They are important regional or distant-water fishing States; they are most likely to be able to show a "real interest" within the meaning of Article 8(3) UNFSA;[70] they did in fact express their interest in participation; they represent all Arctic States by including Iceland as well as Sweden, Finland and mainland Denmark (Member States of the EU); and they include all parties to the Convention on the Conservation and Management of Pollock Resources in the Bering Sea (CCBSP)[71] and NEAFC.[72] Based on these considerations, the Broader Process can be said to have included the most important stakeholders, with all participants enjoying equal status and rights.[73] It is worth mentioning, though, that Arctic indigenous peoples were only represented in the delegations of some of the participants, including Canada, the United States and Denmark,[74] and that environmental NGOs were represented in the delegation of the United States.[75]

From the outset, the negotiations seemed to aim for a compromise solution in the sense that only consensus on all individual points of discussion would be sufficient for the conclusion of an agreement.[76] When the draft CAOF Agreement was agreed in November 2017,[77] consensus had been reached. This consensus extended to the legal status of the CAOF Agreement as a binding treaty rather than a non-binding instrument. Canada, which volunteered to act as depositary for the CAOF Agreement at the meeting in Reykjavik in

69 On the role of South Korea, see J H Choi, 'Arctic Ocean Fisheries and Korea' in Nordquist *et al.* (2017) (n 19) 204–210.

70 For a discussion of the concept of "real interest" in the present context, see the discussion of the CAOF Agreement's provisions on participation below.

71 *The Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea*, (Washington, DC, 16 June 1994), available at <https://www.afsc.noaa.gov/REFM/CBS/convention_description.htm>; accessed 5 October 2018.

72 Heidar 2017, note 19 *supra*, p. 196.

73 But see L Zou, 'Stirred Water Under the Ice Cap: An Analysis on A5's Stewardship in the Central Arctic Ocean Fisheries Management' (2016) *Arctic Yearbook* 411–424, who criticizes a perceived "unilateralism" of the Arctic Five.

74 Molenaar (n 57), at p. 3.

75 EJ Molenaar, 'The Five-Plus-Five Process on Central Arctic Ocean Fisheries in the Context of the Evolving International Law Relating to the Sea and the Arctic', Presentation, Symposium: The Role of Non-Arctic States / Actors in the Arctic Legal Order-Making (Kobe, 7–9 December 2017); available at <https://www.uu.nl/en/files/rgl-nilos-molenaar-pres-cao-fisheries-kobe-2017pdf>; accessed 5 October 2018.

76 Chairman's Statement (n 63).

77 *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*, Draft Text, 30 November 2017, on file with the authors.

March 2017,[78] has been awarded that function.[79] A final meeting of the delegations to undertake a legal and technical review took place on 7 February 2018, resulting in minor adjustments to the wording, as reflected in the final text made available, *inter alia*, by the EU Commission prior to signature.[80]

The CAOF Agreement's Substantive Scope

Fish Stocks Covered by the CAOF Agreement

The CAOF Agreement applies to "fish" and defines the term as "species of fish, molluscs and crustaceans" excluding, however, sedentary species within the meaning of Article 77(4) LOSC.[81] For the purposes of Article 77(4) LOSC, sedentary species are "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil". Coastal States enjoy sovereign rights over sedentary species by virtue of their continental shelf, not their EEZ.[82] It follows that in parts of the CAO there will be an overlap of (1) high seas, the fisheries of which are governed by the CAOF Agreement, and (2) continental shelves beyond 200 nautical miles of some of the Arctic Five, the sedentary fisheries of which are subject to exclusive coastal State jurisdiction.[83] This could potentially be relevant for sedentary stocks such as that of the non-native but commercially interesting snow crab (*Chinoecetes opilio*) which is currently spreading in the Barents Sea and might expand further north.[84] Therefore, the exclusion of sedentary species ensures that the CAOF Agreement will not interfere with

78 Chairman's Statement (n 63).

79 See Article 15(1) CAOF Agreement.

80 EU Commission, Annex to the Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement to prevent unregulated high seas Fisheries in the Central Arctic Ocean, COM (2018) 454 final, 12 June 2018.

81 See Article 1(b) CAOF Agreement, mirroring Article 1(1)(c) UNFSA.

82 See Articles 68, 77(1) and 77(4) LOSC.

83 See generally A R Maggio, 'Article 77' in Proelss (n 20), at MN. 25–26.

84 See generally H S B Hansen, 'Three major challenges in managing non-native sedentary Barents Sea snow crab (*Chionoecetes opilio*)' (2016) 71 *Marine Policy* 38–43; I Dahl and E Johansen, 'The Norwegian snow crab regime and foreign vessels – a commentary on the Juras Vilkas decision of the Øst-Finnmark District Court' (2017) *The JCLOS Blog*, available at <http://site.uit.no/jclos/files/2017/03/The-Norwegian-snow-crab-regime-and-foreign-vessels---a-commentary-on-the-Juras-Vilkas-decision-of-the-Øst-Finnmark-District-Court-.pdf>; accessed 5 October 2018.

the ongoing process of defining the outer limits of the Arctic Five's continental shelves beyond 200 nautical miles.[85]

As there are no further exclusions, the CAOF Agreement covers any fish stocks, including straddling or highly migratory species, discrete high seas stocks, and anadromous and catadromous stocks.[86] However, even without an express exclusion,[87] the CAOF Agreement's definition of "fish" cannot be held to include marine mammals such as cetaceans and seals,[88] which are governed by separate regimes such as the 1946 International Convention on the Regulation of Whaling (ICRW)[89] which established the International Whaling Commission (IWC).[90]

The Applicability of the UNFSA to the CAOF Agreement

Unlike the substantive scope of the CAOF Agreement, the scope of the UNFSA is restricted "to the conservation and management of straddling fish stocks and

85 On this topic, see AG Oude Elferink, 'The Delimitation of the Continental Shelf Beyond 200 Nautical Miles in the Arctic Ocean: Recent Developments, Applicable Law and Possible Outcomes' in Nordquist *et al.* (2016) (n 19) 53–80, with further references.

86 Other fisheries agreements expressly exclude such stocks from their scope. Examples: Article 1(h) of the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (Tokyo, 24 February 2012); available at <https://www.npfc.int/system/files/2017-01/Convention%20Text.pdf>; accessed 5 October 2018 (NPFC Convention): catadromous species and sedentary species; Article 1(f) NAFO Convention: sedentary species and, insofar as subject to regulation by other treaties, anadromous, catadromous and highly migratory species. For definitions of these types of fish stocks, see D H Anderson, 'Straddling and Highly Migratory Fish Stocks" in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012), paras. 1 ff.

87 For an express exclusion, see Article 1(h)(iii) NPFC Convention.

88 This implicit exclusion resembles the approach taken in Article I(2) CAMLR Convention. See (n 104) *infra*.

89 *International Convention for the Regulation of Whaling*, (Washington, 2 December 1946, in force 10 November 1948) 161 *UNTS* 72. Publications relevant to the regime for marine mammal conservation in the Arctic include N Bankes and E Whitsitt, 'Arctic Marine Mammals in International Environmental Law and Trade Law' in Jensen and Hønneland (n 19), 85–206; M Fitzmaurice, 'International Law and Whaling in the Arctic' in N Loukacheva (ed), *Polar Law and Resources* (Norden, Copenhagen, 2015) 99–108; N Sellheim, 'A Legal Framework for Seals and Sealing in the Arctic in Loukacheva (ed), *ibid.*, 109–118; M Fitzmaurice, 'Indigenous Whaling, Protection of the Environment, Intergenerational Rights and Environmental Ethics' (2010) 2(1) *Yearbook of Polar Law* 253–277; M Fitzmaurice 'Indigenous Whaling and Environmental Protection' (2012) 55 *German Yearbook of International Law* 419–463.

90 See <https://iwc.int/>; accessed 5 October 2018.

highly migratory fish stocks" in accordance with Article 3(1) UNFSA.[91] As the CAOF Agreement in principle also applies to stocks not covered by the wording of the UNFSA (such as discrete high seas stocks), and given that China is not a party to the UNFSA, the question could be asked whether the CAOF Agreement as a whole can be analysed in light of requirements set out by the UNFSA. However, there is a general trend towards an application of the UNFSA – or at least the rules and principles contained therein – also in the context of fish stocks other than straddling and highly migratory fish stocks.[92] It is even more important to note that reference to the UNFSA in the preamble and the operative provisions of the CAOF Agreement are evidence of the parties' intention to create a fisheries regime for the CAO that is in conformity with the UNFSA.[93]

The Relationship of the CAOF Agreement with Other Regional Agreements

The Arctic Five plus Five are cautious in ensuring that the CAOF Agreement would not affect the current legal regime of the CAO, so that it would not prejudice their rights and claims in the region and would not interfere with existing regimes. The relevant provision, Article 14 CAOF Agreement, addresses these questions on three different levels.

First, concerning the general legal framework, the parties "recognize that they are and will continue to be bound by their obligations under relevant provisions of international law" (with an express reference to the LOSC and the UNFSA).[94] The parties also

> recognize the importance of continuing to cooperate in fulfilling those obligations even in the event that [the CAOF Agreement] expires or is terminated in the absence of any agreement establishing an additional

91 MW Lodge and SN Nandan, 'Some Suggestions Toward Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995' (2005) 20 *The International Journal of Marine and Coastal Law* 345–379, at pp. 371–373.

92 See Y Takei, *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems* (Brill Nijhoff, Leiden, 2013) 106–109; UNGA Res. 60/31, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/31>; accessed 5 October 2018, para. 12: "[e]ncourages States, as appropriate, to recognize that the general principles of the [UNFSA] should also apply to discrete fish stocks in the high seas"; Anderson (n 86), at para. 27, who argues that the "general provisions [of UNCLOS] have now to be interpreted together with and in the light of their elaboration in the [UNFSA]".

93 See Articles 3(6), 7, 14(1) and 14(3).

94 Article 14(1).

> regional or subregional fisheries management organization or arrangement for managing fishing in the Agreement Area.[95]

This is merely a reference to the general duty to cooperate.

Second, concerning the rights and obligations of the Parties arising from that general legal framework, Article 14(2) states that

> [n]othing in this Agreement shall prejudice the positions of any Party with respect to its rights and obligations under international agreements and its positions with respect to any question relating to the law of the sea, including with respect to any position relating to the exercise of rights and jurisdiction in the Arctic Ocean.

In particular, the CAOF Agreement will not prejudice the rights, jurisdiction and duties of any party under the applicable international legal regime, specifically not "the right to propose the commencement of negotiations on the establishment" of regional fisheries management organizations or arrangements (RFMOs/As) in the CAOF Agreement Area.[96] This last clause appears to be a reference to Article 8(2) UNFSA which provides that "consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks".

Third, Article 14(4) provides that the parties' rights and obligations arising from "other agreements compatible with [the CAOF Agreement] and that do not affect the enjoyment by other Parties of their rights or the performance of their obligations under [the CAOF Agreement]" shall not be altered by the CAOF Agreement. Moving beyond the rights and obligations of the parties themselves, Article 14(4) also acknowledges the role of fisheries bodies established by such agreements from an institutional perspective by holding that the CAOF Agreement "shall neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries management". This appears to specifically refer to those fisheries agreements which are relevant for the CAOF Agreement Area, namely, NEAFC, the Joint Russian-Norwegian Fisheries Commission, NASCO, and – at least theoretically – ICCAT. This interpretation is confirmed by the CAOF Agreement's preamble, which underlines "the importance of ensuring cooperation and coordination between the Parties and [...] other relevant mechanisms for fisheries management that are established and operated in accordance with international law, as well as

95 *Ibid.*

96 Article 14(3).

with relevant international bodies and programs". In particular, the preamble *expressly* acknowledges the role of NEAFC, which "has competence to adopt conservation and management measures in part of the high seas portion of the central Arctic Ocean". It is notable that there is no express reference to the Joint Russian-Norwegian Fisheries Commission, and to the Commission's theoretical competence to manage fisheries in the CAO. The reasons for this omission are subject to speculation. Perhaps Norway and Russia did simply not manage to convince the other parties to include such a reference, in which case ambiguity remains with regard to whether (theoretically) commercial fishing activities conducted under the auspices of the Commission would be "unregulated" and thus fall within the scope of the CAOF Agreement's interim measures concerning unregulated commercial fishing.[97] Alternatively, Norway and Russia might have agreed that the Commission has no role to play in the CAO besides the CAOF Agreement.

The CAOF Agreement's Spatial Scope

The CAOF Agreement's spatial scope extends to the CAOF Agreement Area, which is defined as "the single high seas portion of the central Arctic Ocean that is surrounded by waters within which Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America exercise fisheries jurisdiction".[98] This area accounts for approximately 1.1 million square miles of high seas (see figure 1). Three observations can be made with regard to the definition of the CAOF Agreement Area in relation to (1) compatibility between coastal and high seas fisheries management in the CAO, (2) the spatial overlap of the CAOF Agreement Area with the NEAFC Convention Area, and (3) the implicit exclusion of Svalbard's Fisheries Protection Zone from the CAOF Agreement Area.

Compatibility between Coastal and High Seas Fisheries Management in the CAO

Article 9(1)(b) UNFSA requires States (albeit with respect to RFMOs/As)[99] to agree on "the area of application, taking into account [Article 7(1)], and the

97 Rayfuse (n 19), at p. 44 submits (with respect to the Oslo Declaration) that "[t]he argument can thus be made that Norway and Russia remain entitled to authorize commercial fishing by their vessels in the Central Arctic Ocean".

98 Article 1(a).

99 The issue of whether the CAOF Agreement can be classified as an RFMA will be dealt with in the last chapter.

characteristics of the subregion or region, including socio-economic, geographical and environmental factors". Under Article 7(1) UNFSA, coastal States and States fishing in the high seas for the same straddling or highly migratory stocks found within and beyond national jurisdiction must cooperate with respect to the conservation and management of these stocks. In addition, Article 7(2) UNFSA lays down a duty to cooperate for coastal States and high sea fishing States "for the purpose of achieving compatible measures in respect of [straddling and highly migratory stocks]" so that conservation and management measures adopted for the high seas and for maritime zones under national jurisdiction with respect to straddling or highly migratory fish stocks are "compatible in order to ensure that these stocks are conserved and managed in their entirety".[100] The rationale of the compatibility principle is that because both straddling and highly migratory fish stocks are not restricted to either the high seas or maritime zones under national jurisdiction, coastal State measures and multilateral measures must not contradict or undermine each other, as they would otherwise not provide for effective management and conservation of the stocks concerned.[101] Similarly, an ecosystem-based approach to international fisheries management as envisaged by Article 5 UNFSA would require, *inter alia*, "conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks".[102]

However, as is obvious from the definition of the CAOF Agreement Area, the spatial scope of the CAOF Agreement is based entirely on legal considerations rather than on ecosystem or even stock-focused management considerations. This exclusive focus on the high seas of the CAO was criticized during the negotiations[103] as it might constitute a challenge for effective management in light of the mobility, as well as interdependencies, of fish stocks and associated or dependent species. By contrast, the spatial scope of the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CAMLR Convention),[104] which established the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), has been held to constitute "in itself a

100 Article 7(2) UNFSA.

101 See, e.g., D Diz Pereira Pinto, *Fisheries Management in Areas beyond National Jurisdiction: The Impact of Ecosystem-Based Law-Making* (Brill Nijhoff, Leiden, 2010) 93–98; Heidar (n 19), at p. 185.

102 Churchill (n 19), at p. 154; Tang (n 19), at pp. 218–219.

103 *Ibid.*, at p. 194; Molenaar 2016 (n 19), at p. 450.

104 *Convention for the Conservation of Antarctic Marine Living Resources* (Canberra, 20 May 1980, in force 7 April 1982) 1329 *UNTS* 47.

manifestation of an ecosystemic view of the ocean" because it includes the area south of the Antarctic Convergence that forms part of the marine Antarctic ecosystem.[105]

It has also been suggested that, as far as straddling and highly migratory fish stocks are concerned, restrictions in the CAOF Agreement Area which are not accompanied by similar restrictions in the maritime zones of the Arctic Five might run contrary to the compatibility principle.[106] However, nothing in Article 7 UNFSA suggests that, for example, stricter measures for high seas fisheries based on a precautionary approach would contradict the purpose of the compatibility principle. Additionally, it is not clear to what extent straddling and highly migratory stocks, insofar as they are currently exploited in the maritime zones of the Arctic Five, will be relevant for potential future commercial fisheries in the high seas of the CAO. Furthermore, the issue of compatibility is not ignored by the CAOF Agreement, which makes express reference to – and copies part of the wording of – Article 7 UNFSA.[107] Given that all relevant coastal States are among the parties to the CAOF Agreement, compatibility should be an achievable goal. On the other hand, some authors have voiced concerns over the fact that the CAOF Agreement could be used by the Arctic Five to protect their coastal fisheries without adopting similarly strict conservation measures.[108]

Spatial Overlap with the Regulatory Area of NEAFC

The parties of the CAOF Agreement decided not to exclude that portion of the high seas area of the CAO from the CAOF Agreement Area which falls within the NEAFC Convention Area. Already during the negotiations, this approach was criticized in light of the fact that all NEAFC members participated in the negotiations, and that an additional future RFMO/A needlessly creates a regulatory overlap.[109] On the other hand, the representation of the NEAFC members in the CAOF Agreement will likely avoid a conflict between those two regimes.[110]

105 A Fabra and V Gascón, 'The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach' (2008) 23 *International Journal of Marine and Coastal Law* 567–598, at p. 574.

106 Heidar (n 19), at p. 185.

107 Article 3(6).

108 L Zou and HP 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 pp. 133–136.

109 Molenaar 2016 (n 57), at p. 4; Heidar (n 19), at p. 197.

110 This is particularly true in light of the decision-making procedures under the CAOF Agreement discussed below.

Implicit Exclusion of Svalbard's Fisheries Protection Zone

The wording "waters within which [...] exercise fisheries jurisdiction" seems to have been carefully chosen instead of the usual reference to "areas under national jurisdiction" in the UNFSA[111] and in regional fisheries agreements.[112] The reason appears to be that there was no agreement among the Arctic Five plus Five regarding the spatial scope of the 1920 Spitsbergen Treaty[113] which, in Article 2, recognizes the "full and absolute sovereignty of Norway" over Spitsbergen (or Svalbard).[114] The Arctic Five plus Five (with the exception of the EU) are among the 46 parties of the Spitsbergen Treaty.[115] The Spitsbergen Treaty also states in Article 2 that "[s]hips and nationals of all the high contracting parties shall enjoy equally the rights of fishing [in Svalbard's] territorial waters". There is considerable disagreement as to whether the right to equal access to the fisheries of Svalbard's "territorial waters" nowadays also extends to Svalbard's Fisheries Protection Zone (FPZ) and continental shelf.[116] Whereas Norway maintains that this is not the case, other States have expressed the opposite view. In the past, Russia and Iceland have even taken the position that Norway may not establish maritime zones beyond the territorial sea at all, but they seem to have changed their view.[117] Similarly, the EU seems to no longer challenge Norway's jurisdiction in these areas as such, but demands equal access to all of Svalbard's maritime zones in accordance with the EU's interpretation of the Spitsbergen Treaty.[118] Thus, the wording "waters within which [...] exercise fisheries jurisdiction" in Article 1(a) CAOF Agreement can best be understood in terms of a compromise formula that fulfils three objectives: first, it clarifies that, in any case, Svalbard's maritime zones are not within the spatial scope of the CAOF Agreement. Second, it recognizes that Norway is

111 Article 3(1) UNFSA.

112 Cf. Article 1(p) NAFO Convention; Article 5 of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 14 November 2009, inforce 24 August 2012) [2012] ATS 28 (SPRFMO Convention).

113 Treaty relating to Spitsbergen (Paris, 9 February 1920, in force 14 August 1925) (1924) 18 *American Journal of International Law* 199–208.

114 Molenaar (n 75).

115 Treaty status available at <http://basedoc.diplomatie.gouv.fr/exl-php/cadcgp.php>; accessed 5 October 2018.

116 For detailed discussion, see EJ Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard' (2012) 27 *The International Journal of Marine and Coastal Law* 3–58, at pp. 10 ff.; G Ulfstein and R Churchill, 'The Disputed Maritime Zones around Svalbard' in MH Nordquist, T Heidar and JN Moore (eds), *Changes in the Arctic Environment and the Law of the Sea* (Brill Nijhoff, Leiden, 2010) 551–593.

117 See the references provided by Molenaar (n 116), at pp. 18 ff.

118 *Ibid.*, at pp. 21 ff.

entitled to exercise fisheries jurisdiction in Svalbard's maritime zones. Third, it avoids any concession that these zones are maritime zones of Norway from which Norway can exclude other States. Seen from this perspective, the CAOF Agreement does not prejudice the parties' positions on the matter.

To What Extent Does the CAOF Agreement Apply a Precautionary Approach?

Most observers would agree that the lack of scientific data and the associated scientific uncertainties regarding ecosystems and (future) fish stocks in the CAO demand the application of a precautionary approach.[119] The following section thus assesses to what extent the CAOF Agreement indeed applies such an approach. First, the status and requirements of the precautionary approach in international fisheries law is briefly addressed. Second, the stated objectives of the CAOF Agreement are analysed. Third, the operative part of the CAOF Agreement is assessed against the requirements of the precautionary approach and the stated objectives of the CAOF Agreement. In that regard, particular attention will be paid to the provisions on "Interim Conservation and Management Measures Concerning Fishing", the Joint Program of Scientific Research and Monitoring (JPSRM), the CAOF Agreement's decision-making procedures and the adequacy of the CAOF Agreement's compliance mechanisms.

The Precautionary Approach in International Fisheries Law

To this day, the precautionary approach (or "precautionary principle", insofar as the terms are often used interchangeably)[120] is, as far as its legal status, content and consequences are concerned, surrounded by considerable controversy. It has been observed that much of the debate is related to the fact that different "versions" of the precautionary approach are held by different commentators to reflect customary international law, without sufficient attention being paid to the fact that the precautionary approach, although codified in numerous multinational environmental agreements, is often framed in different terms.[121] In light of the fact that a rule or principle of customary international law can only be considered as being valid if and to the extent to which

119 See Heidar (n 19), at p. 184.

120 See the discussion by D Freestone, "The Marine Environment" in JB Wiener, MD Rogers, JK Hammitt and PH Sand (eds), *The Reality of Precaution: Comparing Risk Regulation in the US and Europe* (RFF Press, Washington DC, 2010) 177–200.

121 P Sands and J Peel, *Principles of International Environmental Law* (3rd ed, Cambridge University Press, Cambridge, 2012) 219 ff.; J Wiener, 'Precaution' in D Bodansky, J Brunnée

the underlying practice is sufficiently uniform, only the broadest version of the precautionary approach can be held to be accepted as customary international law.[122] This version is arguably enshrined in Principle 15 of the Rio Declaration, which highlights that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[123] As such, the "core characteristic feature is environmental action in the face of scientific uncertainty".[124]

As far as the specific case of international fisheries law is concerned, however, it must not be ignored that Article 6 UNFSA expressly requires the parties to the UNFSA to "apply the precautionary approach widely to conservation, management and exploitation of straddling and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment". The UNFSA, to which also the United States (generally acting as persistent objector concerning the validity of the precautionary principle under customary international law) has acceded,[125] further substantiates the content of this approach as well as the consequences of its application in Article 6 and in its Annex II, which prescribes guidelines for the application of precautionary reference points in the conservation and management of straddling and highly migratory fish stocks. Taking into account that Principles 6.5 and 7.5 of the FAO Code of Conduct contain similar specifications of the precautionary approach, and that this approach has been adopted within the practice of numerous RFMOs, it is submitted that the precautionary approach has become established as a general principle of fish stocks management.[126] This conclusion is

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and E Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007) 597–612, at pp. 604 ff.

122 P Birnie, A E Boyle and C Redgwell, *International Law and the Environment* (3rd ed, Oxford University Press, Oxford, 1999) 160–161, at p. 163; A Proelss, 'Prinzipien des internationalen Umweltrechts' in A Proelss (ed), *Internationales Umweltrecht* (De Gruyter, Berlin, 2017) 69–104, at pp. 86–87.

123 Rio Declaration on Environment and Development (1992) 31 *International Legal Materials* 874, at p. 879; UN Doc A/CONF.151/26.

124 Schröder, 'Precautionary Approach/Principle' in Wolfrum (note 86), at para. 2; see also D Cameron and J Abouchar, 'The Status of the Precautionary Principle in International Law' in D Freestone and E Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer Law International, Alphen aan den Rijn, 1996) 29–52, at p. 45.

125 Note that in their declaration submitted under Article 43 UNFSA, the United States has not in any way questioned the duty to apply the precautionary approach as defined in the UNFSA.

126 See, e.g., R Barnes and C Massarella, 'High Seas Fisheries' in E Morgera and K Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar

also supported by the decision of the International Tribunal for the Law of the Sea (ITLOS) in the *Southern Bluefin Tuna Cases*, where the ITLOS clarified that the principles of environmental protection codified in Part XII of the LOSC, including (although not expressly mentioned) the precautionary approach,[127] are also applicable to species protection and fisheries management measures.[128] Indeed, given the remarkable differences in the evaluation of the state of fish stocks as well as the fact that fish are extremely hard to monitor compared to other groups of animals, international fisheries law may be regarded as the prime example for the need to apply a precautionary approach.

All that said, it should not be ignored that the legal consequences of applying the precautionary approach cannot be determined in a general manner, but rather depend on the individual case, i.e., on how the precautionary approach has been framed in the specific context of the applicable fisheries treaty.[129] Whereas it is safe to conclude that a complete disregard for stock sizes, or the repeated enactment of total allowable catches (TACs) resulting in fishing mortalities that exceed a stock's maximum reproductive potential, respectively, will usually violate the precautionary approach,[130] there is typically more than one possible precautionary management measure that can be taken. As regards its normative content, the precautionary approach does not embody a general prohibition, but an optimizing imperative that requires a balancing of the specific circumstances involved in the case at hand.[131]

Publishing, Cheltenham, 2016) 369–389, at pp. 374–375; D Freestone, 'International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, Oxford, 1999) 135–164; J M Van Dyke, 'The Evolution and International Acceptance of the Precautionary Principle' in D D Caron and H N Scheiber, *Bringing New Law to Ocean Waters* (Brill Nijhoff, Leiden, 2004) 357–379.

127 *Southern Bluefin Tuna* (*Australia* v. *Japan; New Zealand* v. *Japan*), Order of 27 August 1999, [1999] ITLOS Rep. 280–301, at p. 296. Cf. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (*SRFC*), Advisory Opinion of 2 April 2015, [2015] ITLOS Rep. 4–70, at p. 59. For further references, see A Proelss, 'Fisheries' in Morgera and Kulovesi (eds) (n 126) 178–197, at pp. 182–183.

128 *Southern Bluefin Tuna* (n 127), at p. 295.

129 Takei (n 92), at pp. 96–101.

130 See Proelss (n 127), at pp. 178, 186 and 191.

131 For further reasoning, see Proelss (n 122), at pp. 69, 90–96. Specifically in the context of high seas fisheries, see also Takei (n 92), at pp. 99–101; F Orrego Vicuña, 'The Law Governing High Seas Fisheries: In Search of New Principles' (2004) 18 *Ocean Yearbook* 383–394, at p. 387: "[I]n fisheries activities scientific uncertainty is always the rule. It follows that activities cannot be paralysed until having full scientific certainty that no environmental damage will ensue".

Interim Conservation and Management Measures Concerning Fishing

Article 3 CAOF Agreement provides for "Interim Conservation and Management Measures Concerning Fishing" in the CAOF Agreement Area. For the purposes of the CAOF Agreement, "fishing" refers to "searching for, attracting, locating, catching, taking or harvesting fish or any activity that can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish".[132] Thus, the CAOF Agreement adopts a broad concept of fishing that covers any forms of incidental catch and bycatch that might occur during activities in the CAOF Agreement Area. As the CAOF Agreement distinguishes between commercial and non-commercial fishing, these two categories are addressed separately.

Commercial Fishing

Article 1(d) CAOF Agreement defines "commercial fishing" as "fishing for commercial purposes". Prior to the adoption of the CAOF Agreement, there were repeated calls for a temporary moratorium on commercial fishing based on a precautionary approach to fisheries in the CAO, i.e., pending the availability of adequate scientific knowledge of the target stocks.[133] In that regard, one should bear in mind that a temporary ban or moratorium on commercial fishing represents a fisheries management measure in the form of a non-allocation of fishing opportunities (quota or TAC of zero) itself.[134] Depending on the state of scientific knowledge concerning stock biomass and distribution, and on the interrelationship between commercially fished stocks and the marine ecosystems concerned, such a ban can be regarded as reflecting the precautionary approach to the conservation and management of straddling and highly

132 Article 1(c).

133 Churchill (n 19), at p. 154; PEW Charitable Trusts, 'The International Waters of the Central Arctic Ocean: Protecting Fisheries in an Emerging Ocean' available at <http://www.pewtrusts.org/~/media/assets/2014/pewfisheriesmapbook_english_updated2014_current.pdf?la=en>; accessed 5 October 2018; PEW Charitable Trusts, 'An Open Letter from International Scientists' available at <http://www.pewtrusts.org/~/media/legacy/oceans_north_legacy/page_attachments/international-arctic-scientist-letter-with-sigs-522012.pdf?la=en>; accessed 5 October 2018; PEW Charitable Trusts, 'An Open Letter from International Scientists' available at <https://oceanconservancy.org/wp-content/uploads/2017/10/CAO-scientistLetterFINAL2017.pdf>; accessed 5 October 2018; Point 21 of Kitigaaryuit Declaration, 12th General Assembly of the Inuit Circumpolar Council (ICC) (24 July 2014), available at <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/img-724172331.pdf>; accessed 5 October 2018.

134 See also Heidar (n 14), at p. 184: "catch limits may be low, even zero".

migratory fish stocks as envisaged by Article 6 and Annex II UNFSA.[135] For example, the United States adopted legislation as early as 2009, prohibiting commercial fishing for almost all stocks in the Arctic maritime zones of the United States until there is sufficient scientific data supporting the commencement of sustainable commercial fishing.[136] In 2014, Canada also adopted similar legislation incorporating both a precautionary and an ecosystem-based approach for the management of its Arctic fisheries in the Canadian Beaufort Sea.[137] As far as high seas fishing moratoria adopted by RFMOS/AS are concerned, the ongoing interim moratorium on fishing for Alaska pollock established in 1992 and incorporated into the CCBSP in 1994 is a good example – albeit not one of timely precautionary action but an attempt to protect and restore a collapsed fishery.[138]

It should be taken into account, though, that a moratorium constitutes the strictest of many measures available to implement the precautionary approach. As stated, the precautionary approach does not demand a ban on a potentially harmful activity under all circumstances but may, depending on factors such as the degree of potential adverse environmental impacts and of scientific uncertainty concerning the size and recruitment rate of the stocks concerned, allow reduced activity. Thus, in the absence of considerable scientific uncertainty, the adoption of a moratorium is not necessarily demanded, or even supported, respectively, by the precautionary approach. One example of such an unjustified moratorium would arguably be the temporary but consistently extended moratorium on commercial whaling imposed by the IWC with respect to species listed as of "least concern" by the International Union for the Conservation of Nature (IUCN) and other scientific bodies.[139]

On closer inspection, however, it should be noted that the CAOF Agreement does precisely not impose a complete moratorium on commercial fishing. Rather, like the non-binding 2015 Oslo Declaration, which is also "noted" in the preamble of the CAOF Agreement, the CAOF Agreement envisages a

135 *Ibid.*; Papastavridis (n 19), at p. 338.

136 'Fishery Management Plan for Fish Resources of the Arctic Management Area' available at <https://www.npfmc.org/wp-content/PDFdocuments/fmp/Arctic/ArcticFMP.pdf>; accessed 5 October 2018.

137 See B Ayles, L Porta and R McV Clarke, 'Development of an Integrated Fisheries Co-Management Framework for New and Emerging Commercial Fisheries in the Canadian Beaufort Sea' (2016) 72 *Marine Policy* 246–254.

138 For a basic comparison, see Zou and Huntington (n 108), at pp. 135–136.

139 See e.g., A Proelss, 'Marine Mammals' in Wolfrum (note 86), at para. 16. An example would be the Common Minke Whale (*Balaenoptera acutorostrata*).

moratorium on *unregulated* commercial fishing.[140] Based on the objective of the CAOF Agreement, which "is to prevent unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks",[141] the Arctic Five plus Five appear to consider that the moratorium constitutes a precautionary measure. The parties may still authorize commercial fishing by vessels entitled to fly their flag. First, they may do so pursuant to

> conservation and management measures for the sustainable management of fish stocks adopted by one or more regional or subregional fisheries management organizations or arrangements, that have been or may be established and are operated in accordance with international law to manage such fishing in accordance with recognized international standards.[142]

Second, they may do so pursuant to "interim conservation and management measures that may be established by the Parties pursuant to Article 5, paragraph 1(c)(ii)".[143] In conjunction with these two options, the interim measures reflect a "'stepwise process' in advance of establishing in the future regional or subregional fisheries management organizations or arrangements [for the CAOF Agreement Area]".[144] The practice of adopting interim measures prior to the establishment of an RFMO/A is not without precedent. Besides the non-binding interim measures contained in the 2015 Oslo Declaration, which could be considered as a first step prior to the adoption of a binding framework for a stepwise approach, there have also been non-binding interim measures prior to the establishment of other RFMOs/As such as the South Pacific Regional Fisheries Management Organization (SPRFMO).[145]

The first option makes clear that, in principle, commercial fishing may be conducted under the auspices of existing RFMOs/As with competence to regulate fisheries in (parts of) the CAOF Agreement Area, in particular NEAFC. Under generally accepted definitions, fishing in compliance with the

140 With respect to the Oslo Declaration, see Ryder (n 57), at pp. 5–6; Molenaar 2016 (n 57), at p. 453.
141 Article 2.
142 Article 3(1)(a).
143 Article 3(1)(b).
144 Chairman's Statement, Reykjavic, 27 March 2017 (n 63).
145 See discussion by Tang (n 19), at pp. 223–224.

conservation and management measures of an RFMO/A does not constitute "unregulated fishing".[146] As is evident from the words "may be established", Article 3(1)(a) also does not prevent the establishment of a new RFMO/A with the competence to regulate fisheries in the CAOF Agreement Area and the granting of authorizations to fish under such a newly established RFMO/A.

However, regulation by an RFMO/A does not *per se* suffice to meet the requirements imposed by the CAOF Agreement. Instead, the relevant RFMO/A must be "operated in accordance with international law to manage such fishing in accordance with recognized international standards".[147] The reference to "international law" certainly includes the LOSC and the UNFSA, both of which are expressly mentioned in the preamble of the CAOF Agreement, as well as general international law. That said, the question arises as to what constitutes "recognized international standards" in the context of the CAOF Agreement. Given the express reference in the preamble, it appears that the term includes the FAO Code of Conduct and probably other soft-law instruments with a similar level of international acceptance. During the negotiations it was suggested by commentators that the term is "probably intended to comprise key obligations of international fisheries law, such as ecosystem and precautionary approaches, with particular attention to new and exploratory fisheries".[148] In this regard, it is noteworthy that whereas the 2015 Oslo Declaration used the term "recognized international standards", the Chairman's Statement after the meeting in Nuuk in February 2014 used the term "modern international standards".[149] It has been argued that the latter standard might have been preferable to the former because, arguably, it puts "greater emphasis on more recently developed approaches in international fisheries law and management, such as the precautionary approach and ecosystem-based fisheries management".[150] On the other hand, the standard of "recognized international standards" resembles that of "generally recommended international minimum

146 See, in particular, para. 3(3) IPOA-IUU: "Unregulated fishing refers to fishing activities [...] in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or [...] in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law".

147 Article 3(1)(a).

148 Heidar (n 19), at p. 193; Molenaar 2016 (n 19), at p. 462.

149 Chairman's Statement, Nuuk, 24–26 February 2014 (n 52).

150 Ryder (n 57), at pp. 5–6.

standards" adopted by the LOSC, the UNFSA and other international fisheries instruments.[151]

The second option, i.e., Article 3(1)(b) in conjunction with Article 5(1)(c)(ii), permits commercial fishing *directly* pursuant to conservation and management measures adopted *under the CAOF Agreement itself* pending negotiations under Article 5(1)(c)(i) concerning the establishment of a new RFMO/A. Therefore, Article 3(1)(b) comes into play when two requirements are met. First, the parties must have determined under Article 5(1)(c)(i), on the basis of considerations that the "distribution, migration and abundance of fish in the Agreement Area would support a sustainable commercial fishery" as mentioned in the chapeau of Article 5(1)(c), "to commence negotiations to establish one or more additional regional or subregional fisheries management organizations or arrangements for managing fishing in the Agreement Area". These considerations must be based on scientific information derived from the JPSRM, the scientific programs of the parties and from "other relevant sources", and must take into account "relevant fisheries management and ecosystem considerations, including the precautionary approach and potential adverse impacts of fishing on the ecosystem".

Second, the parties must have decided "to establish additional or different interim conservation and management measures in respect of those stocks in the Agreement Area" under Article 5(1)(c)(ii). This last step, which can only be taken after the commencement of negotiations pursuant to Article 5(1)(c)(i), must (again) be based on the above-mentioned considerations and requires that the parties have agreed on "mechanisms to ensure the sustainability of fish stocks". Thus, the permission to fish in accordance with Article 3(1)(b) aims to ensure that commercial fishing is both possible *and* based on proper regulation during the transition period from the CAOF Agreement to a new RFMO/A with competence to regulate fisheries in the CAOF Agreement Area. At the same time, Article 3(1)(b), together with Article 5(1)(c)(ii), establishes a competence for CAOF State parties to conserve and manage fisheries *directly* under the CAOF Agreement – as soon as negotiations are triggered pursuant to Article 5(1)(c)(i). The ramifications of these findings for the classification of the CAOF Agreement will be discussed in the next section. Finally, given that both Articles 5(1)(c)(i) and (ii) can only be used "on the basis" of, *inter alia*, scientific information obtained through the JPSRM, which itself must only be established within two years from entry into force of the CAOF Agreement, it could be argued that Articles 5(1)(c)(i) and (ii) cannot be triggered until the

151 *Ibid.* See, for example, Article 119(1)(a) LOSC; Articles 5(b) and 10(c) UNFSA. See also Article 30(5) UNFSA: "generally accepted standards".

JPSRM has generated such scientific information – i.e., potentially after more than two years have passed. This would also be in line with a precautionary approach.

The fact that the CAOF Agreement does not impose a full moratorium on commercial fisheries in the CAOF Agreement Area does not come as a surprise. It has been suggested that the reason for the Arctic Five plus Five's scepticism towards a real moratorium on commercial fishing in the CAO might be related to the decision-making mechanism of the CAOF Agreement and experiences in other international fora for the management of marine living resources.[152] For example, due to the required three-fourths majority for decisions at the IWC, States interested in commercial whaling have been unable to lift the IWC's moratorium on commercial whaling, at least with respect to some species and stocks that might support sustainable exploitation.[153] In light of the consensus requirement for decision-making under the CAOF Agreement,[154] the danger of even a single State blocking a decision to lift a moratorium once it is imposed would have been a real one.

Non-commercial Fishing

The CAOF Agreement distinguishes expressly between two types of non-commercial fishing, namely exploratory fishing and fishing for scientific purposes. Although recreational and subsistence fisheries are not expressly mentioned, they, arguably, can also be classified as non-commercial fishing.[155] The classification is important because the interim measures adopted under Article 3 CAOF Agreement, just like the commitments under the 2015 Oslo Declaration,[156] apply only to commercial fishing. "Exploratory fishing" is defined as "fishing for the purpose of assessing the sustainability and feasibility of future commercial fisheries by contributing to scientific data relating to such fisheries".[157] The second type of non-commercial fishing addressed by the CAOF Agreement is fishing for scientific purposes. The CAOF Agreement encourages parties to conduct scientific research both under the JPSRM and under their respective national scientific programs.[158]

The CAOF Agreement exempts non-commercial fisheries from a direct application of the interim measures under Article 3. This brings with it some risks

152 Molenaar 2016 (n 19), at pp. 454–455, 462; Heidar (n 19), at p. 195.
153 Molenaar, *ibid.*, at pp. 454–455, 462; Heidar, *ibid.*, at p. 195.
154 See discussion on decision-making procedures below.
155 Molenaar (n 51), at p. 10.
156 Molenaar 2016 (n 16), at p. 451; Heidar (n 19), at p. 194.
157 Article 1(e).
158 Article 3(2).

for effective precautionary management. Given previous experiences with the misuse of exceptions to moratoria, for example that of Article VIII of the ICRW and Japanese scientific research whaling, the interests of States wanting to explore potential future commercial fisheries and conservationist States have to be carefully balanced. Exploratory fisheries have proven to be particularly challenging for precautionary fisheries management in the practice of RFMOs.[159] Indeed, there appears to have been some disagreement during the negotiations of the CAOF Agreement with regard to the question of whether exploratory fishing should be classified as non-commercial or commercial fishing.[160]

This explains why the CAOF Agreement contains some significant safeguards. Exploratory fishing may only be authorized by the parties pursuant to conservation and management measures established on the basis of Article 5(1)(d) CAOF Agreement.[161] Under that provision, the parties have three years to establish "conservation and management measures for exploratory fishing in the Agreement Area". In accordance with these measures, exploratory fishing, *inter alia*, shall not undermine the objective of the CAOF Agreement[162] and "be limited in duration, scope and scale to minimize impacts on fish stocks and ecosystems and shall be subject to standard requirements set forth in the data sharing protocol adopted in accordance with Article 4, paragraph 5".[163] It is important to note that this means that Article 5(1)(d) establishes competence to adopt conservation and management measures *directly* under the CAOF Agreement. In this regard, it has been suggested that CCAMLR's measures for regulation of exploratory fishing "appear to be the most plausible manifestations of current 'recognised international standards'".[164]

In addition, the parties may only authorize exploratory fishing "on the basis of sound scientific research and when it is consistent with the [JPSRM] and

159 See generally R Caddell, 'Precautionary Management and the Development of Future Fishing Opportunities: The International Regulation of New and Exploratory Fisheries' (2018) 33 *International Journal of Marine and Coastal Law* 1–66.

160 According to Molenaar (n 51), at p. 10, reference was made to the practice by CCAMLR regarding exploratory fishing, which, however, has its own "inconsistencies and shortcomings". See the discussions in CCAMLR, Report of the Thirty-fourth Meeting (2015), available at <https://www.ccamlr.org/en/system/files/e-cc-xxxiv_4.pdf>; accessed 5 October 2018, 9.11–9.21.

161 Article 3(3).

162 Article 5(1)(d)(i).

163 Article 5(1)(d)(ii). This is in line with the Oslo Declaration, in which the Arctic Five also pledged to "ensure that any non-commercial fishing in this area does not undermine the purpose of the interim measures, is based on scientific advice and is monitored, and that data obtained through any such fishing is shared". See Oslo Declaration (n 56).

164 Caddell (n 159), at p. 49.

[their] own national scientific program(s)"[165] and "after [they have] notified the other Parties of [their] plans for such fishing and [they] provided other Parties an opportunity to comment on those plans".[166] The CAOF Agreement does not, however, require approval of exploratory fishing by the meeting of the parties.[167] Finally, the parties must "adequately monitor any exploratory fishing that [they have] authorized and report the results of such fishing to the other Parties"[168] – a duty that, as is demonstrated by reference to Article 6(6) UNFSA, reflects requirements stemming from the precautionary approach. It follows that the CAOF Agreement itself aims to ensure that no unregulated exploratory fishing takes place in the CAOF Agreement Area.

With regard to fishing for scientific purposes, the parties have a supervisory obligation of due diligence to ensure (insofar as their scientific research activities involve the catching of fish) that these activities "do not undermine the prevention of unregulated commercial and exploratory fishing and the protection of healthy marine ecosystems".[169] In addition, the CAOF Agreement "encourages" the parties to inform each other about their intention to issue such authorizations.[170]

Duration of the Interim Measures and the CAOF Agreement

Following its entry into force, the CAOF Agreement will, as a result of the sunset clause in Article 13(1), remain in force for a period of sixteen years. After the expiration of this initial time period, the CAOF Agreement will automatically renew itself for successive periods of five years.[171] Any party can prevent this automatic renewal by either presenting a formal objection at the last meeting of the parties prior to the expiration of the initial or a subsequent extension period,[172] or by sending a formal objection to the depositary no later than six

165 Article 5(1)(d)(iii).

166 Article 5(1)(d)(iv).

167 Also noted by E J Molenaar, 'An Introduction to the Central Arctic Ocean Fisheries Agreement', Presentation, Seminar: Breaking New Ground in the Melting North: A Fisheries Agreement for the Central Arctic Ocean', Brussels, 13 February 2018, available at <https://www.uu.nl/en/files/molenaar-presentation-caof-agreement-2018-02-13pdf>; accessed 5 October 2018.

168 Article 5(1)(d)(v).

169 Article 3(4). On the concept of due diligence obligations in international fisheries law, see *SRFC Advisory Opinion* (n 127), at paras. 125 ff.; VJ Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47(4) *Ocean Development and International Law* 327–345, at pp. 335 ff.

170 Article 3(4).

171 Article 13(2).

172 Article 13(2)(a).

months prior to the expiration of the relevant period.[173] This reflects the strong position of the individual parties to the CAOF Agreement and particularly concerns about "multilateral creeping coastal State jurisdiction" by the Arctic Five among the other parties.[174] The use of a sunset clause with a fixed time period, subject to renewal, is similar to the Ross Sea Marine Protected Area (MPA) established by CCAMLR, which entered into force on 1 December 2017 and covers an area of approximately 1.5 million km^2.[175] The Ross Sea MPA is subject to a sunset clause providing for a period of 35 years, subject to renewal or replacement by consensus.[176] Fishing is generally prohibited in the Ross Sea MPA,[177] except for krill fishing in a designated Krill Research Zone.[178] In addition, special restrictions on fishing apply in a designated Special Research Zone (SRZ) unless they are renewed by consensus after 30 years.[179]

Whereas withdrawal does not affect the status of the CAOF Agreement, a timely objection to an extension of the Agreement's duration will terminate the treaty. If negotiations concerning the establishment of a new RFMO/A in the CAOF Agreement Area are started, the parties are obliged to "provide for an effective transition" between the CAOF Agreement and the new regime in order to "safeguard healthy marine ecosystems and ensure the conservation and sustainable use of fish stocks".[180]

Joint Program of Scientific Research and Monitoring (JPSRM)

Given that a precautionary approach frequently involves "a more proactive role for scientific information",[181] it also requires or at least suggests the reduction of scientific uncertainty. The interrelationship, established by the precautionary approach, between the adoption of fisheries management measures and the constant need to update their scientific basis is implicitly reflected in the notion of "best scientific information available" used by Article 6(3)(a)(b)

173 Article 13(2)(b).

174 EJ Molenaar, 'The CAOF Agreement: Key Issues of International Fisheries Law', Presentation, Conference: New Knowledge and Changing Circumstances in the Law of the Sea (Reykjavik, 28–30 June 2018), available at <http://icelandkmiconference2018.com/>; accessed 5 October 2018.

175 CCAMLR, Conservation Measure 91–05 (2016), Ross Sea Region Marine Protected Area, available at <https://www.mfat.govt.nz/assets/Environment/Ross-Sea/CCAMLR-Ross-Sea-conservation-measure.pdf>; accessed 5 October 2018.

176 *Ibid.*, at para. 20.

177 *Ibid.*, at para. 7.

178 *Ibid.*, at para. 9.

179 *Ibid.*, at paras. 8 and 21.

180 Article 13(3).

181 Schröder (n 124), at para. 12.

UNFSA,[182] as well as by Article 6(5) UNFSA, which speaks of the need to revise measures "in the light of new information".

Indeed, it is commonly regarded as a best practice of fisheries bodies to establish a scientific advisory body.[183] To that end, the CAOF Agreement envisages the establishment of the JPSRM, which is intended to "facilitate cooperation in scientific activities with the goal of increasing knowledge of the living marine resources of the central Arctic Ocean and the ecosystems in which they occur",[184] and to improve the "understanding of the ecosystems of the Agreement Area".[185] A particular focus of the JPSRM will be to determine "whether fish stocks might exist in the Agreement Area now or in the future that could be harvested on a sustainable basis and the possible impacts of such fisheries on the ecosystems of the Agreement Area".[186] The JPSRM is to be established within two years of the entry into force of the CAOF Agreement,[187] and the parties will "guide" its development, coordination and implementation.[188] The establishment of the JPSRM will also involve the adoption of a "data sharing protocol" in a separate document (again within two years of the entry into force) in accordance with which the parties are obliged to "share relevant data, directly or through relevant scientific bodies and programs".[189]

The parties must also ensure that the JPSRM "takes into account the work of relevant scientific and technical organizations, bodies and programs".[190] Although the CAOF Agreement does not provide a list of such organizations

182 See also Article 119(1)(a) UNCLOS, which mentions "best scientific evidence available".

183 Lodge *et al.* (n 20), at pp. 32–33.

184 Article 4(1).

185 Article 4(2). The relevant provisions of the CAOF Agreement are based on a Draft Framework for a JPSRM which identified key questions to be answered through this Program and provided initial thoughts for an action plan associated with it. See Draft Framework for a Joint Program of Scientific Research and Monitoring for the Central Arctic Ocean (2015), available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/meeting_reports/Framework_Res_Mon_CAO_July_2015_final.pdf>; accessed 5 October 2018.

186 Article 4(2).

187 *Ibid.*

188 Article 4(3).

189 Article 4(5). A draft data sharing policy was already developed during the 5th FiSCAO, but the envisaged data sharing protocol is a matter of negotiations between the CAOF Agreement's parties. See Chair's Statement, 5th FiSCAO (n 66). On the importance of enhanced scientific cooperation and data sharing in CAO fisheries research, see Van Pelt *et al.* (n 14), at pp. 82–85. See also the Agreement on Enhancing International Arctic Scientific Cooperation (Fairbanks, 11 May 2017, in force 23 May 2018), available at <https://oaarchive.arctic-council.org/handle/11374/1916>; accessed 5 October 2018.

190 Article 4(4).

and programs, the Arctic Five expressly mentioned two particularly important examples in their 2015 Oslo Declaration,[191] namely the International Council for the Exploration of the Sea (ICES)[192] and the North Pacific Marine Science Organization (PICES).[193] Additionally, the JPSRM has to take into account "indigenous and local knowledge",[194] which forms part of the scientific information subject to review by the parties,[195] and which will form part of the basis on which the parties consider whether the CAOF Agreement Area would support a commercial fishery.[196] This is in line with the preamble of the CAOF Agreement, in which the parties express their desire to promote not only scientific knowledge, but also "indigenous and local knowledge of the living marine resources of the Arctic Ocean and the ecosystems in which they occur as a basis for fisheries conservation and management in the high seas portion of the central Arctic Ocean".[197]

At least every two years, the parties must hold "joint scientific meetings" which are to take place at least two months prior to the biannual (or more frequent) meetings of the parties, in which they present the results of their research, review the best available scientific information, and provide scientific advice.[198] To this end, the parties will adopt (within two years of the entry into force) "terms of reference and other procedures for the functioning of the joint scientific meetings".[199]

The JPSRM is not intended to limit the parties' freedom and right to conduct marine scientific research (MSR) on the high seas under Articles 87(1)(f) and 238 LOSC, respectively.[200] This can be deduced from the without-prejudice-clause in Article 3(7) CAOF Agreement, which expressly provides that – apart from the interim measures adopted pursuant to Article 3 – nothing in the CAOF Agreement "shall be interpreted to restrict the entitlements of Parties in relation to marine scientific research as reflected in [the LOSC]". One commentator has proposed that as freedom of MSR is subject to less strict limits compared

191 Oslo Declaration (n 56).

192 Available at <http://www.ices.dk/Pages/default.aspx>; accessed 5 October 2018.

193 Available at <http://meetings.pices.int/>; accessed 5 October 2018.

194 Article 4(4).

195 Article 5(1)(b).

196 Article 5(1)(c).

197 See also points 46 ff. of the Kitigaaryuit Declaration (n 133). It should be noted, however, that, at least with respect to FiSCAO, holders of indigenous and local knowledge did not play an important role so far. See Chair's Statement, 5th FiSCAO (n 66).

198 Article 4(6).

199 *Ibid.*

200 For a discussion of the definition of MSR, which is not provided by the text of the LOSC, see N Matz-Lück, 'Article 238' in Proelss (n 20), at MN 13 ff.

to scientific research concerning stock development, and that because under the UNFSA only members of RFMOs/As are entitled to fish on the high seas, research activities with direct relevance for the exploration and exploitation of fish stocks should exclusively fall within the scope of the RFMOs/As concerned.[201] Whereas CCAMLR Conservation Measure 24-01 (2013), to mention an example, distinguishes between scientific research activities on the one hand and fishing activities on the other by reference to the amount of catch per stock,[202] the reference included in Article 246(5) LOSC to MSR in the EEZ that "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living" would be obsolete, were the activities concerned not generally covered by the MSR regime.[203] Article 4 UNFSA further supports the position that as far as scientific research is concerned, the pertinent requirements adopted in the context of an RFMO/A cannot generally be considered as *leges speciales* vis-à-vis the provisions of Part XIII LOSC.[204] The definition of "conservation and management measures" contained in Article 1(1)(b) UNFSA does not necessarily cover scientific research activities on fish stock development, which is why the "exclusionary" character of Part III of the UNFSA does not, arguably, extend to scientific research activities. If this view is correct, Article 3(7) CAOF Agreement provides a clarification of, but not a constitutive rule on the scope of the JPSRM in relation to Part XIII LOSC.

Decision-making Procedures

Taking into account its importance as a legal tool to guide decision-making of States in situations of scientific uncertainty, and as demonstrated by Article 6(3)(a) UNFSA, the precautionary approach can be regarded as requiring improved decision-making for fishery resource conservation and management.[205] As one commentator has put it, this may involve the need to implement decision-making procedures which prevent individual actors from blocking the adoption of precautionary measures, such as majority voting instead of

201 Tang (n 19), at p. 226. On China's position concerning the freedom of marine scientific research in MPAs established by CCAMLR, see also J Tang, 'China's engagement in the establishment of marine protected areas in the Southern Ocean: From reactive to active' (2017) 75 *Marine Policy* 68–74, at p. 73.

202 CCAMLR, Conservation Measure 24–01 (2013), The Application of Conservation Measures to Scientific Research, available at <https://www.ccamlr.org/en/measure-24-01-2013>; accessed 5 October 2018.

203 Matz-Lück (n 200), MN 16.

204 But see Tang (n 19), at p. 228.

205 See also generally J Swan, 'Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes' (2004) 995 *FAO Fisheries Circular*, at p. 21.

consensus.[206] In that regard, it appears that those Arctic coastal States who were concerned with losing influence as a result of the CAOF Agreement, succeeded in retaining their powerful position at least to some extent.[207] Although decisions on questions of procedure require only a simple majority,[208] decisions on substance require consensus, defined as "absence of any formal objection made at the time the decision was taken".[209] However, the distinction between questions of procedure and questions of substance is virtually irrelevant in the context of the CAOF Agreement, because any party can unilaterally determine that a question is one of substance.[210] The result is that *any* contentious decision will require consensus, which in turn means that a single party can block the entire decision-making process.[211]

It is true that, as a general rule, consensus is aimed for in most fisheries bodies, including RFMOs.[212] However, where no consensus is reached on a question of substance, usually a qualified majority suffices, except for decisions for which consensus is specifically required.[213] Where disagreement remains, a party's interests are often secured through objection procedures which allow the State in question to opt out of a certain decision. Experiences with RFMOs indicate that a general consensus requirement can make the decision-making process vulnerable to be blocked by individual States.[214] However, it is also not entirely clear whether, as it is often argued,[215] qualified majority

206 Schröder (n 124), at para. 12.

207 On the competing interests of the Arctic Five and the other parties, see Molenaar (n 174).

208 Article 6(1). It should be noted that Arctic indigenous peoples, although mentioned in both the preamble and in substantive provisions of the CAOF Agreement, do not have a vote of their own under the general decision-making procedure. However, Article 5(2) CAOF Agreement provides that "representatives of Arctic communities, including Artic indigenous peoples" can participate in committees and similar bodies established to promote the implementation of the CAOF Agreement, including the JPRSM.

209 Article 6(2).

210 Article 6(3).

211 See also Molenaar (n 75): "*de facto* veto".

212 Cf. Article 8(1) NPFC Convention; Article 16(1) SPRFMO Convention; Article XIII(1) NAFO Convention.

213 D Freestone, 'Fisheries, Commissions and Organizations' in Wolfrum (n 86), at para. 16. Cf. Article 8(1) NPFC Convention: three-quarters; Article 16(2) SPRFMO Convention: three-quarters; Article 3(9) NEAFC Convention: two-thirds; Article XIII(2) NAFO Convention: two-thirds.

214 R Rayfuse, 'Regional Fisheries Management Organizations' in DR Rothwell, AG Oude Elferink, KN Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 439–462, at p. 454: "tyranny of consensus decision-making".

215 See A Serdy, *The other Australia/Japan Living Marine Resources Dispute: Inferences on the Merits of the Southern Bluefin Tuna Arbitration in Light of the Whaling Case* (Brill Nijhoff,

decision-making with an objection procedure in which only limited, pre-defined grounds for objections are permissible, is preferable, given that outvoted States might oppose conservation measures at a lower political cost.[216]

With respect to the CAOF Agreement, at least some of the Arctic Five appear to have insisted on a single decision-making procedure requiring consensus, whereas earlier proposals included decision-making based on a "double-qualified" majority with a special role for the Arctic Five.[217] As a result, the CAOF Agreement's provisions on decision-making have a decidedly Antarctic touch to them in that they closely resemble those of the CAMLR Convention.[218] Alternatively, they could also have been inspired by the consensus requirement in Article V(2) CCBSP, particularly as all parties to the CCSBP are also parties to the CAOF Agreement.[219] In any event, the CAOF Agreement's provisions on decision-making are evidence of the Arctic coastal States' self-perception as "stewards" of the Arctic Ocean, which is not without concern for other interested States.[220] This interpretation is reinforced by the CAOF Agreement's preamble, which expressly recognizes "the special responsibilities and special interests of the central Arctic Ocean coastal States in relation to the conservation and sustainable management of fish stocks in the central Arctic Ocean". It follows that, as far as the decision-making procedures in the CAOF Agreement are concerned, regional politics seem to have taken precedence over effectiveness in adopting precautionary measures.

This is also reflected in the CAOF Agreement's provisions on entry into force. The CAOF Agreement will only enter into force 30 days after *all* of the Arctic

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Leiden, 2017) 64 ff., giving the negative example of the impasse at the Commission for the Conservation of Southern Bluefin Tuna caused by disagreement in conjunction with a consensus requirement for the adoption of the total allowable catch and quotas. As a positive example, Serdy mentions the qualified majority decision-making procedures of SPRFMO.

216 Fabra and Gascón (n 105), at pp. 582–583.

217 Molenaar (n 211); Molenaar (n 167). An example of such "double qualified" majority decision-making can be found in Article 12(1) of the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific (Santiago de Chile, 14 August 2000, not yet in force), available at <http://www.jus.uio.no/english/services/library/treaties/08/8–02/living-marine-resources.xml>; accessed 5 October 2018, which requires a two-thirds majority including a majority of the agreement's coastal member States.

218 Article XII(1) CAMLR Convention also requires consensus. Note that the Arctic Five plus Five both directly and via the EU include most Antarctic claimants as well as key Antarctic fishing States.

219 See discussion of participants involved in the negotiations above.

220 Molenaar (n 211): "creeping coastal State jurisdiction".

Five plus Five have become parties.[221] However, once the CAOF Agreement has entered into force, the withdrawal of one of the parties, which takes effect after a period of six months after notification of withdrawal, will not affect the status of the CAOF Agreement.[222] The CAOF Agreement also stipulates that a withdrawal does not affect "duty of the withdrawing Party to fulfill any obligation in this Agreement to which it otherwise would be subject under international law independently of this Agreement".[223] From a legal standpoint, this statement is redundant and may, at best, remind withdrawing parties that they cannot, in cases of parallel obligations of identical content, escape these obligations by withdrawing from the CAOF Agreement.

Compliance and Dispute Settlement

According to the FAO, a precautionary approach to the management of fisheries requires that the feasibility and reliability of management options be evaluated, and that this evaluation also take into account the practicality of implementing and securing compliance with the management options concerned.[224] Compliance is thus a crucial element of precautionary management policies.

To this end, Article 117 LOSC contains a broad "duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas". More specifically, Article 18(1) UNFSA requires States fishing on the high seas to "take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures". This general obligation is spelt out in more detail in the remaining paragraphs of Article 18 UNFSA. Under Article 19(1) UNFSA, a State fishing on the high seas must also "ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks". This obligation is substantiated by a list of compliance and enforcement measures in Articles 9(1)(a)–(e) and Article 19(2) UNFSA.[225]

221 Article 11(1).

222 Article 12.

223 *Ibid.*

224 FAO, 'Precautionary Approach to Capture Fisheries and Species Introductions' (1996) 2 *FAO Technical Guidelines for Responsible Fisheries* 11, at paras. 35–6. See also A Jaeckel, *The International Seabed Authority and the Precautionary Principle* (Brill, Boston, 2017) 286.

225 Provisions on flag State responsibility are also contained, *inter alia*, in Article 111 Compliance Agreement, including an obligation "take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that

Beyond these general obligations under the UNFSA, it is important to include additional, clearly defined flag State obligations, combined with effective compliance mechanisms, into regional agreements such as the CAOF Agreement – particularly if not all members of the regional agreement are parties to the UNFSA (such as China in the present context).[226] To this end, Article 3(5) CAOF Agreement contains a due diligence obligation of the parties to "ensure compliance with the interim measures established by [Article 3], and with any additional or different interim measures they may establish pursuant to Article 5, paragraph 1(c)". As indicated by reference to Article 5(1)(c) CAOF Agreement, the obligation to ensure compliance extends to interim measures adopted under Article 5(1)(c)(ii) CAOF Agreement during the negotiations towards a new RFMO/A. In addition, the supervisory obligation in Article 3(4) CAOF Agreement with respect to fishing for scientific purposes should be recalled.[227]

It is a truism that effective high seas fisheries management also depends on whether the regime in place can successfully compel non-parties to comply with conservation and management measures. In this respect, the CAOF Agreement directs its parties to "encourage non-parties to this Agreement to take measures that are consistent with the provisions of [the CAOF Agreement]".[228] More specifically, and in line with Article 17(4) UNFSA, parties are obliged to "take measures consistent with international law to deter the activities of vessels entitled to fly the flags of non-parties that undermine the effective implementation of this Agreement".[229]

The CAOF Agreement also provides for compulsory dispute settlement as a means to ensure compliance and to resolve disputes which could influence the effectiveness of the interim measures.[230] Article 7 CAOF Agreement copies the newer generation of compromissory clauses incorporated into treaties

undermines the effectiveness of international conservation and management measures". However, Russia, Iceland and China are not parties to the Compliance Agreement and it is not recalled in the preamble of the CAOF Agreement.

226 Heidar (n 19), at p. 189.

227 See discussion of measures concerning non-commercial fishing above.

228 Article 8(1). Cf. Article VIII(1) Compliance Agreement.

229 Article 8(2). Cf. Article VIII(2) Compliance Agreement. For a discussion of what measures are "consistent with international law", see Papastavridis (n 19), at pp. 339–359.

230 Most commentators advocate the inclusion of provisions on compulsory dispute settlement into fisheries agreements. See, e.g., J-F Pulvenis de Séligny-Maurel, 'Regional Fisheries Bodies and Regional Fisheries Management Organizations and the Settlement of Disputes Concerning Marine Living Resources' in L del Castillo (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill Nijhoff, Leiden, 2015) 698–712, at p. 701.

establishing RFMOs which provide for compulsory dispute settlement, and specifically Article 19 NPFC Convention.[231] Under Article 7 CAOF Agreement, disputes relating to the interpretation or application of the CAOF Agreement may be submitted to dispute settlement under Part VIII of the UNFSA – irrespective of whether or not the parties to the dispute are also parties to the UNFSA. This wording is important, given that China is not a party to the UNFSA.[232] Therefore, the CAOF Agreement's dispute settlement clause can be described both as relatively innovative and as part of a pre-existing trend towards compulsory dispute settlement in regional fisheries agreements.[233] However, it also lags behind some of the most recent developments in that it lacks a multi-layer dispute settlement mechanism providing for both panels of experts and judicial dispute settlement.[234]

Participation in the CAOF Agreement

The second important question that the present article addresses is that of whether the CAOF Agreement's provisions on participation are in conformity with international fisheries law, particularly in light of the Broader Process of negotiations that was not open to States other than the Arctic Five plus Five. Both relevant coastal States and States fishing for stock on the high seas have a duty to cooperate with relevant RFMOs/As under Article 8(3) UNFSA "[w]here

231 Compare also Article 34 SPRFMO Convention; Article XV NAFO Convention.

232 See <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>; accessed 5 October 2018.

233 See discussion by V J Schatz, 'The Settlement of inter-State Disputes concerning Conservation of Marine Living Resources in the Arctic and Antarctic High Seas: From Fragmentation to Comprehensive Compulsory Jurisdiction?' in N Liu, C Brooks and T Qin (eds), *Governing Marine Living Resources in the Polar Regions* (Edward Elgar, Cheltenham, 2019) (forthcoming), giving the examples of the reform processes of NAFO and NEAFC in this regard.

234 See e.g., Articles 17 and 34 SPRFMO Convention. There have already been two cases based on the review procedure established in Article 17 and Annex II SPRFMO Convention. See *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, Findings and Recommendations of the Review Panel (5 July 2013), available at <https://pcacases.com/web/sendAttach/2082>; accessed 5 October 2018; *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, Findings and Recommendations of the Review Panel with regard to the objection by the Republic of Ecuador to a decision of the Commission of the South Pacific Regional Fisheries Management Organization (CMM 01-2018) (5 June 2018), available at <https://pcacases.com/web/sendAttach/2400>; accessed 5 October 2018.

a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks".[235]

There are two ways by which this duty can be fulfilled.[236] First, the States concerned can become members of the relevant RFMO/A. Second, they can agree to apply the conservation and management measures established by the RFMO/A. States failing to opt for one of these options are prohibited from fishing for the stock in question.[237] As a corollary of these duties, non-parties to the RFMO/A in question must also have a qualified right to participate in these institutions if they are to be compelled to cooperate. The lack of a legal framework for a legitimate membership process in many RFMOs/As has been widely criticized as an obstacle to effective fisheries management and conservation.[238] The inability of regional regimes to provide for a transparent and orderly process for the acceptance of new members is often referred to as the "new entrants problem".[239] In this respect, Article 8(3) UNFSA states:

> Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement [...]. States having a real interest in the fisheries concerned may become

235 A general duty to cooperate in high seas fisheries management and conservation can be found in Articles 117 and 118 LOSC. Accordingly, it has been suggested that Article 8(3) UNFSA "basically 'institutionalises' the duty to cooperate in respect of straddling and highly migratory fish stocks by requiring its exercise through regional or subregional fisheries organisations or arrangements". See R Rayfuse, 'Article 118' in Proelss (n 20), at MN. 26.

236 For a more detailed discussion, see EJ Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms' (2000) 15(4) *International Journal of Marine and Coastal Law* 475–531, at pp. 489 ff.

237 Article 8(4) UNFSA.

238 S Cullis-Suzuki and D Pauly, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations' (2010) 34 *Marine Policy* 1036–1042, at p. 1041; T Bjorndal, V Kaitala, M Lindroos and GR Munro 'The management of high seas fisheries' (2000) 94 *Annals of Operations Research* 183–196; P Pintassilgo and CC Duarte, 'The new-member problem in the cooperative management of high seas fisheries' (2001) 15 *Marine Resource Economics* 361–378; V Kaitalaand and GR Munro, 'The management of high seas fisheries' (1993) 8 *Marine Resource Economics* 313–329.

239 See generally A Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge, Cambridge University Press, 2016).

> members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

Thus, where a State has a "real interest in the fisheries concerned" within the meaning of Article 8(3) UNFSA, the relevant RFMO/A's "terms of participation" must not preclude that State's membership and may also not be applied in a discriminatory manner so as to exclude that State. If this is not the case, that State may arguably ignore (parts of) the management measures of the relevant RFMO/A.[240]

The two main requirements for a right of non-parties to participate are (1) that the CAOF Agreement is itself, in terms of law, an RFMO/A within the meaning of the UNFSA that has the competence "to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks", and (2) that these non-parties have a "real interest" as envisaged by the UNFSA.

Classification of the CAOF Agreement

As there is currently no commercial fishing in the CAOF Agreement Area, there was neither an obligation of the Arctic Five plus Five under the UNFSA to cooperate with the aim of establishing an RFMO/A at this point in time, nor was there a pressing need to do so.[241] In addition, as mentioned above, none of the existing mechanisms which theoretically cover parts of the CAO (in particular NEAFC) are, at this point, likely to be mandated for this purpose.[242] On the other hand, this does not prevent the establishment of an RFMO/A for the CAO and, indeed, this question arises with respect to the CAOF Agreement *itself*. Based on the CAOF Agreement's text, it appears that the Arctic Five plus Five do not consider that the CAOF Agreement constitutes an RFMO or an RFMA. The CAOF Agreement's preamble states that it is "premature under current circumstances to establish any additional regional or subregional fisheries management organization or arrangement". This is also evident, for example, from the provisions on the commencement of "negotiations to establish one or more additional regional or subregional fisheries management organizations

240 Molenaar (n 236), at p. 499; Serdy (n 239), at pp. 62–63.

241 Cf. Article 8(5) UNFSA. But see Zou (n 73), at pp. 414 ff., who criticizes the Arctic Five's position that no RFMO should be established at this point in time.

242 Heidar (n 19), at p. 188.

or arrangements"[243] and the provisions on the transition between the CAOF Agreement and "any potential new agreement establishing an additional regional or subregional fisheries management organization or arrangement".[244] However, the classification of the CAOF Agreement as an RFMA/O does not depend on the view of the Arctic Five plus Five or stipulations in the CAOF Agreement, but on the CAOF Agreement's true legal nature in view of the UNFSA.[245] Indeed, it has been stated during the negotiations that "it is possible that the outcome of the Broader Process will constitute an RFMA, even if that outcome would not be legally binding".[246] Whereas the UNFSA does not contain a definition of an RFMO, an RFMA is defined as:

> a cooperative mechanism established in accordance with [the LOSC] and [UNFSA] 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.[247]

The most important differences between an RFMO and an RFMA are that the latter (1) is not an international organization,[248] (2) can be bilateral rather than multilateral, and (3) is not necessarily established by a legally binding instrument.[249] The CAOF Agreement does not establish an international organization and, therefore, does not establish an RFMO either. It is less clear, however, whether the CAOF Agreement is or is not in reality an RFMA.[250] The central question is whether the CAOF Agreement is a cooperative mechanism which serves "the purpose, inter alia, of establishing conservation and management measures" within the meaning of Article 1(1)(d) UNFSA.[251] The UNFSA defines "conservation and management measures" as "measures to conserve

243 Article 5(1)(c)(i).

244 Article 13(3).

245 It is perhaps also not without relevance that the pertinent provisions of the CAOF Agreement speak of an *additional* regional or subregional fisheries management organization or arrangement, even though this reference could be interpreted as referring to an additional RFMO/A to those which have been in existence already prior to the CAOF Agreement.

246 Heidar (n 19), at p. 202. See also Molenaar 2016 (n 19), at p. 458. But see Rayfuse (n 19), at p. 47: "it is clear that the Broader Process is not concerned with negotiating the establishment of any new RFMO/As".

247 Article 1(1)(d) UNFSA.

248 See Rayfuse (n 214), at p. 443, who gives the CCBSP as an example of an RFMA.

249 Heidar (n 19), at p. 186.

250 This question was also raised by Molenaar (n 167).

251 Cf. Molenaar (n 236), at p. 490.

and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in [UNCLOS] and [the UNFSA]".[252]

When these definitions are applied to the CAOF Agreement, it is hard to see why it should not be regarded as establishing an RFMA. It should be recalled that Article 3 CAOF Agreement, which is entitled "Interim Conservation and Management Measures Concerning Fishing", provides for conservation and management measures within the meaning of Article 1(1)(b) UNFSA, including a moratorium on unregulated commercial fisheries. In addition, Article 5(1)(d) CAOF Agreement provides for a competence to *directly* establish "conservation and management measures for exploratory fishing in the Agreement Area". {Emphasis supplied.}The same is true of the competence to establish conservation and management measures *directly* under Article 3(1)(b) in conjunction with Article 5(1)(c)(ii) as soon as negotiations towards an RFMO/A are triggered pursuant to Article 5(1)(c)(i). Therefore, a strong argument can be made that the CAOF Agreement is in fact an RFMA – or at least would become one as soon as the mechanism of Article 5(1)(c)(i) is triggered.[253]

The CAOF Agreement and the Concept of "Real Interest"

If one accepts that the CAOF Agreement is – or at least can become – an RFMA, non-parties may have an obligation and, as a corollary of that obligation, a right to participate in the CAOF Agreement if they want to fish in the CAO and have "a real interest in the fisheries concerned".[254] Given that there are currently no commercial fisheries in the CAO, the question arises: what kind of interest would suffice in the context of the CAOF Agreement? It is generally accepted that States already fishing for the high seas fish stock in question have a "real interest".[255] The same is true of coastal States in respect of stocks straddling their EEZs irrespective of whether they currently fish for the stock in question or not.[256] As for new or potential entrants to a high seas fishery, a "real interest" will have to be determined on the basis of whether they can

252 Article 1(1)(b) UNFSA.

253 See also J Sigurjónsson, 'Science-based framework for future fisheries management in the Central Arctic Ocean', Presentation, Conference: New Knowledge and Changing Circumstances in the Law of the Sea (Reykjavik, 28–30 June 2018), available at <http://icelandkmiconference2018.com/>; accessed 5 October 2018: "In essence it can be taken as an RFMA-arrangement, most with rights and obligations of parties in accordance with the 1995 Fish Stocks Agreement".

254 Cf. Article 8(3) UNFSA.

255 Molenaar (n 236), at pp. 494–495.

256 *Ibid.*, at p. 495; Heidar (n 19), at p. 186.

convincingly demonstrate an interest in fishing for the stock in question.[257] Based on the fact that no State can rely on previous fishing in the CAO, it has been argued that – once fishing opportunities arise – all States interested in fishing in the CAO have a real interest.[258] It is less clear, however, whether a kind of interest other than fishing, such as an interest in conservation of the stock or ecosystem or an interest in scientific research, would qualify as a "real interest" within the meaning of the UNFSA.[259] It is recalled that one function of the requirement of "real interest" is to prevent RFMOs/As from an influx of, for example, States opposing any commercial fishing activities, as such an influx (particularly when combined with decision-making based on consensus) can easily lead to a blockade of RFMOs/As.[260] For this reason, several commentators have expressed doubts as to whether States interested in science or conservation (only) can show a "real interest".[261]

On the other hand, a narrow interpretation of the requirement would mean that in cases such as the CAOF Agreement – i.e., in a (temporary) absence of commercially viable stocks, prevailing uncertainty concerning future stocks, and widespread concerns about the conservation of the relevant marine ecosystem – no State would be able to show a "real interest".[262] In such situations, States can only demonstrate an interest in scientific, exploratory and future commercial fishing – or in conservation. For that reason, it has been suggested that the concept of "real interest" ought to be interpreted broadly in such circumstances.[263] Such a broad, functional interpretation would arguably also include States interested in gathering scientific information concerning future fishing opportunities and States interested in exploratory fishing for the purposes of ascertaining the prospects of establishing a commercial fishery. In line with this broad understanding, Iceland reportedly criticized the fact that it was not invited to the consultations prior to the onset of the Broader Process, arguing that it had a "real interest".[264] However, it has been argued that the limited participation in the Broader Process is "wholly consistent with state

257 Molenaar (n 236), at p. 496.

258 Rayfuse (n 19), at p. 48.

259 Molenaar (n 236), at p. 496.

260 *Ibid.*, at pp. 496 ff., with reference to the situation at the IWC. In this regard, see also the discussion of the CAOF Agreement's decision-making mechanism above.

261 See, with further references, Takei (n 92), at p. 66.

262 See also Rayfuse (n 19), at p. 42: "who might constitute an 'interested state' is something of an open question given that no state has ever fished in the Central Arctic Ocean".

263 Heidar (n 19), at p. 186; Compare also the practice of CCAMLR as discussed by N Vanstappen, 'Inclusive and evidence-based decision-making in CCAMLR: A basis for ensuring compliance?' in Liu *et al.* (n 233) (forthcoming).

264 Wegge (n 9), at p. 335.

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".[265] Given that all members of nearby RFMOs/As are also – either directly or via the EU – parties to the CAOF Agreement, it is unclear whether the question will be of practical relevance in the near future. However, it should also be noted that the United Kingdom would likely become an independent member of NEAFC post-Brexit and might also consider an accession to the CAOF Agreement.[266]

Analysis of the CAOF Agreement's Provisions on Participation

If the view that the CAOF Agreement is an RFMA (or can become one) is correct, its provisions on participation – and their application in practice – are (or can become) subject to the requirements of Article 8(3) UNFSA discussed above. The CAOF Agreement is open for signature only for the Arctic Five plus Five for a period of twelve months[267] and, for signatories, remains open for ratification, acceptance or approval at any time.[268] After the lapse of the twelve-month period for signature, any non-signatories among the Arctic Five plus Five may still accede to the CAOF Agreement.[269] Thus, basic membership of the CAOF Agreement is restricted to the Arctic Five plus Five and, without their unanimous participation, the CAOF Agreement will not become a reality.

States other than the Arctic Five plus Five may only accede to the CAOF Agreement under certain additional conditions. First, accession is only possible after the entry into force of the CAOF Agreement.[270] Second, Article 10(2) CAOF Agreement expressly incorporates "real interest" as a requirement for membership, but without reference to "fisheries concerned" in Article 8(3) UNFSA.[271] That omission could relate to the fact that, as discussed above, it would be difficult for States to show a "real interest" in any current fisheries (implying also the use of the resource), given that there are currently no

265 Rayfuse (n 19), at p. 48.

266 See Department of Environment, Food and Rural Affairs, 'Sustainable Fisheries for Future Generations' available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722074/fisheries-wp-consult-document.pdf>; accessed 5 October 2018, at p. 9.

267 Article 9(1).

268 Article 9 (2).

269 Article 10(1).

270 Article 10(2).

271 Compare also the preamble of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (Windhoek, 20 April 2001, in force 13 April 2003) 2221 *UNTS* 189: "States and Organisations having a real interest *in the fishery resources* of the South East Atlantic Ocean" (emphasis added).

commercial fisheries. If true, this would militate in favour of a broad definition of "real interest" as suggested above. Finally, even for States which can show a "real interest", accession is subject to invitation by the parties to the CAOF Agreement.[272] As a decision to invite a third State to accede to the CAOF Agreement appears to be subject to the CAOF Agreement's consensus requirement[273] discussed above, a single party can block the accession of any further States. Doubts could be raised with regard to whether this mechanism is in conformity with Article 8(3) UNFSA, particularly considering the criticism attracted, for example, by the three-quarters majority requirement for accession imposed by Article 20(4) NEAFC Convention.[274] On the other hand, it could also be argued that as long as the parties to the CAOF Agreement do not use their veto powers to bar States with a "real interest" from accession, the requirements of Article 8(3) UNFSA will be met in practice.

Conclusions

As the first regional fisheries agreement adopted prior to the initiation of fishing in a specific area, the CAOF Agreement reflects the current stage of development of international fisheries law. However, it does arguably not constitute a paradigm shift in international fisheries law, taking into account that it is based on, or implements, respectively, traditional regulatory machinery.

Nevertheless, the legal assessment carried out in this article justifies the conclusion that the CAOF Agreement is an international treaty characterized by a comparatively strong precautionary potential. Inasmuch as it permits commercial fishing either through an existing or new RFMO/A, or directly pursuant to conservation and management measures adopted under the CAOF Agreement itself, this permission has been subjected to requirements that safeguard compliance with the precautionary approach, in particular by allocating specific weight to scientific information derived from the JPSRM. Similarly, the establishment of a moratorium on unregulated commercial fishing can be regarded as a precautionary measure, because unregulated fisheries are usually characterised by the lack of scientific data concerning biomass and fishing mortality of the stocks concerned. Further precautionary safeguards have been implemented in respect of non-commercial fishing, but only to a lesser degree in relation to the decision-making procedures, which seem to

272 Article 10(2).
273 Article 6(2).
274 Molenaar (n 236), at p. 522.

give precedence to the regional interests of the Arctic Five over effectiveness, as well as in relation to compliance and enforcement. It is also true that, as one commentator has stated with respect to the negotiation process leading to the CAOF Agreement, "precautionary-minded international agreements are easier to reach before vested interests have become entrenched".[275]

As far as participation in the CAOF Agreement is concerned, some ambiguities remain. These result from the fact that the contracting parties have apparently acted on the assumption that the CAOF Agreement establishes the basis for a potential future RFMO/A, but does not qualify as RFMO/A itself. However, it is submitted on the basis of our legal analysis that the CAOF Agreement is either an RFMA or, at the very least, will become one as soon as the mechanism of Article 5(1)(c)(i) is triggered. If this line of argument is accepted, non-parties will have a right under Article 8(3) UNFSA to participate in the CAOF Agreement, provided that they have a "real interest" in the fisheries concerned. As there are currently no commercial fisheries in the CAO, this gives rise to uncertainties regarding what kind of interest would suffice in the context of the CAOF Agreement. This is particularly relevant due to the fact that the lack of transparent provisions safeguarding a legitimate membership process in RFMOs/As is often held to be an obstacle to effective fisheries management and conservation.

In all, the success of the newly concluded CAOF Agreement cannot be assessed from a purely legal standpoint, but largely depends on the political will of its parties to implement the rights and obligations codified therein in an effective, lawful and legitimate manner. Viewed from that perspective, only the future can tell if the CAOF Agreement, or a future RFMO/A based on its terms, will be more successful than existing RFMOs/As[276] in managing and conserving Arctic Ocean fish stocks.

275 Rayfuse (n 19), at pp. 48–49. See also Pan and Huntington (n 67), at pp. 154–155. But see, more optimistically, Molenaar (n 174).

276 For criticism, see generally Cullis-Suzuki and Pauly (n 238), at pp. 1036–1042. Specifically for NEAFC, see T Bjørndal, 'Overview, Roles, and Performance of the North East Atlantic Fisheries Commission (NEAFC)' (2009) 33 *Marine Policy* 685–697.