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International Legal Issues of Preventing Unregulated Fishing in the Arctic[1]

Vyacheslav K. Zilanov[1], Elena V. Kienko[2], Anna A. Lugovskaya[3]

[1] Murmansk State Technical University
[2] Primakov National Research Institute of World Economy and International Relations of the Russian Academy of Sciences
[3] Russian State University of Justice

Abstract. At various times, the sustainable use of living marine resources in the high seas outside exclusive economic zones, as well as in areas under the jurisdiction of Arctic coastal states, has been severely damaged by illegal, unregulated and unreported fishing. As the climate warms, the threat of unregulated fishing has also emerged on the high seas in the central Arctic Ocean. The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean was signed in Ilullissat (Greenland, Denmark) on October 3, 2018 following multi-round negotiations in the so-called "five plus five" format – representatives of five Arctic states plus representatives of four non-Arctic states and the European Union. This new international legal document reflects national interests in the optimal use of living marine resources of the Arctic states, the Arctic indigenous peoples and residents, as well as interested states.

The present article shows the evolution of international legal instruments to prevent illegal, unregulated and unreported fishing in the high seas. Particular attention is paid to the study of normative and doctrinal materials revealing the treaty practice of states in the Arctic enclaves. A legal interpretation of the provisions of the 2018 Agreement is also given. In the study, the authors used historical, comparative-legal and other general scientific and special legal methods.

From an international perspective, the 2018 Agreement is an innovative legal document that reflects the interests of Arctic and non-Arctic states alike. Despite concerns about the participation of the latter (China, in particular) on the part of Western countries, the Agreement was nevertheless signed and ratified before possible commercial fishing on the high seas in the Central Arctic Ocean starts. This would prevent illegal, unregulated and unreported fishing in advance and thus prevent the depletion of living marine resources in this part of the Arctic Ocean, unlike what happened in other enclaves of the high seas in the Northern Hemisphere.

The entry into force of the 2018 Agreement marked the beginning of cooperation among interested states in the prevention of unregulated high seas fishing in the Central Arctic Ocean. In addition to the general purpose of the Agreement, scientific cooperation between the Parties will contribute to a better understanding of the least-explored area of the high seas. It is likely that environmental cooperation in the Central Arctic Ocean will expand considerably in the future.

[1] English translation from the Russian text: Zilanov V. K., Kienko E. V., Lugovskaya A. A. 2022. Sovremennye mezhdunarodno-pravovye voprosy predotvrashcheniya nereguliruemogo rybolovstva v Arktike. *Moskovskiy Zhurnal Mezhdunarodnogo Prava* [Moscow Journal of International Law]. No. 3. P. 49–67. https://doi.org/10.24833/0869-0049-2022-3-49-67

Keywords: unregulated fishing; the high seas; the enclaves of the high seas; the Arctic Ocean; the Central Arctic Ocean; the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean; the Arctic Region; the Arctic States; non-Arctic States; preventing IUU fishing

Fishing is one of the oldest human activities. Scientific findings indicate than humans "first built boats and simple fishing equipment 800,000 years ago. In other words, "people turned to the sea for food far earlier than they started to cultivate fields for agriculture" (Vylegzhanin 2001: 7¬–8). To be sure, the "history of fishing," including sea fishing, "can trace its beginnings to the first steps of the development of human society" (Moiseev 1989: 224–228). Freedom of fishing in the high seas is, along with freedom of navigation, as essential component of the status of the high seas. The latter traditionally referred to maritime space that does not fall under the jurisdiction of any coastal state, i.e. beyond the territorial sea (Molodtsov 1987: 91). However, according to the United Nations Convention on the Law of the Sea of 1982 (the 1982 Convention), the concept of high seas is narrowed if a coastal state establishes, by law, an exclusive economic zone (up to 200 nautical miles in breadth). In this case, freedom of fishing does not apply in such zones, and such zones, according to Art. 86 of the 1982 Convention, are not considered part of the high seas. That is, freedom of fishing (as an integral part of the principle of the freedom of the high seas in international law) only applies to the high seas, and "covers all parts of the sea that are not included either in the exclusive economic zone, or in the territorial sea or internal waters of any state, or in the archipelagic waters of an archipelagic state."[2]

The principle of freedom of fishing, in turn, is not "absolute," and includes the need for legal regulation. In this respect, the content of such regulation is becoming increasingly substantive. To illustrate: approximately 260 international agreements regulating fishing were concluded over the course of 286 years (from 1683 to 1968); in the six years from 1975 to 1980 inclusive, over 200 bilateral agreements regulating fishing activities appeared (Vylegzhanin, Zilanov 2000: 26–27). The scientific literature notes: "With the improvement of fishing vessels and equipment, and advances in the scale of fishing, the navigation areas of such vessels have become virtually unlimited. The need to regulate fishing within the framework of international agreements arose due to the dangers of overfishing, and the associated dangers to the sustainability (reproduction) of marine life. Such regulation is particularly needed in areas of intensive activity of the fishing vessels of various countries. Scientists rejected the theory of the inexhaust-

[2] Vylegzhanin A. N., Savaskov P. V. Mezhdunarodnoe morskoe parvo [The International Law of the Sea]. In A. N. Vylegzhanin. ed. 2021. *Mezhdunarodnoe pravo. V dvukh chastyakh. Chast 2* [International Law. In 2 volumes. Vol. 2.]. Moscow: Yurayt. P. 228.

ibility of the biological resources of the World Ocean. It became necessary to conclude agreements not only on the fishing industry, but also on the conservation of the living resources of the World Ocean."[3] And there were valid reasons for this.

With the appearance of the expeditionary fleet, virtually any state could refer to the principle of the freedom and "vital necessity" of the high seas and actively fish in marine areas (Lazareva 1978: 101). Coastal states were not happy with this state of affairs even before the signing of the 1982 Convention, and some of them had even unilaterally assumed the right to regulate fishing in the high seas adjacent to their territorial sea (Lazareva 1978: 100).[4] The arguments put forward by coastal states asserting their rights to the living marine resources in such cases were based on the economic interests of such states, as well as on the concern for the reproduction of such biological resources. The goal of regulating fishing and this protecting fish stocks from unreasonable destruction compelled states to enter into international agreements.

International experience shows that the responsibility for ensuring the conservation and rational use of living marine resources has always rested primarily with the coastal states themselves. For example, in 1882, the International Convention for Regulating the Police of the North Sea Fisheries Outside Territorial Waters established mandatory fishing rules for fishermen beyond 3 nautical miles, and gave the vessels of coastal states the right to stop fishing vessels that were in violation of the fishing rules (Korovin 1951: 293). Similar rights were granted to the courts of the contracting parties under the North Pacific Fur Seal Convention concluded between the United States, Great Britain and Russia in Washington on July 7, 1911 (hereinafter referred to as the Washington Convention). In order to save these animals from complete extermination, states were given the right to stop and detain any vessel deemed to be in violation of the ban on pelagic sealing in the waters north of the 30th parallel in the Pacific Ocean. It is noteworthy that the Washington Convention specifically stipulates the application of its provisions in relation to the indigenous peoples living on the coast of the designated area: "the provisions of this Convention shall not apply to Indians, Ainos, Aleuts, or other aborigines dwelling on the coast of the waters […] who carry on pelagic sealing in canoes […] propelled entirely by oars, paddles, or sails, and manned by not more than five persons each […] without the use of firearms; provided that such aborigines are not in the employment of other persons or under contract to deliver the skins to any person" (Art. 4).[5]

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[3] Gureev S. A. ed. 2003. *Mezhdunarodnoe morskoe pravo. Uchebnoe posobie.* [The International Law of the Sea. Study Guide]. Moscow: Yuridicheskaya literature. P. 124.

4 For example, in 1976, the United States adopted the Fishery Conservation and Management Act. URL: https://media.fisheries.noaa.gov/dam-migration/msa-amended-2007.pdf (accessed: 15.06.2022).

[5] The North Pacific Fur Seal Convention of 1911. URL: http://docs.historyrussia.org/ru/nodes/138575-konventsiya-o-mezhdunarodnoy-ohrane-kotikov-zaklyuchennaya-mezhdu-soedinennymi-shtatami-ameriki-velikobritanieyyaponiey-i-rossiey-v-vashingtone-7-iyulya-1911-g#mode/inspect/page/2/zoom/4 (accessed: 15.06.2022). In 1940, the Japanese government denounced the 1911 Washington Convention, and the treaty expired the following year. In 1957, the governments of the Soviet Union, the United States, Canada and Japan concluded the Interim Convention on Conservation on North Pacific Fur Seals. For more on the content of this convention and its termination, see: (Zilanov, Vylegzhanin 1989: 87–94).

Since the end of the Second World War, international agreements on the regulation of fisheries in the high seas have primarily been concluded for the purposes of cooperation in and the protection of living resources in certain geographical areas of the sea, or to regulate fishing of certain species of living organisms. These agreements established fishing quotas for various species, fishing seasons, the allowable mesh sizes for fishing nets, and other rules.[6] For example, in 1946, fifteen states, including the Soviet Union, concluded the International Convention for the Regulation of Whaling,[7] in which they agreed to impose a ban on the hunting of rare species of whales (grey and right whales), as well as calves. The Convention established the maximum catch of whales to be taken in any one season in areas south of the 40th parallel (Molodtsov 1987: 105). The 1946 Convention, which is still in force today, provides for the adoption by a specially established Commission of new rules relating to the conservation and use of the whale population (in particular, protected and unprotected species, open and closed seasons, open and closed waters, including the designation of sanctuary areas, and so on).[8]

The freedom of the high seas (for coastal and non-coastal states) would subsequently receive universal recognition with the adoption of the Geneva Conventions on the Law of the Sea in 1958. Freedom of fishing – one of the four recognized freedoms of the high seas (along with freedom of navigation, freedom to lay submarine cables and pipelines, and freedom of overflight of aircraft) and historically established in international maritime law as a customary norm – is crystallized, in particular, in the 1958 Convention on the High Seas (Art. 2), as well as in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. Within the meaning of this Convention, all states have the right for their nationals to engage in fishing on the high seas, subject to their treaty obligations of that state and with due regard for the interests and rights of coastal states. The legal emphasis on the interests of coastal states is particularly emphasized in Art. 6, para. 1 of the Convention: "A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[9] Paragraphs 3 and 4 of Article 6 of the Convention note the need for cooperation in the protection and rational use of living marine resources: A State […] engaged in fishing in any area of the high seas adjacent to the territorial sea of a State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area."[10] Subject to certain

[6] Kozhevnikov F. I. ed. 1981. *Mezhdunarodnoe pravo: uchebnik* [International Law: A Textbook]. Moscow: Mezhdunarodnye otnosheniya. P. 165

[7] The 1946 Convention is included in a fairly extensive list of international treaties applicable to the Bering Strait – the junction of the Arctic and Pacific oceans. See: (Vylegzhanin et al. 2017: 122¬–124).

[8] International Convention for the Regulation of Whaling of December 2, 1946. URL: https://docs.cntd.ru/document/1901342 (accessed: 15.06.2022).

[9] Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas of April 29, 1958. URL: https://www.un.org/ru/documents/decl_conv/conventions/pdf/fisheries58.pdf (accessed: 15.06.2022).

[10] Ibid.

conditions (the need for urgent application of conservation measures in the light of the existing knowledge of the fishery, etc.), the coastal state may adopt unilateral measures of conservation in any area of the high seas adjacent to its territorial sea.

The 1982 Convention also emphasizes that freedom of fishing on the high seas is an inalienable right of all states. At the same time, however, this right is exercised with due regard for the interests of other States in their exercise of the freedom of the high seas" (Art. 87).[11] Article 116 of the 1982 Convention contains certain additional restrictions on the exercise of the freedom of fishing on the high seas. Specifically, states are obliged to comply with their treaty obligations, and the rights, duties and interests of coastal states. In this case, cooperation between coastal and non-coastal states seems quite natural, since "being in close relationship," freedom of fishing and the protection of living resources represent "a single principle of freedom of rational and scientifically based fishing on the high seas."[12]

The introduction of the new institution of exclusive economic zones (EEZ) in the 1982 Convention placed fishing zones under the jurisdiction of coastal states, which, according to researchers, led to increased fishing in areas of the high seas beyond their borders (Lazareva 1978: 109). As a result, the reproduction of fish stocks in these areas is under threat once again. It is important to note that these living marine resources migrate from the 200-mile EEZ to areas of the high seas during their life cycle. And, as a rule, there are no self-reproducing "isolated" reserves of living marine resources in areas of the high seas that would spend their entire life cycle there (Zilanov 2016: 47).

The importance of cooperation between coastal and non-coastal states is stressed in Arts. 117 and 118 of the 1982 Convention: "… States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."[13] In this regard, the 1982 Convention establishes that fishing is not legal unless the coastal states have agreed on measures for its implementation. The measures defined in Art. 119 of the 1982 Convention for the conservation of the living resources of the high seas, as well as the allowable catch, are aimed at preventing overfishing. Such measures are taken with due consideration, *inter alia*, of the best scientific evidence available, relevant environmental and economic factors, the special requirements of developing states, international minimum standards, and the effects on species associated with or dependent upon harvested species. These legal measures must, however, not be discriminatory in nature.

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[11] United Nations Convention on the Law of the Sea of October 10, 1982. URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_r.pdf (accessed: 15.06.2022).

[12] Serkov V. A. 1985. *Mezhdunarodnaya konventsiya po morskomu pravu 1982 g.: posobie dlya ofitserov voenno-morskogo flota* [The International Convention on the Law of the Sea of 1982: Manual for Naval Officers]. Moscow: Voennoye izdatelstvo. P. 68.

[13] United Nations Convention on the Law of the Sea of October 10, 1982. URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_r.pdf (accessed: 15.06.2022).

Fisheries Enforcement in the High Seas of the Arctic Ocean

Russian international legal science has repeatedly pointed to the unique nature of the status of the Arctic (Ivanov 2013: 11–45), as well as to the inaccuracies in the opinions of those experts who do not give this aspect of the Arctic due attention, equating the legal regime of the seas of the Arctic to those of the ice-free seas of the Indian, Atlantic and Pacific oceans (Barsegov 2002: 23–24; Vylegzhanin et al. 2021: 4–5). It has been noted that this position, which aligns with the official stance of NATO on the status of the Arctic seas, is aimed at ignoring Russia's historic legal foundations in the Arctic (Zhudro 2018).

The seas of the Arctic Ocean are a natural habitat for living marine resources and are of key importance for the fishing of indigenous peoples and coastal communities, as well as for the fishing industries of the five Arctic states (Russia, Canada, Norway, the United States and Denmark). There are five so-called "high seas enclaves"[14] in the seas of the Northern Hemisphere, including the Arctic Ocean, that are surrounded on all sides by the outer boundaries of the 200-mile EEZs of coastal states: 1) "Donut Hole" in the Bering Sea; 2) "Polygon" in the Sea of Okhotsk; 3) "Loop Hole" in the Barents Sea; 4) "Banana," "Decollette" and "Tie Holes" in the Greenland and Norwegian seas; and 5) "Ice Sack" and "Ice Enclave" on the high seas of the central part of the Arctic Ocean (Zilanov 2016: 46; Vylegzhanin, Young, Berkman 2020: 1–3). In these cases, the EEZs of neighbouring and/or opposite coasts of states are located in such a way that they completely encircle the area of the high seas beyond their jurisdiction. However, this situation does not prevent vessels of any state from fishing in these areas of the high seas, unless they are party to an international agreement that specifies otherwise.

In the past, the problem of unregulated fishing in four of the five enclaves led to the development of international legal documents to prevent commercial fishing, which is destructive to fish stocks and causes significant damage to the indigenous population of the North (in particular, pollock, cod, haddock, halibut and other species) (Table 1). Often, measures to prevent illegal, unregulated and unreported (IUU) fishing were only taken when such activities had already reached alarming levels. For example, IUU fishing destroyed pollock stocks in the Bering Sea enclave surrounded by the U.S. and Russian EEZs (amounting to more than 1.3 million tonnes) and, despite the fact that an international convention on the management of such stocks has been signed, these reserves have still not been fully restored.[15]

[14] For more on the concept and status of "high seas enclaves," see: (Molodtsov, Zilanov, Vylegzhanin 1993: 39–51).

[15] "Moratorium on pollock fishing in Central Bering Sea extended for another year." Russian Federal Research Institute of Fisheries and Oceanography. 12.12.2020. URL: http://vniro.ru/ru/novosti/arkhiv-za-2019-god-2/moratorij-na-promysel-mintaya-v-tsentral-noj-chasti-beringova-morya-prodlen-eshche-na-odingod (accessed: 15.06.2022).

Under the terms of the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (the 1994 Convention)[16] signed by China, Japan, South Korea, Poland, Russia and the United States, the parties agreed to establish an international regime for conservation, management, and optimum utilization of pollock resources in the Convention Area; determine the allowable harvest level for pollock based on the latest scientific data; establish an individual national quota of pollock; report on the fishing activities of states; and report on the non-discriminatory nature of the measures taken. An Annual Conference of the Parties was created to achieve the objectives of the Convention. The Conference would establish by consensus an individual national quota of pollock for the succeeding year for each Party, the total of which shall not exceed the allowable harvest level for pollock. As Russian experts note, freedom of fishing in the high seas is applied with due account of Art. 63, para. 2 of the 1982 Convention (Zilanov, Spivakova 1995: 195), which states that "Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks."[17] We are talking in this case about the use by parties of the Oluter-Karachin populations of pollock, which, according to their characteristics, must comply with the provisions of this article (Zilanov, Spivakova 1995: 195). It should be noted here that the 1994 Convention was an unprecedented international agreement for its time, bringing together coastal and non-coastal states with different international policies regarding fishing on the high seas for the purposes of cooperation.

The signing of special international agreements between the governments of coastal states was of no small importance for preventing IUU fishing in other enclaves of the marginal seas of the Arctic Ocean. For instance, the 1996 Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation of Straddling Fish Stocks in the Central Part of the Sea of Okhotsk (the 1996 Agreement) established the obligation of the Parties to discontinue pollock fishing in this sea area. Article 5 of the 1996 states that the Parties shall "invite the attention" of third parties "to any matter relating to the fishing operations conducted by its nationals […] that could affect adversely the long-term sustainable use of the pollock resources of the Sea of Okhotsk"; and encourage third parties "to respect the conservation and management measures for pollock stocks in the Sea of Okhotsk." Further, the Article states: "if the fishing operations conducted by nationals, residents or vessels of any third party could affect adversely the long-term sustainable

[16] Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea of June 16, 1994. URL: https://docs.cntd.ru/document/901799606 (accessed: 15.06.2022).

[17] United Nations Convention on the Law of the Sea of October 10, 1982. URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_r.pdf (accessed: 16.06.2022).

use of the pollock resources of the Sea of Okhotsk, the Parties shall take measures […] that they deem necessary and appropriate to deter such operations."[18] The Agreement contains a reference to the Bering Sea, where there is a risk that fishing vessels could be displaced due to the moratorium on fishing in the enclave of the Sea of Okhotsk. This international treaty can be considered a perfect example of how states managed to improve the ecosystem of an entire sea.

To be sure, this mechanism of cooperation between the United States and Russia to preserve pollock stocks in the central part of the Sea of Okhotsk made it possible to restore stocks to 5–6 million tonnes.[19]

In order to not repeat the tragic events that unfolded in the Bering Sea enclave, and certain other high seas enclaves, it is especially important to take early measures to prevent unregulated fishing in the central part of the Arctic Ocean – the largest high seas enclave in that body of water.

Table 1. High seas areas outside the EEZs of coastal states in the Arctic and adjacent seas, and measures taken to prevent IUU fishing

No.	Name of enclave in the high seas	Enclave area (in thousand square metres)	Catch per year, thousand tonnes	Main types of marine bioresources	Treaty measures to prevent IUU fishing
1	"Hole" and "Polygon" in the Sea of Okhotsk	52	200–350 (IUU fishing)	Pollock	Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation of Straddling Fish Stocks in the Central Part of the Sea of Okhotsk of June 13, 1996.
2	"Donut Hole" in the Bering Sea	21	800–1300 (IUU fishing)	Pollock	Convention on the Conservation and Management of Pollock in the Central Bering Sea of June 16, 1994
3	"Donut Hole" in the Barents Sea	65	20–50 (IUU fishing)	Cod, halibut, sea wolves, snow crab	Agreement between the Government of Norway, the Government of Iceland, and the Government of the Russian Federation concerning certain aspects of cooperation in the area of fisheries of May 15, 1999

[18] Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation of Straddling Fish Stocks in the Central Part of the Sea of Okhotsk of June 13, 1996. URL: https://docs.cntd.ru/document/901880159 (accessed: 16.06.2022).

[19] The Fish of the Sea of Okhotsk. URL: http://oxotskoe.arktikfish.com/index.php/ryba-okhotskogo-morya/mintaj (accessed: 16.06.2022).

4	"Banana," "Decollette" and "Tie Holes" in the Greenland and Norwegian seas	317	150–300 (regulated fishing)	Herring, scomber, blue whiting, perch	Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries of November 18, 1980
5	"Ice Sack" in the Arctic Ocean	2825	no data available (danger of IUU fishing)	Arctic cod, capelin and others	Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean of October 3, 2018

Legal Regulation of Fisheries in the "Ice Enclave"

The need for effective legal support for the conservation of fish resources on the high seas in the central part of the Arctic Ocean (the "ice enclave" or "ice bag") is perhaps the most important environmental and legal issue pertaining to the Arctic today (Vylegzhanin et al. 2021: 39¬–55). Note that this part of the open sea is surrounded by the EEZs of the five Arctic states and has an area of 2.8 million square kilometres, which is twice the area of the Barents Sea. This enclave was completely covered with ice in the past and completely inaccessible for marine research, commercial shipping (except when escorted by icebreakers), and, of course, commercial fishing. However, due to the gradual reduction of ice cover and the changes that are taking place in the ecosystem due to climate change, a significant part of the Arctic Ocean, including part of the high seas area, is already free of ice for part of the year. Current projections indicate that the entire Arctic Ocean is likely to be ice-free for part of the year within a few decades.[20]

The legal regime of the high seas in the central part of the Arctic Ocean is somewhat unique. But, despite the specific features of the conservation of living marine resources and of how to best ensure their sustainable management in the high seas in the central part of the Arctic Ocean, the universal international treaties already discussed – unless there is a corresponding *lex speciales* (customary and special treaty rules) – also apply to this body of water.

An important international legal source generally applicable to the "ice enclave" is the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the 1995 Agreement).[21] The objective of the 1995 Agreement is to ensure

[20] Balton, D. (2021). The Arctic Fisheries Agreement Enters into Force. Polar Points. June 25. URL: https://www.wilsoncenter.org/blog-post/no-9-arctic-fisheries-agreement-enters-force (accessed: 16.06.2022).

[21] The provisions of the 1995 Agreement do not take precedence over the provisions of the 1982 Convention (Art. 4).

the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of the 1982 Convention. The 1995 Agreement introduced the concept of "straddling fish stocks," understood as fish that are found both in the EEZ and in areas of the open sea adjacent to such a zone. It also prescribes measures to prevent or eliminate overfishing and excess fishing capacity based on the best scientific information available and taking into account fishing patterns, the interdependence of stocks, generally recommended international minimum standards, using the "precautionary approach" (Vylegzhanin, Zilanov 2000: 45).

Within the meaning of the 1995 Agreement, any state, even if not a party to the Agreement, can participate in the development of measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks on the high seas. Article 8 of the 1995 Agreement states that coastal and non-coastal states should consult through a competent subregional or regional fisheries management organization or arrangement.[22] The provisions of this Article also address issues of cooperation with states that have a "real interest" in the fisheries concerned, through the participation of the latter in a fisheries management organization, and, accordingly, have access to the fishery resources to which these conservation and management measures apply. As foreign researchers have noted, this term can mean that flag states can declare a "real interest" in a particular fishery, even if they have not participated in it previously, but intend to do so in the future, or even if they have no such intention and want to participate in a fisheries organization solely for the purpose of preserving marine biodiversity (Kim, Park, Son 2022: 126).

The 1995 Agreement strengthened the general legal regime for the conservation of living marine resources both on the high seas and in the EEZ by: a) creating obligations for third states to conserve marine resources (through the legally binding nature of environmental measures taken by the Parties to the regional agreement for states that are not party to it but which use fish stocks); b) establishing internationally agreed rules regarding the application of national measures, alongside the international measures, for the conservation of natural resources; c) spelling out the content of the precautionary approach; and d) focusing on the conservation of marine ecosystems.

The Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean adopted by the five Arctic states in 2015 (the 2015 Declaration) also contains provisions on the "precautionary approach." Some foreign publications place too much emphasis on the fact that the 2015 Declaration is not legally binding and does not contain international obligations (Molenaar 2015: 427). However, it does contain the consolidated international legal position of the five Arctic states regarding the regime of the fishery resources of the "ice enclave."

[22] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of August 4, 1995. URL: https://legal.un.org/avl/pdf/ha/aipuncls/aipunds_ph_r.pdf (accessed: 16.06.2022).

The purpose of the 2015 Declaration is to continue discussions on the development of measures to prevent unregulated fishing on the high seas in the central part of the Arctic Ocean. While commercial fishing in this area of water is unlikely in the near future, the Arctic States posit in the 2015 Declaration that it would be prudent to implement interim measures to prevent unregulated fishing in the high seas portion of the central Arctic Ocean. Such interim measures include: 1) establishing a regional fisheries management organization or arrangements to manage such fishing; 2) establishing a joint programme of scientific research with the aim of improving understanding of the ecosystems of this area; 3) joint monitoring of activities in this area; and 4) ensuring that non-commercial fishing in this area is based on scientific advice.[23] These measures were subsequently enshrined in the text of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean.

The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean

The topic of "scientific diplomacy" has gained a lot of traction in recent times (Berkman, Vylegzhanin 2013: xxiii), and the role of scientific ideas and opinions in the implementation of advanced international legal mechanisms can indeed be significant. In 2012, approximately 2000 scientists from 67 countries sent an open letter to the international community imploring them to take action to protect these waters until the impact of fishing on the local ecosystem has been analysed (Harrison et al. 2020). This approach requires that the Arctic states take a leading role in the development of a new international agreement. In addition, a management system for central Arctic Ocean fisheries should be established on the basis of a comprehensive study of the biology and ecology of the region and the feasibility of fishing in its high seas in order to set scientifically sound catch levels.[24]

In 2016, a meeting of delegations of the States Parties to the 2015 Declaration, as well as delegations of the People's Republic of China, Iceland, South Korea, Japan and the European Union, was held in Washington (Harrison et al. 2020). After four rounds of discussions at meetings of NGOs and six rounds of intergovernmental negotiations, the last of which was held on November 30, 2017, the representatives of the participating states agreed on the draft Agreement. Later, on October 3, 2018, a ceremony was held in Ilulissat, Greenland for the signing of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean. It took just two and a half years for the Agreement to be ratified by all ten signatories, which is not much time for such an important legal document. The Agreement subsequently entered into force on June 25, 2021.

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[23] Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean. 2015. URL: https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/2015_oslo_declaration.pdf (accessed: 16.06.2022).

[24] An Open Letter from International Scientists. URL: https://legacy-assets.eenews.net/open_files/assets/2012/04/23/document_pm_02.pdf (accessed: 16.06.2022).

The 2018 Agreement consists of a preamble and 15 articles. The following is a legal analysis of the significant articles contained in the Agreement.

The preamble to the Agreement emphasizes the "initiative of the central Arctic Ocean coastal states" and their "special responsibilities and special interests […] in relation to the conservation and sustainable management of fish stocks in the central Arctic Ocean." And the five Arctic states play a crucial role in this. At the same time, the wording of the Agreement reflects the interests of other parties too, specifically non-Arctic states and the indigenous peoples of the North. We can thus state that the Agreement attempts to balance the interests of all parties.

Special attention was paid during the drafting of the 2018 Agreement to the interests of Arctic residents, including Arctic indigenous peoples, and their involvement in the negotiation process. Indigenous and local knowledge of the living marine resources of the Arctic Ocean and the ecosystems in which they occur was used "as a basis for fisheries conservation and management in the high seas portion of the central Arctic Ocean."[25] Arctic indigenous peoples may also participate in the implementation of the Agreement by submitting proposals for consideration by the Parties. For example, the Inuit Circumpolar Council (ICC) held a series of workshops on Inuit engagement in the Agreement in 2020 and 2021.[26]

The preamble also notes that it is "premature under current circumstances to establish any additional regional or subregional fisheries management organizations or arrangements for the high seas portion of the central Arctic Ocean."[27] The North East Atlantic Fisheries Commission (NEAFC) is recognized as the only competent international organization that coordinates fishing activities in the central part of the Arctic Ocean. Note that the area within which the NEAFC exercises its functions does not cover the entire central Arctic region defined as the "Agreement Area," and extends only to part of the high seas in northern Greenland and Svalbard. Other regional fishery organizations do not deal with the conservation and management of marine living resources in the "ice enclave" either. Some foreign publications have mentioned the possible establishment of a Joint Russian–Norwegian Fisheries Commission.[28] At the same time, the authors of these works acknowledge that Norway and Russia may advocate a multilateral approach to fisheries management in the designated area (Brooks, Liu, Qin 2019: 99).

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[25] Agreement on the Prevention of Unregulated Fishing on the High Seas in the Central Arctic Ocean. 2018. URL: http://publication.pravo.gov.ru/Document/View/0001202106280035 (accessed: 16.06.2022).

[26] Balton D. 2021. The Arctic Fisheries Agreement Enters into Force. *Polar Points.* June 25. URL: https://www.wilsoncenter.org/blog-post/no-9-arctic-fisheries-agreement-enters-force (accessed: 16.06.2022).

[27] Agreement on the Prevention of Unregulated Fishing on the High Seas in the Central Arctic Ocean. 2018. URL: http://publication.pravo.gov.ru/Document/View/0001202106280035 (accessed: 16.06.2022).

[28] For more on the NEAFC and fisheries agreements between Russia and Norway, see: Vylegzhanin A. N. ed. 2019. *Pravovoy rezhim Shpitsbergena i prilegayushchikh morskikh rayonov: akademicheskiy uchebnik dlya magistratury* [The Local Regime of Spitsbergen and Adjacent Maritime Areas: An Academic Textbook For Master's Students]. Moscow: Norma. 308 p.

Article I of the 2018 Agreement explains the terms used in the document. The Agreement introduces the concept of "central Arctic coastal states." Thus, for the first time, the Agreement *expressis verbis* secures the special status of the Arctic states. Since the Agreement mentions the 2015 Declaration, there is no doubt that this term (although not defined in Art. 1 of the Agreement) refers to Canada, Denmark, Norway, Russia and the United States.

The definition of the term "Agreement Area" does not cause any difficulties either, as it repeats the meaning of "Area" put forward in the 2015 Declaration, that is, "the single high seas portion of the central Arctic Ocean that is surrounded by waters within which Canada, Denmark, Norway, the Russian Federation and the United States of America exercise fisheries jurisdiction."[29] It thus follows from this that the 2018 Agreement is limited to the central Arctic only and does not apply to the other enclaves we mentioned earlier.

The term "fish" is defined as "species of fish, molluscs and crustaceans except those belonging to sedentary species."[30] According to Art. 77, para. 4 of the 1982 Convention, "sedentary species," which are excluded from the scope of the 2018 Agreement, include organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[31]

The objective of the 2018 Agreement is to prevent unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks. This appears to be a good compromise: the 2018 Agreement does not preclude the possibility of a new additional agreement being concluded by the Parties in the future to allow fishing in the Agreement Area when scientifically justified and properly regulated. However, unregulated fishing in the central Arctic Ocean (which is already prohibited by international law) must be prevented through the joint efforts of the Parties.

The 2018 Agreement makes a distinction between commercial fishing and fishing for research purposes (Art. 3). Exploratory fishing in the area of the Agreement Area is only authorized only pursuant to conservation and management measures for

[29] Agreement on the Prevention of Unregulated Fishing on the High Seas in the Central Arctic Ocean. 2018. URL: http://publication.pravo.gov.ru/Document/View/0001202106280035 (accessed: 16.06.2022).

[30] United Nations Convention on the Law of the Sea of December 10, 1982. URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_r.pdf (accessed: 16.06.2022).

[31] With regard to such species, the International Law Commission admitted "no exceptions" to the principle of the right to fish on the high seas "covering the continental shelf, save as regards sedentary fisheries and fisheries carried on by means of equipment embedded in the sea floor." International Law Commission: Articles Concerning the Law of the Sea with Commentaries. 1956. URL: https://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf (accessed: 16.06.2022).

fish stock. The Parties undertook, within three years of the entry into force of the Agreement, to carry out conservation and management measures for exploratory fishing in the Agreement Area, and may amend such measures from time to time thereafter. These measures shall provide, *inter alia,* that such fishing: 1) shall not undermine the objective of the Agreement; 2) shall be limited in duration, scope and scale; 3) shall be carried out on the basis of sound scientific research and when it is consistent with the Joint Program of Scientific Research and Monitoring and its own national programmes; 4) shall be authorized only after a Party has notified the other Parties of its plans to carry out exploratory fishing; and 5) shall be adequately monitored (Art. 5(1)(d)).

Commercial fishing in the high seas portion of the central Arctic Ocean is prohibited until conservation and management measures for the sustainable management of fish stocks adopted by one or more regional or subregional fisheries management organizations or arrangements, that have been established and are operated in accordance with international law and recognized international standards, have been approved.

Article 3, paragraph 6 of the 2018 Agreement contains a reference to the Art. 7 of the 1995 Agreement on the "Compatibility of conservation and management measures" for fish stocks that occur in areas both within and beyond national jurisdiction in the central Arctic Ocean in order to ensure conservation and management of those stocks in their entirety. The "compatibility of measures" taken by a coastal state in the EEZ, a state interested in fisheries in the high seas, or an international fisheries management organization, implies the obligation of all Parties to cooperate on issues of conservation of living marine resources.

Article 4 of the 2018 Agreement provides for the establishment by the Parties of a Joint Program of Scientific Research and Monitoring with the aim of improving their understanding of the ecosystems of the Agreement Area and determining whether fish stocks might exist there that could be harvested on a sustainable basis. In this regard, joint scientific meetings will be held at least every two years to present the results of their research and review the best available scientific information. As part of the Joint Program of Scientific Research and Monitoring, the Parties will determine the feasibility of establishing an additional regional fisheries management organization and implementing additional or different interim measures, as well as the possibility of sustainable commercial fishing. Foreign researchers believe that the implementation of joint research and monitoring programmes will 1) advance the state of knowledge of one of the least understood parts of the world ocean; and 2) give scientists the necessary information to decide whether to replace the 2018 Agreement with a different mechanism that would allow us to open and manage a sustainable commercial fishery

on the basis of sound science.[32] It is likely that such cooperation between the Parties in the future will cover not only the conservation of the living marine resources of the "ice enclave," but also other environmental issues.

Article 6 of the 2018 Agreement establishes procedures for decision-making through two mechanisms: decisions on questions of procedure are taken by a majority vote, while decisions on questions of substance are taken by consensus. This approach is quite justified considering the experience of other fisheries organizations.

Article 7 of the Agreement clarifies the provisions relating to the settlement of disputes between the Parties: the provisions set forth in Part VIII of the 1995 Agreement "apply, *mutatis mutandis,* to any dispute between Parties relation to the interpretation or application of this Agreement, whether or not they are also Parties to the 1995 Agreement."[33] This is an extremely important clarification, since not all States Parties to the 2018 Agreement are also Parties to the 1995 Agreement. China, for example, is not a Party to the 1995 Agreement because of the way it outlines the rules on enforcement and the use of "force" during inspections of fishing vessels by the authorities of states other than the flag state.

The final provisions of the 2018 Agreement establish that it is not an open-ended document – the Parties agreed on an initial period of 16 years following its entry into force, upon expiration of which it shall remain in force for successive five-year periods upon agreement by the Parties. What is more, the document provides for expanding the composition of the Agreement: after its entry into force, the Parties may invite other interested states to accede to it.

The People's Republic of China and the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean

The process of clarifying the legal regime of the Arctic is currently under way, and several non-Arctic states are actively involved in it. This has caused some controversy, especially given the fact that non-Arctic states hold talks on the status of the region without the participation of Arctic states (Vylegzhanin, Kienko 2021: 296–318). However, Western countries are clearly exaggerating their concerns with regard to China's involvement in clarifying the legal regime for the living resources in the central Arctic Ocean. Let us not forget that China is a permanent member of the UN Security Council, a nuclear power with growing military and economic might, a neighbour of Russia, and the largest country in the world in terms of population size, which actively

[32] Balton D. 2021. The Arctic Fisheries Agreement Enters into Force. *Polar Points.* June 25. URL: https://www.wilsoncenter.org/blog-post/no-9-arctic-fisheries-agreement-enters-force (accessed: 16.06.2022).

[33] Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean of August 31, 2018. URL: http://publication.pravo.gov.ru/Document/View/0001202106280035 (accessed: 16.06.2022).

promotes its interests in the Arctic both through participation as an Observer in the Arctic Council and within the framework of the implementation of treaties concluded with the Arctic states (Kienko 2019: 43).

China's international legal position regarding the rational use of the living marine resources in the Arctic Ocean is based on the proper protection of Arctic biodiversity, scientific research, and the fair and equitable sharing and use of the benefits generated by the exploitation of such resources.[34] According to China's Arctic Policy, published in 2018, "China will strengthen survey on and research into the fishery resources in the high seas in the Arctic, carry out appropriate exploratory fishing, and play a constructive part in the management of fisheries in the high seas in the Arctic Ocean." As regards fishing in the high seas in the Arctic Ocean, according to China's Arctic Policy, "China has consistently held a firm stance in favor of conservation in a scientific manner and of rational use, and maintains that, while enjoying their lawful right to conduct fisheries research and development in the high seas in the Arctic Ocean," and it believes that "all States should fulfil their obligations to conserve the fishery resources and the ecosystem in the region."[35] While the 2018 Agreement does not contain any reference to "rational use," the wording "use natural resources in a sustainable manner" does appear in the "Priorities of Russia's Chairmanship of the Arctic Council 2021–2023."[36]

We should also note that, in accordance with the document, "China hopes to strengthen cooperation with the Arctic coastal States on the research, conservation, and utilization of fishery resources."[37] For the time being, China is expected to focus on exploring the potential fishing opportunities in the 2018 Agreement Area and actively participating in the Joint Program of Scientific Research and Monitoring.

China's Five-Year National Fishery Development Plan states that the country "pays attention to and actively participates in Arctic fisheries affairs, and is actively involved in research on the study and management of Arctic fisheries resources."[38] The Chinese government also plans to: 1) deepen international cooperation in the fishing industry, in particular through international and regional fisheries organizations, and create a fair and reasonable international fisheries management mechanism; and 2) work towards implementing the 2030 Agenda for Sustainable Development, the United Nations Fish Stocks Agreement, and the Food and Agriculture Organization's Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported

[34] China's Arctic Policy. First Edition. January 2018. URL: http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm (accessed: 16.06.2022).
[35] Ibid.
[36] "Priorities of Russia's Chairmanship of the Arctic Council 2021–2023." URL: https://arctic-council-russia.ru/priorities/ (accessed: 16.06.2022).
[37] China's Arctic Policy. First Edition. January 2018. URL: http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm (accessed: 16.06.2022).
[38] Five-Year National Fishery Development Plan (in Chinese). URL: http://www.moa.gov.cn/gk/ghjh_1/201712/t20171227_6128624.htm (accessed: 16.06.2022)

and Unregulated Fishing. According to the National Fishery Development Plan, China intends to "implement, in good faith, international obligations, improve capacity to comply with international standards, and safeguard and protect the country's rights and national interests in marine fisheries"; "deepen bilateral cooperation in the fishing industry, create intergovernmental cooperation mechanisms with the three–five states located along the route of the Belt and Road Initiative, as well as with key fishing states."[39]

Despite the fact that China signed the 2018 Agreement at the same time as the other Parties, it took three years to actually ratify it. According to the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, the ratification and abrogation of treaties concluded with foreign states are entrusted to the Standing Committee of the National People's Congress. After the signing of a treaty or an important agreement, the Ministry of Foreign Affairs submits it to the State Council for examination and verification; the State Council then refers it to the Standing Committee of the National People's Congress for decision on ratification. The instrument of ratification is signed by the President of the People's Republic of China and countersigned by the Minister of Foreign Affairs.[40]

In May 2021, the Government of the People's Republic of China approved the 2018 Agreement, and then sent the instrument of ratification to the depositary state of the Agreement – Canada. In accordance with Art. 11, the Agreement shall enter into force 30 days after the date of receipt by the depositary of all instruments of ratification. China was the last state to approve the Agreement, paving the way for the completion of all the procedures necessary for its entry into force.

Conclusion

The development of modern international maritime law is facilitated by the initiative of coastal states to conserve living marine resources of the high seas and use these resources in a rational and sustainable manner. While universal and special international agreements have contributed significantly to the international legal regulation of fisheries in the high seas, they have not specified the obligations of states to prevent IUU fishing in the central part of the Arctic Ocean. Guided by existing mechanisms (the 1982 Convention, the 1995 Agreement and bilateral intergovernmental agreements), as well as by Russia's international legal experience in preventing IUU fishing in the marginal seas of the Arctic Ocean, states have managed to reach a consensus on the conservation of fisheries resources in the largest open sea enclave in the Arctic – the so-called "ice enclave."

[39] Ibid.

[40] Law of the People's Republic of China on the Procedure of the Conclusion of Treaties. URL: http://www.asianlii.org/cn/legis/cen/laws/potcot368/ (accessed: 16.06.2022).

The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, which has now entered into force, not only fills the legal gap, but is undoubtedly an innovative international legal document that unites the interests of Arctic and non-Arctic states, concerned international organized, and Arctic residents, including Arctic indigenous peoples, whose livelihoods largely depend on fishing – not only near the Arctic coast, but also in other areas of the EEZs of the five Arctic states.

An important feature of the 2018 Agreement is that the Arctic states confirmed their intention to cooperate with other interested parties in order to preserve the fish resources of the central Arctic Ocean and prevent unregulated fishing there. This is the first international agreement in which Arctic and non-Arctic states participate on an equal basis. The 2018 Agreement recognizes that these states have a common interest in the conservation and sustainable use of living marine resources, both within and beyond their respective national jurisdictions, i.e. in the "ice enclave." In the long term, the 2018 Agreement satisfies the interest of all contracting parties and is generally consistent with the historic status of the Arctic.

Additionally, the 2018 Agreement made it possible to take measures in advance to prevent IUU fishing on the high seas, something that, unfortunately, could not be done in other enclaves of the Arctic Seas (such as the Barents, Okhotsk and other seas). Based on scientific evidence and the precautionary approach, the 2018 Agreement introduced a ban on commercial fishing in the Agreement Area until such a time that the scientific data necessary to determine the allowable catch of fishery resources and assess the impact of anthropogenic and other interference in the region's ecosystem has been delivered, and until a comprehensive regime for managing these resources has been put in place. It would appear that this is what will allow us to preserve the living marine resources from overfishing and prevent their depletion.

The next step after the entry into force of the 2018 Agreement is expected to be a joint decision of the Parties regarding the next phase in its implementation. In particular, they will need to decide whether to establish a regional fisheries management organization, or whether to continue to refrain from engaging in commercial fishing until appropriate measures have been taken to manage and conserve fish stocks based on scientific evidence. The question of a regional international fisheries management organization also remains open, since some Parties to the 2018 Agreement have called for granting such a status to an organization that already exists – the North East Atlantic Fisheries Commission.

About the Authors:

Vyacheslav K. Zilanov – Candidate of Biological Sciences, Doctor Honoris Causa, Murmansk State Technical University, 13, ul. Sportivnaya, Murmansk, Russian Federation, 183010. E-mail: vkzilan@mail.ru

Elena V. Kienko – Candidate of Legal Sciences, Primakov National Research Institute of World Economy and International Relations of the Russian Academy of Sciences, 23, ul. Profsoyuznaya, Moscow, Russian Federation, 117997. E-mail: miss.kienko@yandex.ru

Anna A. Lugovskaya – Lecturer, Russian State University of Justice, 2-1, ul. Azovskaya, Moscow, Russian Federation, 117638. E-mail: a.lugovskaya22@gmail.com

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