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LAW AND POLITICS IN OCEAN GOVERNANCE

THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES

Tore Henriksen,
Geir Hønneland
and Are Sydnes

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Cambridge, Lysaker and Tromsø,

Tore Henriksen
Geir Hønneland
Are Sydnes

ABBREVIATIONS

ACFM	Advisory Committee on Fisheries Management (ICES)
CBD	Convention on Biodiversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
COFI	Committee of Fisheries (FAO)
CoP	Conference of the Parties
CP	Contracting Party
DWFN	distant-water fishing nation
EC	European Community
EU	European Union
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
FFA	South Pacific Forum Fisheries Agency
GATT	General Agreement on Tariffs and Trade
HMS	highly migratory fish stocks
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Council for the Exploration of the Sea
ICNAF	International Commission for the Northwest Atlantic Fisheries
ICSEAF	International Commission on South East Atlantic Fisheries
IGO	intergovernmental organization
IPOAs	International Plans of Action (FAO)
IUU	illegal, unreported and unregulated (fishing)
LOS	Law of the Sea
LOSC	United Nations Law of the Sea Convention

MHLC	Multilateral High-level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific
MSY	maximum sustainable yield
NAFO	Northwest Atlantic Fisheries Organization
NCP	Non-Contracting Party
NEAFC	North-East Atlantic Fisheries Commission
NGO	non-governmental organization
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PA	precautionary approach
PECCOE	Permanent Committee on Control and Enforcement (NEAFC)
PIC	Pacific Island Countries
PINRO	Polar Institute for Marine Fisheries Research and Oceanography, Murmansk
RFMO/A	regional fisheries management organization/arrangement
RSA	Republic of South Africa
SEAFO	South East Atlantic Fisheries Organization
STACFAC	Standing Committee on Non-Contracting Party Fishing Activities (NAFO)
STACTIC	Standing Committee on International Control (NAFO)
TAC	total allowable catches
UNCED	United Nations Conference on Environment and Development ('Rio Conference')
UNCLOS (I, II, III)	United Nations Conference(s) on the Law of the Sea
UNTS	United Nations Treaty Series
VMS	vessel monitoring system(s)
WCPFC	Western and Central Pacific Fisheries Commission
WCPO	western and central Pacific Ocean
WTO	World Trade Organization

LIST OF MAPS

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PART I

BACKGROUND

CHAPTER ONE

INTRODUCTION

In 1995 the United Nations adopted the 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 (hereafter 'the Fish Stocks Agreement', or simply 'the Agreement').[1] The Agreement, which is an elaboration of Articles 63(2) and 64 of the UN Law of the Sea Convention of 1982 (LOSC),[2] was an effort to curb rising conflicts and unilateral actions regarding the rights and duties of states to exploit and manage straddling and highly migratory fish stocks. In doing so, the Agreement broke new ground in international fisheries law more generally, not least by incorporating new environmental principles, provisions on compliance and enforcement, and the duty of states to cooperate.

This volume explores the legal and political implications of the Fish Stocks Agreement in five selected regional fisheries management regimes. The cases chosen reflect the diversity of the institutional arrangements that have been established at the regional level to manage straddling and highly migratory fish stocks. We examine three established and operational regional fisheries management regimes, and two regional agreements establishing such regimes, negotiated following the Fish Stocks Agreement in 1995. These case studies provide the empirical basis for a comparative discussion on regional fisheries management and a stocktaking on the implementation of the Agreement at the regional level.

This introductory chapter begins with a brief introduction to regional fishery organizations and how their role has changed since the Fish Stocks Agreement was adopted in 1995. Then follows an outline of the questions to be asked in the case studies presented in the book, and the cases of regional fisheries management to be reviewed.

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[1] UNTS vol. 2167, available at www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm (accessed June 2005).

[2] UNTS vol. 1833, available at www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (accessed June 2005). For the state parties, see www.un.org/Depts/los/convention_agreements/convention_agreements.htm (accessed June 2005).

THE CONCEPT OF REGIONAL FISHERIES MANAGEMENT REGIMES

Regional fisheries management regimes are international institutions established by states, identifying common gains in working together to overcome collective-action problems related to the management of regional fisheries.[3] A problem inherent in understanding and explaining regional fisheries management is that there exists a multitude of terms to define what qualifies as a 'regional mechanism' under international fisheries law. For example, Article 8(1) of the UN Fish Stocks Agreement states that coastal states and distant-water fishing nations (DWFNs) shall pursue cooperation either directly, or through appropriate sub-regional or regional fisheries management organizations or arrangements.[4] What qualifies as an international organization is well established by the LOSC and international law. However, this leaves the unresolved question of what distinguishes direct cooperation, an arrangement, and sub-regional or regional cooperation. Though this may obscure what qualifies under which concept, it also reflects the fact that no single format of regional management can fit all geopolitical and biophysical conditions. In the absence of formal criteria, this is given content through state practice.

Regional fisheries management regimes may be established as formal organizations with personnel, infrastructure, budgets and legal personality by a constituting agreement between the parties. Four of the five cases discussed in this volume are regional fisheries management organizations in this sense.[5] However, regional fisheries regimes may also be based on institutionalized arrangements without an independent organizational apparatus, but with similar functions.[6] The concepts used in international fisheries law, regional and sub-regional organizations, direct cooperation and other arrangements leave the institutional design of regional fisheries management largely up to the specific context of the fisheries and the discretion of the states involved.[7] For the purpose of this volume, we apply the terms 'regional fish-

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[3] For discussions on the functions and roles of regional fishery regimes see Koers (1973), Heck (1975), Marashi (1996), Stokke (2001a) and Sydnes (2001a).

[4] This is largely a reiteration of Articles 63(2) and 64 of the LOSC. However the Fish Stocks Agreement Article 8(1) introduces the concept 'arrangement'. For a more extensive discussion see Chapter 2, this volume.

[5] The Northwest Atlantic Fisheries Organization, the North-East Atlantic Fisheries Commission, the South East Atlantic Fisheries Organization, and the Western and Central Pacific Fisheries Commission.

[6] One such arrangement is discussed in this volume, the Joint Russian–Norwegian Fisheries Commission.

[7] There are differences in the discretion allowed to states in LOSC Articles 63(2)–67 and 118 on specific regimes. The Fish Stocks Agreement (Art. 8(1)) leaves the form of cooperation to the discretion of state parties.

eries management regimes' and 'RFMO/As' interchangeably, to denote regional fisheries management organizations *or* arrangements as defined by the Fish Stocks Agreement (Art. 8(1)).

Worldwide, there now exist more than 20 operative regional fishery organizations (Marashi, 1996; Sydnes, 2001a) as well as several other regional arrangements.[8] A second challenge in studying regional fisheries management is that not all regional fishery regimes are actively involved in managing fish stocks. In some cases, the regime may not be mandated to manage the fish stock directly. This is, for example, the case for the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization, both of which have been established as purely scientific marine organizations.[9] In other cases, regional fishery regimes may not have acted upon their mandate to manage the fisheries, focusing instead on the functions of fisheries development and/or policy coordination among member countries.[10] Examples here are the Committee for the Eastern Central Atlantic Fisheries and the Western Central Atlantic Fisheries Commission; for an extended discussion, see Sydnes (2001a).

THE CHANGING ROLE OF REGIONAL FISHERIES MANAGEMENT REGIMES

The sustainability of the old high seas regime, constituted by the *mare liberum* doctrine, rested on the ability of states to cooperate on the management of fisheries in areas beyond the territorial seas. In several cases, regional fishery organizations were established—as in the northeast Atlantic, northwest Atlantic, Indo-Pacific and Mediterranean.[11] However, most regional fisheries organizations established during the old high seas regime proved inefficient (Burke, 1994: 95). The freedom of the seas doctrine did not differentiate between the rights and duties of states to high seas fisheries resources, nor did it establish any sanctions for fishing nations that did not cooperate or abide by measures established under regional fishery regimes. This meant few incentives for member countries of regional fisheries organizations to limit the efforts of their own fleets. As a result, member countries were often unable to agree upon common regulations, or were unwilling to implement them. There were generally no enforcement schemes to ensure

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[8] For examples see Stokke (2001a).

[9] As will be discussed in Chapters 4 and 5, ICES provides scientific advice to the member countries of both the North-East Atlantic Fisheries Commission and the Joint Russian–Norwegian Fisheries Commission.

[10] This is particularly the case in developing regions (Sydnes, 2002).

[11] For overviews of these organizations, see Koers (1973), Marashi (1996), Sydnes (2001a).

that regulations were complied with. Moreover, there was also the 'free-rider' problem of unregulated fishing by non-members (Koers, 1973; Churchill & Lowe, 1999).

From the end of the Second World War onwards, a growing number of states came to regard the high seas regime as both inequitable and inefficient. Some coastal states reacted by making unilateral claims to jurisdiction over the waters beyond their territorial seas and the living marine resources there (Juda, 1996). These unilateral actions challenged the freedom of the seas doctrine and paved the way for the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958 and UNCLOS II in 1960. The failures of LOSC I and II to address the pressing issues of international fisheries spurred further unilateral claims among countries in Latin America and Africa.[12] The proliferation of such claims in turn put the issue of coastal state jurisdiction onto the agenda of LOSC III, which was convened in 1973.

LOSC III (1973–1982) culminated in the adoption of the LOSC on 10 December 1982. Agreement on the introduction of exclusive economic zones (EEZs) was reached at an early stage,[13] and was widely acknowledged by the second half of the 1970s (Churchill & Lowe, 1999: 161). The expectation was that EEZs would provide coastal states with the authority and incentives to conserve and manage the living marine resources in a sustainable manner (Hey, 1996). The continued freedom of the high seas—including fishing—was considered a counterpoint to the introduction of EEZs (LOSC Art. 87). As most world fisheries at the time were in fact within waters now covered by EEZs, this was viewed as a minor issue.[14]

In many cases, the introduction of EEZs led to closer bilateral and multilateral cooperation on managing transboundary fish stocks. Many fish stocks now fell exclusively within the jurisdiction of coastal states and could be managed by coastal states exclusively or by agreements between coastal states.[15] Most established regional fisheries organizations and other arrange-

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[12] The process was initiated by the Truman Proclamation in 1945, followed by Chile, Ecuador and Peru in 1952, the Montevideo Declaration (1970), the Lima Declaration (1970), the Santo Domingo Declaration (1972) and the African States Regional Seminar (1972) (Juda, 1996: 193–94).

[13] The EEZ concept was based on a Kenyan proposal in 1972, fleshed out by the UN Seabed Committee. It represented a compromise between certain Latin American and African claims to 200-nautical-mile territorial seas, and states that opposed extended national sovereignty (among them Japan, the USA and the USSR). Granting the coastal states sovereign rights to the living marine resources, in contrast to sovereignty over these ocean areas, was a concession made by the maritime powers to ensure their security interests in the freedom of movement (Churchill & Lowe, 1999: 160).

[14] The exception being the high-value highly migratory fish stocks like tuna.

[15] For example, the Joint Russian–Norwegian Fisheries Commission was established in 1976 to manage the shared fish stocks in the Barents Sea. See Chapter 5 of this volume.

ments were thereby circumscribed by the introduction of EEZs that covered most of the world catch at the time.[16] As a consequence, the statutes of regional fishery organizations had to be revised. For example, the International Commission for the Northwest Atlantic Fisheries (later Northwest Atlantic Fisheries Organization) and the North-East Atlantic Fisheries Commission[17] were re-established by new constituting agreements that took into account the claims of coastal states to EEZs. Some regional fisheries organizations became dormant (like the 'new' North-East Atlantic Fisheries Commission), while others were abolished (as was the case with the Regional Fishery Advisory Commission for the Southwest Atlantic). In general, regional fishery regimes had the role of filling the institutional void between EEZs, as in the case of straddling and highly migratory fish stocks.[18] They were established and maintained only in cases where the value of the fisheries in the region induced the need for such cooperation (Sydnes, 2002).

The introduction of EEZs led to the displacement of many DWFNs, as these fleets had established fisheries operations in waters that now lay within the EEZs of coastal states. In several cases, DWFNs negotiated bi- and multilateral fisheries agreements with developing coastal states to gain access to their fisheries (Stokke, 2001a: 4–5). However, as many coastal states sought to develop their national fisheries sectors, this was to become a limited option. The fleets of many DWFNs therefore sought new fishing grounds on the high seas beyond national EEZs. In such cases, a natural target was found in economically valuable straddling and highly migratory fish stocks, where there was often an established market for the catches (Meltzer, 1994; Stokke, 2001a: 5).

During the 1980s and 1990s, regional fisheries cooperation re-emerged as a major issue on the international agenda. Several regional conflicts arose regarding the management of straddling and highly migratory fish stocks (Meltzer, 1994). In some areas, coastal states were finding that their efforts to manage stocks sustainably within their EEZs were being undermined by destructive fishing practices on the high seas. There was also general concern regarding the sustainability of established fishing practices, both within the EEZs and on the high seas (Hey, 1999). Agenda 21, adopted by the

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[16] During the early 1990s, high seas fisheries had represented 10% of world catch, according to FAO, 1994, "World Review of Highly Migratory Species and Straddling Stocks", *FAO Fisheries Technical Paper*, 337: 3. It is generally held that the corresponding figure was only a few percent when the LOSC was adopted in 1982 (Stokke, 2001a: 5).

[17] Dealt with in Chapters 3 and 4, respectively, of this volume.

[18] Straddling fish stocks are those that migrate between EEZs and the adjacent high seas (LOSC Art. 63(2)). Highly migratory fish stocks undergo extensive migrations over ocean areas both within EEZs and areas of high seas (LOSC Art. 64). The latter are formally listed in the LOSC, Annex I.

UNCED in 1992, recommended that the UN convene a conference on the international management of straddling and highly migratory fish stocks[19]—the UN Fish Stocks Conference 1993–95.[20]

The Fish Stocks Agreement was negotiated and adopted in the context of broader political developments in international fisheries governance. Parallel to the track leading to the Agreement, the Food and Agriculture Organization of the United Nations (FAO) was mandated by the 1992 Declaration of Cancun[21] to establish a code of conduct for responsible fisheries. The FAO Code of Conduct was adopted by the FAO Council in 1995 as a voluntary agreement (Art. 1(1)).[22] It has a global scope establishing principles and standards applying to all levels of organization and all aspects of fisheries (Art. 1–2). The FAO Code of Conduct reiterates the duty of states to cooperate through regional fishery organizations (Art. 6(12)). Regional fishery organizations are integrated generally in all provisions pertaining to fisheries management (Art. 7), fishing operations and the duties of states (Art. 8) and fisheries research (Art. 12), among others. The FAO Committee of Fisheries (COFI) has adopted four international plans of action (IPOAs) and initiated a wide range of activities to support the implementation of the FAO Code of Conduct (Garcia & Doulman, 2005). In addition, the FAO Compliance Agreement was adopted by the FAO Conference on 24 November 1993.[23] This agreement, which is legally binding, forms an integral part of the FAO Code of Conduct. It was negotiated as an effort to curb the rising international problem of fishing vessels being re-flagged to avoid fisheries regulations. There is a substantial potential for synergies between the provisions of the Fish Stocks Agreement and the FAO Code of Conduct and IPOAs.[24]

The Fish Stocks Agreement should be seen, first, as the result of an historical process in the evolution of international fisheries law and, second, in the context of other agreements negotiated by the international community to deal with challenges in international fisheries (see e.g. Hey, 1996). The

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[19] Report of the United Nations Conference on Environment and Development, Vol. 1, Resolutions adopted by the Conference, 1992, UN Doc. A/CONF.151/26 (Rev.1), Vol. I., Chapter 17.

[20] In full: the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, established by General Assembly resolution 47/192.

[21] Adopted by the International Conference on Responsible Fishing, Cancun, Mexico, 6–8 May 1992.

[22] Code of Conduct for Responsible Fisheries, 1995, *International Organizations and the Law of the Sea Documentary Yearbook*, 11: 700.

[23] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993, International Legal Materials (1994), 33: 968.

[24] See Garcia & Doulman (2005) on FAO efforts regarding the implementation of the FAO Code of Conduct and IPOAs.

Agreement does not represent an end: instead, it marks the beginning of a new era in the management of straddling and highly migratory fish stocks. Its impact, of course, will depend on its implementation.[25] One decade after the adoption of the Fish Stocks Agreement, this volume enquires into how these developments have been reflected in five regional case studies. This seems a timely effort, as the 'Informal Meeting of States Parties' to the Fish Stocks Agreement are currently preparing for the review conference to be held in 2006, in accordance with Article 36 of the Agreement. [26]

QUESTIONS TO BE ASKED, CASES TO BE REVIEWED

The main objective of this book is to examine the current working of five RFMO/As, focusing on their adaptation to the requirements of the Fish Stocks Agreement. We occasionally refer to this as the 'implementation' of these requirements in the RFMO/As. There exists an extensive body of international relations literature on the implementation of international environmental agreements (see, for instance, Hønneland & Jørgensen, 2003; Stokke et al., 2005; Underdal & Hanf, 2000; Victor et al., 1998). This literature is mostly concerned with the preconditions for the successful implementation of international agreements at the national level, often with main emphasis on the capacity of a given state to govern or on the specific features of the agreement in question. Other studies have been oriented towards linkages—for example, between regimes at the global and regional level, and the diffusion of normative and structural elements of such regimes from one level to another (Stokke, 2001a). The ambitions of this volume are more modest as far as contributing to the theory debate is concerned. While we focus on the diffusion of different elements of the Fish Stocks Agreement in the RFMO/A, we do not aim to demonstrate causality in a strict scientific sense of the word.

This introductory chapter is followed by a comprehensive review of the Fish Stocks Agreement in Chapter 2, with main emphasis on the Agreement's provisions on i) the right and obligation to cooperate; ii) material principles for cooperation (particularly the precautionary approach); iii) procedural principles for cooperation (especially decision-making procedures and transparency); iv) allocation principles; and v) compliance, enforcement and dispute settlement. This lays the foundations for the discussion of the five regional fisheries regimes studied in Chapters 3 to 7. We ask to what

[25] At the time of writing there are 56 parties to the Fish Stocks Agreement. For the updated status of the Agreement, see www.un.org/Depts/los/reference_files/status2005.pdf.

[26] www.un.org/Depts/los/convention_agreements/fishstocksmeetings/icsp4report.pdf.

extent the RFMO/A in question reflects the following provisions of the Fish Stocks Agreement:

- the right and obligation to cooperate
- the precautionary approach to fisheries management
- decision-making procedures, including transparency and stakeholder participation
- compliance, enforcement and dispute settlement

First, the obligation of states to cooperate on the management of straddling stocks laid down in the LOSC is strengthened in the Fish Stocks Agreement. Most importantly, only states that agree to cooperate in an RMFO/A or comply with the provisions of an RMFO/A shall have the right to participate in the fisheries in question. Second, the Fish Stocks Agreement introduces the precautionary approach to fisheries, which means that states are to take regulatory action even in the absence of incontrovertible scientific evidence of harm to the fish stocks.[27] Third, the Agreement calls for more efficient decision-making procedures to enable the member countries of RFMO/As to respond to their duties to conserve and manage fish stocks. Moreover, it reflects emerging trends in international environmental politics by including provisions on transparency in the decision-making process, whereby all parties with a legitimate interest are given access to this process. Fourth, flag-state responsibility is strengthened through the Fish Stocks Agreement in that all states are obliged to exercise jurisdiction over high seas fishing operations carried out by vessels under their flag. More importantly, it strengthens the possibility of non-flag states to inspect fishing vessels on the high seas. Parties to the Agreement have given advance consent to vessels under their flag being inspected by personnel authorized under an RFMO/A. In case of violation of RFMO/A regulations, the flag state must either prosecute the vessel itself, or agree to its being prosecuted by the non-flag state.

The book does not aim at providing an exhaustive review of regional fisheries management regimes. Instead, we have wanted to offer in-depth analyses of five such regimes—some of which have already been quite extensively treated in the literature, others not:

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[27] Originating in more general international environmental law towards the late 1980s—in particular related to industrial pollution—the principle was incorporated into international law on fisheries in a less stringent form as what came to be known as the precautionary *approach* in the mid-1990s. For discussions of the precautionary approach to fisheries management, see, e.g., Garcia (1994), Hewison (1996) and Kaye (2001).

- The *Northwest Atlantic Fisheries Organization* (NAFO) was re-established in 1978, following the widespread acceptance of EEZs. It has the competence to manage the fisheries on the high seas of the Northwest Atlantic. The fisheries within NAFO were at the apex of the fisheries conflicts that led to the negotiation of the Fish Stocks Agreement in 1993–95. Demersal fisheries have been depleted since the 1990s, while pelagic fisheries have remained at normal levels. The crisis in demersal fisheries has resulted in NAFO being a forum for the elaboration of new management approaches in the Atlantic region. NAFO has an independent scientific council and an established scheme for control and enforcement. The regime has 18 members.
- The *North-East Atlantic Fisheries Commission* (NEAFC) was re-established in 1980, following the negotiation on a new constituting agreement reflecting the introduction of EEZs in international fisheries law. The geographical mandate is, thus, limited to the high seas. The regime remained a 'dead letter' until the 1990s, when NEAFC undertook to manage red fish, a straddling stock, followed by Norwegian spring-spawning herring, mackerel and (to an extent) blue whiting. Management measures are based on scientific advice from ICES. Beyond the setting of regulatory measures, NEAFC established a scheme of control and enforcement entering into force in 1999. There are six parties to the regime.
- The *Joint Russian–Norwegian Fisheries Commission* was established in 1976 as a bilateral arrangement between Norway and Russia. Its mandate covers the members' shared fisheries of the Barents Sea, namely cod, haddock and capelin. The Commission has established total allowable catches for the shared stocks throughout their range, covering the Norwegian and Russian EEZ, the Fisheries Protection Zone around Svalbard and the Barents Sea 'Loophole'. The parties cooperate regarding scientific assessments, fisheries regulations, and enforcement and control. The Commission receives scientific advice from the International Council on the Exploration of the Sea (ICES). This regime is what Stokke (2001a: 330) refers to as 'bilateralist': the hub of the regime is a bilateral arrangement, but third parties are tied to it through regular negotiations on quota exchanges.
- The agreement establishing the *South East Atlantic Fisheries Organization* (SEAFO) was adopted in 2001 as the first regime for managing straddling fish stocks after the Fish Stocks Agreement of 1995. The mandate of SEAFO covers the high seas of the Southeast Atlantic, an area in which fisheries are at a low level and current fishing activities are limited. An interim arrangement has been operative (2001–2004) to gather informa-

tion on fisheries activities in the mandate area. The SEAFO Convention entered into force on 13 April 2003, and an inaugural meeting was held in March 2004. Thus far, only the European Community, Namibia and Norway have ratified or approved the convention.[28]

- The *Convention on the Conservation and Management of the Highly Migratory Fish stocks in the Western and Central Pacific Ocean* was adopted by majority vote in September 2000. It was the first regional regime for managing highly migratory fish stocks to be negotiated following the Fish Stocks Agreement. The 28 parties to the negotiations represented a broad spectrum of interests in the highly valuable tuna fisheries of the western and central Pacific Ocean. A Preparatory Conference, active 2001–2004, was established to facilitate the entry into force of the convention and the future workings of the commission. The convention entered into force on 19 June 2004; an inaugural meeting held in December the same year. There are sixteen state parties to the convention in addition to Taiwan, which has the status of a 'fishing entity'.[29]

In the final chapter, we put together the findings of the case studies and put forth a set of generalizations based on the comparative examination of how, and to what extent, the Fish Stocks Agreement has been applied and implemented by the regional fisheries regimes examined.

[28] www.seafo.org/
[29] www.wcpfc.org/

CHAPTER TWO

THE FISH STOCKS AGREEMENT

INTRODUCTION

The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was convened in April 1993 on request of the UN General Assembly.[1] It was mandated to identify and assess problems relating to conservation of these fish stocks, to consider means for improving cooperation between states and to formulate appropriate recommendations. The conference came on the initiative of the 1992 UN Conference on Environment and Development, which had identified several problems relating to high seas fisheries.[2] The problems included unregulated fishing and insufficient cooperation between states. The conference was thus to address the shortcomings of the UN Law of the Sea Convention provisions on the high seas, especially Article 63(2).

On 4 August 1995, after six sessions, the conference adopted without a vote the 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[3] (hereafter 'Fish Stocks Agreement' or the 'Agreement').[4] The Fish Stocks Agreement was opened for signature 4 December 1995.

It entered into force on 11 December 2001 following the 30th ratification. By mid-October 2005 there were 56 state parties to the Fish Stocks Agreement, including the European Community, compared with 149 state parties to the UN Convention on the Law of the Sea (hereafter LOSC).[5]

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[1] A/RES/47/192, available at www.un.org/documents/ga/res/47/a47r192.htm (accessed October 2005).

[2] Agenda 21, Chapter 17 Programme Area C. Sustainable use and conservation of marine living resources of the high seas, in A/CONF.151/26 (Vol. II), available at www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter17.htm (accessed October 2005).

[3] The Arabic, Chinese, English, French, Russian and Spanish texts of the Fish Stocks Agreement are equally authentic, Art. 50. This analysis will be based on the English text.

[4] UNTS vol. 2167 pp 88, also reproduced on www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm (accessed June 2005).

[5] UNTS vol. 1833, pp. 397, also reproduced on www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (accessed June 2005). For an overview of the state parties, see www.un.org/Depts/los/convention_agreements/convention_agreements.htm (accessed June 2005).

The Fish Stocks Agreement is comprehensive, consisting of 50 articles divided into 13 parts, in addition to two annexes. The Chairman of the Conference has identified the three pillars of the Fish Stocks Agreement:[6] The first pillar consists of the conservation and management principles, the second pillar ensures that the measures are adhered to and complied with, and the third pillar provides for peaceful resolution of disputes. The obligation to cooperate on the conservation of living marine resources has been strengthened by according the regional fisheries management organizations more authority. The Fish Stocks Agreement also provides for non-flag state enforcement and the incorporation of the LOSC dispute settlement procedures into the regional fisheries management organizations.

Upon the adoption of the Fish Stocks Agreement, the Chairman of the Conference claimed it contained a substantive and effective response to the mandate given by the UN General Assembly.[7] In the preamble of the Fish Stocks Agreement it is described as a means to address the problems identified by the above-mentioned 1992 conference. This raises questions whether the Fish Stocks is an effective response, which will be discussed in this chapter under the following themes:

- the right and obligation to cooperate
- material principles for cooperation
- procedural principles for cooperation
- mechanisms for compliance and enforcement and dispute settlement

The impact of the Fish Stocks Agreement on the law of the sea largely depends on the number of states and which states that become parties to it. The Fish Stocks Agreement is, like other treaties, binding only on the states parties.[8] Regional fisheries management organizations and arrangements (hereafter RFMO/As) are central mechanisms in the implementation of the Fish Stocks Agreement. These RFMO/As may not become parties to the Fish Stocks Agreement. Therefore one is dependent on the member states of the RFMO/As to become parties to ensure that it will be implemented. If a minority of members are parties to the Fish Stocks Agreement, they may not be able to implement its provisions. Some of the provisions of the Agreement require all member states to be parties, to ensure effective imple-

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[6] A/Conf.164/35 available at www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (accessed October 2005). Most of the documents of the Conference may be found in Levy & Schram (1996).

[7] Ibid.

[8] This is reflected in Article 26 of the Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, Vol. 1155, p. 331.

mentation. In some cases there will be a need to amend the constituent treaties of the RFMO/A to be consistent with the requirement, and that may be a long process. Anyhow, the Agreement may have political effects on the activities of the RFMO/As in the sense that they may adopt its innovations or be inspired by it in their practice.

Although the vast majority of the present state parties to the Fish Stocks Agreement are coastal states and states fishing on the high seas, the number of states involved is relatively smaller than in the LOSC. Several major high seas fishing states (e.g. Japan, South Korea and Thailand) and flag of convenience states (Panama) are not parties, as well as some important coastal states (e.g. Argentina, Chile and Peru). Of course this will affect the possibility to implement the innovations of the Fish Stocks Agreement.

About the Fish Stocks Agreement

The Fish Stocks Agreement applies to areas 'beyond national jurisdiction' (Art. 3(1)). In practical terms this refers to areas of the *high seas* where all states enjoy the freedom of fishing. However, some of the provisions are also applicable to areas under national jurisdiction—exclusive economic zones (EEZs) or exclusive fisheries zones.[9] Articles 5, 6 and 7 refer to the obligation to apply the *precautionary approach,* and the requirement of compatibility of conservation and management measures. The Fish Stocks Agreement thus includes obligations both for coastal states and for states fishing on the high seas.

As indicated in its full title, the Fish Stocks Agreement is directed at the conservation and management of straddling fish stocks and highly migratory fish stocks. However, these two concepts are not defined. Since the objective is to implement the Convention, help may be sought in its provisions. 'Highly migratory species' are introduced in Article 64, where there is a reference to a list of such species in Annex I. The *highly migratory fish stocks* of the Fish Stocks Agreement are found in this list, and include various tuna species. There is no reference to *straddling fish stocks* in the LOSC. This is a concept developed in recent years to describe fish stocks which

[9] The Agreement does not refer to the maritime zones regulated in the Convention, but distinguishes between areas under and beyond 'national jurisdiction'. The objective of the Agreement is to implement the Convention. Therefore it is natural to interpret the concept in this context. The obligations of the involved states in respect of straddling fish stocks and highly migratory fish stocks are geographically limited to the EEZ and the high seas, according to Articles 63(2) and 64 of LOSC. The obligations of the coastal state will thus not directly apply to the territorial sea or the internal waters. The use of 'national jurisdiction' and not EEZ is probably intended to ensure that the Agreement will apply to areas where the coastal state still operates with an exclusive fisheries zone.

"occur both within the exclusive economic zone and in an area beyond and adjacent to the zone" (LOSC Art. 63(2)). Straddling fish stocks and highly migratory fish stocks are both transboundary and occur on the high seas. Still, there is a need to make a distinction between them, because the rights and obligations of states in respect of these stocks may differ.

In consequence, the Fish Stocks Agreement does not apply to fish stocks confined exclusively to areas within or beyond national jurisdiction. A state party is not obligated by the Fish Stocks Agreement to take measures to conserve and manage a fish stock that occurs only on the high seas, or other living marine resources (e.g. seabirds and marine mammals). However, the general principles of the Fish Stocks Agreement include provisions obligating states also to take measures to conserve non-target species and to protect marine biodiversity, as set out in Article 5. These obligations are meant to mitigate the effects of the fishing for target fish stocks and do not imply an independent obligation to conserve these living marine resources. Such obligation must be derived from the Convention and international customary law.

From the title and the objective of the Fish Stocks Agreement, it follows that it aims at an effective implementation of the LOSC. This signals something about the relationship between the two: the Fish Stocks Agreement is not meant to break entirely new ground. There is no integration of the two treaties, as was the case with the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[10] They are separate treaties, which could mean that there may be different legal regimes pertaining to high seas fisheries: the regimes of the Fish Stocks Agreement, the LOSC and customary international law. There may be several reasons why states did not want to integrate the Agreement into the LOSC. First, there were formal obstacles through the amendment procedures in Articles 312–314, restricting the possibilities for revising the LOSC prior to a 10-year period from the entry into force of the LOSC. Secondly, there may also have been political resistance to taking such steps; it could be interpreted as acceptance that the LOSC could be up for amendments.

The relationship between the Agreement and the LOSC is regulated in the Agreement itself: The Agreement is not to prejudice the rights and obligations of the LOSC and is to be interpreted and applied consistent with the LOSC (Art. 4). Although the provision seems to give precedence to the LOSC, it should be interpreted in the context of the background of the Agreement. The mandate of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was to identify problems and formulate

[10] 1994 UNTS: 42.

appropriate recommendations, which it did through the Agreement. Therefore the provision should not be interpreted too narrowly and be applied primarily when there may be doubts whether there are infringements on the rights of coastal states and states fishing on the high seas. The Agreement could have an affect on the interpretation and application of the relevant provisions of the LOSC. The close links between them suggest the Agreement may be viewed as a subsequent agreement on the interpretation and application of the LOSC.[11]

THE RIGHT AND OBLIGATION TO COOPERATE

According to Article 118 of the LOSC, states fishing on the same living marine resources or in the same area of the high seas shall cooperate in the conservation of these resources. As regards straddling fish stocks and highly migratory fish stocks on the high seas, this obligation is supplemented with the special obligations of the relevant coastal states and states fishing for these stocks in adjacent areas of the high seas to cooperate in the conservation of these stocks (Art. 63(2) and 64(1)). These obligations, regulated in the LOSC, have probably now become part of international customary law.

In discussing the obligation to cooperate, it may be useful to distinguish between its elements: the content of the obligation as such and the format of the cooperation. In the LOSC the first involves an obligation for states to "enter into negotiations with a view to take measures" and "shall seek to … agree upon the measures". States shall comply with this obligation either through direct cooperation or through sub-regional or regional fisheries organizations. States do not seem to have an obligation to become members of regional fisheries organizations but may fulfil their obligation to cooperate in other ways. A consequence is that these organizations do not have exclusive competence to regulate high seas fisheries.

An Obligation to Cooperate

Part III of the Fish Stocks Agreement includes several provisions for mechanisms for cooperation on the conservation of straddling fish stocks and highly migratory fish stocks. Although the introductory paragraph of Article 8 seems to leave states a choice whether to cooperate directly or through regional or sub-regional fisheries management organizations or arrangements, the ensuing paragraphs emplace radical limitations on this freedom. Where

[11] Vienna Convention on the Law of the Treaties, Art. 31(3)(a).

there exists a fisheries management organization or arrangement competent[12] to regulate the fishery for a specific straddling fish stock or a highly migratory fish stock, those states fishing for the stock on the high seas and the relevant coastal states shall become members of the organization or participants of the arrangement (Art. 8(3)). States fishing for the stock on the high seas may choose not to join or participate but are then obligated to apply the management measures adopted by the organization or arrangement, in order to be entitled to fish on the stock.

If a straddling fish stock or highly migratory fish stock is not subjected to the regulatory competence of any organization or arrangement, states fishing for the stock on the high seas and the relevant coastal states are obligated to establish either an organization or an arrangement, as per Article 8(5). They are to participate in the work of the new organization either as members or by applying the measures adopted by it.

From this we may conclude that the regional or sub-regional fisheries management organizations and arrangements are given *exclusive competence* to regulate the high seas fisheries of straddling fish stocks and highly migratory fish stocks.[13] This is confirmed by the linkage between the right to access to fishery resources and membership in the organization or arrangement or by acceptance to application of their management measures (Art. 8(4)). Non-members that do not agree to apply the measures adopted by the RFMO/A shall not authorize their vessels to engage in fisheries for these stocks (Art. 17(2)). States cannot escape their obligations by not participating in the cooperation and still continue fishing: as Balton expresses it, "only those who play by the rule may fish" (1996: 138).

The two ways of organizing the cooperation—organization and arrangement—appear as equal mechanisms for cooperation between coastal states and states fishing on the high seas. Direct cooperation is not an alternative.[14] Since there are two alternatives, it is reasonable to assume that there is a distinction between them.[15] The question is what it is and how the difference

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[12] Whether the RFMO/A is competent to establish conservation and management measures for a specific straddling or highly migratory fish stock follows from its constituent treaty: whether the stock occurs within its area of application and is among the stocks the organization may regulate.

[13] This is the conclusion also reached by Molenaar (2000: 484–85), Hayashi (1999: 67–68), Applebaum & Donohue (1999: 234–35), Churchill & Lowe (1999: 309) and Vicuña (2001: 40–42).

[14] An exception is made for areas of the high seas surrounded entirely by an area under the national jurisdiction of a single state (Art. 16). Under such circumstances, the coastal state and states fishing in the area may cooperate directly.

[15] Applebaum & Donohue (1999: 220) argue that, according to the Agreement, states are more or less free to choose how to organize the cooperation. It is submitted that states are not entirely free, since arrangement and organization are the two explicit options. However, they

may affect the cooperation. Arrangement is a relatively new concept in the Law of the Sea. It is defined in the Agreement as "a cooperative mechanism established in accordance with the LOSC and this Agreement by two or more states, *inter alia*, of establishing conservation and management measures" (Art. 1(1)(d)). The definition is not very informative. But it indicates that an arrangement is a permanent forum of cooperation set up by states, although not necessarily through a formal treaty.

The three types of cooperation—direct cooperation, arrangement and organization—may be placed on a scale, with direct cooperation and organization on either end, with arrangement somewhere in-between. An arrangement can be distinguished from bilateral or multilateral state-to-state cooperation (direct cooperation) as being a firmer and more fixed mechanism, not at least to be able to perform some of the functions assigned—including to obtain and evaluate scientific advice, compile and disseminate statistical data, promote and conduct scientific assessments and establish cooperative mechanisms for effective control, surveillance and enforcement (Art. 10). An arrangement must have some sort of infrastructure or organs to perform these duties. The existence of a formal treaty establishing these forums may be an indication but is not necessarily a requirement. 'Organization' is a better-known concept and is used in the LOSC. When contrasted to arrangement, an organization appears as a firmer and more fixed structure, probably by having its own secretariat and headquarters and separate decision-making procedures. 'Organization' also refers to the concept of intergovernmental organizations (IGO)—bodies set up by states through a convention with separate organs and responsibilities. IGOs may have international legal personality (Shaw, 2003: 241). Examples of fisheries management organizations are the North-East Atlantic Fisheries Commission (NEAFC)[16] and the Northwest Atlantic Fisheries Organization (NAFO).[17]

It is not possible to identify precisely what constitutes an arrangement and makes it different from a direct cooperation and an organization. The distinction between them is somewhat undefined. Some elements are crucial for a mechanism to be an arrangement: It will have a permanent forum, with defined decision-making authority and sub-organs of permanent or provisional character. But it will probably not have a permanent secretariat or headquarters. Administrative functions may be carried out by agencies of the participatory states or through its organs. The Annual Conference of the Parties

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have a point when saying that it is difficult to distinguish between the two alternatives, giving the states some latitude in organizing the cooperation.

[16] Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, Art. 3.

[17] Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, Art. II.

established in the 1994 Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea[18] may be regarded an arrangement (Art. IV).

When states establish mechanisms for cooperation according to Article 8 (5), the choice between organization and arrangement will probably depend on the complexity of the regime, that is, the number of fish stocks and states involved. By establishing an IGO with implied powers and ability to perform independently in relations with other IGOs or states, the states allow for a more dynamic form of cooperation. (See Schermers & Blokkers, 1995: §§ 232–236.)

A Right to Cooperate

The focus in legal literature in recent years has been on the obligation of states to cooperate on conservation of high seas fish stocks. (See e.g. Burke, 1994: 99–115). This is not surprising, considering the problems of compliance with this obligation. A right to take part in the cooperation becomes more relevant when the RFMO/As are accorded exclusive competence to regulate the fisheries for straddling and highly migratory fish stocks on the high seas.

According to the Fish Stocks Agreement, there are two ways of cooperating: either through membership or by agreeing to apply the conservation and management measures adopted by the RFMO/A. However, the latter method is not an alternative for most states with an interest in high seas fisheries.[19] They may influence the decisions of an organization—including the alloca-

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[18] International Legal Materials (1995), 34: 67. The text may be downloaded from www.afsc.noaa.gov/refm/cbs/Default.htm (accessed October 2005).

[19] Molenaar (2000: 491) does not consider application of conservation and management measures a real alternative to membership; he sees it as useful only in 'special situations'. His argument is that RFMO/As are not competent to allocate TACs to non-members; thus, the right to fish through such participation will be empty. However, since the Agreement provides for this form of cooperation, it must be assumed to be a real alternative to membership. When non-members are to 'accept' the measures, it does not mean the RFMO is required to take decisions directly applicable to the non-members. The provision asks for unilateral action from the non-member state, meaning indirect application of the measures adopted by the RFMO/A. It is difficult to see how this conflicts with the constituent treaty for the RFMO. If that were the case, member states would be obliged to amend the treaty upon becoming parties to the Agreement. In return for their acceptance, non-members would qualify for participatory rights under the same conditions as members (Art. 11). It would probably not be a problem of competence for the RFMO/A to set aside a portion of the TACs adopted for non-member states. However, things are admittedly complicated when the obligations and rights are directed to states but the relevant decisions are taken by the RFMO/A, often a separate international subject.

tion of total allowable catches (TACs)—only as members. Subsequently, the question of a right to participate in cooperation through membership becomes highly relevant.

It is stated that it is those "having a real interest in the fisheries concerned", which may join an RFMO/A (Art. 8(3)).[20] The key words here are *real interest.* How are they to be read? The natural reading is that there is threshold for new states to become members. Not any state may join an RFMO/A. But the provision may also be interpreted as a safeguard, to prevent existing member states from restricting or even close access to the RFMO/A. Since there is a safeguard clause in the same paragraph, 'real interest' has a separate meaning. The purpose of the provision thus has to be to limit access to the RFMO/As. Then 'real interest' determines which states may become members. It is not sufficient to have an interest in the fisheries concerned. The use of 'real' indicates that states must demonstrate a factual or concrete interest. The intention in adding this requirement must be to restrict access to membership—otherwise it would be unnecessary (Nandan, 2005: 5).

The purpose of the requirement could be to block states without any interests themselves in conducting fishing from joining, thus reserving the RFMO/As for states with actual fishing interests. States without fishing interests would probably be inclined to promote environmental protection or consumer interests through the decisions of the RFMO/As, a somewhat different focus than that of the coastal states and states fishing on the high seas. If they were to comprise a majority, these states could change the policy of the organization away from traditional fisheries management. Precluding states without fishing interest themselves from RFMO/As may prevent such a development. But is this the meaning of 'real interest'? Molenaar (2000: 496) has a point when he argues that interests in 'the fisheries concerned' do not necessarily exclude such states from becoming members.

The concept must be read in its context.[21] According to the first sentence of Article 8(3)), it is the relevant coastal states and the states fishing on the

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[20] There is not a similar requirement when states are required to cooperate on establishing a RFMO/A where there exists no competent RFMO/A (Art. 8(5)). The obligation is directed at the relevant coastal states and the states actually fishing for the stock in question on the high seas. Molenaar (2000: 495) maintains the exclusion of 'real interest' could be an oversight in drafting. The consequence of such omission could be that states not fishing on the stock may take part in the process leading to the establishment of the RFMO/A and become one of its original members, without having to document any real interest in the fisheries. This may seem illogical, as states wanting to joint the organization at a later stage must provide such documentation. On the other hand, it might be difficult to establish a real interest before a stock has been subjected to conservation and management measures through an RFMO/A, so that participation from the start should be open.

[21] Vienna Convention on the Law of the Treaties (Art. 31(1)).

stocks on the high seas that are obligated to cooperate through RFMO/As as members or by applying their measures. Although the wider concept 'states' is used in the second sentence, which regulates the right to membership, it is natural to assume that this refers to the same states as in the first. It is also worth noting that the right and obligation to take part in establishing new RFMO/As is reserved for the relevant coastal states and states fishing for the stocks on the high seas (Art. 8(5)). Therefore it would appear that states without any intention of fishing on the stocks regulated by the RFMO/A are excluded from becoming members from the outset. The preparatory works seems to confirm such an understanding.[22] In the draft agreement the obligation and the right to cooperate were placed in the same provision, being separated in the previous texts.[23] The requirement of real interest is hence not intended for these states. Instead, 'real interest' is directed at states with fishing interests—including the relevant coastal states, states fishing for the stock on the high seas and states intending to fish for the stocks.

Where a straddling fish stock regulated by an RFMO/A occurs in the EEZ of a coastal state, the coastal state has a real interest in the fishery for the stock on the high seas. This follows directly from its obligation to cooperate with states fishing on the high seas, regulated *inter alia* in Articles 7(1) and 8(1). Also fishery for the stock on the high seas and the regulations adopted by the RFMO/A directly affect the conservation and management of the stock in areas under national jurisdiction. The main concern of the coastal state will be to ensure that the RFMO/A takes into account its interests when adopting the measures, and this can be done only through membership.

The remaining question is how states with an interest in fishing for straddling or highly migratory fish stocks on the high seas can display a real interest in the fisheries regulated by the RFMO/A. Since the requirement is rather vague, RFMO/A member states are left with some discretion in developing its content into concrete requirements. There is an obvious danger of misuse. Freestone & Makuch (1996: 29–30) have a good point when they argue, "the wording of the paragraph is ripe for litigation". As mentioned above, 'real' indicates that states must demonstrate they have some factual or concrete interest in the fisheries.

It may be argued that a non-member fishing on a regulated straddling or highly migratory fish stock has a real interest in the fisheries concerned (Molenaar, 2000: 495). Other potential members include states with an expressed intention to fish on the stocks concerned with or without previous fishery in the relevant area (known as 'newcomers' or 'new entrants'). It is

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[22] Vienna Convention on the Law of the Treaties, Art. 32(a).

[23] A/Conf.164/13/Rev 1 Revised negotiating text, paras. 13–14 and A/Conf.164/22 Draft Agreement, Art. 8(3), in Levy & Schram (1996: 442–43 and 626–27).

more logical to assume that a non-member actually fishing on a straddling fish stock has more of a real interest than non-members that merely state an interest in taking part in the fishery (the newcomers) (see Vicuña, 2002: 41–42). If it were sufficient simply to express an interest in participating in the fishery, the requirement in reality would have no content. Others hold a different view. Molenaar (2000: 498–99) concludes that the 'real interest' does not serve as a restriction to participation in RFMO/As. Tahindro (1997: 21) and Balton (1996: 139–40) seems to be of the same opinion.

It is submitted that the requirement does impose restrictions on the right to become member of RFMO/As.[24] Some assistance in interpreting 'real interest' may be found in Article 11, which regulates fishing opportunities for new members of RFMO/As. New members are not automatically accorded participatory rights but must demonstrate interest in the relevant fisheries. Criteria for allocation of rights include the state's previous fishery in the regulatory area of the RFMO/A, its contribution to conservation of the stocks, its contribution of catch data and the conduct of scientific research on the stocks. The same criteria may be used in evaluating whether a state has a real interest. When a non-member has a history of fishing in the area, it demonstrates that it has a concrete link and that the fisheries regulated by the RFMO/A may have importance for it. However, the requirements for joining are not as stringent as those for being allocated participatory rights. The very existence of a distinct provision on fishing rights for new members shows that membership and fishing rights are two separate matters. A state without a previous fishery in the regulatory area may demonstrate a real interest, for example by conducting research there. Obviously, a non-member that fishes for a straddling fish stock, having accepted and complied with the measures of the RFMO/A and other obligations of the Agreement, has demonstrated sufficient interest. It is arguable whether non-members fishing on the stock *without* accepting the conservation measures of the RFMO/A may be considered to have a real interest. That would undermine the requirement of real interest, because states would be more inclined to "fish themselves a right to membership" instead of qualifying by conducting scientific research or other activities.

There are pros and cons for restricting access to RFMO/As. If member states apply stringent conditions for admitting new states to the RFMO/A it would keep membership at a stable level and also facilitate effective

[24] Such interpretation is supported by the preparatory works of the Agreement. The provision underwent substantial amendments towards the end of the conference; and was designed as a right to become member, and the requirement of 'real' was added, A/Conf.164/33 Draft Agreement, Art. 8(3) available at www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (accessed October 2005).

decision-making, compared with a large membership. But if the conditions are considered too strict, that could lead states to decide not to become parties to the Fish Stocks Agreement, and to ignore or even challenge the legality of the conservation measures. The RFMO/A would still have problems with free-riders, and would have to make efforts to prevent them from fishing on the stock. Therefore it could be argued that the condition should be interpreted and applied cautiously, involving these states actively in the management and conservation of the stock as members and using other means to ensure compliance with their conservation and cooperation obligations.[25]

MATERIAL PRINCIPLES FOR COOPERATION

According to the LOSC, the obligation of states to take the measures necessary to conserve the living marine resources of the high seas is to guide them in the cooperation (Art. 63(2), 64 and 118). Although the obligation is elaborated somewhat in the ensuing provisions, the substantive obligation is of a relatively general character, giving the coastal states and states fishing on the high seas leeway in their cooperation.

In the Fish Stocks Agreement there are more concrete provisions on substantive matters apparently restricting the freedom of the states. Modelled on international environmental agreements, the Agreement includes an objective to guide the states in the interpretation and application of the other provisions. This *objective* is to "ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks" (Art. 2). Consequently, the over-arching objective of sustainable development is formally introduced into fisheries management. Sustainable use is one of the elements of sustainable development, focusing on exploiting natural resources in a manner that is 'sustainable' (Sands, 2003: 253). The combination of sustainable use and long-term conservation indicates that states are expected to seek to balance the interests of utilization and conservation when regulating the fisheries.

The objectives are supplemented by twelve *general principles* in Article 5, an approach similar to international environmental agreements. In contrast to rules, principles do not point to a specific solution for problems but indicate the directions states should take in fulfilling the over-arching objective.[26] There is need of such flexibility when dealing with the range of situations to be found in conservation and management of the many marine living re-

[25] This seems to be the argument of Molenaar (2000: 499).

[26] See Sands (2003: 232–34) on principles in international environmental law.

sources of the world. But is it law when states are given such freedom in the application of the Fish Stocks Agreement? Being principles does not mean that states can ignore them or interpret or apply them in whichever way they like. The principles are to be applied in the conservation and management of the stocks and their environment. The principles will indicate what solutions are best suited for meeting the obligations of states.

In this part of the chapter, the focus will be on principles directly relating to the conservation of straddling fish stocks and highly migratory fish stocks: the *precautionary approach* and the *protection of marine biodiversity*. These two principles are partly overlapping. Also the obligation to achieve compatible conservation measure for the straddling fish stocks and highly migratory fish stocks will be discussed here, whereas principles concerning access to and implementation of measures will be discussed in later sub-chapters.

Precautionary Approach

Both coastal states and states fishing on the high seas are to apply the precautionary approach (hereafter PA) in the conservation and management of the fish stocks, as per Article 5(c).[27] The precautionary approach is further developed in Article 6 and in Annex II. In most international environmental agreements the PA—or the precautionary principle—is barely defined, but the Agreement includes several provisions regulating implementation of the PA. At the conference, several states were concerned about the introduction of the precautionary principle to fisheries management and feared it could lead to unnecessary restrictions on fisheries.[28] FAO, which provided the conference with background information, addressed the concern by arguing that it was adequate with a precautionary approach to fisheries.[29]

Objective and Definition

The objective of the PA goes beyond ensuring long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks as indicated in the objective of the Fish Stocks Agreement. The PA shall be

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[27] The provisions apply to areas under national jurisdiction through the reference in Article 3(1).

[28] *Earth Negotiation Bulletin*, Volume 7. United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks www.iisd.ca/vol07/0705004e.html (accessed October 2005).

[29] A/Conf.164/INF/8 The Precautionary Approach to Fisheries with References to Straddling Fish Stocks and Highly Migratory Fish Stocks, available at www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (October 2005).

applied to preserve the marine environment (Art. 6(1)). There is thus a linkage between the PA and the obligation to protect marine biodiversity.

Article 6(3) defines the PA thus:

> States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

This definition is not very precise and does not provide clear directions. It signals that the obligation is relative: The level of caution exerted shall correlate with the quality of the information available. State may be less cautious when there is adequate information available than in situations with little or no available information. Applying the PA means that states are to be more cautious when regulating a new fishery than with an existing one.

It is not only uncertainty relating to scientific information on the stock that is relevant but also uncertainty relating to environmental and socio-economic conditions, according to Article 6(3)(c). This opens for various types of risk evaluations, such as risk of overfishing the stock, risk of deteriorating the quality of the environment and risk of negative economic effects for communities depending on the fisheries. The PA directs states to be risk-averse, but it does not provide any clear answer to what risks are acceptable or at which level the stock should be exploited. When the uncertainty factors are so diverse it is difficult to see a strict application of the PA in the sense that states are required to prohibit a fishery when they are not able to document the absence of negative effects.[30] The provisions on the implementation of the PA may shed some further light on how and when states are to display caution.

Implementation of the PA

The level of precaution: Illustrative of how cautious states shall be is the introduction of *emergency measures* to be taken where natural phenomena or fishing activities have significant negative adverse effects on the fish stocks (Art. 6(7)). This provision probably came as a response to the concern of some states that the PA may lead to moratoriums on fishing. The inclusion of re-active responses indicates that states are not to take into consideration all types of uncertainties, and that the PA is not a stronger version of the precautionary principle. (Ellis, 2001: 300). It is also worth noting that these emergency measures are to be adopted on a temporary basis and be based on

[30] Burke (2000: 119) says, "the provisions (Art. 6) may curb extreme formulations and applications of the precautionary principle as has happened in other contexts."

the best scientific evidence available. These qualifications seem to be safeguards against overly strict and lasting measures.

Regulation of fisheries: A traditional approach in fisheries management has been to delay adoption of conservation measures until there is adequate information available from surveys and research to assess at what level the fish stock may be sustainably harvested. Meanwhile there is a risk of overexploitation of fish stocks. Such an approach will be in conflict with the duty not "to use absence of adequate scientific information … as a reason for postponing or failing to take conservation measures" (Art. 6(2)). States are to use the scientific information available when regulating the fisheries. This obligation is further developed in Article 6(6): states are required to regulate both access to and catches as soon as possible after the start of a new fishery. In practical terms, states are to regulate all commercial fisheries, and fisheries cannot remain unregulated.

But this does not mean that states are obligated to ban fishing on a stock until there is adequate scientific information, as a strict application of the PA would require. States may allow for gradual development of the fishery while they acquire more scientific data on the stock and the impact of the fisheries on the long-term sustainability of the stock. States are also to carry out enhanced monitoring and collect data to assess the state of the stock and revise conservation measures in accordance with the new information. This reflects the first part of the PA: to exercise caution relative to the level of knowledge.

Collecting more information before adopting regulation: The precautionary approach is associated with the adoption of regulatory measures in situations of scientific uncertainty, to prevent damage to the environment. But regulatory actions are not necessarily always the first required response of the PA. In some situations, states shall carry out more and wider research, collect more and new types of scientific information on the fish stocks and their environment and monitor the status of the stocks before taking measures, according to Article 6(3)(d) and (5). The purpose is evidently to reduce uncertainty and consequently risk. The obligation applies in two circumstances: The first concerns the *impact of the fishery on other species and the environment*; the second refers to situations where there are *concerns for the status of the stock.* States are to do research and collect relevant data before taking the necessary measures to mitigate such effects of fishing. This obligation reflects the wider objective of the PA—to preserve the marine environment.

Call for a strategy on conservation and management: Perhaps the most important element in implementing the precautionary approach is the obligation to use *reference points* for each harvested fish stock, as set out in Article 6(3)(b) and (4). The reference points are values derived through scientific

procedures expressed in mortality rates or biomass (Annex II, paragraph 1). Since they are to direct the conservation and management of straddling fish stocks and highly migratory fish stocks, the reference points will serve as quantitative objectives.

Reference points are not new to international fisheries law. The Maximum Sustainable Yield (MSY) serves as an objective for the conservation of living marine resources in the LOSC. The innovations of the Fish Stocks Agreement are:

- The reference points been given a clearer binding effect;
- The precautionary approach is integrated (precautionary reference points) in the setting and use of the reference points.

The adoption of reference points *binds* states: they are obligated to take measures to ensure that the reference points are not reached, and if they are, states shall take pre-determined action to rebuild the stock. Exceeding the reference points will clearly mark that the stock is over-exploited.

The obligation to maintain the stock within the reference points requires states to develop a conservation and management plan or strategy for each stock. Such plans will include the reference points, necessarily the targets/goals on which the ordinary measures are to be based and which will ensure that they are not exceeded, and the measures to be taken if they are exceeded (Annex II, paragraphs 4 and 5). An effect of giving the reference point a clearer function is to promote more long-term considerations in fisheries management.

The *precautionary approach* will influence both the adoption and the use of the reference points. As set out in Article 6(3)(c), states are to take into consideration a wide array of uncertainty factors, such as the size of the stocks, stock condition in relation to reference points, level of mortality, impact of fishing on non-target species and existing and predicted oceanic, environmental and socio-economic conditions. When establishing the reference points for a stock and the subsequent conservation measures, the PA requires states to include a margin of error or buffer to take into account various sources of uncertainties and prevent overfishing or other negative effects of fishing.

Annex II to the Agreement elaborates on how the PA is to be integrated in determining and applying reference points. The annex is an integral part of the Fish Stocks Agreement, Article 48. But as both the title[31] and wording of the annex indicate, it contains more guidelines than directives. States are

[31] Annex II: Guidelines for the Application of Precautionary Reference Points in Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

advised to adopt precautionary reference points, which are a set of set of reference points with a range of purposes (paragraph 2): limit reference points and target reference points. They have been compared to traffic lights: limit reference points are a parallel to the red light/ stop sign, while the target reference points serve as the yellow light, signalling that states are to begin to stop (Davies & Redgwell, 1996: 261–62).

The *limit reference points* shall be set to ensure that the catches are restricted within what is described as safe biological limits (Annex II, paragraph 2). States are recommended to use the MSY as minimum standard for limit reference point (paragraph 7). According to paragraph 3, the reference point is to be based on historical data and scientific information about the stock.

However, due to the uncertainties relating to stock assessments, effects on other species in the ecosystem and other factors relevant for management, TACs and other management measures are not to be based on the limit reference points. States are to develop strategies to ensure that the risk of exceeding the limit reference point is low (paragraph 5). The concept of risk is thereby formally introduced into international fisheries law. In this context, risk may be described as the probability of exceeding the limit reference point.

Risk is handled through the establishment and use of *target reference points*, which indicate the outer limit of the acceptable risk and the management objectives (paragraphs 2 and 5). The target reference points will direct the states in the adoption of the regular conservation and management measures. These measures shall be designed to maintain the stock at levels above the target reference points, which should not be exceeded on average (paragraph 5).

The target reference points will necessarily have to be fixed at a higher biomass level and a lower mortality rate than the limit reference point, introducing a clearer margin of safety or buffer. The size of the buffer depends on the quality of the available scientific information and the risk the states are willing to take. Here the states are to exercise the required caution.

Protection of Marine Biodiversity

States shall not only ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks. The sustainability of such fish stocks will depend on the status of the other elements of the ecosystem as well.

Several of the general principles of the Agreement are directed at preventing effects of fishing on other species or parts of the environment than those

targeted, or at obliging states to take direct measures to conserve other species. They may be described as environmental principles.

The most general of these principles is the obligation *to protect biodiversity in the marine environment* (Art. 5(g)). There is no definition of 'biodiversity' in the Fish Stocks Agreement. But it is reasonable to understand this as a reference to the Convention on Biological Diversity[32] (hereafter CBD), giving it effect to international fisheries law. Biodiversity is defined in Article 2 of the CBD on three levels: diversity within species (genetic diversity), diversity between species, and diversity of ecosystems. An obligation to protect marine diversity will include all the three components. The principle is designed as an obligation of result. As it does not mention the specific action to be taken, states have some discretion in deciding how to protect biodiversity and which measures to take.

The duty to protect biodiversity introduces qualitative norms into fisheries management. States are not only required to maintain sustainable target stocks. They shall also protect diversity of genes, species and ecosystems—a requirement of a holistic fisheries management. The other principles and the above-mentioned provisions on application of the PA supplement the obligation to protect biodiversity and may give some directions on how it is to be put in operation.

An important prerequisite for protecting marine biodiversity is that states have knowledge and information on, *inter alia*, the marine environment and its components, species interactions, and effects of human activity on the environment. The state of knowledge and information is inadequate today. Therefore it is important to note that the principles, as set out in Article 5(d) and (j), also include obligations for states to improve their knowledge and information about the effects of fishing, other human activities and environmental conditions on target stocks and other species belonging to the same ecosystem. These obligations should be read in context with the above-mentioned provisions on implementation of the PA where states are required to develop data collection and research programmes to assess impacts of fishing on non-target species and their environment (Art. 6(3)(d)).

The principles include directives on the actions that states shall take to protect marine biodiversity. There are three categories of actions: those directed at conserving target stocks, at conserving other species, and those directed at conserving both target and non-target species.

In the first category we find the measures to be taken in conserving the straddling fish stocks and highly migratory fish stocks. In implementing the precautionary approach, states are not obliged to set multi-species reference points, which is probably more consistent with a holistic approach to fish-

[32] Convention on Biological Diversity of 5 June 1992, UNTS vol. 1760: 143.

eries management. But in setting and applying the reference points, states shall also take into consideration the uncertainties relating to the impacts of fishing on non-target, associated or dependent species (Art. 6(3)(c)). In practical terms, this means that in determining the reference points for a straddling fish stock, weight must be given to its importance as a component of the food chain (e.g. as prey) and the ecosystem. The target reference point and appurtenant measures may be founded on a higher biomass than when considering only the stock as such.

The second category encompasses the direct action states are to take to conserve other species than those targeted in the fisheries. As set out in Article 5(e), states shall, where necessary, adopt measures for "species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened". This principle should be read together with provisions on the implementation of the PA requiring states to adopt the plans necessary to ensure the conservation of such species and to protect habitats of special concern (Art. 6(3)(d)). In Annex II, paragraph 4, states are recommended to set reference points where necessary for associated and dependent species, triggering pre-agreed measures if exceeded. The Agreement thus authorizes states and consequently the RFMO/As to manage not only target stocks, but also other species of the same ecosystem. The obligations do not have an absolute character: measures are to be taken when necessary, and the critical levels triggering measures are not precise. States are thus left some discretion in deciding what measures to take, and when. Probably reference points would be used for key species of the ecosystem. It is important to note that these obligations relate to the conservation and management of straddling and highly migratory fish stocks. States harvesting other living marine resources are not affected by these obligations unless the harvest has impact on straddling or highly migratory fish stocks.

The third category includes the obligation to take actions directed at both target and non-target species. States are required to develop and use environmentally safe and selective fishing gear and practices, *inter alia* to minimize catch of non-target species and impacts on associated or dependent species, in particular endangered species (Art. 5(f)). Such action could include measures requiring vessels to use nets or other equipment to reduce by-catches of non-target species and a ban on use of bottom trawling practices that destroy important habitats. As with the other principles developing the obligation to protect marine biodiversity, the states are granted some degree of discretion. The states are obligated to develop and use new gear and techniques when practical and cost-effective.

Compatibility between High Seas Conservation Measures and Coastal State Conservation Measures

Straddling fish stocks and highly migratory fish stocks are by definition transboundary, distributed in areas under the jurisdiction of one or more coastal states and in adjacent areas of the high seas. These stocks are subjected to various management regimes. In areas under national jurisdiction, the coastal state has sovereign rights to manage, conserve and use the stock (LOSC Art. 56(1)(a)). On the high seas, the RFMO/A is to regulate the catches and use of the stock, as per Article 10(a)–(b) of the Fish Stocks Agreement. RFMO/As have member states with differing and sometimes conflicting interests.

If the objectives and principles of the Agreement are to be implemented, there is obviously a need for coordinating the measures of the coastal state(s) and the RFMO/A in respect of the same stock. Otherwise the total quantities of catches allowed may exceed the levels considered sustainable, leading to overfishing and depletion.

Article 7(2) of the Fish Stocks Agreement addresses the need for coordination of measures and for minimizing potential conflicts between various jurisdictions by requiring *compatibility* between the measures established for the high seas and for areas under national jurisdiction. According to Article 3(1), the provision also applies to areas under national jurisdiction.

The situation for straddling fish stocks and highly migratory fish stocks may vary considerably from stock to stock, whether a straddling fish stock migrating between the EEZ of a coastal state and an adjacent area to the high seas or a highly migratory fish stock moving over vast areas under the jurisdiction of several coastal states and areas of the high seas. In both such situations there is a need for coordination, but the approaches may differ. In the introductory paragraph of Article 7 there is a reproduction of Articles 63(2) and 64 of the LOSC, indicating that the compatibility requirement may differ in relation to the two types of stocks. Often the management of highly migratory fish stocks will involve many more state actors than straddling fish stocks, thus calling for other approaches.

Article 7 contains both material and procedural obligations. A central procedural obligation for the relevant coastal states and states fishing on the high seas is to cooperate in order to achieve compatible measures for the stock (Art. 7(2)). This obligation must be read in context with the obligation of the coastal states and states fishing on the high seas to cooperate through RFMO/As on adopting management and conservation measures for the stocks on the high seas (Art. 8 and 10(a)). When member states agree on the measures for the stock on the high seas, these are to be compatible with the measures set by the relevant coastal states. Article 7(4)–(6) includes proced-

ures for situations where the states involved cannot agree on compatible measures within a reasonable time, involving use of the dispute settlement procedures of the Agreement. These procedures will be briefly discussed later in the chapter. The inclusion reflects a need for quick settlement in cases of unresolved management and conservation issues.

There is no clear-cut way of interpreting Article 7 and its paragraphs. This is understandable, since the relationship between the interests of coastal states and states fishing on the high seas is regulated. The Fish Stocks Agreement aims at partly conflicting objectives: Not to alter the balance struck in the LOSC, but at the same time to clarify the relationship between the two regimes that regulate these fish stocks. At an early stage of the conference there was agreement of a need for coordination of coastal states and high seas conservation measures. But it was more difficult to agree on how the measures should be coordinated. In a proposal for a treaty forwarded by some coastal states, the conservation measures for the high seas should be designed as not to have an adverse impact on the stocks within areas under national jurisdiction.[33] On the other hand, Japan, a high seas fishing state, argued that the principle of 'due regard' should be the guideline.[34] Compatibility was probably one of the most difficult issues at the conference, touching on the freedom of fishing and sovereign rights of coastal states (Balton, 1996: 137).

The keyword is 'compatibility', which suggests a requirement to ensure that two or more different systems can function together. States are to take into account five specific factors in achieving compatible measures, which will elaborate the content of the requirement (Art. 7(2)(a)–(e)). These five factors are of differing character and will be approached under three headings: conservation and management measures, biological characteristics and dependency.

The test of compatibility is the obligation to ensure that the fisheries permitted through the measures shall not lead "to harmful impact of the living marine resources as a whole", as specified in Article 7(2)(f). The threshold seems to indicate that measures for the stock on the high seas and areas under national jurisdiction do not need to be completely coordinated or symmetrical. The obligation also signals that the compatibility requirement is not only about specific target stocks: it also seeks to ensure protection of the marine living resources.

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[33] A/Conf.164/L.11/rev.1, Art. 4 available in Lévy & Schram (1996: 165).

[34] A/Conf.164/L.28, available in Lévy & Schram (1996: 245–46).

Conservation and Management Measures

The first three of the factors relates to conservation and management measures adopted for the stock, and are set out in Article 7(2)(a)–(c). States are to take into account the conservation and management measures taken by the coastal states for areas under national jurisdiction and those adopted by RFMO/A or agreed between states for the same stock in adjacent areas of the high seas.

In all three factors, reference is made to the LOSC: The coastal state measures shall be adopted in accordance with Article 61, while the measures adopted or agreed for the high seas shall be taken in accordance with the LOSC. It is natural to include the obligations of Article 5 and 6, since they develop the conservation and management obligations of coastal states and states fishing on the high seas. Therefore a basic requirement for measures to be compatible is that each of them implements the conservation obligations of states. Since the content of these obligations is by no means obvious, there could be grounds for dispute between the coastal states and states fishing on the high seas on whether the measures fulfil the basic requirement for compatibility.

When states are to take account of measures adopted for the stocks, this suggests there is to be developed an established practice in the conservation and management of the stock. This will give predictability in the conservation and management of the stocks—both to coastal states and to states fishing on the high seas. States should have good reasons for deviating from the practice. However, states are merely required to "take into account" these measures and are thus not obliged to repeat them. Other considerations in Article 7(2) may direct the coastal states and states fishing on the high seas to design measures that depart from established practice.

A closer look at the three considerations shows differences in language between the first one and the two others. States are not only to take into account the measures established by the coastal states. They shall also "ensure that measures establish in respect of such stocks for the high seas do not undermine the effectiveness of such measures" indicates that greater weight is to be accorded to coastal state measures. Burke is quite categorical in his reading of the provision: "This resolves the issue of the orientation of compatibility—high seas measures are compatible when they do not undermine the effectiveness of coastal States measures" (Burke, 2000: 114). By contrast, Oude Elferink (1999: 7–8) does not place any weight on the difference of the wording. He argues that an ordinary interpretation of Article 7(2)(a) would mean a contradiction between the two obligations: On the one hand the obligation to take into account coastal state measures means that they are one of several considerations, while the obligation to ensure that the

measures of the coastal state are not undermined indicates that these measures have to be accepted as they are. Such an understanding is, according to Oude Elferink, not in accordance with the mutual character of the obligation to achieve compatible measures, which also would require the coastal states to adjust their measures where necessary.

It could be well argued that these two obligations are not conflicting. The first directs states to take into account the measures of the coastal states, while the second regulates how this is to be done. The obligation to ensure that the effectiveness of coastal states measures is not undermined does not necessarily mean that the measures to be adopted for the high seas have to be identical or based on the same objectives as set by the coastal states. The obligation accords states some freedom when adopting measures for the high seas.

Also the timing of the measures seems to be different. While states are to take into account *previously* adopted or agreed measures for the high seas, they are to take into account and not undermine measures still in force for areas under national jurisdiction.[35] The differences suggest a sequence or two-step approach in management and conservation, with the coastal states first adopting measures for the areas under national jurisdiction, followed by cooperation on measures for adjacent areas of the high seas. Also this indicates a certain priority to the interests of the coastal state in determining compatible measures (likewise Oude Elferink, 1999: 7).

Biology, Distribution, Fisheries and Geographical Particularities

The fourth consideration has a somewhat different character than the first three. As set out in Article 7(2)(d), it obliges states to take into account the biology of the stock and the relationships between the distribution, fisheries and the geographical particularities of the region. These are factual circumstances, as Oude Elferink describes them (1999: 10).

The first part of the consideration refers to the biological unity or the characteristics of the stock. Biological characteristics of the stock are relevant in achieving compatible measures because of characteristics attributable either to the area under national jurisdiction or to the area adjacent where the stock occurs. The intention in referring to the unity or the characteristics of the stock must be to ensure that distribution of the stock over different jurisdictions does not undermine the conservation of the stock. An example is when a stock migrates between the jurisdictions as part of its lifecycle, with the spawning areas and the juvenile part of the stock in coastal waters, while the adult part of the stock migrates into adjacent areas of the high seas for

[35] Measures that states shall ensure are not undermined must necessarily still be in force.

feeding. In this case, the obligation to take into account the biological unity of the stock may require the coastal state to take action to ensure recruitment to the stock and to protect its nursing area. Such measures could include a ban on, or regulation of, the use of fishing gear directed at undersized fish, or even a prohibition on fishing in the area. Compatibility would require the coastal state to concentrate the fishery for the mature segment of the stock on the high seas. Where migration is seasonal, the compatibility requirement means that coastal states and states fishing for the stock on the high seas must coordinate measures to ensure that the stock is protected by regulations through its migration. The first part of the consideration thus suggests that, if necessary, seasonally or/and geographically differentiated measures should be set. (On this, see also Oude Elferink, 1999: 10.)

The second part of the fourth consideration requires states to take into account "the relationship between the distribution of the stock, the fisheries and the geographical particularities of the region". When states are to make comparisons between *inter alia* the occurrence of the stock on the high seas and areas of the high seas, this concerns how to allocate the fisheries for the stock between in the different jurisdictions, and includes three types of criteria: distribution, fisheries and geography. Since it is the relationship between these three that states are to take into account, this excludes the application of only of one of them. The *distribution* of the stock in its the components between areas of high seas and under national jurisdiction may be calculated through scientific methods, using time and quantity variables. Distribution may vary, depending on the biological characteristics of the stock: whether it has a stable distribution throughout an area including both the high seas and areas under national jurisdiction, or varying seasonal or lifecycle distribution. Calculating the distribution of the former would depend on quantity, while the time variable must be included when the distribution of the stock varies through the year. The criterion refers to factual circumstances. Changes in distribution due to alterations in the migration pattern of the stock would be an argument for different allocation. The *fisheries* refer to the how the fishery for the stock is distributed between areas of the high seas and under national jurisdiction. There is no indication on the time perspective on which the fisheries are to be assessed, whether the fisheries must have been conducted over some time to be relevant. It is unclear how the *geographical particularities* relates to allocation. But it could involve differences in geographical space between the areas under national jurisdiction and of the high seas where the stock occurs. If the high seas area is a small pocket surrounded by the EEZ of a coastal state, it could be argued that only a marginal share of the fishery takes place on the high seas.

As mentioned above, these criteria are not to be viewed independently: allocation is to be based on a mixture of all three (that is, if they all are rele-

vant in the particular case). Consequently there is to be a certain proportionality between them. Oude Elferink says they shall be "viewed simultaneously" (1999: 10). However, it is impossible to infer the relative weight of each of the criteria.

Dependency

The fifth consideration is the relative dependence on the stock of the coastal state and the states fishing on the high seas (Art. 7(2)(e)). It definitely also concerns the allocation between coastal states and states fishing on the high seas, but with a factor of a socio-economic character. If the coastal state is more dependent on the fishery for the stock, this will be an argument for it to allocate a correspondingly higher portion to its fishermen.

Procedural Principles for Cooperation

In the preceding sections the focus has been on the formal obligations of cooperation and the material obligations states shall implement through the RFMO/As. This section concentrates on the RFMO/As and how they implement the principles and rules of the Agreement. As mentioned in the introduction, RFMO/As may not become parties to the Fish Stocks Agreement. The rights and obligations are directed at states which, as parties to both the Agreement and the agreements establishing the RFMO/A, must implement the obligations of the Fish Stocks Agreement through the RFMO/A. How this will be done may differ. Some implementation may require amending the establishing agreement, while other actions may be effected through decisions of the RFMO/A.

The comprehensive functions of RFMO/As as described in Article 10 of the Fish Stocks Agreement include:

- Agree on conservation and management measures. The types of measures are not defined, giving states freedom to agree on the measures necessary to comply with their conservation and management obligations.
- Agree on participatory rights and accommodation of interests of new member states
- Promote and conduct scientific assessments of stocks and impacts on non-target and associated species
- Obtain and evaluate scientific advice
- Compile and disseminate statistical data from the fisheries
- Establish mechanisms for monitoring, control, surveillance and enforcement

These functions reflect the partly ambitious material principles examined above—for instance, requiring states to carry out extensive research and

monitoring programmes in the ecosystems of the straddling fish stocks and highly migratory fish stocks.

This part of the chapter deals with the organization of the cooperation and decision-making process, the allocation of rights to participate in the regulated fisheries, and transparency in the decision-making process.

RFMO/As: Organization and Decision-making Processes

Organization

The responsibilities of the RFMO/As involve the whole process of fisheries conservation and management—from scientific research and provision of advice, adoption of conservation and management measures and other decisions, to the implementation of these decisions. All these tasks are to be performed in interaction with the member states, other interested states and RFMO/As. To carry out all these functions there must exist a certain infrastructure and procedures to ensure that decisions are taken, implemented and revised if necessary. As noted, the setting may vary from sub-region to sub-region, requiring different approaches and organizations. The Agreement seems to accord the states some latitude in this respect.

When establishing new RFMO/As, states shall agree on "mechanisms by which the organization will obtain scientific advice and review the status of the stocks" (Art. 9(1)(d)). The RFMO/A is to have a mechanism for obtaining and processing scientific information and providing scientific advice, although this function does not necessarily have to be performed through the RFMO/A. A scientific advisory body may be established where appropriate. Alternatives are to have the work done by an international organization such as the ICES or the scientific research institutes of the states participating in the cooperation, as provided for in Article 9 and Article 14(3). States have the same freedom of choice in organizing the collection and dissemination of technical and statistical data (Art. 14).

The Fish Stocks Agreement is relatively silent on the role of the RFMO/A in implementation of conservation measures and other decisions it makes. The focus is on the responsibility of the flag states. However, the Agreement assumes that the RFMO/As have a central role in implementing conservation measures, especially in adopting joint schemes of control and inspection and in coordinating information among member states. Where the RFMO/A is set up as an IGO, this cooperation could take a more dynamic form, giving the RFMO/A a central role in securing implementation of its decisions and other obligations of its member states.

Decision-making

The obligation of coastal states and states fishing on the high seas to cooperate on the conservation and management of straddling fish stocks and highly migratory fish stocks is reiterated in several provisions. States shall cooperate in the application of the general principles (Art. 5). The obligation is further developed, as discussed above, in the obligation to cooperate through the RFMO/As (Art. 8). States have also an obligation to cooperate with the purpose of achieving compatible measures (Art. 7(2)). Article 10 spells out the various tasks on which states are to cooperate on through the RFMO/As: Some refer to the preparation of decisions (e.g. scientific research), others to decisions (e.g. management measures and participatory rights) and a third group to monitor the implementation of the decisions.

In this context the focus is on the decisions to be taken by the RFMO/A in form of conservation and management measures, allocation of participatory rights and mechanisms for monitoring, control, surveillance and enforcement. The question is how the duty to cooperate on these issues is transformed into the decision-making process of RFMO/As. First, does the Fish Stocks Agreement indicate the legal status of the management measures and other decisions as legally binding or advisory? Secondly, does the Agreement indicate how decisions are to be taken: by consensus or majority vote? Are states entitled not to accept the decisions taken by the RFMO/A when they are taken by a majority?

As to the legal status of decisions, the definition of "conservation and management measures" given in Article 1(1)(b) does not provide any clear answers. These measures are defined as those adopted in consistency with relevant rules of international law as reflected in the LOSC and the Fish Stocks Agreement. In the provision regulating the functions of RFMO/As, states are required to "agree on and comply on conservation and management measures" (Art. 10(a)). Further, states shall "agree … on participatory rights" and "establish appropriate measures for monitoring, control, surveillance and enforcement" (Art. 10(b) and (h)). That states are obligated to agree and establish may indicate that these decisions are legally binding. On the other hand, states may also enter into non-binding agreements. However, it is not likely that this is an option in a treaty unless it is clearly stated. Non-members of an RFMO/A are required to undertake to apply its conservation and management measures, in order to be entitled to fish on the stocks, as set out in Article 8(3) and Article 17(2). When the measures are binding on non-members, there is no reason why they should not be binding on the states adopting them.

States are not only to agree on the measures, they shall also comply with them. The obligations of flag states to implement conservation and manage-

ment measures are further developed in Articles 18 and 19, supporting the interpretation that the conservation and management measures are intended to be legally binding. That inspectors from other member states are deemed competent to board and inspect a fishing vessel to control whether it is in compliance with the conservation measures provides further confirmation of this interpretation (Art. 21(1)). A serious violation of conservation and management measures also includes fishing without or after the attainment of quotas set by the RFMO/A, according to Article 21(11)(c). Consequently the adoption of quotas or other types of participatory rights is also required to be legally binding on the member states. Through the RFMO/As, states are to establish procedures for boarding and inspecting consistent with the Fish Stocks Agreement (Art. 21(2)). The RFMO/A therefore is assumed to make binding decisions on these matters.

Thus, it seems safe to conclude that the decisions on conservation and management measures, allocation of participatory rights and control and enforcement schemes adopted by the RFMO/A are to be legally binding.

As to how these decisions are taken and become binding, the general obligation of cooperation means that member states shall seek to agree on these decisions.[36] States would normally strive to achieve agreement by consensus, without using the decision-making procedures of the RFMO/A. But that is not always possible, so there is also a focus in the Agreement on the decision-making procedures.

When states establish a new RFMO/A they shall also agree on its decision-making procedures (Art. 10(j)). These procedures regulate *inter alia* the votes necessary to adopt a decision and how decisions enter into force and become legally binding on member states. The provision does not lay down in detail how the decision-making procedures are to be designed—probably because this is considered a matter for the individual RFMO/A to decide. The procedure will necessarily vary depending on the circumstances: from the RFMO/As with few participating states, to larger and more complex RFMO/As. The procedures shall, however, "facilitate the adoption of conservation and management measures in a timely and effective manner". A similar requirement applies to the member states of existing RFMO/As, who shall cooperate to 'strengthen' the RFMO/As "to improve their effectiveness in establishing and implementing conservation and management measures" (Art. 13). Effective and expeditious decision-making procedures are also indicated as instruments for preventing legal disputes (Art. 28).

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[36] The obligations of Article 10—to agree on conservation measures and other important decisions—seem stricter than the obligation of negotiation as regulated by Articles 63(2) and 118. But it is still the individual state that decides whether it will enter into the agreement. It is therefore difficult to know the legal significance of this development.

From these provisions two keywords may be extracted: expeditious and effective. The first relates to the duration of the decision-making from the preparation to the implementation of the measures, and the second to adherence to the measures by the relevant states. This is vital for application of the principles referred to earlier in this chapter. Beyond these general descriptions, it is difficult to deduce any concrete requirements as to decision-making procedures. What procedures may promote swift and comprehensive acceptance by the states involved may vary. In some instances, decisions taken by consensus could be more effective than decisions adopted by majority vote. Most effective and timely would probably be procedures calling for majority decisions to be automatically binding on all member states. However, such procedures could not be inferred from the above-mentioned provisions and would also be contrary to the intergovernmental character of the Fish Stocks Agreement.

But even if the decision-making procedures of an RFMO/A do not compel a member state object to accept its decisions, it is not necessarily free to ignore them and or to unilaterally set its own establish its own measures. All flag states have an obligation to take necessary action in respect of vessels flying its flag to ensure that the vessels are not involved in activities undermining the effectiveness of these measures (Art. 18(1)). This may be read to apply also to member states/flag states that have not accepted the measures (Churchill, 1998: 228–29). Although the content is not fixed, it requires states to prevent its vessels from engaging in fishing activities that indirectly counteract the measures of the RFMO/A. For example, the member state cannot permit the use of fishing gear that would impair attainment of the objectives of the measures or even render them useless.

Such understanding of Article 18 finds support in other provisions of the Agreement and international law. The conservation and management obligations derived from the general principles and the precautionary approach (Art. 5 and 6) and the cooperation obligations of Article 8 apply to the individual flag state, regardless of its acceptance of the measures adopted through an RFMO/A. A flag state must therefore take its own measures in respect of its vessels to conserve the stock: it cannot simply leave it unregulated. In order to comply with its conservation obligations, the flag state naturally has to take into account the fisheries of other states and the measures they have agreed to conserve the same fish stock. This obligation also follows from the general duty of states exercising freedoms of the high seas to practise due regard of interests of other states exercising their rights

(LOSC Art. 87(2)). According to the 1993 Compliance Agreement,[37] which overlaps the Fish Stocks Agreement, states are to take "such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures" (Art. III(1)(a)). Measures referred to include those adopted through RFMO/As (Art. I(b)). The obligation applies irrespective whether the flag state has accepted the measures in question. In the interest of ensuring compatibility between legal rules on the same subject, the similar obligation of Article 18 should be read likewise.[38]

Transparency

The 1992 Rio Conference on Environment and Development marked a breakthrough for the participation of non-state actors in intergovernmental cooperation on environmental issues. It reflected recognition of the need for transparency in international cooperation on environmental issues in order to ensure the adoption of decisions protecting the environment. Principle 10 of the Rio Declaration states: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level."

At the 1993 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, the issue of transparency in decision-making was raised. Representatives of 22 non-governmental organizations were accredited to the Conference.[39] In the final text there is a separate provision on the issue: states are required to ensure transparency in the decision-making process and other activities of the RFMO/As (Art. 12(1)). The requirement applies not only to decisions on conservation and management measures or allocation of participatory rights, but also to the other functions of the RFMO/A. What transparency is and who may make use of it will be elaborated in the following paragraph.

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[37] The full title is "Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas", adopted by the FAO Conference 24 Nov. 1993 and reproduced in 33 ILM (1994) p. 1309 and www.fao.org/Legal/treaties/012t-e.htm (accessed August 2005). The Compliance Agreement entered into force 24 April 2003 and has 31 state parties (including the EC) as of August 2005.

[38] According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, other relevant rules of international rules applicable between the parties are part of the context when interpreting a treaty.

[39] A/Conf.164/38 Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, III. Participation in the Conference, para 15, available at http://daccessdds.un.org/doc/UNDOC/GEN/N95/272/03/PDF/N9527203.pdf?OpenElement (accessed August 2005).

The transparency requirement means an opening for representatives from other intergovernmental organizations (IGO) and non-governmental organizations (NGO) to take part in the meetings of RFMO/As as observers and have timely access to the records and reports of the RFMO/A (Art. 12(2)). Access to the meetings may include the forums where decisions are taken, as well as meetings of sub-committees. It is not specified what rights these observers have at the meetings; whether they will be able to address the representatives of the member states in writing and/or verbally. Allowing observers at the meetings may have an effect on the decisions taken by the organization; their presence and argumentation may lead states in certain directions. But the states seem to have been given fairly wide discretion in determining the format and extent of participation of observers at RFMO/A meetings. They shall agree on rules of procedures that are not 'unduly restrictive'. The participation of observers has to be weighed against the need for confidentiality in negotiations and effective decision-making. Also the organizations represent differing and sometimes conflicting interests, giving the states freedom in taking them into account.

Those entitled to be accorded observer status and to have access to RFMO/A documents are representatives of other intergovernmental organizations and non-governmental organizations "concerned with straddling fish stocks and highly migratory fish stocks". IGOs and NGOs are required to document a legitimate interest in the fish stocks managed through the RFMO/A, if they are to be accorded observer status. The terms are not very specific, but it is natural to assume that they may include non-governmental organizations representing both trade interests and environmental protection interests. It is more doubtful whether observer status may be granted to NGOs representing labour interests. Relevant IGOs may include other RFMO/As, scientific advisory bodies (like ICES) and FAO.

The provision is silent on the rights of non-members to participate as observers in the meetings of the RFMO/A. Article 12 regulates the access of NGOs and IGOs. But it is natural to assume that non-members also should be granted such rights, since they are obliged to apply the measures.

ALLOCATION OF FISHING OPPORTUNITIES

According to Article 10(b), one of the main tasks of an RFMO/A, in addition to adopting conservation and management measures for stocks harvested in its area of competence, is to regulate the access of states to these fisheries or allocate fishing opportunities. Access may be regulated through quotas or fishing efforts.

If access is not regulated, the member states and states accepting the conservation measures will be free to fish within the limits set by the conservation measures. Where a TAC for a stock has been adopted, states may fish on the stock until the TAC is reached. In a fishery where access is not regulated, there be competition between states and new states will be attracted, all leading to overcapacity in the fishery. To mitigate this overcapacity, states may agree to increase the TAC—with possible negative effects on the stock. Where there is overcapacity the likelihood for overfishing is greater than where there is consistency between the catch capacity and fish available. There is a link between conservation of the stock and access to fishing for the stock.

Although obligated to (through the use of 'shall' in the introduction) states seem to be left some discretion in deciding on regulating access to the fisheries by allocating participatory rights between the states (Art. 10(b)). However, they are also obliged to have mechanisms for accommodating newcomers into the fishery, as further elaborated in Article 11. Accommodation of newcomers could be done in a regime with free access but would probably be better achieved through a system of limited access.

States are also obligated to prevent and eliminate excess capacity and to ensure that the fishing does not go beyond what is considered sustainable use of the stock (Art. 5(h)). The best way of fulfilling this obligation will be for the states to agree on allocation of participatory rights between them, and further allocate these rights among the vessels licensed to participate in the fishery (Art. 18(3)(b)). It is safe to conclude that, in most cases, states are to agree on the allocation of participatory rights through the RFMO/As, and further allocate between their own vessels.

As noted above, also non-members have a right to fish on the regulated stocks if they agree to apply the conservation and management measures (Art. 8(4)). The RFMO/A will necessarily be competent to regulate the participation of non-members in the fisheries.

Allocation Criteria

The question is then how to allocate the participatory rights between states fishing for straddling or highly migratory stock on the high seas. There may be many alternative criteria for allocation, resulting in different allocations. The access of new members[40] to the fisheries managed by RFMO/As is regulated in general terms in Article 11 and will have to be developed further

[40] The use of 'new member' and 'new participants' does not exclude non-members from being allocated quotas or other fishing rights, as Article 8(4) stipulates that they may have access to a regulated fishery if they accept the conservation and management measures adopted.

through the RFMO/As. Article 11 applies to the access of new states to existing fisheries where participatory rights already have been allocated. There are no provisions specifically regulating the allocation of rights between the member states with established rights. However, the rights of these members cannot be seen in isolation from those of the new members. The allocation of rights relates to the fishery for the same fish stock. Distribution of participatory rights to states established in a fishery affects the rights of new states interested in gaining access to the fishery and vice-versa. The freedom of fishing of all states on the high seas requires that new and established states be treated equally, applying the principles of Article 11. The criteria also explicitly refer to the interests of states with established fishing rights. The conclusion is therefore that Article 11 regulates the allocation of participatory rights of *all* states with an interest in the fishery.

It is important to note that the provision does not provide an exhaustive list of relevant allocation criteria or of their priority. Other principles may also be relevant.[41] When states are to 'take into account' these criteria, there is consequently no fixed formula that determines the participatory rights of states. Molenaar (2003: 467) is correct when he argues that the Fish Stocks Agreement does not include a "fundamental norm that is capable of acting as a benchmark for the allocation process". But the criteria may legitimize decisions taken by the RFMO/A.

The principles are of a different character:

Existing Level of Fishing

The status of the target stock and the existing level of fishing effort is the first criterion (Art. 11(a)). It concerns the rate of exploitation and is directly relevant for the question of whether new entrants should be allowed into a fishery. If the stock is considered fully utilized or overfished, the criterion will legitimize refusals of participatory rights. The criterion thus gives priority to states with existing rights, especially where there is scarcity. A new entrant has better prospects in a fishery that is not already fully utilized, such as a new fishery.

Fishing Patterns and Practices

The second criterion concerns the respective interests, fishing patterns and fishing practices of new and existing states (Art. 11(b)). It indicates that the

[41] Molenaar (2003: 468) refers to Articles 7(2) and 24(2)(a) of the Fish Stocks as also regulating allocation issues. Article 7(2) concerns the allocation between coastal states and states fishing on the high seas but not allocation between states fishing on the high seas. Article 24(2)(a) on special requirements of developing states is reflected in Article 11(f).

previous records of fishing are relevant. The concepts of pattern and practice are partly overlapping. 'Pattern' refers to the types and extent of fisheries the state is involved in, while 'practice' has to do with the state's history of fishing. The principle does not specify any geographical area of application, indicating that a state with a long and existing record of extensive fishing should be allocated more rights than a state with a short history of fishing or a limited fishery. Since the provision regulates access to the regulatory area of an RFMO/A, it is natural that the fishing patterns and practice of the states refer to the same area. The principle will favour states that have a record of fishing in the area, over states with no previous fishery in the region.

Conservation

States' contributions to the conservation of the stocks, the collection of catch data and the conduct of research on the stocks is the third criterion (Art. 11(c)). The RFMO/As are wholly dependent on the member states to implement their measures and to provide them with the scientific information. Therefore the criterion may be regarded as an incentive to states, rewarding those that take an active part in the conservation of and acquire knowledge about the stock. Concerning those states reported not to comply with the measures or/and not contributing with information or research, the criterion could serve as an argument for not allocating them quotas or other types of participatory rights.

Needs of Coastal Communities

The forth criterion concerns the needs of coastal communities mainly dependent on fishing on the stocks (Art. 11(d)). It is more specific than the previously mentioned principles. States able to document that they have specific communities which are dependent on the fishery for the stocks regulated by the RFMO/A will be in a stronger position. It is not sufficient that these communities are somehow dependent on fishing on the stock: they have to be mainly dependent on the fishery for the stock on the high seas. This criterion is rather strict, requiring that the major part of the catches be taken of a specific stock on the high seas.

Overwhelmingly Dependant

While the above-mentioned principle concerns the micro/community level, the fifth criterion introduces a similar socio-economic consideration on the macro/state level. States are to take into account the needs of coastal states whose economies are overwhelmingly dependent on the exploitation of living marine resources (Art. 11(e)). The use of the concept of 'coastal state'

indicates that application of the criterion is limited to the coastal states in the region of the RFMO/A. The requirement of an economy being "overwhelmingly dependent" must be understood as meaning that a large percentage of the country's GNP is linked to the fishing industry.

Requirements of Developing Countries

The sixth and final criterion concerns the interests of developing countries in the sub-region (Art. 11(f)). This has limited application, since the stock has to occur in areas under its jurisdiction, in order for the principle to be invoked by a developing state. By contrast, the developed coastal states have to document a previous fishery or dependency to qualify for the right to fish on the high seas.

COMPLIANCE, ENFORCEMENT AND DISPUTE SETTLEMENT

If the objective of long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks is to be met, it is not sufficient that states agree through the RFMO/As on management and conservation measures for the stocks and allocation of participatory rights. The measures have to be implemented by the individual states and complied with by the individual fishing vessels to achieve the objective.

In this part of the chapter the focus will be on the responsibilities of flag states to implement and enforce the measures in respect of their vessels in accordance with their exclusive jurisdiction on the high seas. This jurisdiction is not unlimited, and the rights and roles of the RFMO/A and other states in the implementation of measures will be examined.

Strengthening Flag State Responsibilities

It is the flag state that bears primary responsibility for implementing the conservation measures adopted by the RFMO/As and ensuring that they are complied with by vessels flying its flag (Art. 18(1) and 19(1)). This responsibility is consistent with the general obligation of flag states to implement their international legal obligations in respect of vessels flying their flags and to enforce them. In Articles 18 and 19 of the Fish Stocks Agreement these obligations are further developed.[42]

There are detailed regulations in Article 18 on the actions the flag state shall take to ensure compliance with the decisions of the RFMO/A. If the

[42] The 1993 Compliance Agreement has similar requirements.

flag state is not able to fulfil these obligations, it is to refrain from issuing licences to fish on the stocks regulated by the RFMO/A (Art. 18(2)). This obligation underscores that the freedom of fishing on the high seas is not unlimited. If states are to be allowed to fish, they must comply with their obligations. The most important of the regulations to be taken by the flag state is probably the establishment of a licensing system for the high seas fisheries, as specified in Article 18(3)(a). They shall regulate access of their vessels to the fisheries through licences—which means that fishing without a licence on the high seas is prohibited (Art. 18(3)(b)). The flag state shall attach to the permits the terms necessary for it to implement the conservation measures. It shall also adopt regulations requiring the vessels to record and report their catches. The flag state is responsible for monitoring, control and surveillance of its vessels through observer programmes, inspection schemes and vessel monitoring systems (Art. 18(3)(g)). These measures appear as a list giving the states some discretion in implementation. Where the RFMO/A has established systems for monitoring, control and surveillance, the flag state is obligated to have a compatible national system (Art. 18(4)).

The flag state is responsible for implementing the conservation and management measures through national legislation and establishing a system for controlling and verifying the compliance of its vessels. It is also responsible for enforcing the measures irrespective of where infringements may occur (Art. 19(1)(a)). Enforcement involves measures spanning from initial investigation in the form of physical inspection of the vessel and requiring the vessel to give information to the investigating authorities on vessel position, catches and the like, to instigating legal action if sufficient evidence is available, and instigation of penal and/or administrative sanctions. The flag state shall ensure that such investigation and any subsequent legal proceedings are carried out expeditiously. Sanctions are to be proportional to the severity of the violation; any profits from the illegal activities shall be seized (Art. 19(2)).

International Cooperation on Compliance and Enforcement

Despite the above-mentioned obligations, the flag state is not always capable of effectively verifying and controlling that its vessels comply with the conservation and management measures of an RFMO/A. The fishery may take place in areas of the high seas far away from the flag state. In order to ensure effective compliance, there is a need of cooperation with the states involved in the fishery. States are obliged to cooperate on both verification and enforcement through several provisions of the Agreement, both directly and through the RFMO/A is involved.

As noted, flag states are required to establish national schemes and programmes for monitoring, control and surveillance of their vessels (Art. 18(2)(g)). The use of observers on board, inspection of vessels and vessel monitoring systems (e.g. satellite transmitter system) are tools for ensuring compliance with the measures. Where an RFMO/A has established corresponding regional or sub-regional schemes, the flag state is required to adopt national legislation to implement these in respect of its vessels. States are to cooperate on compliance and enforcement of the conservation and management measures adopted (Art. 20(1)). The RFMO/A will provide a forum for this cooperation.

Rights and Obligations of Non-flag States

Other states have an obligation to assist the flag state in the investigation of alleged violations of conservation and management measures (Art. 20(2)). This help may involve supplying evidence or other relevant information, e.g. from surveillance or inspection of the vessel. States shall adopt legislation enabling the prosecuting authority of the flag state to acquire evidence on alleged violations from non-flag states (Art. 20(5)). Such legislation may include a requirement for testifying. For its part, the flag state is to inform the states involved as to the results of the investigation and any legal actions (Art. 20(3)). This obligation is further developed when the violation is exposed through the inspection of other member states of the RFMO/A, as specified in Article 21(6)(a).

In areas of the high seas subject to the regulatory authority of an RFMO/A, inspectors of the member states may board and control vessels of other member states and non-members, provided that both the inspecting and inspected state are parties to the Fish Stocks Agreement (Art. 21(1)). The procedures of the Agreement are not to be applied directly but the member states are required to adopt an enforcement scheme through the RFMO/A that is consistent with the Agreement (Art. 21(2)). The regional or sub-regional enforcement scheme will be applicable to non-members as well. By becoming a party to the Fish Stocks Agreement they agree to be bound by agreements made by other states.[43] However, if the states have agreed on a different enforcement scheme through the RFMO/A, one which is effective in ensuring compliance by member-state vessels, such a scheme need not be

[43] Franckx (2000) discusses whether the obligations of non-members derived from decisions of RFMO/As are contrary to the *pacta tertiis* rule. He concludes that the Agreement does not violate the rule because the Agreement applies only to state parties, and state parties may consent in advance to being bound by measures to which they have not agreed.

amended (Art. 21(15)).[44] Flexibility is introduced into an apparently strict obligation to implement the procedures of the Fish Stocks Agreement. The wisdom of such an approach may, however, be questioned.

Article 22 of the Agreement specifies detailed procedures for the boarding and inspection of fishing vessels to be followed by the RFMO/A in developing its scheme. The purpose is evidently to ensure that the jurisdiction of the flag state is not undermined by different and rigorous procedures.

The Fish Stocks Agreement also includes procedures for further action to be taken by inspectors if their controls disclose possible violations of conservation and management measures. There are two types of infringements: activity contrary to the measures, and serious violations (Art. 21(6) and (8)).[45] The authority of the inspectors is widened when a vessel is suspected of a serious violation. In either case, the flag state is to be promptly notified about the infringement and is required to respond in accordance with its duty to enforce (Art. 21(5) and (6)). The flag state is either to take charge of the investigation or authorize the inspecting state to investigate (Art. 21(6)). If the flag state does not give the inspecting state permission to continue the investigation and there is no evidence of serious violation, the inspectors are to leave the vessel after the inspection has been completed, as per Article 22(1)(e). If, however, there are "clear grounds for believing" that the vessel has carried out a serious violation, the inspectors may remain on board to secure evidence, should the flag state fail to investigate the violation itself or to authorize the inspecting state to do it (Art. 21(8)). The inspectors may, if necessary, require the master to take the vessel to the nearest port, in which case the flag state shall be promptly informed about the destination of the vessel. There is no indication in the provision how long the inspectors may remain on board. Since the purpose of a prolonged stay is to secure evidence it is natural to assume that the inspectors may stay on board until this objective is accomplished. Neither the inspecting state nor the port state is accorded authority to take further enforcement measures in respect of the vessel or its crew.

The flag state is responsible for enforcing the measures; other states merely function as enforcement agents (Joyner, 1999: 343). When the flag state has authorized the inspecting state to investigate, the latter shall inform the flag state of the result of the investigation (Art. 21(7)). The flag state shall, on the basis of this evidence, take further enforcement measures or may authorize the inspecting state to take further enforcement measures. It is left

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[44] Since the scheme may not be applied to vessels of non-members, the procedures of the Agreement must be used in respect of these vessels.

[45] The types of serious violations are exhaustively listed in Article 21(11); they include fishing without a valid licence, lack of accurate catch records and fishing in closed areas.

to the flag state to specify what measures the inspecting state may take. In case of serious violation and where the flag state fails to respond to its obligations, the inspecting state shall inform both the flag state and the RFMO/A as to the outcome of the investigation (Art. 21(9)). The flag state is obliged to enforce the measure and report on the outcome of its own investigation to the inspecting state and the RFMO/A (Art. 19(1)). The other obligations of the flag state under Article 19 are referred to above. If the flag state does not fulfil these obligations, it may incur international responsibility and be subjected to countermeasures and legal action from the states affected.

The member states shall cooperate through the RFMO/A on taking measures to prevent vessels that have undermined the effectiveness of conservation and management measures or otherwise violated them from fishing in the regulatory area until the flag state has taken appropriate action (Art. 20(7)). This duty must be read together with the obligation of states to assist each other in identifying vessels reported to have undermined the effectiveness of conservation measures (Art. 20(4)). This enforcement measure goes further than simply boarding and inspecting vessels: it means that vessels are to be prevented from fishing. The same obligation applies in respect of vessels of non-members and non-parties to the Fish Stocks Agreement which are fishing on regulated stocks (Art. 17(4) and 33(2)). The exclusive flag state jurisdiction restricts the means of other states to prevent the vessel from actually fishing. But the obligation opens for new approaches to enforcement to be developed by the RFMO/As and their members.

Port State Enforcement

The conservation and management measures of RFMO/As may also be enforced by states when fishing vessels call at their ports. According to Article 23(1) of the Agreement, the port state has both a right and a duty to take measures to "promote the effectiveness of […] sub-regional, regional and global measures". It is very difficult to control fishing vessels which are spread over vast areas of the high seas, and therefore it is important that there is a system in place to monitor compliance when the vessels call at ports, to land or trans-ship their catches. Consequently, the enforcement of the port state is universal and is not restricted to fisheries in areas of the high seas adjacent to its coasts or to the fisheries where it is involved. Theoretically, vessels fishing on the high seas in the Pacific could be subjected to control when calling at ports in Europe.

Port state jurisdiction is twofold: First, authorities of the port state may board the vessel and inspect its documents, gear and catches, as specified in

Article 23(2).[46] The right is not exhaustively described, but the port state is not given unlimited powers. This has to be read in the context of the objective of port state enforcement and would not include, for example, inspections of working conditions. Secondly, if the inspection has established that the catches have been taken in "a manner that undermines the effectiveness of the conservation and management measures" the port state may ban landings or trans-shipments from the vessel (Art. 23(3)). This provision is designed as a right for the port state to adopt legislation allowing for use of these measures.

The port state has the right to enforce the measures of an RFMO/A—but is it required to use this right? Especially if the port state does not have any interest in high seas fisheries, fulfilling these obligations could require resources it might not be willing to spend. The answers provided by Article 23 are somewhat contradictory. According to the introductory paragraph, the port state is explicitly obligated to take enforcement measures. The final paragraph, however, includes a safeguard clause to prevent infringements on the sovereignty of the port state, indicating that the port state cannot be required to use its competence. However, states are obligated to cooperate directly or through the RFMO/As to ensure compliance and enforcement of conservation and management measures, as per Article 20(1). The obligation suggests that at least states in the region where the high seas fisheries are carried out would be required to inspect foreign-flagged fishing vessels visiting their ports. This interpretation is supported by Molenaar (2003: 473). He also argues that the obligation to exercise port state powers is the only innovative thing in Article 23.

It is the findings of the physical inspection that may eventually lead the port state to ban landings or trans-shipment from the vessel. But how can port state inspectors determine that the effectiveness of conservation measures has been undermined on the basis of these findings? As noted, this concept is rather vague, whereas inspectors need more clear-cut criteria for making the decision on a ban. Violation of conservation measures obviously has to qualify as undermining their effectiveness. Examples of violations that may be disclosed in port inspections include the use of prohibited gear, catches of undersized species or of fish subjected to a moratorium or of fish where fishery has been stopped by an RFMO/A due to attainment of the TAC.[47] Other types of violations of regulations—such as fishing without a

[46] The right is limited to vessels having arrived voluntarily in port. But a vessel seeking refuge is still subject to the jurisdiction of the port state if it plans to land or trans-ship.

[47] Banning of landing and trans-shipment would include both vessels flying the flag of member states and non-members. But, based on Article 23(3), it is doubtful whether a vessel flying the flag of a member state not bound by a conservation measure could be banned from

licence, failing to have accurate catch records onboard or misreporting—may also qualify as undermining the effectiveness of the measures. Such violations indicate that the vessel has been engaged in fishing activities contrary to the measures adopted by the RFMO/A.

To perform its responsibilities the port state is required to have information on the relevant conservation and management measures and on fisheries activities in the regulatory areas of the RFMO/As. Obviously, this requires cooperation between the port states and the states fishing on the high seas, also involving the RFMO/A, as envisaged in Article 20.

In Article 218 of the LOSC, port states are accorded extra-territorial jurisdiction in respect of vessels involved in pollution of the marine environment of the high seas or the maritime zones of other states. But the jurisdiction is far wider, giving the port state the right to institute legal proceedings against a vessel for violating applicable international rules and standards.[48]

The right of inspection and to ban landings and trans-shipment of catches is not intended to limit the enforcement jurisdiction of port states. These rights are not to infringe on the exercise of the sovereignty of states over their ports (Art. 23(4)). This means that the port state may take further enforcement action based on its territorial jurisdiction. But it is not clear what enforcement measures represent legitimate exercise of port state sovereignty. A state may deny a fishing vessel the right to call at its port if it has grounds to believe that the vessel has violated conservation measures adopted by an RFMO/A. But it is more doubtful whether the port state may institute legal proceedings against a vessel for violating RFMO measures. The question is whether this infringes on the exclusive flag state jurisdiction or is merely an application of the territorial jurisdiction. It could be argued that it is an application of territorial jurisdiction if the enforcement concerns violations of measures that may be observed while the vessel is in port (e.g. undersized fish).

RFMO/A Enforcement

The discussions so far have focused on the rights of non-flag states to take enforcement action on the high seas and in ports. Their enforcement rights are limited, and the flag state still has the principal responsibility for

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landing its catches. The port state may, however, exercise its sovereignty to ban the landing (Art. 23(4)).

[48] The port state may institute proceedings only in respect of discharges into maritime zones of other states if requested by them, by the flag state, or by other states threatened by the discharge. There is no need for such request if the discharge is likely to cause pollution in a maritime zone of the port state (Art. 218(2)).

implementing the conservation and management measures and to ensuring that its vessels comply with the measures.

There is obviously a need for the RFMO/A to coordinate the control and enforcement of its regulations on the high seas and in ports, and to ensure that the flag states comply with their obligations. As discussed above, non-flag states are competent but not obligated to take enforcement action on the high seas, and probably not in ports. Without some element of coordination by the RFMO/A, there is a risk that enforcement on the high seas would be weak and ineffective. Coastal states and states fishing on the high seas would not necessarily be willing to station inspection vessels in the regulatory area of the RFMO/A or to set up inspection facilities in their ports. One of the functions of RFMO/A is to establish "appropriate mechanisms for effective monitoring, control, surveillance and enforcement" (Art. 10(h)). This seems to give RFMO/As quite comprehensive authority in ensuring the proper implementation of their regulations. It includes the capacity to establish observer programmes, inspection schemes and vessel monitoring systems (e.g. satellite transmitter systems), which would apply to members and non-members alike, as specified in Articles 18(3)(g), 20(1) and 21(2). The RFMO/A would be competent to adopt inspection schemes requiring member states to have inspection vessels present in its regulatory area and probably also to establish mandatory port state inspection schemes. The role of RFMO/As is focused on rule making and on collecting, disseminating, coordinating and evaluating reports from member states and other states involved in enforcing the measures. It is the member states that are responsible for the actual implementation of regulations through inspections and forwarding of reports of sightings and inspections to other member states and the RFMO/A.

When member states act as enforcement agents, it facilitates effective compliance by flag states with RFMO/A regulations. However, flag state action is also needed, through investigation and further enforcement in case of violations. If the flag states fail to take their responsibilities seriously, the effect of the enforcement schemes will be weakened. The motivation of member states to work together on conservation and management of fish stocks may ultimately be undermined if there is doubt as to whether all states comply with their obligations.

It is natural that the RFMO/As have a role in ensuring compliance by the flag states with their obligations under the treaty establishing the RFMO/A and the decisions taken by it to implement these obligations. Also some flag state obligations cannot be controlled by inspecting individual vessels—for example, concerning the obligation to restrict fishery within the quota or fishing days allocated to stocks regulated by the RFMO/A.

The question is whether the RFMO/As are intended by the Fish Stocks Agreement to have such a function. In recent years, international environ-

mental agreements have been adopted where the Conference of the Parties (CoP) or similar treaty bodies are accorded responsibility for ensuring that the state parties comply with the treaty obligations. (See Joyner, 1999: 350 and Beyerlin & Marauhn, 1997: 96–99.) These procedures provide for state parties to submit regular reports to the CoP or another designated body on their implementation of their treaty obligations. The reports are then evaluated, and the CoP adopts recommendations and other measures if there is lack of compliance, including both soft and hard enforcement measures (Lang, 1996: 687–88). The background for the development of these procedures is that traditional methods of compelling states to comply with their obligations has not been successful. (See Marauhn, 1996: 697–98 and Beyerlin & Marauhn, 1997: 73.) The use of countermeasures against a state or bringing it before an international court of justice for breach of its treaty obligations tends to create confrontations, so states do not often take recourse to such measures. These measures are often inappropriate—partly because it is difficult to establish a causal link between an environmental damage and the source attributed to a state, and partly because the environmental damages may be irreversible (Koskenniemi, 1992: 125–27). The development of collective procedures reduces the potential for conflict, as the focus is on removing the causes of non-compliance.

The Fish Stocks Agreement is silent as to competence concerning any further action to be taken by the RFMO/A to enforce the obligations of their member states. The obligation (according to Art. 10(h)) to establish mechanisms through the RFMO/As for effective monitoring, control, surveillance and enforcement does not seem to give them competence to adopt procedures for ensuring compliance by flag states. This is not surprising, since it is the international legal rights and obligations of states globally that are regulated through the Agreement. The Fish Stocks Agreement to a lesser degree regulates how states are to cooperate through the RFMO/As. Whether the RFMO/As are competent to enforce the compliance of their member states must be construed from the constitutive treaty and the international law of intergovernmental organizations.

Dispute Settlement

The dispute settlement procedures of the LOSC shall apply to disputes over the interpretation and application of the Fish Stocks Agreement and of fisheries agreements on straddling fish stocks and highly migratory fish stocks

(Art. 30(1) and (2)).[49] The last-mentioned refers to the treaties establishing the RFMO/As, meaning that these dispute settlement procedures will be an integral part of these agreements as between the state parties also parties to the Agreement. (On this, see Treves, 1999: 256; McDorman, 1997: 67–68 and Boyle, 1999: 19.)[50] These procedures may be invoked over disputes ranging from whether a member state is in breach of its obligations according to the treaty in question, to whether the RFMO/A has overstepped its competence by adopting a decision. Obviously, disputes between member states and non-members must relate to rights and obligations of the Fish Stocks Agreement. However, these procedures apply only to legal disputes over the straddling and highly migratory fish stocks regulated by the RFMO/A and not to discrete high seas fish stocks.

The procedures are not restricted to legal disputes in a strict sense but are also applicable in situations where states are unable to agree on compatible measures within a reasonable time (Art. 7(4)). Thereby an international court of justice may have the final say on measures adopted in respect of straddling fish stocks and highly migratory fish stocks. States may invoke the procedures where coastal states and states fishing for the stock on the high seas cannot agree on whether the measures adopted by the coastal state and those agreed on for the high seas meet the criteria listed in Article 7(2). For example: The coastal state may argue that the measures agreed through the RFMO/A for the high seas will undermine the effectiveness of its measures. Or, states fishing for the stock on the high seas may argue that the measures adopted by the coastal state do not reflect the fact that a larger portion of the stock occurs in the adjacent area of the high seas. A third example could be where the RFMO/A or the coastal state has not yet been able to establish any measures despite ongoing fisheries. However, here the issue is not whether measures are compatible, but whether these states are fulfilling their general obligations to cooperate and to manage and conserve the fish stock and protect the biodiversity of the marine environment.

Article 286 of the LOSC sets out compulsory procedures enabling state parties to submit a dispute with others to an international court or tribunal if the dispute has not been settled otherwise. The state parties may choose between several means of procedures, including the International Court of

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[49] Article 29 contains the use of less formal procedures in disputes of technical nature, avoiding the complex and time-consuming procedures of LOSC by using an ad hoc panel to give non-binding recommendations. What constitutes disputes of 'technical nature' is not defined, leaving it to the states to define. It could be used within a RFMO/A in disputes over conservation measures and allocation of fishing rights where there is a need for expeditious dispute resolution to ensure proper implemenation of RFMO measures.

[50] The incorporation of the dispute settlement procedures of the Convention will not apply to fisheries agreements which include such procedures (Convention Art. 281(1)).

Justice (Art. 287(1)). States that have not chosen a dispute settlement procedure when entering into the Agreement are considered to have accepted arbitration (Art. 287(4)). Parties to a dispute may agree on a dispute settlement procedure of their own choice. If they are not able, the dispute shall be submitted to arbitration (Art. 287(5)). There is an important exception to the application of these procedures: Coastal states are not obligated to accept the resolution of disputes concerning fisheries in their EEZs through courts or tribunal leading to binding decisions (Art. 297(3)). Consequently, an international court does not have jurisdiction in a case where states do not agree on whether the measures adopted by the coastal state are compatible with those established for the same stock in adjacent areas of the high seas (Art. 7(4)). It is difficult to argue that this exception does not apply also to situations regulated by Article 7, since there is an explicit reference to Article 297(3) in Article 32 of the Fish Stocks Agreement: "Article 297, paragraph 3, of the LOSC applies also to this Agreement."[51] Although an international court is restricted to judging whether the measures adopted for the high seas are compatible, it will inevitably include the measures of the coastal states, since they will be the benchmark—not least since the effectiveness of their measures is not to be undermined.

According to Article 297(3)(b)(i), the coastal state is obliged to accept compulsory conciliation when requested by the opposing parties, when it is argued that the coastal state has manifestly failed to comply with its conservation obligations.[52] However, the conciliation commission is not competent to review the decisions taken by the coastal state, but it may put forward proposals leading to an "amicable solution of the dispute" (LOSC Annex V, Art. 5 and 6).

Although the frequency of the use of dispute settlement procedures will remain low, it is important to have this alternative for solving conflicts between states. There may be a preventive effect in knowing that the opposing party may invoke such procedures. Still, it is reasonable to question the effectiveness of these procedures. Most of the RFMO/A competent to regulate straddling fish stocks also regulates the fisheries for discrete high seas fishery resources. The dispute settlement procedures and other rights and obligations of the Fish Stocks Agreement are neither applicable to these stocks nor in the relationship with member states not parties to the Agreement. There is also the question whether courts or tribunals have jurisdiction

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[51] Treves (1999: 259–60) is of the opposite opinion. He seems to argue that an international court or tribunal cannot try the compatibility without including the measures adopted by the coastal state.

[52] There are two other situations where conciliation may be required, but they are not relevant here (LOSC Art. 297(3)(b)(ii)–(iii)).

over disputes on the obligation to protect biological diversity, since the main focus of the Fish Stocks Agreement is on straddling fish stocks and highly migratory fish stocks. However, LOSC dispute settlement procedures may be applicable in these situations to the extent the dispute may be related to the LOSC and the states involved are parties to it.

CONCLUSIONS

This examination has confirmed the Fish Stocks Agreement as a set of comprehensive rules on the conservation and sustainable use of living marine resources. Part of the background to the development of the Agreement was the recognition that the provisions of the LOSC are inadequate for these purposes.

The Fish Stocks Agreement contributes to the strengthening of the legal regime for high seas fisheries. Especially important is the exclusive competence assigned to the RFMO/A to regulate fishery on the high seas for straddling fish stocks and highly migratory fish stocks. The freedom of fishing has been further restricted. On the other hand, the Agreement is ambiguous concerning developing more effective decision-making procedures of the RFMO/A. In practical terms, it is left to the members of the individual RFMO/A to evaluate and revise its procedures. The internal affairs of intergovernmental organizations and arrangements are probably not best regulated through a generally applicable treaty such as the Fish Stocks Agreement. It is questionable whether it would be possible for the Fish Stocks Agreement to set out detailed guidance that could be applicable to all RFMO/As as well as politically acceptable.

The conservation and management principles of Articles 5 and 6 developing the conservation obligations may have a positive effect on the ability and willingness of states to agree on the conservation measures necessary through the RFMO/A. Their freedom of action will to some degree be restricted through these principles. In particular, through the precautionary approach states are required to have a plan for conservation and management of stocks, including targets and predetermined measures to be taken when the targets are exceeded. The Agreement also means a broadening of the competence of the RFMO/A by including the duty to protect marine biodiversity.

Specification of the duties of the individual flag state is also an important aspect of the Fish Stocks Agreement. In the LOSC it was stipulated that the flag state was responsible for implementing and enforcing its international legal obligations in relation to its vessels. But the Agreement goes further in detailing how this should be done, making it more difficult for states to hide

behind vaguely formulated obligations. The obligations reflect that the freedom of fishing also involves obligations, and those states not capable of complying with them shall not fish.

The right of inspectors of member states to board and inspect the fishing vessels of other member states and non-members is perhaps the most important innovation. The system must provide for a relatively high risk of detection of violations, in order to ensure effective implementation of conservation and management measures. If risk is low, vessels will be tempted not to comply with them. Although the flag state has a clear obligation to ensure compliance irrespective of where its vessels fish, it is very important that other states, through the presence of inspectors in the relevant area, are involved in enforcement, to prevent infringements. However, their role is limited to assisting the flag state, which remains responsible for enforcing and imposing sanctions. Who then is to control the flag states? According to the Fish Stocks Agreement, the role of the RFMO/As seems to be to develop joint rules for inspection and other mechanisms for control, monitoring and surveillance in addition to coordination of information on vessel compliance. The Agreement does not go into details—again leaving it to the states to develop this further through the RFMO/A. Moreover, the Fish Stocks Agreement does not specify the role of the RFMO/A in ensuring that member states comply with their obligations.

Enforcement by the port states and other types of non-flag enforcement becomes an increasingly important means of ensuring compliance with the conservation and management measures of RFMO/A, however with potential problems with GATT/WTO. Even with new methods of control, it is impossible to ensure complete control of fishing activities in vast areas of the high seas. Controlling vessels when landing or trans-shipping their catches diminishes the possibilities of escaping control. In the Agreement the port states are authorized to inspect vessels and prohibit landings or transshipment of catches taken in violation of RFMO/A measures. This competence does not go further than what can be deduced from the sovereignty that the port state already enjoys over its territory according to international law. What is needed here is some form of coordination between member states, RFMO/A and relevant port states to ensure effective enforcement. The reason why the provision is not more elaborate is probably because states have feared restrictions on their sovereignty.

As with all intergovernmental agreements or treaties, the effectiveness of the Fish Stocks Agreement depends on its acceptance by the relevant states. So far only 56 states have become parties, and several major high seas fishing states and coastal states have not yet ratified or acceded to it. The RFMO/As are important to implementation of the Agreement. Some provisions may simply be implemented through their practice, whereas others

may require amendment of the constituent treaty. In either case, a precondition for effective implementation is that all member states—or the overwhelming majority—are parties to the Fish Stocks Agreement. If only a few of the member states are parties, they will have difficulties complying with their obligations and exercising their rights, and non-members will have trouble making use of their rights according to the Agreement.

One consequence of lack of adherence to the Fish Stocks Agreement is fragmentation of international law concerning both the sources of law and the legal regime for high seas fishery. The latter may be regulated through the LOSC, the Agreement, international customary law and various global and regional fisheries agreements. But one should not overestimate the fragmentation. The links between the Fish Stocks Agreement and the LOSC indicate that the Agreement will be important in interpreting and applying the latter.[53] Many of the innovations of the Fish Stocks Agreement are likely to become norms of international customary law and thus modify the LOSC and other regional fisheries agreements. Some authors even argue that the Precautionary Approach has already achieved such status (see Cameron & Abouchar, 1996: 36). Of course this will depend on the practice of the states both individually and through the RFMO/As. The case studies presented in this book may indicate such practice.

Even if the Fish Stocks Agreement does not cover discrete high seas fish stocks, the RFMO/As will probably apply the same management principles and control and compliance measures to both types of stocks. As a majority of states are parties to it, also the LOSC may still offer some help, for example through its dispute settlement procedures.

The Review Conference to be held according to Article 36 and planned for 2006 is unlikely to be competent to take on all the issues raised here. The Conference may "propose means of strengthening the substance and methods of implementation of those provisions […] in the conservation and management of straddling fish stocks and highly migratory fish stocks"—a relatively narrow mandate. More radical changes will have to be made

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[53] Anderson (1996: 468) argues the Fish Stocks Agreement can be viewed a 'subsequent agreement' in the terms of the Vienna Convention on the Law of Treaties Articles 31(3)(a), and thus relevant in interpreting LOSC. Article 31(3)(c) of the same conventions reflects the objective of coherent law within the same subjects areas, which also is an argument for interpreting LOSC in light of the Fish Stocks Agreement.

through the amendment procedures of Article 45. The question is whether states are interested in amending the Fish Stocks Agreement only a decade after its adoption.

PART II

CASE STUDIES

CHAPTER THREE

THE NORTHWEST ATLANTIC FISHERIES ORGANIZATION (NAFO)

INTRODUCTION

The Northwest Atlantic Fisheries Organization (NAFO) was established through the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries[1] (Art. II(1)) and came into operation in 1979. NAFO succeeded the International Commission for the Northwest Atlantic Fisheries (ICNAF) following the extension of coastal state jurisdiction from the mid-1970s.

The NAFO Convention Area covers the waters of the northwest Atlantic from Greenland in the east to North Carolina in the south and to the straits between Canada and Greenland in the north (NAFO Convention Art. I(1)). All fisheries resources of this area are included, except for marine mammals, highly migratory species[2] and sedentary species[3]. The more than twenty commercial fish stocks occurring in the Convention Area may be categorized either as straddling fish stocks or as discrete high seas stocks, depending on their distribution. Most of the straddling fish stocks are found on the Grand Banks. Although most of the Grand Banks is part of the Canadian EEZ, two areas—known as the 'Tail' and the 'Nose'—are part of the high seas. The discrete high seas fish stocks occur mainly on the Flemish Cap. But not all fish stocks confine themselves to the regulatory area of one RFMO/A.[4]

The first years were characterized by gradually rising tensions between Canada (the major coastal state) and states fishing on the high seas of the Convention Area, as the fishery resources were gradually being depleted by overfishing, marine mammal predation and climatic changes (Hutchings & Myers, 1994: 2144). NCP vessels were relatively active in the fisheries, with

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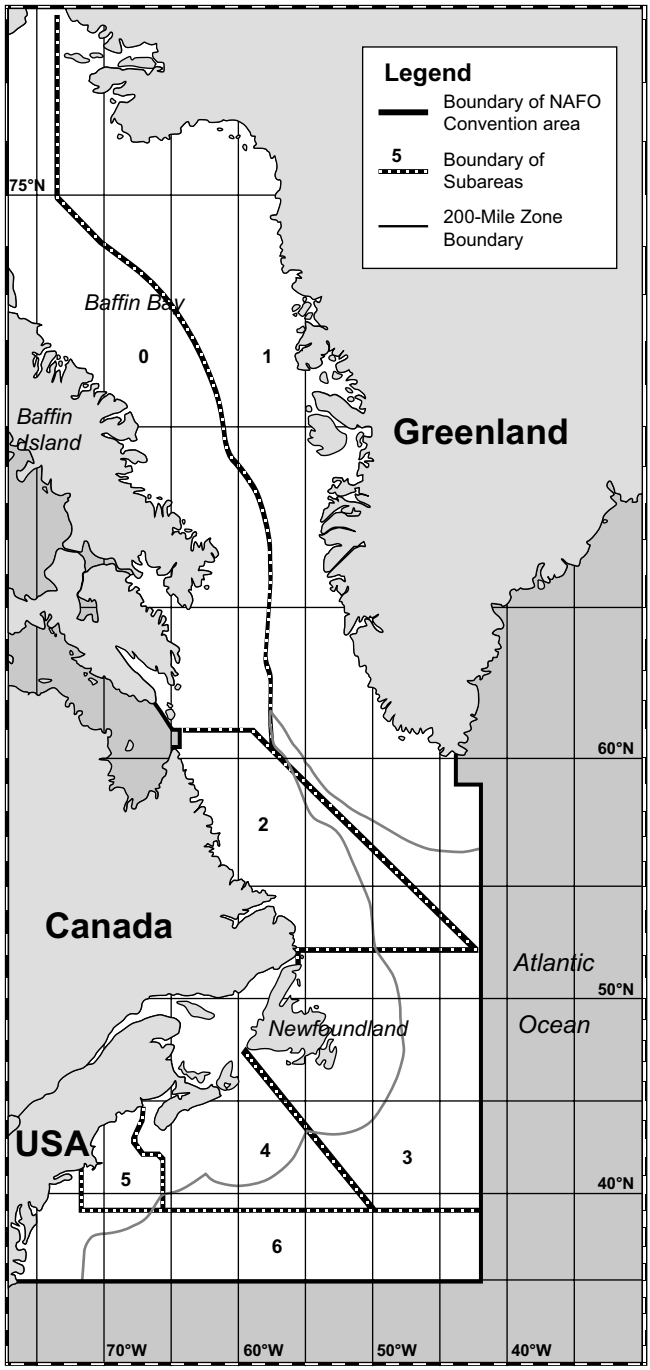
[1] UNTS, 1135, p. 369.

[2] The highly migratory fish stocks are regulated through the 1966 International Convention for the Conservation of Atlantic Tunas (Arts. I and IV), available at www.iccat.es.

[3] The sedentary species on the continental shelf are subjected to the sovereign rights of the Coastal Party (LOSC Art. 77(4) cf (1)).

[4] A few years ago, a redfish stock that was managed through the neighbouring North-East Atlantic Fisheries Commission was discovered in the NAFO Convention Area: NAFO/ NEAFC Working Group on Oceanic Redfish, 13–14 February 2001, Reykjavik, Iceland, in Annual Report of NAFO, p. 51.

Map 3.1 NAFO Convention Area



Source: NAFO Secretariat

catches estimated at 30% of the total allowable catches set by NAFO.[5] Moreover, the largest actor in the high seas fisheries, the European Community, made frequent use of the objection procedure between 1986 and 1992, setting its own quotas, which exceeded the TAC set by NAFO (Rayfuse, 2004: 227–29). Tensions peaked in the mid-1990s, when Canada amended its Coastal Fisheries Protection Act, extending its enforcement jurisdiction to some of the stocks in the adjacent areas of the high seas. The amendments were initially directed at vessels registered in Non-Contracting Parties (hereafter 'NCPs') and stateless entities, but were later further extended to apply to Spanish- and Portuguese-flagged vessels, following the EC objection to NAFO's allocation of the TAC for Greenland halibut (Joyner, 2001: 212–14). Subsequently, in March 1995 the Canadian coast guard boarded and arrested a Spanish trawler on the high seas for alleged illegal fishery on Greenland halibut. Despite or perhaps due to this dispute, the European Community and Canada were able to settle their differences, agreeing *inter alia* to strengthen controls and enforcement on the high seas. In recent years, cooperation between Canada and the other Contracting Parties has improved.

The fisheries in NAFO Convention Area target 25 species, of which 11 species are regulated through NAFO. These 11 species are separated in 19 stocks as described in the Appendix at the end of this chapter (e.g. three cod stocks and three redfish stocks). In 2003, catches were estimated at 2.3 million tonnes; approximately 182,000 tonnes or 8% of the total catches were taken on the high seas.[6] The status of most of the fishery stocks managed through NAFO has not improved. Although the cod stocks of the Grand Banks and Flemish Cap and various stocks of flounder have been subjected to moratoria for more than a decade, their biomass levels are still very low.[7] The moratoria have led to a shift in fisheries patterns, with Greenland halibut becoming one of the most important targeted stocks. However, with the state of the stock deteriorating, NAFO has now adopted a 15-year rebuilding plan for the stock.[8] Although the status of the stocks has prompted the Contracting Parties to take action, as in 1995, it still seems safe to conclude that, during its twenty-five years of existence, NAFO has failed in achieving its objectives of rational management and conservation of the fisheries resources.

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[5] Working Group on Non-Contracting Parties Fishing in the Regulatory Area, pp. 247–48 in NAFO Meetings and Decisions 1979–1992. NCP = Non-Contracting Party, see below.

[6] NAFO Fishery, available at www.nafo.int/fisheries/frames/fishery.html (accessed October 2005).

[7] NAFO regulated stocks, available at www.nafo.int/science/advice/nafo-stocks.html (accessed October 2005).

[8] NAFO/FC Doc 05/1 Conservation and Enforcement Measures, Article 7: www.nafo.int/fisheries/frames/regulations.html (accessed September 2005).

The decisions taken at the 2005 annual meeting to start work on revising the NAFO Convention may prove to be a turning point for the RFMO/A.[9]

In the *first* part of this chapter, the focus will be on the membership and decision-making procedures of the organization. In the *second* part, the question is whether NAFO has implemented important principles such as the precautionary approach and the protection of marine biodiversity. Here the relationship between measures adopted by Canada and NAFO for the same fish stocks will be evaluated. The *third* part looks into the allocation of fishing rights or the access to the fish stocks regulated through NAFO. The *fourth* part of the analysis concerns the implementation and enforcement of measures adopted by NAFO, and is rounded off with some conclusions.

STRUCTURE

NAFO is an intergovernmental organization with a separate legal personality and a broadly defined objective: to contribute "through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources" (Art. II(1) and (3)). The consultations and cooperation of NAFO are to take place through three bodies with specific functions: the General Council, the Scientific Council and the Fisheries Commission (Art. II(2)).[10]

The General Council and the Fisheries Commission are the political organs, competent to adopt decisions. The General Council is responsible for the internal and organizational affairs of NAFO, including the adoption of the budget and the membership of the Fisheries Commission (Art. III). The General Council also deals with relations with Non-Contracting Parties (NCPs) and other intergovernmental organizations. The Fisheries Commission is responsible for the management and conservation of the fisheries resources of the Convention Area in the high seas areas, described as the Regulatory Area (Art. XI(1): cf. Art. I(2)). Consequently, NAFO is not competent to regulate fisheries in those areas of the Convention Area that are subject to national jurisdiction. NAFO has its own scientific advisory body, the Scientific Council, which is to provide the relevant coastal states and the Fisheries Commission with advice on the management and conservation of the fishery resources of the Convention Area (Art. VI). It shall also provide a forum for the study and exchange of scientific information and views; and encourage the Contracting Parties to cooperate in scientific research and to

[9] See press release, available at www.nafo.int/about/media/press/press05.pdf (accessed October 2005).

[10] NAFO also has a permanent secretariat, established to provide the organization with services (Art. XV). The headquarters of NAFO is situated in Dartmouth, Canada (Art. II(4)).

compile and maintain statistics and to publish reports and material on the fishery of the Convention Area. The NAFO Secretariat, led by the Executive Secretary, provides these bodies with services to exercise their functions (Art. XV).

There are thirteen CPs to the NAFO Convention, including the European Community.[11] Nine of them are State Parties to the Fish Stocks Agreement.[12] All the Contracting Parties are State Parties to LOSC. Since a majority of the CPs are State Parties to the Fish Stocks Agreement, they should be able to get the organization to adopt conservation and management measures to implement the principles of this agreement.[13] Other implementations, however, such as dispute settlement procedures, would require amendments to the NAFO Convention in order to be applicable to all fishery resources (including the discreet stocks) and all Contracting Parties. But effective implementation of the Fish Stocks Agreement in respect of the Non-Contracting Parties requires the remaining four Contracting Parties to become State Parties.

THE RIGHT AND OBLIGATION TO COOPERATE

Membership

From its constituent treaty NAFO appears to be a relatively open fisheries management organization. Non-Signatory Parties are free to accede to the NAFO Convention (Art. XXII(4)). A new Contracting Party automatically becomes a Contracting Party of and has voting rights in the General Council and the Scientific Council (Art. IV(1) and Art. IX(1)).

A new Contracting Party does not automatically become a Contracting Party of the Fisheries Commission, which is the competent body to adopt, *inter alia,* conservation and management measures and allocate fishing rights (Art. XI). The membership of the Commission consists of Contracting Parties fishing or planning to fish in the Regulatory Area (Art. XIII). A new Contracting Party is required either to be fishing or to document specific plans for fishing in the Regulatory Area, in order to become a member. The General Council performs an annual review of the membership of the Fisher-

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[11] Bulgaria, Canada, Cuba, Denmark (in respect of Greenland and the Faeroe Islands), the European Community, France (in respect of St. Pierre et Miquelon), Iceland, Japan, Norway, the Russian Federation, South Korea, Ukraine, the USA: www.nafo.int/about/overview/structure/CPs.html (accessed October 2005).

[12] Canada, Denmark, the European Community, France, Iceland, Norway, the Russian Federation, Ukraine and the USA: www.un.org/Depts/los/convention_agreements/ convention_overview_fish_stocks.htm (accessed October 2005).

[13] Decisions of the General Council and the Fisheries Commission are taken by simple majority vote (Arts. V(2) and XIV(2)).

ies Commission (Art. XIII(1)). A consequence of the annual review is that membership is not permanent: states that have ceased fishing risk losing their membership. Logically, the requirement of fishing excludes coastal states in the region from membership if they do not fish in the Regulatory Area.[14]

These clauses indicate that only Contracting Parties with a real interest in fishing interests can become members of the Fisheries Commission. However, compared to the requirement in Article 8(3) of 'real interest', the threshold for becoming a Contracting Party of the Fisheries Commission appears less strict. 'Real interest' may also be read as requiring contributions to research and information on and conservation of the regulated fish stocks.

The practice of the General Council indicates it does not undertake a very comprehensive examination of whether Contracting Parties meet the requirements; usually, it merely establishes as a fact that the members are participating in the fisheries.[15] To date, the only CPs to lose their membership are Bulgaria and Romania, which clearly have not been fishing in the Regulatory Area in recent years.[16] The examination of the requirements is more comprehensive in respect of new CPs. When the most recent entrant to NAFO, Ukraine, applied for membership in 1999, its representative explained that Ukraine planned to fish for shrimp on the Flemish Cap during the latter part of 1999 and in 2000.[17]

The strategy of NAFO has not been to exclude Non-Contracting Parties from membership. Since 1980, eight NCPs have acceded to the Convention and become members of the Fisheries Commission.[18] In 1999, the General Council adopted a resolution directed at NCPs, confirming that NAFO is an open organization,[19] and stressing that membership in the organization does not automatically confer fishing rights. On the contrary, the message was

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[14] However, this is a hypothetical problem, since most coastal states also fish in adjacent areas of the high seas. But the requirement is not quite consistent with the Fish Stocks Agreement. A coastal state is obligated to join an RFMO/A, which regulates the fishery for the stocks also occurring in areas under its jurisdiction (Art. 8(3)).

[15] An example is found in the Report of the General Council Meeting, 26th Annual Meeting, 13–17 September 2004, in *Meeting Proceedings of the General Council and Fisheries Commission September 2004–August 2005*, p. 4.

[16] See previous footnote.

[17] General Council Annual Meeting and Fisheries Commission Annual Meeting, 13–17 September 1999, in Meetings and Proceedings of the General Council and Fisheries Commission for 1999, pp. 39 and 77.

[18] An overview of present and former Contracting Parties is available at www.nafo.int/about/overview/structure/CPs.html (accessed September 2005).

[19] NAFO GC doc. 99/8 Resolution to Guide the Expectations of Future New Contracting Parties with Regard to Fishing Opportunities in the NAFO Regulatory Area, in NAFO Annual Report 1999, p. 62.

that new members would be likely to be allocated limited rights. The focus is on fishing rights and not membership, as in the Fish Stocks Agreement. It may be argued that the 1999 resolution served more as a deterrent than an invitation to join NAFO, and has not been very helpful in preventing NCPs from fishing in the Regulatory Area.

For states fishing on the high seas, the alternative of the Fish Stocks Agreement to membership is to agree to apply the conservation measures adopted by the RFMO/A (Art. 8(3)). Non-members who agree to apply the measures are equally entitled to fish for regulated fish stocks. NAFO has not yet established a scheme for integrating NCPs into the fisheries. Belize, one of the NCPs with most vessels fishing in the Regulatory Area, approached the organization with a request for information on the procedures for becoming a cooperating Non-Contracting Party.[20] NAFO answered that it had not established mechanisms for cooperating with NCPs.[21] Belize was invited to cooperate through membership, but NAFO reiterated that the prospect of fishing rights was slim. Establishing a reliable scheme for cooperating NCPs would require NAFO to identify fishing opportunities for such states. Since the fishing opportunities for most NAFO members are very small because the TACs are allocated based on historical fisheries, this is not likely to happen. How then can NAFO reduce NCP fishing when it has nothing to offer those Non-Contracting Parties that may be willing to cooperate? The practice of directing cooperation through membership is not wholly consistent with the Fish Stocks Agreement. According to the latter, states are not required to become members if they agree to apply the conservation and management measures adopted by the RFMO/As. For states with little interest in the fisheries, this may be a real alternative.

Decision-making Procedures

The General Council and the Fisheries Commission both take their decisions by simple majority,[22] with each Contracting Party casting one vote (Art. V(1) and (2) and Art. XIV(1) and (2)).[23] This implies that the Contracting Parties enjoy the equal influence in decision-making irrespective of their status as coastal states or states fishing on the high seas, and irrespective of the

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[20] Report of the Standing Committee on Fishing Activities of Non-Contracting Parties in the Regulatory Area (STACFAC), item 11 and Annex 7, Meeting Proceedings of the General Council and Fisheries Commission September 2004–August 2005, pp. 79 and 91.

[21] Reference as footnote above, at pp. 6 and 71.

[22] Some decisions require a qualified majority (Arts. XX and XXI).

[23] A two-thirds quorum of member states is required.

quantities caught in the Regulatory Area.[24] Although Canada and the EC are more influential than Japan, membership size affects the effectiveness of the organization.

The General Council and the Fisheries Commission employ differing nomenclature for the official results of their deliberations: while the General Council adopts 'decisions', the Fisheries Commission adopts 'proposals'. The difference is related to the time of entry into force and binding effect of the decisions. The decisions of the General Council concerning internal affairs of the organization, such as the budget or the annual payments of each Contracting Party, are 'decisions' directly and immediately binding on each CP. By contrast, the 'proposals' of the Fisheries Commission do not enter into force until the expiry of certain time limits[25] within which Contracting Parties may submit objections to the proposal (Art. XII). The proposal enters into force after the end of the objection periods and becomes a measure binding on all Contracting Parties except those having presented objections.

The decision-making procedures of the Fisheries Commission reflect that NAFO is an intergovernmental cooperation where decisions are not immediately binding on the states but require their acceptance. However, the right to object to or opt out of decisions has been singled out as one of the greatest weaknesses of NAFO (Churchill & Lowe, 1999: 305–306).[26] Even if the majority of Contracting Parties have accepted a decision, it will not necessarily apply to them all. Objecting Contracting Parties may adopt autonomous measures or approve fishing activities in the Regulatory Area that act to undermine the efforts of the Fisheries Commission to conserve the fish stocks. In the period between 1994 and 2004 there were an average of four objections annually, mainly directed at proposals allocating TACs or fishing activity.

The Fish Stocks Agreement contains rather limited requirements for reforming the decision-making procedures of NAFO and other existing RFMO/As. State Parties are required to strengthen the RFMO/As to "improve their effectiveness in establishing and implementing" measures (Art.

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[24] Japan, with only 2.3% of the 2005 TACs, has the same influence as Canada and the European Community, with 88% of the 2005 TACs.

[25] The time limits are calculated from the date when the Executive Secretary transmits the proposals to the Contracting Parties (Art. XII(1)). Contracting Parties have sixty days to object to a proposal, which is the earliest a proposal may enter into force and become binding if no objections are entered. If one Contracting Party objects within this limit, the objection period is extended to an extra forty days from the transmittal of the objection to the other Contracting Parties, and finally there may be a second extension of the objection period with thirty days from the transmittal of second group of objecting CPs.

[26] Opting-out provisions are a frequent feature in the decision-making procedures of RFMO/As, see Sydnes (2001a: 357–60).

13). The obligation is relatively broad and general, and may include strengthening of the administrative support at the RFMO/A as well as of its decision-making procedures. The obligation becomes somewhat clearer when it is stipulated that states are expected to agree on "efficient and expeditious decision-making procedures" to prevent disputes (Art. 28). The Agreement obviously reflects the need for reform of RFMO/A decision-making procedures.

What exactly does this mean in respect of the NAFO procedures? The requirement of expediency could mean reducing the time-period from the adoption of the proposal to its entry into force. The application of the precautionary approach also requires more expedient decision-making, leading to a fisheries management more adaptive to changing circumstances.

NAFO has not started any process of reviewing its decision-making procedures. The focus has instead been on proposals for restricting the use of the objection procedures. In 1996 the General Council established a Working Group on Dispute Settlement Procedures, mandating it to elaborate separate dispute settlement procedures for the organization taking into account that 1) the procedures of the Fish Stocks Agreement apply to straddling fish stocks and not discrete high seas fish stocks, and 2) that not all members of NAFO are parties to the Agreement.[27] An argument for separate procedures is that they may provide more expedient resolution of disputes than the procedures of the Agreement and LOSC. Nine years later, however, the working group has yet to present an agreed text to the General Council. There are differences over the format of the procedures, provisional measures to be applied (until the dispute has been settled) and whether there should be direct references to LOSC and the Fish Stocks Agreement. Some CPs have been concerned that the Agreement may become applicable to them even if they are not parties.[28]

The working group has adopted a text and alternatives reflecting the state of (dis-) agreement and views.[29] The proposal to amend Article XII requires a Contracting Party to state its reason for objecting to the proposal and to describe the alternative measures it intends to adopt or has adopted. Other

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[27] Report of the General Council, 18th Annual Meeting, item 4.6 in Meeting Proceedings of the General Council and the Fisheries Commission for 1996, pp. 49–50.

[28] Report of the Working Group on Dispute Settlement Procedures (DSP), item 6, in Meeting Proceedings of the General Council and the Fisheries Commission for 2001, pp. 84–88.

[29] Consolidated Text 2001, Annex 12 to Report of the Working Group on Dispute Settlement Procedures (DSP), reproduced in Meeting Proceedings of the General Council and the Fisheries Commission for 2001, pp. 108–109.

CPs may challenge this through the use of dispute settlement procedures.[30] Such disputes will first be referred to an ad hoc panel established by NAFO and intended for an expeditious process. The panel may adopt non-binding recommendations for resolving the dispute. If the parties do not accept these recommendations, the dispute may to be referred to binding dispute settlement procedures. The proposal offers a solution to the standoff created by the use of objections and could promote efficient implementation of the conservation and management procedures.

The General Council established a working group in 2005 to review the NAFO Convention, which will include decision-making procedures and dispute settlement. The group is expected to present its recommendations at the next annual meeting in 2006.[31] It remains to be seen whether there will be changes in the decision-making procedures and whether NAFO will have its own dispute settlement procedures.

Transparency

NAFO has opened for the participation of observers at the plenary meetings of the General Council, the Scientific Council and the Fisheries Commission.[32] The bodies may invite observers from intergovernmental organizations and NCPs, while non-governmental organizations (NGOs) must apply for status as observers at the meetings. Contracting Parties were sceptical about letting NGOs into their meeting rooms when the USA introduced a proposal for enhancing transparency in the General Council and Fisheries Commission.[33] They were concerned that NGOs would dominate the proceedings, and referred to developments in the International Whaling Commission.

The conditions set for NGOs to be granted observer status are more strict than those applicable to intergovernmental organizations and NCPs. To have access to the meetings of the constituent bodies of the organization, NGOs must satisfy two conditions: they must "support the general objectives of

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[30] There is disagreement whether there should be an explicit reference to the right to challenge the objection or if it is sufficient that the right could be construed from the dispute settlement procedures.

[31] Northwest Atlantic Fisheries Organization 2005 Annual Meeting, Press Release 23 September 2005, available at www.nafo.int/about/media/press/press05.pdf (accessed October 2005).

[32] Rules of Procedure for the General Council (Art. 9), the Fisheries Commission (Rule 10) and the Scientific Council (Rule 1.3) from www.nafo.int/about/overview/ convention/conindex.html (Rules of Procedure and Financial Regulations) (accessed September 2005).

[33] Report of the General Council Meeting, item 2.6–2.10, in Meeting Proceedings of the General Council and the Fisheries Commission for 1996, pp. 42–44.

NAFO" and "demonstrate an interest in the species under the purview of NAFO"[34] An NGO is required in its application to make a statement supporting the objectives of NAFO (optimum utilization and conservation of fishery resources). The purpose is to prevent NGOs with the most radical environmental agendas from attending the meetings. But NGOs are not required to express support for the conservation and management policies adopted by the Fisheries Commission. The NGO must also document a genuine interest in the species regulated by NAFO. Such interest may be inferred from the work of the NGO and/or papers and resources prepared by the NGO on conservation, management or scientific study of the fishery resources. In practice this means that NGOs representing environmental or industrial interests may be accorded observer status. The application is to be approved by the Executive Secretary, but Contracting Parties may ask for a vote. NAFO is free to reject an application without giving any reasons.

There have been few observers attending the meetings of NAFO. In recent years, there have been no representatives of Non-Contracting Parties present. Neighbouring RFMO/As have often been represented by Contracting Parties also parties to these. So far no NGOs have been granted observer status. There has been only one application, but it was received after the time limit and was thus rejected. The requirement of documenting a concrete interest seems stricter than in the Agreement—possibly to exclude NGOs with a more general agenda. On the other hand, it is not unreasonable to require that NGOs should be informed about the issues dealt by NAFO.

MATERIAL PRINCIPLES

General

At its annual meeting, the Fisheries Commission adopts proposals for both measures and allocation of catches on straddling and discrete fish stocks by amending the NAFO Conservation and Enforcement Measures.[35] The Scientific Council has an important role in the development of the measures, providing advice to the Fisheries Commission upon request.[36] The 2005 conservation measures include TACs for nine fish stocks, moratoria for twelve fish

[34] See footnote 32, Rule 10.3 (c).

[35] The NAFO Conservation and Enforcement Measures (NAFO FC Doc. 05/1 Serial No. N5070) are available at www.nafo.int/fisheries/frames/regulations.html (accessed October 2005).

[36] The Fisheries Commission adopts a request for scientific advice on management for the year after the succeeding year. At its annual meeting in 2004, the Fisheries Commission requested the Scientific Council for advice management in 2006, to be decided at the 2005 meeting.

stocks and effort regulation for one stock[37], technical measures in the form of by-catch regulations,[38] *inter alia* to prevent catches of stocks under moratoria and of stocks for which no quota has been allocated to the Contracting Party; also gear requirements, including minimum mesh sizes in several fisheries[39] and minimum fish sizes[40] for some stocks to prevent catches of undersized fish, and area and seasonal closures.[41]

The NAFO Convention includes relatively few and mostly general obligations directing the Contracting Parties when adopting the proposals. In this, it reflects the state of the art in the late 1970s. Today the question is whether NAFO has adapted to more recent developments, as reflected in the Fish Stocks Agreement.

Precautionary Approach and Protection of Marine Biodiversity

General

The proposals adopted by the Fisheries Commission shall be "designed to achieve the optimum utilization of the fishery resources"(Art. XI(2)). In doing so, the Commission shall take into account information and advice provided by the Scientific Council. The objective of the Commission must be read together with the overall objective of NAFO, i.e. of contributing to the optimum utilization, rational management and conservation of the fishery resources (Art. II(1)). Although the objective of optimum utilization is also stated in the Fish Stocks Agreement (Art. 5(a)) and LOSC (Art. 62(1)), these are not very helpful in developing the content of the obligation. The NAFO Convention provides little direction on how to weigh the various considerations, and consequently on what constitutes optimal utilization. The objective of NAFO to contribute to rational conservation of resources will, however, restrict the freedom of the Fisheries Commission, as the Contracting Parties may not adopt proposals that threaten fish stocks with overexploitation.

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[37] Allocated quotas and fishing days are listed in the Annual Quota Table and Effort Allocation Scheme annexed to NAFO Conservation and Enforcement Measures (Annex IA Annual quota table and Annex IB Effort Allocation Scheme for Shrimp Fishery in the NAFO Regulatory Area Division 3M).

[38] Art. 9. Vessels are required to move if the catches of stocks for which there is not a directed fishery exceed a certain percentage or quantity.

[39] NAFO Conservation and Enforcement Measures Art. 10.

[40] Ibid. Article 11 and Annex III. Vessels of the Contracting Parties, with the exception of Canada, are required to discard catches of undersized fish immediately if the amount exceeds 10%, and shall move to another area.

[41] Ibid. Art. 12.

Since the Fisheries Commission enjoys broad competence to regulate the fisheries in the Regulatory Area, there should normally be no problems in implementing the new principles of Articles 5 and 6 of the Fish Stocks Agreement. Although this agreement does not apply to discrete high seas fish stocks, the Contracting Parties may agree to apply the principles to these stocks as well. It is more problematic that, when adopting proposals, the Contracting Parties are not directed by the NAFO Convention to take into account the effects of fisheries on the environment and other species.

The competence of the Fisheries Commission to regulate the 'fishery resources' of the Regulatory Area is directed primarily at commercial exploitable stocks, but the concept is broad enough to include other species as well. NAFO will not be able to achieve its objectives of rational management and conservation by only regulating targeted fish stocks. But it is more questionable whether the Fisheries Commission may ban all fishing in a specific area by establishing a marine protected area, or prohibit bottom trawling in areas to protect the environment.

In the following, the focus will be on the implementation of two principles of environmental law in NAFO: the precautionary approach, and the protection of marine biodiversity.

The Precautionary Approach

The precautionary approach came on the agenda of NAFO in 1996, influenced by international developments.[42] The Scientific Council was asked to propose the reference points for fish stocks, harvest control rules and criteria for rebuilding of stocks under moratoria—questions repeated in the annual requests to the Scientific Council for advice up to 2004.[43] As yet, the Scientific Council has not been able to provide comprehensive and concrete advice on these issues.

The Scientific Council established a working group on the implementation of the precautionary approach, which led to a preliminary framework on

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[42] Report of the Meeting of the Fisheries Commission, Annex 11 Fisheries Commission's Request for Scientific Advice on Management in 1998 of Certain Stocks in Subareas 3 and 4, in Meeting Proceedings of the General Council and Fisheries Commission for 1996, p. 136.

[43] See e.g. Fisheries Commission's Request for Scientific Advice on Management in 2006 of Certain Stocks in Subareas 2, 3 and 4, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, pp.155–56, and Fisheries Commission's Request for Scientific Advice on Management in 2002 of Certain Stocks in Subareas 3 and 4, including supplementary questions on Division 3M Shrimp for 2001, in NAFO Annual Report 2000, pp. 125–26.

the precautionary approach.[44] In 1999 the Fisheries Commission made a general decision to apply the precautionary approach in the conservation of the fish stocks,[45] but it was not until 2004 that the Commission adopted the Precautionary Approach Framework.[46] The Framework provides general directions while it is up to the Fisheries Commission to develop plans and strategies for the individual stock. Before proceeding with full-scale implementation, the Fisheries Commission opted for a trial run on two stocks.[47] A study group under the Scientific Council has worked on developing limit reference points, and concluded that this is possible for most stocks.[48]

The Precautionary Approach Framework consists of three main elements:

- reference points
- management strategies and courses of actions
- description of the roles of the Scientific Council and the Fisheries Commission.

There are three sets of reference points, expressed in terms of both biomass and mortality rate. *Limit reference points*: The reference point for the biomass (B_{lim}) indicates levels below which stock productivity is likely to be seriously impaired. The corresponding reference point for the fishing mortality rate (F_{lim}) should not be greater than F_{msy}. *Buffer reference points*: The reference point for the biomass (B_{buf}) is set at a level higher than the Blim, and the corresponding fishing mortality (F_{buf}) is fixed at a level lower than the Flim. These points are set at levels where there is a very low probability of exceeding B_{lim} and the F_{lim}. The more uncertain the stock assessments are, the greater the buffer zones. These reference points are to be used when it is not possible to undertake analyses of the probability of exceeding the limit reference points. *Target reference points:* These reference points are applicable when the stock is above the B_{buf} and mortality is below F_{buf}. The F_{target} may be aimed at achieving other objectives, such as socio-economic considerations. The strategies and courses of actions related to maintaining within

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[44] Fisheries Commission Annual Meeting, 13–17 September 1999, item 10 and Resolution to Guide the Implementation of the Precautionary Approach within NAFO, in Annual Report of NAFO, pp. 61 and 78.

[45] Report of the Fisheries Commission Meeting, item 3.21 Resolution to Guide the Implementation of the Precautionary Approach within NAFO, in Meeting Proceedings of the General Council and the Fisheries Commission, pp. 206–207.

[46] The text is found in SCR Doc.03/23 Proposed NAFO Precautionary Approach Framework.

[47] Report of the Fisheries Commission Meeting, item 12, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 97.

[48] Scientific Council Meeting, 3–17 June 2004, in Scientific Council Reports 2004, pp. 46–48.

the reference points will depend on the status of the stock in relation to the reference points.[49]

Implementing the precautionary approach is a responsibility of both the scientists and the managers of NAFO. The Scientific Council will be charged with determining the status of the stock and classifying it with respect to the reference points, as well as calculating the limit reference points and the security margins (which are important for setting the buffer reference points). The Scientific Council shall also describe the uncertainty associated with the status of the stock and conduct risk assessments. It is the Fisheries Commission that is competent to decide the limit reference points and to select the target reference points, based on specified management objectives. It is to specify the strategies and time-frame for stock rebuilding. This means that the Fisheries Commission is the body responsible for specifying the acceptable levels of risk, which is a political decision.

The framework on the application of the precautionary approach appears as a mere technical matter. But presents the Contracting Parties with a series of value-laden choices. The function of the buffer reference points is to constrain the freedom of the Fisheries Commission when setting operational targets for the fishery, indicating the upper limit of the acceptable risk. But risk assessment cannot determine the correct level of acceptable risk, which will ultimately be a political decision based on a range of considerations.

Some of the concerns of members of the Fisheries Commission related to the proposed rule that there should be no fishing if stocks were below Blim. In its response, the Scientific Council adjusted its proposal to advise that fishing mortality should be kept as close to zero as possible, thereby removing an absolute rule from the Framework. Notably, the Framework does not include any reference to a requirement of developing recovery/rebuilding plans when a stock is in the 'Danger' or 'Collapse' zones, even though it was requested by the Fisheries Commission to develop such criteria. There are no such plans for the stocks under moratoria; the only plan applies to the Greenland halibut stock.

The NAFO precautionary approach has not the character of a legally binding measure. It can be considered as setting out guidelines for the Fisheries Commission and the Scientific Council when developing and implementing the reference points and strategies in respect of the various fish

[49] Where the fishing mortality exceeds F_{buf} and F_{lim}, the Fisheries Commission is to reduce mortality to below F_{buf}, in order to prevent the stock from falling below B_{lim}. Where the biomass has fallen below B_{buf} but mortality is below F_{buf}, the Fisheries Commission is to lower the F below F_{buf}, proportional to how close the stock is to B_{lim}. If both the B and F exceed the buffer reference points, the Fisheries Commission shall reduce F below F_{buf}, proportional to how close the B is to B_{lim}. If both B and F are below the limit reference points, the F should be set as close to zero as possible.

stocks. It remains to be seen when and how the Fisheries Commission will implement the Framework in respect of the other fish stocks of the Regulatory Area.

Since NAFO has yet to implement the precautionary approach, it is difficult to make a thorough assessment of the consistency with the Fish Stocks Agreement. The reference points used in the Framework seem to correspond with the precautionary reference points of Annex II to the Agreement. The buffer reference points are not included in the Agreement, but it is intended to provide extra precaution where adequate data are lacking or there is uncertainty in calculating the probabilities of the biomass or mortality being below the limit reference points (in the short and longer terms). The introduction of buffer reference points would seem to lead to a clearer distinction between various objectives of the fisheries, with the buffer reference points reflecting the objectives of conservation while the target reference points quantify socio-economic and other similar considerations. The Framework is consistent with the Agreement in using the F_{msy} as an upper limit for the F_{lim}. It also includes strategies (albeit not very specific ones) for maintaining or recovering the stock within the reference points. Unlike the Agreement, it does not advise the Contracting Parties to adopt pre-agreed conservation and management actions to be taken when reference points are approached or automatically implemented when they are exceeded. It remains to be seen whether the Fisheries Commission will adopt such strategies when the Framework is to be applied.

The fifteen-year rebuilding plan for the Greenland halibut has been described by NAFO as "an example of forward-looking, precautionary fisheries management."[50] Even if the duty to apply the precautionary approach does not compel states to effect quick recovery to proper levels by adopting moratoria, surely fifteen years is too long a period to merit the term 'precautionary'.

The 2005 Quota Table adopted by the Fisheries Commission includes three previously non-regulated fish stocks.[51] The TACs were adopted after several attempts by Contracting Parties to have them regulated. In 2002, Canada and the USA unsuccessfully proposed the adoption of precautionary

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[50] Press release, annex 11 to the Report of the General Council and its Subsidiary Bodies (STACFAD and STACFAC), 25th Annual Meeting, 15–19 September 2003, in Meeting Proceedings of the General Council and the Fisheries Commission for 2003/2004, p. 30.

[51] Redfish 3O, Thorny Skate in Div. 3LNO and White Hake in 3NO, Report of the Fisheries Commission, item 16.8, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 103.

TACs for two of them, while awaiting advice from the Scientific Council.[52] The Fisheries Commission decided to apply its traditional approach to management, and requested advice from the Scientific Council before adopting any TAC. The European Community maintained in 2004 that there was still not adequate scientific data to warrant adopting TACs for the stocks.[53]

To sum up the practice of the Fisheries Commission: There must be a recommendation of the Scientific Council before it will adopt TACs or other conservation measures. It is interesting to note that the Fisheries Commission does not seem to take into account other information provided by the Scientific Council on the stocks—for example, on the poor quality of the available data.[54] This practice is not consistent with the precautionary approach. When the Fisheries Commission in 2002 and 2003 decided not to regulate new stocks, this was in contravention of a basic element of the approach: "absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures" (Fish Stocks Agreement Art. 6(2)). This implies that even a fishery where there are little scientific data available shall be regulated (Fish Stocks Agreement Art. 6(6)). Neither the fisheries for thorny skate, redfish nor the white hake can be described as new. When the Scientific Council advised there was poor data available on these stocks, a truly 'precautionary approach' of the Fisheries Commission as described in Article 6(6) would have been to adopt the TACs recommended by the Scientific Council and later revise these measures in light of new information provided by the Scientific Council, e.g. increase the TACs if supported by new information.

NAFO has yet to apply the precautionary approach in the management of the fish stocks in the Regulatory Area. The Precautionary Approach Framework points to the right direction, but recent decisions of the Fisheries Commission do not indicate that the Contracting Parties are committed to applying the precautionary approach.

Protection of the Marine Biodiversity

According to the scientists, there have been major structural changes in the ecosystem of which the NAFO Regulatory Area is part—due, among other

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[52] Report of the Fisheries Commission and its Subsidiary Body (STACTIC), 24th Annual Meeting, 16–20 September 2002, item 17.12, in Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, p. 73.

[53] Report of the Working Group on the Management of 3O Redfish, 30–31 March 2004, in Meeting proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 144.

[54] Report of the Fisheries Commission, item 14, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, pp. 98–101.

things, to overfishing.[55] Groundfish (cod, Greenland halibut and flounder) have declined, while small pelagic species and commercially exploited invertebrate species (crab, shrimp) have increased. The Contracting Parties are not required by the NAFO Convention to take into account the effects of fishing on non-target species or the environment as a whole when establishing conservation measures. Any efforts to protect biodiversity have to be inferred from the practice of the Fisheries Commission.

At its meeting in 2005 the Fisheries Commission made some progress, as the Scientific Council was asked to identify areas of marine and ecological significance in the Regulatory Area and the Contracting Parties were asked to provide data on seamounts in the area.[56] However, the above-mentioned revision of the NAFO Convention shall also include more integrated oceans management approaches, which could mean that both the precautionary approach and the ecosystem approach be incorporated into the NAFO Convention.

Consistency between NAFO Measures and Coastal State Measures

When adopting proposals for the conservation of straddling fish stocks in the Regulatory Area, the Fisheries Commission "shall seek to ensure consistency" between its proposals and measures taken by coastal states for the same stock within its fisheries jurisdiction (NAFO Convention Art. XI(3)). In contrast to the parallel Article 7 of the Fish Stocks Agreement on compatibility, this provision does not provide specific explanation of the meaning of the requirement.

Since the Fisheries Commission is instructed to seek to adopt proposals that are consistent with measures already taken by the relevant coastal state, it appears that some priority is given to coastal state interests in the management of straddling fish stocks in the Regulatory Area, over the interests of the other Contracting Parties. If CPs (including the coastal states) are not able to agree on proposals for a straddling stock in the Regulatory Area that are considered consistent with coastal state(s) measures, they still have fulfilled their obligation. The NAFO Convention does not provide procedures for situations where the CPs are unable to agree on what constitute consistent measures, as in the Fish Stocks Agreement.

The lack of indicators of consistency furthers the possibility of disagreement on consistency. One of the causes of conflict between Canada, the

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[55] Report of the Standing Committee on Fisheries Environment, in Scientific Council Reports 2004, pp. 53–54.

[56] See footnote 31 for reference.

major coastal state, and other Contracting Parties of NAFO is the lack of clarity in the NAFO Convention on weighing the interests of coastal state(s) and states fishing on the high seas. Perhaps the best-known dispute occurred in 1995 between Canada and the EC, when the Fisheries Commission was to allocate the TAC for Greenland halibut.[57]

The Fisheries Commission has two different approaches to the conservation and management of straddling fish stocks. The first ensures conservation of straddling stocks over a whole area of distribution, including areas under national jurisdiction, and may be described as *joint conservation*. Joint conservation requires the consent of the relevant coastal states, since the competence of the Fisheries Commission applies to the Regulatory Area (high seas) only. The coastal state may fish on its quotas both in areas under its jurisdiction and in adjacent areas of the high seas. In the second approach, the Fisheries Commission regulates the fisheries for straddling fish stocks in the Regulatory Area; this is a type of *separate conservation*.

Joint Conservation

The Fisheries Commission regulates the fisheries for most of the straddling fish stocks throughout the Grand Banks by setting a joint TAC for each stock, following the practice of its predecessor, ICNAF. However, neither the technical conservation and management measures nor the enforcement measures apply to areas under national fisheries jurisdiction.[58] The joint approach was applied in 2004 when three new fisheries for straddling fish stocks were subjected to regulation, and the Fisheries Commission adopted proposals for TACs and their allocation. The principles of allocation of stocks reflect that these are straddling fish stocks, as there was acceptance for Canada's proposals to set national quotas based on its status as coastal state in respect of the stock and the percentage of biomass within and outside Canada's 200-mile EEZ (zonal attachment).[59] These principles are not found in the NAFO Convention (Art. XI(4)) but are inspired by the criteria in Article 7(2) of the Fish Stocks Agreement, which define the compatibility requirement.

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[57] Report of Special Meeting of the Fisheries Commission, 30 January–1 February 1995, item 6, in Meeting Proceedings of the General Council and the Fisheries Commission for 1995, pp. 15–27.

[58] NAFO Conservation and Management Measures Article 1(1), unless otherwise provided.

[59] Report of the Fisheries Commission Meeting 26th Annual Meeting, September 13–17, 2004, item 16.8 and Annexes 13, 14 and 16 in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005: 103, 144, 145 and 147.

This approach differs from the NAFO Convention and the Fish Stocks Agreement, both of which are based on separate conservation schemes for straddling fish stocks. A possible reason is the power structure of NAFO: The interests of all but one of the Contracting Parties are in high seas fisheries. Canada has no guarantee that its interests will be taken into consideration when the Fisheries Commission adopts its proposal for the straddling fish stocks in the Regulatory Area. Therefore, joint conservation does not necessarily mean a further restriction of the sovereign rights of the coastal state(s) than separate conservation. On the contrary, including the areas under national jurisdiction may give the coastal state a better bargaining position. Joint conservation is also a better solution from a conservation perspective. The prospects of effective implementation of the precautionary approach and protection of biodiversity are better when the stocks are managed as a whole and not separated between the coastal state and the Fisheries Commission.

Separate Conservation

The northern cod stock, perhaps the historically most important stock on the Grand Banks, has been subjected to a moratorium in the Regulatory Area since 1992. The stock has mostly occurred within the Canadian EEZ. In the 1980s the Fisheries Commission adopted proposals banning fishing on the stock in the Regulatory Area, giving Canada exclusive rights over the stock. However, the EC objected to the measures and continued fishing for the stock until 1992. In 1996, the Fisheries Commission adopted new measures, based on a 1993 agreement[60] between Canada and the EC whereby Canada agreed to share the responsibility for the stock with NAFO when the fishery would be resumed.[61] This means that the conservation of the stock on the high seas and in areas under national jurisdiction is separate.

The Fisheries Commission shall obtain annually the decisions of Canada on its TAC, which are to be 95% of the total TAC.[62] The Fisheries Commission may then adopt the TAC for the stock in the Regulatory Area, at 5% of the TAC for the stock. This allocation is based on surveys made in the 1990s on the distribution of the stock.[63]

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[60] Agreement in the form of letters between the European Community and the Government of Canada concerning fisheries relations—Memorandum of Understanding, in *EC Official Journal* L340, 31/12/1993, pp. 3–14.

[61] NAFO Conservation and Enforcement Measures Article 4. These measures expire 31 December 2005.

[62] The Canadian TAC applies to the whole area of distribution, including the adjacent areas of the Regulatory Area, excluding Canadian vessels from the NAFO TAC.

[63] Scientific Council Reports 1998, p. 42.

Consequently, Canada is the competent instance to decide when the high seas fishery may be started again, and the Fisheries Commission cannot adopt any TAC unless Canada has. Another effect is that Canada decides how much may be fished of the stock on the high seas and has main responsibility for conservation of the stock. Although the responsibility is split between Canada and NAFO, the link between the decisions of Canada and the Fisheries Commission ensures coherent conservation of the stock throughout its area of distribution.

This approach is more consistent with the requirements of consistency and compatibility of the NAFO Convention and the Fish Stocks Agreement than NAFO's traditional approach, and gives Canada considerable influence on the conservation and management of straddling fish stocks on the high seas. The allocation between Canada and the state fishing for the stock on the high seas is based on the zonal attachment, which is one of the criteria to be used in ensuring compatible measures of the Fish Stocks Agreement.

There are several reasons for deviating from the traditional pattern of conservation. Probably most important was that the fishery has been vital to the fishing communities of Canada's east coast, compared to the relatively limited distribution of the stock on the high seas. Nor should it be ignored that this agreement between Canada and the members of the Fisheries Commission was reached at a time when there was no fishery for the stock on the high seas. If and when the moratorium is lifted, the question is whether the other Contracting Parties will still be willing to accept the dominant role of Canada.

Allocation of Fishing Rights

The Fisheries Commission is also tasked with allocating fishing rights among the Contracting Parties (Art. XI(4)). The adoption of the Annual Quota Table has been the cause of most of the controversy in the NAFO throughout its existence: 44 of the 47 objections raised between 1994 and 2004 concerned the allocation of fishing rights.

It is at its September meetings that the Fisheries Commission usually adopts the Annual Quota Table, which includes the TACs for most of the regulated stocks and allocations between the Contracting Parties for the following year in national quotas.[64] For some of the stocks, a joint quota (described as 'others') is set, reserved for those Contracting Parties without

[64] The national quotas for Redfish on the Flemish Cap are maximum, as the TAC for the stock is lower than the sum of the quotas. The fisheries will be stopped when the TAC is reached.

individual quotas for the stock.[65] In 2005, such joint quotas were set for six of the nine fish stocks for which there was a TAC; this amounted to only 1.5% of the TACs.

In allocating fishing rights the Fisheries Commission is required by the NAFO Convention to take into account several principles, among them the interests of a Contracting Parties which have traditionally fished in the Regulatory Area, and of the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which has undertaken extensive efforts to ensure the conservation of such stocks. These principles favour Contracting Parties with the longest history of fishery in the area. The purpose was presumably to ensure stability through the continuance of the practice of the predecessor (Applebaum, 1990: 284.) The principles of dependence and contribution to conservation seem to hold priority over traditional fishery since they are to be given special consideration. The general character of these two principles would indicate that Canadian fisheries within areas under national jurisdiction are relevant in applying the principles in the Regulatory Area. They do not provide new Contracting Parties with much chance of being allocated individual quotas.

A study of the practice of the Fisheries Commission confirms that stability has been the prime consideration in the allocation of fishing rights. There have been little or no changes to the allocation of the stocks regulated since 1979.[66] Most of the TACs are allocated between Canada, the EC and Russia.[67]

Three new stocks were added to the Annual Quota Table in 2005. In 2002 NAFO also started regulating the fishery for the stock of redfish migrating from the Regulatory Area of the North-East Atlantic Commission. But most of the TACs for the three fish stocks were allocated between Canada, the EC and Russia. The allocations proposed by Canada were based on criteria such as coastal community dependence and contribution to science and enforce-

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[65] NAFO Conservation and Enforcement Measures Art. 3(3).

[66] The study is based on the Annual Quota Tables between 1979–2004 published in FC Doc. 97/4 Summary of Status of Proposals and Resolutions of NAFO and in the annual Meeting Proceedings of the General Council and the Fisheries Commissions for 1999–2004.

[67] When the Soviet Union, a Contracting Party to the NAFO Convention, disintegrated in 1991, it was succeeded by the Russian Federation. The former Soviet Republics of Estonia, Latvia and Lithuania acceded to the Convention in August 1992. The Fisheries Commission was not able to allocate the quotas of the Soviet Union between Russia and the Baltic parties due to disagreement between these parties. Therefore until 2004 the Fisheries Commission established a 'block quota' to be fished by these parties. In 2003 they agreed to a formulae on allocation of the block quota. When the Baltic parties joined the EC in 2004 and withdrew from NAFO, their fishing rights were allocated to the EC.

ment; catch history, in addition to zonal attachment.[68] The relative weight of these criteria is not known. Fishing opportunities for the redfish were also limited, since most of the TAC was allocated among the NEAFC Contracting Parties that are also NAFO members.

Therefore, there are few prospects for new and existing Fishing Commission members with low or no individual quotas to be allocated substantial fishing rights. Over the years, several of these Contracting Parties have repeatedly voiced their discontent with the policy of the Fisheries Commission.[69] In response, the Fisheries Commission in 1997 established a working group tasked with developing explicit and predictable principles of allocation for existing fisheries, new fisheries and closed fisheries being reopened. Eight years later, however, that Working Group has yet to present its final conclusions to the Fisheries Commission.

On the other hand, the Working Group did prepare the 1999 General Council Resolution to Guide the Expectations of Future New Members with Regard to Fishing Opportunities in the NAFO Regulatory Area.[70] In addition to reiterating the open character of the organization, the resolution warned potential new members that the prospects in the foreseeable future of being allocated fishing rights were small. The Working Group also prepared the Chartering Arrangement, making it possible for vessels of a Contracting Party to fish on the quotas of other Contracting Parties.[71] This arrangement gives vessels of Contracting Parties with small quotas opportunities for a more extensive fishery, but under strict conditions. It may also be questioned whether this arrangement is compatible with the system that fishing rights are obtained on the basis of actual fishery, dependency and other principles of allocation.

It is in particular the USA that has voiced the need to develop the policies of the Fisheries Commission by introducing a broad set of principles applicable to all fish stocks regulated by NAFO.[72] The major quota holders—Canada, the EC and Russia—have stressed the need for stability in the

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[68] See footnote 59 for reference.

[69] E.g. opening statements by the Representative of the United Parties, by the representative of Ukraine and by the Representative of the Republic of Korea, Report of the General Council, Annexes 5–7 in the Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, pp. 28–31.

[70] See footnote 19 for reference.

[71] NAFO Conservation and Enforcement Measures Article 14.

[72] US White Paper on NAFO Allocation, Report of the Working Group on the Allocation of Fishing Rights to the Contracting Parties of NAFO, Annex 9, in the Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, pp. 166–69.

allocation of fishing rights in regulated fisheries.[73] The focus has therefore been on allocation of rights for stocks not currently allocated, meaning unregulated stocks. The work group has focused on making a distinction between qualifying criteria and allocation criteria. To qualify for fishing rights, a state is required to be a member of the Fisheries Commission; additionally, it must provide accurate data on catches, contribute to scientific research and exercise effectively its flag state jurisdiction. Contracting Parties meeting these qualifying criteria are eligible for fishing rights. Allocation of rights is based on conditions such as historical fishing during a representative time span, research contributions, and the needs of coastal communities dependent on fishing on the stock and/or contributions to the conservation and management measures of NAFO. It remains to be seen whether these principles will guide the Fisheries Commission in future allocations. In any case, they do not mean any radical changes to the current policy of NAFO. Although influenced by the Fish Stocks Agreement, the set of general principles leaves the final decisions to the Fisheries Commission. The main challenges to NAFO will come if and when currently closed fisheries are re-opened. Will the newer Contracting Parties—like the USA, Japan, Ukraine and the Republic of Korea—accept continued low shares of quotas?

Allocation of fishing rights is most likely to be among the most contentious issues at future meetings of the Fisheries Commission.

CONTROL, ENFORCEMENT AND COMPLIANCE

General

The individual Contracting Parties are obligated by the NAFO Convention to implement the measures adopted by the Fisheries Commission, including the use of sanctions in respect of violations (Art. XVII). But the Fisheries Commission is also accorded competence on such matters and may adopt proposals for control and enforcement in the Regulatory Area (Art. XI(5)). NAFO is also competent to deal with NCPs whose vessels are involved in activities that hinder NAFO in achieving its objectives (Art. XIX). NAFO's conservation and enforcement measures[74] include a control scheme (chapter II and III), an inspection and surveillance scheme (chapter IV), as well as port state inspection for vessels of Contracting Parties (chapter V). The

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[73] See the opening statements of their representatives at the 2003 meeting of the group, at pp. 159, 160 and 162.

[74] The NAFO Conservation and Enforcement Measures are available at www.nafo.int/fisheries/frames/ regulations.html (accessed October 2005).

conservation and enforcement measures also include a scheme to promote compliance by NCP vessels (chapter VI). NAFO has established two standing committees, one for Contracting Parties (Standing Committee on International Control: STACTIC) and one for Non-Contracting Parties (Standing Committee on Non-Contracting Party Fishing Activities: STACFAC) responsible for implementing these schemes. Their role will be assessed in this subchapter.

Control and Enforcement in Respect of Vessels

Control, Monitoring and Surveillance in the Regulatory Area

To ensure that the Contracting Parties are in control of their fishing vessels, they are to regulate access to the fisheries in the Regulatory Area by the use of licences (Art. 13). They may issue licences only when able to exercise their responsibilities effectively. Parallel to Article 18(2) and (3) of the Fish Stocks Agreement, the provisions also seem to leave it to the individual state— not NAFO—to make this decision.

NAFO's conservation and enforcement measures include requirements for vessels of Contracting Parties: they must record and routinely report catches to the respective Contracting Party, to be forwarded regularly to the NAFO Secretariat (Art. 19, 20 and 22). These requirements are aimed both at ensuring compliance and enabling the Scientific Council to perform stock assessments.

After the 1995 dispute between Canada and the EC, new measures, among them satellite tracking (vessel monitoring system) and an observer programme, were introduced to ensure compliance by vessels. All fishing vessels operating in the Regulatory Area are to be provided with a satellite-monitoring device that reports their position to the respective Contracting Party every second hour (NAFO Conservation and Enforcement Scheme, Art. 21). The Contracting Party is to forward the information to NAFO and to the other CPs. When fishing in the Regulatory Area, every vessel is required to have an independent and neutral NAFO observer onboard (Art. 23). The observer shall report any infringements to inspection vessels present in the Regulatory Area and to NAFO, and file a report to the Contracting Party and to NAFO, including information on catches.

These schemes are more detailed than the Fish Stocks Agreement (Art. 10(h) and Art. 18(3)(f)–(g) and (4)). However, Contracting Parties have expressed concern about the effectiveness of both the reporting obligations

and the observer programme.[75] Catch reports and observer reports do not provide inspectors or port states with the real-time information needed for effective control of vessel compliance. Canada has proposed several amendments to the conservation and enforcement measures, including greater frequency of catch reports and a summary observer report to be transmitted to the Contracting Party at the end of the fishing voyage.[76] However, the Fisheries Commission has not yet considered these proposals.

Inspection at Sea

The Joint Inspection and Surveillance Scheme includes the reciprocal right of Contracting Parties to board and inspect fishing vessels in the Regulatory Area.[77] If the inspectors observe a serious infringement, which includes directed fishing for a stock under moratorium, mesh-size violation and misrecording of catches, the flag state shall ensure that authorized inspectors inspect the vessel within 72 hours (Art. 32). The inspectors shall secure evidence and may remain onboard as long as necessary to provide the authorized inspector with information on the infringement. If justified, the Contracting Party/flag state shall require the vessel to proceed to port for a thorough inspection.

The inspection procedures of NAFO are mostly identical with the procedures of the Fish Stocks Agreement, but there are a few differences. First, there seem to be differing evidentiary requirements for triggering the infringement procedures. The Agreement simply requires inspectors to have 'clear grounds for believing' (Art. 21(8)). By contrast, the NAFO procedures require inspectors to take further actions when they 'observe' the infringements. The most contentious difference concerns the right of the inspecting state to bring the vessel to port. The inspecting state has such rights, according to the procedures of the Agreement—while according to the NAFO procedures it is the flag state/Contracting Party that is competent to require a vessel to proceed to port. Canada has allegedly referred to this discrepancy and has not ruled out bringing vessels of Contracting Parties also State

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[75] Report of the Standing Committee on International Control (STACTIC), 16–19 June 2003, item 5, in Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, pp. 117–18.

[76] Report of the Report of the Standing Committee on International Control (STACTIC) 21–23 June 2004, Annex 6 Proposal for Modifications to the NAFO Monitoring and Control Scheme, in Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, pp. 212–52.

[77] NAFO Conservation and Management Measures, Chapter IV Articles 24–37.

Parties to the Fish Stocks Agreement to port without their prior consent.[78] The Canadian claim raises an important question: may the boarding and inspecting procedures of the Fish Stocks Agreement be applied directly in cases where there is a regional scheme in place? This raises the more general issue of whether State Parties may turn to the procedures of the Fish Stocks Agreement when there is a discrepancy between them and the procedures adopted by the relevant RFMO/A.

Whether Canada may apply the procedures of the Fish Stocks Agreement in respect of vessels of other State Parties and Contracting Parties fishing for straddling stocks on the Grand Banks seems to be addressed by Article 21(2). The provision requires State Parties to adopt procedures through RFMO/As to implement the procedures of the Agreement and prescribes that subsequent boarding, inspection and enforcement is to be conducted in accordance with the RFMO/A procedures. It is only in situations where the RFMO/A has not established its own procedures that the procedures of the Agreement may be applied (Art. 21(3)). A State Party may argue that it may use the procedures of the Agreement where there are inconsistencies. But a correct approach of the Contracting Party would be to have the RFMO/A procedures amended. Unilateral application of the Fish Stocks Agreement could cause conflicts.

NAFO has adopted a separate scheme for vessels of Non-Contracting Parties fishing in the Regulatory Area.[79] Vessels involved in fishing activities (fishing as well as trans-shipment) in the Regulatory Area are assumed to be undermining the effectiveness of the conservation and enforcement measures of NAFO. The inspecting vessels of the Contracting Parties are not competent to board or inspect these fishing vessels, as the flag state is not a CP. Under these circumstances it is the exclusive jurisdiction of the flag state that applies (LOSC Art. 92(1)). The inspecting vessels are to transmit information on such sightings to the Secretariat of NAFO for transmission to the Contracting Parties and the flag state, after having informed the vessel that it has been sighted and assumed to be undermining the conservation and enforcement measures of NAFO. The CPs are not competent to board and inspect these vessels without prior permission. If the vessel gives such consent, the inspectors shall conduct an inspection and report their findings to the Secretariat of NAFO and the flag state.[80]

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[78] The Canadian interpretation was presented by the EC representative in his opening statement at the 2004 General Council Meeting, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 26.

[79] NAFO Conservation and Enforcement Measures, Chapter VI Scheme to Promote Compliance by Non-Contracting Party Vessels Art. 40–44.

[80] These procedures must also be seen in context with measures to be taken in the ports of the Contracting Parties if the vessels intend to land or trans-ship their catches there.

The situation is somewhat different with regard to vessels flying the flag of NCPs that are State Parties to the Fish Stocks Agreement. They have accepted that the RFMO/A procedures—such as the NAFO Joint Enforcement and Surveillance Scheme—for boarding, inspection and enforcement established consistent with the Agreement may be applied in respect of their fishing vessels operating in the Regulatory Area, irrespective of membership of the RFMO/A (Art. 21(1) and (2)). However, the right of boarding and inspection is restricted to those CPs which are State Parties to the UN Fish Stocks Agreement and to NCP vessels fishing for straddling fish stocks on the Grand Banks.[81]

Effective compliance with conservation measures is dependent on an adequate presence of inspectors in the Regulatory Area. The Contracting Parties are not obligated to have inspection vessels present in the Regulatory Area.[82] In practice, inspection vessels are mainly provided by Canada, the EC and sometimes the Faeroe Islands. Both Canada and the EC have requested other Contracting Parties to send inspection vessels to the Regulatory Area, referring to their obligation to ensure compliance.[83]

Inspections in Ports

NAFO has established procedures requiring Contracting Parties to carry out inspections of vessels of both Contracting Parties and Non-Contracting Parties entering their ports after fishing in the Regulatory Area.[84]

The port inspection procedures for vessels of Contracting Parties differ from those applicable to those of Non-Contracting Parties. While the former aim at assisting the Contracting Parties in their implementation and enforce-

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[81] The NCP is obligated to accept to apply the measures established by the NAFO to have access to the fisheries for the regulated stocks (Fish Stocks Agreement Art. 8(4)). If the NCP has accepted, all the NAFO relevant measures apply to the vessel. The situation is more complicated if it has not accepted. Then the NCP are required to refrain from authorizing vessels to fish on the regulated straddling fish stocks (Art. 17(2)). If that is the case and the inspected NCP vessel does not have a license to fish on the stock, it has committed a serious infringement of NAFO's conservation and enforcement measures, giving the inspecting state and the flag state (NCP) further rights and obligations. But if the NCP has issued licenses to fish on straddling fish stocks regulated by NAFO in violation of its obligation not to, it is more natural treat the illegal fishery as a matter between State Parties than a vessel infringing the conservation and management measures of the RFMO.

[82] Contracting Parties with more than 15 vessels present in the Regulatory Area are required to have an inspector in the Regulatory Area or a competent authority present in one of the Contracting Parties adjacent to the Convention Area to respond to any notice of infringements (Art. 24(7)).

[83] Report of the Fisheries Commission, item 12, in Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, p. 86.

[84] NAFO Conservation and Enforcement Measures, Chapter V, Inspections in Port.

ment of the conservation and management measures, the Non-Contracting Party Scheme requires the port state to enforce the conservation measures. This is in contrast to the Fish Stocks Agreement, which does not accord the RFMO/As a specific role in port state inspection but leaves it to the individual state. But if port state enforcement is to be effective, there must be co-ordination between states, and here the RFMO/As play an important role.

A Contracting Party is required to inspect all CP vessels landing their catches in one of its ports (Art. 38). The primary objective of the port inspection is to verify the species and the quantities caught by the vessel (Art. 38(1)), to crosscheck findings with logbooks, catch reports and inspection reports, and to verify the mesh size of nets on board and the size of fish on board. All this information is to be included in a Port Inspection Report, which is to be transmitted on request to the relevant Contracting Party. A copy of the report shall always be transmitted to NAFO (Art. 39). Interestingly, the procedure does not include measures to be taken by the port state if infringements are observed during inspection, as is the case with inspections at sea. Port inspection appears to have a supplementary role, aimed at verifying important information from the fishing activities of the vessels. Possible infringements are to be observed through the other control mechanisms applied during the fishery, like satellite tracking, the observer programme and inspections at sea. But the procedure does not take into consideration that infringements may first be observed during port state inspection. If the port state had the same competence as the inspecting state at sea, there would be more pressure on the flag state to comply with its obligation to react to infringements.

In recent years there has been an increasing focus within NAFO on the effectiveness of its control and surveillance measures. Both the EC[85] and Canada[86] have proposed amendments to the procedure requiring the vessels to give notice in advance of their arrival, enabling the port state to obtain information from the observer, inspections at sea and satellite tracking before starting inspection These changes will provide better coordination between the different enforcement measures. But the proposals do not include an obligation of the port state to transmit its findings automatically to the flag state.

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[85] Report of the Standing Committee on International Control (STACTIC) 16–19 June 2003 Copenhagen, Denmark, Annex 7. Proposal by the European Community with a View to Improving the Control Scheme of NAFO, in Meeting Proceedings of the General Council and the Fisheries Commission, p. 216.

[86] Report of the Standing Committee on International Control (STACTIC), 21–23 June 2004, Annex 6. Proposal for Modifications to the NAFO Monitoring and Control Scheme, in Meeting Proceedings of the General Council and the Fisheries Commission for 2003/2004, pp. 212–51.

The Non-Contracting Party Scheme also includes action to be taken by the Contracting Parties when vessels arrive in their ports (Art. 43). Vessels that, according to reports of inspection vessels have been engaged in fishing activities in the Regulatory Area shall be inspected when calling at one of their ports. The port state shall ban any landing or trans-shipment if the inspection reveals that the vessel has catches of regulated stocks on board, unless it can document that the catches were taken outside the Regulatory Area or that it has complied with the NAFO measures. The burden of proof for compliance with NAFO measures is, in such a case, on the vessel. It is a consequence of the lack of competence of the Contracting Parties to board and inspect the vessels in the Regulatory Area. A ban on landing or trans-shipment of catches may be an effective way of preventing NCP vessels from fishing in the Regulatory Area, However, the measures cannot be effective without the obligation of Contracting Parties not to allow their vessels to receive trans-shipments from Non-Contracting Parties engaging in fishing activities in the Regulatory Area (Art. 41).

Other types of Enforcement in Respect of Vessels

The above-mentioned measures combined with reduced fishing opportunities have lessened the fishing activities of Non-Contracting Parties in recent years.[87] The EC has introduced proposals on further measures to prevent this fishery, which were adopted at the 2005 annual meeting of NAFO.[88] NAFO will, like NEAFC, establish a list of Non-Contracting Party vessels fishing in the Regulatory Area of NAFO.[89] The Contracting Parties are required to take further enforcement measures in respect of the listed vessels, including prohibition of landing and trans-shipment of catches, restriction on assistance from vessels of the Contracting Parties (e.g. supplies and fuel), refusal to be granted license to fish in their EEZ, and to re-flag to any of the Contracting Parties. The approach of the measures introduced must be assessed in light of the inadequate measures available under the Law of the Sea still based on the principle of exclusive flag state jurisdiction. But still, they are confirming to the obligations of the Fish Stocks Agreement to take measures to deter vessels from undermining the effectiveness of the RFMO/A conservation measures (Art. 17(4), 20(7) and 33(2)).

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[87] Reports suggest between six and eight vessels fishing in the Regulatory Area mainly for the oceanic redfish stock shared with NEAFC.

[88] See footnote 31 for reference.

[89] Report of the Standing Committee on Fishing Activities of Non-Contracting Parties in the Regulatory Area (STACFAC), Annex 6 Revised EU proposal, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 77.

RFMO/A Enforcement

It is the flag state which is responsible for ensuring that vessels flying its flag comply with its international legal obligations. It is obliged to exercise its jurisdiction by adopting adequate legislation, investigating infringements and taking administrative and judicial measures against the vessels.[90] The right of other Contracting Parties to enforce the NAFO conservation and management measures are limited to act as enforcement agents for the flag state/Contracting Party. So far the procedures of NAFO are parallel to the provisions of the Fish Stocks Agreement enumerating the responsibilities of the flag state.

In the provisions of the Agreement on control and enforcement, the focus is on the rights of member states and the obligations of flag states. The role of the RFMO/As accorded by the Agreement in ensuring that their member states exercise their rights and comply with their obligations is not clear. The Contracting Parties of the NAFO Convention are required to report to NAFO on the actions they have taken to enforce the conservation measures and sanction infringements (NAFO Convention Art. XVII). The organization has developed this function by introducing detailed reporting obligations and the assessments of these reports made by the organs of the organizations.

There are three main types of reports a Contracting Party is to dispatch to NAFO on a regular basis: reports on the catches, on the inspections carried out and on the enforcement and sanctions taken in respect of its vessels. The Contracting Parties shall report monthly on the catches taken by vessels flying their flags.[91] These reports are meant to serve scientific purposes but also to constrain the fisheries of the Contracting Parties. The CPs are to make two types of report on the inspections carried out by their inspectors: a report on each infringement observed, and a monthly list of the vessels inspected by the Contracting Party.[92]

The flag state/CP is to report biannually on the actions taken in respect of infringements reported by other Contracting Parties, indicating the status of the case and the penalties imposed.[93] Infringements shall continue to be listed in the reports until they are concluded; the Contracting Party is also required to explain why it has not yet taken action. These reports add transparency to the behaviour of Contracting Parties and may in themselves serve to enforce the obligations of the Contracting Party.

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[90] NAFO Convention Art. XVII and NAFO Conservation and Enforcement Measures Art. 13(3) and Art. 33(1) and (5)).

[91] NAFO Conservation and Enforcement Measures Art. 20.

[92] Ibid., Art. 30(4) and (5) and Art. 32(9)).

[93] Ibid., Art. 35.

The Standing Committee on International Control (STACTIC), a subsidiary body of the Fisheries Commission, is accorded a key role in assessing the reports of the Contracting Parties. Among its functions is to review and evaluate the efficiency of the conservation and enforcement measures as well as the compliance of the Contracting Parties with these measures.[94] STACTIC may make recommendations to the Fisheries Commission on these issues. It is also tasked, assisted by the Secretariat, with producing an annual report on compliance by all Contracting States. The first Annual Compliance Review was adopted by the Fisheries Commission at its meeting in 2004.[95] With the acceptance of the Fisheries Commission, STACTIC has assumed a non-confrontational approach to assessing the performance of the Contracting Parties, who are given the opportunity to update their information after the expiry of time limits and committing themselves to pursue investigations where there is a lack of information on the status of cited infringements. This approach is not surprising, since STACTIC is a representative body. The question is how effective this is in achieving a higher level of compliance.

In NAFO there has not been much focus on the use of sanctions in respect of Contracting Parties failing to comply with their obligations. NAFO is probably competent according to international law to deprive Contracting Parties of rights derived from the Convention (e.g. voting rights) if they are in material breach of their obligations (Schermers & Blokkers, 1995: 1453–54). However, the organization is unlikely to apply such measures, since that would create conflict and be regarded as non-productive. The listing of vessels and states may in itself have coercive effect. More likely is the use of allocation of fishing rights as a sanction. NAFO's conservation and enforcement measures already provide for adjustments in subsequent years if a CP has exceeded its quotas, ensuring that it will not maintain the benefits of the non-compliance (Art. 8(3) and (4)).

Another means of dealing with non-compliance is through the use of dispute settlement procedures, which is reserved for disputes between states. The alleged non-compliance of a Contracting Party therefore has to be addressed by another Contracting Party and not NAFO itself. But as the NAFO Convention does not include dispute settlement procedures Contracting Parties may resort to the procedures of the Fish Stocks Agreement or LOSC, provided that the CPs involved are parties to either.

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[94] Rules of Procedure for the General Council, the Fisheries Commission and the Scientific Council, Rules of Procedure for the Fisheries Commission, Rule 5.1.

[95] Report of the Fisheries Commission, 26th Annual Meeting, September 13–17, 2004, item 11 and Annex 5. Annual Compliance Review—2003, in Meeting Proceedings of the General Council and the Fisheries Commission, p. 96 and pp. 122–27.

There is a growing debate within NAFO on the use of sanctions against Contracting Parties in cases of non-compliance. The focus is on the imposition of trade-restrictive measures like a ban on imports of fish from the Contracting Party.[96] This comes after NAFO started reviewing the Scheme to Promote Compliance by Non-Contracting Party Vessels, which introduces the use of trade-related measures against NCPs not responding to a NAFO request to address the fishing activities of their vessels in the Regulatory Area.[97] The argument is that the same measures must be applied in respect of Contracting Parties, in order to be in compliance with the non-discriminatory requirements of the WTO agreements.[98] These proposals reflect a new approach, one that deviates from the traditional means available. It remains to be seen whether NAFO will amend its conservation and enforcement measures accordingly and if the Contracting Parties are willing to apply these measures.

In addition to taking measures in respect of their vessels, NAFO also approaches Non-Contracting Parties. The President of NAFO regularly sends letters to NCPs whose vessels have been sighted fishing in the Regulatory Area, requesting them to investigate the vessels and prevent them from fishing in the Regulatory Area.[99] The effectiveness of these letters alone is questionable, but followed by diplomatic contact of Contracting Parties, they may have an effect. Such a combined approach has led Non-Contracting Parties to cancel the registration of the sighted vessels.[100]

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[96] Report of Joint STACFAC-STACTIC Meeting 17–18 June 2004, item 5 and Annex 3, in Meeting Proceedings of the General Council and the Fisheries Commission, pp. 178 and 184.

[97] Report of the Standing Committee on Fishing Activities of Non-Contracting Parties in the Regulatory Area (STACFAC), item 11 and Annex 6, in Meeting Proceedings of the General Council and the Fisheries Commission for 2003/2004, pp. 66–67 and pp. 77–80.

[98] As previous footnote, p. 67.

[99] See e.g. Report of the General Council Meeting, item 14 and Annex 3 Letter to Dominica, in Meeting Proceedings of the General Council and Fisheries Commission September 2004–August 2005, pp. 5–6 and 74.

[100] See e.g. 2005 NAFO Annual Meeting Press Release and Report of the Standing Committee on Fishing Activities of Non-Contracting Parties in the Regulatory Area (STACFAC), item 7, in Meeting Proceedings of the General Council and the Fisheries Commission September 2004–August 2005, p. 69.

CONCLUSIONS

In a report to the Canadian Minister of Fisheries and Oceans, an advisory panel recommended establishing a new RFMO/A to replace NAFO.[101] The panel was not convinced that the present membership of NAFO is willing or able to reform the organization to reflect the developments of recent years. However, NAFO is in many respects is one of the leading RFMO/As—as reflected by its elaborate organization, systems and schemes. But another conclusion to be drawn from the analysis is that NAFO's standing may be threatened by its lack of responses to recent developments.

In the 1990s, NAFO initiated several processes to reform the organization and its policy, but progress has been slow. Except for the Precautionary Approach Framework, the organization has not been able to adopt and implement substantial changes. This applies to dispute settlement procedures/ decision-making procedures, allocation of fishing rights and the control and enforcement schemes. Even if there is agreement on the precautionary approach, it will still take some time before the organization actually implements the precautionary approach, and NAFO is still a long way from protecting biological diversity. A main reason for this slow process is the various disagreements among the Contracting Parties on the directions to take. Another important reason may be that the Contracting Parties have not felt the urgency as long as most of the relevant fish stocks are still subjected to moratoria.

However, the developments at the 2005 meetings of the General Council and Fisheries Commission suggest that there may be a new momentum in the reform process. NAFO has initiated a total review of the organization by establishing a working group, which is to present its recommendations at the 2006 annual meetings. This indicates that the development and progress of the organization depends on consensus between the two major actors: Canada and the EC.

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[101] Breaking New Ground. An Action Plan for Rebuilding the Grand Banks Fisheries. Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic, from www.dfo-mpo.gc.ca/overfishing-surpeche/documents/advisory_e.htm (accessed September 2005)).

APPENDIX 1: STOCKS MANAGED THROUGH NAFO

Straddling fish stocks

- American plaice (*Hippoglossoides platessoides*), div. 3LNO
- Capelin (*Mallotus villosus*), div. 3NO
- Cod (*Gadus morhua*), div. 3NO
- Cod (*Gadus morhua)*, div. 3L
- Greenland halibut (*Reinhardtius hippoglossoides*), 3LMNO
- Redfish (*Sebastes mentella* and *Sebastes fasciatus*), div. 3LN
- Redfish (*Sebastes mentella* and *Sebastes fasciatus*), div. 3O
- Redfish (*Sebastes mentella* and *Sebastes fasciatus*), sub-area 2, div. 1F and 3K
- Shrimp (*Pandalus borealis*), div. 3LN
- Shrimp (*Pandalus borealis*), div. 3O
- Squid *Illex* (*Illex illecebrosus*), sub-areas 3 and 4
- Thorny skate (*Amblyraja radiata*), div. 3LNO
- White hake (*Urophycis tenuis*), div. 3NO
- Witch flounder (*Glyptocephalus cynoglossus*), div. 3L
- Witch flounder (*Glyptocephalus cynoglossus*), div. 3NO
- Yellowtail flounder (*Limanda ferruginea*), div. 3LNO

Discrete high seas fish stocks

- American plaice (*Hippoglossoides platessoides*), div. 3M
- Cod (*Gadus morhua*), div. 3M
- Redfish (*Sebastes mentella, Sebastes marinus, Sebastes fasciatus*), div. 3M
- Shrimp (*Pandalus borealis*), div. 3M

CHAPTER FOUR

THE NORTH-EAST ATLANTIC FISHERIES COMMISSION (NEAFC)

INTRODUCTION

Background and Structure

The North-East Atlantic Fisheries Commission (hereafter 'NEAFC' or 'the Fisheries Commission') was established through the 1980 Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries (Art. 3(1)).[1] NEAFC was restructured following the extension of the fisheries jurisdiction of coastal state parties to 200 nautical miles in the mid-1970s. The Fisheries Commission became operational in 1982, but did not start to function properly until the mid-1990s, when the Contracting Parties agreed to regulate the fisheries for several straddling stocks in the high seas parts of the Convention Area. The adoption of the Fish Stocks Agreement was probably one of the reasons for the revitalization of the NEAFC as an organization.[2] In 1998, NEAFC was set up with a separate secretariat to manage all information on catches, control, surveillance and enforcement, following the adoption of conservation measures and schemes on control and enforcement and on Non-Contracting Parties.

From 2006, following the accession of Estonia and Poland to the European Union, there will be five Contracting Parties (CPs) to the NEAFC Convention.[3] They are all state parties to the Fish Stocks Agreement and LOSC.[4]

The Fisheries Commission is an intergovernmental organization with separate legal personality (Art. 3(2)) and a secretariat with headquarters in London. It has a broadly described objective, which is to carry out its obligations in the "interests of the conservation and optimum utilization of the fisheries resources of the Convention Area." The Fisheries Commission does not have

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[1] Official Journal of the European Community 1981 L 127 p. 22, available at www.neafc.org/footable/docs/Convention.pdf (accessed October 2005).

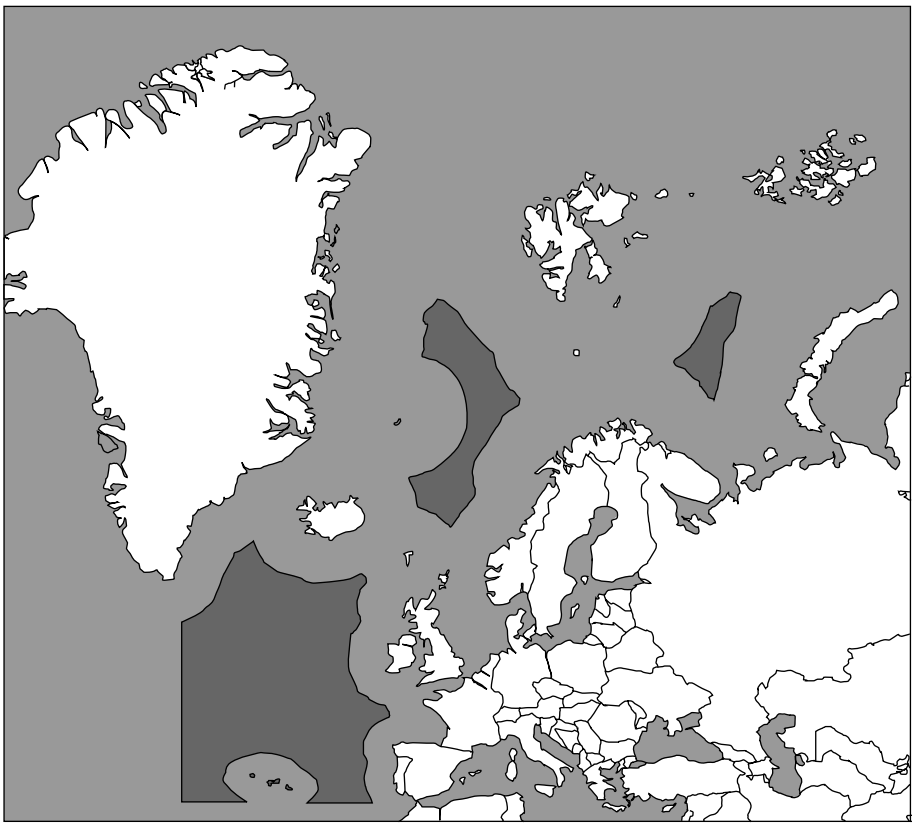
[2] For further discussion on the reasons for the revival of NEAFC, see Churchill (2001: 239–40.

[3] Denmark, (in respect of Greenland and Faeroe Islands), the European Community, Iceland, Norway, and the Russian Federation: www.neafc.org/about/about_neafc_basics.htm (accessed September 2005). Estonia and Poland have denounced the NEAFC Convention following their EU accession, effective as of 15 July and 21 April 2006, respectively.

[4] Denmark, the European Community, Iceland, Norway and the Russian Federation: www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

a separate scientific subsidiary body but is provided with scientific advice by the International Council for the Exploration of the Seas (ICES).[5]

Map 4.1 NEAFC Convention Area



Source: NEAFC Secretariat

The Convention Area includes the northeast Atlantic west to Greenland, south to the Iberian Peninsula and east and north to the Barents Sea (Art. 1(2)). The Fisheries Commission may adopt recommendations for all fishery resources of the Convention Area, except for large sea mammals,[6] sedentary species,[7] highly migratory species[8] and anadromous stocks[9] (Art. 1(2)). For

[5] NEAFC Convention Art. 14.

[6] Sea mammals are managed through the International Whaling Commission: www.iwcoffice.org.

[7] Sedentary species are subject to the sovereign rights of the coastal state (LOSC Art. 77).

[8] Highly migratory species are regulated through the International Commission for the Conservation of Atlantic Tunas (ICCAT), www.iccat.es.

the fisheries within areas under national jurisdiction, it may adopt recommendations only when requested by the relevant CP and after receiving its affirmative vote (Art. 6(1)).

In effect, the regulatory authority of NEAFC involves three areas of the high seas in the northeast Atlantic: the Reykjanes Ridge–Azores area, the 'Doughnut Hole' of the Norwegian Sea[10] and the Barents Sea 'Loophole'.

ICES[11] provides NEAFC with scientific advice on five straddling fish stocks (redfish, herring, blue whiting and mackerel) and several deep-sea species. The catches of the five stocks in the Convention Area were in 2002 about 3 million tons, of which 20% were taken on the high seas.[12] Both the blue whiting (*Micromesistius poutassou*)[13] and herring stocks (*Clupea harengus)*[14] are considered to have full reproductive capacity in the terms of ICES. But ICES has expressed concern for the future status of the blue whiting, as the catches have increased sharply in recent years, reaching 2.4 million tons in 2003 and 2004. This rise was enabled by good recruitment in some years. But if recruitment fails, the biomass will decline. ICES considers the mackerel stock mackerel (*Scomber scombrus*) as being harvested unsustainably; due *inter alia* to catches exceeding TACs.[15] Surveys in 2003 suggest that the spawning biomass of redfish *(Sebastes mentella)*[16] was at 5% of the level in the early 1990s.[17] The estimated catch rate of 20% far surpasses the recommended 5%. The status of the Rockall haddock (*Melanogrammus aeglefin-*

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[9] Anadromous species are managed through the North Atlantic Salmon Conservation Organization (NASCO), www.nasco.int.

[10] Also known as the 'Banana Hole' (Churchill, 2001: 236).

[11] See e.g., Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission 8–12 November 2004, item 6, p. 8.

[12] The figures is based on statistics provided by NEAFC, available at www.neafc.org/fisheries/index.htm (accessed October 2005).

[13] ICES Advice, Vol. 9, October 2005, 4.4 Blue whiting combined stock (Subareas I IX, XII, and XIV), pp. 52–64, available at www.ices.dk/committe/acfm/comwork/report/2005/oct/whg-comb.pdf (accessed October 2005).

[14] ICES Advice, Vol. 9, October 2005, 1.4.5 Norwegian spring-spawning herring, pp.65–72, available at www.ices.dk/committe/acfm/comwork/report/2005/oct/her-noss.pdf (accessed October 2005).

[15] ICES Advice, Vol. 9, October 2005, 1.4.2 Northeast Atlantic Mackerel (combined Southern, Western and North Sea spawning components), pp. 31–41, available at www.ices.dk/committe/acfm/comwork/report/2005/oct/mac-nea.pdf (accessed October 2005).

[16] There is uncertainty as to whether there are two components or stocks of redfish: an oceanic *S.mentella* living in the upper layers of the Irminger sea and deep-sea pelagic *S.mentella* living at greater depths.

[17] ICES Advice 2004, ACFM/ACE Report, para. 4.2.5.d Pelagic *Sebastes mentella* in the Irminger Sea and adjacent areas (Subareas V, VI, XII, and XIV and the NAFO Subareas 1+2), pp. 2-139–2-150 available at www.ices.dk/products/icesadvice/Book2Part%201.pdf (accessed October 2005).

us) is uncertain, due to incomplete data.[18] There is lack of information and knowledge about the deep-sea species and ICES is unable to give specific advice.[19] The advice is based on the general biology of these species, which are especially vulnerable due to low productivity. ICES considers most of them as exploited unsustainably, and recommends that there should not be direct fishery for some and a reduction in others. New fisheries should be permitted only followed by programmes to collect data.

In 2005 there were four NEAFC recommendations in force: a TAC for the mackerel stock, a closed area in the Rockall haddock fishery, effort limits in the fisheries directed at deep-sea species[20] and a ban on bottom trawling in five parts of the Reykjanes Ridge–Azores area.[21]

THE RIGHT AND OBLIGATION TO COOPERATE

Membership

Membership is primarily reserved for the signatories (meaning the CPs to the preceding Fisheries Commission). But any state may accede to the NEAFC Convention and become a member of the Fisheries Commission, provided its application for accession is approved by three-fourths of all the state parties (Art. 20(4)). There are no substantive conditions. To date, however, the CPs have approved the application of one only state: Estonia became a Contracting Party to the NEAFC Convention and a member of the Fisheries Commission in 2003. Several NCPs have signalled their interest in joining NEAFC. Since it is left to the discretion of the individual CP to decide on membership, NEAFC cannot be described as an open RFMO/A. Within NEAFC, opinion has differed on the openness of the organization. The EC has argued that the requirements are too restrictive and not consistent with recent developments in international law whereby the obligation to cooperate necessitates the possibility of membership in an RFMO/A.[22] Iceland has claimed that all states with 'real interest' may become members, viewing

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[18] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 5(e) Rockall haddock.

[19] Ibid., item 5(f) Deep-Sea Species.

[20] These 25 species are listed in Annex I.B to the NEAFC Scheme of Control and Enforcement; they include cusk (*Brosme brosme*), orange roughy (*Hoplostethus atlanticus*), blue ling (*Molva dypterigia*), available at www.neafc.org/measures/docs/scheme-2005.pdf (accessed October 2005).

[21] Reference as in footnote 18, items 7 and 14, reproduced at www.neafc.org/measures/index.htm (accessed October 2005).

[22] Report of the Meeting of the Working Group on the Future of the North-East Atlantic Fisheries Commission, 8–9 April 2002, p. 3.

this not as a problem of the Convention *per se,* but as a potential problem in the practice of the Convention.

The restricted right of new entrants to NEAFC membership has led to the adoption of a scheme prescribing detailed rules and procedures for according a formalized status of 'Co-operating Non-Contracting Parties'.[23] A Non-Contracting Party (NCP) must apply for this status on an annual basis; further, it is required to agree explicitly to respect and apply the NEAFC conservation measures and to take action to ensure compliance by its vessels by implementing most of the NEAFC Scheme of Control and Enforcement.[24] This includes the duty to perform inspections at sea and in port, to implement satellite tracking of the vessels and to require its vessels to report to the NEAFC Secretariat on catches in the same format as the vessels of CPs. When accorded status as Co-operating Non-Contracting Parties, such states may fish on the 'cooperating quota' established for some of the regulated fish stocks.[25] NEAFC has usually adopted cooperating quotas in the redfish and mackerel fisheries.[26] The Fisheries Commission has yet to accord the formal status of Co-operating Non-Contracting Party. The reason may be the limited fishing opportunities available for NCPs: in 2005, there were no co-operating quotas available.

The NEAFC approach to membership is consistent with the Fish Stocks Agreement as far as there exists no unconditional right to membership in an RFMO/A.[27] However, it is a problem that no material requirements are stipulated in the Convention as to developing 'real interest' and directing the CPs in taking their decision. Thus, a state may risk being unjustifiably refused NEAFC membership. Then the alternative for the state may be to make use of the dispute settlement procedures of the Fish Stocks Agreement in respect of the CPs to be accorded membership.[28] A better way of handling membership issues would be to refer the decision to the Fisheries Commission, requiring it to apply specified criteria. Such a process would be more transparent and ensure a fairer treatment of prospective members.

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[23] Scheme to Promote Compliance by Non-Contracting Party Vessels with Recommendations established by NEAFC (Art. 10), www.neafc.org/measures/docs/NCPscheme-2005.pdf (accessed October 2005).

[24] The NEAFC Control and Enforcement Scheme can be downloaded from www.neafc.org/measures/docs/scheme-2005.pdf (accessed October 2005).

[25] See www.neafc.org/measures/cooperation-quota.htm (accessed October 2005).

[26] Report of the 22nd Annual Meeting of the North-East Atlantic Fisheries Commission 10–14 November 2003, Annex I—NEAFC Recommendations.

[27] Likewise Molenaar (2003: 465), who argues that approval may be regarded as a method for ascertaining the presence of real interests.

[28] Depending on whether the state in question is a party to the Fish Stocks Agreement.

The approach to those NCPs that are either not qualified or not willing to join NEAFC is also consistent with the provisions of the Fish Stocks Agreement on the non-members of RFMO/As: NEAFC has established the same link between the legal commitment of NCPs to apply the conservation measures and fulfil other obligations of the flag state, which could be described as fulfilling the obligation to cooperate, with the right of access to regulated high seas fisheries.

The strategy of NEAFC in respect of NCPs differs somewhat from that of NAFO. By establishing a formalized cooperation with these states, NEAFC seems to be in a better position to exert effective control of the high seas fisheries under its purview. Although NAFO is an open RFMO, not all states are able or willing to cooperate by joining. The NEAFC strategy offers them a legitimate way of cooperating and the possibility of addressing the CPs as observers at the annual meetings of the Fisheries Commission. This strategy also assists NEAFC in identifying NCPs that have no interest or ability to cooperate, thereby enabling the organization and its members to direct actions to prevent such vessels from fishing. The success of the NEAFC strategy depends on what fishing opportunities it can offer the NCPs. Small cooperation quotas may tempt them not to apply for cooperating NCP status—whereas overly generous cooperating quotas may attract too many states. NEAFC has to walk the fine line between success and failure, but is in a better position than NAFO, with healthier fish stocks.

Decision-making Procedures

The Fisheries Commission adopts conservation, control and enforcement measures by two-thirds majority (Arts. 5(1), 8(1), 9(1) and Art. 3(9)).[29] Each CP has one vote in the Commission. With all CPs present and voting, a proposal needs four votes to be carried.

These decisions have status as recommendations. The use of the non-binding concept reflects that the decisions do not enter into force and become legally binding on CPs until the expiry of periods of objection (Art. 12(1)). A recommendation is not binding on any CPs that have used their right to object within the prescribed periods (Art. 12(2)).

The small NEAFC membership obviously has consequences for the decision-making of the organization, almost requiring unanimity for recommendations to be adopted. As consequence, the most conservative of the CPs may have the final say in developing a recommendation. But it is also im-

[29] The majority is required among the state parties voting, and with a quorum of 2/3 of Contracting Parties (Art. 3(9)).

portant for effective implementation of the recommendations that the CPs are in agreement.

In 2005 only one of the important straddling fish stocks (mackerel) was subjected to conservation measures. NEAFC was not in a position to adopt conservation measures for the herring, redfish and blue whiting stocks. There were several proposals for redfish conservation measures, meaning that none of them received the required majority,[30] and the organization has yet to adopt conservation measures for the blue whiting.[31] Consequently, NEAFC cannot be described as an effective RFMO. However, this lack of effectiveness is not only due to the decision-making procedures. The straddling fish stocks in question are also shared between two or more of the adjacent coastal states/CPs. NEAFC has usually not adopted recommendations for a stock unless the relevant coastal states have agreed on the TAC and its allocation for the same stocks in areas under national jurisdiction. The rationale is that regulating the high seas fisheries for a stock where no coordinated measures have been taken by the coastal states has little or no effect. Moreover, it should be noted that these coastal states are also CPs of NEAFC. If they are not able to agree on the fisheries in areas under national jurisdiction, then neither are they likely to agree on measures for the same stocks in adjacent areas of the high seas.[32]

When NEAFC has been successful in adopting recommendations, CPs have often used their right to object. Iceland and Russia have regularly objected to the conservation measures for mackerel.[33] Although they have entered into force, these conservation measures have not been effectively implemented as they are not applicable to all CPs.

Discussions within NEAFC on strengthening its decision-making procedures have focused neither on reviewing the qualified majority requirement nor on the right to object. This is hardly surprising, since these represent the very elements of an intergovernmental and not a supranational organization, which most CPs would oppose. The focus of NEAFC, inspired by the proposals discussed in NAFO, has been on developing its own dispute settlement procedures.[34] At its annual meeting in 2001, NEAFC agreed that the EC

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[30] Report of the 23rd Annual Meeting of the Northeast Atlantic Fisheries Commission 8–12 November 2004, item 7(a) Oceanic-Type Redfish.

[31] Reference as previous footnote, item 7(b) Blue whiting.

[32] If the coastal states are not able to agree on quotas for the fisheries in their EEZs, it is not likely that there will be any quota share left for the high seas fishery.

[33] Reference as footnote 30, item 7(d) mackerel.

[34] Report of the Working Group on the Future of NEAFC London 24–26 April 2001, item 5.

should formally propose[35] to amend the NEAFC Convention by including an article 'importing' the procedures of Part XV of LOSC.[36]

The EC proposal contained a second article requiring CPs to state their reasons for objecting to a recommendation and to declare their intentions following the objection, including alternative conservation measures planned or already taken. The purpose was partly to restrict the use of objections and to establish a basis for a legal dispute and consequently the use of dispute resolution procedures. The proposed procedures also included the use of an optional ad hoc panel procedure to be applied in disputes over NEAFC recommendations, so as to ensure quick resolution without involving the complex procedures of LOSC. If any of the parties were not satisfied with the recommendations of the panel, they could then refer the dispute to the compulsory procedures. The proposal implied that the dispute settlement procedures overlap with the decision-making procedures. States might still object to recommendations, but the effect of the objection would be limited when its legality is challenged. The ad hoc panel procedure could prevent situations where objecting CPs might unilaterally set their own measures for stocks regulated by NEAFC by resolving the dispute between these CPs with the others.

At the 2002 annual meeting of NEAFC, Russia opposed the EC proposal and it was not put to a vote.[37] However, a compromise was later reached, by according the Fisheries Commission the legal basis for making recommendations on dispute settlement procedures. This was formally adopted by NEAFC in November 2004,[38] but the amendment has not yet entered into force.[39]

The text of the new Article 18_{bis} is as follows: "The Commission shall make recommendations establishing procedures for the settlement of disputes arising under this Convention." At the same time as the amendment

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[35] A proposal submitted by a CP for the amendment of the NEAFC Convention must be approved by the Fisheries Commission by a 3/5 majority of all Contracting Parties before it may be transmitted to each CP for ratification (Art. 19(2)).

[36] Report of the 20th Annual Meeting of NEAFC 5–9 November 2001, item 12(l). At an extraordinary meeting in 2002, the Fisheries Commission adopted the rules concerning panel procedure to become effective when the Convention was amended: Report of the Extraordinary Meeting of the North-East Atlantic Fisheries Commission 10–12 April 2002, item 6(a) and Annex C.

[37] Report of the 21st Annual Meeting of the North-East Atlantic Fisheries Commission, 12–15 November 2002, item 12 Amendment of the Convention.

[38] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 12 and Annex K.

[39] The procedures for the entry into force of an amendment are described in Art. 19(3) and (4)).

was adopted, NEAFC approved two recommendations[40] to be applied when Article 18_{bis} enters into force. The first recommendation concerns the statement Contracting Parties are to give on reasons for objection and the alternative measures they intend to take or have taken. The second recommendation concerns the dispute settlement procedures.

The two recommendations include legal concepts such as 'shall', 'compulsory procedures' and 'binding decisions', which may suggest they introduce obligatory dispute settlement procedures in NEAFC. But this is not an obvious conclusion. For one thing, these procedures are not incorporated into the Convention, as would be normal if they really were meant to be binding on the CPs. However, when Article 18_{bis} directs the Fisheries Commission to establish dispute settlement procedures, this is a strong indication of a delegation of authority to establish binding procedures. The Fisheries Commission is to establish these procedures in the form of 'recommendations', which are normally understood as being non-binding. However, the concept is used in Article 12(1) for legally binding decisions.

The question is whether recommendations adopted under Article 18_{bis} are regulated by this provision. If they are not, the dispute settlement procedures of NEAFC will be non-binding. The other paragraphs of Article 12 may indicate that paragraph 1 does not apply to such recommendations: CPs have a right according to Article 12(2)–(4) to object to recommendations adopted under Articles 5, 6, 8 and 9. When reading Article 12(1) together with these paragraphs it may be interpreted as to apply only to these recommendations and not to the recommendations adopted under Article 18_{bis} or other provisions. The alternative interpretation is that Article 12(1) has a wider application than Article 12(2)–(4) and may include recommendations adopted under Article 18_{bis}. The paragraphs 2–4 may be interpreted as confined to defining those recommendations to which CPs may object. Thus, the two recommendations adopted under Article 18_{bis} may not be objected to and will be directly binding on all CPs.

It is meaningful to make such distinction between the two types of recommendations. Since the recommendations on dispute settlement procedures are to include general obligations, there seems to be little sense in subjecting them to a right of objection whereby they would be applicable to only some of the CPs.

The problem of the application of Article 12(1) is new since Article 18_{bis} is the first and only provision entailing the adoption of recommendations which are not referred to in Article 12(2)–(4). Of course this could be an oversight by the CPs when drafting the amendment. It could also mean that

[40] See footnote 38.

these recommendations were not to be subjected to objections but a recommendation under Article 12(1).

Amending the NEAFC Convention sends a very strong signal that the recommendations adopted under Article 18_{bis} are legally binding. If the CPs intended the procedures to be non-binding they could easily been adopted through a resolution. The amendment and the recommendations were developed as a package, which suggests that the CPs did not intend to have a right to object. From the preparatory works it follows that the proposed text was a "a compromise, it was agreed to amend the Convention to give the legal basis for making recommendation(s) on dispute settlement procedures."[41] This suggests that the intention has been to accord the Fisheries Commission competence to establish legally binding dispute settlement procedures. The articles from the original proposal for amendment of the Convention were transformed, unrevised, into the recommendations, which indicates that they were meant to be binding.

From this we may conclude that the dispute settlement procedures established through the recommendations entail legally binding dispute settlement procedures. Under the NEAFC Convention, CPs will be obligated to accept compulsory dispute settlement entailing binding decisions.

It is questionable whether the dispute settlement procedures will have any effect on the functioning of NEAFC. Here the main challenge is to establish comprehensive conservation and management measures for the high seas, and this will hinge on the ability and will of the coastal states to agree on the conservation and management of stocks in areas under national jurisdiction. The coastal states are not subjected to the compulsory dispute settlement procedures—but the procedures may help to address any problems arising from the use of objection procedures, if the CPs refer to them. It may not always be in the interest of the other CPs to challenge an objection.

Transparency

The NEAFC rules on granting observer status adopted in 2001 are identical with the rules of NAFO.[42] The reader is referred to Chapter 3 on NAFO for a more thorough analysis of the rules and the relationship with the Fish Stocks Agreement.[43]

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[41] Likewise, as in footnote 30.

[42] NEAFC Rules of Procedures Chapter 8 Rules Granting Observer Status, downloaded from www.neafc.org/about/docs/rulesofprocedure.pdf (accessed October 2005).

[43] A short summary: IGOs that have regular contacts with NEAFC and NCPs fishing in the Convention areas are to be invited to the plenary meetings of NEAFC. NGOs must apply for observer status and may be eligible if they support the objectives of NEAFC and have

Since 2002 there have been several observers attending the annual meetings of the Fisheries Commission. IGO observers come mainly from other RFMO/As but also from FAO, ICES and OSPAR.[44] There are usually five or six observers from NCPs and two or three NGOs observers at the annual meetings. These are observers with different background and interests. Their mission is both to report on the proceedings and to influence the decision-making of NEAFC. The latter task may be observed from their opening statements and interventions, described in the reports of the meetings. NCPs often use the platform to advocate their interest in joining, stressing the importance of the fisheries to their industry or indicating their willingness to cooperate with the organization. The annual meetings of the Fisheries Commission are thus an important arena for communication and cooperation between the CPs /NEAFC and the NCPs.

The IGOs have different agendas. The observer from FAO focuses on NEAFC's implementation of the Code of Conduct and its various international action plans, especially on IUU (illegal, unreported and unregulated) fishing and the recent ILO port state initiative. NEAFC regularly participates in RFMO/A meetings facilitated by the FAO. As will be discussed later, NEAFC has obviously been influenced by FAO and has implemented parts of the International Plan of Action on IUU fishing. Also OSPAR has an interest in the activities of NEAFC as their convention areas are concurrent and the OSPAR Commission has responsibility (under Annex V of the OSPAR Convention) to "protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems."[45] The OSPAR Commission has approached NEAFC with requests for cooperation. But the Contracting Parties of NEAFC have not been enthusiastic about cooperation between the two organizations, pointing out that it is NEAFC that is competent to regulate the fisheries and that any coordination of activities between them should be done through the individual CPs.[46] But there is an agreement that OSPAR and NEAFC should exchange observers. A letter from OSPAR on the need to protect cold-water

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demonstrated an interest in the species under its purview. Observers allowed to attend the plenary meetings of the Fisheries Commission may make oral statements if invited; they may distribute documents and are entitled to receive the same documents as the delegations of the CPs.

[44] OSPAR stands for the Convention for the Protection of the Marine Environment of the North-East Atlantic, www.ospar.org.

[45] See the text of Annex V on the protection and conservation of the ecosystems and biological diversity of the maritime area of the OSPAR Convention, at www.ospar.org/eng/html/convention/welcome.html (accessed October 2005).

[46] Report of the 21st Annual Meeting of the North-East Atlantic Fisheries Commission, 12–15 November 2002, item 15(e).

corals on the western slopes of the Rockall Bank was probably instrumental in the adoption of the recommendation to prohibit bottom trawling in these areas.[47] The reported activities of NEAFC reflect that it is influenced by international trends in fisheries management and environmental protection as developed in other IGOs.[48] How NEAFC is influenced will be discussed below.

The observers from NGOs have all represented environmental protection interests. They have mostly been concerned with protection of seamounts and deep-sea fisheries.

MATERIAL PRINCIPLES

The Fisheries Commission is to adopt recommendations concerning fisheries, taking into account the best available scientific advice (Arts. 4(1) and 5(1)). Such recommendations may include measures regulating the fishing gear permitted, size of fish to be retained on board, closure of fisheries and establishing total allowable catches (TACs) (Art. 7). NEAFC is to seek information and advice from ICES, including information on the state of the fish stocks and the effects of fishing on those stocks, as well as advice on their conservation and management (Art. 14(1)). The Fisheries Commission is also to cooperate with ICES on encouraging and conducting research. The scientific advice and information that ICES is required to provide is specified in a Memorandum of Understanding between the two organizations.[49]

NEAFC has adopted several types of measures—including TACs, minimum mesh sizes, closed areas and ban on bottom trawling in specific areas. For 2005 there is only one TAC in force, for the mackerel stock. As mentioned above, it was not possible to agree on measures for the herring, blue whiting and redfish stocks.

Implementation of New Principles of Conservation

The Fisheries Commission is guided by relatively broad and general objectives seeking to conserve and obtain optimum utilization of the fishery re-

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[47] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, items 13 and 14.

[48] See e.g. item 13 in the Report of the 23rd Annual Meeting of NEAFC referred to above.

[49] Memorandum of Understanding between the North-East Atlantic Fisheries Commission and the International Council for the Exploration of the Seas, from www.neafc.org/reports/annual-meeting/docs/am2003_papers/2003_07_ices.doc and www.ices.dk/advice/Request/NEAFC/NEAFC%20MoU.pdf (accessed October 2005).

sources of the Convention Area (Art. 4). However, these objectives reflect the state of the Law of the Sea in the late 1970s. The question is whether they are able to incorporate and develop with the new international law. In the following, the focus will be on the precautionary approach and protection of marine biodiversity.

Precautionary Approach

ICES introduced the precautionary approach to NEAFC at its annual meeting in 1997.[50] It has based its advice to NEAFC, the coastal states and other RFMO/As on the precautionary approach since 1998.[51] NEAFC has subsequently requested that advice be based on the precautionary approach. ICES introduced a set of biological reference points for the single stock. The first establishes benchmarks in form of limit reference points (B_{lim} and F_{lim}) to be avoided. Precaution is introduced by the second reference points (B_{pa} and Fpa), which are set to restrict the risk of the spawning biomass falling below the limit reference points. Uncertainty necessarily attends calculations of biomass and fishing mortality; thus ICES established these operational reference points precisely so as to take this uncertainty into account. To minimize the risk of the spawning biomass falling below B_{lim}, ICES advises the estimated biomass should be kept at a higher level (Bpa), thereby introducing a 'buffer zone' to ensure that the 'true' biomass has a low probability of being below B_{lim}. The distance between B_{lim} and B_{pa} is not fixed, and will depend on the uncertainty relating to the assessment and the level of risk that society is willing to take.[52]

ICES points out that the precautionary reference points should not be used as targets for the exploitation of the stock. Managers are to set target reference points within the precautionary reference points to take socio-economic considerations into account. If the precautionary reference points are used as targets, ICES has argued, the annual advice and subsequent management action will be influenced by uncertainty assessment as much as on the basis of actual changes in stock status. The assessments and advice of ICES will depend on the status of the stock in relation to the reference points. If fishing mortality is higher than Fpa, then ICES will consider the stock as being at risk of unsustainable harvesting, and will advise a reduction.

ICES was influenced by both the Fish Stocks Agreement and the FAO Code of Conduct for Responsible Fishing when developing the precaution-

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[50] Report from the Fifteenth Annual Meeting, November 1997, item 7.

[51] Report of the ICES Advisory Committee on Fisheries Management and Advisory Committee on Ecosystems, 1.4. The Form of ICES Advice, 1(2): 1–4, from www.ices.dk/products/icesadvice/Book1Part1.pdf.

[52] For further discussion on reference see Chapter 2, this volume.

ary approach, but there are some variations from Annex II of the Fish Stocks Agreement. First, while both include limit reference points, there is no parallel to the precautionary reference points of ICES in the Fish Stocks Agreement. The target reference points of the Fish Stocks Agreement are intended for management objectives, whereas the ICES precautionary reference points reflect conservation goals. States are requested to take action when the precautionary reference points are exceeded, and they serve in effect as extra limit reference points. It may seem that ICES by this intends to influence fixing of the level of acceptable risk, which is more a political than a scientific issue. Secondly, ICES does not define any minimum standard for limit reference points, as in Annex II of Fish Stocks Agreement where maximum sustainable yield (MSY) should be regarded as such. On the one hand, not linking the reference points to a specific standard decreases the risk of repeating past errors. On the other hand, without such reference, the limit reference might be set too low, thereby increasing the actual risk.

It is the managers that have responsibility for establishing stock-specific reference points. By entering into a Memorandum of Understanding with ICES, NEAFC has accepted its format. Managers are further required to develop strategies and plans for managing and conserving the stocks within these constraints. NEAFC has yet to adopt such management plans for fish stocks in the Convention Area. This is due in part to the lack of adequate scientific information about stocks such as redfish and deep-sea species.[53] In respect of the straddling fish stocks mackerel and herring, NEAFC has to a large extent—as will be discussed later in the chapter—been charged with adopting measures on the high seas to implement the coastal state agreements on these stocks. The coastal states have agreed on management plans for these stocks, which NEAFC is to apply when adopting measures for the stocks on the high seas. (On this, see Churchill, 2001: 248–53.)

In fact, the precautionary approach is directly relevant for NEAFC. Two examples may illustrate how it has (or has not) been used to legitimize regulatory measures: the cases of redfish, and of deep-sea species.

Iceland has unsuccessfully argued that the redfish stock straddling Greenland's and Iceland's EEZs and the regulatory areas of NAFO and NEAFC are in fact several different stocks and should be managed separately. NEAFC requested special advice on this issue, but, according to ICES, there were not sufficient data to conclude that there is more than one stock.[54] These conclusions reflected disagreement among the scientists, so it then became a question of how to deal with such scientific uncertainty. Citing the precau-

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[53] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 6.

[54] Report of the Meeting of the Redfish Working Group, 18–20 October 2004, item 5.

tionary approach, Iceland argued that it was better to take some measures (area regulations) which reflect that there may be several stocks dispersed over different areas, even if they might not be perfect.[55] The EC did not support the proposal for area regulations, referring to the lack of scientific support. At an earlier meeting, the EC representative had argued that the uncertainty was too great to adopt the measures as a precautionary move.[56] When applying the precautionary approach, lack of adequate scientific advice—also due to disagreement among scientists—should not be used as an excuse for not adopting adequate measures. However, the EC raised an important and relevant issue in arguing that every conservation measure should have a minimum of scientific backing. The precautionary approach is about how to deal with scientific uncertainty: it does not make science redundant. As may be recalled from Chapter 2, an important aspect of the precautionary approach is to raise the level of knowledge and information about the living marine resources, so that states may utilize them in a sustainable manner. In this case, NEAFC seem to have applied such a strategy by requesting ICES to provide more information and advice on the redfish stock(s) and appropriate measures. However, the inability of the CPs to agree on even a TAC for the stock cannot be regarded as 'precautionary'.

Fisheries for deep-sea species came on the NEAFC agenda in 2000,[57] after ICES had informed that most of the species were being harvested outside sustainable limits and recommended immediate reductions in the fisheries. The EC stressed that it was important for NEAFC to take responsibility, and that it regarded "the management of deep-sea fisheries as the next major issue for NEAFC to solve."

Deep-sea fisheries are conducted at depths greater than 400 meters in large parts of the Convention Area, from the Arctic to subtropical regions.[58] Many of these species have low productivity, reaching maturity at a high age. This renders them particularly vulnerable to overfishing, and recovery may be slow. There is limited knowledge and information about the central biological characteristics of the species (migration, feeding, recruitment) and their ecosystems, as well as a lack of data from the fisheries. The deep-seas fisheries on the high seas of the northeast Atlantic started in the early 1980s, triggered partly by the decline in fisheries on the continental shelves. Since

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[55] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, items 6 and 7.

[56] Reference as in footnote 54.

[57] Summary Report, North-East Atlantic Fisheries Commission 19th Annual Meeting, 21–24 November 2000, item 8.

[58] ICES Advice 2004, ACFM/ACE Report, 3.10 Deep water Populations and Habitats, downloaded from www.ices.dk/products/icesadvice/Book1Part2.pdf (accessed October 2005).

the species are caught both in directed fisheries and as by-catches, it is difficult to manage them separately.

In 2001 NEAFC established a work group, tasked with assessing and recommending appropriate regulatory measures and control schemes in addition to identifying research needs.[59] The following year, ad hoc and temporary measures were introduced to freeze the activities of deep-sea fisheries on the high seas of the Convention Area at the highest levels of previous years for specified species.[60] The CPs were not able to agree on more permanent measures in 2003 as planned, *inter alia* due to disagreement on which species to include and the reference period for limitations. At its annual meeting in 2004, NEAFC decided to reduce efforts by 30% in 2005.[61] The Fisheries Commission will probably at its meeting in November 2005 establish more comprehensive measures, including defining the period of reference, a further reduction of efforts and special control measures.

The approach of NEAFC to the management of fisheries for deep-sea species can hardly be described as 'precautionary'. These fisheries have remained unregulated for years, while the precautionary approach implies that *all* fisheries are to be regulated through effort and/or catch limits, also when there is not adequate scientific information (Fish Stocks Agreement Article 6(6)). The vulnerability of deep-sea species, coupled with the high degree of scientific uncertainty relating to the species, should argue for precautionary measures. Measures implemented thus far do little to limit or even reduce activities, as it has been left to the individual CP to decide its own level of effort in these fisheries.

Protection of Marine Biodiversity

NEAFC seems to be accorded relatively broad authority in regulating high seas fisheries. But it could be questioned whether the organization is competent to take on the responsibility of protecting marine biodiversity, regulating the fisheries for commercially important species so as to protect and conserve other species negatively affected by the fisheries. The objectives of conservation and optimum utilization are traditionally linked to the target fish stocks, and not to the effects of the fisheries on the environment.

The environmental aspects of fisheries management have gradually been introduced in NEAFC. When NEAFC discussed the Strategic Plan for ICES in 2000, the EC representative found it extremely ambitious and comprehen-

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[59] Report of 20th Annual Meeting of NEAFC, 5–9 November 2001, item 7(f) and Annex L.

[60] Report of 21st Annual Meeting of the North-East Atlantic Fisheries Commission, 12–15 November 2002, item 8 (f) and Annex N.

[61] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 7(f) and Annex J.

sive, and remarked that "[i]t covers ecology and biodiversity to a worrying degree"[62] Probably influenced by the Reykjavik conference on "Responsible Fisheries in the Marine Ecosystem",[63] NEAFC decided to include the ecosystem approach on its agenda.[64] In the declaration issued by the conference, states committed themselves to work on incorporating ecosystem considerations into fisheries management. The secretariat has been active in reporting to the annual meeting on international developments in biodiversity work,[65] including the 2002 Johannesburg Summit and its Plan of Implementation,[66] the Conference of the Parties to the Biodiversity Convention[67] and the UN open-ended informal consultative process on oceans and the Law of the Sea, where a ban on bottom trawling was considered.[68] Among its conclusions is that important international forums seldom consult RFMO/As when considering initiatives that affect fisheries.[69]

As mentioned, there have been contacts between NEAFC and the OSPAR Commission on issues concerning biodiversity protection in their concurrent areas of competence.

The increased focus on protecting biodiversity and on the ecosystem approach to fisheries management is not only due to external influence. Also the CPs have gradually become more positive—as with the EC, after the inclusion of ecosystem approach in the revised Common Fisheries Policy.[70]

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[62] Summary Report, North-East Atlantic Fisheries Commission 19th Annual Meeting, 21–24 November 2000, item 18.

[63] Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, Reykjavik, Iceland, 1–4 October 2001 Report of the Conference, available at ftp://ftp.fao.org/FI/DOCUMENT/reykjavik/Default.htm (October 2005).

[64] Report of the 20th Annual Meeting of NEAFC, 5–9 November 2001, item 8(j).

[65] E.g. Doc. AM 2003/19 A Note on the Relationship between Fisheries and Environmental and Conservation Concerns and AM 2004/11 Global and Regional Processes and Developments in the Management of the Oceans.

[66] The Plan of Implementation and other documents from the summit may be downloaded from www.un.org/esa/sustdev/index.html (accessed October 2005).

[67] Biodiversity Convention: www.un.org/esa/sustdev/index.html (accessed October 2005).

[68] The UN General Assembly established in 1999 an open-ended informal consultative process in order to facilitate its annual review, by considering the Secretary-General's annual reports on oceans and the law of the sea and by suggesting particular issues to be considered by the General Assembly: www.un.org/Depts/los/consultative_process/consultative_process.htm.

[69] Report of 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 13.

[70] Report of the Extraordinary Meeting of the North-East Atlantic Fisheries Commission 14–15 May 2003, item 11. The legal basis for the Common Fisheries (CFP) Policy is Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy. One of the objectives of the CFP is "progressive implementation of an ecosystem-based approach to fisheries management" (Art. 2).

An ecosystem approach to fisheries management will necessarily have consequences for the form and content of the scientific advice provided. In 2004, ICES began implementing the ecosystem approach in its advice,[71] and has defined the ecosystem approach as marine management taking an integrative view and including ecosystem considerations.

As a first step, scientific advice will be presented in an 'ecosystem context', meaning that the advice will refer to an area considered an ecosystem, as the result of a three-step process: First, the limits of single-stock exploitation are identified according to the precautionary approach as referred to above, but also with some ecosystem considerations included. Second, the mixed fisheries issues are addressed. Fish stocks harvested in mixed fisheries cannot be viewed in isolation: constraints should be identified for the fisheries as a whole. Stocks that are in a critical stage may determine the advice for other stocks. Thirdly, there are the ecosystem concerns. Fisheries may impact on habitats or other flora and fauna beyond the fish population, through incidental by-catches of non-commercial fish species or sea mammals. Removal of fish will also have an overall impact on the structure and energy flow of the ecosystem. In consequence of this threefold approach, ICES may advise a lower fishing mortality rate for a stock than indicated by the single-stock limits, if another stock in critical condition is taken as by-catch or if the fishery has other ecosystem effects.

In the 2004 Memorandum of Understanding ICES committed itself to provide NEAFC with regular ecosystem advice.[72] When ICES presents its scientific advice at the annual meeting of NEAFC in November 2005 it will include the ecosystem element. But it remains to be seen how this will affect the practice of NEAFC and whether there will be an ecosystem approach to fisheries management. However, there are some signs that NEAFC has already taken into account the need to address the ecosystem effects of fishing, through its recommendations and in proposals for fundamental changes of the legal foundations of the organization.

Regulation of deep-sea fisheries may be considered part of traditional fisheries management. But the regulations came because of the growing international focus on the protection of deep-sea biodiversity.[73] It is in this context that the recommendation to regulate efforts in the fisheries and the plans for further action should be seen. The same applies to the recommend-

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[71] ICES Advice 2004, ACFM/ACE Report, Para. 1.3.1, www.ices.dk/products/cesadvice/Book1Part1.pdf (accessed October 2005).

[72] See references in footnote 49.

[73] E.g. Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting, which focuses on this theme; accessed October 2005 from www.un.org/Depts/los/consultative_process/consultative_process.htm#A/60/99.

ation adopted in 2004 to protect five deep-sea areas on the high seas (including four oceanic seamounts) in the Reykjanes Ridge–Azores area by prohibiting the use of bottom trawls and static gear until 31 December 2007.[74] ICES has been asked to evaluate the effects of closing areas for trawling, and whether these measures should be continued or even extended to other areas after 2007.

This broadening focus of NEAFC has raised questions whether the organization is adequately equipped and competent to address the new responsibilities. As noted above, it could be questioned whether the organization is competent to regulate fisheries so as to protect and conserve also living marine resources not under its purview, such as sedentary species.[75] There have also been discussions on whether NEAFC should play a more proactive role in the international processes addressing problems of general ocean management.[76] A working group was tasked with assessing alternatives for strengthening the role of NEAFC. There was agreement in the working group that, to be considered a relevant and effective actor, NEAFC should address issues on IUU, marine protected areas, moratorium on bottom trawling in the high seas, and abandoned and lost fishing gear and ghost fishing.[77] But NEAFC should continue to be a fisheries management organization "adding concerns for marine ecosystems to the fisheries management measures already in place." There were several options concerning how to adjust the legal foundations to the new role of the RFMO/A, including adopting a declaration on interpretation and amending the Convention. The working group has recommended amending the Convention.[78] Its proposal will probably be adopted by NEAFC at its meeting in November 2005 before being transmitted to the CPs for ratification (NEAFC Convention Art. 19).

The main elements of the proposal, which has been influenced by the Fish Stocks Agreement as well as more recent RFMO/As such as SEAFO, are:

The *Preamble* will include references to treaties and non-binding document, including LOSC, the Fish Stocks Agreement, FAO Compliance Agreement and the FAO Code of Conduct for Responsible Fisheries. Such

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[74] Report of 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 14.

[75] Report of the Meeting of the Working Group on the Future of the North-East Atlantic Fisheries Commission, 26 April 2005, Annex 1.

[76] Report of the 23rd Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 11(c).

[77] Report of the Meeting of the Working Group on the Future of the North-East Atlantic Fisheries Commission, 26 April 2005, item 4.

[78] Working Group on the Future of the North-East Atlantic Fisheries Commission, 28 June 2005, item 3 and Annex I.

reference indicates that they should be used in the interpretation and application of the NEAFC Convention.

There will be a *Definition* of 'fisheries resources' to include fish, molluscs and crustaceans, thereby extending the scope of NEAFC, which will now be competent to regulate the exploitation of non-fish species and to regulate the fishery to protect and conserve other species subject to the jurisdiction of the coastal states (sedentary species) or other RFMO/As (e.g. anadromous species and highly migratory species).

The Convention will have a separate provision on the *Objective*. The EC representative argued that this would have more effect than if the objective were merely part of the preamble. The objective of NEAFC is to "ensure long-term conservation and optimum utilization of fishery resources […], providing sustainable economic, environmental and social benefits." New elements here are the requirement concerning the long-term aspects of conservation and sustainability. The sustainability concept is complex, indicating that states must weigh different interests. The question is whether the objective can provide any guidance.

The *Principles* to be applied by the NEAFC include the precautionary approach and an obligation to take into account the impact of fisheries on other species and on the ecosystem, and where necessary adopt measures to minimize the harmful impacts. There is no definition of the precautionary approach, but it may be interpreted in light of the Fish Stocks Agreement and the Code of Conduct, referred to in the preamble. Interestingly, the proposal seems to strengthen the role of science in fisheries management, since NEAFC is not merely to "take into account" the best available scientific evidence (as in the present convention), but is to *ensure* that its recommendations are based on the best scientific evidence available. This wording may come as a response to proposals, such as a general ban on bottom trawling, that CPs have argued lacked scientific basis. The danger is that this principle may be used as an argument for not taking action in situations of scientific uncertainty. But it has to be balanced with the duty to apply the precautionary approach. The principles on protection of marine biodiversity are flexible as in the Fish Stocks Agreement, allowing NEAFC some space to weigh economic and social interests against environmental interests.

When adopted and in force, these amendments will bring NEAFC closer to other post- Fish Stocks Agreement RFMO/As.

Consistency between the NEAFC Measures and Coastal State Measures

The fish stocks regulated by NEAFC may be found both in areas under the jurisdiction of CPs and in adjacent areas of the high seas in the Convention

Area.[79] There are two possible approaches to the regulation of such straddling stocks in the NEAFC Convention: separate conservation, and joint conservation (Art. 5, Art. 6).

Joint conservation means that fishery for the stock is managed and conserved through NEAFC in its entirety. However, to have effect in areas under the jurisdiction of a CP, such measures must be requested by the CP and it must vote for the recommendation (Art. 6(1)).

'Separate conservation' means that NEAFC adopts recommendations for measures on the high seas and the CP(s) for the areas under national jurisdiction (Art. 5(1)). In order to ensure coordination of measures to prevent overexploitation, NEAFC is required when adopting recommendations to "seek to ensure consistency" between its recommendations and any measures taken by a CP for the conservation and management of the same stock within areas under its jurisdiction (Art. 5(2)). In contrast to the Fish Stocks Agreement, this provision does not provide any guidelines on how to achieve consistency.

Of the four straddling fish stocks regulated by NEAFC, to date it is only redfish that has been managed in its entirety by the organization (Churchill, 2001: 258–62). Regulations were introduced in 1996 in a predominantly high seas fishery with uncertainty as to the distribution of the stock between the high seas and the EEZs of the coastal states. This was probably why the coastal states (Iceland, and Denmark in respect of Greenland) accepted the NEAFC regulations as applying to areas under their jurisdiction.[80] The regulations were influenced by the Fish Stocks Agreement, since zonal attachment and dependence were two of the principles proposed for allocating catches.[81] However, in 1999 Iceland withdrew from this management, after unsuccessfully arguing that there were several redfish stocks, and not just one. NEAFC has set aside a part of the TAC for Iceland.[82] When Denmark (in respect of Greenland) joined Iceland in 2004 in promoting a proposal for managing the redfish as several stocks, as mentioned above, there were not the votes necessary to adopt recommendations for the redfish.

The other (straddling) stocks are managed separately by the NEAFC and the relevant coastal states, through a two-step process: First, the coastal states sharing the stock agree on a TAC for the areas under national jurisdiction and its allocation; then they introduce proposals in NEAFC for the

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[79] There are not sufficient scientific data to conclude whether the deep-sea species included in the recommendation on effort reductions are straddling fish stocks or discrete high seas resources.

[80] Working Group on Oceanic Redfish *(Sebastes mentella),* 2–5 October 1995, item 3.1.3.

[81] As previous footnote.

[82] Report of the 22nd Annual Meeting of the North-East Atlantic Fisheries Commission, 10–14 November 2003, item 8(a).

adoption of a TAC recommendation and its allocation for the high seas share of the stock. The coastal states have established management plans for blue whiting, mackerel and Norwegian spring-spawning herring. In recent years there have not been any coastal state agreements for the blue whiting and herring stocks, and consequently no proposals have been made for their regulation on the high seas parts of the Convention Area.

The coastal states have, however, proposed a recommendation for the regulation of mackerel, after reaching an agreement on conservation measures and quotas in their EEZs.[83] The recommendation includes a TAC, to be allocated between the CPs. NEAFC has set a block quota for the three coastal states/CPs and left it to themselves to allocate the RFMO/A. The coastal states may fish on part of their coastal state quotas on the high seas and the quotas allocated through NEAFC in areas under national jurisdiction. In effect, NEAFC then regulates only the fishery of those CPs which are not considered relevant coastal states. NEAFC has left it to the coastal states to decide the size of the future TAC for the stock, and consequently for the high seas when high seas TACs are to be established on the basis of the relationship between the TAC agreed by them and the TAC adopted by NEAFC in 2004. Similar recommendations have been adopted for the herring stock.

The separate conservation approach (or two-step approach) may seem inspired by the 'compatibility' requirement of the Fish Stocks Agreement, with the coastal states setting the standard for the high seas regulation of straddling fish stocks (see Churchill, 2001: 251). But a more plausible explanation is the balance of power in NEAFC, since in this case the relevant coastal states have enough votes to get the recommendations adopted. This is confirmed by the unsuccessful attempt by the two coastal states (Iceland, and Denmark in respect of Greenland) to introduce conservation measures for the redfish stock(s) on the high seas.

Allocation of Fishing Rights

The Fisheries Commission may also adopt recommendations for the allocation of the total allowable catches or fishing efforts between the CPs (Art. 7(e) and (f)). There are no principles listed in the NEAFC Convention for allocation, so NEAFC seems free to decide how to allocate the catches.

The working groups established to develop proposals for regulating redfish and mackerel listed several principles for allocation—among them, zonal attachment, contribution to conservation, present and previous fishery

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[83] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, items 6(d) and 7(d) and Annex J.

pattern, dependency and contribution to scientific research on the stocks.[84] But it is not possible to read from the practice of NEAFC what exact principles are applied, or with what weight. As mentioned above, the quotas allocated to the relevant coastal states for several straddling fish stocks do not have practical meaning. These stocks may be fished in areas under national jurisdiction, and the quotas in areas under national jurisdiction may be fished on the high seas. Actual allocations are made through coastal state agreements.

A central objective in the practice of NEAFC seems to be to maintain stability and predictability in its allocations. In the recommendation on management measures for mackerel in 2005, an important element was to maintain the relative relationship among quotas in subsequent years as well.[85] But allocation of quotas is the main reason for the use of the objection procedures,[86] as well as explaining why NEAFC has not adopted recommendations for management measures.[87]

The objective of stability has consequences for the fishing rights of potential future CPs. Like NAFO, NEAFC has adopted 'Guidelines on the expectations the expectation of future new CPs with regard to fishing opportunities in the NEAFC Regulatory Area'.[88] As explained above, NEAFC has established a scheme for cooperating NCPs (see footnote 15 for references). If accorded such status, the NCPs may fish on the 'cooperating quota' usually set aside for these states in the redfish and mackerel fisheries.[89] If they become CPs, they can be allocated part of the cooperating quota, which would give them some priority over other new CPs without a similar history of cooperation.

It would appear that NEAFC is trying to balance different interests by regulating access to the high seas fisheries: interests of established states, newcomers and cooperating NCPs. The lack of agreement on the allocation of most stocks may undermine the confidence of NCPs and prospective CPs

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[84] Working Group Oceanic Redfish, 4–5 October 1995, and Working Group on Mackerel and Blue Whiting, 25–27 March 1998.

[85] Recommendation by Denmark (in respect of the Faeroe Islands and Greenland), the European Community and Norway, for a NEAFC Recommendation on Management Measures for Mackerel in 2005: www.neafc.org/measures/mackerel_2005.htm.

[86] Russia and Iceland have regularly objected to the conservation measures for mackerel: www.neafc.org/measures/mackerel_2005.htm (accessed October 2005).

[87] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8 – 12 November 2003, item 7(b) and (c) on blue whiting and Norwegian spring-spawning herring respectively.

[88] Report of the 22nd Annual Meeting of the North-East Atlantic Fisheries Commission, 10–14 November 2003, item 12(A), from www.Neafc.Org/Footable/Becoming_Cp.Htm (accessed October 2005).

[89] See www.neafc.org/measures/cooperation-quota.htm (accessed October 2005).

in the ability of the organization to take care of their interests, so NEAFC will have to overcome its internal problems if it is to prevent such developments. It will also have to address the accommodation of new entrants to the fisheries, as required by the Fish Stocks Agreement. The question is whether these interests are compatible.

CONTROL, ENFORCEMENT AND COMPLIANCE

The Fisheries Commission may adopt recommendations for control and enforcement measures on the high seas of the Convention Area (Art. 8(1)). NEAFC is not given explicit competence to address the NCPs and their fisheries activities on the high seas parts of the Convention Area, although such competence may be implied from its general capability to regulate the fisheries on the high seas of the Convention Area (Art. 5(1)). NEAFC will have to perform this function to deal with the fishing activities of NCPs, if it is to achieve the objectives of conservation and optimum utilization (Shaw: 2003: 1195–98). Through its practice, NEAFC has assumed such de facto competence.

NEAFC has adopted two schemes for control and enforcement of its conservation measures: The Scheme of Control and Enforcement (Control Scheme)[90] and the Non-Contracting Party Scheme (NCP Scheme),[91] applicable to the vessels of CPs and NCPs, respectively. However, the cooperating NCPs are required to agree to apply most of the Control Scheme.[92] The approach adopted by NEAFC is what Molenaar (2003: 473–74) has described a 'two tier-approach' in respect of NCPs: first by seeking cooperation with NCPs, and second by taking measures to deter what is considered unregulated fishery. The cooperating NCP scheme has already been introduced. The following analysis will show that different treatment is to be accorded the vessels of non-cooperating NCPs.

A Permanent Committee on Control and Enforcement (PECCOE) has been established, tasked *inter alia* with monitoring and evaluating the implementation of both schemes, including reports on inspections, on infringements and the respective CPs' follow-up of the infringements.[93] PECCOE reports to NEAFC.

In the following, we focus first on the regulations adopted by NEAFC on control and enforcement in respect of vessels. Secondly, we examine the role

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[90] www.neafc.org/measures/ docs/scheme-2005.pdf (accessed October 2005).

[91] www.neafc.org/measures/ docs/NCPscheme-2005.pdf (accessed October 2005).

[92] NCP Scheme Art. 10.

[93] Permanent Committee On Control And Enforcement (PECCOE), Terms Of Reference, accessed October 2005 from www.Neafc.Org/Footable/Docs/Peccoe_Termsof_Reference.pdf.

played by NEAFC in respect of CPs and NCPs in ensuring that they comply with their obligations.

Control and Enforcement in Respect of Vessels

Control, Monitoring and Surveillance

The Control Scheme applies to the commercial utilization of all fisheries resources of the Regulatory Area[94] (Art. 2). Consequently the CPs are obligated to regulate access to both regulated and unregulated resources through the use of authorizations (Art. 3(1b)). The CP is to ensure that authorized vessels comply with the recommendations which are binding on it. If a CP is unable to carry out its responsibilities, it shall not issue any authorizations. It is also required to notify the NEAFC Secretariat of all its vessels authorized to fish in the Regulatory Area.

The CPs are further required to ensure that their vessels operating in the Regulatory Area record their catches and fishing activities and regularly communicate their catches to the relevant authorities (Art. 7, Art. 10). NEAFC has established a vessel monitoring system (Art. 9). CPs shall require all vessels authorized to fish in the Regulatory Area to install equipment that enables continuous tracking of their positions by satellite. CPs are to communicate the catch reports and the satellite tracking to the NEAFC Secretariat, for transmission to other CPs with inspection vessels in the Regulatory Area (Art. 12).

The control and surveillance systems to be implemented by the CPs/ flag states are prerequisites for ensuring that vessels comply with NEAFC recommendations. They are consistent with the flag state duties as developed in Article 18 of the Fish Stocks Agreement. It is interesting to note that CPs are not required to place observers on board the vessels while the latter are present in the Regulatory Area—which could be a more effective means of preventing infringements. The pilot projects undertaken for daily catch reports and reduction in advance notification of inspection will provide real-time information (Art. 11). Coupled with satellite tracking, this should make it easier for inspectors to discover infringements, and may partly remedy the lack of presence on board.

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[94] The Regulatory Area is defined as the waters of the Convention Area lying beyond the waters under the jurisdiction of Contracting Parties, Control Scheme Art. 1a).

Inspection at Sea

The Control Scheme includes procedures for reciprocal right of CPs to board and inspect fishing vessels in the Regulatory Area, including vessels engaged in trans-shipment (Arts. 13–20). These procedures will also be applicable to vessels of NCPs state parties to the Fish Stocks Agreement when fishing on the straddling fish stocks regulated by NEAFC (Fish Stocks Agreement Art. 21(1), (2)). A CP is required to have an inspection vessel present in the Regulatory Area when ten or more of its vessels are engaged in fishing activities (Art. 14(5)). Such inspection vessels are responsible for surveillance and inspection of the fishing vessels. Fishing vessels sighted in the Regulatory Area are to be registered and reported to the respective CP and the Secretariat (Art. 16). Inspections shall be carried out in a non-discriminatory manner, and should reflect the size of the fleet and its time in the Regulatory Area (Art. 13(3)). Inspections may include gear, catches, equipment and documents necessary to establish whether the vessel has been acting in compliance with the relevant conservation and management measures (Art. 17).

If the inspectors find 'clear grounds for believing' that the vessel has engaged in activities contrary to the Control Scheme or other NEAFC recommendations, they may initiate infringement procedures (Art. 19). These procedures include securing the evidence for the flag state and immediate communication to the authorities of the respective CP to facilitate its enforcement action. If the vessel is suspected of having committed a 'serious infringement' there are further measures to be taken (Art. 20). Serious infringements include fishing without valid authorization, serious misrecording of catches and use of prohibited fishing gear. The flag state is to respond to the notification by ensuring that the vessel is inspected within 72 hours. The inspectors shall ensure the security and continuity of the evidence, and may remain on board for the period necessary to provide the inspector of the flag state/ CP with information. It is the flag state/CP that, if evidence so warrants, shall require the vessel to proceed to port, and may authorize the inspectors to bring the vessel to port.

As with the parallel procedures of the Fish Stocks Agreement, the infringement procedures of NEAFC reflect that the other CPs merely act as enforcement agents. It is the flag state/contracting state that is responsible for enforcing the conservation measures. NEAFC inspection procedures copy those of the Fish Stocks Agreement, except for the right of the inspectors to bring the vessel to port without the permission of the flag state. The question, as further discussed under Chapter 3 on NAFO, is whether this right goes even further, since there are several requirements attached.

The NCP Scheme applies to the fishing vessels of NCPs which are not state parties to the Fish Stocks Agreement. The inspecting vessels shall forward information to the NAFC Secretariat on such vessels sighted engaged in fishing activities in the Regulatory Area, for transmission to the other CPs (Art. 3). Further, the vessel shall be informed that it is presumed to be undermining the recommendations of NEAFC and that this information will be forwarded to the CPs and the flag state. The inspectors shall request permission to board and inspect the vessel (Art. 4). If such permission is granted and the inspection reveals infringements of the recommendations, the CP responsible may take such action as appropriate in international law. This would probably be to notify the flag state and request it to take appropriate enforcement action in respect of the vessel.

The compliance of fishing vessels will depend on the presence and activities of inspection vessels in the Regulatory Area. By requiring CPs to dispatch vessels to the areas, NEAFC is in a better position to achieve this than are other RFMO/As. Concerning the vessels of NCPs, the mere presence of inspection vessels sighting and approaching them while fishing on the high seas may have a preventive effect, but it is unlikely to deter them unless coupled with other measures directed at them or the flag state. An equally important purpose of the sightings of these vessels is thus to document their fishing activities for use in other types of enforcement. The real enforcement in respect of these vessels takes place elsewhere, as in the ports or coastal waters of the CPs.

Inspections in Ports

The Control Scheme does not include any provisions on port inspection. It is left to the individual CP to decide whether to inspect vessels entering its ports after having fished in the Regulatory Area. However, there has been work in the NEAFC on developing compulsory port inspections as a way of addressing IUU fishing of CPs.[95] This work gained some momentum in 2004, after the adoption of a FAO model scheme[96] for port state inspection.[97]

The NCP Scheme includes port inspections (Art. 5), whereby NCP vessels entering a CP port are to be subjected to inspection. The inspection is to include documents (e.g. authorizations), logbooks, fishing gear and catches

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[95] Report of the Extraordinary Meeting of the North-East Atlantic Fisheries Commission, 10–12 April 2002, item 6(b).

[96] Report of the Technical Consultation to review port state measures to combat illegal, unreported and unregulated fishing, Rome 31 August–2 September 2004, FAO Fisheries Report No. 759.

[97] Report of the 24th Meeting of the North-East Atlantic Fisheries Commission, 8–12 November, item 9(c).

on board. The CP/port state shall prohibit any landing or trans-shipment from an NCP vessel which has on board species that are regulated by NEAFC, unless it can be documented that these were caught outside the Regulatory Area or in compliance with the regulations (Art. 6). If inspection vessels have sighted the vessel engaged in fishing activities in the Regulatory Area and it is not registered in a cooperating NCP, the ship's master will have difficulty in providing such documentation.

The NCP Scheme on port inspections is consistent with the Fish Stocks Agreement on the procedures and measures to be taken. However, it may be questioned whether the CPs are in fact complying with their obligation as port states (according to Art. 23) to promote the effectiveness of RFMO/A measures, if they have not adopted a similar scheme for their own vessels. The narrow focus on vessels of NCPs may also be viewed as discriminatory and in violation of the Fish Stocks Agreement.

Other Types of Enforcement in Respect of Vessels

The ban on landing and trans-shipment of catches from NCP vessels by the coastal states/CPs is an important measure to prevent such vessels from fishing. The costs of having to land these catches in other ports may make the fishery unprofitable. However, this ban may be circumvented by trans-shipping the catches to other vessels for landing in ports outside the CPs.

NEAFC has taken measures to widen the measures available, not least so as to be able to deal with such adjustments.[98] The measures partly implement recommendations of the FAO International Program of Action on IUU fishing,[99] focusing on what is defined as unregulated fishery of NCPs.[100] In addition to port inspection, these measures include actions to be taken by the coastal CPs, market-related measures and measures to ensure that nationals do not support or engage in IUU fishing. (See Molenaar, 2003: 473–77, for a more detailed presentation of IUU measures.)

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[98] NEAFC amended the NCP Scheme at its 22nd Annual Meeting in 2003; see report, item 10(c).

[99] International Plan Of Action To Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, esp. paras. 78–83, available from www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/003/y1224e/y1224e00.HTM (accessed October 2005).

[100] Unregulated fishing is defined as activities undertaken in "the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a state not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization.", para. 3.3.1.

All NCP vessels sighted as engaged in fishing activities in the Regulatory Areas are to be placed on a provisional list (Art. 9).[101] The list shall be revised annually on the basis of, *inter alia,* responses from the flag states. Depending on the response of the flag state and other information, NEAFC will then either remove the vessel from the provisional list or transfer it to a confirmed list. Vessels will be removed from the lists if the flag states provide NEAFC with satisfactory information indicating, among other things, that they have taken effective enforcement action in relation to the vessels in question or have documented that the vessel was not involved in IUU fishing. These lists may be found on the NEAFC website.[102]

Listing a vessel on the Internet it may in itself have preventive effect. Other RFMO/As[103] and coastal states will be made aware of the vessel and can take action to prevent it from fishing in areas under their jurisdiction.

The Contracting Parties are to take further enforcement measures against vessels on the lists (Art. 11). They shall not in any case be permitted to land or transmit their catches; and the CPs shall prohibit their own vessels from assisting listed vessels in any way, as well as prohibiting the supply of provisions and fuel in their ports to the vessels. Vessels on the confirmed list shall also be banned from fishing in areas under the jurisdiction of the CPs and not be allowed to re-flag to any CPs. The CPs are also to ban the import of fish from such ships.

These measures, aimed at worsening the fishing opportunities and trade of the individual vessel, may prove to be an effective method of stopping IUU fishing. Although these measures are not found in the Fish Stocks Agreement, which focuses on traditional enforcement measures in the law of the sea, the Agreement provides CPs with certain legitimacy when requiring member states to take measures consistent with international law to deter activities of vessels which undermine the effectiveness of regional conservation measures (Art. 17(4), Art. 20(7) and Art. 33(2)) (See Molenaar, 2003: 473). Also here the question is whether the narrow focus on vessels of NCPs is consistent with the Fish Stocks Agreement. (Consistency with WTO Agreements may also be questionable, but this will not be discussed here.) Member states are also required to take measures to deter vessels flying the flags of other member states from fishing (Art. 20(7)). There is no reason

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[101] Vessels of cooperating NCPs will not be listed, provided they do not fail to document that the fish were caught in compliance with NEAFC recommendations and within a cooperation quota, duly notified to NEAFC by the flag state and not in breach of catch report requirements (NCP Scheme Art. 10(6)).

[102] 'A' list, www.neafc.org/measures/iuu_a_2005.htm and 'B' list: www.neafc.org/measures/iuu_b.htm (accessed October 2005).

[103] NEAFC is to transmit all information on sightings and port inspections of Non-Contracting vessels to other relevant RFMOs (NCP Scheme Art. 7(2)).

why some of the measures used against NCP vessels cannot be used—with necessary modifications—against CP vessels involved in serious or repeated infringements of NEAFC recommendations.

The introduction of these new sets of enforcement measures has come as a response to the lack of will and ability of flag states to address the activities of their vessels. However, since the flag states are still responsible for implementing international law, applying these measures within NEAFC may be problematic—in effect, questioning the CP's responsibility as flag state. Perhaps a better approach would be to approach the state instead of its vessels.

RFMO/A Enforcement

NEAFC is, like other RFMO/As, dependent on the CPs/flag states to implement its recommendations and to ensure they are complied with. The CPs are obligated to ensure that their vessels fish within the recommendations adopted by NEAFC (Art. 3c) and to take the necessary enforcement measures in respect of vessels infringing on the recommendations (NEAFC Convention Arts. 15 and 16 and Control Scheme Arts. 21 and 23). The flag state/CP is required to take administrative as well as criminal proceedings against vessels reported to have infringed on the conservation measures. However, they are not explicitly required to ban the vessel from fishing on the high seas until sanctions are imposed, as prescribed in Article 19 of the Fish Stocks Agreement. Such an enforcement measure could act as an efficient deterrent in respect of the vessel.

It is through obligatory reports to NEAFC on catches (Control Scheme Art. 8) and on infringements (NEAFC Convention Art. 15(2) and Control Scheme Art. 24) that the organization and other CPs will be able to control whether the Contracting Party is acting in compliance with its obligations. These reporting obligations may in themselves have a preventive effect. The CP shall list an infringement in subsequent reports until actions have been taken in respect of the vessel in question.

The respective CPs are to present their infringement reports at the meeting of PECCOE, where they will also be required to explain the status of the enforcement of such infringements.[104] This may be described as 'soft enforcement'.

The CPs are required to report biannually to NEAFC on the numbers of and results of inspections carried out by their vessels at sea (for CP vessels), and at sea and in ports of NCP vessels (NCP Scheme Art. 8 and Control

[104] Report of the 7th PECCOE meeting London, 6–7 October 2004, item 6.

Scheme Art. 25). These reports, coupled with other information provided by the CPs (e.g. authorizations granted to fish on the high seas), enable NEAFC to assess the efficiency of its control and enforcement scheme. Thus far, however, the organization has not been able to coordinate all the information, and is looking to NAFO to learn from its new comprehensive compliance review.[105]

In addition to taking measures against vessels, NEAFC also approaches the respective NCPs. The NEAFC Secretariat is required to transmit information on sightings, inspection at sea and port inspection to the respective Non-Contracting Party (NCP Scheme Art. 7). In the communication to the NCP, the latter is requested to take measures to ensure that the vessel(s) are prevented from involvement in activities that undermine the effectiveness of NEAFC recommendations, and to report back to NEAFC on the measures taken. The response of the NCP will be decisive for whether the vessel in question is then removed from the above-mentioned lists. Each year, NEAFC is to review the actions taken by NCPs whose vessels are listed, and identify any that have failed to address the unregulated fishery (NCP Scheme Art. 12). NEAFC may also decide on action against these NCPs, including trade-related measures. Since this is beyond the competence of NEAFC, these measures are to be adopted between the CPs. The measures are also to be multilateral and non-discriminatory in character, so as not be in breach of the WTO agreements. The CPs have not yet adopted such measures.

The role of NEAFC in ensuring the compliance by Contracting Parties and Non-Contracting Parties is not regulated by the Fish Stocks Agreement, but it is important in achieving effective implementation of NEAFC regulations. On the other hand, the practice of NEAFC suggests that there is still some way to go before the organization has properly defined its role. It may also be questioned why NEAFC has not been accorded competence to take enforcement measures in respect of CPs failing to comply, as is the case with NCPs. This could violate obligations under the WTO agreements.

CONCLUSIONS

The analysis reflects that NEAFC is probably one of the pre-Fish Stocks Agreement RFMO/As to have undergone the most radical changes in recent years—from a rather obscure existence in 1995 to an apparently vibrant organization by 2005. NEAFC seems to have surpassed NAFO as the most active RFMO/A, as it has developed dispute settlement procedures of its

[105] Ibid. For an overview of sightings of NCP vessels in the Regulatory Area for 2004, see www.neafc.org/reports/annual-meeting/docs/am2004_papers/2004-09_ncp-list.xls (accessed October 2005).

own, actively implemented the precautionary approach and pioneered implementation of the ecosystem approach and measures on IUU fishing.

This development cannot be explained solely by the Fish Stocks Agreement and the fact that most or all CPs have ratified it. Also important have been several other parallel and partly overlapping global and regional processes, such as OSPAR. That NEAFC has a relatively small membership, consisting mainly of coastal states bordering its Regulatory Area, has made the development easier. Since most of the fish stocks also are found within their jurisdiction, NEAFC has been by affected by changes in the policy of coastal states.

However, we should also note that NEAFC has not been particularly effective, as many of the fish stocks exploited still remain unregulated. Indeed, it might be tempting to ask whether the recent focus on ecosystem management is a way of diverting attention from these stocks. If NEAFC is to be able to perform its RFMO/A functions as described in this chapter, its Contracting Parties must be able to agree on basic and detailed conservation and management measures for fish stocks. Otherwise they will not have any legitimacy in respect of Non-Contracting Parties in requiring them to prevent their vessels from fishing on the stocks. And that would also undermine the status of NEAFC in the Contracting Parties.

CHAPTER FIVE

THE JOINT RUSSIAN–NORWEGIAN FISHERIES COMMISSION

INTRODUCTION

The Joint Russian–Norwegian Fisheries Commission manages some of the most valuable fish stocks in Arctic waters. The Commission was established by Norway and the Soviet Union in 1976 to accommodate the two countries' obligations under the evolving Law of the Sea (LOS) regime. The main task of the Commission is to establish total allowable catches (TACs) for three fish stocks in the Barents Sea that are defined as joint Russian–Norwegian (cod, haddock and capelin), but it is also involved in fisheries regulation more widely and, since 1993, in enforcement and compliance control.

This chapter gives a presentation of the regime, especially its operations since the mid-1990s. In line with the main research question of this book, we ask to what extent the principles of the Fish Stocks Agreement have been implemented in this particular regional fisheries management arrangement. The main focus is on those provisions of the agreement that were new as compared to the LOS Convention—notably the precautionary approach, transparency in the decision-making process and new directions about enforcement collaboration in regional fisheries management organizations and arrangements.[1] We divide the discussion into four main parts: i) the structure and allocation principles of the regime; ii) the regime's material principles, especially the introduction of the precautionary approach from the late 1990s; iii) procedural principles, focusing on transparency and stakeholder participation; and iv) provisions for compliance and enforcement. First, however, a brief overview of the fisheries covered by the regime.

THE FISHERIES IN QUESTION

The Barents Sea comprises those parts of the Arctic Ocean that lie between the North Cape on the Norwegian mainland, the South Cape of Spitsbergen Island in the Svalbard archipelago, and the Russian archipelagos of Novaya Zemlya and Franz Josef Land; see Map 5.1. Traditionally, the fish and marine mammals of the Barents Sea have provided the basis for settlement

[1] That management decisions should be based on scientific advice is not a new requirement, so this will not be separately discussed here. Nor is the Barents Sea jurisdiction treated; see Churchill & Ulfstein (1992) for a discussion.

along its shores, particularly in Northern Norway and in the Arkhangelsk region of Russia. Since the Russian Revolution of 1917, the city of Murmansk on the Kola Peninsula has functioned as the nerve centre of the northwest Russian fishing industry.

The Barents Sea contains a great abundance of fish stocks of a variety of species.[2] The reason for this abundance is the rich plankton production in these waters, providing food for large stocks of pelagic fish, i.e. fish living in the space between the seabed and the surface. The pelagic fish stocks, first and foremost capelin and herring, are in turn the prey of demersal fish such as cod, haddock and saithe. Both pelagic and demersal fish serve as food for sea birds, marine mammals and humans. Cod, capelin and herring are key species in the ecosystem. Cod feed on capelin, herring and smaller cod, while herring feed on capelin larvae. Periods of growth in the cod and herring stocks, along with a reduced capelin stock, tend to alternate with periods of low cod growth and no herring, but abundant capelin.

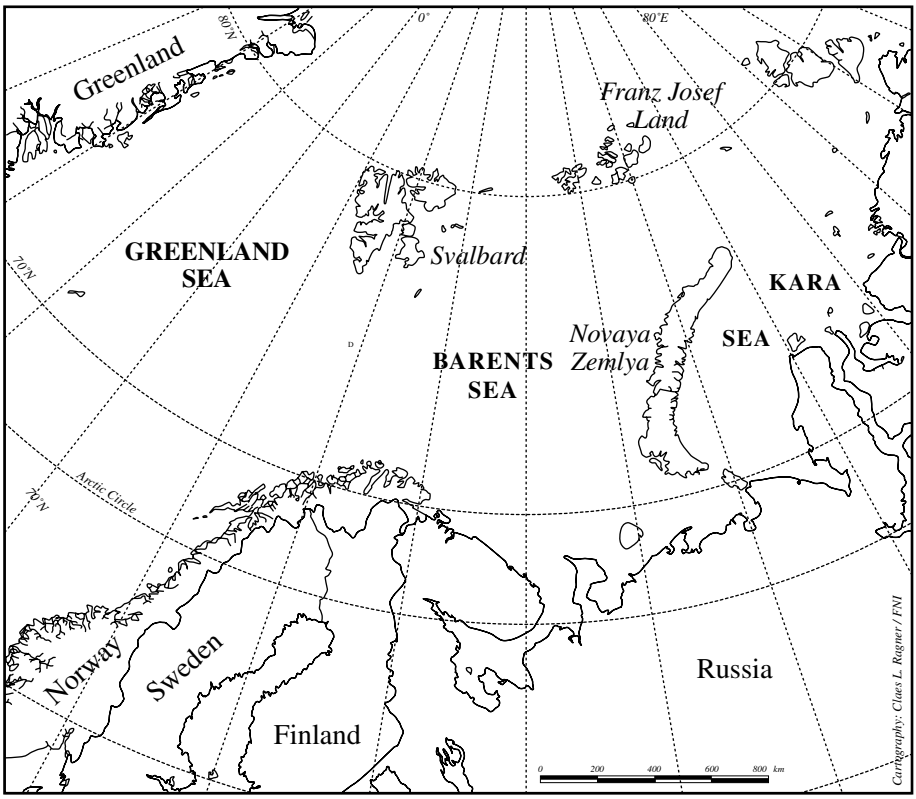
The Barents Sea capelin (*Mallotus villosus*) was among the largest and most important stocks in the Northeast Atlantic in the first decades after the Second World War. One major trait of this stock is that large year-on-year variations in individual growth lead to substantial fluctuations in stock size, with considerable implications for the whole ecosystem. Over the past decades, the total biomass has fluctuated from close to 9 mill. tonnes (1975) to 0.2 mill. tonnes (1986). The size of the capelin stock remained relatively stable during the 1970s, but fell dramatically in the 1980s and 1990s. Overfishing reinforced a natural downward trend, bringing the stock close to total collapse. Commercial fishing for capelin was halted in 1986; moderate quotas were set for the years 1991–93 and 1999–2004.

The Northeast Arctic cod (*Gadus morhua*) spawn along the coastline of Norway from the age of seven. After spawning, they return to the Barents Sea. Fry of this species also drift into the northern parts of the Barents Sea. From the age of four, cod prey upon capelin as the latter species moves southwards to its breeding grounds. The cod stock reached a total of some four million tonnes at the end of the 1960s, then decreased steadily throughout the 1970s, bottoming out at less than one million tonnes in the mid-1980s. The level of the late 1970s was regained in the early 1990s, but a new decline set in a few years later. Furthermore, scientists cut their stock estimates in 1998 with the discovery that their estimation method had yielded inflated figures. The cod quota was cut significantly around the turn of the

[2] This description of the Barents Sea resource base is derived from annual publications issued by the Norwegian Institute of Marine Research, which discuss the state of the individual fish stocks of the Barents Sea. See, in particular, *Havets ressurser* ("Resources of the Sea"), Institute of Marine Research, Bergen, 2004.

millennium, but has been increased moderately since then, in line with more optimistic views on the size of the stock.

Map 5.1 The Barents Sea



The Northeast Arctic haddock (*Melanogrammus aeglefinus*) stock in the Barents Sea tends to follow the same pattern as the cod. Having reached an all-time low in 1983–84, an increase was brought about by strong age-groups from the years 1982–83. Another decline took place in the late 1980s. From 1990, recruitment improved markedly until 1995. In recent years, a modest overall decrease has been observed, but the spawning stock has increased.

Fluctuations in the size of age-groups are more significant for haddock than for cod, and the total stock is also considerably smaller. Thus, it is generally considered difficult to sustain a stable haddock fishery over time. Other important demersal fish stocks in the Barents Sea include saithe or coalfish (*Pollachius virens*), redfish (*Sebastes mentella* and *Sebastes marinus*) and Greenland halibut (*Reinhardtius hippoglossoides*). In addition, there is a considerable fishery of shrimp (*Pandalus borealis*) in the Barents Sea.

STRUCTURE AND ALLOCATION PRINCIPLES OF THE REGIME

The establishment of 200-nautical-mile zones during the negotiation of the LOS Convention in the 1970s led to a transition from multilateral negotiations for the Barents Sea fisheries under the auspices of the North East Atlantic Fisheries Commission (NEAFC) to bilateral negotiations between coastal states with sovereign rights to fish stocks. Norway and the Soviet Union entered into several bilateral fishery agreements in the mid-1970s.[3] The Russian–Norwegian management regime for the Barents Sea fish stocks defines objectives and practices for bilateral management—in addition to national-level management procedures—within the fields of research, regulations and compliance control.[4] The collaboration of Russian/Soviet and Norwegian scientists in the mapping of the Barents Sea fish resources dates back to the 1950s. It is now institutionalized within the framework of the International Council for the Exploration of the Sea (ICES), which gives annual quota recommendations through its Advisory Committee for Fisheries Management (ACFM). The main participants in the mapping of the Barents Sea fish stocks are the Knipovich Scientific Polar Institute for Marine Fisheries Research and Oceanography (PINRO) in Murmansk and the Norwegian Institute of Marine Research.

The Joint Russian–Norwegian Fisheries Commission includes members of the two countries' fishery authorities, other governmental agencies, marine scientists and representatives of fishers' organizations.[5] The Norwegian delegation is headed by a leading official at the Norwegian Ministry of Fisheries, whereas the Russian delegation is normally headed by the first Deputy Chairman of the federal body for fisheries management.[6] The Com-

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[3] "Avtale mellom Regjeringen i Unionen av Sovjetiske Sosialistiske Republikker og Regjeringen i Kongeriket Norge om samarbeid innen fiskerinæringen" ("Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Kingdom of Norway on Cooperation in the Fishing Industry"), in *Overenskomster med fremmede stater* ("Agreements with Foreign States"), Ministry of Foreign Affairs, Oslo, 1975: 546–49; "Avtale mellom Regjeringen i Kongeriket Norge og Regjeringen i Unionen av Sovjetiske Sosialistiske Republikker om gjensidige fiskeriforbindelser" ("Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Mutual Fishery Relations"), in *Overenskomster med fremmede stater* ("Agreements with Foreign States"), Ministry of Foreign Affairs, Oslo, 1977: 974–78.

[4] For further presentations of the regime, see Hoel (1994), Hønneland (2000a, 2000b, 2004a), Nakken (1998), Stokke (2001b), Stokke & Hoel (1991) and Stokke et al. (1999).

[5] See the discussion about stakeholder participation below for further details.

[6] For most of the period 1991–2004, there was a Russian State Committee for Fisheries, i.e. an independent federal body of governance, immediately below the ministerial level. The general reorganization of Russia's federal bureaucracy in 2004 split the Committee into three agencies within and under the Ministry of Agriculture: a policy-making fisheries department within the Ministry, an implementing fisheries agency under the Ministry, and a fisheries

mission meets at least once a year, establishing TACs for the joint fish stocks of the Barents Sea: cod, haddock and capelin.[7] Cod and haddock are shared on a 50–50 basis, while the capelin quota is shared 60–40 in Norway's favour. In addition, quotas of the parties' exclusive stocks, and their portions of the shared stocks, are exchanged. Russia has traditionally given a share of its cod quota to Norway in return for a share in the latter's quotas of redfish, herring and Greenland halibut. However, after the introduction of reforms in the Soviet Union in the late 1980s, the Russians have kept a larger portion of their cod quota.

After the sessions of the Joint Fisheries Commission, the two parties conduct further quota exchanges in bilateral negotiations with third countries. Traditionally, the Soviet Union/Russian Federation has given part of its Barents Sea cod quota to the Faeroes, while Norway has transferred a share of its quota to the EU in exchange for quota shares in the North Sea. An enforcement cooperation between Norway and Russia in the Barents Sea has been in place since 1993; this will be presented separately below.

MATERIAL PRINCIPLES: TURNING TO 'PRECAUTION'

The agreements between Norway and the Soviet Union that established the fisheries management collaboration between them both list "conservation and rational exploitation of marine living resources" as the central aim of the collaboration.[8] The underlying principles for the Commission's quota establishment first became an issue in the late 1990s, as a direct result of the provisions in the Fish Stocks Agreement concerning the precautionary approach to fisheries management.[9] The initiative came from ICES, which established a Study Group on the Precautionary Approach to Fisheries Management in 1996. The mission of the Study Group was to draft a new form of recommendations by ACFM, incorporating the precautionary ap-

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monitoring and enforcement unit in the veterinary service, also under the Ministry (Hønneland, 2004b, 2005a, 2005b).

[7] The Kamchatka crab (*Paralithodes camtschaticus*) was introduced into the Barents Sea by the Soviets in the late 1960s. It became a shared stock in 2003, after the Russians agreed to Norway's establishing a westward limit (26° East) beyond which the Norwegian party would be entitled to determine the size of the stock. See *Protokoll for den 32. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 32nd Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 2003.

[8] "Avtale mellom Regjeringen i Unionen av Sovjetiske Sosialistiske Republikker og Regjeringen i Kongeriket Norge om samarbeid innen fiskerinæringen", Art. 1; "Avtale mellom Regjeringen i Kongeriket Norge og Regjeringen i Unionen av Sovjetiske Sosialistiske Republikker om gjensidige fiskeriforbindelser", Preamble.

[9] I.e. as an explicitly formulated concept such as the precautionary approach.

proach. The report of the Study Group elaborated the basis for calculations of concrete reference points for the various fish stocks within the responsibility area of ICES, including the Barents Sea.[10] The reference points are signposts for the provision of information on the status of the stocks in relation to predefined *limits* to be avoided and *targets* to be aimed at in order to achieve the management objectives.[11] ICES proposed reference points for the Northeast Arctic cod stock in 1998; see Table 5.1.

Table 5.1 ICES reference points for the Northeast Arctic cod stock 1998–2001 and after 2001

B_{lim}: 112,000/220,000 tonnes (lowest spawning stock biomass without danger of stock collapse)	B_{pa}: 500,000/460,000 tonnes (lowest 'acceptable' spawning stock biomass)
F_{lim}: 0.70/0.74 (fish mortality associated with potential stock collapse)	F_{pa}: 0.42/0.40 (fish mortality considered to have a 95% probability of avoiding the F_{lim})

Sources: ACFM Report 1998, International Council for the Exploration of the Sea, Copenhagen, 1998; *Havets ressurser* ("Resources of the Sea"), Institute of Marine Research, Bergen, 2004.

B refers to the size of the spawning stock while F indicates fish mortality, which is the sum of natural mortality and catch rate. The $-_{lim}$ values represent levels of spawning stock and catches associated with potential stock collapse ('limits to be avoided'); the $-_{pa}$ values imply precautionary approach levels for the spawning stock and catch rate ('targets to be aimed at'). A catch rate higher than F_{pa} is defined as overfishing; a stock with a spawning stock biomass lower than B_{pa} is considered to be overfished. Hence, the management of the Northeast Arctic cod stock is held to be in accordance with the precautionary approach only as long as the stock's spawning mass is larger than 460,000 tonnes (500,000 tonnes until 2001) and the catch rate is lower than 0.40 (0.42 until 2001), or steps are taken within reasonable time to bring the spawning stock and catch rate within these limits. The reference point for the spawning stock size of 500,000 tonnes equalled the 'safe biological limit' that had been applied by ICES for this stock since 1986 (Aasjord, 2001). As commented by Stokke & Coffey (2004), there was more continuity than

[10] *Report of the Study Group on the Precautionary Approach to Fisheries Management*, International Council for the Exploration of the Sea, Copenhagen, 1997.

[11] The basis for calculating reference points is detailed further in a second report from the Study Group: *Report of the Study Group on the Precautionary Approach to Fisheries Management*, International Council for the Exploration of the Sea, Copenhagen, 1998. See also Chapter 2 of this volume.

change in the reference points used by ICES after its introduction of the precautionary approach.

In Norway, the precautionary approach has been incorporated into the country's official fishery policy.[12] On the Russian side, no reference to precaution is found in national fisheries legislation, e.g. in the federal Fisheries Act adopted in 2004[13] or in central pieces of fisheries legislation elaborated at lower levels of the legal hierarchy. Instead, the Act on the Exclusive Economic Zone,[14] the Maritime Doctrine[15] and the Fisheries Act, as well as the various provisions on quota allocation issued during the period 1995–2003 all emphasize the 'development' or 'exploitation' aspects of fisheries management (Hønneland, 2004b, 2005a, 2005b). The introduction of the precautionary approach by the Joint Fisheries Commission came gradually during the last half of the 1990s. In the protocol from its 1997 session, the Commission noted:

> The parties agreed on the need to develop further long-term strategies for the management of the joint stocks of the Barents Sea. Until such a strategy is available for cod, the parties agreed that the annual total quota is to be established so as the spawning stock is maintained above 500,000 tonnes at the same time as the fishing mortality in the next years is reduced to less than F_{med} (safe biological limit)=0.46.[16]

The same paragraph is used in the protocol from the 1998 session, with the specification that fishing mortality shall be reduced to less than 0.46 "no later than in 2001".[17] In the protocol from the 1999 session, F_{med} (safe biological limit) is changed to F_{pa} (precautionary approach) and the aimed-at

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[12] *St meld nr 51 (1997–98) Perspektiver på norsk fiskerinæring* (White Paper No. 51 (1997–98) Perspectives on the Norwegian Fishing Industry), Stortinget, Oslo, 1997: 15.

[13] *O rybolovstve i sokhranenii vodnykh biologicheskikh resursov* ("On Fisheries and the Conservation of Aquatic Biological Resources"), Federal Law of the Russian Federation No. 166-FZ, adopted 20 December 2004, entry into force 3 January 2005.

[14] *Ob Isklyuchitelnoy Ekonomicheskoy Zone Rossiyskoy Federatsii* ("On the Exclusive Economic Zone of the Russian Federation"), Federal Law of the Russian Federation, adopted by the State Duma 18 November 1998 and by the Federation Council 2 December 1998, Moscow. Published in English translation as "Federal Act on the Exclusive Economic Zone of the Russian Federation", *Law of the Sea Bulletin*, 2001 (46): 37–63.

[15] *Maritime Doctrine of the Russian Federation to the Year 2020*, approved by the President of the Russian Federation, Vladimir Putin, 27 July 2001, Pr.-1387 (English version provided by the Norwegian Embassy in Moscow; on file with the authors).

[16] *Protokoll for den 26. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 26th Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 1997: 2.

[17] *Protokoll for den 27. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 27th Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 1998: 2.

catch rate level reduced from 0.46 to 0.42,[18] i.e. brought into accordance with the recommendations from ICES. In 2000, the Joint Fisheries Commission requested ICES to "reconsider the B_{pa} in light of the dynamics of the cod stock over the last 30–40 years".[19] In 2001, B_{pa} was reduced to 460,000 tonnes and the other reference points were revised; see Table 5.2. On the one hand, reducing the spawning stock to 460,000 tonnes (instead of 500,000 tonnes) was now considered acceptable. On the other hand, fish mortality must now not go lower than 0.40 to be considered precautionary, as opposed to 0.42 before.

As follows from Table 5.2, the relationship between recommended TAC, agreed TAC and actual catches of cod in the Barents Sea varied between 1995 and 1999. Since the turn of the millennium, however, there has been a clear tendency: TAC is set considerably above ICES recommendations,[20] and actual catch has been even higher. The spawning stock has been above the precautionary reference point since 2002—it actually tripled from 2000 to 2003—but fish mortality has not come within precautionary limits (0.7 in 2003).

In 2002, the Commission established a new strategy for its management of the Northeast Arctic cod stock, aimed at ensuring biological viability and greater economic predictability for fishery-dependent communities in Norway and Russia. The main elements of the strategy are as follows:

- average fish mortality should be kept below the precautionary limit over three-year periods;
- TAC should not change more than 10% from one year to another; but
- exceptions can be made in situations where the spawning stock has fallen below B_{pa}.[21]

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[18] *Protokoll for den 28. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 28th Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 1999: 2.

[19] *Protokoll for den 29. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 29th Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 2000: 2.

[20] The reason TAC was set far above scientific recommendations is generally believed to be associated with the short-term interest of Russian shipowners, who gained increased influence in the Russian delegation to the Joint Fisheries Commission in the late 1990s. Also, there was a deep mistrust in Russia to Norway's motivations for reducing the cod quota. Many were of the opinion that the scientific scepticism was unfounded and that Norway simply wanted to reduce the flow of wild cod to international markets in order to secure good prices for farmed cod. See Hønneland (2004a) for a discussion.

[21] *Protokoll for den 31. sesjon i Den blandede norsk-russiske fiskerikommisjon* ("Protocol from the 31st Session of the Joint Norwegian–Russian Fisheries Commission"), Ministry of Fisheries, Oslo, 2002: 2.

Table 5.2 ICES recommendations, TACs, catches and spawning stock for Northeast Arctic cod 1995–2004 (in thousand tonnes)

Year	Main advice from ICES	Recommended TAC	Agreed TAC	Catch	Spawning stock
1995	No gain by increasing F	681	700	740	501
1996	No gain by increasing F	746	700	732	579
1997	Well below F_{med}	<993	850	762	565
1998	F_{med}	514	654	593	388
1999	Reduce F to below F_{pa}	360	480	485	252
2000	Increase spawning stock to over B_{pa} in 2001	110	390	414	222
2001	High probability of spawning stock larger than B_{pa} in 2003	263	395	426	321
2002	Reduce F to below 0.25	181	395	445	505
2003	Reduce F to below F_{pa}	305	395		653
2004	Reduce F to below F_{pa}	398	486		652

Source: St meld nr 45 (2003–2004) *Om dei fiskeriavtalane Noreg har inngått med andre land for 2004 og fisket etter avtalane i 2002 og 2003* (White Paper No. 45 (2003–2004) On the Fishery Agreements Norway has concluded with other Countries for 2004 and the Fishery according to the Agreements in 2002 and 2003), Ministry of Fisheries, Oslo, 2004.

PROCEDURAL PRINCIPLES: TRANSPARENCY AND STAKEHOLDER PARTICIPATION

As accounted for in Chapter 2, the Fish Stocks Agreement requires states to ensure transparency in the decision-making process of regional fisheries management organizations and arrangements. A central aspect of such transparency is the participation of various 'stakeholders' in the work of the organization or arrangement. In the Joint Fisheries Commission, all participation goes through the delegations of the two member states. As mentioned above, the Commission consists of civil servants, scientists and fishing industry representatives from Norway and Russia. Roughly speaking, representatives of the two countries' ministries and directorates normally make up just above one third of their delegations, scientists another third or so, and fishing industry representatives somewhat below the last third. The composition of the Norwegian delegation has been more stable over time than the Soviet/Russian one. In Soviet times, the country's fishing industry was heavily represented—on the other hand, it is quite meaningless to distinguish between user groups and governmental agencies in a planned economy with

only state-owned fishing organizations; see Hønneland & Nilssen (2000) for a discussion. As noted, the influence of Russian shipowners within the Russian delegation to the Joint Fisheries Commission increased during the 1990s, but since the turn of the millennium fishing industry representation has decreased. In 2004, only one shipowner and a politically quite insignificant association of fishing collectives were represented; see Table 5.3.

More important than user-group representation, as the provisions of the Fish Stocks Agreement have normally been interpreted, is representation by stakeholders not directly involved in fishing activities, but with a legitimate interest in them. Particularly relevant in this context are environmental NGOs. In both Norway and Russia, fisheries management in the Barents Sea has traditionally been the sole responsibility of the respective country's 'fishery complex'—the axis between fishery officials, fishery scientists and fishing industry representatives—to which neither environmental groups, regional authorities nor other stakeholders have had access.[22] Demands for a change came only with the Joint Fisheries Commission's increasing tendency in the late 1990s to set quotas far in excess of scientific recommendations. In Norway, both environmental NGOs and regional authorities started to question the legitimacy of the Commission's decisions and demand representation on it, or at the very least information about its work.[23] A few excerpts from Norwegian media around the turn of the millennium, reflecting the view of the Norwegian Society for the Conservation of Nature, illustrate this debate:

> We are excluded (from the Joint Fisheries Commission) and hence denied participation in the debate about the future of our fisheries—just like the rest of the Norwegian population. […] Unfortunately, Norwegian fishery policies are today carved out in a closed room, quite contrary to democratic rules of the game. It is only two weeks until [the Joint Fisheries Commission] meets in Murmansk in order, among other things, to establish total quotas for the Barents Sea for next year. We have no idea about the proposals Norway has put forward and hence no possibility to take part in the debate. […] What kind of secrecy is it that we allow to develop in the Norwegian–Russian fisheries debate? A closed culture has developed in which both parties are caught in the negotiation game. The members of the Commission have, in a way, their own

[22] Admittedly, the Regulation Council, which distributes quota shares among Norwegian shipowners, has one representative from the Saami Parliament and one from regional authorities. It also has observers from the Norwegian Society for the Conservation of Nature, the Directorate for Nature Management and the Coast Guard.

[23] The sessions of the Joint Fisheries Commission take place behind closed doors; only the results of the 'negotiations' are made public.

> reality, with which the rest of the world cannot identify. The result is bad fisheries management.[24]
>
> It's a cocoon, where the Directorate of Fisheries, marine science and the Ministry [of Fisheries] have created a strange fraternity. We are not informed about what is going on and whether it is in fact Russia that is pressing for higher quotas or if Norway is agreeing. The closed nature of the [Joint] Fisheries Commission violates democratic principles.[25]

While many within the Norwegian fishery establishment thought that environmental NGOs had no 'real interest' in the establishment of Barents Sea quotas, the Norwegian Society for the Conservation of Nature was supported by one of the most respected experts on the Barents Sea regime, Olav Schram Stokke of the Fridtjof Nansen Institute.[26] Probably as a result of the mounting criticism, the three northernmost counties in Norway were allowed to appoint a representative to the Joint Fisheries Commission in 2003, and in the following year the Saami Parliament was represented for the first time. Environmental NGOs or other stakeholders have not been included thus far, but the Norwegian authorities have aimed at greater openness towards the public before and after the sessions of the Commission, e.g. in the form of press conferences and public debates. A similar tendency is not in evidence on the Russian side. First, environmental NGOs are generally weak in Russia and the opinions of 'non-experts' are seldom welcome.[27] Second, as a result of the traditional 'compartmentalization' of Russian politics, the idea of giving environmental interests influence on fisheries management is hardly politically feasible.[28] Third, since Vladimir Putin's ascendance to power in 2000, the regions have lost most of the political autonomy they had gained during the presidency of Boris Yeltsin. Hence, Russian fisheries management has been re-centralized and regional authorities enfeebled. As follows from Table 5.3, the regional administrations of Murmansk, Arkhangelsk, Karelia and Leningrad[29] were represented on the Russian delegation to the Joint Fisheries Commission in 2000 and/or 2001; in 2004, only Murmansk was still represented.

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[24] Leader of the Barents Sea office of the Norwegian Society for the Conservation of Nature to *Fiskeribladet*, 2 November 1999: 4.

[25] Leader of the Barents Sea office of the Norwegian Society for the Conservation of Nature to *Fiskeribladet*, 2 November 2001: 7.

[26] *Fiskeribladet*, 28 September 2001: 27. Stokke referred specifically to the requirements of the Fish Stocks Agreement.

[27] See Hønneland (2003) for a discussion of the status of the 'expert opinion' vs. 'public involvement' in Russia.

[28] This was seriously considered only briefly in the late 1980s, after the State Committee for Environmental Protection had been established in 1988 (Nikitina & Pearse, 1992).

[29] The *oblast* ('county') surrounding the city of St Petersburg retained the name of Leningrad when the city itself was given back its original name.

Table 5.3 Representatives from Norway and Russia on the Joint Fisheries Commission 2000–2004 (Russian agencies referred to by name after 2004 reorganization)

	Norway:	Russia:
Authorities:	–Ministry of Fisheries –Ministry of Foreign Affairs –Ministry of Defence[a] –Directorate of Fisheries –Coast Guard	–Ministry of Agriculture –Ministry of Foreign Affairs –Federal Fisheries Agency –Federal Border Service/ Federal Security Service (FSB)[b] –Murmanrybvod
Research institutes:	–Norwegian Institute of Marine Research (Bergen) –Norwegian Institute of Fisheries and Aquaculture Research (Tromsø)[c]	–VNIRO (Moscow) –PINRO (Murmansk) –SevPINRO (Arkhangelsk)
Fishing industry:	–Norwegian Fishermen's Association –Association of Norwegian Coastal Fishermen –Norwegian Seafood Federation –Norwegian Seamen's Association	–Union of Fisheries Collectives –Murmansk Trawl Fleet –Murman Seafood[d] –Sevryba (the former association of all fisheries enterprises in northwestern Russia) [d]
'New' actors:	–representative of the three northernmost counties[e] –Saami Parliament[e]	–Murmansk regional administration –Arkhangelsk regional administration[d] –Karelian regional administration[d] –Leningrad regional administration[d]

a) Only in 2004.
b) The Federal Border Service was merged with the Federal Security Service (FSB) in 2003.
c) Only in 2000–2002, after which researchers from this institute were transferred to a newly established department of the Norwegian Institute of Marine Research in Tromsø.
d) Only in 2000 and/or 2001.
e) From 2003/2004.

The public debate about transparency and stakeholder participation in the Joint Fisheries Commission was particularly intense in Norway around the turn of the millennium. The most active environmental NGO was the Norwegian Society for the Conservation of Nature (*Norges naturvernforbund*),

which has its own regional office for the Barents Sea. With the Joint Fisheries Commission's strategic plan for management of the cod stock and more optimistic assessments by the fishery scientists since 2002–2003, the discussion about transparency seems to be somewhat on the wane. Since 2003–2004, greater notoriety has surrounded the issue of Russian overfishing in the Barents Sea. The World Wildlife Fund for Nature (WWF), which in 2004 opened an office in Murmansk, has been the most active NGO in raising public concern about overfishing.[30]

All stakeholder representation has to go through the Norwegian or Russian delegations to the Joint Fisheries Commission; there is no 'direct' representation on the Commission by stakeholders. The Commission was established as a bilateral regime between two coastal states, but third countries are annually given a quota in the Barents Sea through negotiations with Norway and Russia.[31] The most important conflict with a third country was the dispute with Iceland during most of the 1990s. The northeastern part of the Barents Sea, the 'Loophole', does not fall within the established zones of the area;[32] and in 1993 Icelandic vessels (largely under flags of convenience) started fishing cod here, arguing that they had the right to do this since the area was international waters and they had historical rights there. Norway and Russia characterized the fishery as illegal, claiming the two coastal states had the right to regulate the Northeast Arctic cod throughout its entire range. However, in 1999 the three countries reached an agreement that gave Iceland a general cod quota for the Barents Sea in exchange for quotas in the Icelandic EEZ.[33] It can be argued that the Fish Stocks Agreement had an influence since it increases pressure on all states involved in a fishery to find cooperative solutions to conservation and management issues (Stokke, 2001b).

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[30] See www.panda.org/about_wwf/where_we_work/arctic/what_we_do/marine/barents/overfishing.cfm (accessed 30 September 2005).

[31] As Stokke & Hoel (1991) observe, the Norwegian and Soviet share of the Barents Sea cod increased after the bilateral regime was established. For instance, Norway and the Soviet Union in 1970 had around 40% and 30% of the cod quota, respectively, while they have retained around 90% for themselves (in principle split equally between them, but normally the subject of negotiation including other species) after the Joint Fisheries Commission was established in 1976.

[32] As noted at the beginning of this chapter, questions of the jurisdiction of the Barents Sea are not discussed here.

[33] *Avtale mellom Norge, Island og Russland om visse samarbeidsforhold på fiskeriområdet* ("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"), *Overenskomster med fremmede stater* ("Agreements with Foreign States"), Ministry of Foreign Affairs, Oslo, 1999: 838–46. On the Barents Sea 'Loophole' and the agreement between Norway, Iceland and Russia, see Churchill (1999) and Stokke (2001b).

PROVISIONS FOR COMPLIANCE AND ENFORCEMENT[34]

In 1992, the Norwegian Coast Guard reported a dramatic increase in cases of underreporting by Russian vessels, and attempted to estimate the total Russian catch in the Barents Sea for that year.[35] In autumn 1992, the Norwegian fishery authorities presented to their Russian colleagues figures indicating that the Russians had fished more than 100,000 tonnes illegally.[36] At the November session of the Joint Fisheries Commission that year, the heads of the two delegations jointly proposed the appointment of a working group to consider cooperation between the enforcement bodies of the two states.[37] The expert group presented a list of eighteen specific proposals within the categories of legislation, information, and control in June the following year.[38]

Exchange of information between the enforcement bodies of the two countries started immediately after the proposals of the expert group had been approved by the Joint Fisheries Commission. The most important measure concerned supplying information on Russian catches landed in Norway to the Russian enforcement authorities. Russian overfishing in 1992 had occurred because Russian vessels had been landing increasing shares of their catches in Norwegian ports, and the Russian authorities were unable to keep track of these landings. As a result of the enforcement cooperation between Norway and Russia, landing data were now automatically conveyed from the Norwegian Directorate of Fisheries to the Russian regional enforcement body, Murmanrybvod. Additionally, routines were established for the informal exchange of information between the Norwegian Coast Guard and Murmanrybvod about the situation at sea. The Norwegian Coast Guard also started to check whether Russian vessels were carrying valid fishery and port permits. Until then, the Coast Guard had only checked that the vessel was licensed for fishing in the Norwegian EEZ. One increasing problem, according to the Russian enforcement authorities, was that Russian vessels

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[34] This section is a shortened and updated version of Hønneland (2004b: 142–54). See this for more detailed references to primary data.

[35] The Norwegian inspectors used the catch logs of the Russian vessels to calculate each individual vessel's total catch that year. Normally, they would have been interested only in catches taken in Norwegian zones, but on this occasion they included catches taken in the Russian EEZ (Hønneland, 2004b: 142, 156).

[36] Ibid. Overfishing constituted one-fourth of the total cod quota in the Barents Sea for 1992.

[37] *Protokoll fra møte i den norsk-russiske ekspertgruppe for forvaltningssamarbeid innenfor fiskerisektoren, mai 1993* ("Protocol from Meeting in the Norwegian–Russian Expert Group on Management Cooperation within the Fisheries Sector, May 1993"), Directorate of Fisheries, Bergen, 1993, Introduction (unpaginated).

[38] Ibid.

with a permit to fish only shrimp and pelagic species were fishing cod as well. Earlier, the Russian authorities would have detected the fraud when the fish was landed. Now that most of the fish was landed in Norway, the vessels could fish for cod in Norwegian waters and deliver it in Norwegian ports, escaping surveillance from Russian enforcement bodies altogether.

Norway and Russia agreed in 1993 to appoint a Permanent Committee under the Joint Fisheries Commission which could meet at short notice to discuss management and enforcement issues. The committee was a carry-over from the expert group and came to be known as the Permanent Russian–Norwegian Committee for Management and Enforcement Cooperation within the Fisheries Sector, hereafter referred to as the 'Permanent Committee'. The activities of the Permanent Committee since 1994 can be divided into three main categories: i) discussions on current issues related to fisheries management and enforcement practices in the two countries; ii) the administration of exchange of personnel (inspectors and observers) and data; and iii) the execution of more comprehensive tasks assigned to it by the Joint Fisheries Commission. Most importantly, the meetings of the Permanent Committee enabled the Norwegian and the Russian fishery authorities to discuss issues of current and at times urgent interest in greater depth than possible by means of ordinary correspondence. Exchange of data and personnel was one of the main proposals to come out of the expert group; this has been one of the Permanent Committee's main concerns since it was established. Another measure that proved effective and has since been continued was the participation of Russian inspectors from Murmanrybvod as observers on inspections of Russian vessels in Norwegian ports carried out by the enforcement division of the Norwegian Directorate of Fisheries. In 1995, the parties agreed to include inspectors from Murmanrybvod and the Norwegian Coast Guard in the exchange programme. Joint seminars for enforcement officers from the two countries have been organized annually since 1994. In addition to the administration of the exchange programmes and discussions of pressing issues, the Permanent Committee has elaborated joint conversion factors for products of fish caught in the Barents Sea and common procedures for the closing and opening of fishing grounds. Further, the Committee played a significant role in paving the way for the introduction of compulsory selection grids in the cod fishery, and satellite communications to track fishing vessels in the Barents Sea. Finally, mention should be made of the efforts of the Permanent Committee to standardize the various types of fisheries statistics used in Norway and in Russia.

The enforcement cooperation initiative between Norway and Russia in the Barents Sea has been successful in the sense that the parties have managed to extend their long-standing cooperative patterns in the spheres of research and regulation of the Barents Sea fisheries to include enforcement issues.

The expert group, and later the Permanent Committee, proved themselves effective bodies in registering management and enforcement problems, elaborating and proposing solutions, and implementing the tasks assigned to them by the Joint Fisheries Commission. This initial success of the enforcement initiative can probably be attributed to a similar understanding of the problems between the parties, as well as to good personal relations across the national divide in the expert group/Permanent Committee, and the advantage of several years' experience of Norwegian–Russian cooperation in the fisheries sector. As far as problem-solving is concerned, the effects of the enforcement partnership are more uncertain. While overfishing might have been avoided in the years immediately following the establishment of the enforcement collaboration, since the turn of the millennium the situation has again become alarming.[39] The exchange of catch and landing data between Norway and Russia is a necessary but insufficient factor in eliminating catch underreporting. Sanctioning mechanisms in Russia, and the sincerity of Russian officials' wish to eliminate overfishing, are uncertain elements in this respect; see Hønneland (2004b, 2005b) for a further discussion.

CONCLUSIONS

The Joint Fisheries Commission is a regional fisheries management arrangement established nearly two decades before the Fish Stocks Agreement was adopted, with clearly defined access rules and decision-making procedures. The two coastal states Norway and Russia are the members of the regime, and three fish stocks are defined as shared between the two parties (in addition to, since 2003, Kamchatka crab, which has not been discussed in this chapter). These, in turn, are divided according to agreed distribution keys: cod and haddock 50–50 and capelin with 60% to Norway and 40% to Russia. The main task of the Joint Fisheries Commission is to set TACs for the shared stocks, to coordinate technical regulation and (since 1993) enforcement of the Barents Sea fisheries.

Have the provisions of the Fish Stocks Agreement been implemented in this particular regional fisheries management arrangement? Most obviously, the Commission's adoption of the precautionary approach to fisheries management, 'channelled' through ICES precautionary reference points, might have led to a more cautious approach to TACs around the turn of the millennium than would otherwise have been the case. On the other hand, it can be argued that there was a general trend towards 'precaution' during this period,

[39] See http://odin.dep.no/fkd/norsk/tema/faktaark/047061-990008/dok-bn.html (accessed 30 September 2005).

and that the establishment of quotas by the Joint Fisheries Commission can hardly be attributable to the principles of the Fish Stocks Agreement alone.

With hindsight, we may say that the initial spawning stock reference points set for Northeast Arctic cod were most likely 'too precautionary'. The commotion caused when the Joint Fisheries Commission did not comply with the guidelines of these reference points in turn directed public attention to the working methods of the Commission. Norwegian environmental NGOs as well as regional authorities demanded representation on the Commission or, at the very least, greater openness about the discussions taking place at its sessions. Some critics specially mentioned the requirements of the Fish Stocks Agreement. As a result, the Norwegian authorities have widened representation to the Commission slightly and generally sought to convey an image of greater 'openness' towards the Norwegian public in its fishery relations with Russia. The three northernmost counties of Norway were in 2003 allowed to appoint one representative to the Norwegian delegation to the Joint Fisheries Commission, and in 2004 the Saami Parliament was also granted representation. Environmental NGOs have so far not been admitted. On the Russian side, regional authorities from several northern counties were included in the delegation during the decentralization of the Yeltsin years; by 2004, only Murmansk was still represented. Unsurprisingly, the Russians have not granted environmental NGOs representation on the Commission.

As a result of Russian overfishing in 1992, an enforcement collaboration between Norway and Russia was established two years before the Fish Stocks Agreement was adopted. The enforcement partnership was strengthened during the 1990s, but does not seem to have been influenced by the provisions of the Fish Stocks Agreement. Since the turn of the millennium, the enforcement cooperation has stagnated, and significant Russian overfishing has again been documented. Further, if the regime is again challenged by considerable high seas fisheries, the Fish Stocks Agreement provides a more powerful set of compliance mechanisms than what had previously been available.

Finally, the quota agreement between Norway, Russia and Iceland in 1999—after a six-year dispute about Icelandic fishing in the Barents Sea 'Loophole'—might have been influenced by the Fish Stocks Agreement's general urge for 'regional cooperation' in the management of fish stocks that straddle the areas between EEZs and the high seas. If not influenced by the Fish Stocks Agreement in its contents, the latter generally put pressure on states to find cooperative solutions.

CHAPTER SIX

THE SOUTH EAST ATLANTIC FISHERIES ORGANIZATION (SEAFO)

INTRODUCTION

The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (SEAFO Convention) entered into force on 13 April 2003. It was the first convention to establish a regional fisheries management organization (RFMO/A) covering straddling fish stocks following the adoption of the Fish Stocks Agreement of 1995. SEAFO is therefore of particular interest as a first take at implementing the Fish Stocks Agreement through the negotiation and establishment of a new RFMO/A.

It took nine years from the initial Namibian initiative in 1995 to the first meeting of the SEAFO Commission in March 2004. This chapter outlines and discusses the road to an operational SEAFO and the manner in which the Fish Stocks Agreement has been reflected in the SEAFO Convention. It begins by presenting the fisheries and fishing activity in the southeast Atlantic, and then turns to the negotiation process and the substantive provisions of the SEAFO Convention. Finally, it outlines the political process of moving the SEAFO Convention from paper to management practice through cooperation among the parties.

Table 6.1 SEAFO timeline

Events and processes
• 1995: Namibian initiative
• 1996–1997: informal coastal state consultations
• 1997–2001: SEAFO Process
• 20 April 2001: SEAFO Convention adopted in Windhoek, Namibia
• 2001–2005: interim arrangement
• 13 April 2003: SEAFO Convention enters into force
• 9–13 March 2004: first meeting of parties, Windhoek, Namibia

THE FISHERIES AND THE CONVENTION AREA

The objective of the SEAFO Convention is to ensure the long-term conservation and sustainable use of the fisheries on the high seas of the southeast Atlantic Ocean (Art. 2).[1] For this purpose the convention establishes SEAFO to manage fish and sedentary species within the mandate area. The high seas fisheries of the southeast Atlantic consist of highly migratory, straddling and discrete high seas fish stocks. The highly migratory fish stocks in the region are managed by the International Commission for the Conservation of Atlantic Tuna (ICCAT)[2] and therefore fall outside the scope of the SEAFO Convention. Sedentary species subject to coastal state jurisdiction under LOSC (Art. 77(4)) are also excluded from the scope of SEAFO. In practice SEAFO will cover alfonsino (Family *Berycidea*), orange roughy (*Hoplostethus* spp.), armourhead (*Pseudopentaceros* spp.), wreckfish (*Polyprion americanus*), deep-water hake (*Merluccius* spp.) and red crab (*Chaceon maritea*) (Sydnes, 2001b: 353).[3]

From 1971 the high seas areas of the southeast Atlantic and the (future) Namibian 200-nautical-mile EEZ were managed by the International Commission on South East Atlantic Fisheries (ICSEAF).[4] ICSEAF was largely unable to agree upon or enforce effective regulations, which over time led to unregulated fishing and cases of stock depletion. The organization became inoperative following Namibian independence in 1990. One of the first acts of the independent Namibian government was to claim a 200-nautical-mile

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[1] At the second session of the SEAFO process (SEAFO 2), it was agreed among parties present that the convention area would cover the high seas of FAO statistical area 47. Angola later wanted to revisit this decision to include its northern coastline (Cabinda). Angola's concern was that excluding Cabinda from the convention area might disadvantage it in an unresolved dispute with neighbouring coastal states. Meetings between the parties and FAO made it clear that such an extension of the mandate area would lead to a need to alter the boundaries of FAO's statistical area and a revision of the mandate area of the Fisheries Committee for the Eastern Central Atlantic (www.fao.org/fi/body/rfb/CECAF/). As this was impracticable, the parties of SEAFO have signed a declaration stating their willingness to extend the boundary of SEAFO northwards. For further discussion, see Sydnes (2001b: 358–59). See also official correspondence between the parties; Ministry of Fisheries and Marine Resources, Republic of Namibia, "SEAFO-Minutes Meeting FAO 17/01/01", Windhoek, Namibia; Ministry of Fisheries and Marine Resources, Republic of Namibia, "Letter to the Honourable Minister Dr. Maria Jardim de Fatima, Ministry of Environment and Fisheries, Angola, 19 January 2001, Windhoek, Namibia".

[2] International Convention for the Conservation of Atlantic Tuna, Rio de Janeiro, 14 May, 1966, 673 *United Nations Treaty Series* 63.

[3] Red crab is an exclusively high seas stock. Article 2 of the SEAFO Convention refers to the fisheries in the convention area, in general, rather than straddling fish stocks in particular. For species names and codes, see SEAFO Convention: Annex.

[4] Though the RSA made claims to the Namibian EEZ, this was not recognized by the other parties to ICSEAF.

EEZ, and jurisdiction over the fisheries within the zone. Meanwhile, the high seas fisheries of the southeast Atlantic (excluding highly migratory fisheries, managed by ICCAT) were left without a managing body. However, there is no direct relation between ICSEAF and SEAFO.

A striking feature of the fisheries in the SEAFO mandate area is the low level of fishing activity and political and economic vested interests. With an average catch of 3,822 tonnes annually in the period 1995–98,[5] it may well be asked: why undertake the burdensome task of establishing a regional fisheries management organization? Considering the general lack of appropriate fisheries management institutions on a global scale, SEAFO may seem a very precautious political investment. As such, SEAFO offers an alternative to established experience in international fisheries cooperation, in that the initiative was triggered by precaution, rather than actual crisis in the fisheries or conflicts among users. It is a legal instrument and cooperative mechanism established for the eventuality of increasing catches or fishing effort on the fisheries on the high seas of the southeast Atlantic Ocean. The potential gain of such cooperation lies in achieving the estimated catch-rates of the mid-1980s, which exceeded 50,000 tonnes (Sydnes, 2001b: 354).

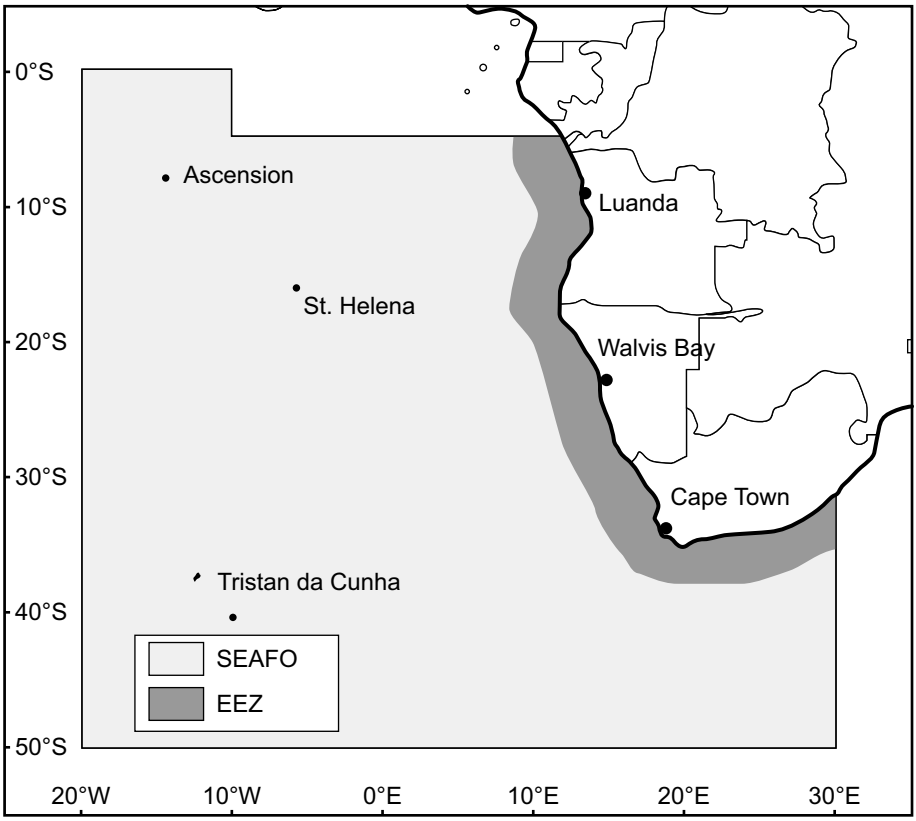
Table 6.2 Estimated catches (tonnes), SEAFO convention area 1995–98

Country	1995	1996	1997	1998	Species
RSA	600	312	177	400	alfonsino, orange roughy, armourhead
Namibia	100	624	970	200	alfonsino, orange roughy, armourhead
Russia			2800		alfonsino, orange roughy, armourhead
Spain	1069	372.8	280.1	682.3	alfonsino, orange. roughy, armourhead
Japan		1008	2171	700	crab mostly, some groundfish
Portugal	62.7	38.1	137.5	154	var. species, octopus, wreckfish
Rep. of Korea	268	305	636		large pelagics
Norway			863.9	1085.3	alfonsino, orange roughy, armourhead
Iceland			466	126	alfonsino, orange roughy, armourhead
Total	2100	2512.9	7354.5	3348	

Source: Japp, 1999: 9.

[5] It is assumed that actual catches, including unreported catches, were approximately 5,000 tonnes (Japp, 1999: 9–10)

Map 6.1 The SEAFO Convention Mandate Area



THE SEAFO PROCESS[6]

The initiative to the SEAFO process was taken by Namibia in 1995, when it approached South Africa to consult on the need for establishing a regional fisheries management organization for the southeast Atlantic Ocean (Bergh, 2000). Namibia's interests in the orange roughy fishery raised concerns regarding the appropriate management of this straddling stock on the high seas—that is, that Namibian management within the EEZ could be undermined by unrestricted fishing on the high seas (Doulman, 1999). The then recently adopted Fish Stocks Agreement also served as an important backdrop in this regard, providing what was considered a sound institutional framework for coastal state cooperation with distant-water fishing nations (DWFNs).

[6] For a fuller account of the negotiation of the SEAFO Convention, see Sydnes (2001b).

Namibia and South Africa held a series of bilateral consultations in 1996 on whether there was a need for a regional fisheries management organization, and what principles such an arrangement should be based on.[7] Once such agreement had been reached, the other coastal states bordering the ocean area—Angola and the UK, on behalf of St. Helena and its dependencies—were invited to attend future consultations. A series of four coastal state consultations were held in 1997.[8] The outcome of this process was a 'coastal state draft' on a SEAFO convention. The coastal state draft was a blueprint of the Fish Stocks Agreement as applied to the southeast Atlantic Ocean, with the FAO Code of Conduct of 1995[9] and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)[10] as additional sources of language (Jackson, 2002).

The first informal session of the SEAFO process (SEAFO 1) was held in December 1997 between the coastal states and DWFNs recognized as having interests in the regional fisheries—the EC, Japan, Norway, Russia and the USA. The coastal state draft provided an outline of the issue at stake and was generally accepted as a basis for future substantive negotiations. Negotiations on issues of substance were opened at SEAFO 2 in May 1998, with most participants having clarified national positions on the coastal state draft. The EC tabled an alternative draft, mainly amending the provisions on compliance, enforcement and flag state duties. Position papers were also tabled by the USA and Japan. However, all participants agreed to proceed on the basis of the coastal state draft. The achievements of SEAFO 2 were substantial. Following lengthy debates, agreement was reached that the future convention was to cover the high seas area of FAO Statistical Area 47, thereby excluding the EEZs of coastal states.[11] Consensus was also reached on the structure of the future SEAFO organization.[12] Thus, the scope and structure of SEAFO were resolved at an early stage. Discussions commenced on objectives and principles, without being resolved. Although Japan and the EC made formal reservations on the amended draft convention as a whole, SEAFO 2 did lead to a political commitment among all the participants on the establishment of a regional fisheries management organi-

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[7] The coastal state consultations were open to, but not attended by, Angola (Sydnes, 2001b).

[8] See reports of the coastal state consultations, Appendix 1.

[9] Code of Conduct for Responsible Fisheries, *International Organizations and the Law of the Sea Yearbook* (1995), 11: 700.

[10] Convention on the Conservation of Antarctic Marine Living Resources (1980), *United Nations Treaty Series*, 1329: 47.

[11] This is further discussed below.

[12] This is further discussed below.

zation for the high seas of the southeast Atlantic. The stage was set for negotiations on matters of substance on how to apply the Fish Stocks Agreement.

The negotiation of the SEAFO Convention took place under a veil of uncertainty regarding the fish stocks and states with interests in the regional fisheries. Compiling data to establish who, where, what and how much, in terms of fishing activity, became part of the negotiation process (Bergh, 2000). A second characteristic of the negotiation process was that it was informal, with a working-group style. Discussions were frank and direct, and conducted mainly in plenary sessions.[13] Many of the participating states had also been dominant actors during the Fish Stocks Agreement negotiations of 1993–1995, such as the EC, Japan, Norway, Russia and the USA. This, and the fact that the parties were aware that the negotiation of the SEAFO Convention as the first new regional fisheries management regime to be established post-Fish Stocks Agreement could establish important precedents, added political weight to the process.

From the initial stages, and the acceptance of the coastal state draft as a basis for further discussion at SEAFO 1, two dominant coalitions formed among the negotiating parties. The coastal states, largely supported by the USA, negotiated on the basis of the coastal state draft. The coastal states held coordinating meetings prior to the sessions of the SEAFO negotiations. As such they represented the 'pushers' throughout the negotiations. The EC and Japan, on the other hand, to a greater extent represented the 'laggards' in the negotiations—opposing drafts, demanding changes and tabling alternative formulations. The roles of the other DWFNs varied considerably. While the Norwegian representative played a brokering role on specific issues, representation from certain other DWFNs was fluid and relatively anonymous, reflecting their low level of vested interests in the regional fisheries. (See Appendix 2 to this chapter.) Thus, the resulting SEAFO Convention largely reflects the outcome of negotiations between the dominant coalitions during the process.

THE SEAFO CONVENTION

Membership

The SEAFO Convention has open membership provisions. It has been characterized as scoring "extremely well on the membership and accession issue" (Franckx, 2001: 161) in comparison to other RFMO/As. The SEAFO Convention is open to states or regional economic integration organizations

[13] Personal communication, informants.

that participated in the SEAFO Process, or whose vessels fish for stocks covered by the convention or did so during the period 1997–2001 of negotiating the convention (Art. 25–26). All contracting parties also have the right to become members of the commission (Art. 6(1)). Future non-parties that fish in the area will be invited to accede the convention and become members of the commission (Art. 22(1)). Furthermore, Article 22(1) provides that non-participating states shall 'enjoy benefits' in the fishery in accordance with their compliance with established SEAFO measures for the relevant fish stock.

That the convention should be open in nature was intended from the initial stages of consultations between Namibia and South Africa, and was underlined by the invitations to distant-water fishing nations to participate in the negotiations of the SEAFO Convention (Sydnes, 2001b). It may seem that the founders of SEAFO went beyond the requirements of the Fish Stocks Agreement, with its qualification that fishing rights be limited to "states having a real interest in the fisheries concerned" (Art. 8(3)).[14] One commentator has noted that the openness of SEAFO is based on a pragmatic approach to LOSC Article 116, establishing the rights of all states to partake in fishing on the high seas (Jackson, 2002: 38–39). This also meant that the SEAFO Convention would not be contested among DWFNs. It can also be argued that, being open to all, the organization gains in legitimacy, making it easier to enforce sanctions, formally or informally (shaming), on non-participating states and IUU fishing.

The openness of SEAFO should also be seen in the context of the fisheries in the convention area. First, though initial attempts were made by distant-water fishing nations to include provisions on the compatibility of measures between the EEZs of coastal states and the high seas of the south-east Atlantic, these were curbed by the absolute stance taken by the coastal states. Instead, Article 19 provides for cooperation and the exchange of data between coastal states and the commission. Second, the level of fishing in the convention area is extremely limited. Finally, though the SEAFO Convention merely establishes a set of non-hierarchic criteria for the allocation of fishing rights, there is little reason to believe that the established fishing patterns of coastal states would be threatened, in terms of re-allocation, by granting distant-water fishing nations access to SEAFO. As such, the aim of coastal states to have control over DWFN participation and effort in the fisheries, by granting them membership in SEAFO, seems to have outweighed long-term distributional concerns.

[14] For an analysis of the Fish Stocks Agreement and 'real interests', see Molenaar (2000).

Principles of Conservation, Management and Allocation

In this section we examine the principles guiding the cooperation of states through SEAFO. First, there are principles of allocation—a crucial issue, as it concerns the distribution of the benefits of cooperation. Second, the (rather few) academic studies of the SEAFO Convention have paid only limited attention to its codification of environmental principles for the establishment of conservation and management measures, as established by the Fish Stocks Agreement. (See Sydnes, 2001b; Jackson, 2000, 2002; Franckx, 2004.)

In general, the SEAFO Convention reflects the Fish Stocks Agreement and modern principles of fisheries management as found in, for example, the FAO Code of Conduct for Responsible Fisheries and the Johannesburg Plan of Implementation. The overall objective of the SEAFO Convention is to "ensure the long-term conservation and sustainable use of the fishery resource" within the convention area (Art. 2). The preamble also establishes a commitment to safeguarding the environment and the marine ecosystem (para. 2). The general principles section of the convention (Art. 3) makes reference to the precautionary approach, the need to take into account the impact of fishing on ecologically related species, species belonging to the same ecosystem (or that are associated with or dependent upon the fishery), the harmful impact on living marine sources as a whole, and the protection of biodiversity.

The preamble makes reference to the exercising and implementation of the precautionary approach in line with the Fish Stocks Agreement. The commission is to manage the fisheries on the basis of the precautionary approach (Art. 6(3g)) and take full account of the biological unity and characteristics of the fish stocks (Art. 6(6)). The application of the precautionary approach is elaborated upon in Article 7. The commission is to apply the precautionary approach widely in the conservation and management of the fisheries, to protect the resources and preserve the marine environment (Art. 7(1)). In cases of uncertain, unreliable or inadequate scientific information, the commission is to be more cautious (Art. 7(2)), but such a situation is not to be used as a reason for failing or postponing to take measures. In applying the precautionary approach:

> … the Commission shall take cognisance of best international practices … including Annex II of the 1995 [Fish Stocks] Agreement and the FAO Code of Conduct for responsible Fisheries 1995 (Art. 7(3)).

As such the SEAFO Convention establishes a linkage to the evolving practices under these agreements. This was objected to by the Japanese delegation.

On the important issue of quota allocation, the SEAFO Convention Article 20(1) largely reiterates the principles of the Fish Stocks Agreement Article 11:[15]

a. the state of fishery resources including other living marine resources and existing levels of fishing effort, taking into account the advice and recommendations of the Scientific Committee;

b. respective interests, past and present fishing patterns, including catches, and practices in the Convention Area;

c. the stage of development of a fishery;

d. the interests of developing States in whose areas of national jurisdiction the stocks also occur;

e. contributions to conservation and management of fishery resources in the Convention Area, including the provision of information, the conduct of research and steps taken to establish cooperative mechanisms for effective monitoring, control, surveillance and enforcement;

f. contributions to new or exploratory fisheries, taking account of the principles set out in article 6.6 of the 1995 Agreement;

g. the needs of coastal fishing communities which are dependent mainly on fishing for the stocks in the South East Atlantic; and

h. the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of fishery resources.

It is not surprising that the negotiators chose to address the tricky issue of quota allocations—or in the words of the SEAFO Convention "participatory rights in fishing opportunities" (Art. 20(1))—merely by establishing general principles to be taken into consideration. First, formalizing frozen allocation keys between the parties is contentious and would impede reaching agreement on a convention text. Second, the negotiations were conducted under substantial scientific uncertainty regarding fishing activities and stocks. Finally, it is not in the nature of the constituting agreements of regional fisheries management organizations to address allocation directly. Instead, Article 20(2) applies the more usual approach of directing the SEAFO Commission to apply the principles of Article 20(1) through annual quotas or effort limitations, to allocate quotas for scientific research and exploratory fishing, and to set aside quotas for non-participants if needed.

[15] Note that the SEAFO Convention, just as the WCPF Convention (Chapter 7, this volume) addresses the issue of quota allocation on the basis of the Fish Stocks Agreement's Article 11 on the participatory rights of new members to a RFMO/A.

Decision-making

The SEAFO Convention establishes an elaborate decision-making procedure for the commission. The coastal state draft outlined a consensus-based decision-making procedure, including a limited opting-out procedure.[16] The rationale was that objections to a measure could be stated only on a limited set of grounds; otherwise, they would be deemed invalid. These grounds were if a decision made by the commission was inconsistent with the SEAFO Convention, discriminatory between parties, or impossible to comply with in practice.[17] This approach was also supported by the USA. The EC and Japan supported decision-making by a two-thirds majority with a general objection procedure. The design of the decision-making process was the subject of substantial discussion during the later sessions of the negotiations (Sydnes, 2001b: 357). Contention concerned the opting-out procedure and whether the decisions made by the commission should be binding. The compromise became a consensus-based decision-making procedure (Art. 17)[18] on matters of substance,[19] with an unconditional opting-out provision (Art. 23). Commission measures on conservation, management and control are to be binding on all parties 60 days after the notification of the secretariat of the measure adopted, unless an objection has been submitted. However, a procedure is established for review meetings of the measure(s) objected to (Art. 23(1f)), the establishment of interim measures (Art. 24), and ad hoc panels of experts (Art. 23(1g)). The SEAFO Convention allows that

> …interim arrangements shall be binding on all Contracting Parties if all Contracting Parties (other than those who have indicated that they are unable to accept the measure … agree that the long-term sustainability of the stocks covered by the Convention will be undermined in the absence of such measures (Article 23(1g)).

This procedure does not prejudice the right of a party to invoke the dispute settlement procedure outlined in Article 24. On matters of interpretation of the SEAFO Convention, the parties shall seek to resolve the dispute by means of their own choice. On matters concerning technical measures, these

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[16] Namibia had initially preferred a majority-vote decision-making procedure. However, the RSA, with its experience from CCAMLR, persuaded Namibia that consensus was a sounder way to achieve their common objectives.

[17] This was a safeguard for the developing coastal states, who were to be the minority in the Commission (Sydnes, 2001b: 357)

[18] Regional economic integration organizations, such as the EC, shall in this regard have only one vote (Art. 17(3)).

[19] Whether an issue is one of substance shall be treated as a matter of substance (Art. 17(1)). Matters that are not of substance shall be decided by a simple majority of parties present and voting (Art. 17(2)).

may be referred to an ad hoc panel of experts for non-binding dispute settlement. If disputes are not resolved within a reasonable time, they are to be referred to binding dispute settlement according to LOSC Part XV or the Fish Stocks Agreement Part VIII (Art. 24(49)).

The Compliance and Enforcement 'System'

The SEAFO Convention establishes a system of observation, inspection, compliance and enforcement (Art. 16) (hereafter referred to as 'the System'). Compliance and enforcement issues proved to be the 'make-or-break' of the negotiation of the SEAFO Convention (Sydnes, 2001b: 358). The coastal state draft initially outlined a scheme broadly based on the Fish Stocks Agreement. This was opposed by the EC and Japan, who opted to establish a more narrowly defined set of principles to guide an enforcement system to be established by the future SEAFO Commission. As negotiations in plenary did not prove fruitful (SEAFO 3–4), a working group (SEAFO 5) and later technical consultations were assigned the role of resolving the main issues of contention. The latter decided to set aside the Fish Stocks Agreement and focus on technical matters and the solutions provided by 'best practices' of established regional fisheries management organizations.[20] Consequently, agreement was reached at SEAFO 6—partially by postponing several issues of substance for decision by the SEAFO Commission.

> Participants agreed that these matters should be dealt with at a later stage and that, in the interest of advancing conclusion of the draft convention, would not be addressed in detail (SEAFO 6, Explanatory note by Chairman: para. 16).

The SEAFO Convention foresees a multilateral and integrated system to be established by the commission (Art. 16(4)) guided, *inter alia*, by the following set of principles (Article 16(2)):

(a) fostering of co-operation among Contracting parties to ensure effective implementation of the System;
(b) a System which is impartial and non-discriminatory in nature;
(c) verification of compliance with conservation and management measures agreed by the Commission; and
(d) prompt action on reports of infringements in contravention of measures agreed by the Commission.

These general principles shall be given content by the System, which is to consist of, *inter alia* (Art. 16(3)):

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[20] Notably, CCAMLR, the Northwest Atlantic Fisheries Organization (NAFO) and the North East Atlantic Fisheries Commission (NEAFC) (Sydnes, 2001b: 358).

- control measures, such as vessel authorization and marking, the marking of fishing gear, and recording of fishing activities;
- a vessel monitoring system;
- an inspection programme at sea and port, including boarding and inspection on a reciprocal basis;
- a multilateral observer programme (allowing for the exchange of observers between parties); and
- procedures for following up on infringements (investigation, notification of proceedings and sanctions).

As such the System is to contain all the elements of an integrated compliance and enforcement scheme. However, practical implementation of the System rests with the SEAFO Commission. If, within two years of the entry into force of the SEAFO Convention, the SEAFO Commission has not established such a system, this shall be given 'urgent consideration' at the request of any contracting party (Art. 16(6)).

Organizational Structure

The organizational set-up of SEAFO basically follows its functional differentiation of tasks, and does not deviate from many other regional fisheries management regimes on a global scale. The SEAFO Convention establishes the commission as its decision-making body, with representation from all parties to the convention (see above). In addition, a Scientific Committee (Art. 10), a Compliance Committee (Art. 9) and Secretariat are to be established (Art. 11).

The Scientific Committee is to provide the SEAFO Commission with scientific advice and recommendations on conservation and management measures, and to promote research cooperation among the parties (Art 10(3)). In doing so, the Scientific Committee shall facilitate the collection of data, establish common criteria and methods for establishing measures, analyse relevant data, conduct stock assessments, and transmit its reports to the commission (Art. 10(4)). The Scientific Committee is to take into consideration the work of other regional fisheries management organizations as well as technical and scientific bodies (Art. 10(5)). It may also, on the approval of the commission, establish any subsidiary bodies it finds necessary in conducting its functions (Art. 10(8)).

The Compliance Committee is to provide "information, advice and recommendations on the implementation of, and compliance with, conservation and management measures" (Art. 9(2)). The functions of the Compliance Committee are of course pending on the establishment and design of a

compliance and enforcement system by the commission.[21] Article 9(3) merely states that the Compliance Committee shall coordinate activities among parties, with the Scientific Committee, and conduct such tasks as directed by the commission. In contrast to the Scientific Committee, which is to meet within three months of the first meeting of the SEAFO Commission (Art. 10(6)), the Compliance Committee is to meet as deemed necessary by the commission (Art 9(4)). In short, the meeting and functions of the Compliance Committee are awaiting the establishment of the System.

MOVING SEAFO FROM PAPER TO PRACTICE

The Interim Arrangement—Procedures Awaiting Practice

The SEAFO Convention provides for the establishment of an interim arrangement (Art. 16(5), Annex), to apply from the entry into force of the SEAFO Convention and until a system of observation, inspection, compliance and enforcement has been established or the SEAFO Commission decides otherwise (Art. 16(5)). The main thrust of the interim arrangement was to provide for the monitoring of fishing activities in the convention area, and thereby also to establish a database for the future work of the SEAFO Commission. Section 1 of the interim arrangement outlines the duties of parties to appropriately authorize vessels flying their flag for fishing or conducting research in the convention area, and notify the secretariat of any such authorizations. Section 2 requires parties to ensure that fishing vessels and gear are appropriately marked, that fishing vessels keep a logbook, and that vessel movements and catches are reported to the secretariat. The final section requires parties, to the extent possible, to collect and report scientific data on the catches, so as to support efforts at stock assessment (Section 3).

Following the signing of the SEAFO Convention and in accordance with its Annex (Art. 16(5)), an interim arrangement was established. Namibia was given responsibility to provide for the secretariat functions until these could be taken over by the SEAFO Secretariat. With the assistance of an external consultant funded by Norway, the tasks and activities of the parties and the interim secretariat were outlined. Having established the basic secretariat facilities (a SEAFO desk and officer) the parties were called upon to fulfil their obligations as provided by the SEAFO Convention (Annex) in letters dated 25 September 2001, and later 7 November the same year. These

[21] This is underlined by the words preceding the quotation above, which is "[u]nless otherwise decided by the Commission" (Art 9(2)).

concerned the gathering of information to provide for baseline data for the activities within the convention area and included:

- notification of authorization
- monthly aggregated catch statistics
- entry and exit reports on vessels basis
- trans-shipment reports on vessels basis
- monthly catch report on vessel basis
- reports containing scientific information
- providing time-series of catches in the Convention Area for building up a database on catches. [22]

The responses from signatories and contracting parties offer an overview of fishing activity within the mandate area. Angola, the EC, Iceland, Norway, the Republic of Korea, the UK, and the USA reported[23] that there had been no fishing activities in the convention area by vessels flying their flag.[24] No response was received from South Africa, while Namibia reported on limited catches for the years 2002–04. Due to the limited registered fishing activity in the convention area, there was no basis for the interim secretariat to establish a country observer programme as provided for by the SEAFO Convention,[25] so the functions of the interim secretariat in establishing a database of fishing activity and an observer programme were rendered inoperative.

A second task of the interim arrangement was to provide for an interim organizational structure. Beyond the contribution of Norway in funding an external consultant, the financial burden of the interim arrangement has been carried by Namibia.[26] Finally, the SEAFO Convention provides for an interim meeting to take place for a revision of the interim secretariat functions. No such meeting was held.[27] However, as we shall see, the SEAFO Secretariat played an important role in preparing the ground for the first meeting of the SEAFO Commission.

During its period of operation, the interim arrangement remained a set of procedures waiting to be implemented. However, the level of fishing effort in the convention area did not require states to act upon their obligations, or

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[22] *South East Atlantic Fisheries Organization (SEAFO), First Session 9–13 March 2004, Report of the Meeting*, Swakopmund, Namibia: 17.

[23] Letters dated 5 March 2002 (Angola); 8 January 2002 and 4 March 2004 (EC); 8 October 2001 (Iceland); 15 November 2001 and 25 February 2004 (Norway); 5 April 2002 (Republic of Korea); 22 March 2002 (the UK); 1 March 2002 and 17 February 2004 (the USA).

[24] *South-East Atlantic Fisheries Organisation (SEAFO), First Session 9–13 March 2004, Report of the Meeting*, Swakopmund, Namibia: 17–20.

[25] Ibid.: 20.

[26] Ibid.: 19.

[27] Ibid.: 19.

further develop the interim arrangement as a coordinating management mechanism.

The First Meeting of the SEAFO Commission— The Long and Winding Road to Swakopmund

The first meeting of the SEAFO Commission was held in Swakopmund, Namibia, 9–13 March 2004. The meeting was open to contracting parties and signatories to the SEAFO Convention and was attended by representatives from Namibia, Angola, South Africa, the European Community and the USA, while FAO participated as an observer.

This meeting was first and foremost dedicated to getting SEAFO up and running as a cooperative mechanism with a functional secretariat. The Commission reached agreement on its own rules of procedure, based on a draft provided by the interim secretariat. These rules were further extended to apply to the Scientific Committee and Compliance Committee.[28] The location and organizational set-up of the secretariat was agreed upon,[29] in addition to a budget and financial regulations.[30] It was agreed that the first meeting of the Scientific Committee should be held back-to-back with the following meeting of the SEAFO Commission. It was further requested that this meeting should give priority to the following issues: the stocks to be covered by the SEAFO Commission, the state of the fisheries in the convention area, to assess available information and identify areas in need of improved data collection, to propose standards for data collection and processing to be adopted by the commission, to decide upon major physical oceanic processes in the region.[31] Finally, it was decided that the Scientific Committee should apply the same open character as the commission itself.

Unsurprisingly, the commission did not set out to regulate the fisheries at its first meeting. Rather, the parties and signatories continue to prepare the ground for future cooperation by operationalizing a functional SEAFO organization. However, the problems of arranging a first meeting of the parties to the SEAFO Convention may be considered an indication of the low level of the stakes involved. From the adoption and signing of the SEAFO Convention on 5 January 2001, through its entry into force on 13 April 2003, no

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[28] Ibid.: Annex 9.

[29] The SEAFO Organization will be located in Walvis Bay and consist of an Executive Secretary and Administrative Officer. Ibid.: Annex 11.

[30] Ibid.: Annex 12–13.

[31] Ibid.: 3.

meeting was held between the parties until the first session of the SEAFO Commission in Swakopmund, in March 2004.[32]

THE FUTURE OF SEAFO: WHO NEEDS IT?

Any firm conclusions regarding the future efficiency of SEAFO seem premature, since the organization itself is still in its infancy. It has previously been claimed that the low level of fishing activity in the convention area gives few incentives for parties to commit time and resources to operationalizing SEAFO. As such there was and is a risk of SEAFO becoming a 'dead letter' organization (Sydnes, 2001b: 360). To some extent, this conclusion still holds. On the other hand, it also seems as if the parties—albeit without any great urgency—are in fact acting upon their commitments under the SEAFO Convention.

The establishment of SEAFO can be regarded as the outcome of the interests of coastal states in a valuable fishery and in ensuring their coastal state rights, as well as the wish of certain DWFNs to put the Fish Stocks Agreement into practice, thereby establishing international precedents for regional fisheries management more broadly. For the latter, the fisheries were not of the essence—as is relatively clear from the passiveness of these parties following the adoption of the SEAFO Convention in 2001 and their limited fishing activity in the area. As such, SEAFO is an unusual case in comparison to the other cases covered in this volume—where the vested interests in the fisheries, claims of jurisdiction and participatory rights, and the sustainability of the fish stocks, more clearly have been the driving forces of regional cooperation.

Notwithstanding, the SEAFO Convention establishes a legal framework for a fully operative RFMO/A for the future management of the fish stocks in the convention area. It goes far in applying the provisions of the Fish Stocks Agreement, while leaving the implementation of these provisions largely to the SEAFO Commission.

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[32] Attempts at arranging meetings between the participants to the interim arrangement and SEAFO Commission are a separate attachment to the report of the interim arrangement. Ibid.: 24.

APPENDIX 1

Draft texts and protocols

Coastal state consultations

- Meeting of Coastal States on a Regional Fisheries Management Organisation for the South East Atlantic. Meeting Documents. 25–26 February 1997, Windhoek, Namibia.
- Second Meeting of Coastal States on a Regional Fisheries Management Organisation for the South East Atlantic. Meeting Documents. 30 June–4 July 1997, Otjiwa, Namibia.
- Third Meeting of Coastal States on a Regional Fisheries Management Organisation for the South East Atlantic. Meeting Documents. 9–10 September 1997, Windhoek, Namibia.
- Fourth Meeting of Coastal States on a Regional Fisheries Management Organisation for the South East Atlantic. Meeting Documents. 2 December 1997, Windhoek, Namibia.

Sessions of the SEAFO process

- First Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Meeting Documents. 3–4 December 1997, Windhoek, Namibia.
- Second Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Record of Proceedings. 19–22 May 1998, Cape Town, South Africa.
- Third Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Record of Proceedings. 22–25 September 1998, Swakopmund, Namibia.
- Fourth Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Record of Proceedings. 8–11 March 1999, Oxford, UK.
- Fifth Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Explana-

tory Note by the Chair to Accompany the Draft of 1 October 1999 of the Draft Convention for the South East Atlantic Ocean. 11 October 1999.

- Sixth Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Explanatory Note by the Chair on the Draft Convention Text of 12 May 2000.
- Seventh Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic. Record of Proceedings. 9–11 November 2000, Windhoek, Namibia.

Other draft texts and consultation protocols (chronologically)

- EC delegation, draft, Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, presented at SEAFO 2, undated.
- Japanese delegation, Draft, Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, presented at SEAFO 4, undated.
- Draft Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean. Text of 1 October 1999.
- Draft Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean. Version of 12 May 2000.
- Technical Consultations on the Development of an Integrated System for Observation, Inspection, Compliance and Enforcement Measures for the proposed South East Atlantic Fisheries Organisation (SEAFO). Chairman's note of proceedings. 1–4 March 2000, Windhoek, Namibia.

APPENDIX 2

Timeline for the negotiation of the SEAFO Convention

Events and participating states

- SEAFO 1, 3–4 December 1997, Windhoek, Namibia:
  Angola, RSA, Namibia, UK, EC, Japan, Norway, Russia, USA
- SEAFO 2, 19–22 May 1998, Cape Town, South Africa:
  RSA, Namibia, UK, EC, Japan, Norway, USA
- SEAFO 3, 22–25 September 1998, Swakopmund, Namibia:
  Angola, RSA, Namibia, UK, EC, Japan, Norway, USA, Ukraine
- SEAFO 4, 8–11 March 1999, Oxford, United Kingdom:
  Angola, RSA, Namibia, UK, EC, Japan, Norway, Russia, USA, Ukraine, Iceland, Korea, Poland
- SEAFO 5, 27 September–1 October 1999, Cape Town, South Africa:
  Angola, RSA, Namibia, UK, EC, Japan, Norway, USA, Iceland, Korea
- Technical consultation on enforcement issues, 1–4 March 2000, Windhoek, Namibia:
  RSA, Namibia, UK, EC, USA, Korea
- SEAFO 6, 8–12 May 2000, Midgard, Namibia:
  RSA, Namibia, UK, EC, Japan, Norway, USA, Iceland, Korea
- SEAFO 7, 9–11 November 2000, Windhoek, Namibia:
  Angola, RSA, Namibia, UK, EC, Japan, Norway, Russia, USA, Iceland, Korea
- Ceremony for signing the SEAFO Convention, 20 April 2001, Windhoek, Namibia:
  Angola, RSA, Namibia, UK, EC, Norway, USA, Iceland, Korea

Source: Sydnes (2001b: 356, 359).

CHAPTER SEVEN

THE WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION (WCPFC)

INTRODUCTION

On 4 September 2000, the coastal states and distant-water fishing nations of the tuna fisheries of the western and central Pacific Ocean (WCPO) adopted the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereafter the WCPO tuna convention, or simply 'the Convention'). This was the first regional fisheries agreement to be established after the UN Fish Stocks Agreement for managing highly migratory fish stocks, notably tuna. The adoption process was unusual in that it was made by majority vote, which reflected the controversies among the parties. The negotiation process included 28 state parties, and took six years and seven formal sessions to reach finalization. The resulting WCPO tuna convention is a comprehensive agreement that goes far in terms of applying the provisions of the Fish Stocks Agreement, to be implemented through the future work of the Western and Central Pacific Fisheries Commission (hereafter the WCPFC, or simply 'the Commission'). The Convention entered into force on 19 June 2004, six months after the deposit of the thirteenth instrument of ratification, acceptance, approval or accession.[1]

This chapter follows much of the same structure as Chapter 6 on the South East Atlantic Fisheries Organization (SEAFO). It provides a brief background of the regional tuna fisheries, before analysing the negotiation and substantive content of the WCPO tuna convention. This is followed by a discussion on the activities of the preparatory conference in setting the stage for the working of the Commission. We round off with a presentation of the first session of the Commission and a discussion on future cooperation within the framework of the WCPO tuna convention.

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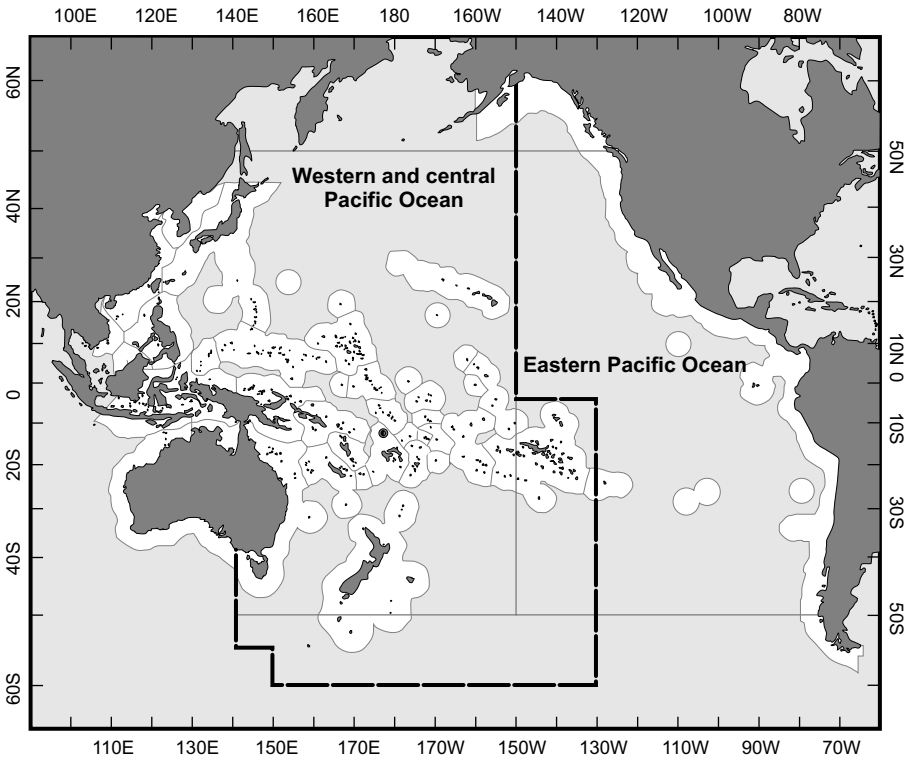
[1] www.wcpfc.org/.

Map 7.1 The WCPO Convention Area



Source: Western and Central Pacific Fisheries Commission

THE FISHERIES AND CONVENTION AREA

The tuna fishery of the WCPO is the largest and most valuable in the world, with a catch of approximately 2 million metric tonnes in 2004.[2] This represents approximately 51% of the global catch of tuna,[3] including 50%–70% of canned tuna for the world market and 30%–40% of the supply for the Japanese sashimi market (Reid et al., 2003: 449). The three main types of fisheries are the pole and line, purse-seine and longline fisheries. In general, the four major tuna species—albacore (*Thunnus alalunga*), skipjack (*Katsuwonus pelamis*), yellowfin (*Thunnus albacares*) and bigeye (*Thunnus obesus*)—are

[2] Draft Report of the First Regular Session of the Scientific Committee of the Commission for the Conservation and Management of Highly Migratory fish stocks in the Western and Central Pacific Ocean, 22 August, 2005: 3. Document available at: www.wcpfc.org/sc1/pdf/DRAFT SC1_Report_220805.pdf.

[3] Ibid.: 3.

in a healthy state, although this has been ascribed to their robustness rather than sound management practices (Aqorau, 2001: 401). However, recent scientific advice recommends reducing the mortality of bigeye and yellowfin.[4]

The tuna stocks migrate extensively throughout the region, crossing the borders of exclusive economic zones (EEZ) and high seas areas. There are variations, but overall between 65% and 75% of the catches of tuna in the region are taken within the EEZs of coastal states (Ram-Bidesi & Tsamenyi, 2004: 383).[5] The majority of coastal states in the region are developing Pacific Island Countries (PICs), most of which have limited land-based resources but vast EEZ areas. Such states are highly dependent on the marine resources under their jurisdiction to achieve economic development (Fairbarn et al., 1991). Although the PICs have sought to develop their national tuna fisheries, it is the operative distant-water fishing nations (DWFNs) that are responsible for approximately 90% of the catches (Cartwright & Willock, 1999). The most important DWFNs in the region are Japan, Taiwan, the USA and the Republic of Korea. The operations of the DWFNs predate the Second World War, and their domestic industries and markets rely heavily on the WCPO tuna fisheries for supply (Tsamenyi & Mfodwo, 1995).

The establishment of the WCPFC did not take place in an institutional void.[6] There was already an operative set of regional, bilateral and multilateral agreements and organizations regulating the tuna fishery. Following the widespread adoption of EEZs during the 1970s and 1980s, coastal states and DWFNs have cooperated through a network of bilateral and multilateral access agreements. Many PICs have established bilateral access agreements with DWFNs in return for revenues and development aid. In addition, in 1987 the member countries of the South Pacific Forum Fisheries Agency (FFA) and the USA negotiated the first Multilateral Treaty, giving the USA access to the tuna fisheries in the EEZs of all FFA member countries and the high seas.[7] Many of the PICs have become dependent on such license revenues for an income from the tuna fisheries (Hunt, 1997).

An important institution in the development of the WCPO tuna fisheries has been the FFA. The organization was established in 1979 by the 14 PICs in the region,[8] and Australia and New Zealand as a response to the adoption

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[4] Draft Report: 39–41.

[5] Some PICs have established exclusive fishing zones—a functionally limited claim to national jurisdiction over the 200 nm. zones. The term EEZ will be used throughout this chapter to include also these zones of national jurisdiction.

[6] For an overview of regional agreements in the South Pacific, see Veitayaki (2005).

[7] For further information see: www.ffa.int/.

[8] The Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, the Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

of EEZs in the region. The role of the FFA has been to promote intra-regional cooperation between the member countries in the management of the marine resources within their EEZs, and to coordinate their relation with DWFNs.

The convention area of the WCPFC is defined by its Article 3. In the south and east, it is defined by latitude and longitude coordinates, but there is less precision for the western and northern boundaries, leaving a degree of uncertainty. In the west a problem relates to Indonesia and the Philippines, which have been unwilling to have their archipelagic waters included in the convention area (Cordonnery, 2002: 10). A second issue relates to ongoing disputes between overlapping claims to national jurisdiction over parts of the South China Sea, which is also left outside the convention area. In the east there will be a need to coordinate the management of bigeye and albacore with the Inter-American Tropical Tuna Commission, as these stocks migrate beyond the established convention area (Cordonnery, 2002: 10).

Attempts at the MHLC process[9] to define a northern border at 50º N were opposed by certain parties to the negotiations. As a result, this boundary has been defined in terms of migratory patterns and through the establishment of a Northern Committee. The establishment of such a committee was one of the compromises made during the MHLC process. It was argued that the fisheries in this area are distinct, in terms of fish stocks and fishing patterns, from those in the rest of the convention area. The Northern Committee is to consist of member countries situated or fishing in the area.[10] In the context of the MHLC process, these were largely DWFNs. The role of the Northern Committee is to make recommendations by consensus to the Commission on measures to be adopted for the area north of 20º N in respect of stocks that occur mostly in this area (Art. 11(7)). As such, the Northern Committee is an advisory body. Moreover, the Commission is entitled to make decisions regarding stocks north of 20º in cases where recommendations have not been formulated by the Northern Committee. If a recommendation made by the Northern Committee is not accepted by the Commission, this is to be returned to the committee for further consideration (Art. 11(7)). There is, however, no guidance on how potential conflicts between these two bodies are to be resolved. Ultimately, the Commission retains the role as the decision-making body.

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[9] In full: The Multilateral High-level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific.

[10] Those are the USA, Canada, Japan, the Republic of Korea, Taiwan, China and New Zealand (the latter flagging vessels fishing in the area) (Cordonnery, 2002: note 38).

NEGOTIATIONS 1994–2000

The MHLC process had delegations from 28 states, as well as representatives from a range of international, intergovernmental and non-governmental organizations.[11] See Table 7.1 for an overview of sessions and consultations.

The issue of establishing an RFMO/A for the tuna fisheries in the WCPO has been on the political agenda ever since the FFA was established in 1979. The FFA was limited in scope to coordination and development in the EEZs of member countries who, however, recognized the long-term need for a broader institutional arrangement.[12] Japan and the USA made calls for the establishment for an RFMO/A based on LOSC Article 64, but contentions between coastal states and DWFNs curbed any attempts at establishing an RFMO/A for the WCPO tuna fisheries covering their entire migratory range.[13] However, during the negotiation of the Fish Stocks Agreement 1993–1995, coastal states and DWFNs saw an emerging institutional platform on which they could base future cooperation.

The first session of the MHLC, held in Honiara in 1994, was of an exploratory nature. The focus was on technical matters, and it was agreed to hold a series of technical workshops (Sydnes, 2001c: 793). Difficult management issues were put on hold, awaiting the adoption of the Fish Stocks Agreement. The second session of the MHLC was held almost three years later, in 1997. In addition to the adoption of the Fish Stocks Agreement in August 1995, an important development was the appointment of Satya Nandan, Fijian Ambassador to the UN, to chair the MHLC process. Nandan had chaired the negotiation of the Fish Stocks Agreement, and saw in the MHLC process an opportunity to implement the agreement in the WCPO. The major outcome of the second session was the 1997 Majuro Declaration, reached at Majuro in the Marshall Islands. The declaration outlined the guiding princi-

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[11] States represented were Australia, Canada, China, the Cook Islands, the Federated States of Micronesia, the Fiji Islands, France, Indonesia, Japan, the Republic of Kiribati, the Republic of Marshall Islands, the Republic of Nauru, New Zealand, Niue, the Republic of Palau, the Independent State of Papua New Guinea, the Republic of the Philippines, the Republic of Korea, the Independent State of Samoa, the Solomon Islands, the Kingdom of Tonga, Tuvalu, the UK (in respect of Pitcairn, Henderson, Ducie and Oeno Islands), the USA and the Republic of Vanuatu. For an overview on representation see "Final Act of the Multilateral High-Level Conference on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", 4 September, Honolulu, Hawaii, para. 4.

[12] "The Parties recognise that effective co-operation for the conservation and the optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal States in the region and all States involved in the harvesting of such resources", South Pacific Forum Fisheries Agency Convention, Honiara: Forum Fisheries Agency (1979): Art III(2).

[13] One dispute concerned the recognition of the rights of coastal states to highly migratory species within their EEZs (Tsamenyi, 1986: 31–34).

ples on which future negotiations were to be based and established a commitment between the parties to establish an RFMO/A in accordance with the LOSC and Fish Stocks Agreement within a time-frame of three years.

Table 7.1 MHLC Sessions and Consultations

- MHLC 1: Honiara, Solomon Islands, 1–5 December 1994.
- Technical consultation on fishing-vessel monitoring systems: Honolulu, Hawaii, September 1995.
- Technical consultation on the collection and exchange of fisheries data, tuna research and stock assessment: Noumea, New Caledonia, 15–19 July 1996.
- Technical consultation on fishing vessel monitoring systems: Suva, Fiji, 13–15 November 1996.
- MHLC 2: Majuro, Marshall Islands, 10–13 June 1997.
- Intersessional technical consultation on issues relating to fisheries management: Honiara, Solomon Islands, 1–5 December 1997.
- Intersessional technical consultation on issues relating to monitoring, control and surveillance: Suva, Fiji, 10–13 March 1998.
- MHLC 3: Tokyo, Japan, 22–26 June 1998.
- MHLC 4: Honolulu, Hawaii, 10–19 February 1999.
- MHLC 5: Honolulu, Hawaii, 6–15 September 1999.
- MHLC 6: Honolulu, Hawaii, 13–19 April 2000.
- MHLC 7: Honolulu, Hawaii, 30 August–5 September 2000.

Real negotiations started with the third session of the MHLC, triggered by the submission of a draft text by the chairman for a regional convention. This move took many of the negotiating parties by surprise, and was by many considered as too much, too soon (Sydnes, 2001c: 795). However, after it had been tabled, there was no returning to non-committing discussions. In general, the chairman's draft was a blueprint of the Fish Stocks Agreement as applied to the WCPO tuna fisheries. Some Asian fishing nations, among them Japan, the Republic of Korea and Taiwan, saw it as being biased in favour of FFA member countries. The latter generally supported the chairman's draft and negotiated on the basis of it. Several participating

states had more mixed roles, depending on the specific issues being addressed.[14]

The structure of the MHLC process followed the same rules of procedure as the negotiation of the Fish Stocks Agreement.[15] The chairman provided a draft text and an agenda of issues to be discussed. At the end of each session, the chairman presented a revised text reflecting the development of the negotiations. In general all issues were open to discussion; however, there was an understanding among the negotiators that once consensus had been achieved, it would take weighty arguments for an issue to be re-opened. Negotiations were conducted in plenary sessions, but from the fourth session of the MHLC also in smaller working groups. Specific working groups, chaired by delegation members, were also established to discuss specific issues such as quota allocation, an observer programme and financial arrangements.[16]

Considering the large number of negotiating parties and their political, economic and cultural differences, it is not surprising that the MHLC process involved a substantial diplomatic effort. Though consensus was readily achieved on specific matters, most matters of substance were issues where there were important conflicts of interest between the negotiating parties. One consequence was that the chairman had to play an active role. With the support of the majority of parties, he adopted two alternative approaches for dealing with issues where consensus could not be achieved. In several cases the provisions of the Fish Stocks Agreement were referred to directly, adopted or modified to the regional context—not always on the basis of consensus. On other issues—and this is not uncommon in international negotiations—the WCPO tuna convention limits itself to establishing broad principles, leaving the substantive decision to be made to the Commission.

In the end, the negotiating parties managed to achieve their goal of finalizing the WCPO tuna convention. However, as a reflection of the controversies arising during the process, consensus was not achieved at the adoption of the convention, with Japan and the Republic of Korea voting against, and China, France and Tonga abstaining.

THE CONVENTION MEMBERSHIP: THE RIGHT AND DUTY TO COOPERATE

The South Pacific is a heterogeneous geo-political region. The WCPO tuna fisheries include states, territories and fishing entities. Given the importance of the fishery, there is also a high level of interest in participating in the

[14] Examples of such were Canada, France, Indonesia the Philippines and the USA (Sydnes, 2001c: 796).

[15] This paragraph draws heavily on Sydnes (2001c: 796–97).

[16] The topical working groups reported to the plenary session.

fishery from fishing nations outside the region. The question of membership has come to include a series of difficult considerations. In general the WCPO tuna convention is open to ratification, acceptance, or approval by the state parties to the MHLC process (Art. 34(1)). After the entry into force of the Convention, the member countries may, by consensus, invite other states or regional economic integration organizations to accede to it, if their nationals and fishing vessels have a wish to participate in the fisheries (Art. 35(2)).[17]

The MHLC process included several territories that do not have competency in their international affairs and thereby cannot be granted full WCPFC membership. Instead, their participation is indirect, through the member countries responsible for the international affairs of the territory in question. In the MHLC process such territories were American Samoa, French Polynesia, Guam, New Caledonia, Northern Mariana Islands, Tokelau, and Wallis and Fortuna. Many felt that these territories should be considered as stakeholders with a legitimate right to participate in the management of the WCPO tuna fisheries. The WCPO tuna convention therefore provides that territories are to be granted full participation in the workings of the WCPFC through the separate rules of procedure of the Commission (Art. 43(2–3)). However, the extent and nature of such participation is to be dependent on the competence and capacity of the territory/ies to exercise the rights and responsibilities of the Convention (Art. 43(2)). In terms of participation in decision-making, this will depend on whether a territory has legal statehood. However, the Commission shall take into account "the interests of all participants", not only state parties, in the performance of its functions (Art. 43(3)).

A second issue of major concern on the issue of membership was the participation of Taiwan, or in the language of the MHLC process, 'Chinese Taipei'. Taiwan has long been a major DWFN in the WCPO tuna fisheries, but its non-recognition as a sovereign state has caused problems regarding RFMO/A membership. As China was also a party to the MHLC process, the issue of Taiwan's participation as a fishing entity or state party came to the forefront. Throughout the MHLC process, China maintained that Taiwan's participation should be limited to observer status as a fishing entity (Cordonnery, 2002: 6). For Taiwan the MHLC process also became a question of international recognition of formal statehood as a party to international conventions, and the establishment of precedent.

The Fish Stocks Agreement applies *mutatis mutandis* to "other fishing entities whose vessels fish on the high seas" (Art. 1(3)). While not mentioning the issue of fishing entities in the Convention itself, the chairman drafted an annex to the Convention on the role and participation of fishing entities

[17] See also discussion on decision-making procedures.

(Annex 1). Annex 1 provides that a fishing entity may, by a written statement to the depositary, become a party to the Convention (para. 1) and participate in the work of the Commission, including decision-making (para. 2). Any future reference to the Commission shall as such include any such fishing entity. The participation of fishing entities is not limited to fishing on the high seas, as is the case of the Fish Stocks Agreement, but covers the Convention area as a whole (para. 1). However, it is underlined that the provisions providing for the participation of fishing entities are intended solely for the purpose of the Convention, and as such do not establish international precedence (para. 4). Both China and Taiwan formally opposed the solution.[18] However, during the adoption of the Convention, Taiwan signed an agreement between it and the chairman of the MHLC process for its participation in the Commission, [19] and China acceded to the Convention on 2 November 2004.[20]

While wishing to incorporate all active coastal states and fishing nations, the MHLC process was challenged by diverging interests among the negotiating parties to include new participants. Moreover, as the WCPO tuna fisheries are based largely on bilateral licensing agreements between coastal states and DWFNs, there was the question of whether new entries to the fisheries, through bilateral agreements, should be granted participatory rights in the MHLC process. This was made relevant when Canada was granted participatory rights at the fourth session of the MHLC, being a proponent of the rights of coastal states in international fisheries governance, and a supporter of the activities of the FFA. Also lurking in the background were initiatives of the European Community to establish itself in the WCPO tuna fisheries through bilateral fishing agreements with certain PICs. Several fishing nations rejected such new entries to the fisheries and the MHLC process during the negotiation of the agreement. Consequently, at the fifth session of the MHLC, negotiating parties adopted a resolution stating, first, that the number of participants should not be increased; second, that requests for participation would not be entertained until the Convention entered into force; and, finally, that any catches conducted by non-members during the interim period before the Convention entered into force should not have any bearing, in terms of establishing rights due to historical catches, on future allocation

[18] China abstaining from voting on the adoption of the Convention, while Taiwan, not invited to participate in the vote, recorded its objection.

[19] Arrangement for the participation of fishing entities between Chinese Taipei, the Chairman of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000.

[20] For the status of the convention see www.wcpfc.org/.

decisions by the Commission.[21] Nevertheless, the UK on behalf of Pitcairn, Henderson, Ducie and Oeno Islands was admitted as a participant from the sixth session of the MHLC.[22] Hence, newcomers are subjected to the decisions of the Commission, to be made by consensus (Art. 35(2)).

PRINCIPLES OF CONSERVATION AND MANAGEMENT

The principles of conservation were subject to limited debate during the MHLC process. The all-inclusive approach of the Fish Stocks Agreement was supported by a majority of negotiating parties including the FFA member countries and the USA, whereas the Asian fishing nations wanted a more narrowly defined set of scientific standards to be applied by the future Commission. On the whole, there was little common ground for constructive negotiations on this matter. As a result, the majority adopted the provisions of the UN Fish Stocks Agreement, despite heavy criticism from the Asian fishing nations.[23]

Article 5 on the principles and measures for conservation is a slightly amended version of Article 5 of the Fish Stocks Agreement. It states that the Commission, in acting upon the LOSC, Fish Stocks Agreement and the WCPO tuna convention, shall adopt measures to ensure long-term sustainability and to promote optimal utilization; further, it is to base its measures on the best scientific evidence available and design these to produce maximum sustainable yields according to a series of qualifications.[24] It also directs the parties to apply the precautionary approach, assess broader ecosystem concerns, protect marine biodiversity, to adopt measures to minimize discards, waste and pollution.

Nowhere is the impact of the Fish Stocks Agreement on the WCPO tuna convention more apparent than in its treatment of the implementation of the precautionary approach. The application of the precautionary approach was assessed and discussed during the MHLC process. At the third session, a report was submitted by the Standing Committee on Tuna and Billfish, discus-

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[21] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fifth Session, Report of the Conference, Honolulu, Hawaii, 6–15 September 1999, Annex 7, paras 1–2, 7.

[22] There is little reason to believe that their participation was seen as posing a threat to established fishing interests.

[23] See Sydnes 2001c: 797–98. Japan and Korea came to oppose references to the Fish Stocks Agreement.

[24] "Relevant environmental and economic factors, including the special requirements of developing States in the Convention Area, particularly small island developing States, and taking into account fishing patterns, the interdependence of stocks and generally recommended international minimum standards, whether subregional, regional or global" (Art. 5b).

sing the use of precautionary limit reference points in the high migratory stocks fisheries of the WCPO.[25] However, in the course of subsequent discussions, it proved impossible to reconcile the differing views on the application of the precautionary approach and the level of detail in which it should be addressed in the Convention. The main line of divergence went between Asian fishing nations, who opposed the application of a precautionary approach, and FFA member countries as well as several other fishing nations, who wanted to apply it fully to the management of the WCPO tuna fisheries. At this stage the chairman deleted the proposed annex on guidelines for the application of the precautionary approach in the draft text, and simply made a cross-reference to the Fish Stocks Agreement itself.[26] Thus, the guidelines in Annex II of the Fish Stocks Agreement form an integral part of the WCPO tuna convention (Art. 6(1a)). Moreover, Article 6 of the WCPO tuna convention is a carbon copy of the corresponding provision of the Fish Stocks Agreement (Art. 6).[27] While this is clearly in line with the Agreement, it also means that little has been gained in terms of detailing how to achieve precautionary management.

The compatibility of measures in the EEZ and on the high seas is a linchpin of the Fish Stocks Agreement (Art. 7) to ensure the sustainable management of straddling and highly migratory fish stocks throughout their migratory range. When the issue of compatibility was inevitably raised by the MHLC, it proved hard to resolve. The coastal state draft was merely a copy of the Fish Stocks Agreement article 7. However, during the third session of the MHLC a paragraph was introduced, providing that coastal states "shall ensure that the measures adopted and applied by it to highly migratory fish stocks within areas under its national jurisdiction do not undermine the effectiveness of measures adopted by the Commission under this Convention in respect of the same stocks" (Art. 8(3)). At the fourth session of the MHLC the coastal states demanded an addition stating that special consideration was to be given to measures set by coastal states when the Commission was to set measures for pockets of high seas surrounded by EEZs (Art. 8(4)). Following this amendment to the text, no further changes were made. There was a clear sense among negotiating parties that raising demands for changes to the text would be met by counter-claims (Sydnes, 2001c: 798). According to Aqorau (2001: 387–88), the resulting reading of Article 8 represents a

[25] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Session, Report of the Conference, Tokyo, Japan 22–26 June 1998, Annex 2.

[26] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fifth Session, Report of the Conference, Honolulu, Hawaii, 6–15 September 1999: Annex 6.

[27] Differences in the order of paragraphs are merely editorial.

departure from the Fish Stocks Agreement, which, he argues, gives clear preference to coastal states.[28] Article 8(3) implies that such a preference does not apply to the WCPO tuna fisheries. This raises the additional question of what measures are to take precedence in cases where these are in conflict—those established by coastal states, or by the Commission. As the Convention provides only limited guidance on this issue, it will have to be resolved through the work of the Commission, and will be as much a question of politics as of legal interpretation.[29]

ALLOCATION OF QUOTAS OR FISHING EFFORT

In many cases, the allocation of quotas and/or fishing rights is what fisheries management is all about. It involves sharing of the gains of otherwise burdensome cooperation. The Fish Stocks Agreement does not directly address the allocation of quotas between states that have established participatory rights in an existing fishery. However, Article 11 provides a non-exhaustive list of factors to be taken into account regarding the allocation of fishing rights to new members to an RFMO or arrangement.[30] An ad hoc working group on International Allocation of Highly Migratory Species reported to the fourth session of the MHLC on the established practices of operative RFMO/As managing highly migratory fish stocks.[31] As all the RFMO/As covered by the report had been established prior to the adoption of the Fish Stocks Agreement, it is not surprising that their practices were more conservative than those proposed by the draft text. The FFA member countries, on the other hand, held internal consultations on various allocation models to arrive at a common stand. In the end, however, the Fish Stocks Agreement Article 11 provided the basis for the MHLC negotiations on the allocation of

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[28] Note however, that there is a difference between straddling and highly migratory fish stocks. The LOSC provides that the duty to cooperate in the management of straddling fish stocks applies to the high seas (Art. 63(2)), while the corresponding article regarding highly migratory fish stocks applies "throughout the region, both within and beyond the exclusive economic zone" (Art. 64(1)). See also discussion in Chapter 2, this volume.

[29] Article 4 dictates that the WCPO tuna convention shall be interpreted and applied in a manner consistent with the LOSC and the UN Fish Stocks Agreement, and shall not "prejudice the rights, jurisdiction and duties of States under the 1982 Convention [LOSC] and the [Fish Stocks] Agreement" (Art. 4).

[30] See also discussion in Chapter 2 of this volume.

[31] These were the Inter-American Tropical Tuna Commission (www.iattc.org/), the International Commission for the Conservation of Atlantic Tunas (www.iccat.es/), the Commission for the Conservation of Southern Bluefin Tuna (www.ccsbt.org) and the Indian Ocean Tuna Commission (www.iotc.org/English/index.php). The working group included representatives from Australia, Taiwan, France, Japan, New Zealand and the USA, but no representation from the developing states of the region.

fishing rights. Through negotiations it was supplemented by specific provisions that reflected the characteristics of participating states and the fisheries of the region. Article 10(3) provides that:

> In developing criteria for allocation of the total allowable catch or the total level of fishing effort the Commission shall take into account, *inter alia:*
> (a) the status of the stocks and the existing level of fishing effort in the fishery;
> (b) the respective interests, past and present fishing patterns and fishing practices of participants in the fishery and the extent of the catch being utilized for domestic consumption;
> (c) the historic catch in an area;
> (d) the needs of small island developing States, and territories and possessions, in the Convention Area whose economies, food supplies and livelihoods are overwhelmingly dependent on the exploitation of marine living resources;
> (e) the respective contributions of participants to conservation and management of the stocks, including the provision by them of accurate data and their contribution to the conduct of scientific research in the Convention Area;
> (f) the record of compliance by the participants with conservation and management measures;
> (g) the needs of coastal communities which are dependent mainly on fishing for the stocks;
> (h) the special circumstances of a State which is surrounded by the exclusive economic zones of other States and has a limited exclusive economic zone of its own;
> (i) the geographical situation of a small island developing State which is made up of non-contiguous groups of islands having a distinct economic and cultural identity of their own but which are separated by areas of high seas;
> (j) the fishing interests and aspirations of coastal States, particularly small island developing States, and territories and possessions, in whose areas of national jurisdiction the stocks also occur.

A notable linkage made here is that between a party's record of compliance and the allocation of quotas or fishing effort (Art. 10(3f)). Second, the mention of historic catches in specific areas clearly indicates a restriction for WCPFC members on entering fisheries where they have no historical rights. Finally, the reference to domestic consumption is of interest, as it puts a premium on those member countries that are the main markets for tuna (like Japan and the USA), while partly disadvantaging states who seek economic development through the export of tuna. However, application of the criteria listed in Article 10 will be subject to political negotiations, as it is the Commission that will set and allocate quotas for the individual fisheries.[32]

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[32] As discussed in the following section, the allocation of quotas is subject to consensus in the Commission.

At the more general level there are two alternative allocation models that the Commission can apply in setting total allowable catches. One is for the Commission to set the total allowable catches for the individual fish stocks, and then to allocate these between the member countries and cooperating non-parties.[33] In the other model, coastal states will set national quotas for the fisheries in their EEZs and the Commission will coordinate such quotas so as not to exceed sustainable limits. According to Aqorau (2001: 394) both these models can be legally supported on the basis of the WCPO tuna convention. This is obviously among the most contentious issues to be dealt with by the members of the Commission, as it may have substantial distributional consequences between coastal states and DWFNs.

DECISION-MAKING PROCEDURES

Conventions establishing RFMO/As or arrangements are generally formulated as framework agreements that leave their implementation to the workings of the decision-making bodies. On the issue of decision-making, the Fish Stocks Agreement provides only limited guidance, in stating that the members of RFMO/As shall "agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner" (Art. 10j). When the MHLC process commenced, it became clear that the future Commission was going to have to decide on a considerable number of substantive issues. Given the vested interests in the fisheries, the large number of negotiating parties and their diversified interests, the issue of decision-making was bound to become a contentious issue.

The initial proposal of the Chairman's draft at the third session of the MHLC was to establish a procedure whereby, as a general rule, decisions were to be made by consensus.[34] However, if agreement could not be reached, decisions on matters of procedure should be made by a simple majority, while matters of substance would require a three-quarters majority of the Commission. Initially the proposal did not achieve much support. FFA member countries were generally accustomed to making decisions by consensus, which was also the preference of most DWFNs. However, the FFA member countries were convinced, by the chairman's introduction, a series

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[33] As noted by Aqorau (2001: 394) this has been the traditional approach of RFMOs managing highly migratory fish stocks.

[34] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Session, Meeting Documents, Tokyo, Japan 22–26 June 1998: Annex, Draft Articles for a Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

of FFA studies and a World Wildlife Foundation information paper, to support the notion that majority voting was pivotal to enable effective regional fisheries management (Sydnes, 2001c: 799). Moreover, as they would constitute a majority of the negotiating parties, a majority voting system would clearly be supportive of their interests. The Korean reaction showed that this was not supported by DWFNs: "Given the fact that coastal States outnumber fishing states by a large majority, decision-making by a three-quarter majority is meaningless."[35] The Asian fishing nations wanted a three-quarters majority voting system including an opting-out provision, whereby parties who had opposed a decision made by the Commission were not to be bound by it. By contrast, the USA wanted binding decision-making by consensus. Discussions commenced during the fourth session of the MHLC. The revised text presented at the end of the fourth session proposed that, while maintaining a general rule of decision-making by a three-quarters majority, decisions on certain issues were to be made by consensus. These included the adoption of rules of procedure for the Commission, financial regulations, budget and formula of contributions and the admission of new members.[36] The fifth session of the MHLC saw the addition of the allocation of total allowable catches and amendments of the Convention to the consensus list, and the qualification of a majority raised to four-fifths. The USA stated that it would be willing to show some flexibility in the matter, but the Asian fishing nations remained opposed. At the final session of the MHLC (seventh session), the USA proposed a chambered voting system, in an attempt to gain support among the Asian fishing nations. Although this failed, the final element of the WCPFC decision-making procedure had been introduced.

In general, the Commission is to make decisions by a three-quarters majority, provided that this includes a three-quarters majority of FFA member countries, and three-quarters of non-members of the FFA. Moreover, no proposal is to be defeated by two or fewer votes in either chamber (Art. 20(2)).

The decision-making procedure also contains safeguards for the minority. On certain matters of substance, decisions by the Commission are to be made by consensus (Art. 20(2)). The consensus list includes the adoption of rules of procedure for the Commission (Art. 9(8)), decisions regarding the total allowable catch or fishing effort, including the exclusion of vessel types (Art. 10(4)), the budget and formula for contributions (Art. 18(2)), the

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[35] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Session, Report of the Conference, Tokyo, Japan 22–26 June 1998: 27.

[36] Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fourth Session, Report of the Conference, Honolulu, Hawaii, 10–19 February 1999: Annex 4.

admission of new members (Art. 35(2)), and amendments to the Convention (Art. 40(2)).

Article 20(6) provides that any member that voted against a decision made by the Commission may seek to have that decision put before a review panel. Such a review may be justified on the basis of the decision being inconsistent with the Convention, the UN Fish Stocks Agreement or the LOSC, or that it is discriminatory against the member country in question (Cordonnery, 2002: 5).

Article 31 states that Part VIII of the Fish Stocks Agreement applies *mutatis mutandis* to any dispute occurring between members of the Commission. Notably, this is to apply whether or not those members are also parties to the Fish Stocks Agreement.

As to the transparency of the WCPFC, Article 21 of the WCPO tuna convention states the general aim of promoting transparency in its decision-making procedures and other activities. The rules of procedure of the Commission and subsidiary bodies are to provide for the participation of intergovernmental and non-governmental organizations that are concerned with relevant matters, without being unduly restrictive.

COMPLIANCE AND ENFORCEMENT

Parts V to VII of the Convention concern the duties of flag states, compliance and enforcement, a regional observer programme and the regulation of trans-shipment. Again there was hard bargaining during the MHLC process, especially between the Asian fishing nations and the FFA member countries. In general, the former wanted the specifics of compliance and enforcement mechanisms omitted from the convention text and left to the WCPFC to decide upon.[37] This was, however, opposed by the FFA member countries and a majority of the delegations.

According to Article 24, each flag state is to exercise effective control over the vessels flying its flag. It has a duty to ensure that vessels flying its flag comply with the measures established by the Commission, and that they do not engage in unauthorized fishing in areas under national jurisdiction. The flag state shall also maintain a record of vessels authorized to fish in the convention area (Art. 24(4)) and annually submit to the Commission information about these vessels (Art. 24(5), Annex IV). It is also a responsibility of the flag state that all vessels authorized to fish in the convention area use

[37] See for example, Statement by the Japanese delegation, Ibid. 12; and statement by the delegation of the Republic of Korea, Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fifth Session, Report of the Conference, Honolulu, Hawaii, 6–15 September 1999: Annex 3.

vessel monitoring systems (VMS) (Art. 24(8)). VMS information is to be reported directly to the Commission, and to the flag state simultaneously. Compliance and enforcement measures are also based on flag-state duties to investigate violations of Commission measures committed by vessels flying its flag (Art. 25(1)). According to Article 26(2), if the WCPFC, within two years after entry into force, has not established a regional mechanism on boarding and inspection within the convention area, Articles 21–22 of the Fish Stocks Agreement shall be applied as if they were part of the WCPO tuna convention.

Though opposed by several DWFNs for being a challenge to flag state authority (Cordonnery, 2002: 10), the Convention establishes a regional observer programme. The observer programme is to be coordinated by the WCPFC Secretariat, who is to authorize independent and impartial observers to collect data and monitor fishing activities (Art. 28(1–3)).[38] In Article 28(6) and Article 3 of Annex III, general guidelines are established for the operation regional observer programme. However, the WCPFC is tasked with developing guidelines to ensure the confidentiality of data and, importantly, to determine the manner in which the observer programme is to be funded.

A final issue to be addressed here is the question of prohibiting transshipment on the high seas. This has been part of the minimum terms and conditions set by FFA member countries when establishing access agreements with DWFNs to the fisheries in their EEZs. As such, they wanted to incorporate this in the WCPO tuna convention, but this was rejected as a general rule (Cordonnery, 2002: 11). Article 29(5) introduces such a prohibition for purse-seine vessels, while for other gear types it states that member countries shall encourage vessels flying their flag "to the extent practicable, to conduct transhipment in port" (Art. 29(1)). Any trans-shipment is to be conducted according to guidelines set out in Article 4 of Annex III, which provides that the WCPFC may establish procedures for the verification of species and quantities.

The Convention does not seem to add precision or strength to the Fish Stocks Agreement as regards compliance, boarding and inspection provisions. However, as noted by Cordonnery (2002: 11), an exception to this general conclusion is the opportunity, provided for by Article 25(12), to impose non-discriminatory trade measures against any party whose vessels' operations are undermining the effectiveness of the measures established by the WCPFC.

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[38] Flag states to not have to require fishing vessels operating exclusively within their own national jurisdiction to accept an observer on board (Art. 24(8)).

Table 7.2 Sessions of the Preparatory Conference 2001–2004

- First session: Christchurch, New Zealand, 23–28 April 2001
- Second session: Madang, Papua New Guinea, 25 February–1 March 2002
- Third session: Manila, Philippines, 18–22 November 2002
- Fourth session: Nadi, Fiji, 5–9 May 2003
- Fifth session: Rarotonga, Cook Islands, 29 September–3 October 2003
- Sixth session: Bali, Indonesia, 19–23 April 2004
- Seventh session: Pohnpei, Federated States of Micronesia, 6–7 December 2004

THE PREPARATORY CONFERENCE (2001–2004)

Having adopted the Convention, the parties to the process also adopted Resolution I on the establishment of a Preparatory Conference to be active until the Convention could entered into force. [39] Most participants realized that the adoption of the Convention, on 5 September 2000, was not the end of negotiations. The Preparatory Conference[40] in the period 2001–2004 was to hold as many sessions as the MHLC process. The Preparatory Conference was open to all parties to the MHLC process, thereby not excluding those who had not adopted the Convention (Art. 1). The role of the Preparatory Conference was to prepare the ground for the future work of the Commission. The mandate of the Preparatory Conference was outlined in the resolution establishing it.[41] Its tasks were, *inter alia,* to prepare draft rules of procedure for the Commission and its subsidiary bodies, draft regulations for the financial and organizational running of the activities of the Commission and Secretariat, provide a provisional agenda for the first meeting of the Commission, location and organization of the Secretariat, budget and scheme of contributions, and make recommendations to the Commission regarding implementation of the functions of the Scientific Committee, and the Technical and Compliance Committee. To facilitate its work, the Preparatory Conference established three open-ended working groups. WG I: on the

[39] WCPO tuna convention, Annex, Resolution 1.

[40] The Preparatory Conference for the Commission for the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. All documents of the Preparatory Conference are available at www.wcpfc.org/.

[41] WCPO tuna convention: Annex, Resolution 1, Art. 6–7.

organizational structure of the Commission, budget and financial contributions. WG II: on the scientific structure of the Commission and interim scientific advice.[42] WG III: on monitoring control and surveillance. The sessions of the Preparatory Conference are detailed in Table 7.2.

The Preparatory Conference delivered on the main body of requests outlined in its mandate,[43] including draft rules of procedure for the Commission and its subsidiary bodies,[44] a draft on the financial regulations of the Commission,[45] and a draft budget for 2005.[46] Further, it recommended a scientific structure for a transitional period.[47] Recommendations were made on data standards and ways to improve data coverage for stock assessments.[48] On the issue of compliance and enforcement, the Preparatory Conference outlined procedures for establishing the Commission's record of fishing vessels and authorizations to fish, and procedures relating to cooperating non-members.[49] However, the Preparatory Conference was not able to make any recommendations regarding a regional vessel monitoring system, due to time constraints.[50] On the complex issue of financial contributions to the WCPFC, several models were launched. The final recommendation was based on the following components: 10% base fee divided equally between members, 20% national wealth component, and a 70% fish production component—based on all catches within the convention area, but subject to a discount

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[42] A Scientific Coordination Group was established as a sub-group of WG II, and held a series of three meetings. WCPFC/PrepCon/48: para 5 and 36.

[43] A summary of the mandate and recommendations is to be found in: Final Report of the Preparatory Conference for the establishment of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean on All Matters Within its Mandate Pursuant to Paragraph 9 of Resolution I, December 2004, WCPFC/PrepCon/48: Annex.

[44] Draft Decision of the Commission Relating to the Rules of procedure of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, WCPFC/Comm.1/2, 8 December 2004.

[45] Draft Decision of the Commission Relating to the Financial Regulations of the Commission, WCPFC/Comm.1/3.

[46] Proposed Budget for the Commission for its First Financial Period from 1 January 2005 to 31 December 2005, WCPFC/Comm.1/4.

[47] This arrangement is to be reviewed two years following the entry into force of the Convention. It recommended that the WCPFC Secretariat have a science manager, and that stock assessments for the four major tuna species be provided by an external contractor, that is the Ocean Fisheries Programme of the South Pacific Community, WCPFC/PrepCon/32: Annex III.

[48] Final report on Working Group II, WCPFC/PrepCon/45.

[49] Final report on Working Group III, WCPFC/PrepCon/46.

[50] Final Report of the Preparatory Conference for the establishment of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean on All Matters Within its Mandate Pursuant to Paragraph 9 of Resolution I, December 2004, WCPFC/PrepCon/48: 24.

factor of 0.4 for catches by developing states or territories within their own national jurisdiction. As a result, most costs are to be carried by the DWFNs operative in the region. This may be regarded as lowering the incentives for DWFNs to participate; but, on the other hand, it allows PICs to participate despite their limited economic resources.

INAUGURAL SESSION

The inaugural session of the WCPFC was held 9–10 December 2004, on Pohnpei, Federated States of Micronesia. The main task of the inaugural session was to adopt the recommendations of the Preparatory Conference and make the WCPFC Secretariat operational in terms of staff, budget and facilities. Members of the Commission and participating territories at the inaugural session were as follows: Australia, China, the Cook Islands, Fiji, the Federated States of Micronesia, Kiribati, the Republic of Korea, the Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, the Solomon Islands, Chinese Taipei, Tokelau, Tonga and Tuvalu.[51] Canada, the European Community, France, French Polynesia, Indonesia, Japan, New Caledonia, Palau, the Philippines, the USA, Vanuatu, and Wallis and Futuna attended as observers, in addition to representatives from FAO and several regional fisheries institutions.[52]

In addition to the procedural elements of adopting the recommendations of the Preparatory Conference, the first session of the WCPFC made certain substantive decisions. First, in response to its request, the European Community was invited by the contracting parties to accede to the Convention.[53] The question of establishing a Northern Committee was deferred, noting that the potential members would consult on the matter.[54] The Commission adopted the procedures proposed for cooperating non-members and designated the states (not territories) that had participated in the MHLC process or the Preparatory Conference status as such: these were Canada, France, Indonesia, Japan, Palau, the Philippines, the USA and Vanuatu.[55]

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[51] Western and Central Pacific Fisheries Commission, First Session of the Commission, Summary Record, 10 December 2004: para 2.

[52] Ibid. para 3.

[53] Ibid. para 6. The invitation of newcomers is to be decided upon by consensus by the Commission according to the WCPO tuna convention (Art. 35(2)). The non-membership of several Asian fishing nations (notably Japan and Korea) may thereby have enabled the consensus regarding membership for the EC.

[54] Ibid. para 6.

[55] This status applies until the state becomes a member, or until the next regular session of the Commission (Ibid. para 21).

On the basis of discussions during the Preparatory Conference, the WCPFC adopted a resolution on requests to the Scientific and the Technical and Compliance Committees for advice to be given to the following session of the Commission.[56] The Scientific Committee is to provide advice on the sustainable catch and effort levels for bigeye, yellowfin and south Pacific albacore; it is to make five- and ten-year projections of total biomass and spawning stocks biomass for bigeye and yellowfin tuna; and estimate the mortality of non-target species. The Technical and Compliance Committee is to provide advice on issues that may require consideration for the implementation of measures, including time/area closures and control sets on floating objects.[57]

The second meeting of the WCPFC is to be held on 12–16 December 2005, on Pohnpei, Federated States of Micronesia. On the basis of the recommendations of the subsidiary committees, the Commission is, given the general principles and precautionary approach of the WCPO tuna convention, to adopt the regulatory measures necessary to address sustainability concerns. These may include:

(a) catch and/or effort limits;
(b) capacity limits for large-scale tuna fishing vessels;
(c) measures to address impacts of large-scale tuna fishing vessels so as to ensure compatibility between measures applied outside areas of national jurisdiction and measures being applied by coastal states to manage fishing by such vessels within their zones;
(d) time and area closures;
(e) mitigation measures to address the mortality of non-target species e.g. seabirds, turtles and sharks.[58]

The members of the Commission foresee that they will commence managing the regional tuna fisheries from the second meeting, although it remains to be seen whether this is actually achieved. It does seem clear that the lengthy period of discussion, elaborations and negotiations during the Preparatory Conference has contributed substantially in enabling the Commission to fulfil its functions from a relatively early stage.

CONCLUSIONS

The WCPO tuna convention has a level of detail not found in other regional fisheries conventions (Aqorau, 2001: 392). Though a framework convention, it prescribes various regulations. Under the leadership of the chairman of the

[56] Ibid. Annex II (1).
[57] Ibid, Annex II(3).
[58] Ibid, Annex II(4).

MHLC process, Satya Nandan, the WCPO tuna convention to a large extent reflects the aspirations of the UN Fish Stocks Agreement as applied to regional fisheries. However, the Convention is the beginning and not the end (Aqorau, 2001: 392). With the large number of member countries and their diverse interests in the fisheries, the future work of the Commission in adopting and implementing conservation and management measures may prove difficult. As noted throughout this analysis, many substantive decisions are left for the Commission to decide upon. Just as the negotiation of the decision-making procedures for the Commission proved to be the 'make or break' of the MHLC process, it is likely to prove equally decisive in determining whether the WCPFC is to be an effective regional fisheries management regime. What is at stake is the largest and most valuable tuna fishery globally. And, despite substantial disagreement and controversies among those involved, the history of achieving cooperation in the WCPO tuna fishery may prove to be a valuable background.

APPENDIX

Reports and resolutions of the MHLC process

- Forum Fisheries Agency. Record of Proceedings of the Multilateral High-Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands, 5–9 December 1994. Honiara: Forum Fisheries Agency Report No. 95/1, 1995.
- Majuro Declaration. Majuro, Marshall Islands, 13 June 1997.
- Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Second Session, Report of the Conference, Majuro, Republic of Marshall Islands, 10–13 June 1997.
- Report of the Intersessional Technical Consultation on Issues Relating to Fisheries Management. Honiara, Solomon Islands, 1–5 December 1997.
- Report of the Intersessional Technical Consultation on Issues Relating to Monitoring Control, Surveillance. Suva, Fiji, 10–13 March 1998.
- Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Session, Report of the Conference, Tokyo, Japan 22–26 June 1998.
- Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fourth Session, Report of the Conference, Honolulu, Hawaii, 10–19 February 1999.
- Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fifth Session, Report of the Conference, Honolulu, Hawaii, 6–15 September 1999.
- Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sixth Session, Report of the Conference, Honolulu, Hawaii 12–19 April 2000.
- Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western And Central Pacific Ocean and Final Act. Adopted by the Conference 4 September 2000. Honolulu, Hawaii.

- Arrangement for the participation of fishing entities. Between Chinese Taipei, the Chairman of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000.
- Resolution I. Establishing a Preparatory Conference for the Establishment of the Commission for the Conservation, Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

PART III

CONCLUSIONS

CHAPTER EIGHT

THE POLITICS OF APPLYING INTERNATIONAL LAW IN REGIONAL FISHERIES MANAGEMENT REGIMES

The UN Fish Stocks Agreement extends upon the legal framework established by the LOSC for state cooperation through regional fisheries management regimes in managing straddling and highly migratory fish stocks. The Fish Stocks Agreement would not have far-reaching consequences if it had not been followed up by initiatives taken by the members of RFMO/As to put its provisions into practice. The aim of this book has been to analyse how the Fish Stocks Agreement has been implemented and/or codified in the constituting agreements and practices of five regional fisheries management regimes. In the introduction to this volume we asked to what extent the following provisions of the Fish Stocks Agreement were reflected in the RFMO/As:

- the right and obligation to cooperate
- the precautionary approach to fisheries management
- decision-making procedures, including transparency and stakeholder participation
- compliance, enforcement and dispute settlement

In this final chapter we answer this question by comparing the institutional arrangements applied in the five case studies examined here.

CASES COMPARED: SCOPES OF COOPERATION

The five in-depth case studies represent a variety of geo-political and bio-physical settings, ranging from the western and central Pacific Ocean in the south, to the Barents Sea in the north. In terms of contracting parties (CP) the regimes range from the 'bilateralist' Joint Russian–Norwegian Fisheries Commission, to the WCPFC, which was negotiated by a full 28 parties. As to the mandates of the regimes, the fisheries vary extensively in terms of stocks and species covered and in annual catches and value, making direct comparison between and among cases difficult. What they have in common is that they are all cooperative efforts to manage straddling and highly migratory fish stocks and, as such, fall within the scope of the Fish Stocks Agreement. In several cases there is overlap in the membership of the five

regimes—for example, the European Community, Japan, the Republic of Korea, Norway, Russia are all members of four of the RFMO/As studied here. Moreover, the regimes include the major players during the negotiation of the UN Fish Stocks Agreement.[1]

Table 8.1 summarizes the defining features of the five cases examined in terms of scopes of cooperation.

Table 8.1 Overview of case studies and scopes of cooperation

	NAFO	NEAFC	Joint Russian–Norwegian Fisheries Commission	SEAFO	WCPFC
Entry into force	1979	1982	1976	2004	2004
Stock coverage	19 stocks	5 stocks and a deep-sea fishery	3 stocks	6 stocks	4 stocks
Catches in Convention Area (approx.)	180,000 tonnes	3,3 million tonnes[a]	492,000 tonnes[b]	3000–5000 tonnes	2 million tonnes
No. of parties	13	7	2	3 (14[c])	16 (28[c])
Mandate area	High seas of the north-west Atlantic Ocean	High seas of the northeast Atlantic Ocean	Barents Sea, migratory range of stocks	High seas of the southeast Atlantic Ocean.	Western and central Pacific Ocean, migratory range of stocks
	Straddling and discrete high seas stocks	Straddling and discrete high seas stocks	Shared and straddling stocks	Straddling and discrete high seas stocks	Highly migratory stocks

[a] This covers all catches within the Convention Area, of which approximately 20% are caught in the Regulatory Area (high seas).

[b] This is the quota set for Northeast Arctic cod in 2005, which is the only straddling stock managed by the regime. Quotas have varied between 160,000 and 850,000 over the past 15 years, and cod is only sporadically caught on the high seas.

[c] Number of negotiating parties with the right to become CPs.

[1] The Latin American countries being an exception, as they are not members of any of the RFMO/As examined in this volume.

Some factors need special mention regarding the scope of cooperation of the RFMO/As. Four out of five of the regional fisheries management regimes examined in the book are formal organizations, while the Joint Russian–Norwegian Fisheries Commission is a bilateral arrangement. The Joint Commission was established in 1976 to manage the shared fish stocks of the Barents Sea. However, in 1993–1997 it was evident that the Northeast Arctic cod stock was a 'straddling stock'—found also in the high seas of the Barents Sea (the 'Loophole'). As such the regime has a 'bilateralist' orientation (Stokke, 2001a: 330) and handles the problem of the shared cod stocks, temporally straddling in nature, through allocating annual quotas to third parties.

Four of the five regimes manage straddling fish stocks, while the WCPFC is constituted to manage highly migratory fish stocks—in practice, the highly migratory tuna stocks of the WCPO. As such the WCPFC differs from the other cases in this volume. The management of highly migratory fish stocks is rooted in the LOSC, which obliges states to cooperate "throughout the region, both within and beyond the exclusive economic zone" (Art. 64(1)). LOSC Article 63(2), on the other hand, obligates states to cooperate on the high seas adjacent to EEZs in the case of straddling fish stocks. While it is generally held that Article 63(2) gives preference to coastal states, this is not the case for Article 64. As the Fish Stocks Agreement is to be interpreted in light of Articles 64 and 63(2), this establishes different conditions for the WCPFC in comparison to the other cases. This is also illustrated by the differences in the provisions on 'compatibility' as applied in the WCPO tuna convention as opposed to those in the NAFO, NEAFC and SEAFO Conventions.[2]

Finally, it should be noted that the three RFMOs managing straddling fish stocks—NAFO, NEAFC and SEAFO—are all additionally mandated to manage discrete high seas fish stocks within their mandate areas.

These factors should be borne in mind in the following comparison on how the RFMO/As have, or have not, implemented the provisions of the Fish Stocks Agreement.

MEMBERSHIP AND COOPERATION WITH NON-CONTRACTING PARTIES

The fundamental question regarding the right and obligation to cooperate is that of membership in RFMO/As. As noted in Chapter 2, the issue of mem-

[2] See, in particular, discussion in Chapter 7. For a discussion on the issue of compatibility, see also Juda (1997: 153–155).

bership has both a supply and demand side. First, who may become a member according to the statutes of the RFMO/A? Are the membership provisions restrictive, are there any procedures to provide for new entrants, or are the RFMO/As open to all new entries? If a state wants to become a contracting party (CP), how is this to be achieved? Second, there is the question of how RFMO/As can ensure that all flag states actively fishing in the mandate area are either members of the RFMO/A or comply with the regulatory measures adopted by it.

In many cases, the main problems concerning membership have involved 'free riders', flags of convenience and IUU fishing. This is reflected in the Fish Stocks Agreement, which stipulates that only members of RFMO/As, or non-contracting parties (NCP) who abide by the measures established by an RFMO/A, are to have access to the fisheries (Art. 8(4)).

The duty to cooperate to gain access to the fisheries has in certain cases led to demands among fishing nations to be allowed membership in the RFMO/As. This is addressed by the Fish Stocks Agreement through the concept of 'real interest' (Art 8(3)). Although this concept provides ample room for interpretation, it is a clear indication that RFMO/As cannot operate with closed membership.

The underlying issue at stake is the political question—what are the benefits of cooperation? In terms of international fisheries management, this can often be reduced to the question of access to the fisheries by being allocated a share of the quotas.

The study of NAFO in Chapter 3 shows that joining an RFMO/A does not automatically provide a flag state with any benefits in terms of being allocated a share of the quotas. As an important contextual factor it should, however, first be noted that several of the commercially most important fisheries in the NAFO Regulatory Area have been at low levels for more than a decade. NAFO itself would seem to be an open organization: any state is free to accede to the NAFO Convention, and thereby have voting rights in the General Council and the Scientific Committee. However, being a CP to the NAFO Convention does not mean that a state is also a member of the Fisheries Commission—and it is the Commission that sets and allocates fishing rights in the Regulatory Area (Art XI). To become a member of the Fisheries Commission, a state must document fishing activities or plans of such. Further, membership in the Commission is subject to an annual review where a certain level of fishing activity is a condition for continued membership. While these formal provisions provide for relatively strict requirements on becoming (and maintaining) membership in the Fisheries Commission, the actual practice of NAFO has demonstrated substantial political flexibility on the issue. Only two CPs (Romania and Bulgaria) have lost their membership, while eight states have acceded to the NAFO Convention and become mem-

bers of the Fisheries Commission. However, the 1999 resolution by the General Council has signalled that new members should not expect to be allocated fishing rights. Moreover, NAFO does not have established procedures concerning NCPs—cooperating non-contracting parties that abide by the regulatory measures of RFMO/As.

While NAFO has a relatively open/liberal practice in terms of granting membership to newcomers, but no procedures for cooperating NCPs, the approach taken by NEAFC is the opposite, as shown in Chapter 4. Formally, NEAFC membership is open to all states, provided it is approved by a three-quarters majority of all parties (Art. 20(4)). The NEAFC Convention does not stipulate any further substantive requirements for becoming a CP. In practice Estonia is the only state to have been granted membership. However, NEAFC has developed a scheme for granting the formalized status of 'Cooperating Non-Contracting Parties'. Through annual application, and on the condition of applying NEAFC measures, a cooperating NCP may be granted fishing rights from the 'cooperating quota' established for certain fish stocks.

The Joint Russian–Norwegian Fisheries Commission (see Chapter 5) is a bilateral regime which has proved itself robust over a period of nearly three decades. However, since its fisheries also straddled into areas of high seas in the years 1993–1997, the effectiveness of the regime was challenged by the fishing vessels of other flag states. The Joint Commission has handled this challenge by granting to third parties an annual quota, following negotiations with Norway and Russia. There are, however, no formalized procedures for dealing with newcomers to the fishery, and it is doubtful whether the practice with third-party quotas could be regarded as a scheme for integrating cooperating NCPs. Granting newcomers membership in the Joint Russian–Norwegian Fisheries Commission has never been considered seriously.[3]

The SEAFO Convention, dealt with in Chapter 6, has been characterized as scoring "extremely well on the membership and accession issue" (Franckx, 2001: 161). The SEAFO Convention is open to all parties that participated in the SEAFO process, as well as to states whose vessels were actively fishing for stocks covered by the convention or did so during the period 1997–2001 (Arts. 25 and 26). The initiators of the SEAFO process (the coastal states) were extremely liberal in terms of inviting parties to take part in the negotiation process—for example, both Norway and the USA had had negligible recorded catches. All contracting parties become members of the SEAFO Commission (Art. 6(1)), and future newcomers to the fisheries will be invited to accede the Convention and become members of the Com-

[3] However, there have been consideration whether NEAFC should manage the high seas cod fishery in the Barents Sea.

mission (Art. 22(1)) as well. Furthermore, NCPs are to 'enjoy benefits' in the fishery in accordance with their compliance with established SEAFO measures for the relevant fish stock.

The WCPO tuna convention is open to all participating states to the MHLC process.[4] Membership became a controversial issue during the negotiations. This was related to the status of territories and fishing entities; in addition, negotiating parties were sceptical about granting participatory rights to new entries during the negotiations and later as parties to the WCPO tuna convention. This was reflected in a resolution made during the fifth session of the negotiations, in practice attempting to set a ceiling on new participants. Now that the WCPO tuna convention has entered into force, decisions regarding new entries are to be made by the Commission, by consensus (Art. 35(2)). However, in view of uncertainties regarding the future participation of several important Asian fishing nations, the WCPO tuna convention has also had to provide for cooperation with NCPs.

> [C]ooperating non-parties to this Convention shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with, and their record of compliance with, conservation and management measures in respect of the relevant stocks. (Art. 32(4))

APPLYING THE PRECAUTIONARY APPROACH

Article 5 of the Fish Stocks Agreement provides a comprehensive list of general principles that are to be applied in the management of straddling and highly migratory fish stocks, some of which follow directly from the LOSC: in particular the dual aim of optimum utilization and maintaining or restoring stocks at levels capable of producing maximum sustainable yields (Hedley et al., 2004: 7). However, the commencing general principles of Article 5 of the Fish Stocks Agreement fundamentally change the manner in which this dual aim is to be achieved. Of particular importance in this regard is the application of the precautionary approach. Basically, the precautionary approach deals with the issue of managing the fish stocks in light of scientific uncertainty and the establishment of acceptable levels of risk. It is prescriptive as to what measures are to be taken by the members of RFMO/As under various conditions. The precautionary approach has generated considerable activity and institutionalized responses by the members of RFMO/As. As such, it requires closer examination, in terms of

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[4] In full: The Multilateral High-level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific. See Chapter 7 for further details and discussion.

how and to what extent it has been adopted and implemented by the regional fisheries management regimes examined in this book.

The Fish Stocks Agreement reflects changes in international environmental law, and—importantly—the implementation of environmental principles (including the protection of biodiversity) into the management of fisheries. This is one of the areas where it breaks new ground, being perhaps the first international treaty to develop the meaning of the 'precautionary approach'. The precautionary approach (PA) is about risk management. It places considerable demands on scientific research in establishing various reference points. There is also a political aspect regarding the determination of acceptable levels of risk and the willingness of to accept scientific advice based on the precautionary approach. Finally, achieving precautionary management relies on the capacity of RFMO/As and states to ensure compliance with the measures established. As such, the precautionary principle is not merely a normative obligation: for effective implementation, it must be followed up throughout the management system. The five cases presented in this volume all demonstrate that implementation of a new principle is not uncomplicated. Although all RFMO/As seem to have embraced the PA—more or less formally—it still remains to be seen whether it is actually applied in promoting and adopting conservation and management measures.

It would appear easier for scientists than managers to accept the PA, as seen in the case of NAFO. On the other hand, both NEAFC and the Joint Russian–Norwegian Fisheries Commission seem to have readily accepted the PA also politically. The latter two RFMO/As receive their scientific advice from an independent organization, in contrast to NAFO, which has its own scientific body. Regimes that receive scientific advice from independent organizations (albeit on request) have distinguished between the scientific and political functions of implementing the precautionary approach. Stokke (2001a: 333) notes that being provided with scientific advice from an external institution or contractor may contribute to the effectiveness of applying the precautionary approach by insulating it from political controversies among members of the regional fisheries regime. However, this can obviously not solve the political problem of applying the approach when it comes to establishing regulatory measures for the fisheries—such as agreeing upon the setting and allocation of total allowable catches, or inducing costs through technical measures.

NAFO has had a long journey towards implementing the PA, since work started in 1996 and is yet to be finished. The relatively early acceptance of the PA showed NAFO as a frontrunner among the RFMO/As, although it seems to have been overtaken by others. It was not until 2004 that the Fisheries Commission approved a framework for the application of the PA and decided to test it out on two of the regulated stocks. There are several

reasons for this long process—partly scientific and partly political. It took time for the scientists to adapt the approach to NAFO conditions, but more important has been the lack of information needed for developing stock-specific reference points, on which application of the PA rests. Political obstacles have been even more significant reasons for the delay. The 2004 framework had been ready for some years, but been put off and revised due to concern on the part of some members of the Fisheries Commission. They had feared the PA could require the Commission to adopt moratoriums once reference points were exceeded. In a situation where most regulated fish stocks are already under moratorium, this did not seem a very attractive approach to them. The introduction of conservation measures for new fish stocks in 2004 also illustrates that members of the Fisheries Commission have not been willing to adopt conservation measures based on the PA. They still seem to require the availability of adequate scientific information before taking action—in contrast to the PA, which expressly stipulates that action is to be taken under such uncertainties. When most fish stocks are subjected to moratoria there may be a feeling that all necessary and possible measures have been taken, but the PA calls for the adoption of strategies for rebuilding stocks as well. So far, NAFO has adopted a rebuilding plan for Greenland halibut, but this can hardly be described as 'precautionary'. There is concern that by-catch of stocks under moratoria may prolong their period of rebuilding. However, without proper plans for their restoration as required by the PA, the balance between exploitation and conservation is not openly addressed.

The NEAFC Convention may soon be amended to instruct the Fisheries Commission to apply the PA in the management of the fish stocks under its purview. This will reflect a change in the normative basis of the RFMO. But the question remains the same: when and how the PA will actually be applied. The prevailing emphasis on requiring decisions to be scientifically based indicates that NEAFC is not about to embark on any radical application of the PA. The PA was introduced to NEAFC in 1998—as with the Russian–Norwegian Fisheries Commission by ICES, its scientific advisor. On the request of NEAFC, ICES has since based its advice to NEAFC on the precautionary approach.[5] However, NEAFC has yet to adopt its own management plans for fish stocks in the Convention Area as required by the PA. This is due in part to the lack of adequate scientific information about stocks

[5] Report of the ICES Advisory Committee on Fisheries Management and Advisory Committee on Ecosystems, 1.4. The Form of ICES Advice, 1 (2):1–4, from www.ices.dk/products/icesadvice/Book1Part1.pdf.

such as redfish and deep-sea species.[6] And in respect of other fish stocks (e.g. herring, mackerel, blue whiting) NEAFC has largely been charged with implementing the management plans of the coastal states, which are the basis for their annual agreements. Although these management plans have been recognized by ICES as precautionary, the lack of agreement on conservation measures for the stocks in the EEZs as well as on the high seas shows that the PA does not yet have strong normative weight. The examples provided in Chapter 4 illustrated how the PA has (or has not) been used to legitimize regulatory measures in the cases of redfish and deep-sea species. The lack of timely and adequate response of NEAFC to the fisheries suggests—as in the case of NAFO—that the managers still are hesitant to take management action in a situation of scientific uncertainty. They appear to be awaiting new data and recommendations from the scientists before taking any restrictive measures.

The initiative to introduce the precautionary approach to the Joint Russian–Norwegian Fisheries Commission came from ICES, which in 1998 proposed reference points, in terms of *limits* to be avoided and *targets* to be aimed for, for the Northeast Arctic cod stock.[7] In Norway, the PA has been incorporated in official fishery policy.[8] On the Russian side, however, no reference to precaution is found in national fisheries legislation, or other central pieces of fisheries legislation. The introduction of the PA by the Joint Russian–Norwegian Fisheries Commission came gradually during the last half of the 1990s. The experience of the Joint Commission shows very mixed results in terms of the management decisions made and their implementation. The relationship between recommended TACs (from ICES), agreed TACs by the Commission and actual catches of cod in the Barents Sea varied between 1995 and 1999. Since then, there has been a clear tendency: TACs are set considerably above ICES recommendations, and actual catches have been even higher. In 2002, the Commission established a new strategy for its management of the Northeast Arctic cod stock, aimed at ensuring biological viability and greater economic predictability for fishery-dependent communities in Norway and Russia. However, as discussed in Chapter 5, the Commission has set TACs above the levels recommended by

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[6] Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004, item 6.

[7] ACFM Report 1998, International Council for the Exploration of the Sea, Copenhagen, 1998; *Havets ressurser* ("Resources of the Sea"), Institute of Marine Research, Bergen, 2004. These reference points were reviewed and changed from 2001; however, as noted by Stokke & Coffey (2004), there was more continuity than change in the reference points used by ICES after its introduction of the precautionary approach.

[8] *St meld nr 51 (1997–98) Perspektiver på norsk fiskerinæring* (White Paper No. 51 (1997–98), Perspectives on the Norwegian Fishing Industry), Stortinget, Oslo, 1997: 15.

ICES, especially since the introduction of the precautionary approach as a basis for such advice.[9] On the other hand, the new strategy makes it significantly more difficult to pursue a non-precautionary approach.

The analyses of the SEAFO Convention and WCPO tuna convention have shown that the precautionary approach is first and foremost a management tool to be implemented through the practice of RFMO/As. Article 6 of the WCPO tuna convention is a carbon copy of the corresponding provision of the Fish Stocks Agreement. However, it is also worth noting that the report of the first meeting of the Scientific Committee apparently made no mention of the precautionary approach, at least not in those terms. The SEAFO Convention addresses the PA in a rather general way, and the question of just how the approach is to be implemented remains unresolved (Hedley, 2001). The SEAFO Convention directs the Scientific Committee to "establish criteria and methods to be used in determining conservation and management measures" (Art. 10(4b)). Among these criteria, the PA might be expected to be central, likewise the development of reference points. However, as the Scientific Committee is a subsidiary body to the Commission, it is the latter that requests advice from the Committee, and that in practice will apply the precautionary approach in setting regulatory measures.

DECISION-MAKING PROCEDURES AND TRANSPARENCY

Decision-making procedures have long impeded the effectiveness of regional fisheries management regimes (McDorman, 2005: 1–2; Sydnes, 2001a). As illustrated here by the cases of NAFO and NEAFC, the parties to RFMO/As have often not been able or willing to reach agreement on the regulatory measures needed to ensure the sustainability of the fisheries. Although the negotiators of the Fish Stocks Agreement acknowledged this, the Agreement provides only limited guidance on how to improve the effectiveness of decision-making in RFMO/As, merely obliging states to "agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner" (Art. 10j). On the other hand, it does not lie in the nature of a framework convention, such as the Fish Stocks Agreement, to dictate parties to apply a specific form of decision-making procedures in their cooperation.

The decision-making procedures of RFMO/As are diverse and contain various elements.[10] Some RFMO/As have legally binding decision-making

[9] Despite this, the spawning stock of Northeast Arctic cod tripled in only a few years after the turn of the millennium and is now well above the precautionary reference point.

[10] See also discussion in Sydnes (2001a); McDorman (2005).

procedures, while others are advisory. Decision may be taken by a majority vote, or by consensus. Moreover, it is common among many regimes to have opting-out provisions, whereby a state party is not bound by a decision if it submits an objection within a certain period of time. In some cases, the opportunity to submit such objections is qualified by pre-established criteria.

The Joint Russian–Norwegian Fisheries Commission is a bilateral regime between the two coastal states of the Barents Sea. Hence, anything but consensus would be unthinkable. On the other hand, since measures are to be implemented mainly within the waters of the two parties, the decisions of the Commission are non-binding in nature.[11]

The WCPFC was negotiated by 28 parties with substantial differences in interests and capacities, ranging from the USA to Nauru, each with one vote in the future Commission. The nature of the WCPO tuna convention also implied that many issues of substance were to be decided upon by the WCPFC, once it was established. Under such circumstances the negotiating parties—and the chairman of the MHLC process—had to seek innovative solutions. The WCPO tuna convention introduces a chambered decision-making procedure to regional fisheries management. In general the WCPFC is to take decisions by a three-quarters majority, providing that there is such a majority among the 14 members of the South Pacific Forum Fisheries Agency (FFA) and among the non-members of the FFA. Any member that voted against such a decision may have it put before a review panel if the measure adopted is regarded as being inconsistent with the WCPO tuna convention, the Fish Stocks Agreement or the LOSC, or as being discriminatory. In cases where disputes are not reconciled by non-binding dispute settlement, dispute settlement as provided for by Part VIII of the Fish Stocks Agreement may be invoked, whether or not the members involved are parties to this agreement. Notably, the WCPO tuna convention also establishes a list of issues to be decided upon by consensus. This lists includes the adoption of the Commission's rules of procedure, decisions regarding TACs and fishing efforts, budget and financial contributions, the admission of new members and amendments to the WCPO convention itself.[12] This implies that issues such as the allocation of quotas and fishing effort, new entries, and the costs of financing cooperation through the WCPFC, are subject to consensus. These issues were obviously put on the 'consensus list' because they are among the

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[11] As noted in Chapter 5, the main issue relating to decision-making procedures within the Commission concern transparency and the representation of environmental non-governmental organizations.

[12] Decisions adopting the rules of procedure for the Commission, a budget and a scheme for financial contributions, and granting membership to the EC were all adopted at the inaugural meeting of the WCPFC; see Chapter 7.

most contentious issues to be dealt with in regional fisheries management. However, this is precisely why submitting them to decision-making by consensus may hamper the future effectiveness of the WCPFC.

NAFO has two decision-making bodies, the General Council and the Fisheries Commission. We will focus on the latter here, as the management body of NAFO. The Fisheries Commission adopts 'proposals' (not 'decisions') by a simple majority. However, any member may object to the proposal within a period, and thereby not be bound by it.[13] After the period of objection expires, however, a 'proposal' adopted by the Fisheries Commission becomes binding on those parties that have not objected to it. This is a notable problem that has hampered the effectiveness of the Fisheries Commission. In the period 1994–2004, a full 47 objections were raised, of which 44 concerned accepting the allocation of quotas among members. However, the NAFO General Council has established a working group, to review not the decision-making procedures *per se* but the use of the objection procedure. After nine years of work, the current proposal for amending Article XII is that a member objecting to a proposal must state its reason for doing so, and must outline the alternative measures it intends to apply. This may be contested by other members and be put before an ad hoc dispute settlement procedure for non-binding resolution, and further to binding dispute settlement if a solution is not achieved. The General Council in 2005 established a working group to review the NAFO Convention, including the decision-making procedures. The outcomes of this process are expected in 2006.

The Fisheries Commission of NEAFC adopts 'recommendations' on conservation, control and enforcement measures by a two-thirds majority. As in the case of NAFO, the decisions are non-binding and do not enter into force before an objection period has expired. Given the limited number of members in NEAFC, if one or more parties should opt out, this would have substantial consequences for the effectiveness of conservation measures. However, an underlying problem hampering the effectiveness of the decision-making procedures of NEAFC is that the straddling fish stocks in its mandate (high seas) area are also regulated through agreements between coastal states that are also parties of NEAFC, for the fishery in their EEZs. When the coastal states do not reach agreement on conservation measures for these stocks (most frequently, TAC allocation), agreement is not reached in NEAFC either.[14] In 2004, a recommendation was adopted enabling the Fisheries Commission to demand reasons and alternative measures from a

[13] The opting-out period is lengthened by 40 days after its transmission.

[14] As noted in Chapter 4, NEAFC was able to establish conservation measures only for the straddling mackerel stock in 2005, while no such measures were adopted for herring, redfish or blue whiting.

CP objecting to regulatory measure, and the establishment of an internal dispute settlement mechanism.[15] These recommendations will be binding on all CPs when they enter into force.

SEAFO, as a newly established RFMO, had several decision-making procedures up for discussion during its negotiation. The SEAFO Commission is to make decision by consensus. These decisions are—as in the case of both NAFO and NEAFC—binding on all parties that have not submitted an objection within 60 days. Attempts at establishing legal qualifications for posing objections failed to gain the necessary support during negotiations. However, the SEAFO Convention provides for review meetings to be held between the parties on measures objected to; and, if this does not lead to a result, for the establishment of interim measures by an ad hoc panel of experts. Such interim measures shall be binding on all parties, in cases where all CPs except that or those who objected deem it necessary for the long-term sustainability of the stocks in question (Art. 23 (1g)).

From this review of the cases, we note certain significant features regarding the practices of the regimes that have been constituted as formal RFMOs. Binding decision-making by majority vote still remains a very rare exception among regional fisheries management regimes, the only known case being WCPFC. Both NAFO and NEAFC have provisions for the commissions to make decisions by majority vote, with an objection procedure, but this is most notable in the cases of the newly negotiated WCPO tuna convention and SEAFO Convention. In the case of the WCPFC, which agreed on a chambered majority voting system, a 'consensus list' has been established, including what is often considered the most complex issues to be dealt with by the CPs of RFMO/As, among others the setting of TACs. The SEAFO Convention goes even further in establishing that decisions made by the SEAFO Commission are to be made by consensus, and then including an opting-out provision. It is questionable whether these decision-making procedures provide for the "adoption of conservation and management measures in a timely and effective manner" as prescribed by the Fish Stocks Agreement (Art. 10j). It is possible to argue that despite the diverse procedures applied by RFMO/As for decision-making, they all reflect that states are only bound by decisions which they have approved, and that efficient management in practice requires a consensus among the parties.

A second feature evident in this analysis is the increasing use of review panels, demands for reasoned objections and alternative measures, and dispute settlement mechanisms internalized in the RFMOs to deal with disputes

[15] Like several other institutional reforms in NEAFC, this was inspired by developments in NAFO.

in an expedient manner. When put into practice, such institutional mechanisms may prove efficient in forging agreement among CPs.

COMPLIANCE AND ENFORCEMENT

The Fish Stocks Agreement builds upon and strengthens flag state duties (Art. 18 and 19). It is the flag state that is responsible for ensuring that vessels flying its flag comply with measures established by RFMO/As. Article 18(3a) specifies that flag states are to regulate high seas fisheries through licensing systems, including requirements to report on activities and abide by regulations. If the flag state is not capable of acting upon its obligations, it is to refrain from issuing licenses. This obligation underscores the development towards a more orderly high seas fisheries regime, as also reflected by the strengthening of the role of RFMO/As as the competent mechanisms for regulating the fisheries. The flag state is further required to establish compliance mechanisms to this end. According to Article 19, a flag state is also obliged to investigate and (if necessary) apply sanctions against infringements, irrespective of where they occur (Art. 19(1a)).[16]

However, it lies in the very the nature of high seas fisheries that flag state enforcement may not always be effective. Compliance and enforcement measures have often been considered among the weak points of regional fisheries management regimes (Churchill & Lowe, 1999). As a consequence, the Fish Stocks Agreement obliges states to cooperate through RFMO/As to establish regional observer programmes, procedures for non-flag state boarding and inspection, etc. The following discussion will focus on these two dimensions—the implementation of flag state duties as provided by the Fish Stocks Agreement, and regional measures to ensure compliance and enforcement.

NAFO is among the RFMO/As which has developed the most comprehensive sets of schemes to ensure compliance with its conservation measures —although this has come more in response to internal conflicts and dwindling fish resources due to IUU fishing than to the Fish Stocks Agreement as such. Parallel to the Fish Stocks Agreement, the schemes are aimed at clarifying the obligations of the individual CP/flag state, *inter alia* to make it easier to identify and prevent violations (such as the licensing requirement). NAFO has established several schemes for surveillance, control and monitoring of the fisheries, in addition to a scheme of reciprocal inspection. This is impressive but problematic due to lack of coordination among the various systems/schemes, and it may be queried whether they have been introduced

[16] For further discussion on flag state duties, see Chapter 2.

for political purposes rather than actually to ensure compliance. The recent introduction of an annual compliance review is an effort to address the effectiveness of these measures. The review also addresses the issue of compliance by the CPs/flag states by their obligation to enforce the conservation measures where they are to report on the status of reported violations. Such enforcement is rather primitive compared with the non-compliance procedures established under other environmental treaty regimes, which may include independent review of the state parties and subsequent (positive or negative) sanctions. In NAFO the enforcement is 'soft', with the CPs controlling each other. The effectiveness of such enforcement may be questioned.

NEAFC has to a large extent copied the schemes and systems established by NAFO, except for the observer scheme. This RFMO seems to have come further than NAFO in addressing NCP fishing but is in still in an early stage when it comes to controlling CP compliance. In both NAFO and NEAFC, the compliance committees have an important role in developing and assessing the schemes and controlling the CPs' measures to implement them.

The Russian–Norwegian Fisheries Commission is a somewhat different situation than the other RFMO/As. Its responsibility is the conservation of fish stocks shared between the EEZs of the two states. The EEZs are subjected to the sovereign rights of the coastal states, including enforcement of conservation measures. But the coastal states have come to realize that enforcement and compliance issues are essential to effective cooperation, so these have been included on the agenda of the Fisheries Commission. The focus of the sub-committee of the Fisheries Commission has been limited to general discussions, exchange of data and inspectors. Recent reports suggest that the Joint Fisheries Commission has not succeeded in eliminating the problem of overfishing. While the problem in the early 1990s was that Russian vessels had started to deliver their catches in Norway—after which the two coastal states expanded their collaboration to include enforcement and exchange of landing data—the problem now is that more and more Russian vessels are delivering their catches to third countries with which Russia has no agreement on such exchange of data.

Both SEAFO and WCPTC are newly established RFMOs, so their responses to compliance and enforcement must be deduced from the constituent treaties. The SEAFO Convention establishes a system of observation, inspection, compliance and enforcement. It is left to the Commission to develop the various schemes integrated in the system (e.g. VMS, inspection and observer programme). The WCPO Convention on the other hand is—like the Fish Stocks Agreement—more detailed both as to the flag state responsibilities and as to the responsibilities of the RFMO, perhaps reflecting the stronger influence of the coastal states during the negotiating process.

For example, the WCPFC is to adopt an observer scheme. Both commissions will be competent to address the compliance of the CPs/flag states with these schemes.

CONCLUSION

The findings of this volume demonstrate the varied experiences of states in implementing the Fish Stocks Agreement by means of establishing or cooperating through RFMO/As. This is partly due to the diverse nature of the five RFMO/As that have been examined. However, a few themes stand out as particularly significant.

In the case of the Joint Russian–Norwegian Fisheries regime, the only 'arrangement' analysed in this volume, Chapter 5 demonstrated several significant linkages to the Fish Stocks Agreement. The precautionary approach was introduced to the Joint Commission though the annual scientific advice provided by the International Council for the Exploration of the Sea (ICES). Demands for increased transparency in the workings of the Commission, as provided for by the Fish Stocks Agreement, have to some extent been met with a broader representation in the national delegations, in particular in the case of Norway. Finally, an agreement between Norway, Russia and Iceland, regarding access to the fisheries, may have been influenced by the urge of the Fish Stocks Agreement for regional cooperation.

For the four regimes established as formal organizations—NAFO, NEAFC, SEAFO and WCPFC—the Fish Stocks Agreement has spurred substantial institutional activity. The Fish Stocks Agreement was the 'window of opportunity' that provided the basis for the negotiations of the WCPO tuna and SEAFO conventions. Both these conventions are extensive agreements that go far towards adopting the provisions of the Fish Stocks Agreement, in terms of general principles, organizational design, compliance and enforcement and dispute-settlement mechanisms. It has undoubtedly influenced the pre-1995 RFMOs NAFO and NEAFC: both through their practice and now through the forthcoming revisions of their constituent treaties that are intended to bring them formally in line with the legal developments of recent years.

It is also notable that NAFO, NEAFC and SEAFO in their constitutions, are to apply to the discrete high seas fish stocks within their mandate area. When these RFMOs and others are applying the Fish Stocks Agreement, although not all members are parties to it, its provisions could eventually have a wider and more general application than feared. The concern of a fragmented international legal framework for high seas fisheries may thus not materialize.

The first half of the 1990s was a period that saw the negotiation and adoption of a series of 'hard' and 'soft law' international agreements adding to the legal framework of the LOSC.[17] Among these was the Fish Stocks Agreement. The following period has to a larger extent been focused on the implementation of the international commitments established by these new agreements.[18] In the case of regional fisheries management, this requires implementation both through national legislation and cooperation through RFMO/As. These processes are facilitated and monitored at the global level through the UN—through the 'Informal Consultations of States Parties to the 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'[19]—and the FAO, which facilitates bi-annual consultation between RFMO/As.[20] Thus there is increasing awareness of the management practices of RFMO/As and the extent to which the members act upon their international commitments.

Institutional developments do not end with the implementation of the Fish Stocks Agreement. The development of new practices by RFMO/As in their implementation of the Fish Stocks Agreement may provide for the development of new international standards (Stokke, 2000). Let us hope that these developments may contribute to bolstering the provisions of the Agreement, providing for more sustainable management practices by the members of RFMO/As. In the end, it is they who bear responsibility for effective implementation of the Fish Stock Agreement.

On a global scale much of the 'action' in applying the Fish Stocks Agreement has been on paper through the endorsement and adoption of its provisions, rather than through the implementation of new principles, guidelines and institutional arrangements through institutional reforms and management measures. There are a number of challenges ahead in moving the Fish Stocks Agreement from paper to practice. RFMO/As still have a considerable challenge in implementing the full range of compliance and enforcement mechanisms provided for by the Fish Stocks Agreement, as the current debates on IUU fishing bear witness to. The issue of NCPs still remains a problem challenging the management efforts of many RFMO/As. The precautionary approach is frequently not applied in the sense that a lack of scientific information should not be used as a reason for not implementing conserva-

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[17] See for example Hey (1996).

[18] See also discussion in Sydnes (2005).

[19] See www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm for reports of the meetings.

[20] See www.fao.org/fi/body/rfb/index.htm for reports of the meetings.

tion and management measures. Finally, RFMO/As as intergovernmental regimes still predominantly maintain the principle that states are only bound by agreements or management measures they have given their consent to.[21] The practical implementation of the Fish Stocks Agreement through regional cooperation and national legislation is therefore an issue that merits further consideration by the scientific research community. For the international political community, a main challenge is to increase the number of parties to the Fish Stocks Agreement, to provide for its widespread application to the conservation and management of straddling and highly migratory fish stocks.

[21] Also the WCPFC, with a chambered majority voting system, applies a consensus rule for the setting of TACs. See Chapter 7.

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