

REPORT OF THE MEETING OF THE WORKING GROUP ON THE FUTURE OF THE NORTH-EAST ATLANTIC FISHERIES COMMISSION

26 April 2005

At NEAFC headquarters - 22 Berners Street, London W1T 3DY

1. Opening of the Meeting

The Chairman, Mr Kolbeinn Árnason, opened the meeting at 10 am in the Board Room on the second floor of 22 Berners Street. All Contracting Parties were represented. He welcomed everyone to the meeting and went through the Terms of Reference from the 23rd Annual Meeting.

2. Adoption of the agenda and appointment of rapporteur

The Chairman suggested that agenda item 4 was taken before item 3.

With these comments the agenda was adopted and the Secretariat was appointed rapporteur.

3. Strengthening the role of NEAFC in a broader ecosystem approach to fisheries management and overall ocean management in the Convention Area;

The representative of Norway presented discussion paper (05/03), Annex 1.

In the ensuing discussions the following points were made:

There may be a need to widen the scope of the NEAFC Convention in line with developments since 1980, when the Convention was signed. There was general acceptance for widening the scope of the Convention to all living marine resources and the effect of fisheries on other parts of the ecosystem.

Attention was drawn to Article 1.2 of the NEAFC Convention.¹ The language was not in line with more recent developments and convention texts and left a lot open to interpretation.

There was consensus that there were two options for moving forward:

¹ Article 1.2. This Convention applies to all fishery resources of the Convention Area with the exception of sea mammals, sedentary species, i.e. organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil and, in so far as they are dealt with by other international agreements, highly migratory species and anadromous stocks.

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1. To express consensus on how to interpret the Convention in a declaration, or
2. To amend the Convention.²

The need to take note of, and cooperate with, a number of organisations and processes dealing with maritime and ocean affair was acknowledged. There were several ways of defining the necessary borderlines and the sharing of tasks.

The need for fisheries authorities to keep track of what is happening in a number of fora was stressed. It was suggested that NEAFC send observers to the OSPAR Working Group on Marine Protected Areas in order to report to the NEAFC Commission. This could be undertaken by Contracting Parties or the Secretariat.

The Chairman felt that the meeting had gone further than he had expected and suggested that the Group met again later this year before the Annual Meeting. This meeting should analyse text for a convention change and text for a declaration so the Commission would have both options. The text should be based on language in the SEAFO and Indian Ocean Convention and other relevant instruments and declarations.

He offered to produce a first draft in cooperation with the representatives of Contracting Parties. Each Contracting Party will appoint a contact person to whom the Chairman will submit his draft. This process should be finalised by late June.

4. The role of other regional and global organisations involved in ocean issues in the Convention Area, possible gaps or overlaps in ocean issues;

The Secretariat presented doc. 05/07, Annex 2.

In the ensuing discussion the following points were made:

Four issues seem to be high on the global agenda:

1. IUU fishing
2. Marine Protected Areas
3. Moratorium on bottom trawling in the high seas
4. Abandoned and lost fishing gear and ghost fishing

To be seen as a relevant and effective RFMO, NEAFC needs to address these areas. This process should, however, be done through looking at what was behind the issues and addressing the underlying causes based on sound science.

² Article 19.1. Any Contracting Party may propose amendments to this Convention. Any such proposed amendment shall be sent to the Secretary at least 90 days prior to the meeting at which the Contracting Party proposes it to be acted upon. The Secretary shall transmit the proposal immediately to the Contracting Parties.

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It was noted that perhaps NEAFC had been concentrating too much on the problems of allocation for a limited number of fish stocks which meant that events happening elsewhere had been missed.

Note was taken of upcoming events, in particular the conference in St. Johns Newfoundland³ during the first week of May and the meeting of the North Atlantic Fisheries Ministers⁴, later in May in Tórshavn, Faroe Islands. Ocean governance would be high on the list of issues at both events. These meetings should be seen as an opportunity to enhance common understanding of the political issues.

It was agreed that the concept of responsible fishing in the marine ecosystem should be the point of departure and NEAFC should continue to be a fisheries management organisation adding concerns for marine ecosystems to the fisheries management measures already in place.

Whatever tools were considered, it should be noted that decisions may affect other RFMOs such as ICCAT, NAFO, NASCO and NAMMCO and Regional Seas Programmes like OSPAR.

It was noted that NEAFC had four options:

1. Do nothing, which was not seen as an option;
2. Amend the Convention;
3. Agree to agree, which is possible under the present Convention as done in November 2004 but it was considered that this is probably not an option
4. Adopt a “London” declaration on how to interpret the Convention in matters addressing concerns, processes, instruments and commitments in ocean governance that have appeared on the international agenda since 1980 when the NEAFC Convention was signed.

It would be possible to include any amendments to the Convention in the ratification procedures already underway with respect to the amendments already agreed on dispute settlement

5. Future meetings

The Group will meet by correspondence over the next two months and convene – if necessary – on 28 and 29 June in Brussels to finalise texts for the 24th Annual Meeting.

³ Conference on the Governance of High Seas Fisheries and the UN Fish Agreement – Moving from Words to Action. St. John’s, Newfoundland and Labrador, Canada May 1-5, 2005

⁴ 10th NORTH ATLANTIC FISHERIES MINISTERS CONFERENCE - Sustainable fisheries & ocean governance in the North Atlantic. Tórshavn, Faroe Islands 31 May 2005

6. The report of the meeting

A first draft of the report of the meeting will be circulated to participants after the meeting.

7. Any other business

The representative of Denmark (in respect of the Faroe Islands and Greenland) informed about the meeting of North Atlantic Fisheries Ministers in Tórshavn on 31 May discussing *i.a.* ocean governance.

8. Actions arising

Actions arising

It was agreed that texts for a declaration and amendment of the Convention, based on recent conventions texts and other relevant legal instruments, should be prepared by a group monitored by the Chairman. The work would start at this meeting and each Contracting Party would appoint a contact person to participate electronically in further drafting.

The Group should meet again if necessary in the last week of June to prepare a final proposal for the 24th Annual Meeting. The EU invited the Group to meet in Brussels on 28 or 29 June 2005.

9. Closure of the meeting

The Chairman closed the meeting and wished everybody a safe journey home.

Annex 1

NEAFC - Working Group on the Future of NEAFC London, 26 April 2005

The NEAFC Convention in the context of recent developments concerning ocean governance

by

the Norwegian delegation

Several initiatives have over the last couple of years been taken to address the conservation and management of the marine ecosystems on the high seas, both by States, intergovernmental organisations and non-governmental organisations. In particular it should be mentioned that the UN General Assembly has urged regional fisheries management organisations to prohibit destructive fishing practices which have adverse impacts on vulnerable ecosystems, including seamounts, hydrothermal vents and cold water corals in areas beyond national jurisdiction. Further the World Summit on Sustainable Development (WSSD) 2002 in Johannesburg agreed on a detailed “Plan of Implementation” that includes a number of provisions regarding international and high seas fisheries (Articles 30 to 36), among them the establishment of marine protected areas (MPAs), including representative networks. The Convention on Biological Diversity (CBD) is also addressing MPAs in marine areas beyond national jurisdiction and has established an Ad Hoc Open-ended Working Group on Protected Areas.

At the annual meeting last fall, NEAFC agreed to close five seamounts and a section of the Reykjanes Ridge in the Regulatory Area for three years to bottom trawling and static gear, so as to protect vulnerable deep-water habitats. These closures were mainly a result of an understanding between the Contracting Parties that NEAFC should play a more proactive role in the international processes addressing challenges of overall ocean management.

Following the discussions during the annual meeting, it was agreed that the Working Group on the Future of NEAFC shall, among other things, examine how to strengthen the role of NEAFC in addressing overall ocean management in the Convention area and look into possible restriction in this respect in the Convention and consequent need for interpretation and/or amendment.

1. The current legal situation

Article 68 of the 1982 UN Law of the Sea Convention (the LOS Convention) specifies that Part V does not apply to sedentary species as defined in Article

77, paragraph 4. It thus appears to except such species from the rules of Part V on foreign access, requirements to ensure rational conservation and optimum utilisation and the obligation to co-operate with other states as regards shared stocks. Several regional fisheries management organizations, such as NEAFC, thus exclude sedentary species, from its scope of application, in accordance with article 77, paragraph.4. It could, however, be argued that there is no reason why general obligations relating to sustainable management, use and conservation set out in the LOS Convention should not apply to these species as well, since this is a dominant theme throughout the Convention.

Sedentary species and habitats occurring outside the EEZs will, in so far as they are found on the continental shelf as defined in Article 76 of the LOS Convention, also come within the scope of the sovereign rights and continental shelf jurisdiction of the coastal State in accordance with Part VI. The Commission on the Limits of the Continental Shelf set up under Annex II of the LOS Convention has only recently started reviewing submissions for the establishment of the limits of the continental shelf beyond 200 nautical miles, and no States Parties are under any obligation to make such submissions until 2009 at the earliest. The process of delimiting the areas of extended continental shelf that will be under national jurisdiction is therefore likely to take many more years.

High seas fishing is in principle open to all States, see Article 87 of the LOS Convention. However, Article 87 also states that this freedom must be exercised with due regard for the interests of other States and also with due regard for the rights under the Convention with respect to activities in the Area. Section 2, Part VII, of the LOS Convention (Articles 116-119) states that the right to engage in fishing on the high seas is further subject to treaty obligations, and to the rights and duties as well as the interests of coastal States (see for example Article 63, paragraph 2, and Articles 64 to 67 of the Convention).

States further have obligations to take such measures with respect to their respective nationals as may be necessary for the conservation of the living resources of the high seas (Article 117) and to co-operate with other States in conservation and management of these resources (Article 118). Moreover, the LOS Convention obliges coastal States and other States that fish for highly migratory species to co-operate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of highly migratory species throughout the region, both within and beyond the EEZ of the coastal State, see Article 64 of the LOS Convention. In regions where no appropriate international organisation exists, the States concerned are obliged to co-operate to establish such an organisation and to participate in its work. These provisions apply to all living resources, including species that are not sedentary as defined in Article 77 of the LOS Convention. The 1995 Agreement further defines and elaborates these obligations with respect to straddling stocks and highly migratory stocks.

Species and ecosystems outside the extended continental shelf as defined in the LOS Convention Article 76 are by definition in the “Area”, which is to be managed by International Seabed Authority (ISA) in accordance with Article 134, paragraph 4, and Article 136 of the LOS Convention. ISA’s competence applies to all “resources” in the Area, meaning “all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules”. In extracting resources from the Area and with respect to all other activities, the Authority is obliged to take all “necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from such activities” and shall adopt appropriate rules, regulations and procedures for “the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment”.

It is questionable, however, whether the Authority has the mandate and the competence to manage the living marine resources of the Area. It is also quite clear that the rules and regulations pertaining to the Area do not have any effect on the legal status of the waters superjacent to the Area, see Article 135, but some habitats and ecosystems are found in the subsoil under the Area, and here the situation appears to be less clear.

Article 8, paragraph a, of the CBD requires Parties as far as possible to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity”. A protected area under CBD differs from “a particularly clearly defined area”, as mentioned in Article 211, paragraph 6, of the LOS Convention, and is understood to be “a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives”, see Article 2. At the same time it is clear that with regard to the marine environment, the rights and obligations set out in the CBD must not be in conflict with those laid down in the LOS Convention, see Article 22, paragraph 2. The establishment of protected areas in the high seas would appear to be in conflict with the prohibition of the LOS Convention Article 89, under which “no State may validly purport to subject any part of the high seas to its sovereignty”. Equally, Article 137, paragraph 3, of the LOS Convention states that no claim, acquisition or exercise of any rights with respect to minerals recovered from the Area by any state or natural or juridical person shall be recognised. Furthermore, it is quite clear that no marine scientific research activities can constitute the legal basis for any claim to any part of the marine environment or its resources. It would thus appear that while States may undertake to designate protected areas under Article 8, paragraph a), of the CBD in areas under their jurisdiction and in accordance with the LOS Convention, before such areas can be established on the high seas, there is a need to examine the existing legal framework, and the UN General Assembly has taken initiatives in this regard.

2. Relevant terms used in some global instruments

The term “fish” is defined in 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 (the 1995 Agreement) to include molluscs and crustaceans except those belonging to sedentary species as defined in article 77 of the LOS Convention. It could be argued that “fish” and “fishery resources” are equal terms.

The term “living marine resources” is used quite frequently, cf. Articles 1, 6, 7, 11, 24 and 30 of the 1995 Agreement and the preamble, article I and article IX of the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement). It should be mentioned that the LOS Convention refers to “living resources”, cf. for example section 2 of part VII (Conservation and management of the living marine resources of the high seas). The inclusion of the word “marine” first appeared in Agenda 21 where States committed themselves to the conservation and sustainable use of marine living resources on the high seas. It seems like, in some cases at least, that the terms “living marine resources” and “fishery resources” are equal. For example is a “fishing vessels” defined in the Compliance Agreement to mean any vessel used for exploitation of living marine resources, thus defining “fishing” to be harvesting of marine living resources. But this is probably not intentional. The term “living marine resources” has a broader application than “fishery resources” as it would for instance include aquatic plants, corals and sponges.

The term “conservation and management measures” is defined in the 1995 Agreement and in the Compliance Agreement to be measures to conserve and manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the LOS Convention, cf. Article 1 of the 1995 Agreement and Article I of the Compliance Agreement.

3. Mandates of other RFMOs

Just a few RFMOs have the competence to regulate bottom fisheries, among them NEAFC. Others are the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Northwest Atlantic Fisheries Organization (NAFO) and the South East Atlantic Fisheries Organization (SEAFO). Work is now going on for the establishment of the Southern Indian Ocean Fisheries Agreement (SIOFA) with the competence to regulate also bottom fisheries in the Southern Indian Ocean. There are several other RFMOs with mandates to regulate highly migratory species such as tuna and swordfish, thus dealing only with fishing activities in the upper part of the water column.

3.1 CCAMLR

Concerning application, Article I of the CCAMLR Convention states the following:

”1. This Convention applies to the Antarctic marine living resources of the area south of 60° south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.

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2. *Antarctic marine living resources means the population of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence.*
3. *The Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment.*

The objective and general principles are referred to in Article II, which read as follows:

- “1. *The objective of this Convention is the conservation of Antarctic marine living resources.*
2. *For the purposes of this Convention, the term “conservation” includes rational use.”*
3. *“any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles:*
 - a) *prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensure the greatest net annual increment;*
 - b) *maintenance of the ecological relationship between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the level defined in sub-paragraph a) above; and*
 - c) *prevention of changes or minimisation of the risk of changes in the marine ecosystem which not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources”.*

3.2

NAFO

In accordance with Article I, paragraph 4, the NAFO Convention applies to:

“all fishery resources of the Convention Area, with the following exceptions: salmon, tunas, marlins, cetacean stocks managed by the International Whaling Commission or any successor organization, and sedentary species of the Continental shelf, i.e. , organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.”

The objective of the Convention is to *“contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources in the Convention Area”*, cf. Article II, paragraph 1.

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NAFO consists of a General Council, a Scientific Council, a Fisheries Commission and a Secretariat. The Fisheries Commission is responsible for the management and conservation of the fishery resources in the Regulatory Area, cf. Article XI, paragraph 1 of the Convention. The functions of the Commission are set out in paragraph 2 of Article XI and reads as follows:

“The Commission may adopt proposals for joint action by the Contacting Parties designed to achieve the optimum utilization of the fishery resources of the Regulatory Area. In considering such proposals, the Commission shall take into account any relevant information or advice provided to it by the Scientific Council”.

Further the Convention includes specified competence and guidelines for the allocation of catches, cf. Article XI, paragraph 4, and the authority to establish control and enforcement measures, cf. Article XI, paragraph 5.

3.3 SEAFO

The Convention defines some terms in Article 1, among them “fishery resources” and “living marine resources”. For the purpose of the Convention:

“Fishery resources” means resources of fish, molluscs, crustaceans and other sedentary species within the Convention Area, excluding (i) sedentary species subject to the fisheries jurisdiction of coastal States pursuant to article 77 paragraph 4 of the 1982 Convention; and (ii) highly migratory species listed in Annex I of the 1982 Convention, and

“Living marine resources” means all living components of marine ecosystems, including seabirds.

Pursuant to Article 2 the objective is:

“To ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area through effective implementation of this Convention”

The general principles are included in Article 3, which reads:

“In giving effect to the objective of this Convention, the Contracting Parties, where appropriate through the Organisation shall, in particular:

- a) adopt measures, based on the best scientific evidence available, to ensure the long term conservation and sustainable use of the fishery resources to which this Convention applies;*
- b) apply the precautionary approach in accordance with article 7;*
- c) apply the provisions of this Convention relating to fishery resources, taking due account of the impact of fishing operations on ecologically related species such as seabirds, cetaceans, seals and marine turtles;*
- d) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem as, or associated with dependent upon, the harvested resources;*

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- e) *ensure that fishery practices and management measures take due account of the need to minimise harmful impacts on living marine resources as a whole; and*
- f) *protect biodiversity in the marine environment.”*

3.4 SIOFA

Pursuant to Article 1 (definitions) of the draft dated 16 July 2004 concerning the Southern Indian Ocean Fisheries Agreement "fishery resources" means:

resources of fish, molluscs, crustaceans and other sedentary species within the Area, but excluding:

- (i) *sedentary species subject to the fishery jurisdiction of coastal States pursuant to article 77 paragraph 4 of the 1982 Convention; and*
- (ii) *highly migratory species listed in Annex I of the 1982 Convention;*

Article 2 sets out the objectives of the Agreement and reads as follows:

The objectives of this Agreement are to ensure the long term conservation and sustainable use of the fishery resources in the Area through cooperation among the Contracting Parties, and to promote the sustainable development of fisheries in the Area, taking account of the needs of developing States bordering the Area that are party to this Agreement, and in particular the least-developed among them and small island developing States.

Further in Article 4, the general principles of the Agreement are (text in brackets are still under discussion):

“In giving effect to the duty to cooperate in accordance with the 1982 Convention and international law, the Contracting Parties shall apply (...) in particular the following principles:

- a)adopt measures based on the best scientific evidence available to ensure the long term conservation of fishery resources, taking into account the sustainable use of such resources and implementing an ecosystem approach to their management;*
- b)[take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;]*
- [b)ensure that measures taken are commensurate with the sustainable use of fishery resources;]*
- c)apply the precautionary approach in accordance with the Code of Conduct and the 1995 Agreement[, noting that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures];*

- d) manage the stocks so that they are maintained at levels that are capable of producing the maximum [economic] sustainable yield, and rebuild depleted stocks to the said levels;*
- e) ensure that fishing practices and management measures take due account of the need to minimize the harmful impact of fishing activities on the marine environment;*
- f) protect biodiversity in the marine environment;*
- g) give full recognition to the special requirements of developing States bordering the Area that are party to this Agreement, and in particular the least-developed among them and small island developing States.”*

4. Possible restrictions of the NEAFC Convention

As outlined above, one of the issues the Working Group should look into is the possible restriction in the Convention in the respect of the strengthening of the role of NEAFC in addressing overall ocean management in the Convention Area, including the consequent need for interpretation and/or amendment.

The NEAFC-Convention applies to “*all fishery resources in the Convention Area with the exception of sea mammals, sedentary species, i.e. organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil and, in so far as they are dealt with by other international agreements, highly migratory species and anadromous stocks.*”, cf. Article 1, paragraph 2. Species that are sedentary form part of the natural resources referred to in Part VI of the LOS Convention, which consist of mineral and other non-living resources of the seabed and subsoil, as well as living organisms belonging to sedentary species. The definition of sedentary species in Article 77 of the LOS Convention is equal to the definition appearing in the NEAFC Convention. Examples of such organisms are bivalves such as oysters and mussels, sea anemones and attached algae. According to Article 1, paragraph 2, there is a general exception for sedentary species in NEAFC. In NAFO, SEAFO and in the draft for SIOFA, the exceptions are related to sedentary species as referred to in Article 77 of the LOS Convention (rights of coastal States over the continental shelf). Thus the NEAFC Convention does not apply to sedentary species living either on or off the continental shelves in the Regulatory Area.

NEAFC has the competence to close areas outside the fisheries jurisdiction of Contracting Parties for fishing activities (for example bottom fisheries), cf. Article 7 of the NEAFC Convention, compared with Article 1, paragraph 2 and Article 5 of the NEAFC Convention. The competence is thus limited to closures related to “fishery resources” as defined in Article 1, paragraph 2. Consequently the Commission does not have a clear mandate to establish closed areas in order to protect seamounts, hydrothermal or cold-water corals as such. The justification for any closure must therefore be that this action is related to the conservation optimum utilisation of the fishery resources (for example deep-sea species, with the exception of sedentary species) in the Convention Area, cf. Article 4, paragraph 1 of the NEAFC

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Convention. This was the approach taken when NEAFC agreed to close some areas for bottom fisheries as from 1 January 2005.

Compared to for example CCAMLR, SEAFO and the draft for SIOFA, there seems to be shortcomings in the NEAFC Convention in order to address the management of the oceans in a wider perspective. The main concern is related to the scope of the Convention. As pointed out above, the mandate refers only to “fishery resources” and it specifically excludes any sedentary species. However, if the NEAFC Parties “agree to agree”, there is probably sufficient space for a possible interpretation in the Convention itself, and that was actually what happened in November last year. But from a legal perspective possible recommendations concerning for example closures of areas to protect corals etc could be challenged. Further, compared to some of the other RFMOs the objective might seem a little bit too general as it refers to “*the conservation and optimum utilisation* of the fishery resources in the Convention Area”. On the other hand, such a general and rather limited objective might give the Commission the flexibility required to take any action deemed necessary.
