



**Third International Symposium**  
**The Role of Non-Arctic States / Actors in the Arctic Legal Order-Making**

**Session on The Central Arctic Ocean (CAO) Fisheries**  
Afternoon of 7 December 2017

The first day of the symposium will start with a keynote speech by Professor Koji Sekimizu. The keynote will be followed by the morning session on Global Arctic Shipping Governance and the afternoon session on The Central Arctic Ocean (CAO) Fisheries.

At CAO Fisheries session, there are two main speakers. **Prof. Erik Molenaar** will deliver his main speech “**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**”. **Dr. Elena Kienko** will deliver her main speech “**Cooperation of Arctic and Non-Arctic States in Conservation and Management of Marine Living Resources in the Arctic: International Law Issues**”, which is based on a paper jointed composed by her and Prof Alexander Vylegzhanin.

Discussants: **Geir Hønneland and Joji Morishita**  
Coordinator: **Leilei Zou**

**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**

*Erik Molenaar*

The currently ongoing negotiation-process on high seas fishing in the central Arctic Ocean between the five central Arctic Ocean coastal States (Canada, Denmark, Norway, Russia and the United States; also: Arctic Five) and China, the EU, Iceland, Japan and South Korea (further: Five-plus-Five process) commenced in December 2015. During the five meetings held so far, delegations made steady progress on a draft ‘Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean’ (CAOF Agreement) but were unable to adopt a final text by consensus. At the time of writing this abstract, the date and venue of the next meeting had not yet been decided, and some uncertainty also existed on the ability of the Five-plus-Five process to conclude its work by means of a legally binding instrument adopted by consensus.

The Five-plus-Five process builds on a de facto preparatory process among the Arctic Five, which culminated in the adoption of the ‘Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean’ (2015 Oslo Declaration). The main drivers for both processes were the receding sea-ice in



the Arctic Ocean as well as spatial shifts in the distributional ranges of many fish stocks from tropical regions towards the polar regions, against a background of increasing global demand in fish and a deteriorating overall status of global fish stocks. From a normative perspective, these processes were/are above all aimed at pursuing science-based, precautionary and ecosystem approaches to fisheries management, and avoiding unregulated high seas fishing by ensuring full high seas coverage with regional fisheries management organizations or arrangements (RFMOs/As).

This presentation will examine the Five-plus-Five process in the context of the evolving international law relating to the sea and the Arctic. The focus will be primarily on the interaction between the domains of the international law of the sea and the international law relating to the Arctic. It is acknowledged, however, that these are not clearly distinguishable domains. In view of the overarching theme of the Symposium: ‘The Role of Non-Arctic States / Actors in the Arctic Legal Order-Making’, the presentation will devote considerable attention to the continued relevance of the phenomenon of ‘creeping coastal State jurisdiction’, which has been one of the principal drivers in the development of the international law of the sea.

It is submitted that, at present, this trend continues to be relevant even though it commonly no longer manifests itself by unilateral coastal State claims to new maritime zones. Arguably, creeping coastal State jurisdiction can in contemporary times be regarded to occur in two main forms. First, by avoiding internationally agreed restraints on coastal State sovereignty, sovereign rights and jurisdiction. This can, for instance, be achieved by ensuring that new regulatory initiatives relating to the international law of the sea apply exclusively to ABNJ and not also to coastal State maritime zones. Second, by coastal States’ assertions of their special roles, interests or rights in areas beyond national jurisdiction (ABNJ; namely: the high seas and the Area) adjacent to their (outer) continental shelf and/or exclusive economic zone (EEZ). ‘Adjacency’ is used here broadly and also comprises the scenario of areas of high seas lying above continental shelves.

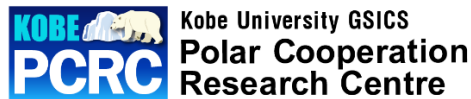
The presentation will conduct a comparative analysis between the Five-plus-Five process and its draft CAOF Agreement, other negotiation-processes to establish RFMOs/As and their outcomes, and the three negotiation-processes to establish legally binding instruments under the Arctic Council. Moreover, ample attention will be devoted to the currently ongoing negotiation-process on an ‘Implementation Agreement on marine biodiversity in areas beyond national jurisdiction’ (United Nations General Assembly Resolution 69/292, of 6 July 2015), which is the most recent step in the so-called ‘BBNJ process’ (biodiversity in areas beyond national jurisdiction).

**COOPERATION OF ARCTIC AND NON-ARCTIC STATES IN  
CONSERVATION AND MANAGEMENT OF MARINE LIVING  
RESOURCES IN THE ARCTIC: INTERNATIONAL LAW ISSUES**

*Elena Kienko*

The Arctic and non-Arctic States are to govern wisely unique Arctic spaces and marine living resources and relevant regional (within the Arctic States) and inter-regional (between the Arctic and non-Arctic States) cooperation is already developing. The object of such cooperation is huge: marine living resources not only in the high seas of the Central Arctic Ocean, enclosed by the 200-miles EEZ of the US, Russia, Norway, Denmark (Greenland) and Canada, but also living resources in these EEZ. Indeed not all Arctic coastal States realize their right to manage fishery resources within EEZ in the Arctic; some are needed in appropriate investments. Russia has signed all universal international treaties which provide for freedoms of the high seas, including freedom of fishing (Geneva Maritime Conventions, 1958; the UN Convention on the Law of the Sea, 1982). According to UNCLOS, if there is no regulation of fishing in the high seas – then no fishing is legitimate in the High Seas. The content of the rules on conservation the marine living resources in the high seas was also revealed in the text of the 1995 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 stock. As the International Court of Justice (the ICJ) noted in 1974: “...the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by recognition of a duty to have due regard to the rights of other States and the needs of conversation for the benefit of all”. The successful cooperation experience of two states - Russia and USA, whose exclusive economic zones surround the Bering Sea enclave of the high sea (“the donut hole”) is noteworthy.

There are legal documents providing *lex specialis* for cooperation of Arctic and non-Arctic States in conservation marine living resources in the Central Arctic Ocean. It is a pity that non-Arctic States are not Parties to none on these Agreements. In contrast to USSR position, Russia considers the rules of International Law of the Sea are applicable to sea areas of the Arctic. Fundamentals of the State Policy of the Russian Federation in the Arctic for the Period until 2020 and a Further Perspective of 2008 notes factors that influence “the formation of the state policy in the Arctic”: “extreme natural-climatic conditions, including a permanent ice cover or drifting ices in the Arctic seas; focal character of industrial-economic development of territories and a low population density; remoteness from basic industrial centers, high resource consumption and dependence of economic activities and life-support of the population on deliveries of fuel, food and essential commodities from other regions of Russia; and low sustainability of ecological systems” in the Arctic region. The

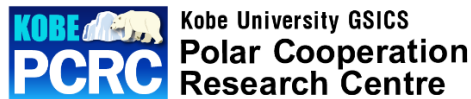


Strategy of Development of the Arctic Zone of the Russian Federation provides for measures aimed at the “rational use of resources and preservation of the natural environment of the Arctic zone” of the RF, based “on its systematic comprehensive research study.” Legal measures to prevent IUU fishing in the Arctic are an international challenge, possible only by collective efforts of Arctic and non-Arctic states on the basis of applicable rules of international law. The Russian Federation has entered into agreements on combating IUU fishing with the Republic of Korea, Japan, Canada and the USA. The Agreement on Enhancing International Arctic Scientific Cooperation, 2017, contains legally binding commitments of the Parties relating first of all to facilitation of the work of scientists engaged in research dealing with Arctic issues, including research of marine living resources.

Legal basis for enhancing cooperation between Arctic and non-Arctic States in conservation and management of the marine living resources in the Arctic are yet far from being definitely settled both intellectually and practically. The very livelihood of local inhabitants of Alaska, of Northern territories of Canada, Russia and Norway, as well as that of Greenland (Denmark) depend to a great extent upon fishing not only in the vicinity of the relevant coasts but in other areas of the EEZ of the Arctic coastal States. The balance of the fauna and flora of the Arctic ecosystems and the economic dependence of local inhabitants of the North and the livelihood of the whole Arctic communities may be negatively affected by any unregulated fishing in the Arctic Ocean. It is necessary to reach an agreement (or even – as a first step – a modus vivendi arrangement) under which no fishing is permitted in the Central Arctic Area enclosed by 200-miles EEZ of the five Arctic coastal States, that is in the Area formerly covered by ice and where there has been no fishing before. As a balanced clause, each Arctic coastal States reserves the right of fishing in the Arctic Ocean within their 200-miles EEZ and the right to give other interested states access to the surplus of the allowable catch according to article 62 of UNCLOS.

The Abstract of Geir Hønneland’s discussion is as follows:

While there is currently no fishing activity in the Central Arctic Ocean, extensive fisheries take place in European sub-Arctic waters. The main demersal fisheries in the Barents Sea, including the world’s largest cod stock, are managed jointly by Norway and Russia, while large pelagic stocks such as herring, mackerel and blue whiting in the Norwegian Sea are managed by EU, Norway, Iceland and the Faroe Islands in multilateral so-called ‘coastal states regimes’. Some stocks are, in turn, managed bilaterally by EU and Norway. The North East Atlantic Fisheries Commission (NEAFC) exists as a framework arrangement in the region, but has little practice influence on actual fisheries management, beyond the coordination of enforcement in areas outside national jurisdiction. Scientific advice for the entire North East Atlantic is provided by the International Council for the Exploration of



the Sea (ICES). The main challenges in recent years are related to the extension northwards of the area of distribution of the Norwegian Sea pelagic species. The coastal states are currently not able to agree on total allowable catches that are within the scientific advice provided by ICES. This is a political issue between the involved states, but the science/policy interface is particularly interesting in this case because one main issue of contention is how, scientifically, to define zonal attachment of fish stocks. Management collaboration between states in sub-Arctic waters dates back more than half a century, and for the scientific cooperation more than a century. Hence there is ample experience to draw on in attempts to identify likely challenges for fisheries management in the higher Arctic.

The presentation summary of Joji Morishita's presentation "**Transition of the Focus in the Five-Plus-Five Process for the Establishment of Central Arctic Fisheries Management Regime**" is as follows:

Responding to the reduction of sea ice coverage in the Arctic Ocean caused by the climate change, the international community expressed its hope that fisheries could be initiated in the high seas area of the Arctic ocean in summer as well as its concerns that unregulated fisheries could also be initiated. The "Arctic 5", five coastal states of the Arctic ocean – Canada, Denmark (on behalf of Greenland), Norway, the Russian Federation, and the United States convened a series of intergovernmental and scientific meetings to discuss this issue. On 16 July 2015, the Arctic five adopted the "Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean" in Oslo, Norway (the Oslo Declaration). This Oslo Declaration triggered a series of consultations regarding conservation and management of potential Arctic high seas fisheries. The main focuses of the consultations seem to be showing transition or evolution of interests of participating members.

The Oslo Declaration was adopted by the Arctic 5 coastal states as a legally non-binding form. Its main message was clearly stated in one of the operative paragraphs.

"We recognize that, based on available scientific information, commercial fishing in the high seas portion of the central Arctic Ocean is unlikely to occur in the near future and, therefore, that there is no need at present to establish any additional regional fisheries management organization for this area. Nevertheless, recalling the obligations of States under international law to cooperate with each other in the conservation and management of living marine resources in high seas areas, including the obligation to apply the precautionary approach, we share the view that it is desirable to implement appropriate interim measures to deter unregulated fishing in the future in the high seas portion of the central Arctic Ocean."



### **Nature of an instrument**

It is evident that the Oslo Declaration follows the conclusions of an Arctic 5 meeting held in Nuuk in February 2014. However, while the Nuuk meeting stated that “[t]he final outcome could be a legally binding international agreement”, the Declaration was short of a binding document. There was no agreement among the Arctic 5 states as to the nature of the document.

Under the initiative by the United States, the Arctic 5 plus 5 meeting, inviting China, the European Union, Iceland, the Republic of Korea, and Japan in addition to the Arctic 5 was convened in December 2015. The “plus 5” states were identified as those with potential capacity to conduct fishing operations in the high seas area of the Arctic ocean. The meeting expanded the scope of participation to the Oslo Declaration and aimed at establishing a legally binding agreement on the issue.

In the A5+5 meeting, all participants expressed their commitments to “prevent, deter and eliminate illegal, unreported and unregulated fishing as reflected in numerous international instruments.”

The meeting also was of the view, based on the report from the 3rd Meeting of Scientific Experts held in April 2015 in Seattle, that “it is unlikely that there will be a stock or stocks of fish in the high seas area of the central Arctic Ocean sufficient to support a sustainable commercial fishery in that area in the near future.” The meeting, however, recognized that changes in the Arctic region including the Arctic ocean were happening so rapidly that predictions were accompanied by uncertainties and that, therefore, a precautionary approach was needed. The meeting also “expressed an interest in strengthening international scientific collaboration, given the very limited scientific information that is available today on this topic.”

It is noteworthy that the interests of Arctic residents, particularly Arctic indigenous peoples, in the issue of high seas fisheries in the central Arctic Ocean was also raised and recognized at the A5+5 meeting.

### **Possible establishment of regional fisheries management organizations**

At the 2<sup>nd</sup> A5+5 meeting in April 2016 held in Washington, D.C., all delegations reaffirmed “their commitment to take interim measures to prevent unregulated commercial high seas fishing in the central Arctic Ocean”. In addition they recognized this commitment as part of a “stepwise” process in advance of possibly establishing one or more additional regional fisheries management organizations or arrangements for this area.” It should be also noted that a number of delegations attended the 2<sup>nd</sup> meeting with mandate to negotiate a legally binding instrument on



this topic.

A possible instrument will be interim in nature and, therefore, will be reviewed periodically. The instrument would include a “commitment to keep under regular review the question of whether to establish one or more additional regional fisheries management organizations or arrangements for the central Arctic Ocean, based on the best available scientific evidence and relevant policy considerations, with the long-term objective of promoting conservation and sustainable use of living marine resources in the Arctic.”

One of the reasons why the possible instrument was regarded as interim in nature was that many delegations support the principle of sustainable use of marine living resources and they thought an instrument only preventing unregulated high seas fishing would be inconsistent with the principle. In other words, even if commercial fishing in the high seas is unlikely to be viable in the near future, it was necessary for them to indicate their commitment as a policy to establish a system for conservation and management of fisheries resources sometime in the future based on the sustainable use principle.

In connection with this point, the meeting recognized that further discussions were needed in the future on the conditions under which a decision might be made to commence negotiations on an agreement to establish one or more additional regional fisheries management organizations or arrangements for the central Arctic Ocean.

### **Scientific Cooperation**

A5+5 have strong interests in scientific cooperation in the CAO. At the 3rd scientific meeting in Seattle in April 2015, the participants developed a status & gaps report, a partial inventory of research & monitoring activities, and a draft framework for a Joint Program of Scientific Research & Monitoring.

At the 1<sup>st</sup> meeting of A5+5 held in Washington, D.C., in December 2015, participants “expressed the desire to cooperate in advancing scientific research and monitoring related to this topic and considered various approaches for doing so.” The meeting discussed the important questions of “whether and when there might exist a stock or stocks of fish sufficient to support a sustainable commercial fishery in the high seas area of the central Arctic Ocean and the effects of any such fishery on the ecosystems.”

This desire for scientific cooperation was reconfirmed in the following A5+5 meetings and for some members, including Japan, this is one of the main interests in participating the CAO fisheries meetings.



### **Decision-making procedures**

As the A5+5 meetings made progress in many of the main issues discussed toward resolutions in differences of views among delegations and a possibility of successful conclusion of the A5+5 process in the near future became a reality, decision-making procedures for the legal instrument has become an important issue. Some coastal countries of the Arctic Ocean want their interests to be respected and decision-making procedures to reflect a priority of coastal states. Non-coastal countries are reluctant to accept this priority while they recognize the importance of coastal states in making the CAO conservation and management regime functional and effective.

At the time of writing this summary, no conclusion was made and hopefully the 6<sup>th</sup> A5+5 meeting to be held immediately before the PCRC Third International Symposium can reach a resolution.