



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 J. Molenaar

Deputy Director, Netherlands Institute for the Law of the Sea (NILOS), Utrecht University & Professor, K.G. Jebsen Centre for the Law of the Sea (JCLOS), UiT The Arctic University of Norway. e.j.molenaar@uu.nl



Universiteit Utrecht

Symposium The Role of Non-Arctic States / Actors in the Arctic Legal Order, Kobe, 7 Dec 2017

Overview presentation

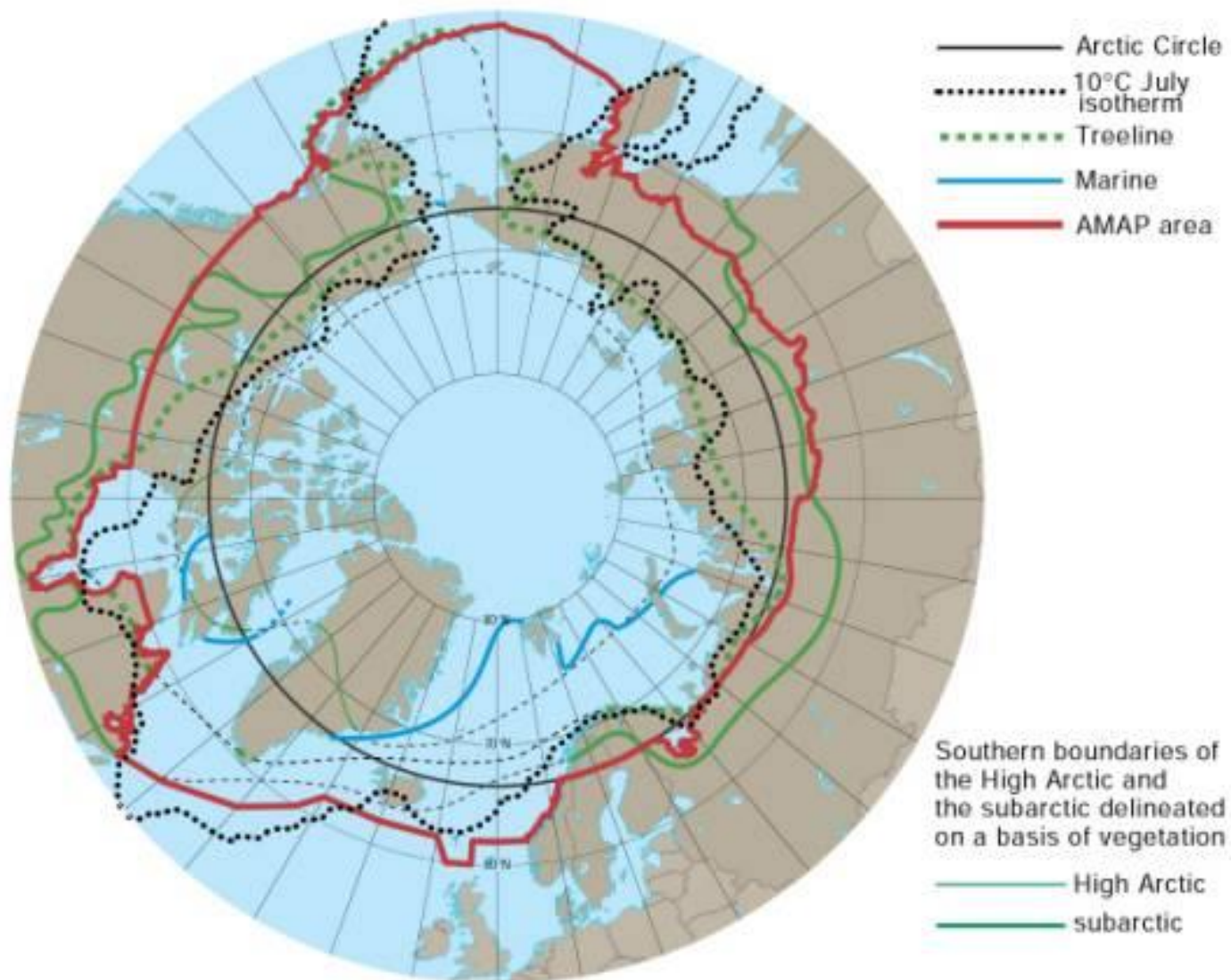
- Introduction
- International Fisheries Law
- The Pathway to the A5 & 5+5 Processes
- The A5 Process
- The 5+5 Process
- Participation in 5+5 Process and CAOFA Agreement
- A Comparative Analysis with Selected RFMOs



Introduction

- Geographical definitions
 - No generally accepted definitions for Arctic, marine Arctic, Arctic Ocean and central Arctic Ocean (three Oceans...)
- Status of participants in the 5+5 process
 - Arctic States (8): Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the US
 - Four high seas pockets; one or more pockets of the Area
 - 5 central Arctic Ocean coastal States
 - Iceland: Arctic coastal State and potential Arctic Ocean coastal State
 - Denmark and EU: hybrid status
 - China, Japan and South Korea: non-Arctic States & high seas fishing States



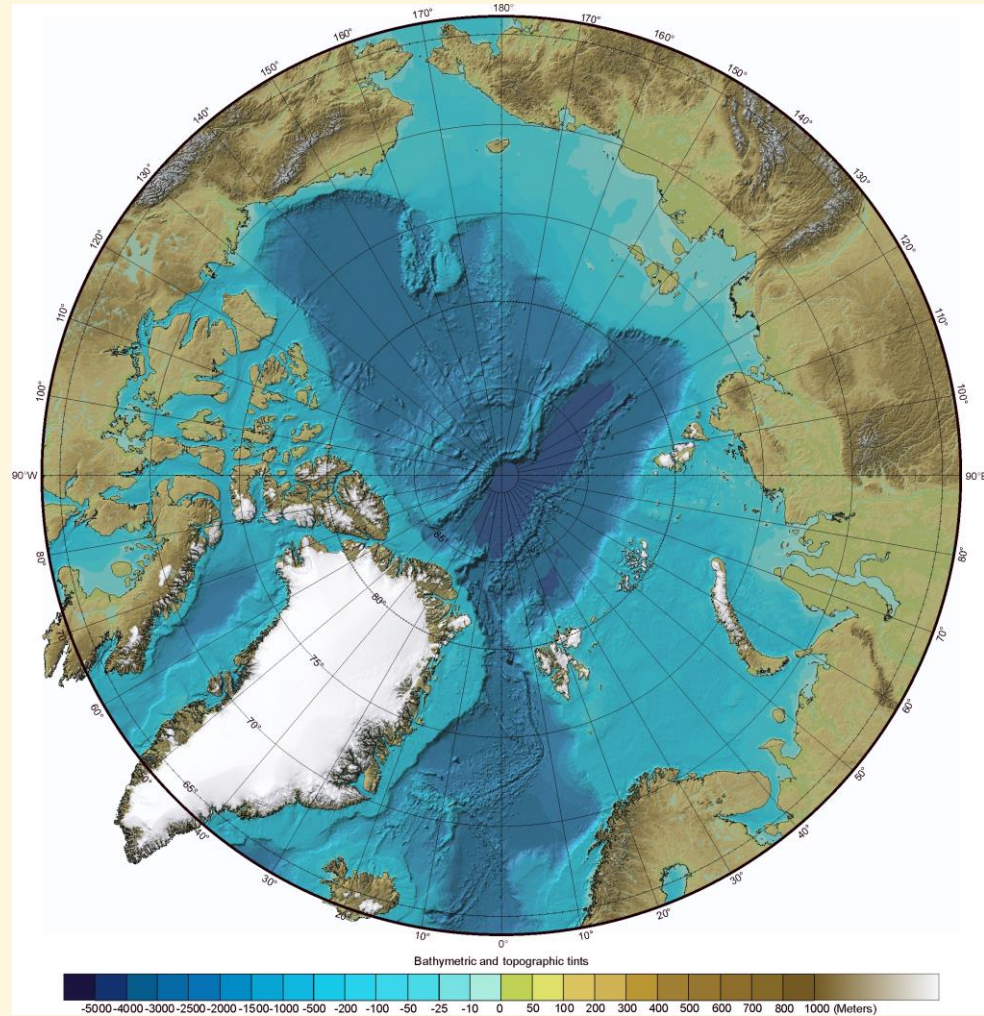
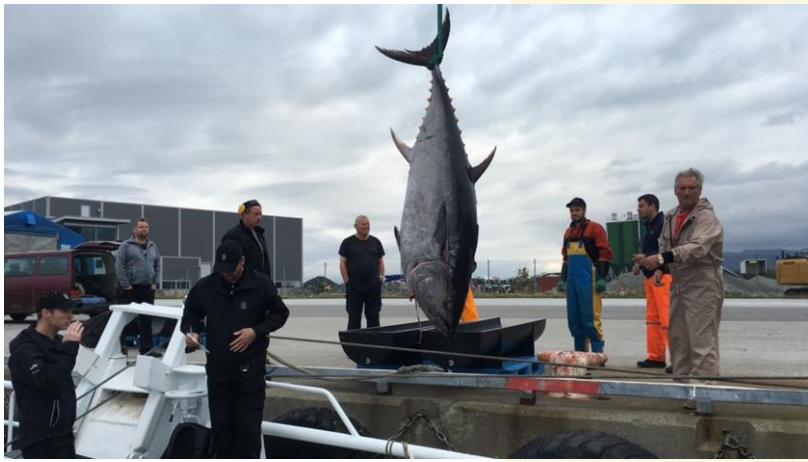




Introduction (cont.)

- Climate change
 - Key findings SWIPA 2017 Assessment are alarming, e.g.
 - “The Arctic’s climate is shifting to a new state”
 - Rapid decrease in sea-ice extent and thickness (access to un-exploited species); Arctic Ocean could be ice-free in late 2030s
 - Fish stocks shift towards polar regions
- Increasing global demand in fish & deteriorating overall status of global fish stocks
- No fisheries in high seas of CAO; but large-scale commercial fisheries in Bering and Barents Seas
- Where will commercially viable high seas fisheries in the central Arctic Ocean be possible first?

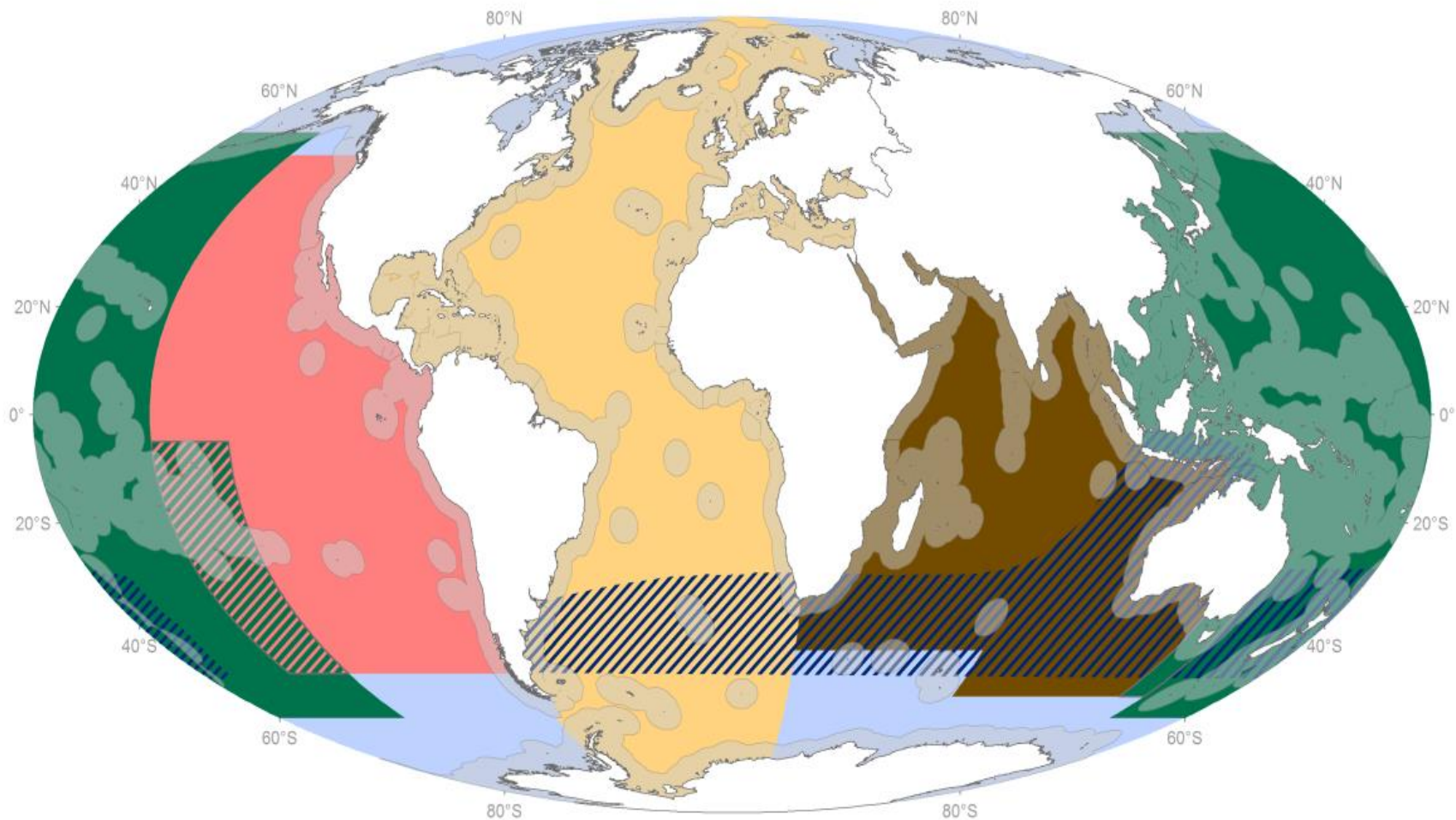




International Fisheries Law

- Global vs regional component
 - Global: jurisdictional framework: e.g. UNCLOS & UNFSA
 - Actual fisheries regulation by States individually and collectively, in particular through Regional Fisheries Management Organizations (RFMOs)
- Ensuring full high seas coverage with RFMOs as part of objective of avoiding unregulated high seas fishing
- Many RFMOs relevant to the marine Arctic but only a few (potentially) also to the central Arctic Ocean
 - North-East Atlantic Fisheries Commission (NEAFC)
 - Joint Norwegian-Russian Fisheries Commission (Joint Commission)
 - Is this an RFMO, an RFMA or neither?





200nm limit

Tuna Regional Fisheries Management Organizations

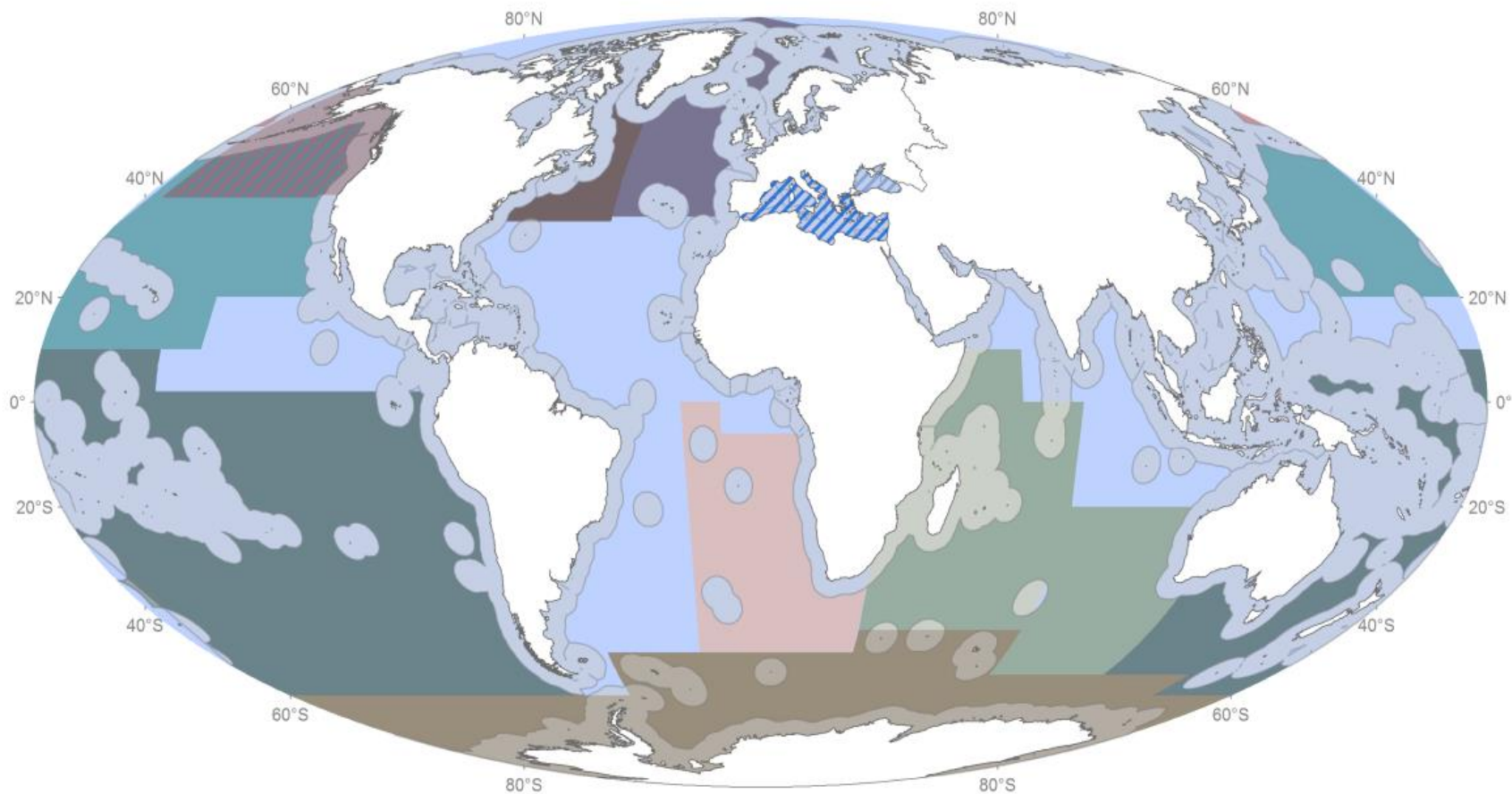
Commission for the Conservation of Southern Bluefin Tuna

Inter-American Tropical Tuna Commission (IATTC)

International Convention for the Conservation of Atlantic Tunas (ICCAT)

Indian Ocean Tuna Commission (IOTC)

Western and Central Pacific Fisheries Commission (WCPFC)



200nm limit

Non-Tuna Regional Fisheries Management Organizations

Conv. on Cons. of Antarctic Marine Living Resources

Conv. on Cons. & Mgmt of Pollock Resources in the Central Bering Sea

General Fisheries Council for the Mediterranean

International Pacific Halibut Commission

Northwest Atlantic Fisheries Organization (NAFO)

North East Atlantic Fisheries Commission (NEAFC)

North Pacific Anadromous Fish Commission

South East Atlantic Fisheries Organization (SEAFO)

South Indian Ocean Fisheries Agreement (SIOFA)

South Pacific Regional Fisheries Mgmt Org

Southwest Indian Ocean Fisheries Commission

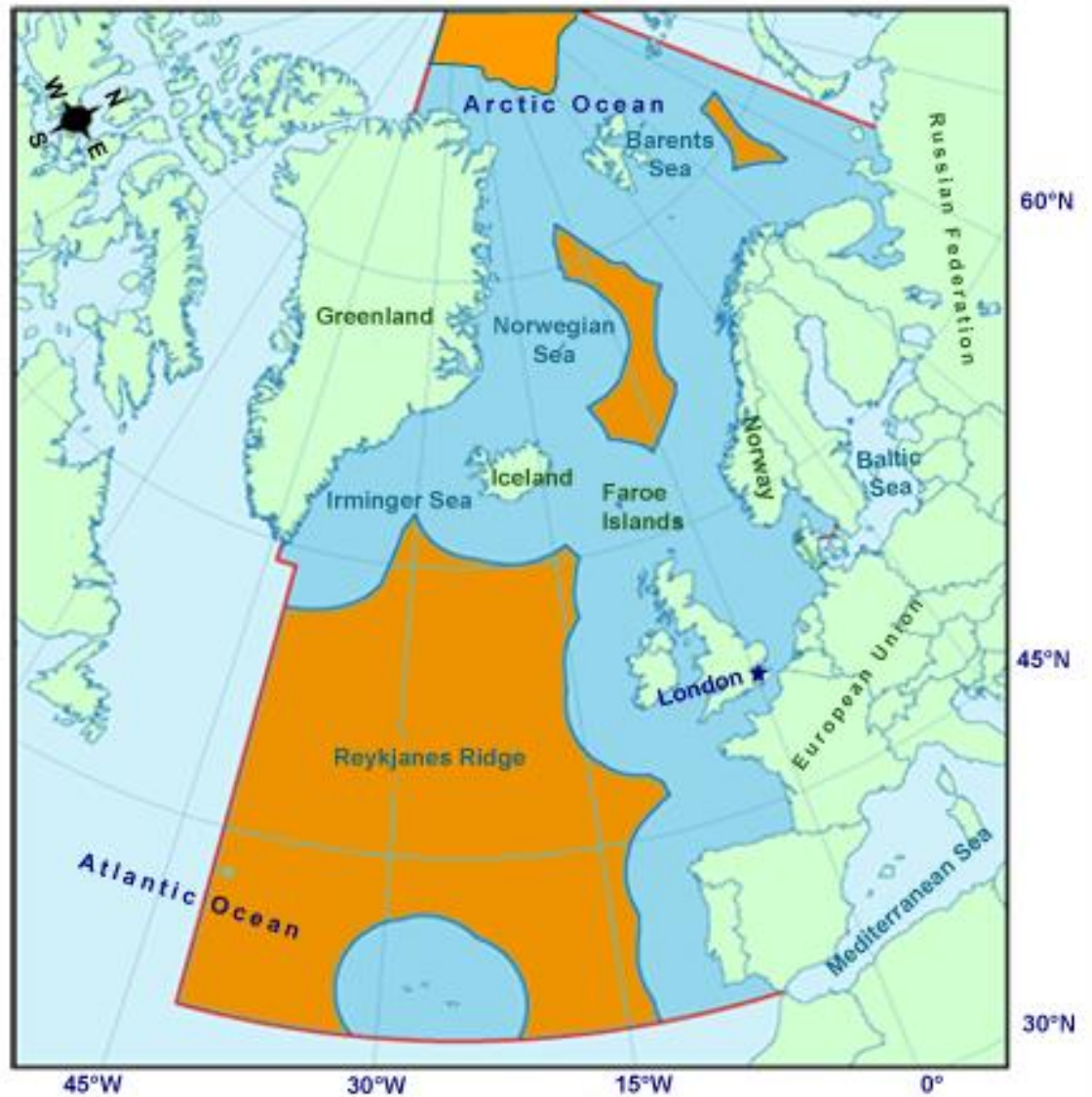
RFMOs also relevant to marine Arctic but not central Arctic Ocean

- Central Bering Sea (CBS) Convention
- International Pacific Halibut Commission (IPHC)
- North Pacific Anadromous Fish Commission (NPAFC)
- Yukon River Panel to Pacific Salmon Treaty
- Intergovernmental Consultative Committee (ICC)
- Western and Central Pacific Fisheries Commission (WCPFC)
- Northwest Atlantic Fisheries Organization (NAFO)

RFMOs also (potentially) relevant to central Arctic Ocean

- North-East Atlantic Fisheries Commission (NEAFC)
- Joint Norwegian-Russian Fisheries Commission
- North Atlantic Salmon Conservation Organization (NASCO)
- International Commission for the Conservation of Atlantic Tunas (ICCAT)





International Fisheries Law (cont.)

- Aspects relating to participation in RFMOs
 - States and entities (i.e. EU and Taiwan)
 - No explicit right to participate in RFMOs in 1958 High Seas Fisheries Convention or the UNCLOS
 - UNFSA: States with a “real interest” have right to participate in RFMOs (Art. 8(3))
 - At any rate coastal States and States engaged in high seas fishing
 - Recognizes justifiability of restricting participation, perhaps motivated by ‘non-user States’ in IWC
 - Implicit acknowledgement of approval role RFMOs
 - Other main candidates for exclusion: new entrants
 - Provisions not really tailored to scenario high seas CAO



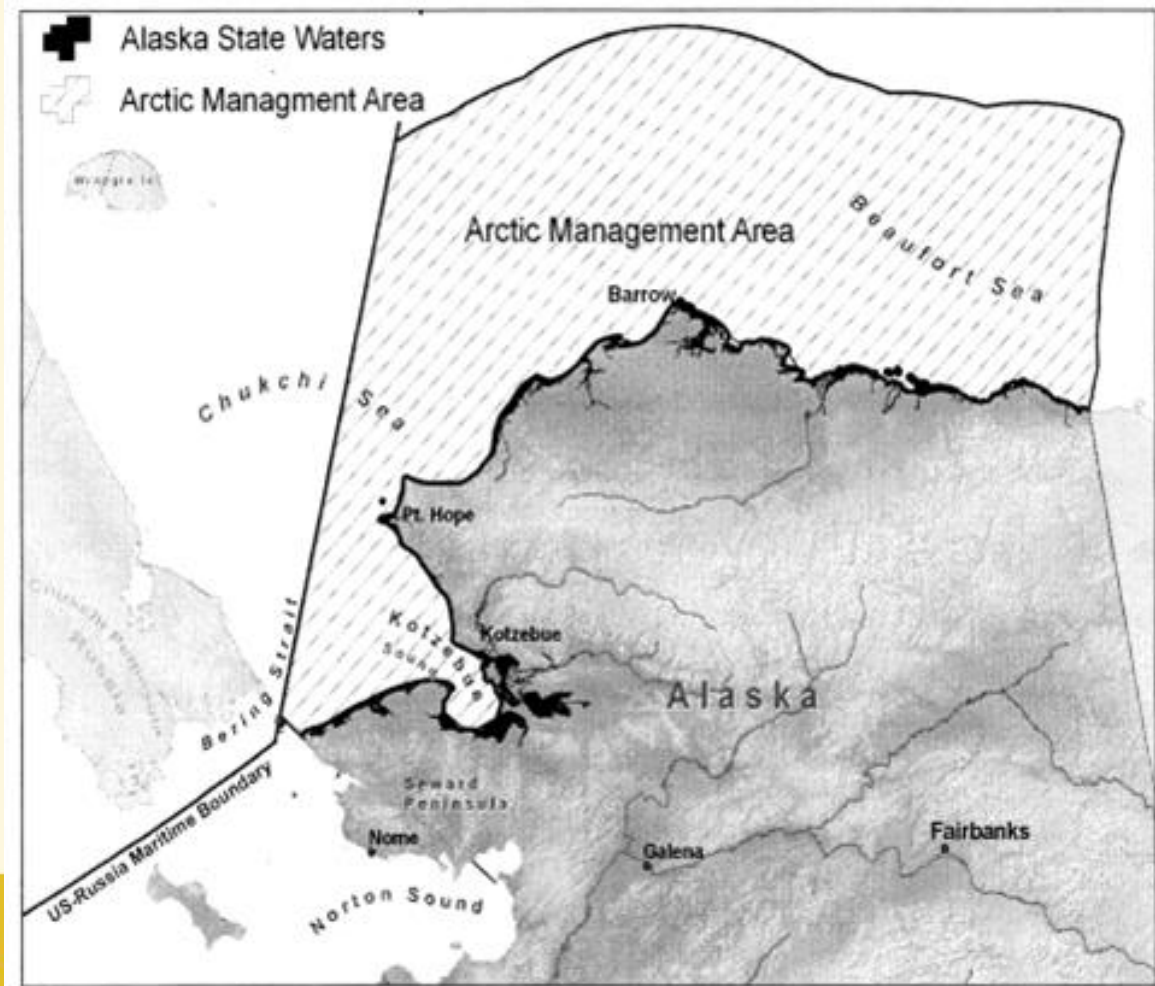
The Pathway to the A5 & 5+5 Processes

- 2007: US Senate Joint Res No. 17
- Nov 2007 SAOs Meeting: “There was strong support for building on and considering this issue within the context of existing mechanisms”
- 2008-2009: search for a suitable mechanism (*inter alia* FAO and UNGA)
- End of 2009/early 2010: Arctic Five: stand-alone process initiated and led by A5
- Objectives A5 & 5+5 processes
 - precautionary, science-based and ecosystem approaches to fisheries management
 - avoiding unregulated high seas fishing by ensuring full high seas coverage with RFMOs



SJ Res 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

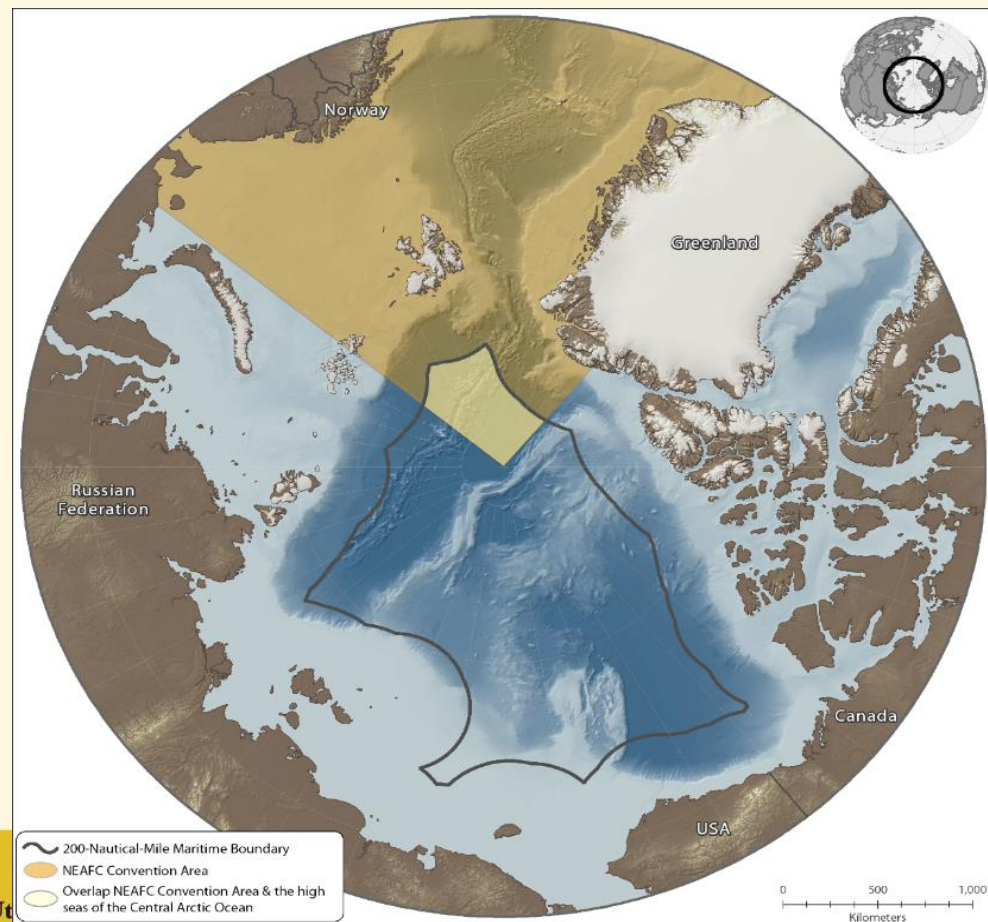


The A5 Process

- Policy/governance meetings
 - 1st: Oslo (June 2010)
 - 2nd: Washington D.C. (April-May 2013)
 - 3rd: Nuuk (Feb 2014)
 - Oslo, 16 July 2015: Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean
 - Non-legally binding
 - Key commitment
 - Spatial scope: high seas (overlap NEAFC Regulatory Area)
- Science meetings
 - 1st: Anchorage (June 2011)
 - 2nd: Tromsø (Oct 2013)
 - 3rd: Seattle (July 2015); with scientists from China, Iceland, Japan and South Korea



We will authorize our vessels to conduct commercial fishing in this high seas area 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 5+5 Process

- A5 + China, EU, Iceland, Japan and South Korea
- Policy/governance meetings
 - 1st: Washington DC (1-3 Dec 2015)
 - 2nd: Washington DC (19-21 Apr 2016)
 - 3rd: Iqaluit (6-8 Jul 2016)
 - 4th: Tórshavn (29 Nov - 1 Dec 2016)
 - 5th: Reykjavik (15-18 Mar 2017)
 - Chairman's Compromise Proposal of 23 March 2017
 - 6th: Washington DC (28-30 Nov 2017)
 - Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement)
- Science meetings
 - 4th: Tromsø, 26-28 September 2016
 - 5th: Ottawa, 24-26 October 2017



The 5+5 Process (cont.)

- Key elements on which consensus already existed prior to 6th Meeting
 - The key 'Oslo Commitment'
 - Joint Program of Scientific Research and Monitoring
 - Exploratory fishing only pursuant to conservation and management measures established by the meeting of the Parties (MoP)



The 5+5 Process (cont.)

- Key elements on which consensus did not exist prior to 6th Meeting:
 - Legal status output (treaty or declaration)
 - The 'stepwise approach': CAOFA Agreement is step 1; RFMO is step 2
 - Spatial scope (dispute on spatial scope Spitsbergen Treaty)
 - Decision-making
 - From multiple decision-making procedures to a single procedure
 - From qualified majority & special role A5 to consensus combined with sunset clause
 - Requirements for entry into force
 - From qualified majority & special role A5 to 5+5



The 5+5 Process (cont.)

- Special role A5
 - Insistence of some of the A5 to have *de facto* veto in decision-making and entry into force & concerns by the Other 5 on precedent-setting effects ('creeping coastal State jurisdiction'), inspired final outcome on decision-making, sunset clause and entry into force
 - Additional Preambular paragraph as part of package
- What remains to be done
 - Legal and technical review
 - Translation in other languages (Chinese, French and Russian)
 - Signature ceremony (summer or fall 2018?); all 5+5?
 - And entry into force (Russia is the key)



Participation in 5+5 Process and CAO F Agreement

- 5+5 Process initiated and led by A5 outside scope existing intergovernmental body; including who to invite
- Participation remained the same throughout the process
- Besides EU, no other non-State actors - i.e. other intergovernmental organizations, (representatives of) Arctic indigenous peoples, or non-governmental organizations (NGOs) - participated in their own right
- Delegations of Canada and Denmark: representatives from Arctic indigenous peoples
- US delegation: representative of US environmental community



Participation in 5+5 Process and CAO F Agreement (cont.)

- (possible) rationales for inviting Other 5
 - Only the 5+5 have “real interest”
 - Iceland and EU ensures participation all Arctic States
 - Significant distant-water fleets and interests, and capability in high latitude fishing
 - All participants of nearby NEAFC and CBS Convention (but not NAFO (Cuba and Ukraine) and NPFC (Taiwan))
 - Not outnumber A5
 - Not: (*de facto*) Observer status with Arctic Council



Participation in 5+5 Process and CAOF Agreement (cont.)

- Accession to the CAOF Agreement
 - From right of any State with an interest to accede, to competence of 5+5 to invite – by consensus – any State with a real interest to accede
 - Will any State accede and, if so, how many and which types?



A Comparative Analysis with Selected RFMOs

Tuna RFMOs	Non-Tuna RFMOs and RFMAs		
	RFMOs		RFMAs
CCSBT IATTC ICCAT IOTC WCPFC	CCAMLR GFCM NAFO NEAFC	NPFC SEAFO SPRFMO	MOP to the CAOFA Agreement COP to the CBS Convention JNRFC MOP to the SIOFA Agreement

Tuna RFMOs	
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission on the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
WCPFC	Western and Central Pacific Fisheries Commission

Non-Tuna RFMOs

CCAMLR	Commission on the Conservation of Antarctic Marine Living Resources
GFCM	General Fisheries Commission for the Mediterranean
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North-East Atlantic Fisheries Commission
NPFC	North Pacific Fisheries Commission
SEAFO	South East Atlantic Fisheries Organization
SPRFMO	South Pacific Regional Fisheries Management Organization

Non-Tuna RFMAs

MOP to the CAOF Agreement	MOP to the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean
COP to the CBS Convention	COP to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea
JNRFC	Joint Norwegian Russian Fisheries Commission
MOP to the SIOF Agreement	MOP to the Southern Indian Ocean Fisheries Agreement



A Comparative Analysis with Selected RFMOs (cont.)

- Some initial conclusions/observations
 - Participation in 5+5 process more limited than some negotiations (e.g. SEAFO & SPRFMO) but more inclusive than others (e.g. NEAFC & NPFC)
 - CAOF Agreement by no means the only constitutive instrument of an RFMO or RFMA which limits accession through substantive requirements and approval role
 - some very 'open' (e.g. ICCAT and SPRFMO), but many comparatively 'closed' (e.g. CBS Convention, CCAMLR, NEAFC, NPFC, WCPFC)
 - Litmus test: approval role applied in practice. Initial conclusion: practice is quite divergent
 - Re creeping coastal State jurisdiction: there are certainly more troublesome RFMOs (e.g. JNRFC, NEAFC and NPFC)





Thanks!

Questions?



Universiteit Utrecht