

# **Strategic Brief**

prepared for the

Minister's Advisory Panel on the Sustainable Management of  
Straddling Stock in the Northwest Atlantic

**March 2005**

Marine & Environmental Law Institute  
Dalhousie Law School  
6061 University Ave  
Halifax, Nova Scotia  
B3H 4H9



## **Preface**

This Strategic Brief has been prepared by Associates of the Marine & Environmental Law Institute at Dalhousie Law School in response to a request by the Department of Fisheries and Oceans, Minister's Advisory Panel on the Sustainable Management of Straddling Stock in the Northwest Atlantic for strategic advice on three issues in connection with its advisory mandate.

Accordingly, this Strategic Brief comprises three "sub-briefs", parts 1, 2 and 3 respectively, outlining issues and presenting options, from a legal perspective. The Terms of Reference referred to three areas of concern:

1. Evaluation of unilateral options, including the concept of "custodial management";
2. NAFO and institutional options;
3. UNCLOS – UNFA: options and opportunities.

At the request of the Panel these sub-briefs have been prepared in a succinct form - essentially, "think pieces" – which are intended to encourage dialogue and reflection and to allow the Panel to clarify its views on the options presented in the paper. It is envisaged that at later date, if the Panel determines that these internal studies are to be published, they will be revised and presented in a publishable format.

The principal authors of this Strategic Brief are: Professor Phillip Saunders (sub-briefs 1 and 3) and Dr. David VanderZwaag, Canada Research Chair in Ocean Law and Governance (sub-brief 2), with the assistance of Mr. J. Batongbacal, JSD Candidate and Dr. Moira L. McConnell, Director, Marine & Environmental Law Institute. The Strategic Brief has been prepared under the auspices of the Marine & Environmental Law Institute, however the views expressed in the Brief are those of its authors.

24 March 2005

## **Introduction**

This Strategic Brief to the Minister's Advisory Panel on the Sustainable Management of Straddling Stock in the Northwest Atlantic comprises three "sub-briefs", parts 1, 2 and 3 of the Brief, outlining the concerns and presenting options on the "straddling fish stocks problem", from a legal perspective. The three sub-briefs are in response to a request for strategic advice and "think pieces" regarding three specific avenues of response that the Panel may wish to consider.

The sub-briefs are entitled:

1. Unilateral options
2. NAFO: Moving from a fisheries discussion forum to an effective management organization
3. Enhancement of the existing global legal regime

It is important to understand at the outset that the "problem" of the decline in straddling fish stocks and the related industry decline is the subject of a diverse range of explanations including, for example: NAFO is the problem; the EU/Spain and Portugal are the problem; "free riders" are the problem; flags of convenience are the problem; ecosystem change is the problem; poor management in Canada is the problem; over-capitalization and subsidization of fleets and the industry in Canada and/or the EU is the problem; poor or discounted scientific advice is the problem; international law is the problem; continental shelf jurisdiction is the problem, or any combination of the above, to name but a few of the more popular reasons that have been put forward over the last decade or more.

Equally, depending on the preferred explanation, the solutions proffered to "the problem" are also variable. It is, therefore, important in any assessment of possible solutions to consider the underlying definition of the problem and its assumptions. Both the definition of the problem and solutions offered also necessarily reflect the disciplinary and other biases of any commentator.

The three sub-briefs that comprise this Strategic Brief are specifically directed to exploring, from a legal perspective, three potential "areas" for solutions, which have been put forward as ways to solve "the problem". The sub-briefs must, therefore, be read in

this light. They are not *per se* oriented to defining the problem of “why” or whether there is a decline but rather they are aimed at exploring questions and ideas that the Panel has expressly raised solutions that it wants to consider.

Since the sub-briefs are prepared by lawyers, they necessarily assume that international law is important and the “rule of the law” must be respected in developing solutions. They also assume that law has a key role to play, perhaps in creating the problem, and certainly in helping to solve it.

The first sub-brief, “Unilateral Options”, evaluates a number of options that it has been suggested over a number of years Canada might pursue, including the concept of “custodial management”. It explores the international law implications of a unilateral – that is, non-consensual - extension of Canada’s legal jurisdiction to waters and stocks governed by the NAFO regime. Such an approach, which has taken different forms and titles over the last decade or more, assumes the efficacy of Canada’s existing fisheries governance regime. It is largely premised on the notion of evolving international law regarding pre-eminence of coastal State rights and responsibilities to exercise some form of stewardship over area of the marine environment and resources outside national jurisdiction (outside the 200nm EEZ) that may be at risk. The sub-brief takes the view that, while these options may at one time have been seen as, at least, arguable, legal and political developments since the early 1990s (including Canada’s prominent role in pushing forward for the development and adoption of 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* (UNFA); the coming force of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS or LOS 1982) and Canada’s ratification of both), makes these options both legally problematic, and practically unworkable.

The second sub-brief, “NAFO: Moving from a Fisheries Discussion Forum to an Effective Management Organization Management”, addresses solutions that have been put forward premised on the idea that the “problem” is one of institutional governance, specifically related to the operation of NAFO. The sub-brief takes the view that the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO

Convention) is a creature of its time. It was adopted in a very early stage in the evolution of regional fisheries management organisations or bodies (RFMOs or RFBs). International law has moved significantly since its adoption, most notably in the direction of integration and effective implementation of the governance principles aimed at achieving sustainable development set out in the 1992 Rio Declaration. The sub-brief takes the view that a renegotiated NAFO Convention - a "NAFO II" - creating a Northwest Atlantic Fisheries Management Convention (NAFMC), or perhaps a Northwest Atlantic Marine Biodiversity Convention (NAMBC), reflecting the best of contemporary law, principles and practice on regional fisheries management is a strategy that should be explored. The sub-brief considers examples of such practices found in other RFMOs. However, the sub-brief cautions against departure from NAFO at this point and, instead, suggests that efforts to develop a constituency for a renegotiated convention should be carried out within the current legal and political framework provided by NAFO. It also proposes a number of other options to better protect coastal State interests in straddling stocks, which, while admittedly going beyond the current state of international law, might be successfully pursued by Canada in renegotiated a convention.

The third sub-brief, "Enhancement of the Existing Legal Regime", explores possible legal solutions and strategies to effect change in the current international fisheries regime for then high seas. It is organized around three main approaches. The first explores the viability and advisability of using the opportunities that will arise in the next few years to propose amendments to LOS 1982 and/or the UNFA. It concludes that in the case of the LOS 1982, it is unlikely that any proposal of substantive value will survive the difficult amendment process. In the case of UNFA, there may be more opportunity for review and action, but it will still be necessary to focus on getting more countries to ratify the Agreement, an effort that may be hampered by significant amendments. Second, it considers options for more effective application of the existing regime, both through fully utilizing available measures such as inspection powers, and through litigation options made possible by the dispute settlement provisions of UNFA and LOS 1982. Finally, it notes the continuing importance of active Canadian participation in other diplomatic avenues at the UN and elsewhere, where the overall problem of high seas governance has achieved new prominence.

## **Sub-brief 1: Unilateral Options**<sup>1</sup>

### **1.1 Introduction**

The problems which continue to beset the conservation and management of fish stocks which straddle the outer limits of Canada's 200 n.m. Exclusive Economic Zone (EEZ), including over-fishing and poorly regulated fishing, are well-known, and have been addressed in other documents prepared for the Panel. This sub-brief is intended to address one category of proposed solutions to the perceived inadequacy of the current regime: the unilateral assertion by Canada of some form of management and/or enforcement jurisdiction in high seas areas adjacent to the Canadian EEZ. Variants of this approach include: extension of the Canadian EEZ beyond 200 n.m.(possibly to the limits of the continental shelf); an expanded application of Canadian jurisdiction over sedentary species, in order to protect both habitat and other species; a Canadian declaration of a limited form of jurisdiction, known as "custodial management", over areas or stocks adjacent to the EEZ. Brief consideration is given to the first two options, with the primary focus on custodial management.

### **1.2 The International Legal Regime for Fisheries**

Any assessment of these options, and in particular their legality and feasibility, must proceed from an understanding of the current international legal regime for fisheries in general, and high seas fisheries in particular. It is neither possible nor necessary here to deal in detail with the international law governing fisheries, but it is possible to summarize the points of greatest relevance to the problem of straddling stocks. As a starting point, it should be noted that the most authoritative statement of the current state of the international law of the sea is found the 1982 United Nations Convention on the Law of the Sea (LOS 1982 or UNCLOS or the Convention), which reflects customary international law related to many jurisdictional issues, and which is in any event imposes binding obligations on the 148 states and entities which are party to it, including Canada (since November 2003).

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<sup>1</sup> Prepared by Professor Phillip Saunders, Associate, Marine & Environmental Law Institute, Dalhousie Law School.

Under the LOS1982 regime, the essential features of fisheries jurisdiction relevant to the Northwest Atlantic can be summarized as follows:

- Within the 200 n.m. Exclusive Economic Zone, the coastal State exercises relatively comprehensive jurisdiction via its “sovereign rights for the purpose of exploring and exploiting, conserving and managing” those resources (Art. 56(1)). There are some corresponding obligations to manage those resources according to various criteria, and to respect certain entitlements of other states, but for all practical purposes the jurisdiction is complete.
- On the extended continental shelf, being the seabed and subsoil outside 200 n.m., to the outer edge of the continental margin as defined in Art. 76, the coastal State has sovereign rights to explore the shelf and exploit its natural resources. These resources are primarily non-living, but do include the category of sedentary species, defined as those 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.” (Art 77(4))
- On the high seas, which are areas beyond national jurisdiction (including the water column above the extended continental shelf), fishing is recognized as a high seas freedom, open to all States, with some limited exceptions for certain species (such as anadromous stocks). Some general duties to cooperate in the conservation and management of high seas living resources are provided for, but the flag State will have exclusive jurisdiction over its vessels, except where otherwise provided by the Convention or in customary international law.

It is at the intersection of coastal State and high seas areas that the jurisdictional picture becomes less clear. Art. 63(2) set out the compromise position adopted under the Convention:

63(2) Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

The difficulties with this provision (and the similar provision dealing with Highly Migratory Species – HMS) became familiar since 1982, the post - UNCLOS period. The entire approach of this provision is to require states to cooperate, but States must only “seek” to agree upon management measures, with no time limits for agreement, and no

absolute requirement for the use of regional organizations. Most important, there is no clear *enforcement* power which would allow a coastal State or regional organization to deal directly with violators. The presumption is in favour of flag State enforcement, and any recourse for the coastal State would be by way of flag State responsibility for failure to control their vessels.

The perceived problems with the LOS 1982 regime, exacerbated by events such as the Turbot War and the South Pacific tuna disputes, ultimately led to the conclusion of 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 (UNFA or the Fish Stocks Agreement). The provisions of this Agreement will be addressed again in sub-brief 3, *infra*, but the essential elements of this agreement can be summarized as follow:

- UNFA is intended to fall within the structure of the LOS 1982, and indeed is clearly designed to provide for the implementation of the Convention, and of the duty to cooperate, as it relates to straddling and highly migratory stocks
- Art. 4 states that nothing in the Agreement "shall prejudice the rights, jurisdiction and duties of States under the Convention", and that it "shall be interpreted and applied in the context of and in a manner consistent with the Convention".
- UNFA deals with jurisdictional issues by enhancing and further defining the role of regional fisheries management organizations (RFMOs), and in particular by requiring, if not membership, at least cooperation with their management measures.
- On the critical issue of flag State responsibility, UNFA, in essence, continues the flag State enforcement approach of the LOS 1982, with some enhancements related to boarding and inspection on the high seas pursuant to regional agreements, and even the possibility of actual enforcement, where there is a failure of the flag State to act.
- In addition to recognizing the primacy of flag State *jurisdiction*, however, UNFA does go into greater detail than the LOS 1982 as to the nature of flag State *obligations*, setting out an extensive list of obligations incumbent upon flag States under the Agreement.

The LOS 1982/UNFA regime, which is only briefly summarized here, provides the context within which any potential unilateral action by Canada must be assessed.



### **1.3 Unilateral Jurisdictional Options**

As noted earlier, there are three main options for unilateral action by Canada to increase, or more aggressively enforce, its presence beyond the limits of the EEZ: actual extension of the EEZ or of a fishing zone (EFZ); use of the sedentary species jurisdiction; and custodial management.

#### **1.3.1 Extension of Canadian EEZ Beyond 200**

It has been suggested that a seaward extension of Canada's EEZ, or perhaps a more limited exclusive fishing zone (EFZ), could be used to assert jurisdiction over the relevant fish stocks, perhaps to the limits of the continental shelf. This approach was explored by Canada in the early 1990s and may, perhaps, have been more viable or least arguable, at that time. However a number of significant legal and political events have occurred since that time, including Canada's prominent role in pushing forward for the development and adoption of UNFA; the coming into force of the LOS 1982 and UNFA and Canada's ratification of both.

These factors suggest that active pursuit of this option presents a number of difficulties, both legal and practical, which make it unlikely that it would provide a productive way forward.

To begin, a full extension of jurisdiction beyond 200 would violate a number of provisions of the LOS 1982, to which Canada is a party, including the following:

- Article 57 specifically limits the breadth of the EEZ to 200 n.m. from the coastal baselines;
- Article 63(2), which is addressed above, explicitly provides for the conservation of straddling stocks in "adjacent" high seas areas through the cooperation of coastal and fishing States, an approach expanded upon in the UNFA, to which Canada is also a party. This would appear to preclude unilateral assertions of jurisdiction;
- Article 87(1) provides that fishing is a freedom of the high seas, open to all States. Furthermore, Article 86 provides that the high seas regime applies to "all parts of the sea that are not included in ...[*zones of national jurisdiction*]".
- Article 92 provides for exclusive flag State jurisdiction over vessels on the high seas, "save in exceptional cases expressly provided for in international treaties or in this Convention".

It might be argued that a limited assertion of jurisdiction over fishing, and not other resources covered by the EEZ regime, or even a more restricted assertion over particular fish stocks, could address some of these conflicts, but this is not a persuasive position. The extent of coastal State fisheries jurisdiction is specifically provided for in the EEZ regime, and there is no other basis in conventional or customary international law for extending it to new areas (except where provided, as with anadromous stocks). Furthermore, Article 86 applies the high seas regime – including freedom of fishing and exclusive flag State jurisdiction - to all areas that are “not included in” the EEZ or some other zone. Given that Article 57 limits the EEZ to 200, this can only mean that high seas freedoms apply (except where otherwise provided) beyond 200.

Apart from the illegality of any such measure, which would be subject to mandatory dispute settlement under the LOS 1982, there does not appear to be any significant international support for what would amount to a complete revision of the jurisdictional regime negotiated under the Convention, and Canada would be left outside the UNFA and NAFO regime, with no realistic prospect for success. The conclusion of the House of Commons Standing Committee on Fisheries and Oceans put the issue in the following terms:

First, there is no international support for the unilateral extension of EEZs;  
Second, unilateral extension would be contrary to the international fisheries priorities Canada has pursued since the establishment of modern EEZs;  
Third, repudiation of a tenet as fundamental to UNCLOS as the 200-mile EEZ would make it very difficult for Canada to fully partake in the rights, duties and organizations the Convention creates; and,  
Finally, unilateral extension of the EEZ would practically guarantee a drawn out and expensive legal challenge against Canada with a significant risk that Canada would lose.

The only point to add here is that, since Canada's ratification of the Convention, and consequent express submission (in its Declaration) to the dispute settlement regime contained therein, the “risk” of a successful legal challenge could be better described as a near certainty. In sum, extension of jurisdiction, whether as an EEZ or EFZ, does not provide a credible option for Canada.

#### 1.4 Sedentary Species Management

Canada does assert jurisdiction over sedentary species on the continental shelf beyond 200 n.m., including snow crabs and Icelandic scallops, and has successfully prosecuted foreign vessels for fishing such species on the continental shelf beyond 200. This raises the question of whether it would be possible to use this jurisdiction to enforce against any vessel which takes any amount of such species, even as by-catch, or which damages the habitat of such species. This could provide an option for restriction or prohibition of fishing methods, particularly bottom fishing methods, which would have the prohibited consequences.

While this jurisdictional entitlement is a useful avenue to pursue where appropriate, it is limited by a number of factors which mean it will not provide a comprehensive solution. First, the application of any regulations would be limited to those areas where such stocks actually occur, and would be of no benefit elsewhere. Second, it is not at all clear whether the prohibitions could be justified as protection of habitat, as opposed to actual restrictions on exploitation. The definition of this jurisdictional entitlement in the Convention is stated as follows (note – “natural resources” includes sedentary species):

77(1). The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

This provision does not mention conservation and management, which are provided for in EEZ jurisdiction over living resources. This may be seen as limiting the jurisdiction of the coastal State to matters directly related to the exploitation of the stocks, and not to the broader conservation purposes, such as habitat protection. Furthermore, and related to this point, the use of the sedentary species provision in a manner clearly intended to deal with catch of other species, as for example in a blanket prohibition of *de minimis* violations, could be seen as an abuse of rights under the Convention and a contravention of the high seas provisions noted earlier. The US experience with the use of this jurisdictional power prior to extension of EEZ jurisdiction in 1976 suggests that this will be a limiting factor.

## 1.5 Custodial Management

A number of bodies – most notably the House of Commons Standing Committee on Fisheries and Oceans in its reports of 2002 and 2003 (SCOFO 2002 and 2003), and the Newfoundland and Labrador All Party Committee, in its 2003 report entitled *Stability, Sustainability and Prosperity: Charting a Future for Northern and Gulf Cod Stocks* (“All-Party Report”) – have suggested that it would be possible to assert a limited form of jurisdiction beyond 200 n.m. for the purpose of prescribing and enforcing conservation and management measures.

One of the difficulties in considering the viability of this option is the fact that it has no meaning in international law, and is not entirely consistent in its various iterations within Canada. There are, however, sufficient commonalities that it is possible to describe a generic form of the concept. It appears that this form of jurisdiction would stop short of asserting sovereign rights, as is the case in the EEZ, and would be structured on the following terms (as described in the SCOFO 2002 Report):

Under a custodial management regime, Canada would assume sole responsibility for the management and conservation of the areas of our continental shelf beyond the 200-mile limit: the Nose and Tail of the Grand Banks and the Flemish Cap. However, foreign fishing interests would not be removed; instead, historic allocation and access would be respected....

The essential purpose of custodial management would be to establish a resource management regime that would provide comparable standards of conservation and enforcement for all transboundary stocks, inside and outside the 200-mile limit. In other words, precisely the kind of regime promised by *UNFA* but delivered by Canada rather than *NAFO*.

....

Under such a regime, Canada would conduct the science, set the TACs, and implement and administer a conservation-based management system that would include monitoring and enforcement.

The major aspect of what would constitute a full EEZ claim that is missing from this description is the power to exclude other States entirely from the fishery, or to give preference to Canada’s own vessels. This allocative function would be performed by reference to “historic allocation and access”. Otherwise, Canada would assume much the same power that it does within its EEZ: the ability to set TACs; the power to choose

and apply management measures; and, critically, the power to enforce compliance with those measures.

### 1.5.1 Legality

Despite the attempt to structure the concept of custodial management as something less than an EEZ claim, the simple fact is that it would necessarily involve the assertion on the high seas of a number of powers which are identical to those available to the coastal state within 200 n.m. – and only within 200 n.m. These include the ability to allocate catches, to prescribe management measures and to enforce those measures against the vessels of other flag States. As a result, the concept of custodial management runs up against much the same legal difficulties enumerated earlier with respect to an extended EEZ claim (with the sole exception being the prohibition on EEZ claims beyond 200n.m., in that this would not be an EEZ):

- The duty to cooperate under Art. 63(2), elaborated in UNFA, would, as noted earlier, preclude unilateral assertion of jurisdiction over management matters. It is presumed, as acknowledged by SCOFO, that this assertion of jurisdiction would be accompanied by withdrawal from NAFO – the RFMO in the region.
- As note earlier, Art. 87(1) of the Convention makes fishing a freedom of the high seas, and Art. 92 provides generally for exclusive flag state jurisdiction, except where otherwise provided. The assertion of custodial management as envisioned by SCOFO and the All Party Report would clearly violate these principles.

The response to these issues in SCOFO's 2002 Report focused on Canada's earlier success in acting beyond 200 n.m. for certain purposes:

The Committee sees no fundamental reason custodial management cannot be implemented. By passing Bill C-29 in 1994, Canada has already demonstrated its willingness and ability to enforce conservation measures beyond its 200-mile limit. Amending the *Coastal Fisheries Protection Act* for this purpose would represent a difference only in scope and not in kind to the measures previously implemented under C-29.

This passage reflects the fundamental misunderstanding of the legal situation which has led to custodial management being given more credence as a workable legal option than it should otherwise have had – a misunderstanding made all the more apparent by Canada's subsequent ratification of the LOS 1982. In the early 1990s and up until

1994/95 Canada could at least claim that it was forced to take action because of the “jurisdictional gap” or ambiguity in the Convention, which left it with no other means but limited unilateral action to ensure that conservation and management measures respecting straddling stocks were applied and respected. Canada’s position was premised on the notion that states were under a duty at customary international law to apply such measures, in this case agreed through a regional organization, but that there was no agreed means of enforcing those obligations (or even of obtaining dispute settlement on a mandatory basis).

There are at least three critical differences in the proposed application of custodial management at the present time, when compared to Canada’s earlier actions. First, the “jurisdictional vacuum” that Canada could point to in 1994 no longer exists. UNFA, whether or not it is regarded as the optimal resolution, is clearly intended to define the mechanisms and measures whereby States will satisfy their duties to cooperate in respect of straddling stocks. This compromise, to which Canada is party, deals with the jurisdictional issue primarily by reference to RFMOs, and addresses flag State duties by way of State responsibility, not permission for unilateral enforcement. It would be difficult for Canada to abandon a legal commitment it actively pursued and then ratified as recently as 1995.

Second, given that custodial management would see Canada setting the allocations and management measures, Canada would no longer have the “cover” of a limited assertion of jurisdiction for purposes of applying *regional* measures – this would be unvarnished unilateralism, and clearly beyond the scope of the current legal structure.

Third, the application of the LOS 1982 dispute settlement regime to the interpretation and implementation of UNFA and RFMO agreements means that Canada can no longer claim, as would be required, for example, in a legal justification of necessity, that it had no peaceful alternative for the resolution of a dispute such as that surrounding the *Estai*.

This final point, respecting dispute settlement procedures, raises a further difficulty. In 1994/95 Canada was able to successfully avoid the jurisdiction of the International Court of Justice by way of a reservation to its submission to the jurisdiction of the Court. Now that Canada is a party to both LOS 1982 and UNFA, it is itself subject to the mandatory

dispute settlement procedures, insofar as a dispute involves another party. Given the opinion expressed above respecting the legality of an assertion of custodial management, this means that Canada would in all likelihood be forced into some form of arbitration, and that it would lose.

### **1.5.2 Feasibility**

The mere fact that a unilateral assertion of custodial management by Canada would be contrary to international law as it currently exists does not mean that it should necessarily be rejected outright. If there were reasonable prospects for using such an assertion to advance international law, while obtaining the desired management improvements on the Grand Banks, more serious consideration would be warranted. There are, however, at least four factors that suggest custodial management is simply not a feasible option at the present time, if we assume that the objective is improved management.

First, the assertion of custodial management as envisaged in the SCOF0 reports would necessarily entail a withdrawal from NAFO, in that it would violate the entire purpose of the NAFO Convention. If NAFO is abandoned, without replacement, as discussed in sub-brief 2, *infra*, there is a real possibility of a “free for all”, with completely unregulated fishing, unless Canada can quickly and successfully enforce its new jurisdiction. Second, this ability to enforce would have to confront significant legal challenges which, as suggested above, could not be avoided and which would likely go against Canada, at least on the current state of the law. It is also likely that claimant States would be seeking provisional or interim measures to forestall Canadian action, given the seriousness of the violations of the Convention regime. Third, there does not appear to be sufficient international support for the further extension of coastal State jurisdiction, so that the prospect of advancing the law solely through state practice is unlikely to come about. Finally, even the most optimistic projection for a successful implementation of custodial management would involve a transition of a number of years, assuming legal and other opposition by fishing nations. This eliminates one of the perceived advantages of this approach over other diplomatic measures, which is the speed with which it could be put in place.

## **1.6 Summary**

The unilateral options, contesting current international law on jurisdiction over fisheries and a duty to develop cooperative solutions through regional organizations, discussed above, including custodial management, are neither legally sound nor practically feasible at this point. While they might appear to be desirable from a short term perspective, the likelihood of achieving success is low enough that they would essentially present a distraction from the task at hand – improving conservation and management efforts over vulnerable shared stocks. Furthermore, it should be understood that there are significant risks that they will result in a worsened situation, aside from exacerbating conflicts, in that the destruction of NAFO, without any effective replacement in the short term, would be a likely result of unilateral action.



## **Sub-brief 2. NAFO: Moving from a Fisheries Discussion Forum to an Effective Management Organization<sup>2</sup>**

### **2.1 Overview**

This sub-brief addresses the question of whether, assuming that the problem of overfishing of straddling stocks is, in part at least, related to institutional failures in the management system, changes are needed or possible. Institutional change can take a number of forms. This sub-brief is specifically concerned with the question of changes to the underlying legal structure – the NAFO Convention - that may improve upon the current system.

NAFO might be likened to a “legal rust bucket.” The clumsy and flimsy keel laid by the 1978 NAFO Convention is now full of holes and cracks and in desperate need of being recast in light of the major “design advances” urged by international fisheries and environmental law agreements and modernization examples in other regional fisheries management organizations (RFMOs).

Three main legal routes towards NAFO reform are possible for Canada to pursue;

- Amending the NAFO Convention,
- Changing the subsidiary “rules” under the Convention, for example, the Rules of Procedure for the General Council, the Fisheries Commission and the Scientific Council and the Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures.
- Renegotiating the Convention.

Amendment of the Convention, while at first glance an attractive option since it would allow Canada to unilaterally propose reforms to NAFO's General Council, a closer look suggests that substantial amendments would likely be extremely difficult, if not impossible. Article XXI of the Convention puts in place what might be called a “convoluted consensus” approach to amendment. Essentially, the Convention provides for adoption of amendments by a three-fourth majority of the votes of all Contracting

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<sup>2</sup> Prepared by Dr. David VanderZwaag, Canada Research Chair in Ocean Law and Governance, Marine & Environmental Institute, Dalhousie Law School. The research assistance and collaboration of Mr. Jay Batongbacal, JSD Candidate is gratefully acknowledged.

Parties but any other Contracting Party can object to the amendment whereby the amendment would not take effect for *any* Contracting Party.

A further factor weighing against the amendment option is the large number of substantive and procedural reforms that need to be considered. As in home renovations, when structural changes become so numerous, the renovator might be well advised to demolish the original building and build anew.

Changing the subsidiary “rules” of NAFO as a route for reforms has major limitations. Only rather cosmetic and minor changes would be possible, for example, encouraging greater non-governmental organization participation through revision of the Rules of Procedure.

Renegotiating the NAFO Convention should be seriously considered with various names being possible for the new agreement. Names that might be adopted as indicative of a changed focus and mandate include: the Northwest Atlantic Fisheries Management Convention (NAFMC), the Northwest Atlantic Marine Living Resource Conservation Convention (NAMLRCC) and the Northwest Atlantic Marine Biodiversity Convention (NAMBC).

Such a renegotiation would not require Canada to withdraw from the existing NAFO Convention. Canada would be well advised to remain a Party to NAFO while leading renegotiation efforts in order to avoid losing or endangering management measures already in place.

The remainder of this sub-brief explores the third option, renegotiation of the NAFO Convention, in more detail. Key areas for recasting NAFO include: expanding the overall objectives of the Convention; incorporating sustainable development principles; revisiting organizational structures and clarifying mandates and functions; strengthening the rules for decision-making; enhancing the participation of non-governmental and other groups; recognizing special coastal State interests and the need for management compatibility; addressing the protection of endangered and threatened marine species; committing to strengthen enforcement and compliance; tackling non-member fishing; facilitating cooperation with other regional and international organizations; providing for an periodic

review of treaty implementation; and establishing dispute prevention and resolution mechanisms.

## **2.2. Building on NAFO**

The following sections consider the various issues referred to in the overview that could be fruitfully addressed in a strengthened RFMO that incorporates the sustainability principles that now inform contemporary regional fisheries management law and practice.

### **2.2.1 Expanding Objectives**

The present Convention can be seen as unduly “fish-focused” and suffering from fisheries “myopia.” The Preamble to the NAFO Convention narrowly focuses on the desire to “promote the conservation and optimum utilization of the *fishery resources* of the Northwest Atlantic area.” No consideration is given to the need to ensure overall marine biodiversity health. There is no mandate to undertake scientific studies on how fisheries are affecting dependent and associated marine species. Article VI of the Convention merely calls for studies of how environmental factors, like temperature or current changes, affect fisheries.

The transition to broader biodiversity and ecosystem integrity objectives may be constrained by the overall emphasis on fisheries exploitation in international and regional fisheries agreements. For example, the 1995 Fish Stocks Agreement or UNFA provides in Article 2 that the objective of the Agreement is to “ensure the long-term conservation of and sustainable use of straddling fish stocks and highly migratory fish stocks.” The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (CCWCPO) and the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (CCSEAF) also focus on the conservation and sustainable use of *fisheries resources*.

However, broader objectives are clearly expressed in the 1982 UN Convention on the Law of the Sea (UNCLOS or LOS 1982) and have been emerging in various international documents and *fora*. Article 119 of LOS 1982 requires that States fishing for living resources on the high seas “take into consideration the effects on species

associated with or dependent upon harvested species.” The FAO Code of Conduct for Responsible Fisheries, in its discussion of management objectives in Article 7.2, emphasizes the need to ensure that the “biodiversity of aquatic habitats and ecosystems is conserved and endangered species are protected.”

An example of a regional convention having a broader ecosystem conservation objective is the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). Article II establishes the overall objective of conserving Antarctic marine living resources and provides that harvesting activities must meet conservation principles such as the maintenance of the ecological relationships between harvested and dependent and related marine species.

### **2.2.2 Incorporating Sustainable Development Principles**

As early as 1972 the world community emphasized the need for principled governance and has urged decision makers at all levels to be guided by key principles. The 1972 Stockholm Declaration contained 26 principles while the 1992 Rio Declaration on the Environment and Development called for the wide application of 27 principles including the precautionary principle, public participation and intergenerational equity.

The need to incorporate principles into regional fisheries agreements is also found in the text of UNFA. Article 5 of UNFA sets out a long list of principles that should be followed by coastal States and States fishing on the high seas in order to give effect to their duty to cooperate in the management of shared fisheries.

Some of the key principles include:

- Applying the precautionary approach;
- Assessing the impacts of fishing and environmental factors on not only target stocks but to the broader marine ecosystem;
- Adopting conservation and management measures for species associated with or dependent upon target stocks with a view to maintaining or restoring populations of such species above levels where their reproduction may become seriously threatened;

- Minimizing catch of non-target species and impacts on associated or dependent species, in particular endangered species, through such measures as the use of selective, environmentally safe fishing gear and techniques;
- Protecting biodiversity in the marine environment;
- Taking measures to prevent or eliminate overfishing and excess fishing capacity;
- Taking into account the interests of artisanal and subsistence fishers;
- Promoting and sharing scientific research and developing appropriate technologies in support of fishery conservation; and
- Implementing and enforcing conservation and management measures through effective monitoring, control and surveillance.

The FAO Code of Conduct for Responsible Fisheries, meant to provide guidance in the formulation of international agreements, also urges the adoption of general principles. Article 6 emphasizes many of the principles found in UNFA, for example, the need to develop and apply selective and environmentally safe fishing gears and practices and the need to apply a precautionary approach. The Code also calls for fisheries management to consider the needs of future generations and to ensure decision-making processes are transparent and participatory involving industry, fish workers, environmental and other interested organizations.

The precautionary approach has been placed on an especially high pedestal for inclusion in regional fisheries management. UNFA devotes an entire article (Article 6) to applications of the precautionary approach and provides guidelines in Annex II for determining stock specific reference points and actions to be taken if reference points are exceeded. The FAO Code of Conduct also gives particular emphasis to the precautionary approach in Article 7.5 and further Technical Guidelines on the Precautionary Approach to Capture Fisheries were adopted in 1996.

Examples of how regional fisheries agreements might incorporate sustainability principles can be drawn from the Western and Central Pacific Convention (CCWCPO ) and the South-East Atlantic Convention (CCSEAF). The CCWCPO adopts, almost word- for- word, the general principles provisions in UNFA as well as the language calling for application of the precautionary approach. Article 3 of the CCSEAF provides a much more abbreviated treatment of general principles with only a few key principles

highlighted such as the precautionary approach and the protection of marine biodiversity.

The ecosystem approach or ecosystem-based management is another key principle that should be incorporated in a revised Convention and developments under both the Convention on Biological Diversity (CBD) and the FAO might be helpful in guiding reforms. The Conference of the Parties to the CBD has adopted 12 principles in support of the ecosystem approach through Decisions V/6 and has further developed annotations to the principles through Decision VII/11. Particularly relevant to the regional context among the 12 principles are: the need to conserve ecosystem structure and functioning in order to maintain ecosystem services (Principle 5); the need to balance conservation and human use of ecosystems (Principle 10); and the need to involve all relevant sectors of society and scientific disciplines (Principle 12). The need to broaden social science inputs into regional fisheries management should be a particular priority in light of the traditional dominance of natural science inputs to fisheries management. The complex questions of how NAFO fisheries allocations impact coastal communities in Canada and in other countries and how corporate interests and communities benefit need to be fully studied.

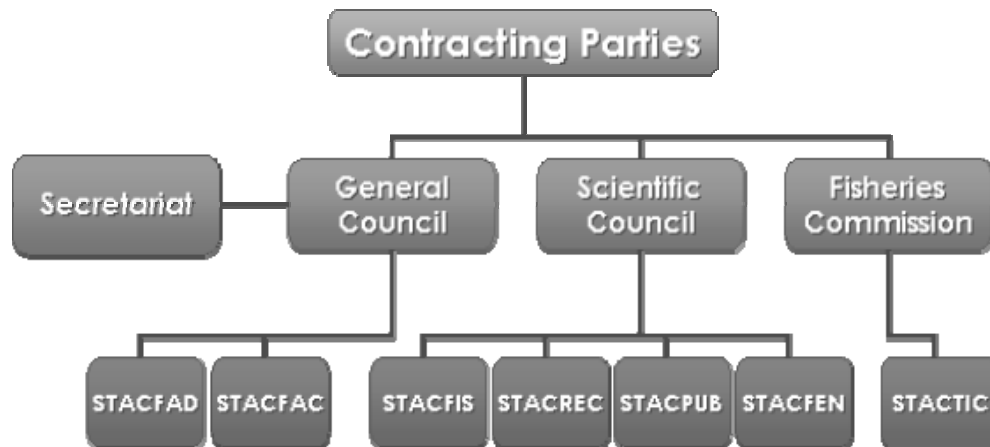
The FAO, in 2003, issued Technical Guidelines on the Ecosystem Approach to Fisheries which urges various directions for fisheries management. Some of the key directions include: improving selectivity of fishing gears; establishing marine protected areas in order to produce benefits for fisheries; prohibition of destructive fishing methods in ecologically sensitive habitats; reducing overall fishing capacity and limiting efforts; establishing market incentives such as eco-labelling for fisheries carried out in accord with the ecosystem approach; and requiring ecosystem-based fishery management plans which identify critical / sensitive habitats and suggest management measures to reduce adverse environmental impacts.

### **2.2.3 Revisiting Organizational Structures and Clarifying Mandates and Functions**

NAFO is presently comprised of four principal bodies, namely the General Council, Secretariat, Scientific Council, and Fisheries Commission, and seven subsidiary bodies called Standing Committees, one each for Finance and Administration, Non-Party

Fishing Activities, Fisheries Science, Research Coordination, Publications, Fisheries Environment, and International Control. NAFO's structure may be illustrated as follows:

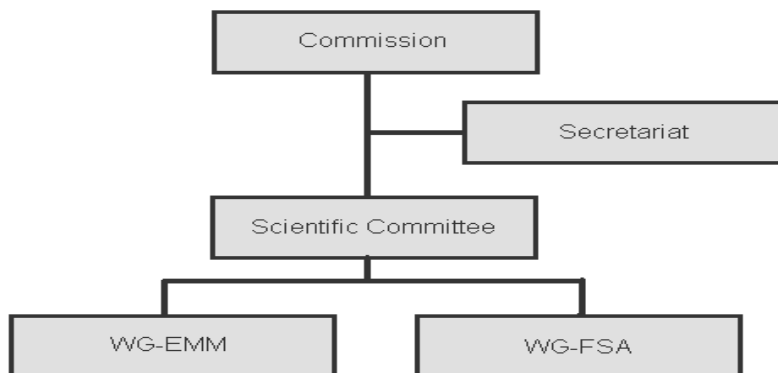
Fig. 1. NAFO Organizational Chart: <<http://www.nafo.org>>



Despite its complexity, this structure is not conducive to facilitating or strengthening management authority over the Convention Area. One may immediately note the relatively flat and non-hierarchical relationships between the subsidiary bodies. The General Council's functions concern largely administrative affairs within the organization, while the Scientific Council's determinations are only advisory and have no authority over any other bodies within or outside NAFO; the Scientific Council does not even have to come to an agreement over its own advice. The Fisheries Commission mainly generates only proposals for joint action for the State Parties to act upon. As a whole, NAFO is not designed or even suited to make substantive decisions, as all such decisions are undertaken individually by the Contracting Parties; as such NAFO cannot be expected to be a truly effective management body in itself.

Among other RFMOs worldwide, there is a variance in organizational complexity, from elaborate structures such as those of NAFO and International Commission for the Conservation of Atlantic Tunas (ICCAT) which have five or more subsidiary bodies, to simpler ones such as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). CCAMLR has a very compact structure comprised of the Commission, the Scientific Committee, and the Secretariat, structured thus:

*Fig. 2. CCAMLR Organizational Chart (J. Batongbacal)*



Art IX of the CCAMLR Convention details the Commission's conservation and management mandate, particularly the actions it must take to give effect to the CCAMLR Convention's objective and principles, the types of conservation measures it may establish, and the means by which the Members may implement them. A Scientific Committee provides scientific advice and conducts research for the Commission, and the latter is required to take full account of such advice and any recommendations, which is indicative of a very strong role for science in the management of the Antarctic. The Scientific Committee has established two working groups, a Working Group on Ecosystem Monitoring and Management (WG-EMM) and Working Group on Fish Stock Assessment (WG-FSA). Meanwhile, the Secretariat carries out most of the day-to-day and administrative work needed for the Commission to function.

It makes good sense to consider developing a similarly streamlined organizational structure in a new convention, designed for flexibility, efficiency, and responsiveness. This might be achieved by eliminating the NAFO General Council entirely and transferring its administrative functions to the Secretariat. The Fisheries Commission could be strengthened and elevated in stature as the principal decision-making body called the Northwest Atlantic Commission (NAC), empowered to directly decide, on behalf of the Contracting Parties, upon matters of policy, such as setting of particular conservation and management goals, the identification and adoption of an ecosystem approach, and the implementation of a precautionary approach, as well as important decisions such as the allocation of TACs.

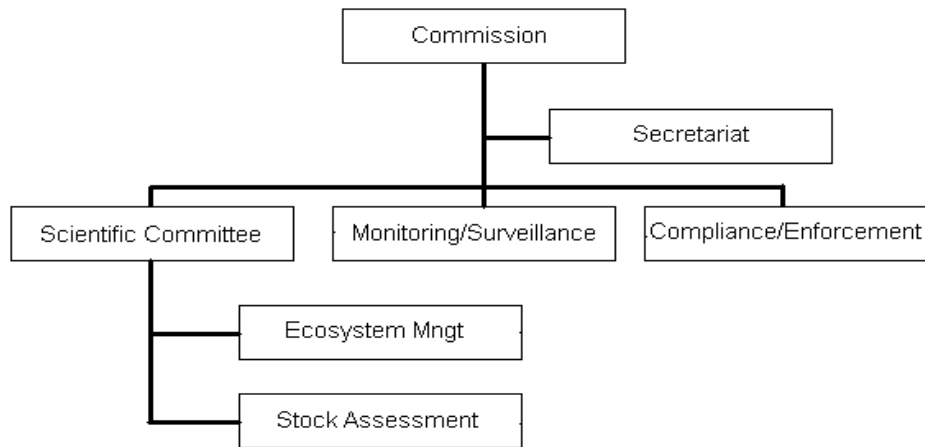


Under a new convention the Scientific Committee might be established to conduct the studies and research which the NAC relies upon for its decisions, as well as have powers to resolve technical questions and scientific differences between Members that might be raised or expressed at the Commission level. The NAC should be required to take full account of the conclusions and recommendations of the Scientific Council, perhaps to the extent of considering itself bound by the Scientific Council's research findings. This would strengthen the role of science in the management of Northwest Atlantic fisheries.

Two other principal committees for Monitoring & Surveillance and for Compliance & Enforcement could also play a prominent role in the NAC's decision-making. These might be established distinctly from the NAC and the Scientific Committee in order to ensure that sufficient attention is given to directing the observation of fisheries activities in the Convention Area, as well as overseeing inspections and pursuing sanctions.

The NAC and the three Committees could be empowered to create subsidiary bodies as needed to support their substantive mandates and function, either on an *ad hoc* basis or as standing committees. It is recommended that a minimum number of standing committees also be established at the outset, perhaps in the Convention itself, to ensure that appropriate organizational units are focused on certain key aspects of management. These standing committees could include sub-committees on Ecosystem Management, which would develop the ecosystem approach and implement precaution; and Stock Assessment, which would include the conduct of scientific research, statistical gathering and analysis, and information management. This revised NAFO structure could be visualized as follows:

Figure 3. Possible Revised "NAFO-II" Structure



This structure builds on the CCAMLR model and indicates a stronger management mandate for NAFO. In reformulating and distributing the mandates and functions of the principal and subsidiary bodies, attention must be paid to ensuring that there is no overlap between bodies and that appropriate relationships between their respective functions are clearly established in order to ensure that their work complement each other and contribute to the achievement of NAFO's objectives.

#### 2.2.4 Strengthening the Rules for Decision-making

The following sections explore various aspects of the decision-making that could be strengthened in a new convention.

##### 2.2.4.1 Facilitating the decision-making process

At present, NAFO's decision-making process for fisheries management can be summarized in two steps: (1) generating proposals, and then (2) waiting for reactions (either acceptance or objection) from the Contracting Parties.

In contrast, more recently-organized RFMOs have been established with regulatory functions and are empowered to make binding decisions on conservation and management measures. Within CCAMLR and the CCWCPO, for example, decisions are made by the respective commissions on behalf of the Contracting Parties. This allows a greater certainty in making decisions acceptable to the Members, and unambiguous

representation and consideration of national positions on the issue at hand in the course of making decisions. On the whole it facilitates discussion and deliberation which considerably shortens the timeframes between the proposal of a measure or activity and its implementation. The locus of substantial deliberation and decision-making remain within the organizations themselves, unlike in the case of NAFO, where it is dispersed outside of the organization.

Under a new NAFO Convention, there should be a substantive decision-making procedure that is marked by timeliness, efficiency, and effectiveness; geared toward consensus-building; works toward binding decisions; and provides for effective dispute settlement within the organization and at all stages of the process from the submission and revision of proposals to their implementation and enforcement. Definite timeframes for action should be prescribed.

#### **2.2.4.2 Improving the voting requirements**

The rules for decision-making for the NAFO General Council and Scientific Council produce very weak outcomes, while the Fisheries Commission in essence does not really decide matters of substance and focuses only on adoption of proposals. In the case of the General Council, only a simple majority is needed for it to make any decisions; even if its functions were not largely administrative in nature, a simple majority rule allows contentious and fractious decisions to be made. The Scientific Council, on the other hand, in cases where there is no consensus, is only required to lay down all the contending views in its determinations. In both cases, the decision rules allow for issues and disputes to remain and fester without satisfactory resolution; they can only be addressed by the Members later, by objecting or opting out of the decisions entirely.

Other RFMO's have established decision rules that encourage full agreement on measures, so that they are not easily ignored or contested later on. CCAMLR for example, requires a consensus on decisions of substance, and simple majority for other types of decisions; any question as to whether a decision is one of substance or not is treated as one of substance. A procedure for review of such decisions is also provided, to the end that any decisions reached by CCAMLR are ultimately acceptable to all and capable of enforcement. The CCWCPO and CCSEAF are among the most recently organized RFMOs, and they both provide for decisions by consensus.

The trend towards consensus-building is not unique to RFMO's. The Convention for the Protection of the Marine Environment of the North East Atlantic (or OSPAR Convention, which refers to the Oslo Convention and Paris Convention that were replaced by it) established the OSPAR Commission to protect the marine environment in the North East Atlantic. Some members of NAFO are also members of the OSPAR Convention. It is empowered to make both binding decisions by unanimous vote, and non-binding recommendations via at least three-quarters majority. Allowing for both binding decisions and non-binding recommendations to be made promotes a more flexible means of resolving issues among the members, as it clarifies the obligations of compliance and enforcement with the particular norms adopted by the Commission.

#### **2.2.4.3 Adopting weighted voting**

Aside from considering binding and non-binding categories of decisions, it has also been suggested for several years that NAFO should additionally consider weighted voting instead of one-country-one-vote distributions. Patterned after practices in international shipping conventions, a weighted voting rule in NAFO could allocate the distribution of votes based on such factors such as historical fish catches, gross tonnage and fleet sizes, economic importance of the stocks to the industry based on indicators such as proportion of GNP and quota allocation trends. There is already a precedent for weighted voting in RFMOs; for example, while Art. 20 of the CCWCPO provides for consensus decisions, in case consensus cannot be reached despite exhaustion of all efforts, a qualified three-fourths majority, based on the geographic distribution of the votes, is provided for.

Weighted voting criteria could be coordinated with "real interest" criteria by which membership is determined. Care should be taken, however, that such factors are not easily manipulated in order to leverage voting rights or do not have perverse effects of undermining future conservation measures (for example, using only the previous year's catch, which could encourage countries to catch more in order to increase the proportion of their vote). It is suggested that further and serious study be made into how a weighted voting process might be established for regional fisheries management.

#### **2.2.4.4. Curbing the “opt- out” loophole**

Recent examples of how the “opt- out” loophole might be substantially plugged is provided by both the CCWCPO and CCSEAF. The CCWCPO allows a member voting against a management decision or being absent from the decision making meeting, to request a review panel of the management decision to see if the decision is inconsistent with the provisions of the Convention or is unjustifiably discriminatory against the member. If a review panel does not find in favour of the member, the management decision will become binding thirty days from the date of communication of the findings and recommendations of the review panel. The CCSEAF Convention sets out an even more complicated “check system” for potential opt out decisions. Any Contracting Party is empowered to request a review meeting of the South-East Atlantic Fisheries Commission for opt out decisions and pending the review meeting may request an ad hoc expert panel to recommend interim measures which would become binding if all Contracting Parties (other than the “opt out Party”) agree that the long term sustainability of the stocks covered by the Convention would be undermined in the absence of such measures.

#### **2.2.5 Enhancing the Participation of Non-Governmental and Other Groups**

As presently constructed, NAFO’s rules of procedure are not very open or transparent to the participation of the public either directly or through non-governmental organizations (NGOs), whether national or international, and independent academic or private institutions. Rules 9 and 10 of the Rules of Procedure of the NAFO General Council require only “intergovernmental organizations” that have regular contacts with NAFO or whose work is of interest to NAFO, and Non-Parties that fish in the NAFO Convention Area to be invited to meetings of the General Council and Fisheries Commission. Any other organizations or institutions may be invited only on the basis of their support for NAFO’s general objectives, or their interest in any species under NAFO management. The NAFO Executive Secretary has wide discretion to decide on why and whether or not an NGO may be invited to NAFO meetings; if they are invited, they may only make oral statements and distribute documents, but are not allowed to make their own records of the proceedings. They may also be required to pay a fee to cover the additional meeting expenses resulting from their participation.

Compared to other international organizations, NAFO is closed and restrictive to public participation. CCAMLR, for example, is much more flexible, as the Commission is allowed, under Art. XXIII of the Convention, to establish working relationships and cooperation with intergovernmental and non-governmental organizations that may assist its work. Such organizations may be invited to meetings of CCAMLR or its constituent bodies, and Rule 30 of the CCAMLR Rules of Procedure provide for means by which such participation is secured and the full extent of participation that may be allowed.

In the Western and Central Pacific, Articles 21 and 22 of the CCWCPO expressly promote the transparency of the decision-making processes and other activities of the Commission, and allows for the participation, in its various bodies and activities, of intergovernmental and non-governmental organizations concerned with matters relevant to the implementation of the Convention. The rules are expressly required to be not unduly restrictive for this purpose, and specific types of cooperation with identified organizations, such as some RFMOs, are mandated.

In the case of OSPAR, para. 23 of the Rules of Procedure permit other States and intergovernmental organizations to be admitted as observers in OSPAR meetings and to be fully represented in committees and working groups, as well as participate in intersessional correspondence groups. Para. 24 and Annex 2 of the Rules contain detailed provisions regarding the qualification, representation, participation, and obligations of these groups as part of OSPAR.

While wider public participation within NAFO along the lines of what other international organizations have done is technically feasible through amendments of the NAFO Rules of Procedure, such participation is better assured through the addition of an appropriate article in the treaty itself. Opening NAFO to public participation by non-State and non-formal groups, can provide immeasurable benefits to NAFO as an organization because direct and continuing access to the expertise and resources of other groups and institutions can definitely assist it in achieving its avowed objectives.

## **2.2.6 Recognizing Special Coastal State Interests and the Need for Management Compatibility**

Perhaps one of the greatest advantages to Canada in seeking NAFO renegotiation is that it may provide an opportunity to advance the “fisheries allocation decisions” in favour of the coastal State and to give primacy to coastal State recommended conservation measures. The NAFO Convention is “dated” by merely urging the NAFO Fisheries Commission to ensure consistency between coastal State management measures and management decisions in the NAFO regulatory area (beyond national jurisdiction). Allocation criteria are left ambiguous with Article XI (4) calling upon the Fisheries Commission to take into account traditional fisheries interests in the area and to give special consideration to the contracting Party whose coastal communities are primarily dependent on fishing for straddling stocks and which has undertaken extensive conservation efforts, in particular, providing surveillance and inspection of international fisheries in the area.

The 1995 Fish Stocks Agreement, while not going as far as Canada might wish in addressing allocation criteria in the extent to which preference should be given to coastal State management approaches / measures, could be read as shifting the balance from the situation under LOS 1982, to one which may favour coastal State management practices and interests. For example, Article 7 of UNFA requires coastal States and States fishing on the high seas to cooperate in achieving compatible conservation and management measures. In determining compatible measures, States must ensure that management measures adopted for the high seas do not undermine coastal State measures; take into account previously agreed regional management measures; consider the extent fish stocks occur in areas of national jurisdiction; take into account the relative dependence of coastal States and high seas fishing States on straddling stocks; and ensure harmful impacts of living marine resources as a whole are avoided.

UNFA also requires Parties to subject compatibility issues to dispute resolution proceedings. Article 7 (4) mandates that Parties make every effort to agree on compatible measures within a reasonable period of time and if no agreement is reached, any concerned State may invoke the dispute settlement procedures set out in Part VIII of UNFA. Article 7 (5) urges States to enter into provisional arrangements pending agreement on compatible management measures.

At the very least Canada should seek to incorporate the UNFA compatibility provisions set out in Article 7 in a new convention, but Canada might even urge States to go beyond UNFA (if it could be achieved in negotiation) to ensure the coastal State is given high priority in fisheries allocations and a central role in determining conservation measures for straddling stocks. For example, in a negotiation, Canada might push to give even greater primacy to the needs and interests of coastal communities of Newfoundland and Labrador and their historical and continuing dependence on the straddling stock resources. Canada might also seek to set a specific time limit for reaching compatibility decisions, for example, 30 days. Canada might even argue for a “default position” where if it adopts management measures for straddling stocks, those measures will become binding within a specified time limit unless a specified majority of Parties object. A variation of the “default position” would be to allow any Party to contest Canada’s setting of management measures through dispute resolution.

### **2.2.7 Addressing the Protection of Endangered and Threatened Marine Species**

Various approaches might be taken to address the important issue of how directed fisheries impact on endangered or threatened marine species in the NAFO Regulatory Area. The issue is not just theoretical in nature but is already a real question in light of the known presence on the Grand Banks of various species at risk, such as spotted and northern wolffish which have been designated as threatened under Canada’s *Species at Risk Act*.

A “minimalist approach” would be to put the endangered / threatened species issue on the agenda of NAFO. For example, the Scientific Council might be mandated to consider the impact of fisheries on endangered or threatened species. Resultant studies might then be used to influence fisheries management decisions, for example, through the closure of fisheries or strict limits on the bycatch of endangered or threatened species.

A “maximal approach” would be to establish a special process to address endangered / threatened species protection. For example, a revamped Convention might provide for a regional listing procedure and regional management responses such as requiring regional recovery and action plans to be developed. Before fisheries that might significantly impact endangered or threatened species would be allowed, a “no jeopardy”



requirement to the survival or recovery determination by a review panel might be required.

A revised Convention might also provide explicit authority for Parties to establish marine protected areas in the NAFO regulatory area. An obligation to identify critical habitats of endangered or threatened species might be imposed.

Regardless of approach, a key question is how determination of endangered / threatened species should be made. Various options might be considered including allowing the coastal State (Canada) to designate endangered / threatened species or establish a regional listing procedure, for example, under the auspices of the Scientific Council.

### **2.2.8 Tackling Non-Member Fishing**

Although fishing vessels flying the flag of States which are not members to NAFO are not covered by its regulatory regime, the Conservation and Enforcement Measures recognizes the need to at least deter their activities, and attempt to establish procedures to address fishing by vessels of Non-Party States. Articles 40 to 44 provide a procedure for reporting sightings of vessels of Non-Parties; prohibit NAFO members from engaging in trans-shipments with non-members; and provide for voluntary inspections at sea and mandatory inspections in port, as well as annual reporting and review of such inspections by NAFO. However, although these measures have been used to successfully address incursions by a few Non-Party States in the past couple of years, they are considerably few and perhaps weak in the long-run. Other RFMO's have established additional measures to address Non-Party fishing in their areas, particularly in light of recent international instruments.

Article 17(1) of UNFA particularly states that Non-Parties are not discharged from the obligation to cooperate in the conservation and management of straddling and highly migratory fish stocks. Article 17(2) emphasizes that such States have an obligation to not authorize fishing for stocks that are under RFMO management regimes.

Even more recently, the FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU fishing), despite

concentrating on incursions within areas of national jurisdiction, highlighted the important role RFMO's may play in deterring fishing by Non-Parties. These include collecting and disseminating information on IUU fishing activities by non-members and stateless vessels, encouraging Non-Parties members to correct their behaviour and take action against stateless fishing vessels, adopt port inspection and catch-certification schemes, disallowing Non-Party vessels from calling into the ports of State Parties, and the use of "market-related measures" to combat illegal, unreported, and unregulated fishing. A few RFMOs have also established their own measures to deter fishing by Non-Parties. The CCAMLR encourages its members to refuse to flag or license fishing vessels which have a history of engaging in illegal, unreported, or unregulated fishing, as well as to condition the issuance of licenses to fish upon the landing of the catch only in States fully implementing the CCAMLR's Catch Documentation Scheme. The NEAFC, on the other hand, uses measures similar to that of NAFO, and in addition, includes a sighted vessel in a "blacklist" that is circulated among all Parties and other RFMO's; urges its members to not authorize the landing or transshipment by such vessels in their ports, or deal with such vessel in any manner that could assist its operations. The NEAFC likewise urges the Members' agencies and citizens to not engage in any transactions with the blacklisted vessel. NEAFC members are also encouraged to jointly and individually deal with the flag states concerned and encourage them to cooperate fully with the NEAFC.

NAFO's measures for Non-Party fishing vessels may only result in forcing the latter to use transshipment-at-sea to extend the range of their operations, which obviates the impact of mandatory port inspections and port bans. Since the inspections-at-sea of Non-Party fishing vessels are currently subject to the consent of the ship's captain, such inspections may prove to be of limited impact in the long run.

In addition to existing options in response to the presence of Non-Party vessels, NAFO, or any one of its members, should officially make representations before the flag State's authorities seeking to revoke the fishing vessel's registration and fishing license. A renegotiated NAFO may also adopt additional Conservation and Enforcement Measures based on the NEAFC's system for addressing fishing by Non-Parties, and extending this further into agreements with other RFMO's for a coordinated policy, perhaps revolving around information exchange and a "global blacklist", against fishing vessels engaged in

fishing in managed waters without authority. A conference of all RFMO's may be initiated by NAFO to establish such a standard and unified approach against fishing by Non-Parties.

It may be useful to consider pushing the legal envelope on such inspections considering the strength of Articles 17(1) and 17(2) of UNFA; it may be argued that such provisions at minimum justify mandatory inspections at sea within the NAFO Regulatory Area by NAFO-authorized enforcement vessels as it is the only way to ensure that such rules are observed and are effective. Flag State jurisdiction should not be used as a shield for wrong-doing, in the same way that maritime territorial boundaries should not provide a safe haven for vessels under hot pursuit. This may be considered as a possible provision in a prospective new agreement; a specific provision in a treaty that clearly considers Non-Party fishing vessels fishing in the Regulatory Area to be subject to mandatory boarding and inspections.

### **2.2.9 Committing to Strengthen Compliance and Enforcement** (see also sub-brief 3)

The existing NAFO Convention is very weak in addressing sanctions and actual enforcement of violations of regional fisheries measures remain with the flag State. Article XVII merely requires Contracting Parties to take actions, "including the imposition of adequate sanctions for violations, as may be necessary" to implement management measures.

At the very least Canada should seek to include in a revised Convention some of the key strengthenings set out in Article 19 of the UNFA which addressed compliance and enforcement by the flag State. Where a vessel has been involved in a serious violation of regional measures, the flag State must be obligated to ensure the vessel does not engage in further fishing operations on the high seas until all outstanding sanctions imposed by the flag State have been complied with. Sanctions must be severe enough to secure compliance, discourage violations and deprive offenders of the benefits accruing from their illegal activities. Measures should be required in national laws of Contracting Parties allowing for the refusal, withdrawal or suspension of authorizations for masters or officers engaged in illegal fishing activities.

Canada might be more courageous and seek to obtain agreement to move beyond UNFA, at least among regional partners in a new Convention. For example, Canada might seek to establish a standardized fine and penalty system for countries to follow in relation to violation of NAFO's conservation measures. Canada could also consider proposing the establishment of a multilateral enforcement approach whereby a body to be established within the regional Convention framework would be given the power to levy sanctions such as denial of access to the Regulatory Area after serious violations.

Numerous difficult questions are raised by such a proposal. They include whether States would ever agree to give up their sovereignty to try and sanction their nationals, whether an administrative or judicial "regional tribunal" is envisaged, who would bear the costs, and how sanctions would be enforced.

#### **2.2.10 Facilitating Cooperation with Other Regional and International Organizations**

The existing NAFO Convention might be described as encouraging a "silo approach" to living resource management. The Convention is silent on the need to cooperate with other regional and international organizations. The Convention merely notes in Article I the various fishery resources not subject to NAFO management, namely, salmon, tunas, marlins, cetacean stocks and sedentary species of the continental shelf. A revamped Convention should follow the model of recent regional fisheries management conventions, such as CCWCPO and CCSEAF, which include a specific article on cooperation with other organizations. Such an article should among other things: call for cooperation with the FAO and other specialized agencies / bodies of the United Nations; encourage consultation cooperation with other inter-governmental organizations such as the International Whaling Commission; urge cooperation with relevant fisheries management organizations in the region, particularly the North Atlantic Salmon Conservation Organization (NASCO) and the International Commission for the Conservation of Atlantic Tunas (ICCAT); allow for agreements and arrangements to be entered into with other organizations; and provide for attendance by other organizations in future meetings of the bodies established under a revised NAFO Convention.

### **2.2.11 Providing for Periodic Review of Treaty Implementation**

Any renegotiated Convention should include a provision to ensure review of how attempted strengthenings and decision-making reforms actually work in subsequent practice. The rationale and value for such a review provision might be drawn from Canada's extensive experiences with statutory reviews at the national level. Almost all recent federal statutes include a provision for critical review, for example, within a five-year period from when legislation enters into force. Legislative reviews provide the opportunity to draw "lessons learned" and to identify ways to further strengthen the legal framework.

An array of independent review mechanisms might be considered. Among others, they include designating a single expert in law of the sea and fisheries law matters or establishment of a multi-person (for example, three or five persons) to a review panel.

Any independent review provision should include a commitment by Contracting Parties to consider the need for further amendments to the Convention and other measures in light of the review process findings and recommendations.

A further option for assessing the adequacy of a revised Convention would be to include an article calling for a review conference. An example of such an approach is provided by UNFA which in Article 36 requires the Secretary-General for the United Nations to convene a review conference four years after entry into force of the Agreement in order to assess the effectiveness of the Agreement in securing the conservation and management of straddling and highly migratory fish stocks and to propose strengthenings.

Whether an independent review or a review conference should be a preferred option remains an open question. Arguments for both approaches can be made. The major points favouring the review conference approach include the more participatory engagement of Contracting Parties and the greater possibility for constructive dialogues among governmental representatives and intergovernmental and non-governmental organizations. A strong point in favour of an independent review is the need to transcend

the potential “glossing over” of legal and institutional shortcomings that might be supported by a general review conference.

### **2.2.12 Establishing Dispute Prevention and Resolution Mechanisms**

A strong decision-making mechanism anticipates the inevitability of disputes, and therefore provides for effective dispute prevention and resolution mechanisms to address them. At present, the NAFO Convention does not provide for either prevention or settlement of disputes among its members arising from the interpretation or implementation of the Convention. It is only on account of Art. 30(2) of the UN Fish Stocks Agreement that NAFO members may now have recourse to dispute settlement under Part XV of the UNCLOS.

The absence of dispute resolution mechanisms is a stark contrast to other RFMO Conventions. CCAMLR, for example, provides at least three dispute settlement mechanisms under Part XXV of the CCAMLR Convention. The Parties must first attempt consultations to choose a dispute settlement process. If this is not feasible, then the dispute shall be submitted to the ICJ or to arbitration. If arbitration is ultimately chosen as the dispute settlement mechanism, then the composition and constitution of the arbitral tribunal is provided for in an Annex to the Convention.

On the other hand, the CCWCPO incorporates the dispute settlement provisions contained in Part VIII of the UN Fish Stocks Agreement. This allows the Parties to resort to the full range of dispute settlement mechanisms under the UNCLOS, including resort to provisional measures, as well as exceptions to dispute settlement under Art. 297 para. 3. In a similar manner, the CCSEAF also provides for multiple dispute settlement mechanisms.

Another option is that of the OSPAR Convention, which simply provides for a straightforward arbitration procedure. Rules for the constitution of the arbitral tribunal, its rules of procedures, applicable laws, and administrative matters, among others, are fully detailed in the Convention itself.

Dispute prevention mechanisms may also be integrated into the decision-making process. The CCWCPO, for example, contains a provision which allows members who

voted against a decision, or who were absent at the time the decision was made, to seek a review of the decision by a separate review panel provided for in an Annex to the convention. This mechanism is clearly a dispute prevention mechanism in the sense that it allows pending issues to be raised and resolved even before a contested measure or decision is implemented.

A similar dispute prevention mechanism may be integrated into NAFO, coupled with the strengthening of the decision-making structures and processes as already pointed out. By enhancing the means by which NAFO members come to clear and binding agreement on issues of whatever nature, the probability of major disputes necessitating resort to international dispute settlement is minimized. This may be further augmented by an arbitration procedure, which is possibly the simplest and efficient solution for possible future disputes. As a preferred mechanism, it would minimize the possibility of waste in time and resources that may be involved in attempting any of the other available dispute resolution mechanisms under UNFA. This mechanism may also be fleshed out in an Annex to a new convention, similar to that of the OSPAR Convention, and laying down the types of disputes subject to arbitration, choice of tribunal venue and membership, provisional measures pending arbitration, administrative support and expenses, and the like.

### **2.3 Conclusion**

With only minor and cosmetic changes possible through revising the subsidiary “rules” of NAFO and extremely difficult amendment process requiring “convoluted consensus” of Contracting Parties, this sub-brief has advocated renegotiation of the NAFO Convention. Twelve areas where substantial reforms should be considered have been identified. The objectives of the present Convention should be expanded from a narrow fisheries focus to a broader ecosystem perspective. Key principles of sustainable development need to be incorporated, including the precautionary approach and the ecosystem approach. The organizational structures of NAFO should be modified through extinguishment of the General Council and creation of an “empowered” Fisheries Commission required to seriously consider Scientific Council advice. Rules for decision-making might be strengthened in various ways including the adoption of weighted voting and the curbing of the opt out loophole. The participation of non-governmental organizations and other groups must be enhanced. The compatibility of coastal State management measures

with regional measures for straddling stocks needs to be further sorted out and Canada might push for the primary right to adopt management measures for such stocks. The protection of endangered and threatened species needs to be addressed and ways to tackle non-member fishing need to be clarified.

Compliance and enforcement approaches need to be strengthened. At the very least Canada should seek to incorporate the advances set out in Article 19 of the UNFA where, among other things, States would be required to ensure that vessels caught violating regional conservation measures would be prohibiting from further high seas fishing until all outstanding sanctions imposed by the flag State have been complied with. Canada might be even more courageous and seek to establish a standardized fine and penalty system for violations of NAFO conservation measures. Canada might also propose the establishment of a multilateral enforcement approach whereby a regional body might levy sanctions against serious violators of regional fisheries conservation measures.

Provision for cooperation with other regional and international organizations needs to be established. The ability to enter into agreements and arrangements with other organizations should be spelled out. Attendance by other organizations in future meetings of bodies established under a revised NAFO Convention needs to be encouraged.

Periodic review of treaty implementation should be provided for. Independent review mechanisms, such as an expert review panel and a review conference, should be considered.

Dispute prevention and resolution mechanisms need to be incorporated into a revised Convention. A suite of choices might be incorporated as provided in Part VIII of the UNFA or more limited processes selected, such as arbitration according to a procedure set out in the revised Convention.

With the major deficiencies and shortcomings of NAFO and the growing realization that past regional fisheries management practices have not been sufficient and effective, Canada must stand up as a leader not a laggard. Canada must develop a clear plan for



transforming NAFO from a discussion forum to an effective regional management organization. The support of non-governmental organizations, academic institutions, communities, and industry interests needs to be better organized to help fuel the attitudes for change.

### **Sub-brief 3: Enhancement of the Existing Legal Regime**<sup>3</sup>

#### **3. Introduction**

The purpose of this sub-brief is to explore options for improvement of the existing legal regime governing the conservation and management of straddling stocks in particular, and high seas fisheries in general. This will be considered under the following headings: amendment or revamping of one or both of the two main legal instruments which provide for the governance of high seas stocks (LOS 1982 and UNFA); improved interpretation and application of these existing legal instruments, whether by litigation or other measures; and the use of other diplomatic channels for addressing identified shortcomings in the existing regime.

#### **3.1 Amendment of Existing Agreements**

##### **3.1.1 Procedures for Review and Amendment**

Both the LOS 1982 and the UNFA allow for review and possible amendment of the agreements. In the LOS 1982, Article 312(1) states that, after the expiry of 10 years after the coming into force of the Convention (i.e. as of December 2004), any State Party “may propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments.” If at least one half of the Parties to the Convention agree, the Secretary-General is to call the necessary conference. Article 312(2) provides the following decision-making structure for the conference:

312(2). The decision-making procedure applicable at the amendment conference shall be the same as that applicable at the Third United Nations Conference on the Law of the Sea unless otherwise decided by the conference. The conference should make every effort to reach agreement

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<sup>3</sup> Prepared by Professor Phillip Saunders, Associate, Marine & Environmental Law Institute, Dalhousie Law School.

on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.

Article 313 provides for a simplified amendment procedure, whereby circulation of a proposed amendment would be sufficient to allow adoption after 12 months, but only if no party objected to either the amendment or the use of the expedited procedure. It is assumed for the purposes of this brief that no amendment of any import would achieve the necessary consensus for use of this process.

In UNFA, Article 36 provides for a review conference to be convened four years after the coming into force of the Agreement (i.e. as of December 2005), on the following terms:

36(1). Four years after the date of entry into force of this Agreement, the Secretary-General of the United Nations shall convene a conference with a view to assessing the effectiveness of this Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks. The Secretary-General shall invite to the conference all States Parties and those States and entities which are entitled to become parties to this Agreement as well as those intergovernmental and non-governmental organizations entitled to participate as observers.  
(2). The conference shall review and assess the adequacy of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks.

Actual amendment of the Agreement is provided for in Article 45, which puts in place a procedure which is similar to that in the LOS 1982. A State Party may submit proposed amendments, and if within 6 months half the parties reply favourably, a conference will be convened, on the same consensus basis as described above. No expedited procedure is provided.

### **3.1.2 LOS 1982 – Feasibility and Prospects**

There are certainly areas which could be identified within the LOS 1982 regime as priorities for amendment, insofar as the high seas and straddling stock regimes are concerned. These could include, for example:

- Clear provision for the priority of the coastal State's interest in straddling stocks, as opposed to the ambiguous wording contained in Art. 63;

- Provision for inspection and enforcement of other flag vessels by coastal States when engaged in management of straddling stocks;
- More explicit requirements for the exercise of flag State responsibility than are contained in the general duties related to the conservation of the living resources of the high seas.

There are, however, a number of factors which would suggest amendment of the LOS 1982 regime in any significant way is simply not a likely prospect: The large number of Parties means that even convening a conference would require a major diplomatic effort, in that half the States Party would need to consent. Actually achieving consensus, or pressing for a vote, on matters as contentious as flag State responsibility or high seas enforcement by coastal States would present even greater difficulties. There does not appear to be any great appetite internationally for a wholesale revision of substantial provisions of the Convention.

Furthermore, given that the matters of greatest relevance to the conservation of straddling stocks have been dealt with (perhaps imperfectly) in the UNFA, which explicitly addresses the implementation of the LOS 1982, it will be difficult to convince large numbers of States that their treatment in the Convention should now be reconsidered. Even if this were possible, it must be remembered that the limited compromises in the UNFA were achieved with respect to a much smaller number of states – it is difficult to see how a broader group, including many States who chose not to enter UNFA, could be expected to do better.

In sum, while amendment of the LOS 1982 in respect of such matters as flag State responsibility and the permissibility of more aggressive coastal State enforcement may be desirable, it is not particularly feasible. Added to this is the fact that any process under the Convention would consume many years, with a limited prospect for a successful outcome at the end.

### **3.1.3 UNFA**

The possibilities for UNFA are somewhat more hopeful, given the smaller number of Parties, and fact that the Agreement provides, not just for amendment, but for a relatively flexible review process which might provide the opportunity to “float” possible amendments in a less formal setting, and to gauge the likelihood of their potential

acceptance. In order to assess the areas of highest priority for review and amendment, it is useful first to briefly summarize the purpose and structure of the Agreement.

- The general purpose of UNFA, as stated in Article 2, is the conservation and sustainable use of straddling stocks and highly migratory species, *within* the context of implementation of the LOS 1982;
- The Agreement gives greater prominence, and provides more detail on the appropriate roles of, RFMOs and other forms of regional arrangements. In essence, these organizations and arrangements are the primary means by which States fulfill their duty to cooperate in the management of these stocks, as stated in the LOS 1982. Some degree of exclusivity of access is provided for members of such organizations, and other States that live by their management measures.
- A number of provisions set out conservation and management principles and measures which are to be applied to straddling stocks both on the high seas and within the EEZs of coastal states. These include, *inter alia*, precaution (as defined in the Agreement), long term sustainability of stocks and protection of biodiversity.
- UNFA makes some provision for enhanced compliance with rules adopted by competent organizations. The primary recourse, however, is still to flag State enforcement on the high seas—although provision is made for “international cooperation” in enforcement, which can include the boarding and inspection of vessels of UNFA member States. Actual arrest and prosecution are possible only under limited circumstances, and within guidelines that allow the flag State to assert jurisdiction.
- In a related set of provisions, a number of more specific obligations on flag States are set out in greater detail (see below).
- Part VIII of UNFA applies the mandatory dispute settlement provisions of the LOS 1982 to disputes respecting the interpretation or implementation of UNFA itself, and to disputes respecting the interpretation and *application* of regional agreements.

It is also possible to identify important gaps and resultant areas for improvement of the Agreement, including the following:

- UNFA, despite some advances in compliance and enforcement by RFMOs and inspecting States, still relies too heavily on flag State enforcement. The poor record with respect to acceptance and implementation of flag State responsibility in dealing with high seas conservation in general give some reason for concern on this front.
- The Agreement is limited to straddling stocks and highly migratory stocks (and associated species), and leaves aside the important problems of discrete stocks on the high seas.

- The Agreement is reliant on RFMOs and other arrangements to implement the conservation and management principles which it sets out. While new agreements might be expected to fully apply the conservation principles and measures set out in the Agreement, most RFMOs (including NAFO) predated UNFA, and full introduction of the conservation principles found in the Agreement will require further work.
- The conservation principles included in UNFA are at times outweighed by an orientation towards exploitation. The definition of precaution is problematic, in that it is defined primarily via “precautionary reference points” which are themselves centred on maximum sustainable yield. In addition, there is little more than passing references to ecosystem and habitat protection.

The difficulties identified here could be addressed in the review and amendment process. For example, amendments could be sought to implement the following improvements to the existing regime:

- Greater inspection and enforcement powers (including arrest and prosecution) could be given to coastal and other States which are members of RFMOs, where they are enforcing measures agreed by the organization (or perhaps a subset of the more serious or significant measures);
- Discrete high seas stocks could be added to the UNFA mandate (presumably when they are subject to the management of an RFMO);
- The conservation principles and measures included in UNFA could be extended to include, eg., greater use of ecosystem and habitat protection. Furthermore, the existing principles could be strengthened by steps such as a removal of the emphasis on exploitation and a redrafting of the definition of precaution.

These improvements can certainly be sought via the review and amendment process, and the flexibility of the review process, as noted above, means that this can be done without committing to any formal wording at an early stage. It should be noted, however, that the pursuit of formal amendment is not without risk. The UNFA currently has only 52 States party to its provisions, and it would certainly enhance the impact and effectiveness of the Agreement if more States can be persuaded to come within the regime it establishes. In that vein it is important note the obligation on States Party, such as Canada, under Article 33 of UNFA

## Article 33

### Non-parties to this Agreement

1. States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.

Careful consideration will need to be given to the impact of more extensive suggestions for amendment, such as increased capability for coastal State enforcement on the high seas. It would be counterproductive if new states are dissuaded from joining the UNFA regime by the introduction of more onerous obligations than are presently provided.

This issue is closely related to a more general point: the major problem at the moment may not be the availability of legal tools, but rather the effective implementation of those which already exist. While there is merit in pursuing improvements to the existing legal structure governing these fisheries, the negotiation of new obligations, however desirable, may not be the top priority as long as the existing obligations are not fully implemented by the widest possible array of States.

### **3.2 Application and Interpretation of Existing Obligations**

The need to more effectively implement existing obligations under LOS 1982 and UNFA can be addressed in at least three ways, two of which already appear to be part of Canadian government policy. First, given that the implementation of UNFA management principles and enforcement-related obligations depend upon their application by RFMOs, including pre-existing RFMOs such as NAFO, it will be necessary to work systematically to achieve full compliance with the letter and spirit of UNFA. The recent work to assess the application of precaution within NAFO is an example of this approach. Other possibilities within the NAFO framework or in a renegotiated NAFO are outlined in sub-brief 2. This will be an issue on which the experience of other regions and RFMOs will be instructive, and it will be necessary to maintain a watching brief on developments in other regions, including those (such as the Western and Central Pacific Fisheries Convention) where RFMOs have been designed from outset to be consistent with UNFA.

The second route for ensuring more effective application of UNFA, and of RFMO provisions as well, is more aggressive unilateral action *within the scope of allowable enforcement actions*. For example, a coastal State or other Party can choose to devote

the resources to fully assert its inspection powers under UNFA and the regional agreements. It is this strategy which Canada appears to have adopted in its enhanced surveillance and inspection activities over the past year or more, with violations being identified and the information being passed back to flag States. This may not result directly in prosecution and penalties, given the continued reliance on flag State enforcement as the default position, but it does have other benefits. There is some deterrent value, given that there will at least be some interference with fishing operations, and at best an actual prosecution by the flag State. Furthermore, the enhanced inspection approach does provide vital information on the extent of the compliance problem, information which may feed into any review process, and may as well support an eventual dispute settlement strategy (see below). In a similar vein, the use of port State jurisdiction to improve monitoring, or in some cases to exclude persistent offenders from supply facilities, can also be pursued.

It has been a perennial criticism of NAFO that there is no adequate dispute settlement procedure to deal with those States who persistently allow violations of agreed rules by their vessels, or who generally fail to cooperate in the manner intended by the NAFO Convention, or by the LOS1982 more generally. UNFA addresses this issue in Part VIII which, in addition to providing for obligations respecting peaceful settlement of disputes by negotiation and other means, applies the mandatory dispute settlement provisions of the LOS 1982 to disputes respecting both UNFA and regional agreements:

30(1) The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

(2) The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.

Part XV of the Convention provides for a number of dispute settlement options, including conciliation and resort to adjudication before the International Tribunal on the Law of the Sea (ITLOS) or arbitral panels, but the central point here is that, assuming other options

were not successful, disputes under UNFA and related agreements could ultimately be submitted to mandatory, binding dispute settlement. This gives rise to the possibility of further defining, and enforcing, state responsibility to cooperate via RFMO arrangements through litigation. There are at least two areas within UNFA that might benefit from such a strategy: the application of conservation and management principles, and the definition of flag State responsibility.

### **3.2.1 Conservation and Management Principles**

Article 7 of UNFA provides for the compatibility of management measures between high seas areas and areas within national jurisdiction. As is noted in sub-brief 2, above, this is likely to raise questions of the “hierarchy” of measures, in that coastal States such as Canada will argue that the special interest of the coastal State justify a greater degree of deference for its management measures in terms of compatibility, a position that finds some support within UNFA (see sub-brief 2). This is, however, likely to be a controversial matter, given the ambiguity of some of the wording in UNFA, and it is entirely possible that ready agreement will not be achieved. At the same time, this will be an issue of some importance for Canada which, if it cannot achieve custodial management rights, will at least wish to ensure that its management measures are respected, and certainly not actively undermined, by measures taken on the high seas at the regional level. Articles 7(3) & (4) deal with this question, and make it clear that failure to agree on compatible measures in a reasonable time is a matter which may be referred to dispute settlement:

7(3). In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

(4). If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.

Article 7(5) additionally specifies an obligation to make efforts to enter into provisional measures pending settlement of the disputes. The significance of these provisions seems clear. A tribunal would be enabled to rule on whether a Party or Parties had fulfilled their “duty to cooperate” by a good faith effort to agree on conservation and management measures, and obstructionist refusals to cooperate could conceivably be sanctioned, or at least condemned. If Canada believed that it had a strong case on the



merits of proposed measures, and on the compatibility issue in particular, redress might be sought through this avenue. In essence, the UNFA provided further definition and substance to the vaguely defined duty to cooperate found in the LOS 1982. Litigation on issues such as compatibility and agreement on conservation and management measures offers the opportunity to take this effort further, and achieve a higher degree of certainty as to what this duty comprises.

There is limited experience with similar cases in the international jurisprudence, but there is equally some reason for optimism. The *Southern Bluefin Tuna Case*, involving Japan, Australia and New Zealand, was an arbitral proceeding under the LOS 1982, which predated UNFA coming into force. It offered a chance to explore and define the duty to cooperate on the management of highly migratory stocks, under both the LOS 1982 and the Convention for the Conservation of Southern Bluefin Tuna (CCSBT). Although ITLOS imposed provisional measures, the arbitral panel which heard the case decided on narrow jurisdictional grounds related to the availability of other dispute settlement options, but presumably a subsequent case under UNFA would be better placed to address the main issue. In another case, involving Chile and the EC, a special chamber of ITLOS was asked to rule on whether “the European Community has complied with its obligations under the United Nations Convention on the Law of the Sea to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile’s exclusive economic zone”. Proceedings in this case have, however, been suspended for the time being due to an interim arrangement reached between the Parties. Finally, it should be noted that in a case involving Ireland and the UK (*The MOX Case*), ITLOS recognized, as part of a ruling on provisional measures, that the duty to cooperate (in that case in the prevention of marine pollution), was a “fundamental principle” under the Convention and in general international law.

Neither of the fisheries cases was taken to completion on the merits (although the Chile-EC case could re-emerge). They do, however, indicate that issues of this nature, respecting cooperation in the framing of conservation and management measures, could at least be framed as a justiciable question, suitable for resolution by an adjudicative body with both jurisdiction and the right set of facts. UNFA addresses the jurisdictional issue, at least for Parties to that Agreement, and it additionally broadens out the range of

considerations beyond those traditionally considered by courts and tribunals, potentially to the advantage of Canada. UNFA specifically mandates tribunals dealing with the interpretation of the Agreement and regional agreements to apply, not only the provisions of the relevant agreements and other principles of international law, but accepted standards for conservation and management of living resources:

Article 30(5) Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

This provision opens up uncharted jurisprudential ground: how will tribunals find and define these “accepted” standards, and how rigorous will they be in their application to states? These questions cannot yet be answered, but it is clear that the addition of this requirement opens up new avenues for arguing in favour of conservation and management principles in their own right, on an equal footing with other, more restrictive legal principles.

### **3.2.2 Flag State Obligations**

The other broad area which might provide opportunities for development of the legal regime through litigation is found in the various flag State obligations imposed under UNFA. While the extent of coastal State power to enforce directly against other flag vessels under the Agreement is, as noted earlier, limited, this does not mean that the *flag State’s* own responsibility is not engaged by violations under the Agreement, and the availability of dispute settlement procedures may enable states such as Canada to test the limits of a flag State’s responsibility for its fleets.

Building on the basic regime set out in LOS 1982, UNFA sets out a number of specific obligations with respect to flag States of vessels fishing for the relevant stocks on the high seas. The broad obligations are defined in Articles 18(1) and (2), which provide as follow:

18(1). A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply

with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.

(2). A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.

Article 17(2) also requires States not to authorize fishing for stocks subject to management measures under a regional organization or arrangement to which they are not party:

Article 17(2). Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.

These obligations presume administrative and enforcement capability, as well as an effective vessel registry, and appropriate offences, to prevent and punish the prohibited actions. Article 18(3) adds a list of specific measures which must be put in place by flag states as part of the general obligations stated above. These include, *inter alia*, the following:

- Provision for “licences, authorizations or permits, in accordance with any applicable procedures agreed at the subregional, regional or global level”;
- Creation of regulations to “apply terms and conditions to the licence, authorization or permit sufficient to fulfil any subregional, regional or global obligations of the flag State” and to “prohibit fishing on the high seas by vessels which are not duly licensed or authorized to fish” or fishing which is not in accordance with a licence
- Ensuring that “vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States”;
- Establishment of a “national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States, taking into account any national laws of the flag State regarding the release such information;
- Provision for “requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional and global standards for collection of such data”;
- Monitoring, control and surveillance of “vessels and their fishing operations and related activities by, *inter alia*” the implementation of

national and regional inspection schemes and regional schemes for “cooperation in enforcement”;

- Requirements “for such vessels to permit access by duly authorized inspectors from other States”;
- Implementation of national and regional observer programmes;
- “Development and implementation of vessel monitoring systems”, including satellite systems.

This is not a complete list, but it does indicate the range of obligations assumed by a flag State with respect to control of its vessels operating on the high seas. Of particular interest, however, is Article 19(1), which requires that a flag State “shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks”, and provides for a number of further specific obligations, including the following:

- The flag State will “investigate immediately and fully” alleged violations of “subregional or regional conservation and management measures”, and “report promptly to the State alleging the violation” with respect to the progress and outcome of the investigation;
- Require vessels to cooperate with inspections and provide the necessary information to inspecting authorities;
- If “satisfied that sufficient evidence is available”, then “refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned;”
- Where a commission of a “serious violations” has been established, ensure that “the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State... have been complied with”.

Article 19(2) sets out significant obligations respecting timeliness, transparency and adequacy of penalties:

19(2) All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.

It is not difficult to see how States could abuse the obligations under Articles 18 and 19, as well as the additional obligations to cooperate in international enforcement set out in Article 20, but the statement of actual criteria (as, for example with the reference to penalties which deprive offenders of the benefits) could still give a properly motivated tribunal the opportunity to find that a flag State which persistently refused to enforce, or enforced in a token manner, was responsible at international law for those failings. This will not be an easy case to make, as there is a great deal of room to argue as to how an investigation is treated on the merits of a particular evidentiary case, but it is conceivable that the results of a coordinated inspection effort, regularly reported to the flag States, could be used to develop the necessary evidence of a pattern of non-compliance with these flag State obligations.

### **3.2.3 Summary**

Enhancing the implementation and application of both UNFA and NAFO provisions should be a priority, in part because this effort can go forward immediately, and is based on existing obligations. This should include, as noted above, explicit incorporation of UNFA obligations in NAFO, unilateral pressure to the extent permitted by the current inspection and enforcement regime, and, potentially, litigation to further define the duty to cooperate in conservation and management, and the nature and extent of flag state obligations. Litigation should always be the last option, but it is one which should not be ignored, particularly given the potential for introduction of conservation standards into international jurisprudence, made possible under UNFA.

### **3.3 Other Diplomatic Avenues**

The focus of this sub-brief has been on the legal instruments most directly engaged in determining the legal regime for fisheries on the high seas, including straddling stocks. It should be remembered, however, that a number of other initiatives, involving both legal development and more general policy coordination, continue to deal with broader aspects of the global problems of high seas governance than straddling stocks, or the specific issues of the Northwest Atlantic. Relevant initiatives include, but are not limited to, the following:

- FAO activities to deal with Illegal, Unreported and Unregulated (IUU) fishing, and with flag State responsibility for the activities of fishing vessels. These have led to the non-binding *Code of Conduct for Responsible Fisheries (1995)*, and the subsequent development of

International Plans of Action (IPOAs) on specific issue areas, including the *International Plan Of Action To Prevent, Deter And Eliminate IUU Fishing*. The 1993 *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.*, which is now in force and to which Canada is party, sets out standards for flag State responsibility for high seas fishing.

- The ongoing work of the International Maritime Organization (IMO) and the International Labour Organization (ILO) other relevant organizations, to, *inter alia*, improve flag State implementation and port state inspection procedures to address the problem of flag State responsibility, and the development of principles on request of the United Nations General Assembly related to the “genuine link” between States and vessels of their flag.
- The High Seas Task Force, organized under the auspices of the OECD, and including Canada as a member, has begun its work and recently issued a summary of its first meeting, which included discussions of high seas monitoring, control and surveillance, flag State responsibility, port State controls, and broader issues of high seas governance. Although this is in its early stages, the work of like-minded states in this context may provide a valuable impetus for long-term change.
- The United Nations Open-ended Informal Consultative Process on Oceans and Law of the Sea (UNICPOLOS) has provided an important forum for international discussion of high seas governance, among other issues. In another UN related process, which reported to UNICPOLOS, the “Consultative Group on Flag State Implementation” including IMO, ILO, FAO, UNEP, OECD and UNCTAD, prepared a report on flag State implementation of international obligations.

This sampling of the wide range of international activities of direct relevance to the broader problem of high seas governance, and particularly of problems related to flag State responsibility, makes it clear that this cluster of issues has engendered some degree of urgency, at least among some States and certainly among international organizations and NGOs. Canada, consistent with the position set out in the National Ocean Strategy, has been actively involved in a number of these initiatives, though perhaps not uniformly so. It should be a priority to ensure a strong Canadian presence in and support for these various actions, all of which contribute to some degree to the long term enhancement of the international legal regime of the high seas.