

**Report of the Working Group on the Future of NEAFC
London
24 – 26 April 2001**

The Working Group met in accordance with a decision taken by the Commission at last year's Annual Meeting (*see item 11 of the Report of the 19th Annual Meeting*).

1. Opening

The Chairman, Mr. Friedrich Wieland (EU), opened the meeting at 10.15 hrs on 24 April 2001 and noted that all Contracting Parties were represented (Annex 1).

In his welcoming remarks, the Chairman recalled the following: This Working Group had been set up in 1996 in order to review the constitutional rules of NEAFC in the light of new developments such as the 1995 UN Agreement on Straddling Fish Stocks and the FAO Code of Conduct of Responsible Fisheries. The Working Group became instrumental in both the creation of a new Secretariat as well as the elaboration of the non-Contracting Party Scheme. In order to avoid duplication of work, NEAFC wished to await the outcome of parallel NAFO processes concerning the issues of transparency and dispute settlement. In the meantime, NAFO has come to terms with the issue of transparency but, seen from a North-East Atlantic perspective, the NAFO process on dispute settlement was taking much more time than expected.

2. Adoption of the Agenda

The provisional agenda was adopted (Annex 2).

3. Election of the Rapporteur

It was agreed that the Secretariat shall act as rapporteur.

4. Rules for Granting Observer Status at NEAFC Meetings (Transparency)

The Chairman pointed out that the normal meaning of the term "transparency" had to do with the quality of letting light pass without distortion or the quality of being clear or recognisable but that, in connection with regional fisheries organisations, this very term was now encompassing not only 'transparency in the decision-making process' but also the complex issue of appropriate participatory frameworks for *inter alia* non-governmental organisations (NGOs).

The representative of Norway presented a working paper (Annex 3) which, as he explained, was drawn up at the request of the President of NEAFC and destined to show how the new NAFO rules pertaining to the admission of observers could be easily adapted within the framework of NEAFC. He added that, because of all NEAFC Contracting Parties being Contracting Parties to NAFO as well, this adaptation should be possible without major complications.

Participants thanked Norway for having prepared this paper. All of them concurred that work in the present instance should draw upon the outcome of the NAFO process. In view of the much smaller size of NEAFC, however, some participants cautioned against too automatic a transposition of the NAFO rules.

The Chairman suggested that three main topics should be addressed:

- The intended NEAFC rules must be consistent with the terms of Article 12 of the UN Agreement on Straddling Fish Stocks.
- Even though there should be no re-invention of the wheel at this juncture, the intended rules must be suitable for the specific purposes of NEAFC.
- The form of the introduction of the intended NEAFC rules, e.g. by way of an amendment of the NEAFC Convention, a recommendation in the technical sense or an amendment of the Rules of Procedure, must be determined.

Participants considered the NAFO rules and, by way consequence, a possible adaptation of these rules to NEAFC ends to be consistent with the UN Agreement.

Participants also held that, in line with the avenue chosen within NAFO, the intended NEAFC rules should be introduced by way of amended Rules of Procedure.

A first discussion of the components of possible NEAFC rules showed more or less concurrent views on the relevant topics, namely (1) the eligibility of applicants, (2) a suitable selection procedure and (3) the issue of access to bodies and/or meetings.

The representative of Denmark (in respect of the Faroe Islands and Greenland) affirmed that, in line with NAFO rules, intergovernmental organisations should benefit from less strict conditions and that, in any event, observers should only be admitted to plenary sessions of NEAFC.

The representative of Iceland stated that, in pursuance of Iceland's persistent position all along the NAFO process, their preference was for a solution, under which the objection of one Contracting Party should suffice to deny an applicant NGO observer status.

The representative of the EU cautioned against too restrictive rules in this field and exemplified that, in comparison with a time period of 60 days in ICCAT, the period of 100 days for the filing of applications might be too onerous. In contrast to that, the representatives of Denmark (in respect of the Faroe Islands and Greenland) and Norway observed that the time period at issue was designed to offer enough room for both an orderly selection procedure as well as due information of applicants of the outcome of that procedure sufficiently in advance of relevant meetings.

An examination of draft operative provisions in the form of an amendment of the Rules of Procedure (Annex 4) revealed consensus among participants on most parts of the text except that the specific requirements pertaining to the selection procedure (i.e. Section 36) formed the subject matter of more protracted discussions.

In this context, the representative of Iceland re-stated his earlier position and insisted that each Contracting Party be given a right to object against the admission of NGOs. This motion was to be seen against the background of Iceland's rather bad experience with NGO participation in other international organisations. Furthermore, he held that the terms "*as observers or otherwise, as appropriate,*" in Article 12 (2) of the 1995 UN Agreement purportedly left it to the discretion of each organisation to specify the participatory framework for NGOs, which it deemed fit.

The representative of Denmark (in respect of the Faroe Islands and Greenland) referred to similar adverse experience where misconduct of NGOs had even resulted in criminal proceedings. He stressed that, in such grave cases, the Contracting Parties concerned must be in a position to pull an "emergency brake". In this vein, he presented a proposal for the listing of activities in contravention of the laws of a Contracting Party as a disqualifying criterion (Annex 5). In subsequent discussions, he replaced this with another proposal which aimed at addressing this issue by way of a right of the Contracting Party concerned to object to the presence of the NGO in question (Annex 6). He clarified that this proposal intended to achieve not only expulsion of NGOs during ongoing meetings but also, if necessary, denial of observer status. He added that the very exceptional nature of the proposed rule was counterbalanced by concomitant strict information obligations incumbent upon any Contracting Party which might have recourse to that rule.

The representative of the EU considered these motions to be incongruous with modern transparency standards as reflected in the 1995 UN Agreement and subsequent State practice. He also outlined that a right to veto would amount to decision-making by unanimity. This would conflict with the normal decision-making rules enshrined in Article 3 (9) of the NEAFC Convention. or, in other terms, the introduction of such a new rule would require an amendment of the Convention. He, therefore, urged to stay with the compromise which NAFO had reached after lengthy debates and which included, among others, a rather sophisticated selection procedure, on the one hand, and the exclusion of observers from access to meetings of subsidiary bodies and working groups, on the other. Furthermore, he emphasised that the situation within NEAFC was hardly comparable to the situation encountered in the International Whaling Commission.

The representative of Norway expressed sympathy for the ideas put forward by Denmark (in respect of the Faroe Islands and Greenland) and Iceland inasmuch as they reflected experience which Norway itself had also made in other organisations. However, he saw no realistic chance to divert too much from the solution which had been hammered out in the NAFO process.

The Chairman welcomed movement on the side of participants. He stressed that, while a call for liberal rules was fully consistent with contemporary ideas of transparency, the concerns of Contracting Parties about certain NGOs remained understandable. Still, he foresaw considerable practical problems if selection procedures were to deal with matters of criminal proceedings under domestic law and, more particularly, with cases of acquittal and/or outstanding final judgement.

Under these circumstances, the Chairman suggested that, on balance, the said concerns could be accommodated by way of the insertion of the terms “*and are in good standing*” as an additional qualifying criterion in Section 34. He emphasised that the ordinary meaning of these terms was ‘having kept all the rules’ or ‘having paid the necessary money’ or, in a wider sense, ‘with a good reputation’. Drawing upon this, one could construe the suggested criterion to mean that only applicants with a good reputation could be admitted or, inversely, that applicants with either a record of misconduct or even with a criminal record should be barred from observer status. Such a proviso would also give the selection procedure a specific direction.

The representative of Denmark (in respect of the Faroe Islands and Greenland) attached great importance to such an interpretation. Thereupon, participants accepted the insertion of the suggested new criterion and endorsed the so amended rules for rules granting observer status at NEAFC meetings (Annex 5).

The representative of Iceland re-stated his reservations about Section 36. This was duly noted.

Recommendation: The Working Group recommends to the Commission that it adopt at its 20th Annual Meeting the rules for granting observer status at NEAFC meetings as set out in Annex 5.

5. Dispute Settlement Procedures

By way of introduction, the Chairman retraced the developments of dispute settlement in international law from the initial requirement of explicit consent of the States concerned in each case, via the so-called optional clause under the Statute of the International Court of Justice to the concept of compulsory and binding dispute settlement under Part XV of UNCLOS. He highlighted that, next to strengthened conservation and stricter enforcement, dispute settlement became the third pillar of the 1995 UN Agreement. This has clearly given another push in the direction of compulsory and binding dispute settlement. He stressed that the most recent judgement of the International Tribunal for the Law of the Sea in the “Grand Prince” Case (Belize versus France) underscored the increasing importance of international dispute settlement in the field of fisheries.

The Chairman suggested that discussions should revolve around the following topics:

- The desirability of a NEAFC dispute settlement mechanism;
- The elements of such a mechanism; and
- The form of the introduction of such a mechanism within NEAFC.

Participants were unanimous in their opinion that it was **desirable** for NEAFC to establish a dispute settlement mechanism of its own. They held that the absence of such a mechanism would entail a risk of possible disputes being submitted to alien procedures and decided in application of provisions other than the NEAFC Convention.

Participants also concurred that, irrespective of a possible stalemate in the parallel NAFO process, discussion of the **elements of a possible NEAFC dispute settlement mechanism** should proceed on the basis of the “Consolidated Text” which came out of last year’s session of the NAFO Working Group (see NAFO/GC Doc. 00/4, Annex 12). In this context, participants emphasised the importance of a requirement to motivate objections as a means of either preventing disputes or accelerating their resolution. The representative of Norway drew attention to similar provisions in the new SEAFO Convention. Furthermore, participants expressed their consensus with the following: In line with the technique used in Part VIII of the 1995 UN Agreement, a NEAFC dispute settlement mechanism entailing binding decisions should basically consist of an “import” of the procedures of Part XV of UNCLOS into NEAFC. However, an optional panel procedure should be offered as a means of resolving disputes over conservation and management measures in a swifter manner and within a NEAFC framework before such disputes were submitted to the more complex binding procedures. Even though the parties to a dispute should remain free to choose this procedure, their choice would carry with it acceptance to apply the outcome of the panel procedure as a provisional measure pending the definitive and binding settlement of the dispute.

After some discussion of technicalities, participants unanimously endorsed the operative provisions for a NEAFC dispute settlement mechanism (Annex 6).

Upon invitation from the Chair, participants also considered possible **procedural requirements** for the establishment of a panel and its work. The Chairman stressed that this was breaking new ground because the topic had never been really addressed in the NAFO process. Discussions started from a working paper, which had been presented at the 1999 Working Group of NAFO, and eventually resulted in drawing up a first skeleton of rules concerning the panel procedure (Annex 7). In this context, the following views were expressed:

- Expertise (paragraph 1) and speed (paragraph 2) were seen as essentials.
- As regards the choice of the third panellist (paragraph 4), a substitute selection by the President of NEAFC was envisaged in the event that the parties to the dispute should be unable to agree. In contrast to that, random selection by drawing a lot was considered to be inappropriate as this might invalidate the standing of the panel procedure. The representative of Iceland suggested that the President of the International Tribunal for the Law of the Sea could be entrusted with this task. The representative of Denmark (in respect of the Faroe Islands and Greenland) held that much depended on the subject matter of the dispute (conservation, control or data collection) and that, therefore, a person conversant with NEAFC matters should make the choice.
- As regards possible rules of procedure (paragraph 10), the representative of Denmark (in respect of the Faroe Islands and Greenland) saw merits in leaving this to the discretion of the parties concerned. There was a general view, however, that the work of the panel should not be unduly hampered by discussions over the rules of procedure. The Chairman noted that a blueprint of possible rules of procedure could accelerate proceedings.

- As regards the issue of expenses and fees (paragraph 11), the representative of Denmark (in respect of the Faroe Islands and Greenland) queried whether and on what basis NEAFC should incur any costs or expenses in this context. The representative of Norway held that the Secretariat might be requested to provide services to panels. This should be decided on a case-by-case basis.

Participants undertook to give these topics further consideration between now and this year's Annual Meeting. Furthermore, they undertook to scrutinise the issue of **timing**. As a working-hypothesis, the panel procedure should be designed in such way that proceedings could be concluded within the first five months of the calendar year following the Annual Meeting, at which the disputed measure was established.

Participants then turned to the question of the **form of the introduction of a dispute settlement mechanism** within NEAFC. The representative of Denmark (in respect of the Faroe Islands and Greenland) had a preference for a protocol or some other instrument which helped to avoid an onerous amendment of the Convention. The representative of Iceland sympathised with this. The representative of Norway advocated an amendment of the Convention. He emphasised that, in any event, the chosen instrument had to be binding upon all Contracting Parties and that if the Convention were to be negotiated nowadays, it would inevitably incorporate terms pertaining to dispute settlement. The representative of the EU seconded this position. He added that provisional application could cater for possibly lengthy ratification procedures. Participants concurred, however, that, notwithstanding the form of the introduction of the main body of the intended mechanism, the Commission should be empowered to prescribe any necessary rules concerning the panel procedure.

The Chairman concluded that it was for the Contracting Parties to decide on the appropriate form. He nevertheless offered for consideration that, if consensus were reached on the establishment of the intended dispute settlement mechanism, the ensuing amendment of the Convention and, as appropriate, corresponding ratification by the Contracting Parties should not cause major problems.

Recommendation: The Working Group recommends to the Commission that it adopt at its 20th Annual Meeting the operative provisions for a NEAFC dispute settlement mechanism as given in Annex 6.

6. Consideration of the report on “The Second Meeting of the FAO and non-FAO Fisheries Bodies and Arrangements”

The Chairman recalled that the recent Special Meeting of NEAFC, which was held on 22/23 March 2001, requested the Working Group to address this topic. He reviewed the history of the FAO meetings in question and the involvement of NEAFC in them.

Participants exchanged views on the variety of issues which were touched upon at the FAO Meeting, which took place on 20/21 February 2001. They accepted that NEAFC should continue to participate in future FAO Meetings of this calibre provided that FAO offered no more than a forum for discussion of matters which were of relevance for regional co-operation in fisheries management.

At the instigation of the representative of Denmark (in respect of the Faroe Islands and Greenland), participants also accepted that NEAFC should make itself acquainted with issues of general interest that might come up at meetings convened by FAO or other international organisations. More particularly, NEAFC should keep track of what was happening on the environmental side with respect to fisheries. The representative of Denmark (in respect of the Faroe Islands and Greenland) indicated that, as an example, the role of CITES was of interest to his delegation. Under these circumstances, participants concurred that NEAFC should discuss any such issues under a permanent agenda item at its Annual Meetings. It would be desirable to have such discussion prior to the meetings of the other organisations. If feasible, such discussion should result in some more or less co-ordinated NEAFC position. This was, however, not a must given that it was much more essential that the Contracting Parties became aware of both up-coming issues as well as their possible implications for NEAFC.

The representative of Norway gave a thorough overview of both the FAO process, which led to the adoption of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU). He drew attention to the chapter pertaining to regional fisheries organisations and stressed that, for most of the issues listed there, NEAFC has already put into place appropriate tools to combat IUU fishing. He nevertheless found that some issues have not yet been dealt with by NEAFC. Such outstanding issues were enhanced port State control, market related measures, the monitoring of landings and the issue of chartering of fishing vessels. He noted that one particular issue, namely the call on non-Contracting Parties to join regional fisheries organisations (see paragraph 74bis of the IUU Plan of Action), might be critical for NEAFC if seen against the background of the rather restrictive conditions for the admission of new members under the NEAFC Convention.

This presentation was followed by a vivid exchange of views, at the conclusion of which the representative of Norway undertook to prepare a paper for consideration at this year's Annual Meeting. The paper will consist of a sort of 'check-list' and juxtapose the topics, for which NEAFC has already established appropriate measures, and the outstanding issues, for which NEAFC may have to take action.

In connection with the issue of new entrants, participants noted that many interested third States have already inquired with the Secretariat about fishing possibilities which might be available to them in the Regulatory Area of NEAFC. Participants accepted that, following the example of NAFO, NEAFC should contemplate issuing a resolution or some other instruments for the purposes of guiding expectations of interested non-Contracting Parties. Participants emphasised that the linkage with proper compliance with co-operation and conservation obligations under international law was decisive in this very context.

Recommendation: The Working Group recommends to the Commission that

- **it continue to participate in FAO meetings on regional co-operation in fisheries management;**
- **it discuss, in an appropriate form and under a permanent agenda item at its Annual Meetings, topics of general interest, which may come up in the framework of FAO and/or other international organisations; and**

- **it contemplate preparing and issuing indications to guide the expectations of interested non-Contracting Parties.**

7. Any Other Business

No other matters were raised.

8. Closing of the Meeting

The meeting was adjourned at 16.00 hrs. on 26 April 2001.