1. Opening

The Chair, Mr Gylfi Geirsson (Iceland), opened the meeting at 10 am, welcoming everybody. All Contracting Parties were present. He drew attention to the 20 July request of the NEAFC President, for PECCOE to report back to the Commission within two weeks on the IUU listing of the vessel “Franziska” and the subsequent request to also report on the vessels “Enterprise” and “Pacific Voyager”. No Party wished to make an opening statement.

2. Appointment of the rapporteur

The Secretariat was appointed rapporteur.

3. Discussion and adoption of the Agenda

The agenda, PE-2011-02-01 was tabled. The Chair proposed that the issue of the vessel “Enterprise” be added to agenda item 4.

The representative of Denmark (in respect of the Faroe Islands and Greenland) asked for clarification on the task to be undertaken under agenda item 4. The Chair stated that a decision must be made on whether the vessels concerned should be removed from the A list or moved to the B list.

The agenda was adopted as amended and with the clarification provided by the Chair.

4. Listing on IUU A List of Peruvian vessels “FRANZISKA” and “ENTERPRISE”
The Chair listed the relevant documents.

The representative of Denmark (in respect of the Faroe Islands and Greenland) requested that the Secretary go over the events that had lead to this Extraordinary Meeting being called.

The Secretary stated that a notification had been received from the EU on 12 July, identifying the vessel “Franziska” pursuant to Article 37.1 of the Scheme. The Secretary had followed the letter of the Scheme in thereby placing the vessel on the IUU A list. Denmark (in respect of the Faroe Islands and Greenland) had subsequently requested that the vessel be removed from the A list. The NEAFC President had consulted the NEAFC Heads of Delegation on whether that should be done. Following that consultation, the conclusion of the President on 20 July was to request that PECCOE hold a meeting and make a recommendation to the Commission within two weeks as to whether the vessel should be removed from the A list.

On 22 July, two other vessels, “Enterprise” and “Pacific Voyager”, were identified by the EU pursuant to Article 37.1 of the Scheme, and subsequently placed on the A list by the Secretary. Denmark (in respect of the Faroe Islands and Greenland) requested that both vessels be removed from the A list. The President subsequently requested PECCOE to make a recommendation regarding these vessels, in addition to the vessel “Franziska”.

Upon receiving the information that “Pacific Voyager” was in fact not a non-Contracting Party vessel, and having consulted with the President, the Secretary removed the vessel “Pacific Voyager” from the A list as it was not a non-Contracting Party vessel and Article 37.1 of the Scheme therefore did not apply to it.

The EU representative requested clarification on the practical implications of an A listing. The Secretary explained the provisions found in Article 45.1 of the Scheme, including the implications of PECCOE making a recommendation for a vessel to be removed from the A list, where the only measure remaining is the general requirement to inspect a non-Contracting Party vessel when it enters port.

The EU representative noted that in her understanding, until such time as PECCOE recommends the removal of the vessels from the "A" list, Contracting Parties are held to apply the measures listed in Article 45(1) of the Scheme, including not authorising the vessels concerned to land or tranship.

The representative of Denmark (in respect of the Faroe Islands and Greenland) stated that Article 37.1 must be read in context, and that it is only activated if there are relevant NEAFC Recommendations in force which are to be presumed undermined. In this context the representative of Denmark (in respect of the Faroe Islands and Greenland) referred to Article 37.2 of the Scheme, which was held to support the reading that the notification procedure under Article 37.1 of the Scheme only becomes operative with regard to fishing activities in maritime areas within the jurisdiction of Contracting Parties where the legal basis of the NEAFC Recommendation is Article 6 of the Convention.
stated that he felt that the Secretary should not have placed the vessels on the A list, as no Recommendation was being undermined. The Recommendation on mackerel is based on Article 5 of the Convention, and therefore per se cannot prejudice Contracting Parties exercise of sovereign and exclusive rights, as reflected in Part V of United Nations Convention on the Law of the Sea, to, inter alia, manage fisheries in maritime areas within national jurisdiction. The representative of Denmark (in respect of the Faroe Islands and Greenland) further stated that being an international organisation, vested with international legal capacity, the NEAFC may entail international responsibility, which could imply due compensation claims from private actors that are subject to its normative legal acts. Hence, it is clear that any latitude Contracting Parties see in Article 37.1 of the Scheme must be used with caution.

The representative of Denmark (in respect of the Faroe Islands and Greenland) also referred to its Notes Verbales which had been submitted to the Secretariat where it was made clear that Denmark (in respect of the Faroe Islands and Greenland) considered the invalid listing null and void. The ratione loci of NEAFC is limited, and the territorial scope of the validity of its acts is, accordingly, predetermined, the consequence of which is that the NEAFC SCH 11/11 and NEAFC SCH 11/12, by which the listings of the vessels “Franziska”, “Pacific Voyager” and of “Enterprise” are notified, are null and void, merely because the relevant NEAFC Recommendation, which could be presumed undermined, is adopted on the basis of Article 6 of the Convention. He further pointed out that where the listing of a vessel under the NEAFC IUU A-list is retracted implies an annulation ex tunc (as opposed to ex nunc), i.e. with retroactive effect.

The Secretary stated that he had acted in accordance with the letter of the Scheme, which did not include him making any judgement on the appropriateness of a listing but to place any vessel on the A list that a Contracting Party identifies pursuant to Article 37.1 of the Scheme.

The Chair stated that the role of the Secretary was to implement the rules of NEAFC and, as far as he could see, this is what he had done in this case.

The EU representative pointed out that the Scheme imposes on Contracting Parties a clear obligation to take the measures listed in Article 45 in respect of vessels included in the A list. This cannot be subject to a retroactive effect of a delisting decision without undermining the Scheme’s entire approach. The EU representative agreed that the role of the Secretary was not to make a judgement on whether a listing was appropriate or not, but to follow the Scheme which in this case led to placing the vessels on the A list as they had been identified pursuant to Article 37.1 of the Scheme. However, the EU considered that the Secretary had made such a judgement regarding the vessel “Pacific Voyager” when he removed it from the A list. The issue of whether “Pacific Voyager” should be removed from the A list should have been discussed by PECCOE along with the “Franziska” and the “Enterprise”.

The representative of Denmark (in respect of the Faroe Islands and Greenland) agreed that there was inconsistency in the Secretary removing the “Pacific Voyager” from the A list.
list, but not agreeing to remove the “Franziska” and the “Enterprise” despite there also being a lack of a legal basis for their inclusion on the A list. He pointed to the fact the function of PECCOE is, pursuant to Article 2 of its terms of reference, limited to activities in the Regulatory Area and repeated the position that, as there was no NEAFC Recommendation in force that applied to waters under the national jurisdiction of the Contracting Parties, the exercise of Faroese authorities to authorise vessels flying the flag of non-cooperating non-Contracting Parties to conduct fishing activities in maritime areas within the jurisdiction of the Faroes cannot undermine a NEAFC Recommendation whose legal basis is Article 5 of the Convention. The vessels should therefore not be on the IUU A list. He furthermore pointed to there being some inconsistencies in the Scheme, which made it necessary to take account of all relevant factors in implementing it, including the limitations set out in the Convention.

The representative of Denmark (in respect of the Faroe Islands and Greenland) reiterated that its participation in this Extraordinary Meeting of PECCOE is limited to seek an expeditious solution to the invalid listings of the vessels “Franziska” and “Enterprise”. In no manner shall it be considered an acquiescence of valid listings of the vessels.

The Norwegian representative agreed that there are inconsistencies in the Scheme. He stated that, regardless of such inconsistencies, we have no choice but to follow the Scheme to the extent possible.

The Icelandic representative agreed with Norway that there was no alternative to following the Scheme.

The representative of the Russian Federation stated that this was a somewhat complicated issue. Nevertheless, the fact remained that the vessels are fully authorised by the Faroe Islands to operate in their waters. There is no NEAFC Recommendation that applies to waters under national jurisdiction, and the vessels had therefore not conducted any IUU fishing activity. He therefore proposed that PECCOE recommends that the vessels be removed from the IUU A list.

The representative of Denmark (in respect of the Faroe Islands and Greenland) agreed that no IUU activity had been conducted by the vessels, and referred to the definition of IUU fishing in the FAO International Plan of Action, which is also the NEAFC definition according to Article 1(l) of the Scheme. As the NEAFC Recommendation on mackerel is based on Article 5 of the Convention it only applies to the Regulatory Area and the authorised activities in waters under national jurisdiction therefore cannot fall under the definition of IUU.

The EU representative agreed that the Scheme was not perfect, and that it could of course never be perfect. She stated that there was a need to rely on the letter of the Scheme and the will to make it work in practice. She considered that, in light of the wording of the Scheme, it would have been useful if Denmark (in respect of the Faroe Islands and Greenland) had notified other Contracting Parties that they had authorised the non-Contracting Party vessels to operate within waters under their national jurisdiction. Such
a notification would have removed the uncertainty that was created by there being non-Contracting Party vessels engaged in fishing activities in the Convention Area. She stated that the EU had acted fully in accordance with the Scheme by identifying the vessels pursuant to Article 37.1 of the Scheme, not least as the EU did not have information on the vessels being authorised by the Faroe Islands.

The representative of Denmark (in respect of the Faroe Islands and Greenland) recognised that there were differing views as to the application of the Scheme. He disagreed with the conclusion that the only option had been to place the vessels on the A list. He further stressed that given the apparent ambiguity it is imperative that Contracting Parties act in good faith. In response to the EU, he pointed out that there was no requirement to notify Contracting Parties of non-Contracting Party vessels operating within their national jurisdiction.

The EU representative agreed that there is no obligation to notify Contracting Parties of all such vessels, but said it would be appropriate to do so on a voluntary basis regarding vessels that are engaged in activities that relate to fish stocks managed by NEAFC. She pointed to Article 3 of the Scheme in this context. Such exchange of information would make co-operation easier and help prevent situations like the one that has now arisen. Although it is impossible to say how one would have reacted to a situation that did not occur, it is reasonable to assume that the process would have been very different, for example, a discussion on means to address the fact that the Scheme does not address this situation, rather than a discussion on listing and de-listing vessels.

She further pointed out that even if the NEAFC Recommendation only applies to the Regulatory Area, the fisheries resources occur in other areas as well and NEAFC must strive to ensure proper conservation and management in all areas. Compatibility of conservation and management measures adopted for the high seas and for the EEZ is an obligation of the Parties concerned under the Law of the Sea, and we cannot look at the Regulatory Area in absolute isolation.

She noted in this respect the EU concerns about the activities on the mackerel stock taking place in Faroese waters as countering NEAFC efforts to conserve and manage sustainably this resource. She indicated that the EU reserved the right to attach a statement to the report in this respect.

The representative of Denmark (in respect of the Faroe Islands and Greenland) noted that this issue had shown that it is necessary to make some amendments to the Scheme, and stated that Denmark (in respect of the Faroe Islands and Greenland) would prepare proposals in this context for a future meeting.

He further stressed that NEAFC can set management measures that apply to the whole Convention Area, based on Article 6 of the Convention, and the fact that the measures for mackerel were based on Article 5 should be seen as explicitly leaving waters under national jurisdiction outside the scope of the NEAFC Recommendation. He furthermore reiterated that the activities of the vessels did not fall within the definition of IUU.
The Chair stated that the main issue for this meeting was whether the vessels in question should be removed from the A list or placed on the B list. His understanding of the interventions so far was that the Russian Federation and Denmark (in respect of the Faroe Islands and Greenland) had stated that they felt that the vessels should be removed from the A list, while the other Contracting Parties had not been explicit in which option they favoured.

The Chair proceeded to ask all delegations for a position on whether the vessel “Franziska” should be removed from the A list or placed on the B list.

The representatives of Denmark (in respect of the Faroe Islands and Greenland) and the Russian Federation confirmed that their position is that the vessel should be removed from the A list.

The Norwegian representative stated that, as a non-Contracting Party vessel, the “Franziska” can be placed on the IUU list. It had indeed engaged in fishing activities that under the Scheme are presumed to undermine NEAFC Recommendations. Even if a Recommendation only applies to the Regulatory Area, fishing in waters under the national jurisdiction of a Contracting Party can undermine the Recommendation.

He reminded delegates that the Contracting Parties had agreed that only vessels flying the flag of a Contracting Party should take part in the mackerel fisheries. Although the legal application of that agreement only applied to the Regulatory Area, Denmark (in respect of the Faroe Islands and Greenland) could be seen as doing the opposite of what was agreed.

The Norwegian representative stated that the process thus far had been in accordance with the Scheme as it stands. Any future amendment of the Scheme would not affect that. He concluded that the vessel should possibly be seen as undermining NEAFC Recommendations and was therefore not ready to give a clear answer on whether the “Franziska” should be removed from the A list without more discussions.

The EU representative agreed with the Norwegian representative that the vessel can be considered as undermining NEAFC Recommendations. She pointed to the fact that the Scheme obliges PECCOE to take account of responses from the flag State. In this case, the response from the flag State included assertions that the EU could not accept and said that the EU would not agree to a conclusion that could be understood to agree with these assertions. This included the statement that placing the vessel on the A list had constituted a material error and that the vessel can not be considered to be undermining NEAFC Recommendations. Contrary to these claims, placing the vessels on the A list had been in full compliance with applicable rules and there was clearly a possibility that the activities of the vessels were undermining NEAFC Recommendations.

The Icelandic representative pointed out that the choice PECCOE had was between removing the vessel from the A list and placing it on the B list. He stated that he would
be very reluctant to place the vessel on the B list in light of the available information. He furthermore stated that, while he did not agree with everything contained in the letter from the flag State, he considered that PECCOE had been presented with sufficient information to recommend to the Commission that the vessel be removed from the A list.

The Chair noted that no delegation was suggesting that the vessel should be placed on the IUU B list, and that the hesitation in agreeing to removing it from the A list mostly concerned the need to ensure that this did not send signals that Contracting Parties were agreeing with statements that they in fact disagree with.

He suggested that a way forward might be to send a recommendation to the Commission that did not only include a conclusion that the vessel should be removed from the A list, but also a statement of a few points that PECCOE considered important in this context and would make it clear that removing the vessel from the A list did not equate agreeing with all the points made by the flag State.

The Chair proposed that he would table a draft for such a recommendation to the Commission, which the Contracting Parties could then amend as necessary.

The delegations agreed that this could be a way forward and agreed to consider a draft that the Chair would formulate.

The Chair asked if the draft should cover both the “Franziska” and the “Enterprise”, or only the “Franziska”. All delegations agreed that the “Franziska” and the “Enterprise” should be dealt with in the same way, so the Chair’s draft should cover them both.

The EU representative furthermore considered that the “Pacific Voyager” should have been included in this process within PECCOE as well, as the Secretary should not have removed the vessel from the A list without the matter being discussed in PECCOE.

The representative of Denmark (in respect of the Faroe Islands and Greenland) agreed that the actions of the Secretary constituted making a judgement on the appropriateness of a listing in one case while not making such a judgement in the cases of the “Franziska” and the “Enterprise”. This may equate with the Secretariat’s acquiescence of a listing in a particular case, while disapproving with other listings. This could have unfortunate legal consequences. He agreed with the EU that the Secretary had therefore been inconsistent in his handling of the three vessels. He also reiterated that invalid listings of vessels on the NEAFC IUU A-list may, as appropriate, entail the international responsibility of NEAFC.

After some discussion, the EU agreed not to include the “Pacific Voyager” in the formal recommendation of PECCOE to the Commission. She stated that she agreed to this on the condition that the report of the meeting clearly shows the opinion of the EU that the Secretary should not have removed the “Pacific Voyager” from the A list, but should rather have let PECCOE deal with that vessel at the same time as it deals with the “Franziska” and the “Enterprise”.

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After the Chair presented his draft for a recommendation from PECCOE to the Commission, the EU presented an alternative version of the draft which became the basis of discussion on the final wording.

After an extensive discussion on the wording of the recommendation that PECCOE should send to the Commission, the conclusion is contained in Annex 1.

The text of the recommendation of PECCOE to the Commission was agreed in light of the fact that several points that Contracting Parties consider important are reflected in the report of the meeting.

The Chair stated that, in his opinion, the current wording of the Scheme includes an automatic procedure. However, he pointed out that placing a vessel on an IUU list was a serious matter and requires that Contracting Parties acted in a consistent manner. In the same way that PECCOE recommendations to remove a vessel from an IUU list must be based on concrete arguments, a decision to place a vessel on an IUU list must also be based on concrete arguments. Increased exchange of information could perhaps help in this context, and amendments of the Scheme might also be necessary.

It was agreed to transmit to the Commission as one package both the recommendation of PECCOE regarding the “Franziska” and the “Enterprise”, and the report of the meeting. It was considered that this would provide both the clear recommendation that was sought and information on the points raised at the meeting which resulted in this recommendation.

The representative of Denmark (in respect of the Faroe Islands and Greenland) asked that the three Notes Verbales that it had sent to the Secretariat regarding the listing of the “Franziska”, the “Pacific Voyager” and the “Enterprise” be appended to the report of the meeting, as they set out in a clear manner the position of Denmark (in respect of the Faroe Islands and Greenland).

5. Any other business

The representative of Denmark (in respect of the Faroe Islands and Greenland) reiterated that Denmark (in respect of the Faroe Islands and Greenland) intended to introduce proposals to amend the Scheme, as the issue being discussed at this meeting showed that improvements to the current wording are necessary.

6. Report to the Commission by 3 August 2011

The report was adopted on 28 July 2011. The Secretary confirmed that it would be transmitted to the Contracting Parties without delay.
7. Closure of the meeting

The Chair closed the meeting at 15:00 pm and thanked everybody for a fruitful meeting. He wished all participants a safe trip home.
RECOMMENDATION BY PECCOE TO THE COMMISSION

PECCOE recommends to the Commission that the vessels “Franziska” (IMO 8802997) and “Enterprise” (IMO 9207211), flying the flag of Peru, be removed from the provisional list of IUU vessels (A list).

However, in this context PECCOE stresses the following points:

The vessels were placed on the A list in accordance with the procedures laid down in the NEAFC Scheme of Control and Enforcement. The decision to recommend removal of these vessels from the A list is taken in accordance with Art. 44.4(d) of the Scheme.

PECCOE holds that fishing activities within waters under national jurisdiction can undermine the effectiveness of Recommendations established under the Convention.

PECCOE notes that the situation affecting the aforementioned vessels is not fully envisaged by the Scheme. In the interest of facilitating cooperation towards its implementation in the short term, PECCOE recommends that all Contracting Parties agree to share information regarding non-Contracting Party vessels they authorise to engage in fishing activities conducted on fisheries resources in waters under their national jurisdiction.
EU statement to PECCOE report

London, 27/28 July 2010

- NEAFC Parties have cooperated together for a number of years now to ensure sustainable fisheries for the benefit of our respective fishing sectors.
- In the fight against IUU fishing, it is crucial to have strong leadership from RFMOs. NEAFC must be seen above reproach. It is right and appropriate for it to have strong measures in place to deter IUU activity in the Convention Area.
- NEAFC has introduced many management instruments, both annual measures as well as the NEAFC Port State Scheme and others to reinforce that objective and is acknowledged to have accomplished much in this respect.
- NEAFC has adopted strategies to address IUU fisheries and, in general, consistent efforts to ensure that no non-Contracting Party vessels conduct fishing operations in the NE Atlantic – we have adapted our instruments to ensure its general application throughout the Convention Area.
- In relation to mackerel, the NEAFC Parties, which are Coastal States for mackerel, recognised that the current disagreements on quota shares could potentially be exploited by non-Contracting Parties sending vessels to the NE Atlantic.
- That was why NEAFC Parties agreed for 2011 that we must ensure that NCP vessels were kept out of the mackerel fishery and hence a measure was adopted for the Regulatory Area.
- The situation we now have with Faroe Islands authorising mackerel fishing by vessels flagged to non-cooperating NCPs is in complete contradiction with NEAFC policy and objectives.
- We now witness a NEAFC Party who, having set an unrealistic and unsustainable quota which far exceeded its capacity to fish such quantities, is importing temporarily vessels flagged to NCP, vessels on whose record the EU has serious concerns.
- This is a retrograde and irresponsible action by the Coastal State. It calls into question their commitment to co-operate with other NEAFC Parties. It undermines everything we have sought to accomplish in NEAFC.
- This is an issue which this Committee is not competent to address, but it will certainly be taken up by the NEAFC Parties in the Fisheries Commission.
Statement of Denmark (in respect of the Faroe Islands and Greenland)

London 28 July 2011

This delegation has participated in this Extraordinary Meeting of PECCOE in order to resolve in an expeditious manner an issue of importance for all Contracting Parties.

The North East Atlantic Fisheries Commission has a strong record of effective measures to prevent, deter and eliminate illegal, unreported, and unregulated fisheries. Denmark (in respect of the Faroe Islands and Greenland) will continuously strive to achieve the regional and global goal of eliminating IUU fisheries. We note, however, that the good efforts, and mutual trust between the Contracting Parties, have been put at stake. The European Union has employed the notification procedure in the NEAFC Scheme of Control and Enforcement, not only on the basis of a selective interpretation of the Scheme, but also in a manner which deliberately seeks to encroach upon coastal States powers, pursuant to international law, as reflected in Part V of the United Nations Convention of the Law of the Sea, to, *inter alia*, manage fisheries in maritime areas within the jurisdiction of other Contracting Parties.

Denmark (in respect of the Faroe Islands and Greenland) wishes to stress that the failure to agree on the adoption of a NEAFC Recommendation on the basis of Article 6 of the Convention, that is which applies throughout the range of the Convention Area, is the responsibility of all Contracting Parties.

This delegation reiterates the inappropriateness of seeking to exploit the absence of a NEAFC Recommendation for mackerel throughout the range of its migration, by seeking to hinder the exercise of Contracting Parties’ sovereign rights, on what would appear to be non-sustainable readings of the NEAFC Scheme. This delegation trusts that equivalent procedures will not be repeated in the future.
The Faroese Representation to London presents its compliments to the Secretariat of the North East Atlantic Fisheries Commission (NEAFC) and, acting upon instruction from the Government of the Faroes, has the honour to refer to the notification SCH 11/11 communicated to the Ministry of Foreign Affairs of the Faroes on 12 July 2011 in which Contracting Parties to the Convention on Future Multilateral Co-Operation in North-East Atlantic Fisheries (Convention) are informed that the vessel *Franziska* (IMO 8802997) is placed on the NEAFC IUU A-list as the vessel in question “is not authorised to operate in the NEAFC Regulatory Area.”

The vessel *Franziska* has been duly authorised by relevant Faroese authorities to undertake fisheries for mackerel in maritime areas within national jurisdiction. The notification of European Union authorities, which triggered the above-mentioned listing on NEAFC IUU A-list, relates to activities which do not occur in the NEAFC Regulatory Area. On the contrary, the fishery in question occurs in maritime areas within national jurisdiction, in which the Faroes exercise, pursuant to international law as reflected in Part V of the United Nations Convention on the Law of the Sea, exclusive and sovereign rights to, *inter alia*, establish management and conservation measures for living resources.

Pursuant to a well-established principle in international law, the legality of the acts of an international organisation is subject to its concordance with its founding treaties. Article 6(1) of the Convention establishes the residual rule with regard to the *ratione loci* of NEAFC, i.e. those parts of the Convention Area that are beyond maritime areas within national jurisdiction of the Contracting Parties to the Convention. This area is referred to as the “Regulatory Area”. It is only in cases where Contracting Parties confer powers to the NEAFC Commission to adopt relevant measures within maritime areas within national jurisdiction that NEAFC, and its Secretariat, may seek to extend the material scope of the Convention to also comprise maritime areas within national jurisdiction.

The NEAFC Commission has not been conferred with powers to adopt Recommendations with regard to the fishing activities of mackerel in Contracting Parties’ maritime areas within national jurisdiction. This implies that its powers *ratione loci* continue to be limited to the Regulatory Area.

Subsequent Agreements may, pursuant to Article 31(3)(a) of the Vienna Convention on the Law of Treaties, to some extent alter the ordinary meaning of a treaty provision. Yet, in no manner can Article 37(1) of NEAFC Scheme of Control and Enforcement (Scheme) be conferred a meaning that
would supplant the principle of fundamental importance as to the powers of NEAFC, namely its residual *ratione loci* limited to maritime areas beyond national jurisdiction, as expressed in the Convention. Further, even if, although being non-sensical, Article 37(1) would have supplanted an ordinary meaning of Article 6 of the Convention, its due application presupposes, pursuant to Article 37(2) of the Scheme, the adoption of "Recommendations established under the Convention". As the International Court of Justice has recognised in its Advisory Opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, a rule of international law operates within "a wider framework of legal rules of which it only forms a part", failing which an interpretation may be "incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules".

The NEAFC Commission has not adopted Recommendations with regard to management and conservation measures for mackerel in maritime areas within national jurisdiction of the Contracting Parties to the Convention. Thus the listing of the vessel *Franziska* on the NEAFC IUU A-list not only encroaches upon the discretionary powers of the Faroes to enact its fishery policy in maritime areas within national jurisdiction, but is also inconsistent with the NEAFC powers. This invalid listing must accordingly be immediately deprived of any legal effect, the vessel removed from the NEAFC IUU A-list, and other Regional Fisheries Management Organisations duly notified, as a matter of urgency.

London, 16 July 2011
NOTE VERBALE

The Ministry of Foreign Affairs of the Faroes presents its compliments to the Secretariat of the North East Atlantic Fisheries Commission (NEAFC) and has the honour to refer to the notification SCH 11/12 communicated to the Ministry on 22 July 2011 in which Contracting Parties to the Convention on Future Multilateral Co-Operation in North-East Atlantic Fisheries (Convention) are informed that the vessel Enterprise (IMO 9207211) is placed on the NEAFC IUU A-list. The European Union (EU) notified the NEAFC Secretariat that the Peruvian flagged vessel Enterprise has been “observed operating in Faroese waters since the beginning of the month of July.”

The vessel Enterprise has been duly authorised by relevant Faroese authorities to tranship mackerel, while in maritime areas under the jurisdiction of the Faroes, from vessels authorised by relevant Faroese authorities to undertake fisheries of mackerel in maritime areas within the jurisdiction of the Faroe Islands. The notification of EU authorities, which triggered the above-mentioned listing on NEAFC IUU A-list, relates to fishery activities which do not occur in the NEAFC Regulatory Area. On the contrary, the fishery activities in question occur in maritime areas within national jurisdiction, in which the Faroes exercise, pursuant to international law as reflected in Part V of the United Nations Convention on the Law of the Sea, exclusive and sovereign rights to, inter alia, establish management and conservation measures for living resources.

Subsequent Agreements may, pursuant to Article 31(3)(a) of the Vienna Convention on the Law of the Treaties, to some extent alter the ordinary meaning of a treaty provision. Yet, in no manner can Article 37(1) of NEAFC Scheme of Control and Enforcement (Scheme) be conferred a meaning that would supplant the principle of fundamental importance as to the powers of NEAFC, namely its residual ratione loci limited to maritime areas beyond national jurisdiction, as expressed in the Convention, except if otherwise decided. Further, even if, although being non-sensical, Article 37(1) would have supplanted an ordinary meaning of Article 6 of the Convention, its due application presupposes, pursuant to Article 37(2) of the Scheme, the adoption of “Recommendations established under the Convention”. To interpret the Scheme selectively, i.e. limited to Article 37(1) in disregard to Article 37(2), is inconsistent with customary treaty interpretation rules. As the International Court of Justice has recognised in its Advisory Opinion in Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, a rule of international law operates within “a wider framework of legal rules of which it only forms a part” failing which an interpretation may be “incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules”.

The NEAFC Commission has not for the year 2011 adopted Recommendations for mackerel under Article 6 of the Convention, which otherwise could have legitimised such notifications under Article 37(1) of the Scheme. The relevant 2011 Recommendation is based on Article 5 of the Convention.
Given the applicable legal rules, the listing of the vessel Enterprise on NEAFC IUU A-list is not only inconsistent with the discretionary powers of the Faroes to enact its fishery policy in maritime areas within national jurisdiction, but is also inconsistent with the NEAFC powers. This invalid listing must accordingly be deprived of any legal effect and the vessel be removed from the NEAFC IUU A-list as a matter of urgency.

Tórshavn, 24 July 2011
NOTE VERBALE

The Ministry of Foreign Affairs of the Faroes presents its compliments to the Secretariat of the North East Atlantic Fisheries Commission (NEAFC) and has the honour to refer to the notification SCH 11/12 communicated to the Ministry on 22 July 2011 in which Contracting Parties to the Convention on Future Multilateral Co-Operation in North East Atlantic Fisheries (Convention) are informed that the vessel Pacific Voyager (IMO 9167904 / External Registration No OW2186) is placed on the NEAFC IUU A-list. The alleged Peruvian flagged vessel is notified to NEAFC by the European Union (EU) to “have been observed operating in Faroese waters since the beginning of the month of July.”

The information contained in the EU notification submitted to the NEAFC Secretariat is based on erroneous facts as to the registration of the vessel, and misunderstandings as to the applicable legal régime, the consequence of which is that this listing must be considered null and void and should be removed from the IUU A-list, and other Regional Fisheries Management Organisations duly notified, as a matter of urgency.

The above-mentioned EU notification is based on Article 37(1) of the Scheme of Control and Enforcement (Scheme), the application of which is limited to non-Contracting Party vessels. The vessel Pacific Voyager was registered on the Faroese ship register on 30 June 2011 and accordingly flies the flag of the Faroe Islands, the consequence of which is that Article 37(1) of the Scheme per se is not a legal basis for any such notification, i.e. regardless of the scope ratione loci of the Recommendations, which the vessel possibly could be presumed to be undermining.

Further, the Government of the Faroes also reiterates its firm view, as communicated earlier to the NEAFC Secretariat, by stressing that the notification of the EU authorities, which triggered the above-mentioned listing on the NEAFC IUU A-list relates to fishery activities which do not occur in the NEAFC Regulatory Area. On the contrary, the fishery activities in question occur in maritime areas within national jurisdiction, in which the Faroes exercise, pursuant to international law as reflected in Part V of the United Nations Convention on the Law of the Sea, exclusive and sovereign rights to, inter alia, establish management and conservation measures for living resources. Since no NEAFC Recommendation on fisheries for mackerel for the year 2011 applies to those parts of the Convention Area that are within Contracting Parties’ maritime areas within national jurisdiction, any notification on the basis of Article 37(1) of the Scheme that relates to such fisheries in Contracting Parties’ maritime areas under national jurisdiction not only per se cannot, to paraphrase Article 37(2) of the Scheme, be presumed to be undermining a NEAFC Recommendation established under the Convention, but also lacks any such legal basis.

Tórshavn, 24 July 2011