

## 8 The Arctic Five-plus-Five process on central Arctic Ocean fisheries negotiations

Reflecting the interests of Arctic and non-Arctic actors

*Joji Morishita*

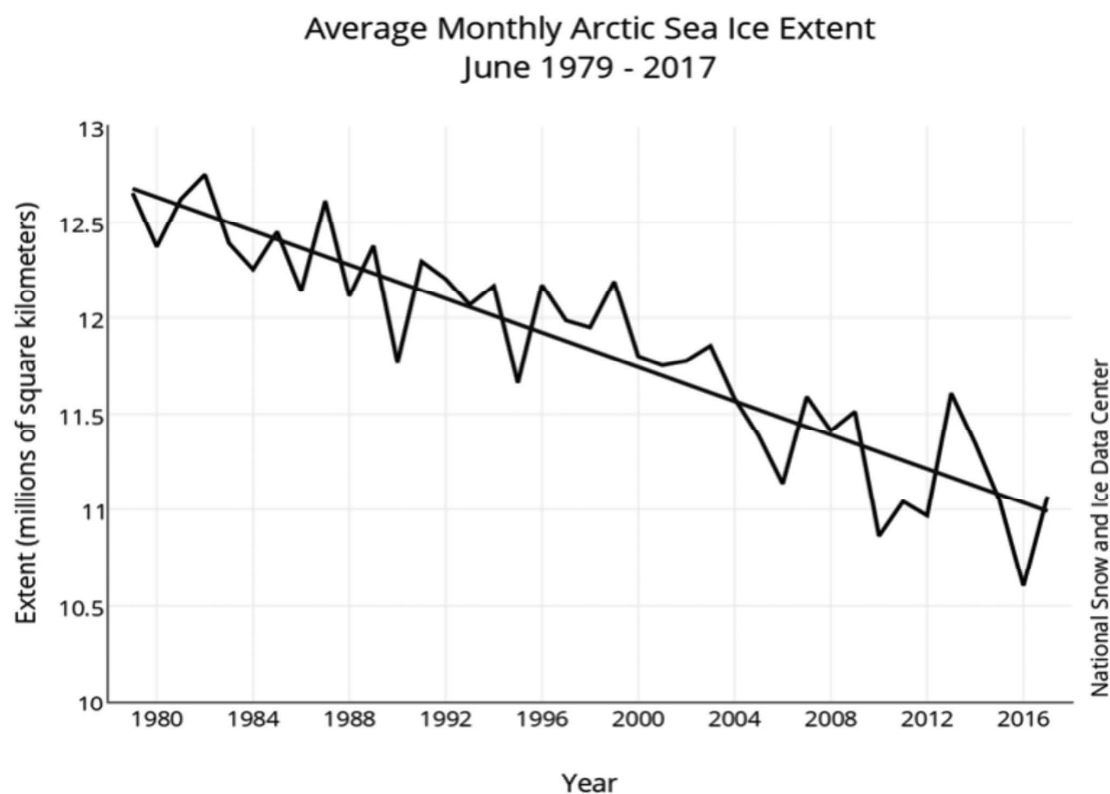
### 8.1 Introduction

Responding to the reduction of sea ice coverage in the Arctic Ocean caused by climate change (see Figure 8.1), the international community expressed its hope that fisheries could be initiated in the high seas area of the central Arctic Ocean (CAO)<sup>1</sup> in summer. Along with this hope arose concerns that unregulated fisheries could emerge. The “Arctic Five”, the five coastal states of the CAO, namely Canada, Denmark (on behalf of the Faroe Islands and 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).<sup>2</sup>

Following the initiative by the United States, the Arctic Five-plus-Five (Arctic 5-plus-5) meeting was convened in Washington, DC in December 2015, to which China, the European Union (EU), Iceland, Japan and Republic of Korea in addition to the Arctic Five were invited. The “plus 5” states were identified, presumably through the Arctic Five consultation process for adopting the Oslo Declaration, as those with potential capacity to conduct fishing operations in the high seas area of the CAO. The meeting expanded the scope of participation from that of the Oslo Declaration and aimed at establishing a legally binding agreement on the issue. After six meetings in two years, a legally binding international instrument – Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean – was concluded by the Arctic 5 plus 5 on 30

1 In this chapter, the CAO includes both high seas and EEZs. When the high seas are discussed, it will be stated as “the high sea of the CAO”. The Arctic Ocean (AO) is the seas generally within the Arctic Circle and the CAO is a part of AO surrounded by the five central Arctic Ocean coastal states.

2 *Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean*, 16 July 2015, Oslo, Norway. [www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf](http://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf) (accessed 18 July 2018).



*Figure 8.1* Decreasing sea ice coverage in the Arctic Ocean

Source: National Snow and Ice Data Center (NSIDC): <http://nsidc.org/arcticseaicenews/2017/07/arctic-ice-extent-near-levels-recorded-in-2012/> (accessed 18 July 2018)

November 2017 in Washington, DC.<sup>3</sup> This chapter analyses the 5-plus-5 process leading to the Agreement.<sup>4</sup>

## 8.2 Background and chronology of negotiations

The CAO is surrounded by the five coastal states – Canada, Denmark (on behalf of Greenland), Norway, the Russian Federation, and the United States – and its central part including the North Pole is enclosed by the exclusive economic zones (EEZs) (or a Fisheries Protection Zone around Svalbard) of these five states.

The CAO is mostly icebound in winter and ice-free waters occur in summer. In the EEZs of the five coastal states, indigenous and coastal peoples have been fishing the abundant fish species for centuries or more. FAO data show that currently there is not much commercial fishery in the Arctic Ocean, indicating no

<sup>3</sup> Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, signed 3 October 2018. The text of the agreement is available in the Appendix of this book and from: [https://eur-lex.europa.eu/resource.html?uri=cellar:2554f475-6e25-11e8-9483-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2554f475-6e25-11e8-9483-01aa75ed71a1.0001.02/DOC_1&format=PDF) (accessed 10 October 2018).

<sup>4</sup> Since I represented the government of Japan in the Arctic 5-plus-5 meetings, this chapter is based on my own personal views and understanding. The content of this chapter does not represent the positions and views of the government of Japan and I am wholly responsible for its content, including any errors.

Table 8.1 Chronology of main meetings on Central Arctic Ocean fisheries

	<i>Arctic 5 meetings</i>	<i>Arctic 5 plus 5 meetings</i>	<i>Scientific meetings</i>
2010	June, Oslo		
2011			June, Anchorage
2013	April-May, Washington, D.C.		
			October, Tromso
2014	24–26 February, Nuuk		
2015			14–16 April, Seattle
	16 July, Oslo, Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean		
		1–3 December, Washington, D.C.	
2016		19–21 April, Washington, D.C.	
		6–8 July, Iqaluit, Nunavut, Canada	
			26–28 September, Tromso
		29 November–1 December, Torshavn, the Faroe Island	
2017		15–18 March, Reykjavik	
		28–30 November, Washington, D.C.	

immediate interest from the Arctic coastal states in Arctic fisheries.<sup>5</sup> This lack of interest may stem from the fact that the seemingly perpetual sea ice cover of the CAO was considered an obstacle to commercial fisheries. However, decreasing sea ice particularly in the summer, caused by climate change and associated rising temperatures, changes in wind patterns and ocean currents, has created an ice-free area even in the high seas portion of the CAO. Additionally, climate change brings about changes in the marine ecosystem leading to a potential of commercially viable fishery resources emerging in or migrating into the high seas of the CAO.

The new emerging situations in the CAO triggered a series of international meetings (Table 8.1). It should be noted that political and scientific processes have been concurrently progressing in a coordinated fashion.

5 FAO (2016) “World Capture Production by Marine Fishing Areas, 18 Arctic Sea” *FAO Yearbook of Fishery and Aquaculture Statistics 2016*. Food and Agriculture Organization: 8, A-1 (a).

### 8.3 Discussions at political processes

The process regarding the future management of the Arctic Ocean started with a meeting in Oslo in June 2010 where officials of the Arctic Five met. They agree to link political and scientific processes regarding CAO fisheries. Two meetings of scientists (Anchorage in June 2011 and Tromsø in October 2013) considered the conditions of the Arctic Ocean and its marine ecosystem, reviewed available scientific information, and discussed future possible cooperation. The second meeting was held in Washington, DC in April/May 2013 and confirmed the leading role of the Arctic Five in conserving and managing the living marine resources of the Arctic Ocean.<sup>6</sup>

The following sections review the discussions in the political processes starting from the 2014 Arctic 5 meeting in Nuuk, Greenland which prepared the basis for the Oslo Declaration.

#### 8.3.1 *The Arctic Five meeting in Nuuk, Greenland*<sup>7</sup>

The Arctic Five met in Nuuk, Greenland, from 24 to 26 February 2014. The main purpose of the meeting was to continue discussions surrounding the development of interim measures to prevent unregulated fishing in the CAO and to continue discussions on related scientific matters. At the meeting, it was reaffirmed that, based on available scientific information, commercial fishing in the high seas area of the CAO is unlikely to occur in the near future and, therefore, there is no need to develop any additional regional fisheries management organisation or arrangement (RFMO/As) for this area.

The Arctic Five also agreed on the desirability of developing appropriate interim measures to deter future unregulated fishing in the high seas of the CAO. The participating states agreed to commit themselves, as interim measures, to (i) authorise their vessels to conduct commercial fishing in the high seas area only pursuant to one or more RFMO/As that are or may be established; (ii) establish a joint program of scientific research; and (iii) coordinate their monitoring, control and surveillance activities, among others. Based on this, the Nuuk meeting agreed to develop a Ministerial Declaration for signature or adoption by the five states based on the provisions described above. This led to the adoption of the Oslo Declaration in July 2015.

It is important to note that the meeting decided to invite other states than the Arctic Five that may have an interest in fishing in the high seas of the CAO. The purpose of the broader process was to develop a set of interim measures, compatible with the Ministerial Declaration, that would include commitments by additional states through a legally binding international agreement.

6 Njord Wegge (2015) "The Emerging Politics of the Arctic Ocean: Future Management of the Living Marine Resources" *Marine Policy* 51: 331–338.

7 Chairman's Statement, Meeting on Arctic Fisheries, Nuuk, Greenland, 24–26 February 2014. [www.afsc.noaa.gov/Arctic\\_fish\\_stocks\\_third\\_meeting/Arctic Fisheries Nuuk Chairmans and ToR for 3rd Meeting.pdf](http://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/Arctic_Fisheries_Nuuk_Chairmans_and_ToR_for_3rd_Meeting.pdf) (accessed 18 July 2018).



### **8.3.2 *The Oslo Declaration***

One and a half years after the Nuuk meeting, the Arctic Five adopted the Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (Oslo Declaration) on 16 July 2015<sup>8</sup> in a legally non-binding form.

In its preamble, the Oslo Declaration acknowledges the changes in the marine ecosystems of the Arctic Ocean due to climate change and recognises that commercial fishing in the high seas portion of the CAO is unlikely to occur in the near future. Consequently, there is no need at present to establish any additional RFMO/As for this area. Following the precautionary approach, the Oslo Declaration, however, expresses desire for implementing interim measures to deter unregulated fishing in the future.

The operative part of the Oslo Declaration also reflects the conclusions of the Nuuk meeting by agreeing to (i) authorise vessels to conduct commercial fishing in the high seas area only pursuant to one or more RFMO/As; (ii) establish a joint program of scientific research with the aim of improving understanding of the ecosystems of this area; and (iii) promote compliance by coordinating monitoring, control and surveillance activities. Finally, the Oslo Declaration acknowledges the interest of other states in the following terms:

We acknowledge the interest of other States in preventing unregulated high seas fisheries in the central Arctic Ocean and look forward to working with them in a broader process to develop measures consistent with this Declaration that would include commitments by all interested States.

### **8.3.3 *The Arctic Five-plus-Five negotiations***

#### **8.3.3.1 *First Meeting, December 2015***<sup>9</sup>

In order to initiate the “broader process”, the first Meeting on High Seas Fisheries in the Central Arctic Ocean hosted by the United States in Washington, DC from 1 to 3 December 2015 saw delegations from the People’s Republic of China, the EU, Iceland, Japan and Republic of Korea, in addition to the Arctic Five. Because the meeting was the first opportunity for the Arctic 5 plus 5 to discuss the Arctic high seas fishing issue, it was exploratory in nature. Furthermore, a number of delegations made clear that they did not have a mandate to negotiate any particular instrument relating to the topic and, therefore, the meeting was conducted on a non-committal basis.

In order to provide the scientific basis for the meeting, the outcomes of the third Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean, which was held in Seattle on 14–16 April 2015 was reported. The scientific meeting was joined by scientists from the “plus 5” and expressed the desire to cooperate in advancing scientific research and monitoring. The meeting discussed the

<sup>8</sup> Oslo Declaration, *supra* note 2.

<sup>9</sup> Chairman’s Statement, Washington, D.C., 1–3 December 2015. [www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279639.htm](http://www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279639.htm) (accessed 18 July 2018).

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 CAO and the effects of any such fishery on the ecosystems”.<sup>10</sup> Based on the report from scientists, the first Arctic 5 plus 5 meeting reaffirmed that it is unlikely that there will be a possibility for a sustainable commercial fishery in that area in the near future. The meeting, however, recognised that changes in the Arctic region 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.

While the meeting was conducted on a non-committal basis, the United States presented a proposal for an international agreement to implement the Oslo Declaration. The agreement would commit its parties to, among others, (i) authorise their vessels to conduct commercial fishing in this high seas area only pursuant to one or more RFMO/As that are or may be established; and (ii) establish a joint programme of scientific research with the aim of informing future fisheries management decisions and improving understanding of the ecosystems of this area.

The US proposal received preliminary reactions from some delegations including suggestions to strengthen or clarify languages of the proposal. However, the discussions and reactions were mainly conceptual in nature.

#### *8.3.3.2 The Second Meeting, April 2016<sup>11</sup>*

The second Meeting of Arctic 5 plus 5 was held again in Washington, DC from 19 to 21 April 2016, less than five months after the first Meeting, also hosted by the United States. This considerable speed for hosting meetings that discuss a possible international agreement probably reflects a political need in the United States, as will be explained later. Some delegations attended the second meeting with a mandate to negotiate a legally binding instrument on this topic.

A possible instrument was regarded to be interim in nature and, therefore, would be reviewed periodically. The instrument would include a commitment to keep the question of whether to establish one or more additional RFMO/As for the CAO with the long-term objective of promoting conservation and sustainable use of living marine resources in the Arctic under regular review. One of the reasons why the possible instrument was regarded as an interim measure was that many delegations supported the principle of sustainable use of marine living resources and they thought an instrument only preventing unregulated high seas fishing would be inconsistent with this 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

<sup>10</sup> Ibid.

<sup>11</sup> Chairman’s Statement, Washington, DC, 19–21 April 2016. [www.afsc.noaa.gov/Arctic\\_fish\\_stocks\\_fourth\\_meeting/pdfs/Chairman’s\\_Statement\\_from\\_Washington\\_Meeting\\_April\\_2016-2.pdf](http://www.afsc.noaa.gov/Arctic_fish_stocks_fourth_meeting/pdfs/Chairman’s_Statement_from_Washington_Meeting_April_2016-2.pdf) (accessed 18 July 2018).

for conservation and management of fisheries resources sometime in the future based on the sustainable use principle.

While suggestions and comments for further improving the US draft were presented at the second meeting, some key issues remained for discussion in future meetings, including the “stepwise approach”, the relationship between the instrument and other international agreements or organisations, the joint programme of scientific research and decision-making.

The “stepwise approach” requires some explanation and could include the following steps which are not mutually exclusive:

- adjusting the Oslo Declaration with input from the plus 5 such that a new, broader non-binding statement could be adopted;
- negotiating a binding international agreement of the kind proposed by the United States; and
- negotiating in the foreseeable future an agreement or agreements to establish one or more additional RFMO/As for the area.

### *8.3.3.3 Third Meeting, July 2016*<sup>12</sup>

The third meeting was held in Iqaluit, Nunavut, Canada from 6 to 8 July 2016 and made substantial progress in many of the main issues discussed towards resolutions in differences of views among delegations. Delegations generally believed that there was a possibility of successful conclusion of this process in the near future even though different proposals for a new declaration or a legally binding agreement were tabled.

In addition to the issue of the legal format of the instrument, remaining issues for further discussions included the conditions under which a decision might be made to commence negotiations on an agreement to establish one or more additional RFMO/As and decision-making procedures. The “conditions” or triggers for commencing negotiations to establish one or more additional RFMO/As could include, for example, a stock level of marine living resources to be targeted for fishing. In other words, if/when the estimated stock biomass of a potential commercial fishing species reaches XX tons, negotiations for establishing one or more additional RFMO/As will begin.

One of the key elements that was raised during the meeting was the importance of indigenous and local knowledge, particularly concerning their role in the joint programme of scientific research and monitoring. This is understandable as indigenous and local communities have been harvesting marine living resources and observing marine environment/ecosystem for millennia. Their accumulated knowledge, while it could be anecdotal rather than scientific, is indispensable for the conservation and management of marine living resources especially when scientific baseline data is inadequate.

<sup>12</sup> Chairman’s Statement, Iqaluit, Nunavut, Canada, 6–8 July 2016. [www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279641.htm](http://www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279641.htm) (accessed 18 July 2018).

#### 8.3.3.4 *Fourth Meeting, November/December 2016*<sup>13</sup>

The fourth meeting was held in Tórshavn, the Faroe Island, from 29 November to 1 December 2016 and was conducted on the basis of a Chairman's Text circulated in October 2016 in the format of a legally binding agreement. The Chairman's Text included the outcomes of the Fourth Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean, which was held in Tromsø on 26–28 September 2016. Delegations felt that they made good progress in resolving differences of view on a number of the main issues under discussion and that the discussions could be concluded in the near future. However, some key points remained unresolved. Of particular concern were:

- the manner in which the agreement addresses exploratory fishing;
- the conditions under which a decision might be made to commence negotiations on an agreement to establish one or more additional regional fisheries management organisations or arrangements for the CAO;
- decision-making procedures.

The negotiating states were not able to find an agreement on these issues and were forced to postpone further discussions to the next meeting.

#### 8.3.3.5 *Fifth Meeting, March 2017*<sup>14</sup>

Considerable progress was made at the fifth meeting held in Reykjavik from 15 to 18 March 2017 in resolving differences of views on many issues under discussion in the draft agreement concerning: (i) the use of terms; (ii) its objective; (iii) many of the measures that would be applied under the draft agreement; (iv) all provisions relating to a Joint Program of Scientific Research and Monitoring; (v) the value of incorporating local and indigenous knowledge; (vi) all provisions relating to exploratory fishing; (vii) dispute settlement; and (viii) most provisions concerning signature, accession, entry into force, withdrawal and relation to other agreements.

Remaining issues included (a) a description or definition of the Agreement Area; (b) the conditions under which a decision might be made to commence negotiations for establishing one or more RFMO/As; (c) the possibility to adopt other conservation and management measures that could apply after such negotiations have commenced; and (d) decision-making procedures. Details for these issues will be elaborated in the sections below.

13 Chairman's Statement, Tórshavn, The Faroe Islands, 29 November–1 December 2016. [www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279642.htm](http://www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279642.htm) (accessed 18 July 2018).

14 Chairman's Statement, Reykjavik, Iceland, 15–18 March 2017. [www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279643.htm](http://www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/279643.htm) (accessed 18 July 2018).

At the close of the fifth meeting, the Chairman offered to circulate within a week his recommendations for resolving the remaining issues under negotiation. His intention was that if all delegations can accept those recommendations within two months, there will be no need for another round of negotiations. Eventually, some delegations could not accept those recommendations, especially regarding decision-making procedures. Another round of negotiations became necessary to finalise the text.

#### *8.3.3.6 Sixth and final meeting, November 2017<sup>15</sup>*

The final meeting was held in Washington, DC from 28 to 30 November 2017. The Chairman's Statement at the close of the meeting declared that the meeting "successfully concluded negotiations on the draft *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*".<sup>16</sup> While there was no explanation on how the remaining issues were resolved, the Statement describes the achievements of the 5-plus-5 process in the following manner.

The Agreement will prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean, an area that is roughly 2.8 million square kilometers in size, roughly the size of the Mediterranean Sea. Commercial fishing has never been known to occur in this area, nor is it likely to occur in the near future. However, given the changing conditions of the Arctic Ocean, the governments in question developed this Agreement in accordance with the precautionary approach to fisheries management.

The Agreement will establish and operate a Joint Program of Scientific Research and Monitoring with the aim of improving the understanding of the ecosystem(s) of this area and, in particular, of determining whether fish stocks might exist in this area that could be harvested on a sustainable basis. The Agreement envisions the possibility that one or more additional regional fisheries management organizations or arrangements may be established for this area in the future.

The Agreement is unique as it was concluded even before problems such as unregulated fisheries and overharvesting actually materialise. It is also unique as it is an interim agreement that incorporates a "stepwise approach" and has a clear "shelf life". This is reasonable because changes in the CAO are under way in an unprecedented pace and there are great uncertainties in the direction/scale/nature of the future changes. The Agreement has some ambiguities such as a "trigger" for moving to a next step of negotiating establishment of one or more RFMO/As. In a sense, the Agreement made some important decisions

15 Chairman's Statement, Washington, DC, 28–30 November 2017. [www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/281792.htm](http://www.state.gov/e/oes/ocns/fish/regionalorganizations/arctic/statements/281792.htm) (accessed 18 July 2018).

16 Ibid.

for future considerations. Conclusion of negotiations is in fact a beginning of a new stage. We have to observe future developments regarding the CAO fisheries issues very closely.

## 8.4 Interests of the players

### 8.4.1 Overview

The negotiations for the high seas fishery in the CAO was triggered by the rapid disappearance of sea ice in the Arctic Ocean caused by the climate change. At the same time, it should be noted that goals for the negotiations and focal points during the negotiations varied among the players: they also shifted and evolved through the course of the negotiations. While the Arctic 5-plus-5 negotiations started because of the adoption of the Oslo Declaration in July 2015, this chapter does not analyse the process that had led to the Declaration in detail since its main purpose is the analysis of the Arctic 5-plus-5 process. However, it is noteworthy that the entire process was led by the initiative of the United States, which was the chair of the Arctic Council from 24 April 2015 to 11 May 2017, during the period of the negotiations. Moreover, even though the Oslo Declaration was adopted as a non-binding document, it was originally contemplated as a legally binding agreement, which was primarily opposed by Russia. These factors cannot be neglected when scrutinising the Arctic 5-plus-5 negotiations.

When concluding the negotiations on the draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean in November 2017, the United States delegation and many other delegations noted that the Agreement was unique and unprecedented as it was concluded in a precautionary manner. Many fisheries agreements were negotiated only as a response to serious problems, such as overfishing. What made the conclusion of this unique and unprecedented agreement possible? Was there any sense of urgency among delegations that made the conclusion of the Agreement in relatively short two years possible? Can the varied interests of the players in the negotiations explain the uniqueness of the Agreement?

From publicly available information, it would be safe to assume that the Arctic Five discussions had started because of the concerns that some fisheries resources could appear in the high seas portion of the CAO as a result of the rapidly melting sea ice; that commercial fisheries could begin without any international regulations; and that the fisheries resources and the Arctic marine ecosystem could be seriously damaged. These are indeed legitimate concerns.

However, the first Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean held in June 2011 in Anchorage, Alaska, in accordance with the instructions from the Arctic Five, concluded that there was no urgency. At the same time, they recognised that knowledge was limited and it was necessary to establish baseline data. This conclusion was reconfirmed by the second Scientific Committee held in October 2013 in Tromsø, Norway. They concluded that there were no prospects in the near future for commercial concentrations of fish

in the high seas area. However, they also agreed that there remained a need to know more about fish stocks with the potential to be harvested in the high seas.

Despite the agreed views of scientists that there were no near-future prospects for commercial concentrations of fish in the high seas area of the CAO, the Oslo Declaration was adopted two years after the second scientific meeting. Furthermore, the draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean was concluded in November 2017. What was the motivation for pushing the “unprecedented” negotiations forward? Where did the energy come from to keep the negotiations running?

## *8.4.2 The players*

### *8.4.2.1 United States*

The United States played a key role as a locomotive of the negotiations. While international discussions regarding the changing Arctic Ocean and a possible need for a fisheries management had emerged long before going into the Arctic 5-plus-5 negotiations, the negotiation period coincides with the “legacy” building period of then-president Barack Obama who was scheduled to leave the White House in January 2017. As many of the past presidents did, Obama was keen to add a “legacy” to his achievements as the president of the United States. In August 2016, President Obama established the Papahānaumokuākea Marine National Monument in Hawaii. The Monument was then the largest Marine Protected Area (MPA) in the world.<sup>17</sup> On 20 December 2016, President Obama made a decision that permanently prohibited development of new oil and natural gas excavation sites in some locations in the Arctic Ocean and the Atlantic Ocean for the protection of the environment and marine life.<sup>18</sup> As he was interested in the protection of the marine environment and Arctic issues, it would be safe to assume that an international agreement for preventing illegal fisheries in the high seas of the CAO was an ideal candidate for his legacy. A source in the US delegation to the Arctic 5-plus-5 negotiations referred to strong instructions from a high level for early conclusion of the negotiations. The fact that the United States hosted three Arctic 5-plus-5 meetings out of the total of six and that they also provided ambassador David Balton, deputy assistant Secretary of State, as the chair of the meeting demonstrates the strong commitment and high-level energy of the United States government for the early conclusion of the negotiations.

17 NOAA National Marine Sanctuaries website: “Papahānaumokuākea Expands, Now Largest Conservation Area on Earth”. <https://sanctuaries.noaa.gov/news/aug16/president-announced-expansion-of-papahanaumokuakea-marine-national-monument.html> (accessed 16 August 2018).

18 Fortune (2016) “Obama Bans New Oil and Gas Drilling Off Alaska and Part of the Atlantic”, 21 December 2016. <http://fortune.com/2016/12/21/barack-obama-oil-gas-drilling-ban-arctic-alaska-atlantic-coast/> (accessed 17 August 2018).

It is without a doubt that the well-experienced and well-respected ambassador Balton played an important role, as a chair, for the successful conclusion of the Arctic 5-plus-5 negotiations. He had chaired and represented the United States at numerous negotiations including the UN Fish Stock Agreement and establishment of different RFMOs. Furthermore, the Arctic issues attract his attention and he has been very active in the field, including as the Chair of the Arctic Council during the US Chairmanship from 2015 to 2017.

#### *8.4.2.2 Russia*

The negotiations would not have been concluded only with the political will of the United States and a capable chair. We must remember that US–Russia relations were extremely difficult at the time of the Arctic 5-plus-5 negotiations in light of the US sanctions against Russia as a response to the Russian annexation of Crimea.<sup>19</sup> It was difficult for the United States and Russia to have a positive dialogue especially through their capitals. Geopolitically as well as geographically, the Arctic 5-plus-5 negotiations would have never been successful without cooperation with Russia whose EEZ occupies a large part of the CAO. In the early stage of the negotiations, Russia was reluctant to have a legally binding agreement, but eventually supported the Agreement that was proposed and promoted by the United States. What was Russia’s reason to change its view on the agreement?

Historically, Russia viewed itself as having to defend its domain on three fronts: the western side facing Europe; the southern side extending from national borders with China to Kazakhstan and the Middle East; and the eastern side facing the United States over the Bering Strait. Since the Russian shoreline comprises roughly one-third of the Arctic coastline, the Arctic Ocean can be considered Russia’s backyard and, relatively speaking, has been under its control. Additionally, the Arctic Ocean remains a strategically highly sensitive area where various military and intelligence operations have been conducted by countries concerned.

However, melting ice in the Arctic Ocean opened up this backyard and created opportunities as well as risks such as increased maritime traffic through the Arctic sea routes, development of energy resources and the possibility of commercial fisheries in the high seas. For Russia, these could be matters of concern that could make the Arctic Ocean the fourth and new front. On the other hand, Russia can expect substantial economic benefits from development and export of natural gas from the Yamal Peninsula, user fees for the Northern Sea Route, among others. It seems fair to say that Russia has somewhat competing interests of maximising economic benefits from the Arctic Ocean while preventing other countries from disturbing its backyard.

19 Jon Rahbek-Clemmensen (2017) “The Ukraine Crisis Moves North: Is Arctic Conflict Spill-Over Driven by Material Interests?” *Polar Record* 53–1: 1–15.



In the early stage of the Arctic 5-plus-5 negotiations, Russia took a position against a legally binding agreement and kept a low profile during the negotiations without commenting much on the draft agreement document tabled by the United States. In the latter part of the negotiations, however, Russia actively engaged in the discussions regarding the draft agreement document and submitted a series of proposals to amend the document. Is this a clear change of positions on the side of the Russian delegation? Or had they just observed the development in the early stage of the negotiations and decided to join the discussion later? Unfortunately, we have no material to answer these questions.

From my own observations it is noteworthy that the composition of the Russian delegation had changed during the negotiations in terms of the levels of representation and organisations they represented. This may or may not have something to do with their position at the negotiations. We also know that in the latter part of the negotiations the United States engaged in dialogue with Russia more actively. This may or may not have something to do with the change of the US presidency from Obama to Trump.

#### *8.4.2.3 China and Republic of Korea*

Both China and Republic of Korea were taking a relatively flexible position throughout the negotiations and actively participated in the discussions. Their basic position was the sustainable use of fisheries resources in case such resources become available in future in the high seas of the CAO. However, their enthusiasm for establishing fishing interests and securing fishing possibilities in the high seas area does not seem to be as strong as that at other fisheries meetings.

China was notably flexible in the discussions on specific wordings for provisions of the draft Agreement. This was a mild surprise for those who know China's often strong and rigid arguments in other fisheries related meetings such as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). This contrast could be explained simply by the difference between the Antarctic Ocean where substantial fisheries interests already exist now and in future and the high seas portion of the CAO where no near future prospects for commercial fisheries exists.

Needless to say, both China and Republic of Korea are interested in the development potential of the Arctic Ocean as a whole, not just limited to fisheries. They have been investing and participating in the Yamal natural gas and other Arctic projects; they have been expanding their scientific research capacity, including ice-breaker research vessels, in the Arctic Ocean; and they have been participating in the Arctic Council as Observer and promoting their presence in many of its subsidiary meetings. Arguably, therefore, the Arctic 5-plus-5 negotiations for the fisheries agreement can be interpreted as part of a larger strategy of their involvement in the Arctic affairs, rather than for the purpose of seeking short-term and real economic benefits in the field of fisheries.

#### 8.4.2.4 *Canada and Denmark (Greenland and the Faroe Islands)*

Canada and Denmark, the latter on behalf of Greenland and the Faroe Islands, promoted the rights and interests of indigenous peoples in the Arctic area on many occasions during the Arctic 5-plus-5 negotiations and, recognising the risk of over-simplification, acted more actively in promoting indigenous rights and interests. Norway, Russia and the United States also have indigenous peoples in their Arctic territories who are engaged in fisheries in their coastal waters. Yet, even though the US delegation, for example, did include a representative of their indigenous communities, the US was not a spearhead in promoting indigenous rights in the negotiations possibly because of their overall low-profile<sup>20</sup> approach in the negotiations. Naturally, the motivation of states to promote indigenous issues varies from country to country, depending on a plethora of issues such as the sizes of the indigenous populations, their history, and their current economic and political status in the country, to say the least.

Fisheries conducted by the indigenous peoples of the Arctic coastal states are small scale as well as subsistence fisheries within the EEZs of each state. Furthermore, at least the United States has prohibited commercial fisheries in its Arctic EEZ waters since 2009. As long as available scientific and fisheries data show, it seems that target species of the indigenous fisheries have no high commercial values. Therefore, concern of the Arctic coastal states, especially for Canada and Denmark/Greenland/Faroe Islands, has been possible adverse effects of potential commercial fisheries in the high seas of the CAO.

Naturally there was no opposition to include due considerations to indigenous peoples in the Agreement and it duly reflected this aspect: the Preamble dedicates three paragraphs to recognise the rights of indigenous peoples, their interests in the conservation and management of living marine resources, and potential contribution of indigenous and local knowledge; Article 4.2 prescribes that the Joint Program of Scientific Research and Monitoring, to be established by the Agreement, shall take into account indigenous and local knowledge; Article 5.2 also provides indigenous peoples with a mechanism to participate in the implementation of the Agreement through “committees or similar bodies in which representatives of Arctic communities, including Arctic indigenous peoples, can participate”.

The manner in which indigenous interests are reflected in the Agreement is consistent with that of the Arctic Council and, therefore, it can be understood that Canada and Denmark succeeded in reflecting their main interests in the Agreement. While indigenous peoples are not explicitly provided with special status as in the case of the Arctic Council, their special interests are well recognised;

20 Dirk Zeller et al. (2011) “Arctic Fisheries Catches in Russia, USA, and Canada: Baseline for Neglected Ecosystems” *Polar Biology* 34–7: 955–973; Report of 2nd Scientific Meeting on Arctic Fish Stocks, Tromsø 28–31 October 2013. [www.afsc.noaa.gov/Arctic\\_fish\\_stocks\\_third\\_meeting/Report%20of%202nd%20Scientific%20Meeting%20on%20Arctic%20Fish%20Stocks%2028%2031%20October%202013.pdf](http://www.afsc.noaa.gov/Arctic_fish_stocks_third_meeting/Report%20of%202nd%20Scientific%20Meeting%20on%20Arctic%20Fish%20Stocks%2028%2031%20October%202013.pdf) (accessed 20 August 2018).

participation in committees or similar bodies to be formed for the implementation of the Agreement (Article 5.2), and references to their rights, interests and knowledge (preambles).

#### *8.4.2.5 Iceland*

Iceland is a member of the Arctic Council. However, it was not a part of the Arctic Five consultations because its EEZ does not face the high seas portion of the CAO. Iceland was not invited to the Arctic Five meetings because, while it is an Arctic state, it is not a coastal state of the “central” Arctic Ocean including the high seas subject to the Arctic 5-plus-5 negotiations. Iceland was not happy with this and there was some tension, although not evident, during the Arctic 5-plus-5 process.<sup>21</sup>

Differences of interpretation of the Svalbard Treaty<sup>22</sup> between Norway and other parties to the Treaty, including Iceland,<sup>23</sup> which ratified the Treaty in 1994, also had some influences on the negotiations, especially in defining the agreement area in the Agreement. The agreement area is defined in Article 1 (a) as a provision of “Use of Terms” rather than an independent article. This was an attempt to play down the issue of the agreement area. The wording of the provision was also selected because of the differences of interpretation regarding the boundary separating the high seas and the area subject to the Svalbard Treaty and the legal character of jurisdiction exercised by Norway. Article 1 (a) defines the high seas area as “surrounded by waters within which” coastal states “exercise fisheries jurisdiction”, not national jurisdiction.

While Iceland could take a position as a coastal country of the Arctic Ocean at the Arctic 5- plus-5 negotiations, they acted as a fishing country supporting the sustainable use of fisheries resources. This is not surprising as Iceland is a major fishing country but the situations above, especially the difference of positions regarding the interpretation of the Svalbard Treaty, might have prompted Iceland to be on the same side with the fishing countries rather than with the coastal countries of the Arctic Ocean.

#### *8.4.2.6 The European Union*

At international meetings concerning fisheries and oceans, the European Union (EU) is often oriented towards protecting the marine environment and strictly

21 Eilís Quinn (2015) “Iceland Blasts Arctic Five for Exclusion from Fishing Agreement” Eye on the Arctic website. [www.rcinet.ca/eye-on-the-arctic/2015/07/30/iceland-blasts-arctic-five-for-exclusion-from-fishing-agreement/](http://www.rcinet.ca/eye-on-the-arctic/2015/07/30/iceland-blasts-arctic-five-for-exclusion-from-fishing-agreement/) (accessed 18 July 2018).

22 Treaty between Norway, the USA, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden with regard to the Archipelago of Spitsbergen, signed 9 February 1920 and entered into force 14 August 1925, *League of Nations Treaties Series 2*: 7.

23 Erik J. Molenaar (2012) “Fisheries Regulation in the Maritime Zones of Svalbard” *The International Journal of Marine and Coastal Law* 27: 3–58.

regulating fishing activities. For example, the EU is a keen supporter of the introduction of Marine Protected Areas (MPAs) and Environmental Impact Assessments (EIAs) in the United Nations BBNJ (marine biological diversity of areas beyond national jurisdiction) discussions. While there should be and there is no inconsistency between environmental protection and sustainable use of fisheries resources, the EU took the position during the negotiations that if/when commercial fisheries resources become available in the high seas portion of the CAO, the agreement should not just prohibit unregulated fisheries but reflect the principle of the sustainable use. The EU delegation, including the head of delegation, mainly consisted of officials from the European Commission's Directorate General (DG) Maritime Affairs and Fisheries (DG MARE) responsible for EU policies concerning maritime affairs and fisheries. Notably, it was not the DG Environment, whose mandate is to implement policies on environmental protection. This could explain the EU's positions at the Arctic 5-plus-5 process, but we have no bases to explain why the EU sent the mainly DG MARE delegation. In light of the EU's general interests in protecting and conserving the Arctic environment, it would not have been surprising had it sent a delegation centring around DG Environment representatives.

It is also noteworthy that only a few national representatives, including Spain and the Netherlands, joined the EU delegation, apart from local embassy staff of other EU Members when meetings were held. Spain has generally strong interests in fisheries. Combined with the DG MARE representation, this limited national representation could be another factor that formed the character of the EU delegation.

#### *8.4.2.7 Japan*

Japan, as one of the non-coastal members of the Arctic 5-plus-5 process, has two main areas of interests in the fisheries negotiations: first, its aspiration to maintain and strengthen Japan's role and presence in the Arctic affairs; second, its general interests in fisheries and sustainable use of marine living resources.

Japan's involvement in the Arctic affairs started mainly from scientific research. Japan's latest Arctic Policy, established on 16 October 2015, also states that Japan's objective is "to play a leading role for sustainable development in the Arctic in the international community, with foresight and policy based on science and technology that Japan has advantage in order to achieve sustainable development".<sup>24</sup> It should be noted that Japan aims to play a leading role in the international community regarding Arctic affairs and obviously the Arctic Council is the main forum for promoting Japan's presence. However, as a non-Arctic state, Japan is merely an Observer at the Arctic Council. For Japan, therefore, the

24 Headquarters for Ocean Policy, Government of Japan (2015) *Japan's Arctic Policy*. [www8.cao.go.jp/ocean/english/arctic/pdf/japans\\_ap\\_e.pdf](http://www8.cao.go.jp/ocean/english/arctic/pdf/japans_ap_e.pdf) (accessed 18 July 2018).

Arctic 5-plus-5 process is a place where Japan can enhance its presence in the Arctic affairs with its expertise in fisheries and science. Moreover, we can argue that in this process Japan tries to compensate its “inferior” status in the Arctic Council. In other words, Japan could not accept any arrangement that reinforces its inferior status by recognising any superior status of the Arctic coastal states in the Agreement. In the latter half of the negotiations, the status issue, including decision-making mechanism and entry into force requirements, were the main interests of the Japanese delegation.

The other aspect that Japan is naturally interested in is the sustainable use of marine living resources in the Arctic area. Sustainable use of the resources based on scientific evidence is Japan’s consistent and global policy.<sup>25</sup> However, fishing industries in Japan do not have any interest in conducting fisheries operations in the high seas of the CAO because of the low prospect of emergence of commercial fisheries stocks and the declined motivation of Japan’s fishing industries to expand their operations outside the current fishing grounds. In other words, Japan’s position to promote the stepwise approach was mainly based on its sustainable use policy rather than real economic interests.

However, Japan is interested in the science of the Arctic environment and its marine living resources. The unprecedented changes in the Arctic and general lack of baseline data in the area are attracting strong interests from scientists in many different fields. The Agreement and its provision for scientific cooperation (Article 4) would provide a very useful platform for Japan to promote its scientific activities in the Arctic. Japan’s challenge is how to take advantage of the Agreement to play a leading role in the science of the Arctic.

## **8.5 Main items of interests at the Negotiations**

### ***8.5.1 Framework of the agreement: legally binding or not***

At the first meeting of the Arctic 5-plus-5 process, the United States submitted a draft agreement that generally follows the content of the Oslo Declaration. The purpose of this proposal was to establish a legally binding framework through the Arctic 5-plus-5 process. In order to reach the overarching objective of the Oslo Declaration – prevention of illegal fishing – it was more desirable and effective to have a legally binding agreement. Since the plus 5 members at present essentially include all players who have the capacity to conduct fishing operations in the central Arctic high seas, a legally binding agreement would be more efficient to attain the goal of the Oslo Declaration. Also for building a legacy for outgoing President Obama, it would have been more desirable to conclude a legally binding agreement.

25 See, e.g., Atsushi Sunami, Tomoko Hamachi, and Shigeru Kitaba (2013) “The Rise of Science and Technology Diplomacy in Japan” *Science & Diplomacy* 2–1. [www.science.diplomacy.org/article/2013/rise-science-and-technology-diplomacy-in-japan](http://www.science.diplomacy.org/article/2013/rise-science-and-technology-diplomacy-in-japan) (accessed 19 July 2018).

At the first Arctic 5-plus-5 meeting in December 2015, many of the participating members were in an “observing mode” and did not have mandates to negotiate a legally binding instrument. At the second meeting in April 2016, many members came with the mandate to negotiate a legally binding instrument, and negotiations for such an instrument had in effect started. Russia, on the other hand, kept its original position that it would be enough to expand the scope of the Oslo Declaration by inviting the plus 5 to join the declaration. It should be noted, however, that Chair Balton did not hurry in making a conclusion about the legal character of the instrument, respecting the Russian position.

Eventually Russia agreed to a legally binding agreement. Once the Russian delegation became active in the negotiations towards a legally binding instrument, one of their main targets was to secure a certain superiority of Arctic littoral states in the decision-making mechanism. For Russia, it seems, the reflection of coastal countries’ superiority in the Agreement was an essential condition to accept a legally binding instrument. Since it was agreed that decision-making of the Agreement was consensus based (Article 6), coastal countries’ superiority was not achieved in that respect since coastal countries and *all other members* of the Agreement have veto rights under the consensus system. The only place where coastal states’ interests are explicitly considered is the Preamble where “the special responsibilities and special interests of the central Arctic Ocean coastal States” are recognised “in relation to the conservation and sustainable management of fish stocks in the central Arctic Ocean”.

### ***8.5.2 Stepwise approach***

At the beginning of the Arctic 5-plus-5 process, the main theme of the negotiations was to prevent illegal fishing in the high seas portion of the CAO and to promote scientific research and the collection of scientific information, reflecting the content of the Oslo Declaration. However, the plus-5 members, mainly Japan and the EU, argued that it was not desirable to conclude an agreement only to prohibit the utilisation of marine living resources even if there is little prospect of viable commercial fisheries in the high seas area in the near future. They requested the agreement to include a provision which, in case fisheries resources become available in future in the high seas portion of the CAO, enables the sustainable use of the resources by establishing a RFMO/A. This argument was supported by other members, including China and Korea.

Accordingly, the Arctic 5-plus-5 negotiations accepted the concept of a stepwise approach where the Agreement is an interim one and the first step towards the possibility of establishing a RFMO/A in the future. Article 5,

paragraph 1 (c) describes this process and is one of the core provisions of the Agreement:

Article 5 paragraph (1)(c)

The Parties shall, *inter alia*:

1.
  - a. ....
  - b. ....
  - c. on the basis of the scientific information derived from the Joint Program of Scientific Research and Monitoring, from the national scientific programs, and from other relevant sources, and taking into account relevant fisheries management and ecosystem considerations, including the precautionary approach and potential adverse impacts of fishing on the ecosystems, consider, *inter alia*, whether the distribution, migration and abundance of fish in the Agreement Area would support a sustainable commercial fishery and, on that basis, determine:
    - (i) whether to commence negotiations to establish one or more additional regional or subregional fisheries management organizations or arrangements for managing fishing in the Agreement Area; and
    - (ii) whether, once negotiations have commenced pursuant to subparagraph (i) above and once the Parties have agreed on mechanisms to ensure the sustainability of fish stocks, to establish additional or different interim conservation and management measures in respect of those stocks in the Agreement Area.

This concept might not have been the best approach for the Arctic Five. They, arguably, felt more comfortable with maintaining the status quo rather than with the emergence of commercial fisheries in the high seas area adjacent to their EEZs. However, the stepwise concept was accepted with no obvious objection. This could be because of the desire of the United States to conclude the Agreement in time so that it could be added as a legacy of President Obama. Also, it should be noted that the common understanding of the Arctic 5-plus-5 is that there would be no emergence of commercially viable fisheries resources in the high seas area of the CAO in the near future anyway. Practically speaking, the next step on this stepwise approach could be a long time into the future – if it ever comes.

Although a stepwise approach received a wide support, this may not work unless there is common understanding as to when and how, in terms of a decision-making system, a negotiation for the establishment of a RFMO/A could be initiated. Therefore, the Arctic 5-plus-5 negotiations spent substantial time in

discussing what should be a “trigger” for starting these negotiations and what kind of a decision-making system would be appropriate.<sup>26</sup> An example for such trigger could be an increase of a target fisheries resource above a certain level. However, we do not have enough information as to what species of fish could emerge in the high seas portion of the CAO in the future since scientific data are limited.<sup>27</sup> This particular trigger would not be practical, at least at present. Another trigger or criterion could be the ever more reduction of sea ice coverage. However, even though sea-ice coverage has certain annual fluctuations, the decreasing trend is clear. Furthermore, decreasing ice coverage does not directly lead to emergence of fisheries resources. Consequently, this trigger would also present some practical problems.

A proposal was tabled to initiate negotiations for the establishment of a RFMO/A after a pre-determined period of time following the entry into force of the first step and irrespective of the situation/emergence of fisheries resources. While there is no scientific basis for this idea, a certainty was introduced as to when in the future the Parties would initiate the next step. This was a desirable arrangement for those who support the stepwise approach. Eventually, it was agreed that this Agreement has a “shelf life” of 16 years and its members must make a decision whether to negotiate a new agreement or to simply extend the Agreement. The “shelf life” provision, Article 13, was included to secure progress in the stepwise approach.

### *8.5.3 Joint programme of scientific research*

The promotion of scientific cooperation among members was already one of the main points of the Oslo Declaration. This was necessary and important because: (i) there was strong interests in the possibility of commercially viable fisheries resources emerging in the high seas area of the CAO as a result of the decreasing sea ice coverage; (ii) there were inadequate scientific data and analysis regarding fisheries resources in the high seas area, including baseline data of the current status of the resources; and (iii) there are pure scientific interests in the rapidly changing Arctic environment in general. No one country can conduct all the necessary research and analyses and, therefore, international cooperation is a logical and desirable approach.

Due to the effects of the climate change, the Arctic Ocean and the entire Arctic region are facing rapid changes that have never been experienced in human history. From pure scientific viewpoint, scientists cannot and should not miss this subject for research and study. There are, of course, limits in scientific capacity, in any one country to conduct scientific research to cover the whole Arctic Ocean. Furthermore, a large part of the Arctic Ocean belongs to the EEZs of the five

26 It should be noted that a decision-making system would also be applied to other issues requiring a decision.

27 Arctic Council (2013) *Arctic Biodiversity Assessment: Status and Trends in Arctic Biodiversity. Conservation of Arctic Flora and Fauna (CAFF)*: 213, 214.



coastal countries. In conducting scientific analysis, it is important to consider the interaction between the land areas and the ocean to understand the whole picture of the Arctic. All those conditions make scientific cooperation imperative.<sup>28</sup>

For the plus-5 members, a joint programme of scientific research in the Arctic Ocean is indeed quite an attractive proposition. They also recognised their responsibility for conducting research as countries capable of carrying out commercial fisheries in the high seas area. Many of them, therefore, expressed interest in and support for a joint programme of scientific research throughout the Arctic 5-plus-5 process. It should be noted, however, that fishing industries of the members have not expressed any interest in beginning fisheries operations at present due to the uncertain prospects concerning the emergence of commercially viable fisheries resources. This situation makes the joint programme of scientific research for the sake of science practically the only merit of joining the negotiations.

The scientific meetings, which were attended by both Arctic Five and plus 5 scientists, were held concurrently with, yet somewhat independently from, the Arctic 5-plus-5 negotiations: the actual management of the scientific meetings was entrusted to the scientists, and participation of non-coastal members to the scientific meetings predated the Arctic 5-plus-5 meetings. This is noteworthy since the terms of reference of the scientific meetings were adopted by the Arctic 5-plus-5 meetings, and the results of the scientific meetings have been presented to the Arctic 5-plus-5 meetings. The Agreement places the scientific meetings as a part of its system and the joint programme of scientific research will be established (Article 4.1) and implemented within the framework of the Agreement (Article 4).

Scientific meetings will be held “at least every two years and at least two months in advance of the meetings of the Parties” and terms of reference and other procedures for the functioning of the joint scientific meetings shall be adopted “within two years of the entry into force of this Agreement” (Article 4.4). Article 4.3 is also important for the promotion of scientific activities as it requires the adoption of a data sharing protocol among the Parties.

However, the scientific meeting under the Agreement might keep its independent nature for the time being because of: (i) its historic development and management as somewhat independent entity from the negotiations; (ii) recognition of many of the participating scientists regarding the scientific meeting as a part of Arctic science in general rather than a subsidiary body of the Arctic 5-plus-5 process; and (iii) no urgency of providing scientific advices to fisheries management by a RFMO/S as its subsidiary body.

#### *8.5.4 Decision-making*

Decision-making was the last remaining issue in the negotiation process. During the negotiations, there were no substantial differences between the Arctic

28 On Arctic Science Cooperation Agreement concluded in 2017 by the eight Arctic states, see Chapter 12 by Akiho Shibata of this book.

littoral and the non-littoral states regarding items such as the objectives of the Agreement and specific approaches for implementing the objectives. However, regarding a decision-making system, there were clear differences of positions and approaches. Coastal states, notably Russia and Canada, argued for the priority, special interests and rights of coastal states. Non-coastal states, notably Japan and the EU, had concerns regarding the possibility of a creeping jurisdiction by coastal states adjacent to the high seas area and of effects to the power balance between the Arctic members and the Observers at the Arctic Council. Again, the United States was relatively flexible and kept a low profile in the discussion regarding this issue.

Various ideas were proposed as to a decision-making system including a super-majority voting system, some form of requirement of consent from coastal states and/or a right of veto by coastal states. Eventually a consensus system was adopted for all decision-making including the condition for entry into force of the Agreement as provided by Articles 6 and 11.

The Arctic 5-plus-5 process, however, selected a decision-making method that addresses the interests of both coastal and non-coastal members: while coastal states can prevent any decision they consider adversarial to their own interests, for non-coastal states consensus is the equal footing method that creates no grouping or priority status among the parties to the Agreement.

Naturally, there is the risk that one member with a different opinion from the rest could veto a decision. In fact, in the beginning of the Arctic 5-plus-5 negotiations, several members expressed their concerns regarding this aspect. However, they made a choice that could lead to practical difficulties in decision-making in order to satisfy the interests of both coastal and non-coastal members.

However, even though the Arctic Five and the plus 5 follow substantially different interests, there is no need to be too pessimistic about the consensus system. This is because: (i) all Arctic 5-plus-5 members essentially share the same objectives regarding the management of the high seas of the CAO (i.e. prevention of unregulated fisheries); (ii) at present, at least, there is no prospect of a situation arising that could bring about serious conflicts between the members; and (iii) there are good examples for consensus-building on difficult issues, for example in the CCAMLR. The CCAMLR's example is encouraging as its membership includes a wide range of representations in terms of, for instance, economic development, geography, interests in Antarctic affairs, and territorial interests. Still, consensus decisions are made and implemented.

## **8.6 Conclusion: the future of the Arctic Five-plus-Five process**

Many international fisheries agreements have been created in response to conflicts among countries over fisheries resources and challenges regarding overfishing situations. In some cases, negotiations started only when the problem had become critically serious. On the other hand, the new Agreement for the high

seas area of the CAO was created, involving almost all players concerned, in a very short time of two years even before fisheries resources emerge in the high seas area and even before any illegal and unregulated fisheries have started. Thus, the Agreement is uniquely precautionary. We need some time before we see how this unique agreement develops or evolves towards a next step. At present, however, the Agreement can be and should be regarded as a success by the international diplomatic community.

At the same time, the members of the Agreement should actively create values from this unique international instrument, rather than just waiting for some values to emerge. If there is no prospect in the near future for commercial fisheries in the high seas area of the CAO, the immediate value would be the joint programme of scientific research and other scientific cooperation among the members.