

Chapter 10

Canada, the European Union and Regional Fisheries Management in the North Atlantic: Conflict, Cooperation and Challenges

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10.1. Introduction

Canada and the European Union (EU) cooperate in four regional fisheries management organisations (RFMOs) applicable to areas of the North Atlantic. They include the North Atlantic Salmon Conservation Organization (NASCO),¹ the International Commission for the Conservation of Atlantic Tunas (ICCAT),² the Northwest Atlantic Fisheries Organization (NAFO),³ and the North East Atlantic Fisheries Commission (NEAFC).⁴

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¹ Established by the *Convention for the Conservation of Salmon in the North Atlantic Ocean*, which entered into force on 10 October 1983, NASCO provides a forum for consultation and cooperation in the salmon stocks that migrate beyond areas of fisheries jurisdiction of coastal states of the Atlantic Ocean north of 36°N latitude. North Atlantic Salmon Conservation Organisation (NASCO), “About NASCO,” available: <<http://www.nasco.int>> (retrieved 20 November 2008) [hereinafter NASCO].

² The International Commission for the Conservation of Atlantic Tunas (ICCAT), responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas, was established by the *International Convention for the Conservation of Atlantic Tunas*, which entered into force in 1969. International Commission for the Conservation of Atlantic Tunas (ICCAT), “Introduction” at <<http://www.iccat.int/en/introduction.htm>> (retrieved 20 November 2008) [hereinafter ICCAT].

³ NAFO, founded in 1979 as a successor to the International Commission of the Northwest Atlantic Fisheries (ICNAF), has management responsibility for many fisheries resources of the Northwest Atlantic, except for salmon, tunas/marlins, whales and sedentary species. Northwest Atlantic Fisheries Organisation (NAFO), “About NAFO,” available <<http://www.nafo.int/about/frames/about.html>> (retrieved 20 November 2008).

⁴ NEAFC, established pursuant to the *Convention on Future Multilateral Cooperation in North East Atlantic Fisheries* which entered into force in November 1982, recommends measures to

This chapter focuses on the role of Canada and the EU in two of the RFMOs dealing with straddling fish stocks, NAFO and NEAFC, through a three-part format. The first section highlights the well-known conflict between the EU and Canada over the setting of quotas within NAFO for Greenland halibut. The famous *Estai* incident involved the arrest by Canada of a Spanish trawler in the NAFO Regulatory Area outside Canada's 200 nautical mile (nm) fisheries zone. Spain's subsequent litigation against the European Commission and Council for agreeing to a lowered total allowable catch (TAC) for Greenland halibut is also described. The second section addresses two main dimensions of cooperation. Global instruments and initiatives guiding regional cooperation in the North Atlantic are first described. The complexities of cooperation in relation to fisheries at the EU level are then discussed, including competences on the external level and the European Community's (EC) role in regional fisheries organisations. The third section reviews four ongoing challenges in regional fisheries management: putting the precautionary approach into practice; implementing the ecosystem approach; reaching consensus on allocation criteria; and ensuring effective compliance and enforcement. The chapter concludes with some key questions raised for discussion at the Brussels Workshop on EU Canada Relations in Law of the Sea and Ocean Governance, 4–5 December 2008.

10.2. Conflict

10.2.1. The *Estai* Incident

Canadian and European fisheries relations infamously came to the forefront of affairs during the *Estai* incident. The Spanish vessel, *Estai*, was arrested for fishing Greenland halibut (turbot) outside Canada's 200 nm fisheries zone off Newfoundland in March 1995. The arrest might be described an act of exasperation because of the failure of NAFO to adequately regulate the harvesting of turbot and growing concern over the unsustainable fishing

Contracting Parties for the rational exploitation of fish stocks in the Convention Area taking scientific advice from the International Council for the Exploration of the Sea (ICES). North East Atlantic Fisheries Commission (NEAFC), "About NEAFC," available: <<http://www.neafc.org/about/neafc-faq.htm>> (retrieved 20 November 2008) [hereinafter NEAFC].

practices of Spanish and Portuguese vessels in the NAFO Regulatory Area.⁵ Canada had lost patience over the excessive use of the NAFO objection procedure as the EU sought to exceed NAFO recommended quotas, garnering some 48 EU objections between 1985 and 1991.⁶ With the accession of Spain and Portugal to the European Economic Community, the problem of Portuguese and Spanish overcapacity was exported to the waters off Canada⁷ as Spain's distant-water fleets had not been given many fishing opportunities within the Community waters. At the same time, its fleets were evicted from third country waters following the worldwide emergence of 200 nm limits.⁸

NAFO attempts to set Greenland halibut quotas for 1995 was the matter of contention. The NAFO's Fisheries Commission had set a total allowable catch (TAC) of 27,000 tonnes with 60.37 percent allocated to Canada, 12.59 percent to the EU and the remainder principally to Russia and Japan. The EU objected and established a unilateral quota of 69 percent of the TAC.⁹ The soaring Spanish catch of turbot from 13 tonnes in 1989 to over 40,000 tonnes in 1994 was a matter of concern to Canada.¹⁰ The misreporting of fish catches in 1993 and 1994 by both Spanish and Portuguese vessels and the apparent lack of effective sanctioning by Spanish and Portuguese authorities for the infractions

⁵ For a general review and critique of NAFO, see T. Henriksen, G. Hønneland, and A. Sydnes, "The Northwest Atlantic Fisheries Organization (NAFO)" in T. Henriksen, G. Hønneland, and A. Sydnes, eds, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Leiden: Martinus Nijhoff, 2006), pp. 63–97. NAFO was established pursuant to the 1978 Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries. This convention was approved by the European Economic Community (EEC) by Council Regulation (EEC) No. 3179/78 of 28 December 1978 Concerning the Conclusion by the European Economic Community of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, *Official Journal* L 378 (30 December 1978) 1. NAFO's Regulatory Area is that part of the area of the NAFO Convention Area not falling under the sovereignty or within the jurisdiction of coastal states. Council Regulation (EC) No. 27/2005 of 22 December 2004 Fixing for 2005 the Fishing Opportunities and Associated Conditions for Certain Fish Stocks and Groups of Fish Stocks, Applicable in Community Waters and, for Community vessels, in Waters Where Catch Limitations are Required, Article 3 (d), *Official Journal* L 12 (14 January 2005) 1. The Northwest Atlantic Area is defined in Article 1 of the Convention.

⁶ Counter-Memorial of Canada (Jurisdiction) in the *Fisheries Jurisdiction Case (Spain v. Canada)*, The Hague, International Court of Justice (February 1996), p. 13 [hereinafter Counter-Memorial of Canada].

⁷ D. Day, "Tending the Achilles' Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks," *Marine Policy* 19 (1995): 257–270, p. 265.

⁸ R. R. Churchill, "The EC and its Role in Some Issues of International Fisheries Law," in E. Hey, ed., *Developments in International Fisheries Law* (The Hague, Boston: Kluwer Law International, 1999), p. 522.

⁹ Counter-Memorial of Canada, n. 6 above, pp. 19–20.

¹⁰ *Id.*, p. 18.

heightened Canadian concern.¹¹

Canada readied itself for unilateral enforcement actions through both legislative and regulatory measures. On 12 May 1994 the Canadian Parliament adopted Bill C-29¹² amending the *Coastal Fisheries Protection Act*.¹³ The amendments recognised straddling stocks on the Grand Banks of Newfoundland as threatened with extinction and emphasised the urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory area with sound conservation measures.¹⁴ Bill C-29 prohibited persons onboard certain classes of vessels from fishing for stated straddling stocks in contravention of prescribed conservation measures. It also authorised regulations to be passed stipulating vessels and stocks subject to the legislation, as well as setting conservation measures.¹⁵ On 3 March 1995 Canada amended the *Coastal Fisheries Protection Regulations*¹⁶ providing for enforcement action against Spanish and Portuguese vessels fishing for straddling stocks in the NAFO Regulatory area in contravention of prescribed conservation measures and included a prohibition on fishing for Greenland halibut.

Canada subsequently initiated enforcement action of its newly-amended regulations. Canadian fisheries protection officers boarded and inspected the *Estai* on 9 March 1995. The ship was seized, and the master was arrested in violation of the *Coastal Fisheries Protection Act and Regulations*. The master was released on March 12th upon payment of CAD8,000 in bail, and the vessel was released on March 15th upon provision of a CAD500,000 bond.¹⁷

Spain was unable to challenge Canada's enforcement actions in the International Court of Justice (ICJ). In a case filed with the ICJ on 28 March 1995, a majority of the Court, in a decision handed down on 4 December 1998, agreed with Canada's position that the Court did not have jurisdiction to consider the merits of the case.¹⁸ Canada had deposited a new optional clause declaration with the ICJ on 10 May 1994 excluding from the Court's jurisdiction disputes concerning Canadian conservation and management measures taken with respect to vessels fishing in the NAFO Regulatory Area

¹¹ Id.

¹² *Act to amend the Coastal Fisheries Protection Act*, S.C. 1994, c. 14.

¹³ *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33.

¹⁴ *Act to amend*, n. 12 above, Section 5.1.

¹⁵ Id., Section 5.2.

¹⁶ *Coastal Fisheries Protection Regulations (Amendment)*, SOR/95-136.

¹⁷ Counter-Memorial of Canada, n. 6 above, p. 21.

¹⁸ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 432.

and the enforcement of such measures.¹⁹

In *Jose Pereira E Hijos S.A. v. Canada (Attorney General)*,²⁰ corporate owners and the captain of the *Estai* instituted a civil action before the Federal Court of Canada with the statement of claims being filed on 28 July 1995 and amended on 30 April 2003. Various damages were sought, including CAD150,000 in general damages for each plaintiff, with key allegations being that the arrest of the ship in international waters was illegal and that there was an unlawful trespass by servants/agents of the federal Crown. A central argument by the plaintiffs was that the arrest was unlawful because supporting Canadian regulations were not enacted for valid conservation and management measures agreed to by NAFO Contracting Parties.

In a January 2007 decision, the Federal Court of Appeal reversed a damage award by the trial judge and denied all damage claims.²¹ The Court found that the Canadian Parliament's intention was for Canada to take enforcement actions in the NAFO Regulatory Area regardless of whether or not Contracting Parties had reached agreement on conservation measures. The Court also indicated there was no demonstration that the Canadian government had acted in bad faith in enacting the regulations.

In April 1995, Canada and the EU reached an agreement dousing the flames lit by the *Estai* incident.²² Canada agreed to repeal its regulatory targeting of Spanish and Portuguese vessels fishing in the NAFO Regulatory Area (effective 1 May 1995), and both parties agreed to jointly submit to the NAFO Fisheries Commission a submission to strengthen NAFO conservation and enforcement measures.²³ Both parties also agreed to implement on a provisional basis various control and enforcement measures, including a commitment to ensure independent and qualified observers aboard all vessels fishing in the NAFO Regulatory Area.²⁴

¹⁹ Canadian Declaration of 10 May 1994, in Counter-Memorial of Canada, n. 6 above, Annex 2.

²⁰ *Jose Pereira E Hijos S.A. v. Canada (Attorney General)*, 2005 FC 1011, 17 C.E.L.R. (3d) 1.

²¹ 2007 FCA 20, 26 C.E.L.R. (3d) 169.

²² See D. Freestone, "Canada and the EU Reach Agreement to Settle the *Estai* Dispute," *International Journal of Marine and Coastal Law* 10 (1995): 397–411.

²³ Council Decision 95/586/EC of 22 December 1995 Concerning the Conclusion of the Agreement Constituted in the Form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes Thereto Between the European Community and Canada on Fisheries in the Context of the NAFO Convention, *Official Journal* L 327 (30 December 1995) 35–45 [hereinafter EC/Canada Agreement]. It was signed by the Commission pursuant to Council Decision 95/546/EC of 17 April 1995 on the Signature and Provisional Application of the Agreement Between the European Community and Canada on Fisheries in the Context of the NAFO Convention, *Official Journal* L 308 (21 December 1995) 79.

²⁴ Counter-Memorial of Canada, n. 6 above, p. 81. For further reviews of the *Estai* incident, see T. L. McDorman, "Canada's Aggressive Fisheries Actions: Will They Improve the Climate for

10.2.2. Consequences of the *Estai* Incident Observable at the EU Level

Consequently, in September 1995, NAFO approved a formula for the allocation of Greenland halibut quotas. Accordingly, the EU fisheries Council established for 1995, an EC quota of approximately 19 percent of the NAFO TAC.²⁵ This TAC was challenged before the European judicial institutions.

In Case T-196/99,²⁶ for example, Spain brought a claim to the European Court of First Instance (ECFI) seeking a declaration that the Commission and Council were liable under Article 288 of the EC Treaty²⁷ for losses suffered by it following the adoption of the 1995 TAC for Greenland halibut. With respect to the alleged illegality of the Council's action in adopting Regulation 3366/94,²⁸ Spain argued that by not lodging an objection, the Council neglected the objectives of the Common Agricultural Policy (CAP) set out in Article 33 of the EC Treaty. The Council was accused of misusing its discretion because it refrained from objecting to the 1995 TAC for Greenland halibut on the basis of the objectives set out in Article 33 of the EC Treaty. Failure to oppose the TAC particularly compromised the objective of ensuring rational development of agricultural production and a fair standard of living for the agricultural community.²⁹ The ECFI noted that the Council's decision to accept the TAC and its acquiescence by implication concerned a measure for conserving marine

International Agreements?" *Canadian Foreign Policy* 2 (1994): 5–28; J. A. Beesley and M. Rowe, "Sound Basis in International Law for Canada's Actions in the 'Turbot War'," *Canadian International Lawyer* 1 (1995): 177–180; G. L. Lugten, "Fisheries War for the Halibut," *Environmental Policy and Law* 25 (1995): 223–229; P. M. Saunders, "And Now That the War Is Over ... Looking Back at the Canada-European Union Fisheries Confrontation of 1995," *The Canadian Law Newsletter* 31 (1996): 15–37; and D. R. Teece, "Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?" *Colorado Journal of International Environmental Law & Policy* 8 (1997): 89–125.

²⁵ Regulation (EC) No. 1761/95 of 29 June 1995 Amending, for the Second Time, Regulation No. 3366/94, L 171 *Official Journal* 1 (21 July 1995).

²⁶ Case T-196/99, *Area Cova, SA and Others v. Council of the European Union and Commission of the European Communities*, 2001 ECR II-3597 [hereinafter Case T-196/99].

²⁷ This is the contractual liability stipulation which states that the Community shall make good any damage caused by its institutions in the performance of their duties.

²⁸ Regulation 3366/94 recorded that the maximum catch level for Greenland halibut in NAFO Sub-areas 2 and 3 in 1995 was as yet unallocated among NAFO Contracting Parties, that the NAFO Fisheries Commission was to convene a meeting to decide the allocation, and that catches of Greenland halibut would be authorised in 1995 and counted against the quotas decided for Member States. Council Regulation (EC) No. 3366/94 of 20 December 1994 Laying Down for 1995 Certain Conservation and Management Measures for Fishery Resources in the Regulatory Area, L 363 *Official Journal* 60 (31 December 1994).

²⁹ Case T-196/99, n. 26 above, para. 64.

resources. Such a measure forms an integral part of the CAP as it is intended, in particular, to ensure the rational development of resources³⁰ and the availability of supplies.³¹

The applicants also alleged that the defendants had misused their powers by adopting a bilateral fisheries agreement with Canada and Regulation 1761/95. Those measures were said to be taken on the basis of EC powers in the area of the Common Fisheries Policy (CFP) in order to achieve objectives different from the CFP objectives particularly that of normalising commercial relations between Canada and the Community.

The ECFI recognised that the measures were designed to put an end to the fishing conflict between Canada and the EC, but stated that their form, subject-matter and reasoning, did fall within the context of the CFP for the following reasons: Firstly, it was in the interest of EC fishermen to ensure the safety of their fishing operations. Secondly, since Canada is represented in several international fishing organisations and assumes a significant role there, the safeguarding of good relations with that country was important in the interests of managing fishing resources at the world level. Maintaining good international relations was considered legitimate in the context of all EC policies. The institutions must always take account, when legislating in the context of a specific policy, its effects on the other activities of the Union, particularly that of public interest.³²

The applicants also claimed to have had a legitimate expectation of a favourable outcome of the dispute between Canada and the EC and in the maintenance of the fishing opportunities which they had enjoyed before it. The ECFI noted that “the allocation of quotas cannot in principle create a situation of legitimate expectation for economic operators.”³³

It was also alleged that the conservation measure was *disproportionate vis-à-vis* the damage caused to Community vessel owners and manifestly

³⁰ *Treaty Establishing the European Community* [consolidated version], *Official Journal* C 325 (24 December 2002) 33-184 [hereinafter EC Treaty], Article 33 (1) (a).

³¹ *Id.*, Article 33 (d); Case T-196/99, n. 26 above, para. 76.

³² Case T-196/99, n. 26 above, para. 158.

³³ *Id.*, para. 121. In this case, the ECFI refers to quotas. In this context, however, this concept is not to be understood as referring to the fishing opportunities allocated to the Member States and derived from a TAC. Rather it refers here to that part of the TAC allocated to the Community as a whole. In particular, it is pointed out that economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the EC institutions in the exercise of their discretion will be maintained, especially in an area such as the CAP, in which the institutions have wide discretion. That applies even more strongly in the context of international negotiations, which imply concessions on either side as well as the negotiation of a compromise accepted by all the Contracting Parties. *Id.*, paras 122–124.

inappropriate with regard to the objective pursued.³⁴ The ECFI pointed out that the fixing of a TAC at a level avoiding the worsening or the diminution of a fish stock also served the interests of EC fishermen because it allowed the safeguarding of resources in the long term. The other CAP objectives had not been sacrificed.³⁵ On the contrary, an approach by the Council taking into account only the objective of ensuring a higher standard of living for certain fishermen in the short term would have involved a serious risk of making the objectives of ensuring the rational development of resources and availability of supplies impossible.

³⁴ Id., para. 78. On the conformity of a Community legislative instrument with the principle of proportionality see Case C-161/96, *Südzucker Mannheim v. Hauptzollamt Mannheim*, 1998 ECR I-281 [hereinafter Case C-161/96], para. 31. In Case C-535/03, the European Court of Justice (ECJ) observed that the principle of proportionality is a general principle of Community law and, in the field of fisheries, is embodied in Article 34 (2) of the EC Treaty. That provision entrusts the Community legislature with the task of implementing the CAP as formulated in Article 33. In particular, a fair standard of living for the agricultural community and the availability of supplies needs to be assured, while excluding any discrimination between Community producers. The ECJ reiterated that the Community legislature enjoys a wide discretion in this field, corresponding to the political responsibilities given to it by Articles 34–37 of the EC Treaty. See Case C-535/03, *Unitemark Ltd, North Sea Fishermen's Organisation v. Department for Environment, Food and Rural Affairs*, 2006 ECR I-2689 [hereinafter Case C-535/03], paras 53–54.

³⁵ In pursuing the objectives of the CAP, the EC institutions must secure the permanent harmonisation made necessary by any conflicting objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made. One condition must, however, be met, that such harmonisation does not have the effect of rendering impossible the realisation of the other objectives. As stressed by the ECFI or ECJ in the following cases: Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93, *O'Dwyer and Others v. Council*, 1995 ECR II-2071, para. 80; Case C-179/95, *Spain v. Council*, 1999 ECR I-6475, para. 28; and Case C-324/96, *Petridi v. Simou and Others*, 1998 ECR I-1333, para. 30.

10.3. Cooperation

10.3.1. Global Instruments and Initiatives Guiding Cooperation in the North Atlantic

While various FAO instruments may also guide regional cooperation,³⁶ Canada and the EU have been particularly influenced towards greater cooperation by the 1995 UN Fish Stocks Agreement³⁷ and the December 2006 UN Sustainable Fisheries Resolution.³⁸ With the EC ratifying the UN Fish Stocks Agreement on 19 December 2003 and Canada on 3 August 1999,³⁹ the EC and Canada committed to strengthening regional fisheries management organisations in light of modern sustainability principles like precaution and the ecosystem approach, as well as enhancing regional compliance and enforcement arrangements.⁴⁰ Canada and the EC have subsequently played substantial roles in achieving modernisation amendments to the NAFO Convention⁴¹ and the EU

³⁶ Food and Agriculture Organisation of the United Nations' (FAO) instruments include the Code of Conduct for Responsible Fisheries; International Plans of Action relating to the incidental catch of seabirds (IPOA–Seabirds), the conservation of sharks (IPOA–Sharks), the management of fishing capacity, and the prevention /deterrence of illegal, unreported and unregulated fishing (IPOA–IUU); and the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas. The instruments are available through the FAO website: <<http://www.fao.org/fishery/publications/en>> (retrieved 20 November 2008).

³⁷ *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*, 8 September 1995, I.L.M., 34, 15421580 (1995), entry into force 11 December 2001, available: <daccessdds.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement> (retrieved 14 November 2008) [hereinafter 1995 UN Fish Stocks Agreement].

³⁸ UN General Assembly, *Sustainable fisheries, including through the 1995 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, and related instruments*, A/RES/61/105 (6 March 2007).

³⁹ Division for Ocean Affairs and Law of the Sea, *Chronological Lists of Ratification*, available: <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratification.htm> (retrieved 20 November 2008).

⁴⁰ For an overview of the Agreement's key provisions, see T. Henriksen, G. Hønneland, and A. Sydnes, "The Fish Stocks Agreement," in Henriksen, et al., n. 5 above, pp. 11–59.

⁴¹ On 28 September 2008, NAFO adopted the *Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries* (GC Doc. 07/4), but the amended text needs to be ratified by at least three-fourths of the NAFO Contracting Parties. The amended text is available at <<http://www.nafo.int/about/frames/about.html>> (retrieved 20 November 2008).

influenced amendments to the NEAFC Convention.⁴² They have also cooperated in enhancing regional compliance and enforcement arrangements although many challenges remain.⁴³

The 2006 UN Sustainable Fisheries Resolution impelled regional fisheries management organisations to adopt and implement various measures to protect vulnerable marine ecosystems (VMEs) from bottom fishing activities. The identification of VMEs and the determination whether bottom fishing could cause significant adverse impacts to such ecosystems was set as a priority.⁴⁴ In areas where VMEs are known to occur or likely to occur, RFMOs were urged to close such areas and to ensure conservation and management measures were established to prevent significant adverse impacts.⁴⁵ RFMOs were also asked to require their members to address

⁴² A “new” NEAFC Convention was adopted through 2004 and 2006 amendments, available *Convention on Future Multilateral Co-operation in the North-East Atlantic*, available: <http://www.neafc.org/about/docs/new_convention.pdf> and also <http://www.neafc.org/system/files/%252Fhome/neafc/drupal2_files/london-declaration_and_new_convention.pdf> (both retrieved 20 November 2008) [hereinafter “New” NEAFC Convention]. For the version of the convention before 2004 and 2006 amendments, see *Convention on Future Multilateral Co-operation in the North-East Atlantic*, London, 18 November 1980, 1285 U.N.T.S. 129, *Official Journal* L 227, 12 August 1981, entry into force on 17 March 1982, available: <<http://eurlex.europa.eu/Notice.do?val=86901:cs&lang=en&list=86901:cs,87372:cs,87022:cs,87021:cs,&pos=1&page=1&nbl=4&pgs=10&hwords=&checktexte=checkbox&visu=#texte>> (retrieved 20 November 2008) [hereinafter NEAFC Convention]. Amendments to the NEAFC Convention were adopted in 2004 and 2006 by the NEAFC Commission. And even though Contracting Parties have agreed to use the convention so amended on a provisional basis, pending ratification, these amendments have not been taken into consideration by the present overview unless specifically mentioned in the text. The NEAFC Convention replaces the North-East Atlantic Fisheries Convention of January 1959 following the extension of states’ jurisdiction over living resources in their adjacent waters to up to 200 nm. For a historical overview of the development of regional fisheries management and RFMOs in the North Atlantic, see S. S. Gezelius, “The Arrival of Modern Fisheries Management in the North Atlantic: A Historical Overview,” in S. S. Gezelius and J. Raakjær, eds, *Making Fisheries Management Work: Implementation of Policies for Sustainable Fisheries* (Dordrecht: Springer, 2008), pp. 27–40.

⁴³ M. Arbuckle, B. Atkinson, and G. Valentina, *Performance Review Panel Report of the North East Atlantic Fisheries Commission, NEAFC* (6 November 2006), available: <<http://www.neafc.org/system/files/performance-review-final-edited.pdf>> (retrieved 20 November 2008) [hereinafter the NEAFC Performance Report]. This document was a result of the agreement by NEAFC members to regularly assess NEAFC performance in relation to the NEAFC Convention, n. 42 above. Section 3.6 et seq of the NEAFC Performance Report especially examines the role of NEAFC in a regional and international context. Section 4.6 concludes that there is room for improvement in the relationship between NEAFC and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR).

⁴⁴ UN General Assembly, n. 38 above, para. 83(b).

⁴⁵ Id. at para. 83(c).

encounters with VMEs by vessels flying their flag. Vessels encountering vulnerable areas, such as cold water corals and sponge grounds, should be required to cease bottom fishing and to report the encounter so appropriate measures can be adopted for the relevant site.⁴⁶

Canada and the EU, spurred on by the UN Resolution, jointly drafted a proposal for bringing NAFO into conformity with the VME protection commitments. The proposal was adopted in revised form at the Inter-sessional Meeting for the NAFO Fisheries Commission in May 2008,⁴⁷ and a new chapter on bottom fisheries in the NAFO Regulatory Area was added to the 2008 NAFO Conservation and Enforcement Measures.⁴⁸ The provisions, *inter alia*, called for the mapping of sites where VMEs are known or likely to occur⁴⁹ and assessments of proposed bottom fishing activities in VME areas.⁵⁰ The Fisheries Commission is authorised to adopt a range of measures to prevent significant adverse impact on VMEs, including prohibiting or restricting bottom fishing activities and requiring changes in gear design and/or deployment.⁵¹ Contracting Parties are required to have their flagged vessels cease bottom fishing when VMEs are encountered and to report encounters.⁵² The terms of reference for an ad hoc working group of managers and scientists on VMEs were also included in the provisions.⁵³ The working group is to provide advice to the Fisheries Commission on VME protection and to develop operational procedures relating to encounters with VMEs.⁵⁴

⁴⁶ Id. at para. 83(d).

⁴⁷ NAFO, *Report of the Fisheries Commission Inter-Sessional Meeting*, 30 April–7 May 2008, Montreal, Quebec, Canada, NAFO/FC Doc. 08/04, Annex 22.

⁴⁸ NAFO, *Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures*, available: <<http://www.nafo.int/fisheries/frames/regulations.html>> (retrieved 20 November 2008) [hereinafter NAFO C&E Measures], NAFO/FC Doc. 08/1 (Revised), Chapter Ibis.

⁴⁹ Id., Article 4(1).

⁵⁰ Id., Article 4(2)(3).

⁵¹ Id., Article 4(5).

⁵² Id., Article 5.

⁵³ Id., Article 4(4) and Annex 1 to Chapter Ibis.

⁵⁴ Id.

10.3.2. Cooperation at the EU Level

10.3.2.1. The Community's Competences on the External Level

Although Member States' vessels have, through the 1982 United Nations Convention on the Law of the Sea,⁵⁵ a right to fish on the high seas, high seas' fishing is extensively regulated by the CFP. Negotiations with third countries for access of Member States' vessels to the fishing zones of third states, and vice versa, are entirely within EC competence. The transfer of competence from the Member States to the EC is therefore not confined to Community vessels fishing in Community waters, but to wherever these vessels operate.⁵⁶ The EC has one of the largest fishing fleets in the world. A significant part of the EC fishing sector depends on access to non-EC resources, i.e., those which are shared with third states in the waters under their jurisdiction or international waters.

The process of transfer of external relations powers to the EC has been particularly marked in the fisheries sector. In the absence of specific provisions in the EC Treaty,⁵⁷ the general system of EC law on its external relations is relevant.⁵⁸ As an international organisation created by a treaty, the EC has legal personality.⁵⁹ This means that in its external relations the EC enjoys the

⁵⁵ *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1833 U.N.T.S. 396 [hereinafter LOS Convention].

⁵⁶ Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Article 1 (1), L 358 *Official Journal* 59–80 (31 December 2002) [hereinafter Regulation 2371/02]. This does not mean that there are no situations where Member States' fishing vessels can conduct high seas fishing for species or stocks for which neither the EC nor a regional fisheries organisation have yet prescribed catch restrictions.

⁵⁷ The EC Treaty does give explicit powers to the EC to act on the international level, but these relate only to restricted fields such as commercial agreements, association agreements with third states, and the environment. The only express treaty-making power relevant to fisheries is found in Article 133(3) of the EC Treaty (*ex* Article 113 of the EEC Treaty) on the common commercial policy, which indirectly authorises the EC to enter into treaties with third states relating to trade in fishery products. *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], Article 113; EC Treaty, n. 30 above, Article 133 (3).

⁵⁸ Joined Cases 3, 4 and 6/76, *Officier van Justitie v. Kramer*, 1976 ECR 1279, para. 16 [hereinafter *Kramer Case*].

⁵⁹ Article 281 (*ex* Article 210 of the EEC Treaty) of the EC Treaty lays down the EC's legal personality. The legal personality of an international organisation may also be inferred from the powers or purposes of the organisation and its practice, as confirmed by the International Court

capacity to enter into international commitments, i.e., to conclude treaties.⁶⁰ The EC's treaty-making powers are thus of two kinds: those expressly conferred on it by the EC Treaty and those that may be implied from its provisions.⁶¹

The most radical expansion of the EC's external fisheries competences has stemmed from the case law of the European Court of Justice (ECJ). Starting with Case 22/70, the ECJ developed the parallelism doctrine, which means that the EC's external treaty-making competence mirrors its internal legislative competence.⁶² In the *Kramer Case*, the ECJ pointed out that the competence to legislate on the internal level in fisheries matters flowed from Article 43 of the European Economic Community (EEC) Treaty (Article 37 of the EC Treaty). According to the parallelism doctrine, the EC thus enjoys treaty-making powers

of Justice (ICJ) in the *Reparation for Injuries Case*. *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174.

⁶⁰ The authority to do so in a specific field not only arises from an express conferment by the treaty, but may equally flow implicitly from other EC Treaty provisions, from an act of accession, and from any measure adopted within the framework of those provisions by the EC legislature.

⁶¹ *Kramer Case*, n. 58 above, paras 19–20.

⁶² This theory was further developed in Opinion 1/76:

[W]henever Community law has created for the institutions of the Community powers within its internal system for attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.

Opinion 1/76, *European Laying-up Fund for Inland Waterway Vessels*, 1977 ECR 741, 3rd Recital.

As regards the exclusiveness of this competence, the ECJ has observed that:

[e]ach time the Community, with a view to implementing a *common policy* [emphasis added] envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or collectively, to undertake such obligations with third States which affect those rules.

Case 22/70, *Commission of the European Communities v. Council of the European Communities, European Agreement on Road Transport*, 1971 ECR 263, para. 17 [hereinafter *ERTA Case*].

Although previously considered unclear and controversial, the ECJ has clarified to some degree the exact scope of the implied powers, see: Opinion 2/91, *Convention N° 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work*, 1993 ECR I-1061; Opinion 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228 (6) of the EC Treaty*, 1994 ECR I-5267; Opinion 2/92, *Competence of the Community or One of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment*, 1995 ECR 521.

in relation to fisheries.⁶³ On the basis of Articles 5 (Article 10 of the EC Treaty) and 116 EEC Treaty,⁶⁴ the ECJ held that:

Member States participating in the [North-East Atlantic Fisheries] Convention and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community in carrying out the tasks entrusted to it by Article 102 of the Act of Accession, but also under a duty to proceed by common action within the fisheries Commission. It further follows therefore that as soon as the Community institutions have initiated the procedure for implementing the provisions of the said [article], and at the latest within the period laid down by [it], those institutions and the Member States will be under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the Convention and in other similar agreements.⁶⁵

In Case C-258/89,⁶⁶ it was argued that the EEC has no authority to independently adopt TACs and quotas with respect to international waters. In this case Spain accepted the result, i.e., the existence of external Community

⁶³ Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, *Act Concerning the Conditions of Accession and the Adjustments to the Treaties*, Part 2 Adjustments to the Treaties, Article 102 [hereinafter 1972 Act of Accession]. Support was found in the 1972 *Act of Accession*, in Regulation 2141/70 and moreover in the very nature of things that:

the rule-making authority of the Community *ratione materiae* also extends – in so far as the Member States have similar authority under public international law – to fishing on the high seas. [I]t followed from the very duties and powers which EEC law had established and assigned to the EEC institutions on the internal level that the Community had authority to enter into international commitments for the conservation of the resources of the sea.

Kramer Case, n. 58 above, para. 30/33. Council Regulation (EEC) No. 2141/70 of 20 October 1970 on the Establishment of a Common Structural Policy for the Fishing Industry, L 236 *Official Journal* 1–4, Article 1 (27 October 1970) [hereinafter Regulation 2141/70].

⁶⁴ Under Article 116 of the EEC Treaty it is provided that:

[f]rom the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market proceed within the framework of international organisations of an economic character only by common action.

EEC Treaty, n. 57 above, Article 116. This article was not withheld in the EC Treaty.

⁶⁵ Kramer Case, n. 58 above, paras 44–45.

⁶⁶ Case C-258/89, *Commission of the European Communities v. Kingdom of Spain*, 1991 ECR I-3977.

powers, but not the premise of the existence of internal Community powers. It was contended that independent authority to limit catches on the high seas could not be vested in the Community, since the Member States had no such powers that they could have transferred to the Community.⁶⁷ Advocate General Darmon set aside this argument by observing that the *de facto* freedom which states in practice grant to their fishermen by not laying down rules in respect of the conservation of stocks on the high seas did not in any way challenge the fundamental principle that the State is empowered, from the point of view of public international law, to impose any restrictions on catches on the high seas.⁶⁸ Spain also contended that a unilateral limitation by the Community of fishing activities on the high seas would be detrimental to its fishermen without being effective since certain non-Member States do not impede upon the freedom of their fishing fleets. The ECJ considered catch restrictions outside the Community zone essential in light of the actual CFP objectives. It found that consideration solely of the stock in Community waters would scarcely be effective and would undermine the objective of conserving the species concerned, since those species would not be subject to any quotas once they moved outside the Community zone.⁶⁹

10.3.2.2. EC Participation in Regional Fisheries Organisations

Due to the EC's exclusive external competence, it is generally not possible for the Member States to participate as separate members in RFMOs. Since the inception of the CFP, the EC has therefore gradually replaced its Member States in most RFMOs. The EC is a contracting party to eleven RFMOs and is in the process of joining others.⁷⁰

⁶⁷ Id., Opinion of Advocate General Darmon, paras 52–53.

⁶⁸ Id., para. 54.

⁶⁹ Id., Opinion of Advocate General Darmon, paras 12–13. In Case C-405/92, the ECJ took any doubt away by pointing out that:

[w]here the high seas are concerned, the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the State whose flag the vessel is flying or in which it is registered. It has in particular competence to adopt for vessels flying the flag of a Member State or registered in a Member State, measures for the conservation of fishery resources of the high seas.

Case C-405/92, *Etablissements Armand Mondiet SA v. Armement Islais SARL*, 1993 ECR I-6133, para. 12.

⁷⁰ The RFMOs to which the EC is a contracting party are: ICCAT, NAFO, NEAFC, the Indian Ocean Tuna Commission (IOTC), NASCO, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the General Fisheries Council for the Mediterranean (GFCM), the Western and Central Atlantic Fishery Commission (WECAFC), Fishery

At present the RFMOs cover practically all the high seas. There are a wide variety of RFMOs. Some were set up under FAO while others were created independently. Some cover all the biological resources in a given zone; others focus on one stock or a group of stocks. The area covered by an RFMO may be limited to the high seas or to EEZ, or may include both.

Member States can retain or become members of RFMOs under exceptional circumstances. This is the case where other states are not favourably disposed towards EC membership such as the Inter-American Tropical Tuna Commission (IATTC),⁷¹ which was established by the 1949 Convention between the United States of America and the Republic of Costa Rica.⁷² The EC is a contracting party to the Agreement on the International Dolphin Conservation Program (AIDCP),⁷³ whose operation has been entrusted to the secretariat of the IATTC. In 1999, the EC signed the AIDCP.⁷⁴ Contrary to the AIDCP, accession of new members to the 1949 Convention (IATTC convention) is limited to states. However, an amendment process was launched in 1999 with the adoption of the so-called Guayaquil Protocol, so that regional economic integration organisations could become members. However, the entry into force of this protocol, proved to be long.⁷⁵ Therefore the EC agreed to allow Spain, the only EC Member State whose vessels operate in the area, to become a member of IATTC. Spain's accession was on a temporary basis and

Committee for the Eastern and Central Atlantic (CECAF), the South-East Atlantic Fisheries Organisation (SEAFO), and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WFCPC). On the changing role of RFMOs and the Community participation therein, see generally Commission of European Communities, *Community Participation in Regional Fisheries Organisations*, Communication from the Commission, COM(1999) 613 (Brussels, 8 December 1999).

⁷¹ See more, Inter-American Tropical Tuna Commission (IATTC) website at <<http://www.iatcc.org/>> (retrieved 14 December 2008).

⁷² *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, Washington, 31 May 1949, 80 *U.N.T.S.* 3. This convention entered into force on 3 March 1950 [hereinafter 1949 Convention]. The Inter-American Tropical Tuna Commission (IATTC) has been given competence to regulate highly migratory fish stocks in the Eastern Pacific Ocean. IATTC membership comprises fourteen coastal and fishing states with interests in the region.

⁷³ *Agreement on the International Dolphin Conservation Program* (AIDCP), Washington, 15 May 1998, entry into force 15 February 1999, available: <[http://www.iatcc.org/PDFFiles2/AIDCP-\(amended-Oct-2007\).pdf](http://www.iatcc.org/PDFFiles2/AIDCP-(amended-Oct-2007).pdf)> (retrieved 22 April 2009).

⁷⁴ Council Decision 1999/337/EC of 26 April 1999 on the Signature by the European Community of the Agreement on the International Dolphin Conservation Programme, L 132 *Official Journal* 1–27 (27 May 1999); Council Decision 1999/386/EC of 7 June 1999 on the Provisional Application by the European Community of the Agreement on the International Dolphin Conservation Programme, L 147 *Official Journal* 23 (12 June 1999).

⁷⁵ At the time of writing, the protocol had been signed by just eight IATTC members, and ratified by only four among them. It will only enter into force once all IATTC parties have ratified it.

on account of “unique circumstances.” It was also without any precedent-creating authority and could not affect the EC’s exclusive competence in fisheries matters.⁷⁶ Even under this exceptional regime, it took until 2003 for Spain to receive the *nihil obstat* from all other members to accede to IATTC. IATTC adopted a new IATTC Convention text in June 2003 to replace the 1949 Convention, and the EC signed this so-called Antigua Convention on 22 May 2006.⁷⁷

It is also possible for both the EC and the Member States to be members of an RFMO when the issues addressed concern shared competences. For instance, the conservation and rational use of marine living resources in the seas surrounding Antarctica takes place within the framework of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)⁷⁸ and within the broader framework of the Antarctic Treaty System (ATS).⁷⁹ The main instruments within the ATS are the Antarctic Treaty,⁸⁰ the Convention for the Conservation of the Antarctic Seals,⁸¹ and CCAMLR. The EC is a member of the CCAMLR Commission, the Convention’s regulatory body, alongside several EC Member States. The EC and its Member States share competences due to its broad scope, but also because it is part of the ATS and therefore subject to the sensitive “agreement to disagree” on the sovereignty situation.⁸²

⁷⁶ Council Decision 1999/405/EC of 10 June 1999 Authorising the Kingdom of Spain to Accede to the Convention Establishing the Inter-American Tropical Tuna Commission on a Temporary Basis (IATTC), L 155 *Official Journal* 37–38, 5th Recital (22 June 1999). According to this Decision, Spain is required to denounce the 1949 Convention on the date of the Community’s accession thereto.

⁷⁷ The Antigua Convention (Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, Antigua, Guatemala, 18 February 2002) will enter into force after the deposit of the seventh instrument of ratification by a current contracting party to IATTC. Council Decision 2006/539/EC of 22 May 2006 on the conclusion, on behalf of the European Community of the Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica, L 224 *Official Journal* 22 (16 August 2006).

⁷⁸ *Convention on the Conservation of Antarctic Marine Living Resources*, Canberra, 20 May 1980, 19 *I.L.M.* 837 (1980). This convention entered into force on 7 April 1982.

⁷⁹ See Secretariat of the Antarctic Treaty website at <<http://www.ats.aq>> (retrieved 15 December 2008).

⁸⁰ *The Antarctic Treaty*, Washington, DC, 1 December 1959, 402 *U.N.T.S.* 71. This convention entered into force on 23 June 1961.

⁸¹ *Convention for the Conservation of Antarctic Seals*, London, 1 June 1972, 11 *I.L.M.* 251. This convention entered into force on 11 March 1978.

⁸² See E. J. Molenaar, “CCAMLR and Southern Ocean Fisheries,” *International Journal of Marine and Coastal and Law* 16 (2002): 465–499. At the 18th annual CCAMLR meeting in 1999, the division of competence between the EC and its Member States was implicitly challenged by means of a notification by the EC Commission to engage in an exploratory

A similar situation arises in connection with FAO fishery advisory bodies such as the Fishery Committee for the Eastern and Central Atlantic (CECAF),⁸³ the Western and Central Atlantic Fishery Commission (WECAFC),⁸⁴ and the General Fisheries Council for the Mediterranean (GFCM).⁸⁵ The rationale for the continued participation of EC Member States within these bodies predominantly appears to be due to the development and cooperation objectives of these bodies, which is an area in which the EC and its Member States share competence.⁸⁶ Scientific research in fisheries is another issue where competence is shared, hence the Member States continued membership of the International Council for the Exploration of the Sea (ICES) alongside the EC.

The Community has a sizeable fleet conducting bottom fishing activities in certain high seas areas not covered by a RFMO. Through Regulation 734/2008 on the protection of VMEs in the high seas from the adverse impacts of bottom fishing gears, the Community now protects vulnerable high seas marine ecosystems from the destructive effects of such activities.⁸⁷ Prior to this Regulation, the Community had only adopted measures to close bottom fishing in areas within Community waters and on the high seas within the framework of all existing RFMOs empowered to regulate bottom fisheries. This regulation seems to end the stalemate in the sensitive political debate regarding the scope of the Community's conservation competence.

fishery for Patagonian toothfish on behalf of a Portuguese vessel, even though Portugal was not a party to the CCAMLR Convention at that time. Strong objections during the meeting and afterwards, by both EC Member States and third states, compelled the EC Commission to inform the CCAMLR Executive Secretary that it intended to suspend the exploratory fishery for technical reasons. Council Regulation (EC) No. 601/2004 of 22 March 2004 Laying Down Certain Control Measures Applicable to Fishing Activities in the Area Covered by the Convention on the Conservation of Antarctic Marine Living Resources, L 97 *Official Journal* 16 (1 April 2004).

⁸³ Fishery Committee for the Eastern Central Atlantic, Instituted by FAO Council Resolution 1/48 (June 1967).

⁸⁴ Western Central Atlantic Fishery Commission. Established by FAO Council Resolution 4/61 (November 1973).

⁸⁵ *Agreement for the Establishment of a General Fisheries Council for the Mediterranean*, Rome, 24 September 1949, 126 *U.N.T.S.* 239. This agreement entered into force 20 February 1952.

⁸⁶ Molenaar, n. 82 above, p. 160.

⁸⁷ Council Regulation (EC) No. 734/2008, of 15 July 2008 on the Protection of Vulnerable Marine Ecosystems in the High Seas From the Adverse Impacts of Bottom Fishing Gears, L 201 *Official Journal* 8–13 (30 July 2008).

10.3.2.3. The EC and Negotiation of Conservation Agreements

The European Commission is responsible for the negotiation of fisheries agreements, whereas the Council, after consulting Parliament, concludes it.⁸⁸ Such an agreement is binding on the EC institutions as well as on its Member States.⁸⁹ The general practice is for the Commission to negotiate in line with negotiating mandates received from the Council. Before taking effect, the agreements must be adopted by the Council in the form of a regulation based on Articles 37 and 300 of the EC Treaty.⁹⁰

In areas outside EC competence, Member States retain their right of individual action and the right to enter into treaties. In situations where the EC has treaty-making competence but such competence is not exclusive, it is shared with the Member States.⁹¹ A classic example of this is to be found in the LOS Convention.⁹² For the purpose of the LOS Convention, conservation and management of fisheries resources were identified as exclusive EC powers, as were some environmental protection and other competences. The remaining matters were areas where legislative powers were retained by the Member

⁸⁸ EC Treaty, n. 30 above, Article 300 (1) & (3). This basic procedure varies both in terms of voting rules within the Council and the extent of parliamentary involvement according to the subject matter of the agreement and the procedures applicable to the adoption of internal measures. For an early account see P. M. Leopold, "The External Relations Power of the EEC in Theory and Practice," *International and Comparative Law Quarterly* 26 (1977): 54–80. Generally see M. Koskeniemi, *International Law Aspect of the European Union* (The Hague, Boston: Kluwer Law International, 1998); A. Dashwood, and C. Hillion, *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000).

⁸⁹ EC Treaty, n. 30 above, Article 300 (1) & (7).

⁹⁰ Note that this requires prior consultation with the Parliament.

⁹¹ Competence will be shared according to Macleod et al., where that consequence flows from the EC Treaty article conferring power on the EC; 2) the EC has potential competence that could be exclusive when exercised but which has not yet been exercised; 3) the subject matter of the treaty falls partly within the field of the EC's exclusive treaty-making powers and partly outside; 4) the EC's treaty-making powers derive from internal EC rules which set minimum standards; and 5) in certain limited areas, such as intellectual property, where EC and Member State competence can co-exist without either displacing the other. I. MacLeod, I. D. Hendry, and S. Hyett, *The External Relations of the European Communities* (Oxford: Oxford University Press, 1996), pp. 56–63 & 63–67; R. R. Churchill, "The EC and its Role in Some Issues of International Fisheries Law" and E. Hey, "The Fisheries Provisions of the LOS Convention," both in E. Hey (ed.), *Developments in International Fisheries Law* (The Hague, Boston: Kluwer Law International, 1999), pp. 536–537.

⁹² A. W. Koers, "Participation of the European Economic Community in a New Law of the Sea Convention," *American Journal of International Law* 7 (1979): 426–443; K. R. Simmonds, "The European Economic Community and the New Law of the Sea," *Hague Recueil* 218, no. 1 (1989): 108–157; R. Simmonds, "The Community's Declaration Upon Signature of the UN Convention on the Law of the Sea," *Common Market Law Review* 23 (1986): 521–544.

States. It was thus not possible for the Community and the Member States to assume independently of each other, the obligations and rights enshrined in the LOS Convention. Therefore, the practice has arisen of concluding “mixed agreements” to which both the EC and its Member States are parties. They need the signature and ratification by each Member State, in addition to the formal conclusion by the EC. With respect to the negotiation, conclusion and implementation of such mixed agreements, the ECJ has prescribed an obligation on the EC and the Member States to ensure close cooperation between them.⁹³

Several issues other than conservation have caused some controversy in determining whether the EC has treaty-making powers, and if so, the exclusivity of these powers. The precise scope of the EC’s exclusive external competence has traditionally been a subject of dispute between the Commission’s broad interpretation viewpoint and the Council’s restrictive viewpoint, and it has been the task of the ECJ to clarify the matter.⁹⁴

An illustrative example of this tension in relation to the Community’s membership in fisheries organisations and some of the procedural difficulties which may arise are evident in Case C-25/94.⁹⁵ In this case, the Commission requested that the ECJ annul the decision⁹⁶ giving Member States the right to vote in the FAO concerning the adoption of the draft Agreement to Promote Compliance with International Conservation and Management Measures by

⁹³ Ruling 1/78 Delivered Pursuant to the Third Paragraph of Article 103 of the European Atomic Energy Commission Treaty, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, 1978 *E.C.R.* 2151, paras 34–36; Opinion 2/91, n. 62 above, para. 36; Opinion 1/94, n. 62 above, para. 108.

⁹⁴ Member States are reluctant to leave international relations to the exclusive competence of the Community. The development of subordination clauses and mixed agreements has been quite deliberately aimed in practice at stunting the use of exclusive Community competence. Mixed agreements need to be signed and ratified by all Member States, thus it normally takes several years before they can enter into force. In order to speed up the entry into force of the parts of mixed agreements that deal with pure EC competences, the EC often makes use of so-called interim agreements under EC competence. Interim agreements exclude, therefore, the articles under Member State competence. As a result, interim agreements can enter into force as soon as the Community has concluded the agreement. Interim agreements do not need to be signed and ratified by the individual Member States. See M. Cremona, “The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community,” *Oxford Journal of Legal Studies* 2 (1982): 393–428; D. O’Keeffe and H. G. Schermers, *Mixed Agreements* (The Hague: Deventer, Kluwer, 1983), p. ix; A. Rosas, “The EU and Mixed Agreements,” in Dashwood & Hillion, n. 88 above, pp. 200–220.

⁹⁵ Case C-25/94, *Commission of the European Communities v. Council of the European Union*, 1996 ECR I-1469.

⁹⁶ Decision of the Fisheries Council of 22 November 1993.

Fishing Vessels on the High Seas.⁹⁷ The FAO provides for a system of alternative exercise of the rights attached to membership between the EC and its Member States. This allows the Commission to speak and vote where an agenda item is within exclusive competence of the Community. If an agenda item contains matters containing elements both of national and Community competence, the Commission can only represent the EC on the issues that fall within its exclusive competence. Registration of vessels is a Member State competence. During negotiations on the draft agreement, the clauses relating to registration and flagging were removed. Subsequently, the Commission is considered having the right to vote. The ECJ pointed out that:

[w]here it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.⁹⁸

In addition, “the Community institutions and the Member States must take all necessary steps to ensure the best possible co-operation in that regard.”⁹⁹ The ECJ concluded that the Council was wrong in maintaining that the draft agreement concerned an issue not within the exclusive competence of the Community. Accordingly, it was for the Commission to vote for the adoption of the draft agreement.¹⁰⁰

⁹⁷ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, 24 November 1993, U.N.T.S., 2221 (2003): 91–129, entry into force 24 April 2003, available: <www.fao.org/legal/treaties/012t-e.htm> (retrieved 20 November 2008) [hereinafter 1993 FAO Compliance Agreement].

⁹⁸ Case C-25/94, n. 95 above, para. 46; Ruling Ruling 1/78, n. 93 above, paras 34–36; Opinion 2/91, n. 62 above, para. 36; Opinion 1/94, n. 62 above, para. 108.

⁹⁹ Opinion 2/91, n. 62 above, para. 38.

¹⁰⁰ Case C-25/94, n. 95 above, para. 50.

10.4. Challenges

10.4.1. Integrating the Environmental Dimension into the CFP

As discussed above, EC internal competences premises action on the external level. Thus, the competence of the EC to act in the international arena is a question of Community law rather than of international law. During the 2002 CFP reform there was a general consensus that the CFP was failing to achieve its objectives of conserving fish stocks, protecting the marine environment, ensuring the economic viability of European fleets, and providing good quality food to consumers. A 1999 survey in the North East Atlantic confirmed that 40 out of the 60 main commercial fish stocks were outside safe biological limits. The most severely depleted species was cod. The European Commission's 2001 Green Book painted a very bleak picture of EC fish stocks.¹⁰¹ The Commission then considered the possibility of reviewing the whole of the CFP framework. The 2002 CFP reform set broader objectives and resulted in several significant changes. Firstly, noting that the CFP traditionally dealt with environmental matters in a reactive way rather than integrating environmental concerns into all management considerations in a proactive matter,¹⁰² the Commission concluded that the CFP needed to equip itself with the necessary tools of proactive management of environmental concerns. Initially, the fundamental element of environmental integration in fisheries was identified as the change in attitude of management through the adoption of an *ecosystem-based approach* to fisheries management. Secondly, the *environmental policy principles* needed to be applied to fisheries management. With the exception of the precautionary principle in the management of single fish stocks, limited work had been carried out to ascertain their implications to fisheries management.¹⁰³

¹⁰¹ Commission of the European Communities, *Green Paper on the Future of the Common Fisheries Policy, Volume I*, Communication from the Commission, COM(2001) 135 (Brussels, 20 March 2001).

¹⁰² Commission of the European Communities, *Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy 5*, Communication from the Commission, COM(2001) 143 final (Brussels, 16 March 2001) [hereinafter COM(2001) 143 final].

¹⁰³ Commission of the European Communities, *Partnership for Integration, A strategy for Integrating Environment into European Union Policies*, Communication from the Commission, COM(1998) 333 (Brussels, June 1998); COM(2001) 143 final, n. 102 above, pp. 21–22. On 21 June 1998, the Council endorsed a Community Strategy on Biological Diversity. This strategy called for the generation of sector-based action plans. With regard to the fisheries, the objectives were twofold: firstly, to conserve commercially fished species of marine fish in order

The new Regulation 2371/02 provides the legal basis to adopt measures to reduce negative impacts on the environment. It is explicitly stated that the CFP must provide for coherent measures concerning the “limitation of the environmental impact of fishing.”¹⁰⁴ To this end, it sees the *precautionary approach* when taking protection and conservation measures as an appropriate tool.¹⁰⁵ The gradual implementation of an *ecosystem-based approach* to fisheries management is further envisaged.¹⁰⁶ Sustainable exploitation is explicitly linked with minimising the effects on marine ecosystems.¹⁰⁷ However, the Regulation, as opposed to the precautionary approach, does not provide a definition of the ecosystem approach.

The conservation measures to be adopted in the pursuit of sustainable fishing activities may include measures for each stock or group of stocks aimed at limiting fishing mortality and the environmental impacts of fishing activities. However, the Regulation is specific about technical measures, stating that they must be adopted to reduce the impact of fishing activities on marine ecosystems and non-target species.¹⁰⁸ Focusing on conservation, the recent trend is for a multi-annual approach to management and recovery plans. For stocks at or within safe biological limits, multi-annual management plans will be adopted to ensure the objective of sustainable exploitation. For stocks outside safe biological limits,¹⁰⁹ the adoption of multi-annual recovery plans is an absolute

to achieve sustainability of stocks, fishing opportunities and food supply and, secondly, to reduce the impact of fishing operations on non-target species and marine habitats. It therefore envisaged the application of the precautionary approach to the setting of TACs. Commission of the European Communities, *A European Community Biodiversity Strategy*, Communication from the Commission, COM(1998) 42 (Brussels, 4 February 1998); Commission of the European Communities, *Application of the Precautionary Principle and Multiannual Arrangements for Setting TACs*, Communication from the Commission, COM(2000) 803 final (Brussels, 1 December 2000).

¹⁰⁴ Regulation 2371/02, n. 56 above, Article 1 (2) (b).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, Article 2(1), which reads: “For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system based approach to fisheries management.”

¹⁰⁷ Article 3(e) reads “sustainable exploitation means the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine eco-systems.”

¹⁰⁸ *Id.*, Article 4(g)(iv).

¹⁰⁹ According to Article 3(l) of Regulation 2371/02, “safe biological limits” means indicators of the state of a stock or of its exploitation inside which there is a low risk of transgressing certain limit reference points.

priority.¹¹⁰ During the years following the CFP reform, the Council commenced implementation of multi-annual plans by adopting three recovery plans for stocks with a status “outside safe biological limits.”¹¹¹ Recovery plans targeting species outside Community waters have also been adopted, e.g., the Greenland halibut recovery plan, managed by NAFO.¹¹²

10.4.2. Putting the Precautionary Approach into Practice

10.4.2.1. NAFO and the Precautionary Approach

If measured by the number of fish stocks subject to a directed fishing moratorium because of their depleted status, NAFO’s record of precautionary fisheries management can only be described as poor. For 2008, eight groundfish stocks were subject to a directed fishing ban. Those stocks included: 3L, 3M and 3N cod; 3LN redfish; 3LNO and 3M American plaice; and 3L and 3NO witch flounder.¹¹³

NAFO has moved to formally adopt the precautionary approach on two main fronts. At the 2004 annual meeting, the Fisheries Commission adopted the

¹¹⁰ *Id.*, Article 5(2).

¹¹¹ Council Regulation (EC) No. 423/2004 of 26 February 2004 Establishing Measures for the Recovery of Cod Stocks, L 70 *Official Journal* 8–11 (9 March 2004); Council Regulation (EC) No. 811/2004 of 21 April 2004 Establishing Measures for the Recovery of the Northern Hake Stock, L 150 *Official Journal* 1–11 (30 April 2004); Council Regulation (EC) No. 2166/05 of 20 December 2005 Establishing Measures for the Recovery of the Southern Hake and Norway lobster Stocks in the Cantabrian Sea and Western Iberian Peninsula and Amending Regulation (EC) No. 850/98 for the Conservation of Fishery Resources Through Technical Measures for the Protection of Juveniles of Marine Organisms, L 345 *Official Journal* 5–10 (28 December 2005).

¹¹² Council Regulation (EC) No. 2115/2005 of 20 December 2005 Establishing a Recovery Plan for Greenland Halibut in the Framework of the Northwest Atlantic Fisheries Organisation, L 340 *Official Journal* 3–6 (23 December 2005). Council Regulation (EC) No. 643/2007 of 11 June 2007 amending Regulation (EC) No. 41/2007 as Concerns the Recovery Plan for Bluefin Tuna recommended by the International Commission for the Conservation of Atlantic Tunas, L 151 *Official Journal* 1–16 (13 June 2007). See also Council Regulation (EC) No. 1559/2007 of 17 December 2007 Establishing a Multi-annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean and Amending Regulation (EC) No. 520/2007, L 340 *Official Journal* 8–24 (22 December 2007).

¹¹³ NAFO C&E Measures, n. 48 above, NAFO/FC Doc. 08/01 (Revised), Annex I.A, Annual Quota Table. Bans on fishing capelin and shrimp in NAFO area 2NO were also in force.

NAFO Precautionary Approach Framework.¹¹⁴ The Framework provides guidance for setting fishing mortality and stock biomass reference points¹¹⁵ and suggests management strategies according to five zones (safe, overfishing, cautionary, danger, and collapse).¹¹⁶ In September 2007, NAFO Contracting Parties agreed to give the precautionary approach a legal foundation through an amended Convention.¹¹⁷ Article III of the modernised Convention requires Contracting Parties individually and collectively to apply the precautionary approach in accordance with Article 6 of the 1995 UN Fish Stocks Agreement.¹¹⁸

However, practical implementation of the precautionary approach has been thwarted in at least four main ways. Firstly, the Scientific Council has not been able to determine reference points for many stocks partly due to limited scientific data as well as stocks whose reference points have not been determined. These stocks include white hake in Divisions 3NOPS,¹¹⁹ capelin in Divisions 3NO,¹²⁰ redfish in Divisions 3LN and in Divisions 3O,¹²¹ thorny skate in Divisions 3LNO,¹²² and witch founder in Divisions 3NO.¹²³

Secondly, there has been the all too common political over-riding of scientific advice. For example, at the 29th meeting of the Fisheries Commission in September 2007, the Commission set various TACs for 2008 above the recommended scientific advice. A few instances are as follows:

- Redfish in Division 3M, TAC of 8,500 tonnes (above the Scientific Council's advice of not exceeding 5,000 tonnes)
- White hake in Divisions 3NO, TAC of 8,500 tonnes (even though the

¹¹⁴ NAFO/FC, *NAFO Precautionary Approach Framework*, Doc. 004/4/18, available: <<http://archive.nafo.int/open/key-documents/fcdoc04-18.pdf>> (retrieved 20 November 2008). The Fisheries Commission also agreed to initially test implementation of the Precautionary Framework on two stocks (yellowtail flounder in Divisions 3LNO and shrimp in 3M) starting in 2005. See NAFO, *Report of the Fisheries Commission Meeting, 26th Annual Meeting*, September 13–17, 2004, Dartmouth, Nova Scotia, FC Doc. 04/17.

¹¹⁵ The Framework discusses setting fishing mortality limit and buffer reference points, as well as stock biomass limit and buffer reference points.

¹¹⁶ For example, in the safe zone, managers may choose to establish TACs based on socio-economic considerations; for the collapse zone, fishing mortality should be set as close to zero as possible.

¹¹⁷ Amendment, n. 41 above.

¹¹⁸ *Id.*

¹¹⁹ See NAFO, *Report of Scientific Council Meeting*, 7–21 June 2007, SC 7-21, p. 23.

¹²⁰ *Id.*, p. 24.

¹²¹ *Id.*, pp. 26, 28.

¹²² See Scientific Council Meeting, 1–15 June 2006, SC 1-15, p. 19.

¹²³ *Id.*, p. 15.

Scientific Council advised such a level was “unrealistic”)

- Thorny skate in Divisions 3LNO, TAC of 13,500 tonnes (even though the Scientific Council advised thorny skate in Divisions 3LNOPs should be managed as a unit and the TAC should not exceed 11,000 tonnes)¹²⁴

At the 30th annual meeting of the Fisheries Commission, further divergencies from the following of scientific advice for 2009 stood out. The Fisheries Commission TACs for thorny skate, white hake, and redfish in 3M and shrimp in Divisions 3LNO were not consistent with scientific advice.¹²⁵

Even though Greenland halibut in Subarea 2 and Divisions 3KLMNO has been subject to a fifteen year rebuilding plan, the Fisheries Commission has also set quotas higher than recommended by the Scientific Council. For example, for 2009, the Council recommended a TAC of 10,471 tonnes but the Commission adopted a TAC of 16,000 tonnes.¹²⁶ The quota was set despite the Scientific Council’s documentation that catches from Greenland halibut in 2004–2007 exceeded the rebuilding plan TACs by 27, 22, 27 and 42 percent respectively.¹²⁷

The preparedness of Contracting Parties to set substantial quotas even when scientific information is lacking represents a third practical constraint on precautionary, as exemplified by management of the redfish stock in Division 3O. Even though the Scientific Council acknowledged that stock dynamics and recruitment patterns are poorly understood and TAC advice was impossible,¹²⁸ the Fisheries Commission established TACs of 20,000 tonnes for 2008 and 2009.¹²⁹

A fourth precautionary pitfall has been the considerable bycatch occurring even for the commercial fish stocks subject to moratoria. A 2005 report estimated especially high bycatch removals for four stocks closed to

¹²⁴ NAFO, *Meeting Proceedings of the General Council and Fisheries Commission*, September 2007 – August 2008, pp. 82–87.

¹²⁵ NAFO, *Report of the Fisheries Commission, Thirtieth Annual Meeting*, 22–26 September 2008, Vigo, Spain, NAFO/FC Doc. 08/22, pp. 4–8 and Annex 7. Inconsistencies were a thorny skate TAC of 13,500 tonnes (6,000 tonnes scientific advice), white hake TAC of 8,500 tonnes (scientific advice that such a TAC is not sustainable), redfish in 3M TAC of 8,500 tonnes (scientific advice that TAC should not to exceed 5,000 tonnes), and shrimp in 3LN TAC of 30,000 tonnes (25,000 tonnes scientific advice) [hereinafter NAFO Thirtieth Annual Meeting].

¹²⁶ *Id.*, pp. 4, 8.

¹²⁷ NAFO, *Report of the Scientific Council Meeting*, 5–19 June 2008, NAFO SCS Doc. 08/19, p. 5.

¹²⁸ NAFO, n. 119 above, p. 119.

¹²⁹ NAFO C&E Measures, n. 48 above, Annex I.A, Annual Quota Table; NAFO Thirtieth Annual Meeting, n. 125 above, p. 8.

directed fishing.¹³⁰ Bycatch removals, expressed as a percentage of current total biomass, were thought to be 70–89 percent for 3NO cod, 15–27 percent for 3NLO American plaice, close to 30 percent for 2J 3KL witch founder, and 8.6–18.9 percent for 3NO witch flounder.¹³¹ Although bycatch restrictions have been imposed for fish stocks under moratoria,¹³² the efficacy of these restrictions remains to be seen.

10.4.2.2. NEAFC and the Precautionary Approach

The “New” NEAFC Convention also states that the NEAFC Commission is to ensure that Recommendations are based on the best scientific evidence available and that the precautionary approach is applied.¹³³ It is not always clear, however, to what extent the precautionary approach has been translated in NEAFC management measures. The memorandum of understanding between NEAFC and OSPAR acknowledges and provides for the development of a common understanding of the application of the precautionary approach principle.¹³⁴

The TAC adopted in 2009 for mackerel was consistent with ICES advice. In addition, the Contracting Parties agreed to implement a long-term management plan for the mackerel stock in the North East Atlantic for 2010 and subsequent years, which is consistent with the precautionary approach.¹³⁵ The 2009 TAC for Norwegian (Atlanto-Scandian) herring was set at 1,643,000 tonnes and also consistent with ICES advice. A long-term management plan was also agreed to.¹³⁶

¹³⁰ A Rosenberg, M. Mooney-Seus, and C. Ninnis, *Bycatch on the High Seas: A Review of the Effectiveness of the Northwest Atlantic Fisheries Organization* (Toronto: WWF-Canada, 2005).

¹³¹ *Id.*, p. 131.

¹³² Article 11 of the NAFO’s C&E Measures, n. 48 above, establishes a bycatch retained on board limit of 1,250 kg or 5% of the total catch (whichever is greater). If a vessel exceeds the 5% bycatch in one haul, the vessel must move a minimum of 10 nm from any position of the previous tow. If after moving, the next haul still exceeds the bycatch limit, the vessel must leave the Division and not return for at least 60 hours.

¹³³ “New” NEAFC Convention, n. 42 above, Article 4 (2) a & b.

¹³⁴ Memorandum of Understanding between the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission, available: <http://www.neafc.org/about/docs/oprar_mou.pdf> (retrieved 12 December 2008) [hereinafter NEAFC/OSPAR MoU].

¹³⁵ *Agreed Record of Conclusions of fisheries Consultations between the Faroe Islands, the European Community, Norway on the management of Mackerel in the North-East Atlantic in 2009*, available: <http://www.neafc.org/system/files/mackerel_2009_agreedrecord_signed.pdf> (retrieved 20 November 2008)

¹³⁶ *Agreed Record of Conclusions of fisheries consultations on the management of the Norwegian Spring Spawning (Atlanto-Scandian) Herring Stock in the North-East Atlantic for*

Implementing the precautionary approach seems especially problematic in relation to three fish stocks. For 2009 the TAC for blue whiting was set at 590,000 tonnes instead of the precautionary limit of 384,000 tonnes recommended by ICES.¹³⁷ For pelagic redfish, no precautionary reference points have been set and no consensus on stock structure exists, yet substantial fishing continues. ICES considers that the current landings of 64,000 tonnes is far above its advice of 20,000 tonnes. ICES advises that a management plan be developed and implemented which takes into account the uncertainties in science and the properties of the fisheries. Conditions set for directed fishing activities for orange roughy, namely restricting catches of any Contracting Party to 150 tonnes and ensuring vessels operate with a historical fishing record, are deemed precautionary but without a clear rationale.¹³⁸

NEAFC was criticised at its 2008 meeting for having a different approach to the impact assessments for exploratory and existing fisheries. For new fisheries “particular care shall be taken in the evaluation of risks of the significant adverse impact on VMEs, in line with the precautionary approach.” For existing fisheries a more lax approach seems to be suggested as there is no mention of the precautionary approach but instead the notification that assessments should take account of the history of bottom fishing in the areas proposed.¹³⁹

2009, available: <http://www.neafc.org/system/files/herring_2009.pdf> (retrieved 20 November 2008) [hereinafter 2009 agreement on the allocation of herring].

¹³⁷ *Agreed Record of Conclusions of fisheries consultations between the European Community, the Faroe Islands, Norway on the management of blue whiting in the North-East Atlantic in 2009*, available: <http://www.neafc.org/system/files/bluewhiting_2009.pdf> (retrieved 20 November 2008) [hereinafter 2009 agreement on the allocation of blue whiting].

¹³⁸ In ascertaining the “robustness” of the process of multilateral cooperation in North East Atlantic fisheries, the NEAFC Performance Report Document, n. 43 above, noted at page 33 that there were no long-term objectives or plans in place to detect whether the current “30% reduction in TAC in relation to the orange roughy is sufficiently precautionary or not.” Even though Annex 1 of the NEAFC Performance Report lists the orange roughy as one of the species for which NEAFC may request recurring scientific advice from the ICES, there are no long-term precautionary plans in place.

¹³⁹ NEAFC, NEAFC Recommendation XVI: 2008, Recommendation By The North-East Atlantic Fisheries Commission In Accordance With Article 5 Of The Convention On Future Multilateral Cooperation In North-East Atlantic Fisheries At Its Extraordinary Meeting On 1-2 July 2008 To Adopt The Following Recommendation On Bottom Fishing Activities In The NEAFC Regulatory Area, available <http://www.neafc.org/system/files/%252Fhome/neafc/drupal2_files/16-rec_bottom_fishing_em_2008.pdf> (retrieved 20 November 2008).

10.4.3. Implementing the Ecosystem Approach

10.4.3.1. NAFO and the Ecosystem Approach

While a considerable focus of NAFO continues to be on single stock assessments and establishing TACs and other controls for fish stocks not under a moratorium,¹⁴⁰ NAFO has been trying to alter its course towards an ecosystem approach in multiple ways. Amendments to the NAFO Convention in September 2007 committed parties to apply an ecosystem approach to fisheries management in the Northwest Atlantic,¹⁴¹ with established safeguarding of marine ecosystems as an objective¹⁴² and the preservation of marine biological diversity as a key principle.¹⁴³

Various institutional mechanisms have been forged to advance marine ecosystem research and understanding. In the early 1990s, the Scientific Council established a Standing Committee on Fisheries Environment (STACFEN). STACFEN has published numerous studies on how biological resources are influenced by environmental factors, including climate change.¹⁴⁴ The Scientific Council has established a Working Group on Ecosystem Approach to Fisheries Management which first met in May 2008 and has been tasked with identifying VMEs, furthering research on regional ecosystems in the NAFO Convention Area, and developing ecosystem indicators.¹⁴⁵ A Joint NAFO-ICES Joint Working Group on Deep Water Ecology has been formed to increase sharing of information and cooperative research on deep water ecosystems. A March 2008 meeting of the Working Group advanced understanding of coral species' distributions throughout the North Atlantic.¹⁴⁶

NAFO has progressed in protecting some vulnerable marine ecosystems. In 2006, the Fisheries Commission agreed to close four seamounts to demersal fishing gears in the Regulatory Area, namely: Orphan Knoll, Corner

¹⁴⁰ For a good overview of NAFO's regulatory approaches and constraints, see A. A. Rosenberg, R. J. Trumble, J. M. Harrington, O. Martens, and M. Mooney-Seus, *High Seas Reform: Actions to Reduce Bycatch and Implement Ecosystem-Based Management for the Northwest Atlantic Fisheries Organization* (Toronto: WWF-Canada, 2006).

¹⁴¹ Amendment, n. 41 above, Preamble.

¹⁴² *Id.*, Article II.

¹⁴³ *Id.*, Article III (e).

¹⁴⁴ See NAFO Science, "Ecosystem Considerations," available: <http://www.nafo.int/science/ecosystem_html> (retrieved 23 November 2008).

¹⁴⁵ See NAFO Working Group on Ecosystem Approach to Fisheries Management, available: <<http://www.nafo.int/science/ecostem/eawg/wg-ea.html>> (retrieved 20 November 2008).

¹⁴⁶ International Council for the Exploration of the Sea (ICES), *Report of the ICES-NAFO Joint Working Group on Deep Water Ecology (WG DEG)*, 10–14 March 2008, Copenhagen, Denmark, ICES CM 2008/Acom: 45 [hereinafter WGDEG Report].

Seamounts, Newfoundland Seamounts, and New England Seamounts.¹⁴⁷ In 2007, the Commission agreed to establish a Coral Protection Zone, closing all fishing activity involving bottom contact gear for a large area of Division 3O from 1 January 2008 to 31 December 2012.¹⁴⁸

Further advances towards protecting VMEs were made in 2008. The Scientific Council identified on a broad scale basis eight additional candidate VMEs,¹⁴⁹ and a preliminary map of the bottom trawl fishing “footprint” for 2003–2007 was produced.¹⁵⁰ An Ad Hoc Working Group of Fishing Managers and Scientists on VMEs was established to further discussions and recommendations for protecting VMEs.¹⁵¹ At its annual meeting in September 2008, the Fisheries Commission agreed to extend protection from demersal fishing gears to the Fogo Seamounts as of 1 January 2009, and to adopt an Interim Exploratory Fishery Protocol and an Interim VME Encounter Protocol.¹⁵²

Even though NAFO has been taking numerous steps towards an ecosystem approach with its various governance implications,¹⁵³ the reformatory swim is far from over with four challenging issues becoming apparent. These challenges include fully fleshing out and ensuring VME protection, casting the management net to cover a broader range of species, bolstering the conservation of sharks and sea turtles, and furthering marine ecosystem research.¹⁵⁴

¹⁴⁷ NAFO, *Report of the Fisheries Commission, 28th Annual Meeting*, 18–22 September 2006, Dartmouth, Nova Scotia, Canada, NAFO/FC Doc. 06/14 at 9. Pursuant to Article 14(5) of NAFO’s E&C Measures, n. 48 above, the closure is to be effective from 1 January 2007 until 31 December 2010.

¹⁴⁸ NAFO, *Report of the Fisheries Commission, 29th Annual Meeting*, 24 September 2007, Lisbon, Portugal. NAFO FC Doc. 07/24 at 11 [hereinafter NAFO Twenty-ninth Annual Meeting]. The Protection Zone has been given force through Article 15 of NAFO E&C Measures. These measures will be discussed later in this study.

¹⁴⁹ Report of the Scientific Council Meeting, 5–19 June 2008, NAFO SCS Doc. 08/19, pp. 38–41.

¹⁵⁰ *Id.*, p. 34.

¹⁵¹ See Report of the AD Hoc Working Group of Fishing Managers and Scientists on Vulnerable Marine Ecosystems (WG FMS), 8–12 September 2008, Montreal, Canada, NAFO/FC Doc. 08/8.

¹⁵² NAFO Thirtieth Annual Meeting, n. 125 above, p. 44.

¹⁵³ For a summary of the vast array of measures flowing from the ecosystems approach, see S. M. Garcia, A. Zerbi, C. Aliaume, T. Do Chi, and G. Lasserre, “The Ecosystem Approach to Fisheries: Issues, Terminology, Principles, Institutional Foundations, Implementation and Outlook,” FAO Fisheries Technical Paper No. 443 (Rome: FAO, 2003).

¹⁵⁴ These four central challenges, of course, are not the only limitations in achieving implementation of the ecosystem approach. Other challenges include, lack of compliance with

Fully Fleshing Out and Ensuring VME Protection under NAFO

Further designation and protection of VMEs in the NAFO Conservation Area remains a central challenge for further implementation of the ecosystem approach. At the September 2008 meeting of the Fisheries Commission, the Commission considered eight potential VME candidates but decided for most sites additional high level habitat mapping would be required to identify VME boundaries with greater certainty.¹⁵⁵ The Commission requested the Scientific Council to refine its information on coral concentrations as soon as possible in 2008 so as to provide information on sponge concentrations by 30 June 2009 and to provide information on corals and sponges in canyons as soon as practicable or at least provide a progress report by 30 June 2009.¹⁵⁶ Only the Fogo Seamounts were added to the closed area list. Whether Canada and Greenland should move to protect VMEs in the Baffin Bay/Davis Strait region remains to be seen.¹⁵⁷

Non-governmental organisations (NGOs) at the September 2008 meeting were quick to criticise the lack of agreement protecting all the candidate VME areas. The EU, in particular, was accused of backtracking on deep-sea protection.¹⁵⁸ The failure to fully implement the 2006 UN General Assembly Resolution on Sustainable Fisheries was lamented, specifically the need to implement protective measures for identified VMEs by 31 December 2008.¹⁵⁹ NGOs expressed serious concern over the apparent view of some NAFO Contracting Parties that historically fished areas should not be closed as ecosystem damage had already occurred.¹⁶⁰

The Exploratory Protocol for New Fishing Areas, agreed to by the Fisheries Commission in September 2008, also addressed VMEs, but its effectiveness in practice remains to be seen. The Protocol requires Contracting Parties to submit harvesting, mitigation, catch monitoring, and data collection plans to the Executive Secretary before allowing bottom fishing activities in new areas to commence. A mitigation plan must include measures to prevent significant adverse impact to VMEs that may be encountered. A catch

management measures, fisheries on juveniles, and illegal, unregulated and unreported (IUU) fishing. See Rosenberg et al., n. 130 above.

¹⁵⁵ NAFO Thirtieth Annual Meeting, n. 125 above, p. 6.

¹⁵⁶ *Id.*, pp. 9–10 and Annex 13.

¹⁵⁷ See WGDEG Report, n. 146 above, which documents coral distributions in the region.

¹⁵⁸ See The Deep Sea Conservation Coalition, *European Union Backtracks on Deep-Sea Protection* (10 October 2008), available: <http://www.save_the_highseas.org/display.cfm?ID=179> (retrieved 20 November 2008).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

monitoring plan must include recording/reporting of all species caught, 100 percent satellite tracking, and 100 percent observer coverage, and a data collection plan is required for identifying VMEs/species. No prior impact assessment process exists, but the Executive Secretary is required to forward the planning information to all Contracting Parties and the Scientific Council. Exploratory fishing trip reports must be submitted by parties to the NAFO Scientific Council.

The adequacy of the Encounter Protocol in protecting VMEs is also questionable. The Protocol will require fishing vessels encountering indicator species of corals and sponges to “move away” at least two nm if a catch per set brings up more than 100 kg of live coral and/or 1,000 kg of live sponges.¹⁶¹ Such high catch thresholds have been criticised,¹⁶² but the Protocol notes the provisional basis of these thresholds and the possibility for adjustment in light of recent experience.¹⁶³

Casting the Management Net to Cover a Broader Range of Species

A further ecosystems approach challenge is to extend protective management measures to a broader range of species, especially marine species at risk. NAFO currently manages only 11 of some 25 commercial species.¹⁶⁴

The existing shortcoming is exemplified by the spotted wolffish and northern wolffish stocks. While Canada has listed these two species as threatened under its *Species at Risk Act*¹⁶⁵ and has required within the EEZ allowable harm permits for takings and live releases if possible,¹⁶⁶ the two wolffish species remain unprotected in the NAFO Regulatory Area outside Canadian fisheries jurisdiction.

¹⁶¹ NAFO Thirtieth Annual Meeting, n. 125 above, Annex 13.4, para. 3.

¹⁶² See Deep Sea Conservation Coalition, n. 158 above.

¹⁶³ NAFO Thirtieth Annual Meeting, n. 125 above, Annex 13.4, para. 3.

¹⁶⁴ NAFO, “NAFO Fishery,” available: <<http://www.hafo.int/fisheries/fishery-.html>> (retrieved 20 November 2008).

¹⁶⁵ *Species at Risk Act*, S.C. 2002, c. 29.

¹⁶⁶ See D. L. VanderZwaag, and J. Hutchings, “Canada’s Marine Species at Risk: Law and Science at the Helm, but a Sea of Uncertainties,” *Ocean Development & International Law* 36 (2005): 219–259, p. 229. Also see D. Kulka, C. Hood and J. Huntington, “Recovery Strategy for Northern Wolffish (*Anarhichas denticulatus*) and Spotted Wolffish (*Anarhichas minor*), and Management Plan for Atlantic Wolffish (*Anarhichas lupus*) in Canada” (St. John’s: DFO Newfoundland and Labrador Region, 2007), pp. 70–71. Following publication of the recovery strategy, conservation conditions have been included within fisheries licenses. David Millar, Regional Manager, Species at Risk, Fisheries and Oceans Canada, pers. comm. (23 April 2009).

Bolstering the Conservation of Sharks and Sea Turtles

The management of sharks and sea turtles, two relatively high profile marine species, might be described as rather secondary to the NAFO agenda. NAFO's C&E Measures devotes just one article (Article 16) to the conservation of sharks with four main commitments: Parties are required to report data for all catches of sharks¹⁶⁷; Parties are required to impose a shark finning ban whereby their vessels must not have onboard shark fins totalling more than 5 percent of the weight of sharks onboard up to the first point of landing¹⁶⁸; Parties are urged to encourage the live release of sharks caught in non-directed fisheries¹⁶⁹; and Parties are also encouraged to undertake research into non-selective fishing gears and the identification of shark nursery areas.¹⁷⁰

The conservation of sea turtles is addressed through a 2006 resolution of the Fisheries Commission aimed at reducing sea turtle mortality in NAFO fishing operations.¹⁷¹ The resolution urges Parties to enhance the implementation of existing turtle mitigation measures and to provide sea turtle catch and release data to the NAFO Secretariat.¹⁷²

Various management challenges surround the future management of shark and sea turtles. For sharks, those challenges include ensuring catch data is fully reported, revisiting whether the 5 percent weight of shark fins onboard is a workable conservation measure, and determining whether shark bycatch or other fishing requirements should be imposed.¹⁷³ For turtles, the adequacy of reporting on fisheries interactions with sea turtles in the NAFO Convention Area needs to be assessed,¹⁷⁴ and the question of whether catch mitigation

¹⁶⁷ NAFO C&E Measures, n. 48 above, Article 16(1).

¹⁶⁸ *Id.*, Article 16(3).

¹⁶⁹ *Id.*, Article 16(6).

¹⁷⁰ *Id.*, Article 16(7)(8).

¹⁷¹ Resolution of the Fisheries Commission of NAFO to Reduce Sea Turtle Mortality in NAFO Fishing Operations (22 September 2006) 1/06, available: <<http://www.nafo.int/publications/resolutions/res1-06.html>> (retrieved 20 November 2008).

¹⁷² *Id.*, paras 2 and 5.

¹⁷³ It should be noted that at the September 2007 Fisheries Commission meeting, the United States proposed a prohibition on possessing porbeagle sharks in the Regulatory Area, but no consensus was reached and the proposal was withdrawn. NAFO Twenty-ninth Annual Meeting, n. 148 above, s. 8.14. The bycatch of porbeagle sharks in pelagic longline fisheries has been a concern. The NAFO President was requested in September 2008 to write to ICCAT, urging ICCAT to take necessary conservation measures to protect the porbeagle stock. NAFO Thirtieth Annual Meeting, n. 125 above, s. 10.

¹⁷⁴ Reporting appears to be quite limited, with Canada, Denmark and Portugal providing updates on sea turtle-fisheries interactions and the United States submitting an update on its Northwest Fisheries Observer Program, Sea Turtle Training Module. NAFO Secretariat, Update

measures should become mandatory remains to be discussed.

Furthering Marine Ecosystem Research

While NAFO is transitioning towards an ecosystem approach, building scientific information and understanding of marine ecosystems is a great challenge. The relative paucity of scientific information was highlighted by the Working Group on Ecosystem Approach to Fisheries Management in its May 2008 Meeting. The report acknowledged that very little is known about deep-water benthic communities, seamount fish communities and marine mammal distributions in the NAFO Regulatory Area.¹⁷⁵ The need to increase data collection and mapping of sponge habitats was emphasised,¹⁷⁶ as was the need for more data on non-commercial species.¹⁷⁷ The report also noted the ecology of canyons in the NAFO Regulatory Area is not well documented.¹⁷⁸

The Fisheries Commission has highlighted the need for more information on the role of seals in the marine ecosystem of the Northwest Atlantic. The Commission has requested the Scientific Council to provide an overview of present knowledge, including the impact of seals on fish stocks, at the Commission's next annual meeting in 2009.¹⁷⁹ At the September 2008 Meeting of the Commission, the EU announced it would start implementing a research programme in the summer of 2009 on mapping the seabeds. The EU welcomed the cooperation of other Parties in such an endeavour.¹⁸⁰

10.4.3.2. NEAFC and the Ecosystem Approach

NEAFC not only focuses on conserving and managing target species, but also envisages to minimise bycatch of fish and non-fish species and other impacts on the broader marine environment. At its 2003 meeting, NEAFC reviewed recent trends in the international management of marine resources, including

on Sea Turtle-Fisheries Interactions, NAFO Thirtieth Annual Meeting, n. 125 above, pp. 6–7, 20, September 2008, FC Working Paper 08/24 and FC Working Paper 08/24 (Addendum).

¹⁷⁵ NAFO, *Report of the NAFO Scientific Council Working Group on Ecosystem Approach to Fisheries Management (WGEAFM)*, Scientific Council Meeting – June 2008, NAFO SCS Doc. 08/10, pp. 6-7, 20.

¹⁷⁶ *Id.*, p. 16.

¹⁷⁷ *Id.*, p. 37.

¹⁷⁸ *Id.*, p. 41.

¹⁷⁹ NAFO Thirtieth Annual Meeting, n. 125 above, p. 10 and Annex 5, item 14.

¹⁸⁰ *Id.*, p. 9.

the ecosystem approach. In 2005, the Working Group on the Future of NEAFC examined how to strengthen NEAFC's role in addressing overall ocean management. The ecosystem approach is now a permanent agenda item at annual meetings. The "new" NEAFC Convention reflects the ecosystem approach by stating that the Commission when making recommendations in accordance with Article 4 or 6 of the Convention, shall in particular:

take due account of the impact of fisheries on other species and marine ecosystems, and in doing so adopt, where necessary, conservation and management measures that address the need to minimise harmful impacts on living marine resources and marine ecosystems; . . .
take due account of the need to conserve marine biological diversity.¹⁸¹

In addition, it is provided that:

The Commission shall provide a forum for consultation and exchange of information on the state of the fishery resources in the Convention Area and on the management policies, including examination of the overall effects of such policies on the fishery resources and, as appropriate, other living marine resources and marine ecosystems.¹⁸²

NEAFC has made some progress in protecting deep-sea species and habitats from the effects of trawl fishing. An area adjacent to Rockall Bank was first closed to trawl fishing in 2001. In 2002, NEAFC set a limit on the catch of many, though not all, deep-water species taken in bottom trawl fisheries on the high seas of the NEAFC area. The limit, however, specified that the fishing effort was not to exceed the "highest level put into deep-sea fishing in previous years" despite ICES' advice that most deep-water fish species are exploited well beyond safe biological limits in the region. In 2003, the NEAFC Commission reviewed scientific information from ICES concerning deep-sea species. From March 2004, a temporary freeze on efforts in deep-sea fisheries was introduced for the rest of the year in the NEAFC Regulatory Area.¹⁸³ A 30 percent reduction in deep-sea fisheries effort was agreed for 2005 onwards following ICES advice. At its 26th annual meeting in November 2007, NEAFC adopted management measures limiting for each Contracting Party the

¹⁸¹ "New" NEAFC Convention, n. 42 above, Article 4(2)(c-d).

¹⁸² *Id.*, Article 4(3).

¹⁸³ C. M. Johnston, *Scoping Study: Protection of vulnerable high seas and deep oceans biodiversity and associated oceans governance* (Peterborough: Joint Nature Conservation Committee, 2004).

effort for 2007 for directed fishing of deep-sea species. The effort could not exceed 65 percent of the highest level put into deep-sea fishing in previous years for the relevant species. This measure entered into force on 16 February 2008.¹⁸⁴

In July 2008, NEAFC recommended mapping existing bottom fishing areas within the Regulatory Area for bottom fishing activities.¹⁸⁵ Contracting Parties were required to submit relevant information. The deadline was 1 September 2008, but only the Russian Federation and Iceland had submitted such information. From 1 January 2009, all bottom fishing activities in new bottom fishing areas, or with bottom gear not previously used in the area concerned, will be considered as exploratory fisheries and shall be conducted in accordance with an exploratory bottom fisheries protocol. Exploratory bottom fishing activities are to be subjected to an assessment procedure, with the understanding that particular care will be taken in the evaluation of risks of the significant adverse impact on VMEs, in line with the precautionary approach. New bottom fishing activities will be based upon the results of exploratory bottom fisheries. It will be the task of NEAFC to authorise bottom fishing and to establish conservation and management measures to prevent significant adverse impacts on VMEs. Contracting Parties and vessels flying their flag will be required to cease bottom fishing activities where, in the course of fishing operations, evidence of VMEs is encountered. The encounter, including the location and the type of ecosystem in question, must be reported to NEAFC so that appropriate measures can be adopted.¹⁸⁶ This proposal was based on a Norwegian proposal, which, to a large extent, is based on a proposal by Canada and the EU in NAFO.

NEAFC has only recently made progress in imposing restrictions on the impact of deep-water trawling in the North East Atlantic on seamounts, coldwater corals, and sensitive bottom ecosystems in the region. Consequently, destructive deep-sea bottom trawl fisheries could continue to expand in the North East Atlantic.

Five vulnerable habitats were closed to demersal fishing gear for 2005–2007 and in November 2006, NEAFC closed parts of the Hatton and Rockall Banks, the Logachev Mounds and the West-Rockall Mounds to fishing from January 2007–December 2009. These and additional areas had been proposed by the EC in 2005 based on recommendations from ICES. These closures,

¹⁸⁴ North-East Atlantic Fisheries Commission (NEAFC), NEAFC Recommendation XV: 2008, available: <http://www.neafc.org/measures/current_measures/docs/15-rec_deepsea_species_2008.pdf> (retrieved 20 November 2008).

¹⁸⁵ NEAFC, Extraordinary Meeting in London on 1–3 July 2008.

¹⁸⁶ NEAFC Recommendation XVI, n. 139 above.

while being a positive step forward for offshore marine conservation, were viewed by NGOs as exemplifying the short-term fishing interests of some of the Convention's parties soon after they were designated. NEAFC Recommendation VII recommended that with respect to certain vulnerable deep-sea habitats, bottom trawling and fishing with static gear was to be prohibited in the following areas: a) the Hecate and Faraday seamounts and a section of the Reykjanes Ridge; b) the Altair seamounts; and c) the Antialtair seamounts. These measures apply for the period 1 January 2008–31 December 2008.¹⁸⁷ Recommendation IX, also resulting from the 26th annual meeting held in November 2007, entailed measures to close certain areas to protect deep-water coral reefs.¹⁸⁸

At its 2003 meeting, NEAFC also reviewed recent trends in the international management of marine resources, including cooperation with other regional and global organisations. NEAFC works closely with other RFMOs in the North Atlantic, namely NAFO¹⁸⁹ and the International Baltic Sea Fishery Commission (IBSFC), as well as ICES. The NEAFC Secretariat initiated the North Atlantic Regional Fisheries Management Organization (NARFMO) and has organised annual meetings since 2001.

NEAFC and the OSPAR Commission (in charge of the Convention for the Protection of the Marine Environment of the North-East Atlantic) have delivered a breakthrough initiative by announcing plans to promote mutual cooperation towards the conservation and sustainable use of marine biodiversity in the North East Atlantic. For the first time in the North East Atlantic, the Commissions in charge of fisheries management and protection of the marine environment are working together. Previously they could have been seen as working towards diverse goals but now a converging vision of a healthier North East Atlantic has encouraged them to sign a memorandum of understanding (MOU), in which both have agreed to cooperate towards the protection of marine ecosystems. The MOU, which has applied since September 2008, covers not only national maritime areas, but also areas beyond national jurisdiction.¹⁹⁰

¹⁸⁷ NEAFC, Recommendation VII, available: <<http://www.neafc.org/measures/index.html>> (retrieved 20 November 2008).

¹⁸⁸ NEAFC, Recommendation IX: 2008, available: <http://www.neafc.org/measures/current_measures/9_deep-water-corals_08.html> (retrieved 20 November 2008).

¹⁸⁹ NEAFC sets TAC for oceanic redfish for both NAFO and NEAFC.

¹⁹⁰ NEAFC/OSPAR MoU, n. 134 above.

10.4.4. Reaching Consensus on Allocation Criteria

10.4.4.1. NAFO and Allocation Criteria

The NAFO Convention provides very general and limited guidance regarding allocation of fishing opportunities in the Regulatory Area that relates to adjusting current fisheries, reopening closed fisheries, opening new fisheries, and ensuring new members receive an appropriate share. Article XI(4) of the Convention essentially calls for a balancing between the interests of Parties exercising traditional fishing and coastal state interests:

Proposals adopted by the Commission for the allocation of catches in the Regulatory Area shall take into account the interests of Commission members whose vessels have traditionally fished within that Area, and, in the allocation of catches from the Grand Bank and Flemish Cap, Commission members shall give special consideration to 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 through international action, in particular, by providing surveillance and inspection of international fisheries on these banks under an international scheme of joint enforcement.¹⁹¹

A Working Group on the Allocation of Fishing Rights, formed in 1997, held a number of meetings culminating in a meeting in March 2003 at Miami, Florida, where consensus could not be reached on allocation criteria.¹⁹² Four key criteria emerged from the discussions, albeit not formally endorsed. They include:

- historical fishing in accordance with NAFO rules during a representative reference period;
- contribution to research and data collection on the stock concerned;

¹⁹¹ The NAFO *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, 24 October 1978, U.N.T.S., 1135, 370-388, entry into force 1 January 1979, full text available: <<http://www.nafo.int/about/overview/convention/convention.pdf>> (retrieved 20 November 2008) [hereinafter NAFO Convention].

¹⁹² NAFO, *Report of the Working Group on the Allocation of Fishing Rights to the Contracting Parties of NAFO*, March 26–27, 2003, Miami, Florida, U.S.A., NAFO/FC Doc. 03/02, full text available: <http://archive.nafo.int/open/mp/2003-04/fc_allocation-mar.pdf> (retrieved 20 November 2008).

- needs of coastal communities that are dependent on fishing for the stock concerned; and/or
- contribution to the NAFO conservation and enforcement measures.¹⁹³

The challenge of fisheries allocation is especially apparent in relation to shrimp. For shrimp in Division 3M, NAFO parties have not been able to agree on a quota allocation scheme due to differing opinions on the extent to which historical fisheries should influence a quota allocation and which reference period should be used.¹⁹⁴ As a result, a rather unsatisfactory scheme continues whereby Contracting Parties are allocated a certain number of fishing days by a specific number of vessels (see Table 10.1).¹⁹⁵

Table 10.1. Effort allocation scheme for shrimp fishery in the NAFO Regulatory Area Division 3M (2008)

Contracting Party	Number of Fishing Days	Number of Vessels
Canada	456	16
Cuba	100	1
Denmark		
– Faroe Islands	1,606	8
– Greenland	515	14
European Union	3,293 ¹	33 ¹
France (in respect of St. Pierre et Miquelon)	100	1
Iceland	N/A	N/A
Japan	100	1
Korea	100	1
Norway	1,985	32
Russia	2,100	N/A
Ukraine	100	1
USA	100	1

¹ This includes fishing entitlements transferred from Poland (100 fishing days with one vessel), Estonia (1,667 fishing days with eight vessels), Latvia (490 fishing days with four vessels) and Lithuania (579 fishing days with seven vessels) following their accession to the EU.

¹⁹³ Id., Annex 11, Draft Guidelines for future allocation of fishing opportunities for the stocks not currently allocated.

¹⁹⁴ NAFO, n. 47 above, p. 5.

¹⁹⁵ NAFO C&E Measures, n. 48 above, Annex I.B.

Iceland has consistently objected to the effort allocation scheme as it could lead to overfishing.¹⁹⁶ Allocation of shrimp in Division 3L continues to be controversial. Objectors such as Denmark, in respect of the Faroe Islands and Greenland since 2002,¹⁹⁷ have questioned the allocation scheme for the shrimp, which has been rolled over since 1999 without consensus on the basis for division of shares.¹⁹⁸

10.4.4.2. NEAFC and Allocation Criteria

NEAFC uses a wide range of methods to allocate fishing opportunities, particularly by means of TACs and national quotas.¹⁹⁹ NEAFC's focal species are redfish, mackerel, herring, haddock, blue whiting and deep-sea species.²⁰⁰ The Contracting Parties to the Convention have, in many instances, been unable to take the necessary steps to effectively implement the Convention due to the lack of agreed allocation arrangements in many key fisheries.²⁰¹ Prior to 2006, no agreement was reached on the allocation of blue whiting.²⁰² Lack of consensus on stock structure led to the absence of management measures for oceanic redfish in 2005. Agreement on the sharing out of Atlanto-Scandian herring had to wait until 2008.²⁰³ Recently, Greenland expressed its great

¹⁹⁶ NAFO, n. 47 above, pp. 4–5.

¹⁹⁷ Objections Lodged by Contracting Parties (1994–2007). Copy provided to the authors by the NAFO Secretariat.

¹⁹⁸ NAFO, n. 47 above, pp. 5–6.

¹⁹⁹ “New” NEAFC Convention, n. 42 above, Article 7.

²⁰⁰ These include ling, tusk, blue ling, great silver smelt, orange roughy, grenadiers, black scabbardfish, sea breams, alfonsinos/golden eye perch, squalid sharks, and greater forkbeard.

²⁰¹ Decisions are made by simple majority or, where the Convention requires a qualified majority, by a two-thirds majority of votes of all Contracting Parties present and casting affirmative or negative votes. Each Contracting Party has one vote. A quorum of two-thirds of Contracting Parties is required. In the event of a split of votes on any matter subject to a simple majority, the proposal is rejected. Recommendations become binding on the date determined by the Commission. In an emergency, votes may be taken by post or other means of communication. Any Contracting Party may object to a recommendation (for management measures only) within 50 days of the date of notification. Since 2004 (the amended Convention), Contracting Parties are required to provide a written statement identifying the reason for the objection, their intentions, and alternative conservation and management measures. Management of all stocks is discussed in the plenary meeting.

²⁰² Recommendation adopted by postal vote on blue whiting by Denmark in respect of the Faroe Islands and Greenland, the EC, Iceland, and Norway.

²⁰³ Recommendation from the 26th Annual Meeting November 2007, Recommendation by the North East Atlantic Fisheries Commission in Accordance with Article 5 of the Convention on Future Multilateral Cooperation in North East Atlantic Fisheries at its annual Meeting in

disappointment for not having been allocated a share of the Atlanto-Scandian herring stock for 2009. Greenland believes it should be entitled to a share of this stock. It finds support in Article 7 of the UN Fish Stocks Agreement, which states that the track record in the relevant fisheries should be taken into account when allocating fishing opportunities from straddling stocks. Greenlandic vessels have conducted fisheries for the stock in the years since its recovery when no international management has been in place.²⁰⁴

2009 allocation of blue whiting²⁰⁵

European Community	165,628 tonnes
Faroe Islands	141,870 tonnes
Iceland	95,739 tonnes
Norway	139,806 tonnes

2009 allocation of herring²⁰⁶

European Community	106,959 tonnes
Faroe Islands	84,797 tonnes
Iceland	238,399 tonnes
Norway	1,002,230 tonnes
Russian Federation	210,633 tonnes

A recommendation to guide the expectations of new members to NEAFC was discussed during the May 2003 meeting of the NEAFC Working Group on the Future of NEAFC.²⁰⁷ It was agreed that stocks regulated by NEAFC are fully allocated, and fishing opportunities for new Members are likely to be limited to new fisheries. New Contracting Parties will participate on same basis as existing Contracting Parties in future allocation of stocks unregulated at the time of application. In addition, new Contracting Parties that were previously Cooperating Non-Contracting Parties may request part of the relevant

November 2007 to adopt conservation and management measures for the Norwegian Spring-spawning (Atlanto-Scandian) Herring in the NEAFC Regulatory Area in 2008.

²⁰⁴ NEAFC, *Report of the 27th Annual Meeting of the North East Atlantic Fisheries Commission*, 10–14 November 2008, available: <http://www.neafc.org/system/files/27neafc_annual_2008_vol1_main-report.pdf> (retrieved 20 November 2008).

²⁰⁵ 2009 agreement on the allocation of blue whiting, n. 137 above.

²⁰⁶ 2009 agreement on the allocation of herring, n. 136 above.

²⁰⁷ E. J. Molenaar, "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations," *International Journal of Marine and Coastal Law* 18, no. 4 (2003): 457–480.

cooperative quota. Such allocations will be considered on case-by-case basis.²⁰⁸

Reaching agreements on TACs and management measures is a major challenge to NEAFC because allocations for the NEAFC Regulatory Area are adopted by NEAFC only if there is coastal state agreement regarding allocation amongst the coastal states. The successful resolution of allocation issues, which is crucial for successful management, requires moving away from the ad hoc negotiations amongst coastal states towards management systems driven by transparent objectives and implementation processes.²⁰⁹

Another challenge is that of clarifying ICES advice on stock status for mackerel and redfish.²¹⁰ Information collected and advice provided by ICES is utilised differently for different fisheries that are regulated under the Convention. In the case of pelagic stocks, the information is utilised in the first instance by coastal states in order to reach agreements on TACs and allocations within the Convention and Regulatory Areas. Though not involved in this initial process, NEAFC in following agreed allocations, will then take steps to develop and implement management measures to support these decisions. However, a different process is followed for pelagic redfish and deep-sea species whereby the TACs and allocations are set directly by NEAFC and may, or may not, be endorsed by coastal states.²¹¹

10.4.5. Ensuring Effective Compliance and Enforcement

In order to facilitate the comparison of the compliance and enforcement provisions of the NAFO and NEAFC systems, a similar structure will be adhered to when analysing each RFMO. An introductory section describes the

²⁰⁸ NEAFC, *Guidelines for the expectation of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area* (November 2003), available: <<http://www.neafc.org/becomingacp>> (retrieved 15 November 2008). These guidelines were agreed at the 22nd Annual Meeting of NEAFC in November 2003.

²⁰⁹ K. Hoydal, "A note by the Permanent Committee on Management and Science" (PECMAS) on the advice provided by ICES as seen from NEAFC's perspective, PECMAS, 18–19 October 2007.

²¹⁰ NEAFC Performance Report, n. 43 above, Section 3.3.4, et seq., p. 30. ICES had advised that pelagic redfish was vulnerable to overexploitation. It had also advised that management should aim to prevent a disproportionate exploitation of the fish in the Regulatory Area, and to date this has not been done. This Report provides the NEAFC Commission with a basis to consider ways of improving fisheries in the Regulatory Area. The Report was presented to the NEAFC Commission and led to the new conservation and enforcement scheme that entered into force 1 May 2007.

²¹¹ Id., Section 2.5.6, p. 20.

structure, membership, and objectives of each RFMO and is followed by an analysis of reporting and verification provisions. The inspection, boarding and observer schemes, as well as other enforcement mechanisms, are subsequently addressed. This is followed by a section highlighting the strengths and weaknesses of each system. Finally, a brief review of how each RFMO implements the 1993 FAO Compliance Agreement²¹² and the 1995 UN Fish Stocks Agreement²¹³ is undertaken.²¹⁴ This section concludes by indicating the ways in which NAFO and NEAFC have recently intensified their cooperation efforts aiming to arrive at a more effective compliance and enforcement system.

10.4.5.1. The Northwest Atlantic Fisheries Organization

Structure, Membership and Objectives

NAFO consists of the General Council, the Scientific Council, the Fisheries Commission, and the Secretariat situated in Canada.²¹⁵ NAFO has the following membership: Canada, Cuba, Denmark (in respect of Faeroe Islands and Greenland), the EC, France (in respect of St. Pierre and Miquelon), Iceland, Japan, Korea (Republic of), Norway, the Russian Federation, Ukraine, and the United States.²¹⁶ The organisation has no provisions on Cooperating Non-Contracting Parties.²¹⁷

The Contracting Parties agreed to maintain in force and to implement

²¹² 1993 FAO Compliance Agreement, n. 97 above.

²¹³ 1995 UN Fish Stocks Agreement, n. 37 above.

²¹⁴ The point of departure for this analysis is E. Franckx, *Fisheries Enforcement. Related Legal and Institutional Issues: National, Subregional or Regional Perspectives* (Rome: Food and Agriculture Organization, 2001), pp. 96–105 (NAFO) and 87–95 (NEAFC), available: <[ftp://ftp.fao.org/docrep/fao/007/y2776e/y2776e00.pdf](http://ftp.fao.org/docrep/fao/007/y2776e/y2776e00.pdf)> (retrieved 16 November 2008) [hereinafter FAO Legislative Study 71]. This analysis was mainly updated on the basis of two documents: 1) E&C Measures, n. 48 above.; and 2) North-East Atlantic Fisheries Commission, Scheme of Control and Enforcement, London, February 2008, available: <http://www.neafc.org/measures/docs/scheme_2008.pdf> (retrieved 20 November 2008) [hereinafter NEAFC Scheme]. Moreover, the following documents were taken into consideration: with respect to NAFO see NAFO Thirtieth Annual Meeting, n. 125 above, and with respect to the NEAFC see Performance Report, n. 43 above.

²¹⁵ NAFO Convention, n. 191 above, Article 2(2 & 4).

²¹⁶ List of members available: <<http://www.nafo.int/contact/frames/members.html>> (retrieved 20 November 2008).

²¹⁷ NAFO C&E Measures, n. 48 above, Chapter VI, Article 47 et seq. All Non-Contracting Parties' vessels sighted in the Regulatory Area are presumed to be undermining the effectiveness of NAFO regulation. See also n. 272 below.

within the Regulatory Area a scheme of joint international enforcement.²¹⁸ This scheme includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties and for flag state prosecution and sanctions on the basis of evidence resulting from such boarding and inspection.²¹⁹

Reporting and Verification

Reporting and verification is undertaken by three primary methods: catch reporting, vessel register, and reporting of each offloading for transshipment of fish. A Contracting Party must ensure that each vessel of that party with fish on board, on entering the Regulatory Area, has a record in its fishing logbook of the amount of each species of fish on board.²²⁰ Moreover, as regards fish taken subject to Fisheries Commission measures, a Contracting Party must guarantee that all vessels of that party fishing in the Regulatory Area record their catches and the estimated cumulative catch on a daily basis and that the records must correspond to the smallest geographical area for which a quota has been allocated.²²¹ This will show the disposition of the catch, including any fish off-loaded while the vessel is operating in the Regulatory Area, as well as catch retained aboard the vessel for the duration of at least twelve months.²²²

For all fish taken subject to Fisheries Commission measures, Contracting Parties are requested to ensure that all vessels of that party fishing in the Regulatory Area either record their cumulative production by species and product form in a production logbook, or stow in the hold all processed catch in such a way that each species is stowed separately.²²³ A stowage plan has to be maintained showing the location of the products in the hold. Furthermore, the Contracting Party, within thirty days following the calendar month in which the catches were made, has the duty to report provisional monthly catches by species and stock area to the Executive Secretary,²²⁴ whether or not that party has quota allocations for the stocks from which catches were obtained.²²⁵ The Executive Secretary, within ten days following the monthly deadlines for receipt of the provisional catch statistics, collates the information received and

²¹⁸ NAFO Convention, n. 191 above, Article 11(4 & 5).

²¹⁹ NAFO C&E Measures, n. 48 above, Chapter IV.

²²⁰ *Id.*, Article 23.

²²¹ *Id.*, Article 23(3).

²²² *Id.*

²²³ *Id.*, Article 23(5).

²²⁴ NAFO Convention, n. 191 above, Article 15(2). The Executive Secretary, appointed by the General Council, is the chief administrative officer of the NAFO Secretariat.

²²⁵ NAFO C&E Measures, n. 48 above, Article 24(1).

circulates it to Contracting Parties.²²⁶

It is the responsibility of the Executive Secretary to establish and maintain a register of all vessels of more than fifty gross tons that are authorised to fish in the Regulatory Area.²²⁷ Each flag Contracting Party has to notify the Executive Secretary of all vessels of more than fifty gross tons engaged in fishing or in processing fish in the Regulatory Area.²²⁸ The format for the register of vessels requires twenty different entries and is made in electronic form.²²⁹ The Executive Secretary makes this register available to all Contracting Parties in a systematic fashion and in accordance with applicable confidentiality requirements.

When the transshipment of fish takes place while the vessel is operating in the Regulatory Area, a report has to be made at least 24 hours in advance. The report should include the date, the time, the geographical position of the vessel, and total round weight by species to be transhipped in kilograms.²³⁰ The verification of the reports, as will be seen, is a competence of the observers.

Inspection and Boarding Schemes

In order to improve and maintain compliance with the conservation and enforcement measures for their vessels fishing in the Regulatory Area, Contracting Parties acquiesce to a scheme of 100 percent observer coverage and to oblige all vessels fishing in the Regulatory Area to be equipped with satellite tracking devices.²³¹ Each Contracting Party has the primary responsibility to obtain, for placement on its vessels, independent and impartial observers performing only the duties explicitly provided for in the C&E Measures.²³² Their salaries are normally covered by the sending Contracting Party. Moreover, each Contracting Party has to provide to the Executive Secretary a list of the observers they will be placing on vessels in the Regulatory Area.²³³

²²⁶ Id., Article 24(4).

²²⁷ Id., Article 19(1).

²²⁸ Id.

²²⁹ Id., Article 19(2).

²³⁰ Id., Article 26(1.d). Article 2(4) defines transshipment as the transfer over the side of any quantity of fisheries resources retained on board, while in the Regulatory Area, from one fishing vessel to another.

²³¹ Id., Annex I to Chapter Ibis notes that a catch monitoring protocol of 100 percent satellite tracking and observer coverage is essential for fishing areas within the Regulatory Area.

²³² Id., Article 27(1).

²³³ Id., Article 27(3).

Observers monitor the vessels' compliance with the relevant conservation and enforcement measures.²³⁴ Their duties are as follows:

1. To record and report upon the fishing activities of the vessel and verify the position of the vessel when engaged in fishing. The observer monitors the functioning of, and reports upon any interference with, the satellite system. In order to better distinguish fishing operations from steaming and to contribute to an *a posteriori* calibration of the signals registered by the receiving station, the observer maintains detailed reports on the daily activity of the vessel
2. To observe and estimate catches with a view to identifying catch composition and monitoring discards, by-catches and the taking of undersized fish
3. To record the gear type, mesh size and attachments employed by the master
4. To verify entries made to the logbooks
5. To collect catch and effort data on each haul
6. To carry out the scientific work as requested by the Fisheries Commission²³⁵

The vessel on which an observer is placed has to provide suitable food and lodging during the observer's deployment. Vessel masters have to ensure that all necessary cooperation is extended to observers in order for them to carry out their duties including providing access, as required, to the retained catch, and catch which is intended to be discarded.²³⁶

The use of arms in relation to the inspections is prohibited and, in particular, the inspectors are requested not to carry arms. The principle of not carrying or using arms shall not be deemed to limit the performance of inspections by a Contracting Party of vessels flying its own flag.²³⁷

A serious infringement is considered to have occurred where a NAFO inspector finds an apparent infringement of the following prohibitions:

1. Fishing on an "Others" quota without prior notification to the Executive Secretary, or more than seven working days after the Contracting Party for the inspected vessel has been notified by the Executive Secretary

²³⁴ In this case, the NAFO C&E Measures with amendments as adopted at the Fisheries Commission's Inter-Sessional Meeting (see n. 47 above) in May 2008.

²³⁵ NAFO C&E Measures, n. 48 above, Article 27(4).

²³⁶ *Id.*

²³⁷ *Id.*, Article 28(8).

- that fishing under an “Others” quota for that stock or species was closed
2. Directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited
 3. Directed fishing for stocks or species after the date on which the Contracting Party for the inspected vessel has notified the Executive Secretary that vessels of that party will cease a directed fishery for those stocks or species
 4. Fishing in a closed area or with gear prohibited in a specific area
 5. Mesh size violations
 6. Fishing without a valid authorisation issued by the flag Contracting Party
 7. Mis-recording of catches
 8. Interference with the satellite tracking system
 9. Catch communication violations
 10. Preventing an inspector or an observer from carrying out his or her duties

The inspector must attempt to communicate with an inspector of the Contracting Party for the inspected vessel.²³⁸ The master of the inspected vessel has the duty to provide the use of the vessel’s radio equipment and operator for messages to be sent out and received for this purpose.²³⁹ The inspector also immediately reports to the Executive Secretary.

Whilst awaiting the arrival of the inspector of the Contracting Party for the inspected vessel, the inspector may require the master to cease all fishing which appears to the inspector to contravene the measures referred to above. The inspector may also seal the vessel’s hold awaiting port inspection.²⁴⁰ In 2006, an enhanced follow-up with regard to certain serious infringements (namely points 2 and 7 above) was elaborated whereby the flag state may be required to order the vessel to proceed immediately to a port in order to be inspected.²⁴¹

When a port call is made in the port of a Contracting Party by a vessel that has been engaged in fishing for stocks subject to conservation measures, the Contracting Party whose port is being used has to ensure that its inspector is

²³⁸ *Id.*, Article 36(2).

²³⁹ *Id.*

²⁴⁰ *Id.*, Article 36(6).

²⁴¹ *Id.*, Article 36(7). Article 36(7) explains that this is only applicable where justified, and the inspection must be made by the contracting flag state vessel’s inspector in the presence of another Contracting Party’s inspector. Where the vessel’s home port is a long way away, the Article lists ports in the Regulatory Area where the vessel will be inspected by authorised officials.

present and that, on each occasion when catch is offloaded, an inspection takes place to verify the species and quantities caught.²⁴² The Contracting Party is to ensure that the interference in the offloading activity is minimised and that the quality of the catch is not adversely affected.²⁴³ The quantities landed by species and the quantities retained on board, if any, are to be cross-checked with the quantities recorded in logbooks, catch reports on exit from the Regulatory Area, and reports of any inspections carried out under this scheme.²⁴⁴ Additionally, inspections have to include verification of mesh size of nets on board and size of fish retained on board.²⁴⁵

Other Enforcement Provisions/Schemes

NAFO has adopted a wide range of measures for the conservation and management of the stocks in the Regulatory Area. These include setting total allowable catches and member nation quota allocations,²⁴⁶ technical conservation measures such as minimum fish sizes,²⁴⁷ minimum mesh sizes,²⁴⁸ and changing gear requirements.²⁴⁹ Fishing vessels have to record their catches on a daily basis and record their cumulative production by species in a production logbook.

Where a NAFO inspector cites a vessel for having committed an apparent infringement of reporting and gear requirements, the inspector will immediately report this to the Executive Secretary. The Executive Secretary in turn immediately has the duty to ensure, for information purposes, that an inspection

²⁴² Id., Article 44(1).

²⁴³ Id. Chapter IV, Article 28(9), in stating the general provisions for inspection and surveillance, notes that quality of catch is maintained by avoiding any damage to packaging, wrapping, or other containers. Where cartons and other containers are opened as part of the inspection process, they must be opened in such a way as to facilitate prompt resealing, repacking, and eventual re-storage.

²⁴⁴ Id., Article 44(3). In addition, inspections must be carried out in accordance with Chapter IV provisions on inspections and surveillance.

²⁴⁵ Id., Article 44(4). Annex XIV describes and notes the applicable mesh sizes, gauges, gauging procedure, and usage in the Regulatory Area. For accuracy, pictorial representations of gauges and sizes are also included.

²⁴⁶ Id., Annex 1.A lists the TACs and quotas for the calendar year for stocks such as cod, redfish, etc.

²⁴⁷ Id., Article 14.

²⁴⁸ Id., Article 13.

²⁴⁹ Id. See also with respect to some of these measures n. 245 above and accompanying text.

vessel authorised by the Contracting Party is present in the Regulatory Area.²⁵⁰

Contracting parties engaged in surveillance or inspection activities in the Regulatory Area must aim at ensuring equal treatment between all Contracting Parties having vessels operating in the Regulatory Area through an equitable distribution of inspections. A ratio between the number of inspections and fishing activity of the inspected Contracting Party, based on, *inter alia*, catch levels, fishing days, and compliance records of that particular state, will, as far as possible, have to be followed in this respect.²⁵¹ Moreover, inspection vessels operating in the Regulatory Area have to maintain contact, as far as possible on a daily basis, and with due regard to radio security, in order to exchange information on boardings/sightings or other relevant information and to coordinate their activities.²⁵² Furthermore, Contracting Parties engaged in inspection or surveillance activities in the Regulatory Area have the duty to prepare reports of inspection activity, based on a calendar year, outlining details of boardings, sightings, and apparent infringements.²⁵³

Each Contracting Party has to ensure that each of its vessels operating in the Regulatory Area is equipped with a satellite-tracking device allowing the continuous tracking of its position by the Contracting Party.²⁵⁴ Automatic communication should occur at least every two hours to a land-based monitoring centre of the flag state.²⁵⁵ To this end the satellite tracking device must allow for automatic communication at least once every six hours when operating in the Regulatory Area to a land-based fisheries monitoring centre of data relating to the following:

1. The vessel identification
2. The most recent geographical position of the vessel (longitude, latitude) with a position error which has to be less than 500 metres, with a confidence interval of 99 percent
3. The date and time of the fixing of the said position of the vessel

²⁵⁰ NAFO C&E Measures, n. 48 above, Article 36 lists a gear requirement infringement as a serious infringement, therefore making security and continuity of evidence an imperative, hence the need to minimise the possible delay in reporting these infringements.

²⁵¹ *Id.*, Article 28(6).

²⁵² *Id.*, Article 28(3).

²⁵³ NAFO Convention, n. 191 above, Article 18, in general, and NAFO C&E Measures, n. 48 above, Article 29(1), in particular. This stipulation comes with an annual time limit by the first of November. By this time, Contracting Parties are to notify the Executive Secretary of provisional participatory plans. According to Article 29(3) of the NAFO C&E Measures, this will ensure coordination of operations between Contracting Parties.

²⁵⁴ NAFO C&E Measures, n. 48 above, Article 25(1).

²⁵⁵ *Id.*, Article 25(1). This Article 25(1) stipulation operates to maintain compliance with vessels in adherence to the conservation and enforcement measures in the Regulatory Area.

The flag state has to keep these records for three years.²⁵⁶

Each Contracting Party has to take the necessary measures to ensure that its land-based fisheries monitoring centre receives these data.²⁵⁷ The land-based monitoring centre of the flag state subsequently has to transmit this information to the Executive Secretary, but not later than 24 hours after having received these communications.²⁵⁸ Upon the request of the Contracting Party, this information can also be sent directly from the vessel to the Executive Secretary. Moreover, the land-based fisheries monitoring centre of each Contracting Party ought to be equipped with computer hardware and software enabling automatic data processing and electronic data transmission. Each Contracting Party is obliged to provide for back-up and recovery procedures in case of system failures.²⁵⁹

NAFO has set up a system of blacklisting of flag of convenience illegal, unregulated and unreported (IUU) fishing vessels.²⁶⁰ It works with a provisional list that enumerates vessels that have been identified as having been engaged in fishing activities contrary to the convention regime. Enquiries are subsequently made into the reasons why these vessels were fishing without permission, and if there is no suitable explanation, the vessel is transferred permanently to the IUU list.²⁶¹

NAFO previously had a system of port inspection in place whereby a vessel which had been engaged in fishing for stocks subject to the conservation and enforcement measures could offload in a port of a Contracting Party. However, this system has created numerous difficulties within the surveillance and inspection scheme. NAFO is currently working on a revised port control system. This is discussed below under “Common/Similar Initiatives by NAFO and NEAFC.”

²⁵⁶ *Id.*, Article 25(2).

²⁵⁷ *Id.*, Article 25(1 & 2).

²⁵⁸ *Id.*, Article 25(6). As previously noted, in n. 250 above, this is to ensure speedy reporting and coherence between Contracting Parties.

²⁵⁹ NAFO C&E Measures, n. 48 above, Article 25(2).

²⁶⁰ *Id.*, Articles 47 & 50. Contracting Parties participate in this procedure by submitting to the Secretariat information relevant for the identification and listing of Non-Contracting Parties carrying out IUU fishing in the Regulatory Area. Thereafter, the Standing Committee on International Control (STACTIC) will recommend the applicable sanction to be meted out to the Non-Contracting Party.

²⁶¹ For more information on IUU lists, see NAFO website at <<http://www.nafo.int/about/frames/about.html>> (retrieved 20 November 2008). See also “Common/Similar Initiatives by NAFO and NEAFC” section in this chapter below.

Strengths of the NAFO System

Membership. Even though any state can become member of the NAFO founding document, membership of the Fisheries Commission itself is restricted to Contracting Parties either participating in fisheries in the Regulatory Area, or parties with evidence that they expect to participate in such fisheries during the year of the annual meeting or during the following calendar year.²⁶² In the latter instance, however, the evidence must be judged satisfactory by the General Council, where Contracting Parties are represented and have one vote.²⁶³ The ability of the General Council²⁶⁴ to review and determine the membership of the Fisheries Commission at each annual meeting indicates that this body exercises some degree of control in membership management. As in the NEAFC system, if new members seek to obtain membership in the Fisheries Commission, “such new members should be aware that presently and for the foreseeable future, stocks managed by NAFO are fully allocated, and fishing opportunities for new members are likely to be limited.”²⁶⁵ Under the NEAFC system this has been reviewed as “appropriate,”²⁶⁶ but doubts abound as it has been argued to be the reason for continued unregulated fisheries in the convention area.²⁶⁷

Open System in Theory. Participation in the Convention is open to any state subject to notification in writing to the depository. However, the membership of the Fisheries Commission is limited to parties that either participate in the fishing activities in the Regulatory Area, or provide evidence that they are going to participate in such fisheries in the near future.²⁶⁸ Currently it is quite difficult to be admitted as a member of the Fisheries

²⁶² NAFO Convention, n. 191 above, Article 13(1).

²⁶³ *Id.*, Article 14(1).

²⁶⁴ Note that each Contracting Party in accordance with Article 4(1) of the NAFO Convention is a member of the General Council.

²⁶⁵ NEAFC Performance Report, n. 43 above, Appendix XI, p. 91. In 2003, the NEAFC Commission adopted these guidelines for states seeking membership as Contracting Parties of NEAFC or as Cooperating Non-Contracting Parties. The limiting nature of these stipulations is an indication of the fact that, at present, all resources in the NEAFC Regulatory Area are overexploited. See also n. 208 above, and accompanying text.

²⁶⁶ NEAFC Performance Report, Section 3.5.2.1, p. 49.

²⁶⁷ M. W. Lodge, D. Anderson, T. Løbach, G. Munro, K. Sainsbury, and A. Willock, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations* (London: The Royal Institute of International Affairs, 2007), available: <http://www.chathamhouse.org.uk/files/10301_rfmo0807.pdf> (retrieved 20 November 2008), pp. 17 and 36.

²⁶⁸ See n. 262 above, and accompanying text.

Commission due to limited resources in a limited area.²⁶⁹ The fact that the membership of the Fisheries Commission is reviewed annually by the General Council means that there is still a possibility of interested states obtaining membership as NAFO does not, in theory, operate a closed membership system.

Full Observer Vessels Coverage. Even though this certainly is an achievement of NAFO, the substantial costs involved to make such a system operational should not be underestimated: It costs an estimated USD26 million per year for Canada and USD362 million per year for the EC.²⁷⁰

Satellite Fishing Vessels Tracking and Real-time Reporting. As noted in the aforementioned point, the costly nature of full observer vessel coverage has led to a system where states are allowed 25 percent coverage by observers supplemented by more detailed and frequent electronic reporting.²⁷¹

Port State Inspection. NAFO has developed its port state inspection system, in line with NEAFC developments, making it one of the more progressive systems that can serve as example for others.

Non-Contracting Party Vessels. NAFO has established a scheme to promote compliance by Non-Contracting Party vessels with the conservation and enforcement measures. Contracting Parties have to report to the NAFO Secretariat all sightings made by inspectors of Non-Contracting Party fishing vessels engaged in fishing activities in the NAFO Regulatory Area.²⁷² Such reports must include all information derived from the inspector's observations concerning the Non-Contracting Party fishing vessel's activities. The inspector will attempt to inform the Non-Contracting Party fishing vessel that it has been sighted engaging in fishing activities, that a surveillance report has been completed,²⁷³ that there may be consequences for the vessel, and that this

²⁶⁹ NAFO Thirtieth Annual Meeting, n. 125 above, p. 29, Annex 5. Fisheries Commission's Request for Scientific Advice on Management in 2010 and Beyond of Certain Stocks in Subareas 2, 3 and 4 and Other Matters (FC WP 08/41, Rev. 2 now FC Doc 08/19), para. 6. Here it was noted that many of the stocks in the NAFO Regulatory Area are in need of rebuilding. This means that the stocks are below the stock biomass or recovery milestone of 60,000 tonnes (Blim).

²⁷⁰ High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas* (Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN, and the Earth Institute at Columbia University, 9 March 2006), available: <<http://www.high-seas.org/docs/HSTFfinal/HSTF-Final-Report-09-03-06.pdf>> (retrieved 12 November 2008), p. 25.

²⁷¹ Lodge et al., n. 267 above, p. 49.

²⁷² NAFO C&E Measures, n. 48 above, Article 47(1). Article 47(1) stipulates the unequivocal and immediate presumption of infringement on the part of a Non-Contracting Party vessels engaging in fishing activities in the Regulatory Area. See also n. 217 above.

²⁷³ NAFO C&E Measures, n. 48 above, Article 47(3).

information will be distributed to all NAFO Contracting Parties and to the flag state of the vessel.

In the event that a Non-Contracting Party vessel that has been sighted and reported as engaged in fishing activities in the NAFO Regulatory Area is boarded by inspectors, the findings of the inspectors must be transmitted to the Executive Secretary.²⁷⁴ The Executive Secretary will transmit this information to all Contracting Parties within one business day of receiving this information and to the flag state of the boarded vessel as soon as possible.²⁷⁵

In addition, Contracting Parties agree to bring to the attention of any state not a party to the NAFO Convention any matter relating to fishing activities in the Regulatory Area undertaken by nationals or vessels of that state²⁷⁶ that appear to affect adversely the attainment of the objectives of the Convention.²⁷⁷ The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects. However, it should be noted that the absence of a formal framework for cooperation brings into question the effectiveness of such a system for Non-Contracting Parties.²⁷⁸

Traditional Rights. Proposals adopted by the Fisheries Commission for the allocation of catches in the Regulatory Area take into account the interests of members whose vessels have traditionally fished within that area. In the allocation of catches from the Grand Bank and Flemish Cap,²⁷⁹ Fisheries Commission members must give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which have undertaken extensive efforts to ensure the conservation of such stocks through international action,²⁸⁰ in particular by providing surveillance and inspection of international fisheries on

²⁷⁴ Id., Article 48(1).

²⁷⁵ Id.

²⁷⁶ Note that these acts are presumed to be illegal, unreported and unregulated (IUU) fishing activities under Article 47 of the NAFO C&E Measures.

²⁷⁷ NAFO C&E Measures, n. 48 above, Article 54(1) is NAFO's attempt to include Non-Contracting states' relations with Contracting Party states in its control and enforcement measures. Here the theme is that of Non-Contracting states' cooperation with Contracting Parties.

²⁷⁸ D. Owen, *Recommended Best Practices for Regional Fisheries Management Organizations: Practice of RFMOs Regarding Non-members*, Technical Study No. 2 (London: The Royal Institute of International Affairs, 2007), available: <http://www.chathamhouse.org.uk/files/9997_rfimotech2.pdf> (retrieved 20 November 2008), p. 8.

²⁷⁹ NAFO Convention, n. 191 above, Article 11 (4).

²⁸⁰ Id. In relation to the Flemish Cap, the Fisheries Commission restricts shrimp fishing in Division 3M, whereupon lies the Flemish Cap, based on the advice of the Scientific Council in the interest of conservation and stock control. NAFO C&E Measures, n. 48 above, Article 14. For a discussion of the scientific assessments in relation to the Flemish Cap, see NAFO Thirtieth Annual Meeting, n. 125 above, p. 4.

these banks under an international joint enforcement scheme.²⁸¹

Review of Performance. NAFO has recently undergone a review of its performance. Contrary to the NEAFC recent practice, this was an internal review. It nevertheless also constitutes a recommended best practice.²⁸²

Weaknesses of the NAFO System

Objection Procedure in the Convention. If any Fisheries Commission member presents to the Executive Secretary an objection to a proposal, within sixty days of the date of transmittal, the proposal will not become a binding measure on that member. This procedure, albeit not often relied upon, still is used between two and four times each year.²⁸³

Absence of Dispute Settlement Procedure. The present NAFO Convention does not include a dispute settlement procedure, however, an amendment to the NAFO Convention adopted in 2007, but not yet in force, contains an elaborated dispute settlement provision.²⁸⁴

Absence of Enforcement Powers. Compared to its member states, NAFO has no autonomous powers in case of infringements of reporting and gear requirements. Before any action can be taken, the consent of the flag state is required.²⁸⁵

Absence of Conventional Provision on Cooperating Non-Contracting Parties. Even though the NAFO conservation and enforcement measures contain some provisions for cooperation, other than the stipulation that states should adhere to their obligations,²⁸⁶ the present amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries is without a provision on cooperation between Non-Contracting Parties. Although the amendments are not yet in force, this was a missed opportunity. Article 16 only addresses the issue of Non-Contracting Parties in general and specifically approaches the issue without examining the issue of cooperation with Non-

²⁸¹ NAFO C&E Measures, n. 48 above, Chapter IV.

²⁸² Lodge et al., n. 267 above, p. 115. A performance review is likely to be addressed by NAFO after the amended convention has entered into force and is implemented.

²⁸³ Id., p. 39.

²⁸⁴ Amendment, n. 41 above, Article 3, introducing amongst others a new provision concerning settlements of disputes, namely Article 15.

²⁸⁵ NAFO C&E Measures, n. 48 above, Article 38 states that the competent authorities, upon notification of an infringement, are duty bound to investigate this infringement. This means that all enforcement powers lie within the flag state's domain. It must be admitted that this state of affairs is rather the rule than the exception in RFMOs.

²⁸⁶ Id., Article 54 notes the need for cooperation in order to ensure the effectiveness of the control and enforcement measures adopted pursuant to the Convention.

Contracting Parties.

There are, however, some conventional provisions which impact on this issue in an indirect manner.²⁸⁷ Examples of the indirect applicability of the Convention's provisions are evident when one notes that Non-Contracting Parties can consent to boarding²⁸⁸; the vessel can establish that it applied all relevant conservation and enforcement measures in order to land or transship fish²⁸⁹; the flag state can report back after the placing of the vessel on the provisional list on the measures it has taken²⁹⁰; the flag state can, after the IUU listing of a vessel, report back to the Standing Committee on International Control that it has taken effective action to stop the vessel from further IUU fishing activities, either through sanctions or adjustment of the fishing licence²⁹¹; the flag state can exchange information with NAFO regarding vessels on the IUU list in order to help detect control and prevent false import/export certificates²⁹²; and the flag state can, after being so requested, agree to fully cooperate with NAFO and implement its conservation and enforcement measures.²⁹³ Nonetheless no advantages for the non-contracting state formally ensue from any of these actions.

Implementation of the 1993 FAO Compliance Agreement

As called for under the 1993 FAO Compliance Agreement, NAFO requires high seas fishing vessels to report their fishing areas, catches, and landings. Their reports are inspected under a 100 percent observer scheme.²⁹⁴ When a fishing vessel has been sighted committing an infringement, the flag state has to be informed. The flag state has to react as if the infringement had been committed in waters under its jurisdiction.²⁹⁵

NAFO generally complies with the provisions of the 1993 FAO

²⁸⁷ For a more detailed analysis, see Owen, n. 278 above, pp. 100–103.

²⁸⁸ NAFO C&E Measures, n. 48 above, Article 48(1).

²⁸⁹ *Id.*, Article 50(2).

²⁹⁰ *Id.*, Article 49(2).

²⁹¹ *Id.*, Article 53(a)-(k) lists a range of sanctions applicable by the Contracting Party.

²⁹² *Id.*, Article 53(k).

²⁹³ *Id.*, Article 54(1).

²⁹⁴ 1993 FAO Compliance Agreement, n. 97 above. Article 4 calls for state parties to have an accurate record of vessels flying its flag. Article 5 notes the need for cooperation between the parties of the convention in order to harmonise international conservation and management measures in the high seas. Article 8 notes the need for cooperation between Contracting Parties and Non-Contracting Parties for effective ocean management and conservation.

²⁹⁵ *Id.*, Article 3(8) notes that in addition to sanctions under national jurisdiction, sanctions can also include a refusal, suspension, or withdrawal of the authorisation to fish on the high seas.

Compliance Agreement. For example, NAFO's objective is to promote the conservation and optimum utilisation of fishery resources in the Northwest Atlantic.²⁹⁶ All vessels operating in the NAFO area have to register with the Executive Secretary.²⁹⁷

Implementation of the 1995 UN Fish Stocks Agreement

The Fisheries Commission seeks to ensure consistency between any proposal that applies to a stock or group of stocks occurring both within the Regulatory Area²⁹⁸ and within an area under the fisheries jurisdiction of a coastal state, or any proposal that would have an effect through species inter-relationships on a stock or group of stocks occurring in whole or in part within an area under the fisheries jurisdiction of a coastal state.²⁹⁹ The Fisheries Commission also seeks consistency between any measures or decisions taken by the coastal state for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction.³⁰⁰ The appropriate coastal state and the Fisheries Commission accordingly promote the coordination of such proposals, measures and decisions.³⁰¹

The NAFO Contracting Parties agree to maintain and implement within the Regulatory Area a scheme of joint international enforcement.³⁰² This scheme includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties and for flag state prosecution and sanctions on the basis of evidence resulting from such boardings and inspections. A report of such prosecutions and sanctions imposed is included in an annual statement

²⁹⁶ NAFO Convention, n. 191 above, Preamble and Article 2(1).

²⁹⁷ 1993 FAO Compliance Agreement, n. 97 above. Article 4 stipulates that all parties maintain a record of all its fishing vessels. NAFO C&E Measures, n. 48 above, Article 19(1) obliges all Contracting Parties to register their vessels with the Executive Secretary and this registration is circulated to all Contracting Parties. Vessels that are not in this list are deemed not to be authorised to fish in the Regulatory Area.

²⁹⁸ NAFO C&E Measures, n. 48 above, Article 23(1).

²⁹⁹ NAFO Convention, n. 191 above, Article 11(3.a). See also R. Rayfuse, "Canada and Regional Fisheries Organizations: Implementing the UN Fish Stocks Agreement," *Ocean Development and International Law* 34 (2003), p. 211. This is known as the "consistency rule" and is the requirement that the management regime applied to the high seas portion corresponds with the management regime of the coastal state within its EEZ. Rayfuse also notes that this practice, as originated by NAFO, has been applied other by RFMOs as well as by international agreements.

³⁰⁰ NAFO Convention, n. 191 above, Article 11(3.b).

³⁰¹ *Id.*

³⁰² *Id.*, Article 11(4) in general and Article 18 in particular.

regarding the actions that were taken during the last year.³⁰³

The Contracting Parties agree to bring to the attention of any state not a party to this Convention any matter relating to fishing activities in the Regulatory Area undertaken by nationals or vessels of that state that appear to affect adversely the attainment of the objectives of the Convention.³⁰⁴ The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects.³⁰⁵ Furthermore, in 1997, NAFO adopted a scheme to promote compliance by Non-Contracting Party vessels with its conservation and enforcement measures.³⁰⁶ In the event that any Non-Contracting Party vessel that has been sighted and reported as engaged in fishing activities in the NAFO Regulatory Area consents to be boarded by NAFO inspectors, the findings of NAFO inspectors are transmitted to the NAFO Secretariat.³⁰⁷ The NAFO Secretariat will transmit this information to all NAFO Contracting Parties within one business day of receiving this information and to the flag state of the boarded vessel as soon as possible.³⁰⁸ As well as providing the Non-Contracting Party's vessels with a copy of the findings of the NAFO inspectors, the flag state of the boarded vessel is also forwarded a copy of the NAFO inspectors report.³⁰⁹

As regards the call for port state enforcement provisions under the UN Fish Stocks Agreement, NAFO has had a system of port state enforcement in place, but it is presently under reconsideration. This is discussed below under "Common/Similar Initiatives by NAFO and NEAFC."

10.4.5.2. The North East Atlantic Fisheries Commission

Structure, Membership and Organization

The NEAFC covers the North East Atlantic, including dependent seas, and the 200 nm zones, with the exception of Baltic Sea and the Belts, as well as the Mediterranean Sea and its dependent seas. These areas mostly correspond with

³⁰³ Id., Article 18.

³⁰⁴ Id., Article 19.

³⁰⁵ Id.

³⁰⁶ NAFO C&E Measures, n. 48 above, Chapter VI notes the rules of presumed infringement in relation to Non-Contracting Party vessels in the Regulatory Area.

³⁰⁷ Id., Article 47(3).

³⁰⁸ Id., Article 47(4).

³⁰⁹ Id.

FAO Statistical Area 27.³¹⁰

NEAFC has a relatively simple structure. There is the NEAFC Commission itself, which is composed of all members, and a Secretariat. There is no internal scientific body. However, in 2003, NEAFC concluded a memorandum of understanding with ICES³¹¹ by virtue of which scientific advice is received, against payment that represents about 20 percent of the annual budget of NEAFC. The NEAFC Commission is also empowered to set up subsidiary bodies, if this is considered “desirable” for the exercise of its duties and functions.³¹²

The current membership is made up of the following: Denmark (in respect of the Faeroe Islands and Greenland), the EU, Iceland, Norway, and the Russian Federation.³¹³ In 1982, when the NEAFC Convention entered into force, there were 13 members, but most of them are currently EU Member States. These Member States include Bulgaria (EU membership 2007; discontinued membership in the NEAFC Commission in 1995), Estonia (EU membership 2004; joined the NEAFC Commission in 2003 and discontinued its membership in 2006), Finland (EU membership 1995), Poland (EU membership 2004; discontinued membership in the NEAFC Commission in 2006), Portugal (EU membership 1986) and Sweden (EU membership 1995). In 1990, the German Democratic Republic unified with Germany. Since Greenland withdrew from the EC in 1985 it has been represented by Denmark.³¹⁴

The organisation has specific provisions for what it calls Cooperating Non-Contracting Parties.³¹⁵ A Non-Contracting Party seeking that status must submit a request containing the following information: data on historical

³¹⁰ For more information on this area, see J. J. Maguire, “B2 Northeast Atlantic. FAO Statistical Area 27,” in: *Review of the State of the World Marine Fishery Resources. FAO Fisheries Technical Paper 457* (Rome: FAO, 2005): 23–30, available: <<ftp://ftp.fao.org/docrep/fao/007/y5852e/Y5852E02.pdf>> (retrieved 20 November 2008).

³¹¹ This is in accordance with NEAFC Convention, n. 42 above, Article 14 (1 & 2), which notes that the NEAFC Commission shall seek information and advice as well as ensure that joint studies are encouraged and conducted without delay with ICES.

³¹² *Id.*, Article 3(8).

³¹³ NEAFC, “Which Parties make up NEAFC Contracting Parties,” available: <<http://www.neafc.org/what-neafc/118>> (retrieved 20 November 2008).

³¹⁴ NEAFC, “London Declaration and New Convention,” available: <http://www.neafc.org/system/files/%252Fhome/neafc/drupal2_files/london-declaration_and_new_convention.pdf> (retrieved 20 November 2008).

³¹⁵ These are vessels from states that are Non-Contracting Parties but are authorised to fish in specified areas under a cooperation quota. The fishing resource quota as decided by the NEAFC Commission varies from state to state, and cooperating Non-Contracting Party licences are reviewed annually.

fisheries, current fishing activities, and details on research programmes it has conducted in the Regulatory Area and the results which it is willing to share with NEAFC.³¹⁶ It must also accept to respect the NEAFC Scheme³¹⁷ and other recommendations, communicate to NEAFC the measures it takes to ensure compliance, and annually communicate catch and effort data.³¹⁸ On the recommendation of the Permanent Committee on Control and Enforcement (PECCOE), the NEAFC Commission decides on the granting of such status on an annual basis. If granted, the states involved can participate in the plenary and scientific meetings of the NEAFC as an observer. At present Belize, Canada, Cook Islands, Japan, and New Zealand fall within this category.³¹⁹

The objective of NEAFC is to perform its functions in the interests of the conservation and optimum utilisation of the fishery resources of the convention area.³²⁰ Consequently, NEAFC is empowered to recommend a wide variety of conservation and management measures.³²¹ The responsibility for enforcing management measures adopted under the NEAFC rests with the Contracting Parties. They are required to take such action, including the imposition of adequate sanctions for infractions, as may be necessary to implement any recommendations adopted by the NEAFC Commission.³²² However, in 1999, a Scheme of Joint International Inspection and Surveillance was adopted, closely following the models provided by the 1995 UN Fish Stocks Agreement and NAFO.

Reporting and Verification

Each Contracting Party ensures that all fishing vessels flying its flag and conducting fishing activities in the Regulatory Area keep a bound fishing logbook and, where appropriate, a production logbook and storage plan.³²³

³¹⁶ NEAFC Scheme, n. 214 above, Article 34(1).

³¹⁷ The NEAFC Scheme (n. 214 above) is in accordance with the stipulation of the NEAFC Convention (n. 42 above, Articles 7 & 8), which obliges the Commission to make recommendations binding on Contracting Parties. These measures ensure control and enforcement of the Convention with respect to fishing vessels fishing in areas beyond the limits of national fisheries jurisdiction.

³¹⁸ NEAFC Scheme, n. 214 above, Article 43(1).

³¹⁹ NEAFC, "NEAFC Guide," available: <<http://www.neafc.org/neafcguide>> (retrieved 20 November 2008).

³²⁰ NEAFC Convention, n. 42 above, Article 4(1).

³²¹ *Id.*, Article 7 et seq.

³²² *Id.*, Article 15(1).

³²³ NEAFC Scheme, n. 214 above, Article 9(1). Note, however, that this stipulation provides that a Contracting Party may desist from keeping a fishing logbook where its vessels are

The Contracting Party makes sure that its fishing vessels communicate catch reports to their land-based fisheries monitoring centre or directly to the Secretary if the Contracting Party so wishes.

A Contracting Party is required to report the quantities on board when entering the Regulatory Area. This report shall be made no more than twelve hours and at least two hours in advance of each entry into the Regulatory Area.³²⁴ Moreover, a report on weekly catches must be transmitted at the latest at the end of the seventh day after the entry into the Regulatory Area. When fishing trips take more than seven days, the master of the fishing vessel is obliged to transmit by the latest on Monday at noon the catches taken in the Regulatory Area during the preceding week ending Sunday midnight. This report must include information on the number of fishing days since the commencement of fishing, or since the last catch report.³²⁵

Further, the Contracting Party is requested to report the quantities on board when exiting the Regulatory Area. This report has to be made no more than eight hours and at least two hours in advance of each exit from the Regulatory Area. It must include, where appropriate, the number of fishing days and the catch taken in the Regulatory Area since the commencement of fishing, or since the last catch report.³²⁶ Finally, the Contracting Parties have to report the quantities on-loaded and off-loaded for each transshipment of fish during the vessel's stay in the Regulatory Area.³²⁷

Each Contracting Party has the duty, within thirty days following the calendar month in which the catches were landed, or transhipped, to report to the Secretary provisional monthly statistics of catches of fisheries, whether or not that party has quota allocations for the stocks from which catches were obtained.³²⁸ The Secretary, within ten days following the monthly deadlines for receipt of the provisional catch statistics, collates the information received and circulates it to the Contracting Parties.³²⁹ These reporting obligations also apply to regulated resources caught in areas under national fisheries jurisdiction.³³⁰

Additional requirements relate to inspection activities reports. Each

engaged in transshipment operations which offloads quantities on board. This stipulation in the NEAFC Scheme is in accordance with Article 9 of the NEAFC Convention, n. 42 above, which empowers the NEAFC Commission to establish measures providing for the collection of statistical information relating to fisheries in the Regulatory Area.

³²⁴ NEAFC Scheme, n. 214 above, Article 12(1.a).

³²⁵ *Id.*, Article 12(1.b).

³²⁶ *Id.*, Article 12(1.c).

³²⁷ *Id.*, Article 13 (1).

³²⁸ *Id.*, Article 10(1). Note also that these statistics of catches of fisheries are listed according to the species list enumerated in Annex V of the NEAFC Scheme.

³²⁹ *Id.*, Article 10(2).

³³⁰ *Id.*, Article 10(3).

Contracting Party is obliged to report to the Secretary by 1 October of each year for the period 1 July to 30 June the number of inspections conducted by it under the NEAFC. The report should specify the number of inspections on the vessels of each Contracting Party and, in the case of infringement, the date and position of the inspection of the named vessel and the nature of infringement.³³¹ The Contracting Party also has the duty to report the number of air hours flown and the number of days at sea on NEAFC patrol, the number of sightings, and the number of surveillance reports established, as well as the follow-up of such reports.

Inspection and Boarding Schemes

Each Contracting Party assigns inspectors to the NEAFC Scheme. Each inspector carries special documentation of identity as a NEAFC inspector issued by the respective Contracting Party and is obliged to hold and produce this document of identity when boarding a fishing vessel.³³²

Each Contracting Party notifies the Secretary before 1 January of each year of the names of the inspectors and special inspection vessels, as well as the type of aircraft and the details of their identification, which they are assigning to the NEAFC Scheme for that year.³³³ Modifications by Contracting Parties to such notifications must be communicated to the Secretary giving one month's notice.³³⁴ The Secretary in turn circulates such notifications within fifteen days of receipt to all Contracting Parties.³³⁵

Any vessel assigned to the NEAFC Scheme and carrying assigned inspectors, as well as the boarding craft deployed by that vessel, carries a special flag or pennant to indicate that inspectors on board may carry out inspection duties in accordance with the NEAFC Scheme. Aircraft assigned to the NEAFC Scheme must have their international radio call sign clearly displayed.³³⁶

Furthermore, each Contracting Party has the duty to keep a record for

³³¹ *Id.*, Article 32(1). Article 32 further stipulates that these infringements shall continue to be listed on each subsequent report until action is taken in accordance with relevant national law provisions. This is in accordance with the NEAFC Convention, which grants the Contracting Party the right to inspect and sanction in waters under their jurisdiction. NEAFC Convention, n. 42 above, Article 15(1).

³³² NEAFC Scheme, n. 214 above, Article 15(1).

³³³ *Id.*, Article 16(1).

³³⁴ *Id.*

³³⁵ *Id.*, Article 16(2).

³³⁶ *Id.*, Article 16(3).

their assigned inspection vessels and aircraft of the date and hour of the start and termination of their duties under the NEAFC Scheme and to provide this information to the NEAFC Secretary. The Secretary promptly informs the other Contracting Parties.³³⁷

Special rules apply when more than ten fishing vessels of any one Contracting Party are engaged in fishing activities on regulated resources in the Regulatory Area at the same time. The Contracting Party is required, during that time, to have an inspection vessel in the Regulatory Area, or to cooperate with another Contracting Party to jointly operate an inspection vessel.³³⁸

The NEAFC Scheme sets out a series of general inspection and surveillance principles to guide the inspection process. Each Contracting Party ensures that assigned inspectors from another Contracting Party are allowed to carry out inspections on board those of its fishing vessels to which the NEAFC Scheme applies. Furthermore, it has the duty to adopt measures obliging the masters of the fishing vessels to cooperate with the assigned NEAFC inspectors and to ensure their safety throughout the inspection.³³⁹

Moreover, each Contracting Party ensures that inspections carried out by that party are carried out in a non-discriminatory manner and in accordance with the NEAFC Scheme. The number of inspections is based upon fleet size, taking into account the time spent in the Regulatory Area. In its inspections, each Contracting Party aims at ensuring equal treatment between all Contracting Parties with fishing vessels operating in the Regulatory Area through an equitable distribution of inspections.³⁴⁰

Inspectors have to avoid the use of force except when and to the degree necessary to ensure their safety. When carrying out inspections on board fishing vessels, inspectors cannot carry any firearms.³⁴¹ In addition, without limiting the capability of inspectors to carry out their mandates, inspections have to be made so that the fishing vessel, its activities, and the catch retained on board do not suffer undue interference and inconvenience.³⁴²

The NEAFC Scheme also establishes the parameters of the inspection procedure. No boarding can be conducted without prior notice by radio being sent to the fishing vessel or without the fishing vessel being given the appropriate signal using the International Code of Signals, including the identity of the inspection platform, whether or not such notice is acknowledged

³³⁷ Id., Article 16(4).

³³⁸ Id., Article 16(5).

³³⁹ Id., Article 15(2).

³⁴⁰ Id., Article 15(3).

³⁴¹ Id., Article 15(4).

³⁴² Id., Article 15(5).

as received.³⁴³ There can be no more than two inspectors in an inspection party from one Contracting Party boarding a fishing vessel of another Contracting Party.³⁴⁴ Additionally, each Contracting Party has to ensure that its inspection platforms manoeuvre at a safe distance from the fishing vessels according to good seamanship.³⁴⁵

An inspector has the authority to examine all relevant areas, decks and rooms of the fishing vessels, catch (whether processed or not), nets or other gear, equipment, and any relevant documents that the inspector deems necessary to verify the compliance with the measures established by NEAFC and to question the master or a person designated by the master.³⁴⁶ The fishing vessel to be boarded cannot be required to stop or manoeuvre when fishing, shooting, or hauling. The inspectors may order the interruption or delay in the hauling of the fishing gear until they have boarded the fishing vessel and in any event no more than thirty minutes after receiving the signal.³⁴⁷ In addition, inspectors ought not to interfere with the master's ability to communicate with the authorities of the flag state during the boarding and inspection.³⁴⁸

The duration of an inspection may not exceed four hours, or until the net is hauled in and the net and catch are inspected, whichever is longer. In the case of an infringement being detected, the inspectors may stay on board for the time necessary for the completion of the inspection. However, in special circumstances relating to the size of a fishing vessel and the quantities of fish retained on board, the duration of the inspection may exceed the limits stipulated above. In such a situation, the inspecting party shall in no case stay longer on board the fishing vessel than the time required to complete the inspection. The reasons for exceeding the limit stipulated above have to be recorded in the inspection report.³⁴⁹

In carrying out their inspection, the inspectors may request of the master any assistance required.³⁵⁰ Moreover, the report of the inspection may be commented upon by the master and must be signed by the inspectors at the end of the inspection. A copy of the inspection report has to be given to the master

³⁴³ Id., Article 18(1). This reinforces Section 3.3.12 of the NEAFC Performance Report (n. 43 above), which highlights the importance and centrality of automatic transmission of messages and handling of data in the NEAFC Scheme.

³⁴⁴ NEAFC Scheme, n. 214 above, Article 18(6).

³⁴⁵ Id., Article 18(10).

³⁴⁶ Id., Article 18(2).

³⁴⁷ Id., Article 18(3).

³⁴⁸ Id., Article 18(9).

³⁴⁹ Id., Article 18(5).

³⁵⁰ Id., Article 18(8).

of the fishing vessel.³⁵¹

During an inspection, the master of a fishing vessel is requested to facilitate prompt and safe boarding. The master is to cooperate with and assist in the inspection of the fishing vessel conducted pursuant to these procedures,³⁵² and not obstruct, intimidate or interfere with the inspectors in the performance of their duties. Moreover, the master has to allow inspectors to communicate with the authorities of the flag Contracting Party and the inspecting Contracting Party. Further, the master must provide them access to relevant areas, decks and rooms of the fishing vessel, catch (whether processed or not), nets or other gear, equipment, and any relevant documents.³⁵³

The NEAFC Scheme also establishes procedures for reporting infringements, with special procedures provided for serious infringements. If the inspectors find that there are clear grounds for believing that a fishing vessel flying the flag of another Contracting Party has engaged in any activity contrary to NEAFC recommendations, they are required to note the infringement in the inspection report and to take all necessary measures to ensure security and continuity of the evidence for subsequent dockside inspection.³⁵⁴ An identification mark may be affixed securely to any part of the fishing gear that appears to the inspector to have been in contravention of applicable measures.³⁵⁵

In order to facilitate Contracting Party action on the infringement, inspectors immediately are obliged to attempt to communicate with an inspector or designated authority of the Contracting Party of the inspected fishing vessel.³⁵⁶ In addition, the Contracting Party inspecting a fishing vessel ought to communicate in writing the details of an infringement to the designated authorities of the Contracting Party of the inspected vessel within the working day following the inspection whenever possible.³⁵⁷ The original of the inspection report, together with any supporting documentation, is to be forwarded promptly to the appropriate authorities of the Contracting Party of

³⁵¹ Id.

³⁵² Id., Article 19(a). As noted in Annex XIV of the NEAFC Scheme, these procedures include, *inter alia*, ensuring that embarking and disembarking occurs by means of a ladder of which the positioning and construction requirements are described in detail.

³⁵³ Id., Article 19(d & e).

³⁵⁴ Id., Article 28(1.a). Note also that these measures must be in conformity with Article 18 provisions on inspection procedures or the relevant areas to be considered, as well as Article 27 provisions on inspection reports using port state control inspection reports (PSC 3) as set out in Annex XVI.

³⁵⁵ Id., Article 28(1.b).

³⁵⁶ Id., Article 28(1.c).

³⁵⁷ Id., Article 28(2).

the inspected fishing vessel as well as a copy to the Secretary.³⁵⁸

A serious infringement means:

1. Fishing without a valid authorisation issued by the flag Contracting Party
2. Fishing without or after attainment of a quota
3. Use of prohibited fishing gear
4. Serious mis-recording of catches
5. Repeated failure to comply with the communication procedure
6. Landing or transshipment without authorisation of the port state
7. Preventing an inspector from carrying out his duties
8. Directed fishing for a stock that is subject to a moratorium or for which fishing is prohibited
9. Falsifying or concealing the markings, identity or registration of a fishing vessel
10. Concealing, tampering with or disposing of evidence relating to an investigation
11. Multiple violations that together constitute a serious disregard of conservation and management measures
12. Engaging in transshipment or joint fishing operations with vessels of a Non-Contracting Party which has not been accorded the status of a Cooperating Non-Contracting Party
13. Supplying any provisions, fuel or other services to vessels that have been placed on the IUU list³⁵⁹

If a NEAFC inspector considers that there are clear grounds for believing that a fishing vessel has committed a serious infringement, the inspector must promptly notify the flag Contracting Party of that infringement as well as the Secretary.³⁶⁰ The flag Contracting Party is obliged to respond to the notification without delay and to ensure that the fishing vessel concerned is inspected within 72 hours by an inspector duly authorised by that flag Contracting Party.³⁶¹ In order to preserve the evidence, the inspector is required to take all necessary measures to ensure security and continuity of the evidence whilst minimising interference with and inconvenience to the operation of the vessel.³⁶² Moreover, the inspector is entitled to remain on board the fishing

³⁵⁸ Id., Article 28(3).

³⁵⁹ Id., Article 29, Section a, et seq.

³⁶⁰ Id., Article 30(1). In transshipment operations, the parties to be notified consist of parties of donor vessels.

³⁶¹ Id., Article 30(2).

³⁶² Id., Article 30(3).

vessel for the period necessary to provide information to the duly authorised inspector concerning the infringement or until the response of the flag Contracting Party requires the inspector to leave the fishing vessel.³⁶³

The flag Contracting Party, if evidence so warrants, requires the fishing vessel to proceed immediately to a port designated by that Contracting Party for a thorough inspection under its authority and in the presence of a NEAFC inspector from any other Contracting Party that wishes to participate.³⁶⁴ Additionally, the flag Contracting Party may authorise the inspecting Contracting Party to bring the fishing vessel without delay to a port designated by the flag Contracting Party.³⁶⁵ If the fishing vessel is not called to port, the Contracting Party must provide due justification in a timely manner to the Secretary and to the inspecting Contracting Party. The Secretary has to make such justification available on request to any Contracting Party.³⁶⁶ Where a fishing vessel is required to proceed to port for a thorough inspection in accordance with control measures,³⁶⁷ a NEAFC inspector from another Contracting Party may, subject to the consent of the Contracting Party of the fishing vessel, board the fishing vessel as it is proceeding to port, may remain on board the fishing vessel as it proceeds to port, and may be present during the inspection of the fishing vessel in port.³⁶⁸

The appropriate authorities of a Contracting Party notified of an infringement committed by a fishing vessel of that party are requested to take prompt action to receive and consider the evidence of the infringement and, conduct any further investigation necessary for the follow up to the infringement and, whenever possible, inspect the fishing vessel concerned.³⁶⁹ Each Contracting Party has to designate the appropriate authorities mandated for receiving evidence of infringement and has to inform the Secretary of the address of those authorities.³⁷⁰ The Secretary then shall subsequently inform all other NEAFC Contracting Parties.³⁷¹

The NEAFC Scheme makes provisions for mutual recognition of inspectors. In the interest of uniformity, each Contracting Party is required to consider and act on reports from inspectors of other Contracting Parties under

³⁶³ Id., Article 30(4).

³⁶⁴ Id., Article 30(5).

³⁶⁵ Id., Article 30(6).

³⁶⁶ Id., Article 30(7).

³⁶⁷ Id., Articles 5 & 6.

³⁶⁸ Id., Article 30(8).

³⁶⁹ Id., Article 28(4).

³⁷⁰ Id.

³⁷¹ Id.

the NEAFC Scheme on the same basis as reports from its own inspectors.³⁷² Contracting Parties must also cooperate in order to facilitate judicial or other proceedings arising from a report submitted by an inspector under the NEAFC Scheme.³⁷³

Other Enforcement Provisions/Schemes

The NEAFC Scheme includes specific provisions to facilitate enforcement concerning fishing vessels, including provisions for IUU fishing vessels and port state measures. Each Contracting Party notifies, in computer readable form, to the Secretary prior to 1 January of each year if possible, or in any case before the vessel's entry into the Regulatory Area, all fishing vessels authorised to fish in the Regulatory Area and notably whether the vessel is authorised to fish one or more of the regulated resources. Each Contracting Party is requested to notify any modifications to this information without delay.³⁷⁴

Each Contracting Party is required to implement a vessel monitoring system (VMS) for its fishing vessels exceeding 20 metres between perpendiculars or 24 metres overall length which fish, or plan to fish, in the Regulatory Area. The Contracting Party must require its fishing vessels, fishing in the Regulatory Area, to be equipped with an autonomous system capable of automatically transmitting messages to a land-based fisheries monitoring centre (FMC), thereby allowing a continuous tracking of the position of a fishing vessel by the Contracting Party of that fishing vessel.³⁷⁵ This system became operational on 1 January 2000.³⁷⁶

To this end, each party ensures that the satellite device enables a fishing vessel to communicate to the Contracting Party the following data:

1. The vessel identification
2. The most recent geographical position of the vessel with a position error of less than 500 metres and with a confidence interval of 99 percent
3. The date and time of the fixing of the said position of the vessel
4. Where applicable, data relating to the catch on board
5. Where applicable, data relating to transshipment³⁷⁷

³⁷² Id., Article 28(5).

³⁷³ Id.

³⁷⁴ Id., Article 5(1).

³⁷⁵ Id., Article 11(1 & 1.a).

³⁷⁶ Id. The FMC became operational with each Contracting Party providing for back-up and recovery procedures in the event of system failures.

³⁷⁷ Id., Article 11(1.b).

Moreover, each Contracting Party guarantees that the master of a fishing vessel flying its flag ensures that the satellite-tracking devices are at all times fully operational and that all the information is transmitted. In the event of a technical failure or non-operation of the satellite-tracking device fitted on board a fishing vessel, the device must be repaired or replaced within one month. After this period, the master of a fishing vessel is not authorised to commence a fishing trip with a defective satellite-tracking device. In case a device stops functioning and a fishing trip lasts more than one month, the repair or the replacement has to take place as soon as the vessel enters a port. The fishing vessel is not authorised to continue or commence a fishing trip without the satellite-tracking device having been repaired or replaced.³⁷⁸ Each Contracting Party also has to make sure that a fishing vessel with a defective satellite-tracking device communicates, at least daily, their reports by other means of communication (radio, fax, or telex).³⁷⁹

Contracting Parties, for the purpose of this scheme, cooperate with the Secretary in order to establish a database delimiting the Regulatory Area by latitude and longitude coordinates.³⁸⁰ This occurs without prejudice to each Contracting Party's position concerning the delimitation of sea areas under their sovereignty and jurisdiction.³⁸¹

NEAFC has set up a system for blacklisting flag of convenience IUU fishing vessels.³⁸² When vessels are observed in the area fishing without a valid licence, they are added to the 'A' list, i.e., a provisional list of IUU vessels.³⁸³ Enquiries are subsequently made into the reasons why these vessels were fishing without permission, and if there is no suitable explanation, the vessel is transferred permanently to NEAFC's 'B' list.³⁸⁴ Vessels can only be removed from this list by decision of the NEAFC Commission at its annual meeting. The listing system seems to be reaping its first rewards, with recent instances where

³⁷⁸ *Id.*, Article 11(3).

³⁷⁹ *Id.*, Article 11(4). In addition, Annex VIII, Section 5, notes the stipulated format for transmission of information.

³⁸⁰ *Id.*, Article 11(5).

³⁸¹ *Id.*

³⁸² This is known as the 'A' and 'B' listing system. According to the panel in the NEAFC Performance Report (n. 43 above), this is a significant change in combating IUU fishing in the Regulatory Area.

³⁸³ NEAFC Scheme, n. 214 above, Article 44(1).

³⁸⁴ *Id.*, Article 44(3). This list is available at NEAFC, "Management Measures Currently in Force," available: <<http://www.neafc.org/measures/iuu-b.htm>> (retrieved 20 November 2008). This listing system was established in 2005 and has taken a stance in combating activities of IUU vessels. However, the degree of state control and the degree of cooperation between Contracting Parties and the Secretariat in this matter is yet to be clarified, as will be noted later on in this study.

listed vessels have been scrapped. This issue is discussed below under “Common/Similar Initiatives by NAFO and NEAFC.”

NEAFC has also adopted port state control measures. It has a special system in place to control the landings or transshipments of foreign vessels in ports of Contracting Parties. First, the Contracting Parties have to designate ports where such landings will be allowed.³⁸⁵ The master of a foreign vessel intending to call into such a port must notify the competent port authorities at least three working days in advance.³⁸⁶ The port state subsequently forwards this information to the flag state of the vessel.³⁸⁷ When the flag state confirms by return copy³⁸⁸ that the vessel in question had sufficient quota for the species declared, that the quantities of fish on board have been duly reported and considered in the calculation of any catch or effort limitations that may be applicable, that the vessel in question had authorisation to fish in the areas declared, and finally, that this information was verified according to VMS, the fish can be landed or transshipped.³⁸⁹

Strengths of the NEAFC System

Membership. The Convention lists individual parties eligible to participate in the Convention and the NEAFC Commission. Importantly, this list includes the EU. Any state not referred to in this list (Member States of the EU excepted) may accede to the Convention subject to the approval of three-fourths of all the Contracting Parties.³⁹⁰ In 2003, the NEAFC Commission adopted the Guidelines for the Expectation of States Considering Applying for Membership of NEAFC and Possible Fishing Opportunities in the NEAFC Regulatory Area.³⁹¹ According to these Guidelines, new entrants “should be aware fishing opportunities for new Contracting Parties will not be allocated on stocks already regulated.” Further, new entrants will only be entitled to allocations from unregulated stocks on the same basis as other Contracting Parties.³⁹²

³⁸⁵ NEAFC Scheme, n. 214 above, Article 21.

³⁸⁶ *Id.*, Article 22(1).

³⁸⁷ *Id.*, Article 22(3). This information is also forwarded to the flag state of the donor vessels where the vessel has engaged in transshipment operations.

³⁸⁸ *Id.*, Annex XV lays out the format of the port state control form.

³⁸⁹ *Id.*, Article 23(1–2).

³⁹⁰ The NEAFC Convention, n. 42 above, Article 20(4).

³⁹¹ The full text of these Guidelines is found in the NEAFC Performance Report, n. 43 above, Appendix XI, available also: <<http://www.neafc.org/becomingacp>> (retrieved 20 November 2008).

³⁹² NEAFC Performance Report, n. 43 above, Appendix XI, p. 91.

Three such applications have been made, of which two were rejected (Ukraine and Lithuania), and only one (Estonia), was accepted. The Performance Review Panel considered this process to be “appropriate.”³⁹³ However, others have stated that this is instead an incentive to engage in unregulated fishing.³⁹⁴

Scope. The NEAFC Commission may also adopt recommendations concerning fisheries conducted within the national jurisdiction of a Contracting Party, but only if the Contracting Party in question specifically requests and approves the recommendation.³⁹⁵

Cooperating Non-Contracting Parties. The Performance Review Panel was of the opinion that the criteria to become a Cooperating Non-Contracting Party are transparent, appropriate, and applied accordingly. In contrast to other RFMOs, NEAFC expressly foresees the possibility of granting cooperation quotas to Cooperating Non-Contracting Parties.³⁹⁶ Such quotas have been accorded in practice. According to the Recommendation for Conservation and Management Measures for Pelagic Redfish in the Irminger Sea and Adjacent Waters in the NEAFC Convention Area in 2008, 123 tonnes of redfish will be available to Cooperating Non-Contracting Parties, as was the case in 2007.³⁹⁷ Moreover, NEAFC has created opportunities for Cooperating Non-Contracting Parties to participate in the supply chain as the general prohibition to engage in transshipment or joint shipping operations, normally considered to be a serious infringement with vessels of Non-Contracting Parties, does not apply here. These vessels, when sighted in the Convention area, are not automatically presumed to be undermining NEAFC. The rules applicable to vessels of other non-Contracting Parties are distinguished by the rules applicable to Cooperating Non-Contracting Parties, hence the ‘A’ and ‘B’ list system.³⁹⁸

Non-Contracting Party Vessels. NEAFC has been an example for other RFMOs for the development of a scheme for Non-Contracting Party fishing vessels. A Non-Contracting Party vessel, which has been sighted engaging in fishing activities in the Regulatory Area, is presumed to be undermining the

³⁹³ Id., Section 3.5.2.1, p. 49. It was also noted that it is especially difficult to determine participatory rights due to extant overexploitation and full quotas in the Regulatory Area.

³⁹⁴ Lodge et al., n. 267 above, p. 17.

³⁹⁵ The NEAFC Convention, n. 42 above. Article 6(1).

³⁹⁶ For a more detailed analysis, see Owen, n. 278 above, pp. 107–113.

³⁹⁷ For a complete PDF copy of the Recommendations, see: *Recommendation for Conservation and Management Measures for Pelagic Redfish in the Irminger Sea and Adjacent Waters in the NEAFC Convention Area in 2008*, entry into force on 8 May 2008, available: <http://www.neafc.org/system/files/03-rec_seb_ment_irminger_postalvote+.pdf> (retrieved 20 November 2008).

³⁹⁸ NEAFC Performance Report, n. 43 above, Appendix XII clearly stipulates that vessels of Cooperating Contracting Parties shall not be placed on the IUU vessel list.

effectiveness of recommendations established under the Convention.³⁹⁹ In the case of any transshipment activities involving a sighted Non-Contracting Party vessel inside or outside the Regulatory Area, the presumption of undermining the effectiveness of recommendations established under the Convention applies to any other Non-Contracting Party vessel that has engaged in such activities with that vessel.⁴⁰⁰ Information regarding such sightings must be transmitted immediately to the Secretary.⁴⁰¹ The Secretary has to transmit this information to all Contracting Parties within one business day of receiving this information and to the flag state of the sighted vessel as soon as possible.⁴⁰² The Contracting Party which sighted the Non-Contracting Party vessel has to attempt to inform such a vessel that it has been sighted engaging in fishing activities in the Regulatory Area and is accordingly presumed to be undermining the recommendations established under the Convention and that this information will be distributed to all Contracting Parties and to the flag state of the vessel.⁴⁰³

In the event that any Non-Contracting Party vessel, which has been sighted and reported as engaged in fishing activities in the Regulatory Area, consents to be boarded by NEAFC inspectors, their findings are to be transmitted to the Secretary.⁴⁰⁴ The Secretary has the duty to transmit this information to all Contracting Parties within one business day of receiving this information and to the flag state of the boarded vessel as soon as possible.⁴⁰⁵ The Non-Contracting Party vessel that is boarded must be provided with a copy of the findings of the NEAFC inspectors.⁴⁰⁶

Port Inspections. Contracting Parties shall ensure that their vessels do not receive transshipments of fish from a Non-Contracting Party vessel that has been sighted fishing in the NEAFC area.⁴⁰⁷ When such a vessel enters a port of any Contracting Party, it shall be inspected by authorised Contracting Party officials knowledgeable about the recommendations established under the Convention.⁴⁰⁸ The vessel is not to be allowed to land or tranship any fish until

³⁹⁹ NEAFC Scheme, n. 214 above, Article 37(2).

⁴⁰⁰ *Id.*, Article 37(3).

⁴⁰¹ *Id.*, Article 37(1).

⁴⁰² *Id.*

⁴⁰³ *Id.*, Article 37(1 et seq.).

⁴⁰⁴ *Id.*, Article 38(1).

⁴⁰⁵ *Id.*, Article 37(1).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*, Article 41. Note, however, that this stipulation is preceded by the requirement to submit the Non-Contracting Party's vessels for inspection in the light of its presumed infringements in the Regulatory Area.

⁴⁰⁸ NEAFC Convention, n. 42 above, Article 7 lists a non-exhaustive list of measures applicable to fisheries in the Regulatory Area.

this inspection has taken place.⁴⁰⁹ Such inspections include the vessel's documents, log books,⁴¹⁰ fishing gear,⁴¹¹ catch on board,⁴¹² and any other matter relating to the vessel's activities in the Regulatory Area.

Landings and transshipments of all fish from a Non-Contracting Party vessel which has been inspected shall be prohibited in all Contracting Party ports if such inspection reveals that the vessel has on board species subject to recommendations established under the Convention. This is the procedure until it is established that the fish were caught outside the Regulatory Area or in compliance with all relevant recommendations established under the Convention.⁴¹³

Information on the results of all inspections of Non-Contracting Party vessels conducted in the ports of Contracting Parties, and subsequent action, have to be immediately transmitted through the Secretary to all Contracting Parties and as soon as possible to the relevant flag state(s).⁴¹⁴

Each Contracting Party annually reports to the Secretary by mid-September for the period 1 July to 30 June the number of inspections of Non-Contracting Party vessels it conducted under this Scheme in its ports, the names of the vessels inspected and their respective flag state, the dates and ports where the inspection was conducted, and the results of such inspections.⁴¹⁵

As a part of the existing comprehensive NEAFC Control and Enforcement Scheme, new measures have been adopted. A new measure, which entered into force on 1 May 2007, effectively closes Contracting Party ports to landings of frozen fish which have not been certified by the flag state of the vessel intending to land.⁴¹⁶ Additionally, the coastal state can also limit the number of ports where frozen fish is allowed to be landed in order to streamline these inspections.⁴¹⁷

Vessels without Nationality. Where there are reasonable grounds for suspecting that a vessel, which has been sighted engaging in fishing activities in the Regulatory Area, is without nationality, a NEAFC Contracting Party may

⁴⁰⁹ NEAFC Scheme, n. 214 above, Article 40(1).

⁴¹⁰ *Id.*, Annex IV stipulates the format for the logbook.

⁴¹¹ *Id.*

⁴¹² *Id.*, Annex XV also stipulates the format for recording catch on board. The port state control form may be used where Non-Contracting Party's vessels dock at a Contracting Party's dock for inspection.

⁴¹³ *Id.*, Article 41.

⁴¹⁴ *Id.*, Article 42(1). This is to establish if the non-Contracting Party's vessel has engaged in any IUU activity within the Regulatory Area.

⁴¹⁵ *Id.*, Article 43(1).

⁴¹⁶ *Id.*, Article 20.

⁴¹⁷ *Id.*, Article 21.

also board and inspect the vessel.⁴¹⁸ Where evidence warrants, a NEAFC Contracting Party may take such action as may be appropriate in accordance with international law.⁴¹⁹ Contracting Parties are encouraged to examine the appropriateness of domestic measures to exercise jurisdiction over such vessels.⁴²⁰

Review of performance. NEAFC has recently undergone a review of its performance.⁴²¹ In 2006, a panel consisting of internal NEAFC representatives and external experts submitted its final report, which was discussed by the organisation at a special meeting in 2007. This clearly constitutes a recommended best practice in the management of the Regulatory Area.⁴²²

Weaknesses of the NEAFC System

Objection Procedure. Any Contracting Party may object to a recommendation within 50 days of the date of notification of that recommendation.⁴²³ In the event of such an objection, any other Contracting Party may similarly object within 40 days after receiving notification of that objection.⁴²⁴ If any objection is made within this further period of 40 days, other Contracting Parties are allowed a final period of 40 days after receiving notification of that objection in which to lodge objections.⁴²⁵ A recommendation does not become binding on a Contracting Party that has objected thereto.⁴²⁶ If three or more Contracting Parties have objected to a recommendation, it will not become binding on any Contracting Party.⁴²⁷ Except when a recommendation is not binding on any Contracting Party, a Contracting Party which has objected to a recommendation

⁴¹⁸ *Id.*, Article 1(g) defines a Non-Contracting Party vessel as one not only flagged in a Non-Contracting Party, but also a vessel suspected to be without nationality. The rules that apply to Non-Contracting Party vessels also apply to vessels without nationality.

⁴¹⁹ *Id.*, Article 38(1).

⁴²⁰ *Id.*

⁴²¹ NEAFC Convention, n. 42 above, Article 4(2) notes that the Commission shall provide a forum of consultation and exchange of information on the state of the fisheries resources in the Regulatory Area, the management policies in place, and an examination of the overall effect of such policies, hence the performance review panel. In addition, Article 14(3) adds that the Commission, in the interest of its functions as set out in Articles 4, 5 and 6, may establish working arrangements aimed at improving its activities in the Regulatory Area.

⁴²² Lodge et al., n. 267 above, p. 115.

⁴²³ This stipulation, as discussed in the NEAFC Performance Report, n. 43 above, Section 3.4.2, is an Article 12(2.a) stipulation of the NEAFC Convention, n. 42 above.

⁴²⁴ NEAFC Convention, n. 42 above, Article 12(2.a).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*, Article 12(2.c).

may at any time withdraw that objection. It then becomes bound by the recommendation within 70 days, or as from the date determined by the NEAFC Commission, whichever is the later.⁴²⁸ If a recommendation is not binding on any Contracting Party, two or more Contracting Parties may nevertheless at any time agree among themselves to give effect thereto. In this event, they must immediately notify the NEAFC Commission accordingly.⁴²⁹ The use of such an objection procedure could well undermine the conservation of the resource.⁴³⁰

Formal Absence of Dispute Settlement Procedure. In 2004, an amendment was proposed concerning a dispute settlement procedure whereby states would be obliged to explain their reasons for using the objection procedure. Even though these amendments were adopted in 2005, they have not yet entered into force.⁴³¹

Lack of Convention Basis for Non-Contracting Parties Rights and Obligations. The “new” 2007 Convention does not intend to enumerate the rights and obligations of non-Contracting Parties. At present, these rights are scattered throughout the NEAFC Scheme,⁴³² the Non-Contracting Parties Scheme,⁴³³ and the 2003 Guidelines for the Expectation of Future New Contracting Parties with Regard to Fishing Opportunities in the NEAFC Regulatory Area.⁴³⁴ All of these measures are without a Convention basis.

Vessel Monitoring System. Even though the database of the vessel monitoring system is quite innovative and forms an essential element in the NEAFC monitoring scheme, the Performance Review Panel is of the opinion that the quality of the information deserves enhanced control and that the use of this state of the art technology by NEAFC is underutilised.⁴³⁵

Inspections. The Performance Review Panel noted that one Contracting Party was obviously not participating in the system since it had so far not deployed inspectors or inspection vessels in the Regulatory Area, even though

⁴²⁸ Id., Article 12(2.d).

⁴²⁹ Id., Article 12(2.e).

⁴³⁰ NEAFC Performance Report, n. 43 above, Section 3.4.2, which notes that this weakness has prevented the establishment of management measures for redfish and mackerel by Contracting Parties.

⁴³¹ Id., Section 3.4.4, p. 46.

⁴³² NEAFC Scheme, n. 214 above.

⁴³³ Id., Chapter VII.

⁴³⁴ See n. 391 above and accompanying text.

⁴³⁵ NEAFC Performance Report, n. 43 above, Section 3.3.12.1, p. 39 especially, notes the ongoing issue of quality control in terms of collating information to determine similarities between donors and receiver vessels’ reports. See also Section 4.3, p. 56.

it is so required under the Convention system.⁴³⁶

Implementation of the 1993 FAO Compliance Agreement

The preamble of the “new” 2007 Convention explicitly “recognises” the 1993 FAO Compliance Agreement.⁴³⁷ NEAFC inspectors remain under the operational control of the authorities of their Contracting Parties. However, they have the powers of inspection, seizure and search, as defined in the NEAFC Scheme of Joint International Inspection, as well as surveillance implementation under the 1993 FAO Compliance Agreement.⁴³⁸

In determining the extent to which Contracting Parties recognise the Compliance Agreement, the current NEAFC Scheme enjoins Contracting Parties to ensure that stated measures to be taken, whether administrative action or criminal proceedings, are in conformity with the Contracting Party’s national law against the natural or legal persons responsible where there has been a derogation from NEAFC measures.⁴³⁹ The measures taken are to be in accordance with the relevant provisions of national law, be capable of effectively depriving the beneficiaries of any economic benefit, or provide sanctions proportionate to the seriousness of such infringements, thus discouraging future infringements.⁴⁴⁰

High seas fishing vessels have to report their catches in the NEAFC area. Each entry and exit has to be reported. These reports are inspected by the observers and by port inspectors.⁴⁴¹ NEAFC also includes high seas conservation and management measures with a stated objective of NEAFC performing its functions in the interests of the conservation and optimum utilisation of the fishery resources of the convention area.⁴⁴² All vessels

⁴³⁶ Id., Section 3.3.12.1, p. 39. The Panel recommended that where a party has more than ten fishing vessels engaged in fishing in the Regulatory Area, it should have an inspection vessel or jointly cooperate with another Contracting Party for inspection purposes.

⁴³⁷ This 2007 “New” NEAFC Convention (n. 42 above) is novel in that it adopts the amendments to the convention as agreed during the 24th annual meeting of the NEAFC in 2005. These amendments serve to bring the NEAFC Convention in line with the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. See also n. 42 above.

⁴³⁸ “New” NEAFC Convention, n. 42 above, in its preamble, not only recognises the 1993 FAO Compliance Agreement (see n. 97 above and), but also “takes into account” the FAO Code of Conduct for Responsible Fisheries (a already mentioned, n. 36 above).

⁴³⁹ NEAFC Scheme, n. 214 above, Article 31(1).

⁴⁴⁰ Id., Article 31(2).

⁴⁴¹ Id., Chapters III–V.

⁴⁴² See n. 320 above, and accompanying text as well as the “New” NEAFC 2007 Convention, n. 42 above, Article 2. This is the Regulatory Area, in which, according to the NEAFC Scheme,

operating in the NEAFC area have to register with the Secretary.⁴⁴³ The NEAFC Scheme consists of new technologies in fisheries monitoring, and establishes control measures, rules on reporting IUU activities, as well as port state control measures. These features are designed to ensure adequate high sea fisheries management as called for under the 1993 FAO Compliance Agreement.

When a vessel has been sighted committing an infringement, the flag state is informed. The appropriate authorities of the Contracting Party are notified of the infringement committed by the fishing vessel and have to take prompt action to receive and consider the evidence of the infringement.⁴⁴⁴ The Performance Review Panel concluded that the NEAFC “Contracting Parties largely fulfil their duties as Flag States.”⁴⁴⁵

Implementation of the 1995 UN Fish Stocks Agreement

As with the 1993 FAO Compliance Agreement, the preamble of the “new” NEAFC Convention explicitly “recognises” the 1995 UN Fish Stocks Agreement.⁴⁴⁶

The Contracting Parties agree to maintain in force and to implement within the Regulatory Area the NEAFC Scheme. The latter includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties⁴⁴⁷ and for flag state prosecution and sanctions on the basis of evidence resulting from such boarding and inspection.⁴⁴⁸ A report of such prosecutions and sanctions imposed shall be included in an annual statement regarding the actions that were taken during the preceding year.⁴⁴⁹

n. 214 above, Article 1(b) lies beyond the waters under the fisheries jurisdiction of the Contracting Parties.

⁴⁴³ NEAFC Scheme, n. 214 above, Article 5(1) notes that the Secretary is notified of fishing vessels on an annual basis. Furthermore Annex II lists the authorised vessels, main gear types and the format for registration.

⁴⁴⁴ *Id.*, Article 28(4).

⁴⁴⁵ NEAFC Performance Report, n. 43 above, Section 3.3.10.1, p. 38.

⁴⁴⁶ “New” NEAFC Convention, n. 42 above, Preamble.

⁴⁴⁷ NEAFC Scheme, n. 214 above, Article 18(11). Article 46(1) states the provisions in relation to Contracting Parties. They may jointly request the cooperation of Non-Contracting Parties’ vessels in achieving the goals of the NEAFC Scheme. Article 16(5) also states that the means of inspection may be operated jointly between Contracting Parties.

⁴⁴⁸ NEAFC Convention, n. 42 above, Article 15(1). See also NEAFC Scheme, n. 214 above, Article 31(2).

⁴⁴⁹ NEAFC Convention, n. 42 above, Article 15(2). See also its application in the NEAFC Scheme, n. 214 above, Article 31(1 & 2). See also n. 331 above. This falls within the purview

As regards Non-Contracting Parties, the Contracting Parties agree to bring to the attention of any Non-Contracting Party any matter relating to the fishing activities in the Regulatory Area of the nationals or vessels of that state that appear to affect adversely the attainment of the objectives of the Convention.⁴⁵⁰ The Contracting Parties further agree to confer, when necessary, in order to assess steps to be taken towards obviating such adverse effects. NEAFC adopted a scheme to promote compliance by Non-Contracting Party vessels with the conservation and enforcement measures established by the NEAFC.⁴⁵¹ Further, when a non-Contracting Party vessel, which has been sighted and reported as engaged in fishing, enters a port of any NEAFC Contracting Party, it shall be inspected by authorised Contracting Party officials.⁴⁵²

NEAFC aims to make its information and decision making processes accessible for Contracting Parties and observers. Observers were only allowed to attend meetings in 2001. However, the Performance Review Panel noted that discussions on allocations are often not open to all Contracting Parties and observers. It stressed the need for improvement in ensuring transparency between participating coastal states in quota allocation and management measures.⁴⁵³ In addition, the current lack of access to information by NGOs should be reversed, especially prior to NEAFC Commission meetings.

10.4.5.3. Common/Similar Initiatives by NAFO and NEAFC

A recent noteworthy positive development is that both NAFO and NEAFC have tried, albeit not concurrently, to pay very close attention to the achievements of the other. Several examples are provided *viz.*

Since 2002 both organisations have been cooperating with respect to the management of pelagic redfish in the Irminger Sea, a straddling fish stock between the two convention areas. NEAFC receives the scientific advice and establishes the management measures, including the allocation of the total allowable catch in the NAFO area. For control purposes, however, catches are

of the Secretary's duties and must also specifically detail the current status of the case and/or the sanction or prosecution imposed for infringements.

⁴⁵⁰ NEAFC Scheme, n. 214 above, Article 34. Also in explaining the status of Cooperating Non-Contracting Parties, it was stated that the rules for reporting vessels, catch, and effort data, as well as monitoring and surveillance, apply in management of their activities.

⁴⁵¹ *Id.*, Articles 34–36.

⁴⁵² *Id.*, Article 40(1).

⁴⁵³ NEAFC Performance Report, n. 43 above, Section 4.5, p. 56.

reported to both the NAFO Fisheries and NEAFC Commissions.⁴⁵⁴

Additionally, NAFO and NEAFC have recently joined forces to establish an overarching North Atlantic list of IUU vessels. Vessels on the list of IUU vessels of the NEAFC are automatically transferred to the NAFO list and vice versa. The underlying rationale is that because both Regulatory Areas are adjacent, there are straddling stocks in their respective Regulatory Areas and as IUU fishing is a global phenomenon, the vessels listed under one convention system are presumed to be engaged in IUU fishing activities in the Regulatory Area of the other.⁴⁵⁵ NEAFC Recommendation XI of 2008 expands this kind of cooperation to CCAMLR and South-East Atlantic Fisheries Organisation (SEAFO). Further, the Recommendation adds that delisting is only possible if the organisation originally listing the vessel decides to do so.⁴⁵⁶ Thus, as noted by the NEAFC Performance Report, NEAFC could well serve as a useful reference to other RFMOs in this respect as it demonstrates a positive development in fisheries management.⁴⁵⁷

A third, more recent example of common initiatives, is NAFO's newly adopted port state control scheme, which was inspired by NEAFC practice in the Regulatory Area. NAFO's former port state control provisions required vessels that had been fishing for stocks subject to conservation and enforcement measures to call in the port of a Contracting Party to be inspected when offloading their catch. Even though the interference of the inspectors in the offloading activity was minimal, the quality of the catch had to remain unaffected, but this was compromised by the fact that such inspections took time. The ensuing reports were then forwarded to the port state, upon request, and to the Executive Secretary. A 2007 discussion paper proposed an amendment and, after many adaptations, was finally adopted at the thirtieth annual meeting of the NAFO Fisheries Commission in late September 2008. The new system very much resembles the successful port state control system adopted by NEAFC a year earlier. It is based on the following measures: the master has to present prior notification to the port state, which is forwarded to the flag state. No authorisation to land or tranship the cargo in port will be

⁴⁵⁴ Lodge et al., n. 267 above, p. 18.

⁴⁵⁵ NEAFC Scheme, n. 214 above, Article 44(5). Article 44(5) states that the Secretariat shall transmit the IUU 'B' list and any amendments thereto, as well as other relevant information, to NAFO. Also Article 44(6) notes that NAFO lists of vessels engaging in IUU activities will be automatically entered into the NEAFC 'B' list.

⁴⁵⁶ Id., Article 44(5 & 6). See also A. K. Sydnese, "Regional Fishery Organizations: How and Why Organizational Diversity Matters," *Ocean Development and International Law* 32 (2001): 349–372, for a general overview of CCAMLR, SEAFO, and other RFMOs in fisheries management.

⁴⁵⁷ NEAFC Performance Report, n. 43 above, Section 3.3.13.1, p. 41.

granted without the flag state of the Non-Contracting Party vessel confirming the legal status of the catch.⁴⁵⁸ All the documents involved are posted on the secure part of the NAFO website.⁴⁵⁹ The scheme even moves beyond the port state measures which are presently being developed in FAO on some points. The objective of the drafters of these new NAFO provisions on port state control was clearly to reflect as closely as possible the port state control mechanism of NEAFC.

10.5. Conclusion

While Canada and the EU are well known for sparring over fisheries interests and allocations in the NAFO Regulatory Area, Canada and the EU have displayed considerable cooperation since the famous *Estai* incident. Both have played substantial roles in achieving modernization amendments to reflect the ecosystem and precautionary approaches in regional fisheries management agreements. Both have cooperated in enhancing regional compliance and enforcement arrangements in NAFO.

Canada and the EU continue to face four major challenges in regional fisheries management. Putting the precautionary approach into practice has been problematic with quotas for some stocks set above precautionary scientific advice or without precautionary reference points. Implementing the ecosystem approach might be described as “just leaving port” with still very limited scientific understandings of marine ecosystems and limited protections given to vulnerable marine ecosystems. Reaching consensus on allocation criteria for shared fish stocks continues to be a thorny issue in both NAFO and NEAFC. Achieving effective compliance and enforcement remains a challenge with various constraining realities including exclusive flag state jurisdiction to prosecute regulatory offences beyond national maritime zones and the slow entry into force of dispute settlement procedures.

Clearly Canada and the EU have not reached an end point in strengthening cooperation within regional fisheries management. Various questions remain to be traversed:

- Should scientific advice be subject to political override?
- How might the role of scientific advice be strengthened within RFMOs?
- How might the ecosystem approach be bolstered at the regional level?

⁴⁵⁸ NAFO C&E Measures, n. 48 above, Article 49(1).

⁴⁵⁹ *Id.*, Article 51(1).

- What initiatives, if any, should be considered for further crystallising fisheries allocation criteria?
- Should the closer cooperation between NAFO and NEAFC be extended to other RFMOs?
- How much reliance on state of the art information technology is desirable?
- Should the fundamental changes in the compliance and enforcement strategies of RFMOs be reflected in their conventions?
- How might cooperation with non co-operating non-Contracting Parties be enhanced?