

## Briefing Note

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

Erik J. Molenaar

On 16 July 2015, in Oslo, the coastal states of the Arctic Ocean – Canada, Denmark, Norway, the Russian Federation and the United States (Arctic Five) – took a long-awaited further step in the international regulation of Arctic Ocean fisheries by signing the [‘Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean’](#) (Oslo Declaration). Key features of the Declaration are that it contains various political commitments, rather than international obligations; it relates exclusively to fishing in the high seas portion of the central Arctic Ocean; it is different than a ‘moratorium’, ‘ban’ or ‘freeze of fishing effort’; and it applies only to the Arctic Five.

The origins of the Arctic Five’s process on Arctic Ocean fisheries can be traced back to the United States Senate joint resolution No. 17 of 2007, directing the United States “to initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean.” One of the first intergovernmental discussions on Arctic Ocean fisheries occurred at the November 2007 meeting of the Arctic Council’s Senior Arctic Officials (SAOs), which concluded that “There was strong support for building on and considering this issue within the context of existing mechanisms.” The search for a suitable mechanism – existing or new – took place largely in 2008 and 2009, during which various existing regional and global bodies were proposed by interested states and entities. No consensus among the Arctic Five could be reached for any of these proposals.

By the end of 2009 or at least by early 2010, the Arctic Five agreed that if a new international instrument on Arctic Ocean fisheries should be developed at all – which was not yet evident for all five by then – its development should be initiated and led by the Arctic Five outside the framework of (other) existing mechanisms. For this purpose, the Arctic Five have, since March 2010, convened a number of policy/governance meetings at senior officials level, alongside a series of science meetings. The former includes three meetings on which information was made publicly available, namely in June 2010 (Oslo), in April/May 2013 (Washington D.C.) and in February 2014 (Nuuk). Other meetings on which information was not made publicly available have also been held, both before June 2010 and after February 2014. Science meetings have been convened in June 2011 (Anchorage), October 2013 (Tromsø) and April 2015 (Seattle), the last one also involving scientists from China, Iceland, Japan and South Korea.

The Declaration signed in Oslo was already envisaged in the Chairman's Statement of the February 2014 Nuuk meeting and was scheduled to be signed at ministerial level in June 2014. The Russian Federation's annexation of Crimea and the subsequent events in Eastern Ukraine disrupted these plans and for a while it was uncertain if these and 'The Way Forward' agreed to in Nuuk would ever come to fruition. The Oslo Declaration – signed at ambassadorial rather than ministerial level, probably instigated by Canada in view of the many Canadians with Ukrainian descent – brought an end to this uncertainty and confirmed that the consensus that existed in Nuuk had remained largely intact.

The most important commitment of the Oslo Declaration is that the Arctic Five will implement an interim measure that authorizes their vessels "to conduct commercial fishing in [the high seas portion of the central Arctic Ocean] only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards." The wording is identical to that agreed in Nuuk, except for the substitution of "modern" by "recognized," which is arguably not a very significant change. As already said above, this commitment cannot be equated with a 'moratorium', 'ban' or 'freeze of fishing effort' as it still allows fishing pursuant to existing or new regional fisheries management organizations or arrangements (RFMOs/As). The Oslo Declaration's explicit reference to the North-East Atlantic Fisheries Commission (NEAFC) – whose mandate extends to part of the high seas portion of the central Arctic Ocean – amounts to a recognition that NEAFC is one such existing RFMO/A.

A similar explicit recognition of the Joint Norwegian-Russian Fisheries Commission (Joint Commission) is not included in the Oslo Declaration, even though its geographical mandate implicitly includes the entire Arctic Ocean, and Norway and the Russian Federation appear to view it as an RFMA. However, for a number of reasons – more relating to geopolitics than international law – it does not seem very likely that Norway and the Russian Federation will authorize their vessels to engage in commercial fishing in the high seas of the central Arctic Ocean exclusively pursuant to regulation by the Joint Commission. First of all, their participation in the Arctic Five's process on Arctic Ocean fisheries already reflects their support for a multilateral rather than a bilateral approach. Moreover, while the Oslo Declaration repeats once again the Arctic Five's position that there is "no need at present to establish" a new RFMO – as commercially viable fisheries are unlikely to materialize in the future – it also envisages a "broader process" involving other interested States (and entities) "to develop measures consistent with [the

Oslo Declaration] that would include commitments by all interested States.” It is submitted that such measures would constitute an RFMA.

The Nuuk Chairman’s Statement also envisaged this ‘broader process’ and even explicitly mentioned that “the final outcome could be a binding international agreement.” Its non-inclusion in the Oslo Declaration reflects as a minimum a lack of consensus on the need or desirability of the sentence. However, the root cause for this could also be a lack of support by one or more of the Arctic Five for a legally binding outcome. On the other hand, the significance of the non-inclusion of the sentence should also not be overstated, as a legally binding outcome is not ruled out.

At the time of writing, the envisaged broader process still seemed to be in a design-phase without agreement on rules of procedure, date and venue of a first meeting, and who will participate besides the Arctic Five. Some time ago the intention seemed to be that participation in the broader process would be exclusively based on invitation by the Arctic Five, and that the following non-Arctic states and entities would be invited: China, the European Union (EU), Iceland, Japan and South Korea. Participation by states and entities in the broader process would thus consist of ‘Five-plus-Five.’ Limiting participation in this way may also serve to ensure that the Arctic Five are not outnumbered by non-Arctic Ocean coastal states and entities. However, the substitution of the phrase “additional States” by “all interested States” raises the question if the Arctic Five are perhaps considering more inclusive participation.

The Oslo Declaration recognizes the interests of Arctic indigenous peoples “in the proper management of living marine resources in the Arctic Ocean.” However, participation of their representatives in their own right – rather than as part of the delegations of the Arctic Five – is probably not able to secure consensus among the Arctic Five, and may also be opposed by non-Arctic States that have concerns relating to indigenous peoples, in particular China. Participation by non-governmental organizations – both green and industry – may be less controversial.

So far, the only real challenge to the role claimed by the Arctic Five seems to have come from Iceland, which took/takes the view that it is entitled to join the Arctic Five, apparently on account of the possibility that the distributional range of fish stocks that occur in the Arctic Ocean also overlaps with Iceland’s maritime zones. It is nevertheless submitted that, in their capacity as coastal states to the Arctic Ocean, the Arctic Five share certain rights, interests and concerns as well as obligations, and it is therefore perfectly understandable – and often in fact required – that they cooperate and coordinate on various issues at one level or another. Iceland is simply not an Arctic Ocean coastal state on account of geography. If the Arctic Five were to allow Iceland to join them, they would not only have difficulty in finding a convincing common denominator but would also stimulate ‘applications’ by other ‘nearby’ states or entities, or renewed calls to convene the ‘broader process’ under the auspices of the Arctic Council.

One of the earliest instances of cooperation among the Arctic Five – although not necessarily conceived as belonging to the domain of the international law of the sea – is the 1973 Agreement on the Conservation of Polar Bears. So far, the Arctic Five’s process on Arctic Ocean fisheries is not inconsistent with international law. Most importantly, nothing in the Oslo Declaration suggests that the Arctic Five’s commitments will be imposed on non-signatories. The Declaration only observes that the Arctic Five “intend to continue to work together to encourage other States to take measures in respect of vessels entitled to fly their flags that are consistent with these

interim measures.” This will probably above all be done by means of the envisaged broader process.

While the Arctic Five’s process on Arctic Ocean fisheries has so far arguably been in conformity with international law, there are certainly concerns about the envisaged broader process. First, the Arctic Five have repeatedly and explicitly claimed a lead role in the development of international regulation of high seas fishing in the central Arctic Ocean. The Nuuk Chairman’s Statement describes their lead role as “appropriate.” At earlier occasions, one or more of the Arctic Five argued their lead role to be based on their ‘special/particular responsibility’ and ‘unique interest and role’ as Arctic Ocean coastal states. The Oslo Declaration is silent about the Arctic Five’s lead role, however, and contains instead a clarification of the Declaration’s rationale and international legal basis, with particular reference to the precautionary approach.

This does not mean that the Arctic Five have renounced their lead role. Among other things, they are likely to maintain full control on the crucial and sensitive issue of participation in the broader process. If participation would indeed consist of Five-plus-Five, this would be open to challenges of inconsistency with the freedom of high seas fishing and the right of all states with a ‘real interest’ to participate in RFMOs/As that have a partial or exclusive high seas mandate. The difficulty for such challenges is that Five-plus-Five would be largely in line with the current overall practice on membership or participation within such RFMOs/As. It should also be kept in mind that there are currently no commercially viable fisheries in the high seas of the central Arctic Ocean and this may remain unchanged for a considerable number of years to come. Finally, as noted above, it may well be that the Arctic Five are considering more inclusive participation than Five-plus-Five.

Another reason why the Arctic Five claimed a lead role was to significantly shape the substantive output of the broader process. The Oslo Declaration stipulates that the measures resulting from the broader process are to be “consistent with” the Oslo Declaration. This raises the question as to how much flexibility among the Arctic Five, and room for maneuvering and negotiation there eventually will be? Or, to put it differently, to what extent will the substance of the Oslo Declaration amount to a *fait accompli* and preclude the newly invited states and entities from participating in the broader process in a way that would be both meaningful and consistent with their rights under international law? Here too, however, it must be emphasized that there are currently no commercially viable high seas fisheries and that the Oslo Declaration does not propose a ‘moratorium’, ‘ban’ or ‘freeze of fishing effort’.

A second distinct concern on the broader process is that the Arctic Five have spatially confined it to the high seas of the central Arctic Ocean. If this remains unchanged, it would not address the potential risk that coastal State maritime zones in the central Arctic Ocean will be subject to less stringent regulation than the high seas portion. It can be safely assumed that fisheries will become commercially viable within coastal State maritime zones earlier than within the high seas area. The more urgent challenge, therefore, is for each of the Arctic Five to ensure that commercial fishing in their own maritime zones is also regulated in accordance with ‘recognized international standards’, with particular reference to new and exploratory fisheries. Such regulation will - for reasons of credibility and in light of the notion of compatibility laid down in Article 7 of the 1995 Fish Stocks Agreement – be crucial for securing support among non-Arctic Ocean coastal states and entities to participate in the envisaged broader process and its eventual adoption of a regional

instrument on high seas fisheries in the central Arctic Ocean. Non-Arctic Ocean coastal states and entities may also propose that the notion of compatibility be included in this instrument. For the United States this would not appear to be problematic, as it has already put in place a ‘freeze of fishing effort’ in its exclusive economic zone off Alaska in the Arctic Ocean. Hopefully, the other Arctic Ocean coastal states either already have regulation with a similar stringency level in place or are prepared to do so sooner or later, but at any rate before the conclusion of the broader process.

Despite these points of concern, it would be inappropriate to conclude this contribution without due appreciation for the Arctic Five’s pro-active and precautionary efforts and commitments, and implicit dismissal of a *laissez-faire*, *laissez-aller* attitude. It is to be hoped that their envisaged broader process commences in the near future, will operate in accordance with international law and produce a successful outcome, in particular in light of the ecosystem approach to fisheries management.