

THE SENATE

LE SÉNAT

CANADA

**THE MANAGEMENT OF ATLANTIC FISH STOCKS:
BEYOND THE 200-MILE LIMIT**

**STANDING SENATE COMMITTEE
ON FISHERIES AND OCEANS**

Chair

The Honourable William Rompkey, P.C.

Deputy Chair

The Honourable Janis G. Johnson

February 2007

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In addition, the Honourable Senators James Cowan, J. Michael Forrestall, Joan Fraser, Leonard J. Gustafson, and Rose-Marie Losier-Cool were members of the Committee at various times during this study or participated in its work on this matter during the First Session of the 39th Parliament.

Research Staff:

Claude Emery, Library of Parliament

Till Heyde and Catherine Piccinin

Clerks of the Committee

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Tuesday, May 16, 2006:

The Honourable Senator Johnson moved, seconded by the Honourable Senator Stratton:

That the Standing Senate Committee on Fisheries and Oceans be authorized to examine and report on issues relating to the federal government's new and evolving policy framework for managing Canada's fisheries and oceans;

That the papers and evidence received and taken and the work accomplished by the Committee on the subject during the First Session of the Thirty-Eighth Parliament be referred to the Committee; and

That the Committee submit its final report to the Senate no later than Friday, June 29, 2007.

The question being put on the motion, it was adopted.

Paul Bélisle

Clerk of the Senate

**THE MANAGEMENT OF ATLANTIC FISH STOCKS
BEYOND THE 200-MILE LIMIT**

**STANDING SENATE COMMITTEE ON
FISHERIES AND OCEANS**

ACRONYMS

DFAIT	– Department of Foreign Affairs and International Trade
DFO	– Fisheries and Oceans Canada
EEZ	– Exclusive Economic Zone
EU	– European Union
FAO	– UN Food and Agriculture Organization
FCC	– Fisheries Council of Canada
ICNAF	– International Commission for the Northwest Atlantic Fisheries
ICJ	– International Court of Justice
IUU	– Illegal, Unreported and Unregulated
LOS Convention	– 1982 United Nations Convention on the Law of the Sea
NAFO	– Northwest Atlantic Fisheries Organization
NGO	– Non-Governmental Organization
RFMO	– Regional Fisheries Management Organization
TAC	– Total Allowable Catch
UN	– United Nations
UNCLOS III	– Third United Nations Conference on the Law of the Sea
UNFA	– 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, or United Nations Fish Stocks Agreement
UNGA	– UN General Assembly
VMS	– Vessel Monitoring Systems

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FOREWORD

Canadians, especially people in Newfoundland and Labrador – the province most directly affected – are profoundly disillusioned with the Northwest Atlantic Fisheries Organization (NAFO). Fish stocks that straddle the 200-mile boundary line on the Nose and Tail of the Grand Banks, historically one of the world’s most prolific fishing grounds, remain severely depleted and show no signs of recovery despite more than a decade of fishing moratoria. Evidence clearly shows that the destruction began decades earlier when Canada’s fishing zone was less than 200 miles.

This year (2007) marks the 30th anniversary of Canada’s 200-mile limit, the 25th anniversary of the 1982 UN Convention on the Law of the Sea, and the 15th anniversary of the Canadian northern cod moratorium. The demise of northern cod, once the single most important species of groundfish on Canada’s East Coast, devastated coastal communities in Newfoundland and Labrador. Billions of dollars in public funds were spent on a series of costly adjustment programs in the region.

While theories abound about what caused the decimation – unsustainable and wasteful fishing practices; environmental factors and changes to the ecosystem; and an out-of-control population of voracious seals – it cannot be denied that the large-scale overfishing by foreign fleets during the mid-1980s and early 1990s exacted a toll on the “straddling stocks” and the several stocks under NAFO’s direct control have suffered disastrous depletion.

In September 2005, an advisory committee of experts to the Minister of Fisheries and Oceans concluded that NAFO had so many flaws, and such a record of failure, that a new organization had to replace it. Upon taking office in 2006, the new Minister made the foreign overfishing issue one of his top priorities. The Committee saw this as opportune time to review NAFO and its myriad problems.

In September 2006, following its Annual Meeting, NAFO announced “great progress with its ground-breaking reform agenda.” Canadian Fisheries Minister Loyola Hearn also spoke about real and unprecedented movement towards reform and renewal. While participants in our Committee’s hearings were somewhat encouraged by the news, they were also cautious in their support. A good deal of scepticism was in fact expressed about what was actually accomplished. Some pointed to apparent flaws in the proposed reforms. Although they offer some hope for better conservation and enforcement, much still depends on the good will and cooperation of NAFO member states to effect real change, and such a positive attitude was not always evident in the past.

An international meeting to finalize amendments to the legal text of NAFO's Convention is scheduled for April 2007. Obviously, the devil will be in the details. The Committee has asked for a copy of the amended text, which constitutes a package to be submitted for adoption later this year at NAFO's Annual Meeting in September 2007. In the meantime, we offer recommendations intended to improve NAFO and to otherwise benefit the fishery.

In forming its views, the Committee heard from a number of experts and government officials in Ottawa, including Minister Loyola Hearn. The Committee members also travelled to Newfoundland and Labrador on 7-9 November 2006. A full day of public hearings was conducted in St. John's, and concluded with an open-mike session to hear from members of the public.

As part of fact-finding work, the Committee was briefed by staff at the Department of Fisheries and Oceans' (DFO) Northwest Atlantic Fisheries Centre. In St. John's, Committee members also viewed Provincial Airlines' state-of-the-art technology for aerial high-seas surveillance, considered the most cost-effective and advanced system in the world for the surveillance and detection of illegal marine activities. In Labrador, Committee members met with fishermen belonging to the Labrador Fishermen's Union Shrimp Company in L'Anse-au-Clair, to hear their success story on implementing sustainable livelihoods along the Labrador coast.

We wish to thank those who generously made time available to meet with us in Ottawa and in Newfoundland and Labrador, and those who provided written submissions. We were very impressed by the energy and commitment shown by all participants in our study; this report reflects their views and their voices.

William Rompkey, Chair

RECOMMENDATIONS

1. **The Committee recommends that Canada support a prohibition on bottom dragging in unregulated areas of the high seas. To condone bottom dragging in such areas runs counter to Canada's stated objectives in sustainable development and responsible management of the oceans.**
2. **The Committee recommends that Canada appoint a national panel of scientific and legal experts in the Law of the Sea to determine whether Canada could prohibit dragging on the ocean floor by foreign fishing fleets on Canada's continental shelf outside 200 miles.**
3. **The Committee recommends that Canada immediately demand that all foreign fishing fleets on Canada's continental shelf be subject to the same laws and penalties as are Canadian fishermen in that all vessels should have observers and active Vessel Monitoring Systems on board at all times or face immediate return to port and prosecution, and the evidence of fisheries observers should be made admissible in court proceedings.**
4. **The Committee recommends that the Department of Fisheries and Oceans undertake a comprehensive scientific review of the Grand Banks ecosystem, and invite NAFO members to cooperate in this endeavour. The review, which should include habitat considerations, would be the basis for devising conservation objectives and ecosystem rebuilding measures over a ten-year timeframe.**
5. **The Committee recommends that Canada immediately inform NAFO and its members that Canada considers the legal text of the draft NAFO Convention (fourth revision, 13 October 2006) unacceptable in its current form. Canada, as the major coastal state and fishery interest, should take the lead in drafting a new version of the legal text to take forward to negotiations. In so doing, Canada should refuse the imposition of the two-thirds voting rule and any other changes that could weaken Canada's control within the 200-mile limit and its position outside 200 miles.**
6. **The Committee recommends that expert parties outside of the Department of Fisheries and Oceans and the Department of Foreign Affairs and International Trade should advise on the draft Convention and procedural changes. These parties should include former DFO and other former officials experienced in the field, as well as academic and industry representatives.**
7. **The Committee recommends that the Department of Fisheries and Oceans hold discussions with the European Union with the aim of concluding a bilateral agreement on rebuilding fish stocks in the NAFO Regulatory Area. Canada should indicate to the European Union its willingness to make a sizeable investment in research to rebuild those stocks if the EU agrees to match Canada's contribution in this effort.**

- 8. The Committee recommends that, in future, Canada take full advantage of the options for enforcement, dispute settlement, and other provisions made possible under the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFA).**
- 9. The Committee recommends that the Department of Fisheries and Oceans indefinitely maintain the recent increase in Canadian surveillance and enforcement activity in the Regulatory Area. Further use should be made of Canadian Forces vessels and aircraft in fisheries patrols as part of their training and manoeuvres.**
- 10. The Committee recommends that Canada press its partners in the Northwest Atlantic to make NAFO a model and much more successful Regional Fisheries Management Organization, with a bigger voice for the coastal state and with appropriate provisions for the European Union as the other major member.**
- 11. The Committee recommends that the Department of Foreign Affairs and International Trade and the Department of Fisheries and Oceans jointly evaluate the effectiveness of NAFO's sanctions system to determine whether the guidelines adopted in September 2006 are deterring violations in the Regulatory Area, and report to this Committee no later than 31 December 2008.**

THE MANAGEMENT OF ATLANTIC FISH STOCKS BEYOND THE 200-MILE LIMIT

BACKGROUND

Although they fished those areas before Canada was a country, they have no right to fish abusively. Collectively, we can protect what we have left or we will do it on our own [...].

– The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 30 May 2006

These stocks have been subject to massive overfishing by other nations and our government will continue to stand firm against such activity.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

You have to understand that the extension of jurisdiction to 200 miles and not to the continental shelf has practically destroyed the fishery in Newfoundland and Labrador [...]. We have had 15 years to prove to us that the recovery is not taking place.

– Gus Etchegary, Retired industry executive and former Canadian commissioner to ICNAF and NAFO, Committee Proceedings, 9 November 2006

When it comes to fishing on the high seas, the response of the world has been to establish RFMOs.

– Mark Butler, Managing Director and Coordinator, Marine Issues, Ecology Action Centre, Committee Proceedings, 5 December 2006

I do not think there are many people left who do not realize the predicament that we are in around the world.

– Dr. George Rose, Division of Degree Studies and Research, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

[T]he hard work over the past decades to strengthen international law and instruments available to deal with the issues are beginning to pay off. [...] We have punched above our weight to achieve significant gains in international institutions.

– Earl Wiseman, Former DG of DFO's International Affairs Directorat (now retired), Committee Proceedings, 19 October 2006

UNFA brought all parties to the Agreement within the mandatory dispute settlement procedures in the LOS Convention. [...] This would be for disputes related to the interpretation and application of regional fisheries management agreements like NAFO.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

A. Global Trends

The world over, the oceans are being exploited as never before. In its most recent study on the *State of World Fisheries and Aquaculture* in 2004, the United Nations Food and Agriculture Organization (FAO) highlighted a global increase in the proportion of overexploited and depleted stocks, from about 10% in the mid-1970s to close to 25% in the early 2000s. About 24% of the world's marine stocks or species groups are either over-exploited or depleted, and half (52%) are fully exploited, with no reasonable expectations for further expansion. In fact, they may be in far worse shape than previously thought; the global catch may have declined since the late 1980s, rather than increased as previously reported by the UN FAO.⁽¹⁾ In April 2004, the United Nations Department of Public Information identified "overfishing" as one of the top 10 overlooked international media stories of the year.⁽²⁾

Globally, the trend has been one of "fishing down the food web"; having removed the larger fish at the top of various food chains, fisheries are moving down the food chain, targeting ever smaller finfish and invertebrates, and simplifying marine ecosystems.⁽³⁾ In May 2003, a study published in the journal *Nature* showed, among other things, that: worldwide, the biomass of large predatory fish populations with high commercial value, such as tuna and cod, is now only 10% of pre-industrial fishing levels; industrialized fisheries typically reduce the biomass of fish communities by 80% within 15 years; local extinctions can go unnoticed even when closely monitored; and there is little empirical information available from the open oceans.⁽⁴⁾

More recently, in November 2006, an international team of scientists headed by researcher Dr. Boris Worm of Dalhousie University published a study in *Science* magazine that sparked a firestorm of controversy in Canada and abroad. Based on a vast range of data from a wide variety of sources, the authors projected that, at current rates of depletion (if present practices continue), there will be no viable populations of fish left in the world's oceans by the middle of the century. The four-year study concluded that "marine biodiversity loss is increasingly impairing the ocean's capacity to provide food, maintain water quality, and recover from perturbations," but also that the "trends are still reversible."⁽⁵⁾

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- (1) The discrepancy is due mainly to incorrect reporting by China. See: Reg Watson and Daniel Pauly, "Systematic Distortions in World Fisheries," *Nature*, Vol. 414, 29 November 2001, pp. 473-566.
 - (2) United Nations, "UN Spotlights 10 Stories World 'Should Know More About' At Headquarters Press Conference," 30 April 2004.
 - (3) Daniel Pauly and Jay Maclean, *In a Perfect Ocean: The State of Fisheries and Ecosystems in the North Atlantic Ocean*, Island Press, Washington, D.C., 2003, p. 52.
 - (4) Ransom A. Myers and Boris Worm, "Rapid Worldwide Depletion of Predatory Fish Communities," *Nature*, Vol. 423, 15 May 2003, pp. 280-283.
 - (5) Boris Worm *et al.*, "Impacts of Biodiversity Loss on Ocean Ecosystem Services," *Science*, Vol. 214, 3 November 2006, pp. 787-790.

In response to the high seas overfishing problem, more than 30 regional fisheries management organizations (RFMOs) have been established in various parts of the world since 1945. Canada, as a coastal state that borders three oceans, participates in 15 such organizations dealing with straddling and transboundary fish stocks, as well as highly migratory and anadromous stocks.⁽⁶⁾ Some RFMOs, such as the International Commission for the Conservation of Atlantic Tunas and the North Atlantic Salmon Conservation Organization, focus on specific species. Others are regionally oriented, such as NAFO. Some are relatively new, like the North Pacific Anadromous Fish Commission; others, like NAFO, are long-established.

RFMOs differ in membership, coverage of stocks, provisions, etc., but they tend to share certain common elements: member fishing nations receive scientific advice regarding the stocks they are mandated to regulate; they set conservation measures; and they determine total allowable catches (TACs). Some regional fisheries bodies, however, do not assign quotas. Because RFMOs were established in different eras, under different circumstances, with different mixes and numbers of coastal states and distant-water fishing nations, each RFMO has its own procedure for making decisions. With few exceptions, however, decision-making is based on the equality of the parties, with each state having one vote. Decisions are taken either by consensus or by majority decisions with recourse to an objection procedure. The general operational practice is to seek consensus.⁽⁷⁾

Another common feature of RFMOs is that enforcement of conservation measures is left to the “flag states,” the countries where the vessels are registered. Under international law, as embodied in the 1982 United Nations Convention on the Law of the Sea (LOS), flag states have the final and sole responsibility for controlling the fishing activities of their vessels and crew on the high seas, where there is “freedom of fishing,” even in areas regulated by RFMOs.

In the negotiations leading up to the 1982 LOS Convention, Canada was unsuccessful in its efforts to give coastal states jurisdiction over straddling fish stocks. In the wake of 200-mile limits, distant water fishing fleets were displaced from traditional fishing grounds, but increased their catches of fish that straddled 200-mile boundaries. Today, “shared fish stocks” account for as much as one-third of world marine capture-fishery harvests.⁽⁸⁾ On the Grand Banks, the foreign effort persisted in the outer regions of the continental shelf.

(6) DFO, *Canada’s Strategy to Combat Global Overfishing and Improve International Fisheries and Oceans Governance*, http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/bk_strategy_e.htm.

(7) See: Ted L. McDorman, “Implementing Existing Tools: Turning Words Into Actions, Decision-Making Processes of Regional Fisheries Management Organizations (RFMOs),” St. John’s Conference on the Governance of High Seas Fisheries and UNFA, June 2005, http://www.dfo-mpo.gc.ca/fgc-cgp/documents/mcdorman_e.pdf.

(8) Gordon Munro, Annick Van Houtte and Rolf Willmann, *The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects*, FAO Fisheries Technical Paper 465, Rome, 2004, <http://www.fao.org/docrep/007/y5438e/y5438e00.htm>.

Significantly, since 1982, a number of other codes and guidelines for high seas fishing have emerged to make up for the LOS Convention's inadequacies with respect to the management of high seas fish stocks. There was a growing realization that fishery resources are not infinite or inexhaustible as once imagined. The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, also known as the United Nations Fish Stocks Agreement, or UNFA, is considered to be foremost because of its comprehensiveness and the duties it places on states to cooperate in addressing the problem of high seas overfishing of the world's straddling fish stocks. The Agreement was intended to strengthen the world's RFMOs, which are the treaty's main implementation mechanism. Appendix 1 provides a summary outline of the LOS Convention and UNFA.

Canada ratified UNFA in August 1999. As one of its staunchest proponents, Canada considers the Agreement, which entered into force in December 2001 (after receiving the 30 required ratifications), as a major step in the fight against high seas overfishing of the Atlantic groundfish stocks. Considerable hopes have been placed on UNFA, an international instrument once described by the Minister of Fisheries and Oceans in 1995 as a means to end foreign overfishing permanently.

It was frequently noted at the Committee's meetings that UNFA has the potential to effect positive change in the operation of NAFO because of the Agreement's emphasis on the use of RFMOs. With its 50 Articles dealing specifically with straddling and highly migratory fish, UNFA elaborates considerably on the earlier LOS Convention. UNFA's key elements include guiding principles (notably the precautionary approach and the ecosystem approach) meant to assure sustainable fishing, and the boarding and inspection of fishing vessels by states other than flag states on the high seas. It also sets out dispute resolution procedures.

During 1-5 May 2005, the Government of Canada hosted an intergovernmental conference on the *Governance of High Seas Fisheries and the United Nations Fish Agreement* in St. John's. Ministers and senior officials from 45 fishing nations attended the gathering, which culminated with the release of a Ministerial Declaration by ministers from 19 states.⁽⁹⁾ Among other things, the Declaration outlined commitments to strengthen the use of scientific information and the precautionary approach in the decision-making of RFMOs, and provide stronger monitoring, control and surveillance regimes. At their recent annual conferences, North Atlantic Fisheries Ministers and their representatives have also expressed support for the implementation of UNFA's provisions.

(9) St. John's Conference, Ministerial Declaration, 1-5 May 2005, http://www.dfo-mpo.gc.ca/fgc-cgp/declaration_e.htm. In June 2003, the Committee had proposed in its report on *Straddling Fish Stocks in the Northwest Atlantic* that the federal government immediately begin to organize an international conference in Newfoundland and Labrador to focus on ways to strengthen the role and operation of the world's RFMOs, such as NAFO.

B. NAFO

The width of the continental shelf on Canada's Atlantic Coast, far broader than on the Pacific Coast, is a dominant physical feature of the region's marine zone. This area of relatively shallow water is typically higher in nutrients and more productive than the deep ocean. Historically, the region yields much of the commercial fish harvest in North America.

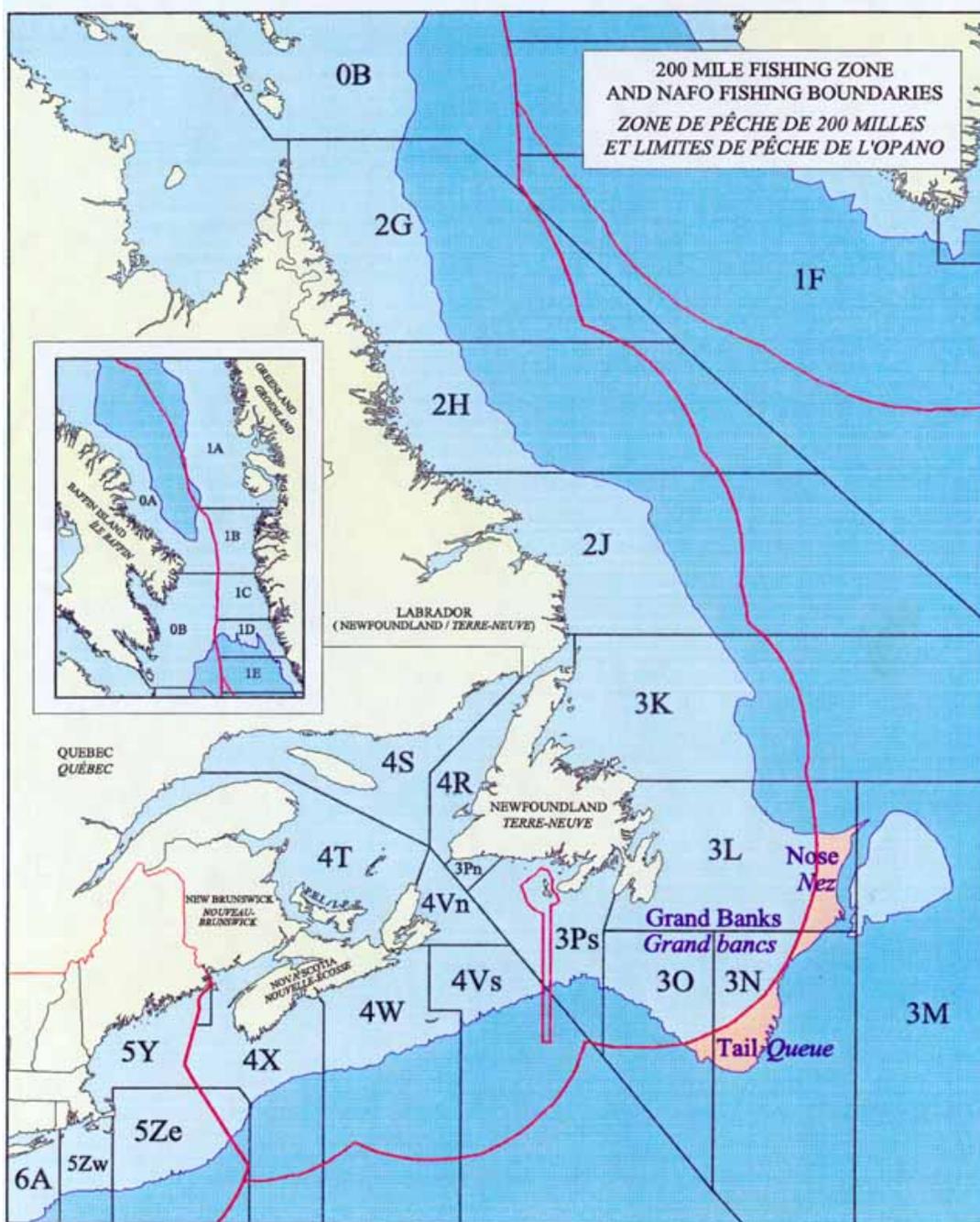
The advent of the 200-mile limit, an arbitrary geopolitical boundary, did not solve the overfishing problem. Three areas remain beyond Canadian control (see Map 1): the northeastern portion of the Grand Banks (the "Nose"), the southeastern portion (the "Tail"), and the outcropping of the shelf (the "Flemish Cap") about 120 nautical miles east of Canada's 200-mile Exclusive Economic Zone (EEZ). Fish stocks are found inside and outside the 200-mile limit, and some straddle the boundary during seasonal migrations. Canada's problems arise from the fact that two very different legal regimes apply to the same biological stocks: one inside Canada's 200-mile limit, and the other in international waters where the legal principle of freedom of fishing prevails. When outside, the so-called "straddling stocks" are subject to harvest by foreign vessels.

Since 1 January 1979, the Northwest Atlantic Fisheries Organization has been the RFMO responsible for the "rational management and conservation of the fishery resources" on the Grand Banks beyond the 200-mile limit. NAFO was mandated to: take into account scientific advice; achieve the "optimum utilization ... of the fishery resources"; "seek to ensure consistency" with management measures of the coastal states; and "give special consideration" to members "whose coastal communities are primarily dependent on fishing."⁽¹⁰⁾

(10) NAFO's structure and programs can be viewed at: <http://www.nafo.int/about/frames/about.html>.

Map 1

NAFO Fishing Areas



Source: DFO.

The NAFO “Convention Area” includes waters falling under the jurisdiction of Canada, Denmark (Greenland), France (St. Pierre and Miquelon) and the United States. The “Regulatory Area” includes only that part of the Convention Area that lies beyond 200 miles,

and covers approximately 775,000 square nautical miles of fishing grounds. NAFO covers all fishery resources of the Northwest Atlantic ocean area, except for those managed by other RFMOs (e.g., salmon, tunas and marlins, and whales), and sedentary species of the continental shelf, over which, under the 1982 LOS Convention, Canada has sovereign rights for the purpose of exploitation.

NAFO establishes total allowable catches and national allocations for a number of “straddling stocks” (e.g., redfish, American plaice, yellowtail flounder, Grand Banks cod, witch flounder, capelin, turbot (also known as Greenland halibut), shrimp, and squid) within the Regulatory Area. NAFO also manages so-called “discrete stocks” (cod, redfish, shrimp and American plaice) that do not straddle the 200-mile limit on the Flemish Cap. Because only a fraction of the legendary northern cod stock (in 2J3KL⁽¹¹⁾) is believed to be usually present outside the 200-mile limit, less than 5% on average throughout the year, Canada has managed the entire stock.

There are currently 12 members or “contracting parties” in NAFO.⁽¹²⁾ Each contracting party that participates in the fisheries of the Regulatory Area is a member of the Fisheries Commission (FC), the body responsible for fisheries management and conservation. The FC normally meets once a year in September to adopt proposals on catch allocations and control and enforcement for the following year.⁽¹³⁾ Proposals become binding on all contracting parties unless an FC member objects. Quotas are based mainly on historical fishing patterns; individual contracting parties can do what they wish with their allotments. In 2004, 132 vessels from 15 countries fished in NAFO’s Regulatory Area, with a typical fishing trip lasting an average of three months. The number of vessels varies considerably depending on the fishery and time of year.

(11) The waters off Canada’s East Coast are divided into a set of zones defined by an alphanumeric code. The Convention Area coincides with the former Area of the International Commission for the Northwest Atlantic Fisheries (ICNAF). The straddling stocks are defined in the Canadian *Coastal Fisheries Protection Regulations*.

(12) Canada, Cuba, Denmark (Faroe Islands and Greenland), France (St. Pierre and Miquelon), Iceland, Japan, Korea, Norway, Russia, Ukraine, the United States, and the European Union, which is recognized as a single entity in the NAFO Convention.

(13) NAFO’s General Council, whose Chairman is the organization’s President, supervises internal administrative and financial affairs, and coordinates external relations. A Scientific Council provides a forum for consultation and cooperation with respect to the study, appraisal and exchange of scientific information; it also promotes scientific research, supervises the compilation and maintenance of statistics and records, publishes and disseminates reports, and provides scientific advice. A Secretariat provides the services necessary to the exercise of the duties and functions of NAFO, such as receiving information from vessels in the NAFO Regulatory Area and providing that information to the Contracting Parties.

Although NAFO shares common elements with other RFMOs, NAFO is *unique* in the world in that, under its Convention, decisions are formally adopted by simple majority.⁽¹⁴⁾ Moreover, the conservation and management problem is also *unique* in its scale:

There is no other situation where the interests of a coastal state in so many fishery resources that are mostly within its jurisdiction can be (and have been) so easily undermined by distant water fishing fleets. Because the problem is unique, it is difficult to find any immediate remedy in the current law of the sea provisions for managing straddling stocks.⁽¹⁵⁾

C. NAFO'S Record

When you look at the map, you see that those areas are still exposed and that is one of the reasons that we have the mess we have today. [...] When you look at the infractions that have taken place over the last 20 years, you will find these countries are, in effect, uncontrolled.

– Gus Etchegary, Retired industry executive and former Canadian commissioner to ICNAF and NAFO, Committee Proceedings, 9 November 2006

Every administration of the Government of Canada, whatever the political stripe, has been saying that NAFO is a toothless tiger. For decades, the government has been saying that NAFO has not delivered what it was meant to deliver.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

I think it would be fair to say that to date NAFO has failed dismally.

– Earle McCurdy, President, Fishermen, Food and Allied Workers, Committee Proceedings, 9 November 2006

[T]here [has been] tremendous dissatisfaction with the operations of NAFO as an international regulatory body, both structurally and in its operational side.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

In many people's minds, NAFO – considered one of the most advanced RFMOs – is a synonym for "ineffective."

– Mark Butler, Managing Director and Coordinator, Marine Issues, Ecology Action Centre, Committee Proceedings, 5 December 2006

All through the process of the 1980s and 1990s, the actions taken by Canada produced reactions that ended up improving the system.

– Bob Applebaum, Former DG of DFO's International Directorate (now retired), Committee Proceedings, 19 October 2006

(14) Among RFMOs having the capacity to adopt management measures respecting either straddling or highly migratory fish stocks.

(15) A. W. May (Chair), Dawn A. Russell and Derrick H. Rowe, *Breaking New Ground: An Action Plan for Rebuilding the Grand Banks Fisheries*, Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic, June 2005, http://www.dfo-mpo.gc.ca/overfishing-surpeche/documents/advisory_e.htm.

[T]he stocks were decimated, and in every case where the movement outside 200 miles occurred, they remained decimated. [...] They fished and had a wonderful time because of these great concentrations of fish. This is the story of how the collapse occurred.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

[F]rom our collective experience over the last 25 years, we have seen things go in NAFO from a period of cooperation from 1979 through the early 1980s and then suddenly an event happens that makes people very uncooperative.

– Bill Rowat, Former DFO Deputy Minister (now retired), Committee Proceedings, 19 October 2006

After World War II, major changes in technology occurred when powerful trawlers began fishing the dense overwintering and spawning aggregations of fish in offshore waters. Beginning in the 1950s, the Grand Banks off Canada's East Coast became an industrialized fishing ground, with successive fisheries ministers having to deal with the perennial and thorny issue of "foreign overfishing."⁽¹⁶⁾

The first attempt to bring some order to the foreign fishery on the Canadian continental shelf came with the establishment of the International Commission for the Northwest Atlantic Fisheries (ICNAF) in 1949. ICNAF was given the mandate "to make possible the maintenance of a maximum sustained catch from the fisheries" – an upper limit that was never defined. ICNAF's functions involved both research and conservation, each member state had one vote, and decisions were taken by a two-thirds majority.⁽¹⁷⁾ The management measures and regulatory controls in place were insufficient in the face of massive overfishing. ICNAF failed to conserve the resource, for a number of reasons;⁽¹⁸⁾ notably, there was no collective will to conserve it, and only voluntary compliance with the rules set. Countries that lodged a formal objection were, under a 1964 Protocol to the Convention, free to disregard the conservation measures adopted by the Commission.

By 1968, total catches were about 2½ times the level of the 1950s. That year, an incredible 900,000 tonnes of northern cod was fished – about 810,000 tonnes of which were caught by foreign fleets. For the century prior to 1960, annual catches had generally been less than 300,000 tonnes. Between 1962 and 1977, the stock's spawning biomass plummeted from 1.6 million tonnes to 100,000 tonnes. The situation reached a low point in the late mid-1970s, when severe resource declines threatened the survival of Canada's groundfish industry.

(16) For an historical account, see Gus Etchegary, *Committee Proceedings*, 9 November 2006.

(17) Panels established on the basis of sub-areas within the ICNAF area were given the responsibility of monitoring the groundfish fishery by collecting catch and scientific data, and making recommendations to the Commission.

(18) See Standing Senate Committee on Fisheries and Oceans, *Straddling Fish Stocks in the Northwest Atlantic*, June 2003, pp. 11-14, and pp. 20-31, <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/Com-e/fish-e/rep-e/rep05jun03-e.htm#PDF%20FORMAT>.

In 1964, Canada responded by passing the *Territorial Sea and Fisheries Zone Act*, which established a nine-mile fishing zone outside what was then a three-nautical-mile territorial sea.⁽¹⁹⁾ Under pressure from the Canadian fishing industry and provincial governments on the East Coast, Canada extended its territorial sea to 12 miles in 1970. The Gulf of St. Lawrence and Bay of Fundy area were declared to be within Canada's exclusive jurisdiction in 1971. In 1977, Canada followed the international trend⁽²⁰⁾ and unilaterally declared a 200-nautical-mile (370.4-kilometre) exclusive fishing zone. A wave of optimism swept the Canadian industry, which hoped to benefit from a vastly increased share of a properly managed stock.⁽²¹⁾ While the new 200-mile limit resulted in some rebuilding, fish stocks were apparently not in as good condition as everybody believed at the time.⁽²²⁾

With the new regime of 200-mile limits, NAFO replaced ICNAF in 1979. NAFO, like its predecessor ICNAF, has a very long history of problems. Witnesses at our hearings and staff at DFO's Northwest Atlantic Fisheries Centre described distinct "periods" in NAFO's history.

Canada entered into a series of bilateral fisheries agreements with NAFO countries that stipulated conditions allowing them inside the Canadian zone to take surplus fish.⁽²³⁾ This was done in exchange for their cooperation and support of Canadian management initiatives in the NAFO Regulatory Area. By all accounts, NAFO's performance was satisfactory until the impending entry of Spain and Portugal into the European Economic Community (now the European Union). This changed in 1985, when the EU argued for the first time that total allowable catches should be set well above previous levels.

The EU's expansion to include Spain and Portugal in 1986 created new demands on existing fisheries arrangements as a result of the following factors: a doubling of the total number of EU fishermen; a 75% increase in overall fishing capacity; a 45% rise in production for human consumption; and a similar increase in fish consumption in the enlarged Community.⁽²⁴⁾ During this period, the EU, which needed to find fishing grounds outside its own waters for Spain

(19) At the turn of the 20th century, most maritime states had proclaimed territorial seas of three miles – a distance based on the range a cannon could fire.

(20) At that time, developments at the Third United Nations Conference on the Law of the Sea (UNCLOS III) suggested that an expansion of coastal state jurisdiction over fisheries out to 200 nautical miles was inevitable.

(21) Two boundary disputes also ensued – one with the United States in the Georges Bank/Gulf of Maine area (resolved by reference to the International Court of Justice (ICJ) in The Hague in 1984) and one with France, which claimed a 200-mile economic zone around the islands of St. Pierre and Miquelon off the southern coast of Newfoundland and Labrador (resolved by a decision of a court of arbitration in 1992).

(22) Approximately 10% of the shelf lies beyond Canadian jurisdiction.

(23) Canada no longer has that "carrot" because there are no surplus stocks left.

(24) Spain at the time had by far the largest fishing fleet within Europe, and one of the largest in the world.

and Portugal, argued that NAFO measures were unnecessarily conservative and ignored its socio-economic problems. Until then, Spain's traditional cod fleet had fished in the region. Thereafter, the Spanish factory freezer trawler fleet arrived off Canada's East Coast after having been expelled from the waters off Namibia. In effect, it may be said that Europe began "exporting" its problem of excessive fishing capacity to the Nose and Tail of the Grand Banks.

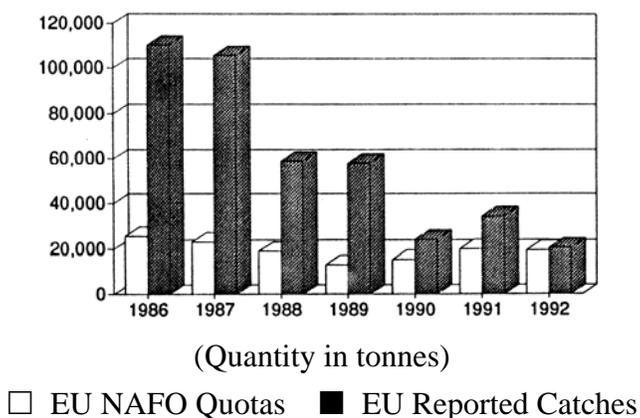
Beginning in 1986, the EU, which did not get any support for its positions from other NAFO members, launched wholesale objections to NAFO decisions, thus opting out of those decisions. The facts are indisputable: the EU systematically set its quotas higher than those set for it by NAFO, and many times higher than its traditional shares. Between 1985 and 1992, over 50 objections were lodged by the EU using the NAFO Convention's Objection Procedure.⁽²⁵⁾ Overruns of several hundred per cent were common. In some cases, the EU's catch exceeded not only its assigned quota, but also the entire NAFO quota (Graph 1). In 1986, for instance, NAFO allocated 14,750 tonnes of 3NO cod (on the "Tail" of the Grand Banks) to members of the EU. After filing an objection and setting a 26,400-tonne autonomous quota, the EU proceeded to catch 30,470 tonnes (the reported catch). Similarly, in 1986, the EU objected to its quota of zero for 3LN redfish, and then caught 23,388 tonnes. Between 1984 and 1990, with total cumulative quotas of 214,000 tonnes, the EU reported cumulative groundfish catches of 836,000 tonnes, while Canadian estimates put the actual catch at closer to 911,100 tonnes.⁽²⁶⁾

European catches of Canadian-managed northern cod greatly contributed to that stock's decimation. In 1986, when a NAFO moratorium was placed on fishing the stock outside Canada's 200-mile limit, the EU argued that, as a sovereign body, it was entitled to fish in international waters in accordance with the LOS Convention; that a moratorium for northern cod (in 3L, on the "Nose" of the Grand Banks) could not be justified since a fishery on the same stock was being conducted inside the Canadian zone; and that its vessels had fished in the area for hundreds of years. Between 1986 and 1991, despite being allocated a zero quota of northern cod, the EU opted out and set unilateral quotas at levels far excess of what its fleet could even catch.

(25) Under the 1978 NAFO Convention's "Objection Procedure" (a carryover from the ICNAF Convention), proposals adopted by the Fisheries Commission are transmitted to all contracting parties and become binding measures on all who do not file an objection (Article XII). Any Commission member that presents an objection to a proposal (e.g., a quota) is not bound by the measure. There is no limit on the number of objections that can be made or on the type of proposal to which an objection may relate. There are no formal mechanisms for the settlement of disputes.

(26) The Hon. Robert Thibault, Minister of Fisheries and Oceans, "Preparing for NAFO," Fact Sheet (undated).

Graph 1
Overfishing by the EU, 1986-1992



Source: DFO, March 1995.

In 1988, the NAFO General Council adopted a resolution calling on all contracting parties to avoid excessive or inappropriate use of the Objection Procedure. In 1989, the Council adopted another resolution calling on all Contracting Parties to comply with the NAFO management framework and its conservation decisions and maintain the traditional spirit of cooperation and mutual understanding in the organization. With the exception of the EU, all NAFO members voted in favour of both resolutions, but they had little effect. According to Dr. Art May, the objections to NAFO's rules could not have happened at a worse time: the adoption of autonomous quotas coincided with a less productive period due to a climatic cooling from the mid-1980s to the mid-1990s, which reduced productivity. Many species of fish migrated to the edge of the Grand Banks in record numbers toward warmer water outside 200 miles, only to be more easily caught by foreign vessels.

In the late 1980s, the Canadian government took a number of measures to try to deal with the overfishing problem. For instance, Canada tried to amend NAFO's Objection Procedure⁽²⁷⁾ and improve its weak enforcement capability, but without success. In 1989, a three-pronged strategy aimed at persuading the EU to take a more cooperative approach was launched. The approach consisted of diplomatic overtures to the EU and its member states, a public relations campaign aimed at the European public, and a legal initiative designed to fill the gaps in the 1982 LOS Convention.⁽²⁸⁾

(27) In 1992, Canada proposed the establishment of criteria for the use of the Objection Procedure and to subject objections to a third-party review to assess their validity. Discussion of this proposal was, however, postponed indefinitely.

(28) The legal initiative had little immediate effect, but did eventually lead to the 1995 UNFA.

By the early 1990s, it had become obvious to all that a number of other groundfish stocks had also been seriously depleted. At NAFO's annual meeting in September 1992, TACs and quotas were reduced. For the first time, a ban on fishing for northern cod outside 200 miles (in 1993) did not meet with any EU objections.⁽²⁹⁾ Further reductions and moratoria were agreed to in 1993, and at a special NAFO meeting held in February 1994. That year, in June, Canada's Fisheries Resource Conservation Council and the NAFO Scientific Council voiced their grave concerns about the state of the stocks, unsustainable catch rates, and catches being misreported. Also in 1994, 49 citations were issued by Canada to EU vessels, compared to 26 in the previous year.

Another major Canadian concern during this period was a large increase in unregulated fishing by stateless and flag-of-convenience vessels in the Regulatory Area, many of which were believed to be owned and operated by Portuguese and Spanish interests. In May 1994, Canada's Parliament amended the *Coastal Fisheries Protection Act* to allow enforcement of NAFO regulations against those vessels,⁽³⁰⁾ even outside the 200-mile limit.

In September 1994, Canada proposed that NAFO manage turbot – the largest remaining straddling groundfish stock in the region and one that Spanish vessels were increasingly turning to because of the rapid decline in other fisheries. Canada also negotiated the biggest share of the quotas for its fishermen. Unhappy with its NAFO allocation, Europe's Fisheries Council agreed to invoke NAFO's Objection Procedure and set its own quota on 1 March 1995. Soon after, Canada's regulations were amended to make Spanish and Portuguese vessels subject to the *Coastal Fisheries Protection Act*. Matters then came to a head when the EU rejected Prime Minister Chrétien's proposal for a 60-day moratorium on fishing. On 9 March 1995, Canadian authorities boarded and seized the Spanish fishing vessel *Estai*, which had been fishing outside the 200-mile limit. The arrest sparked what has since become known as the "turbot war."⁽³¹⁾

(29) Prior to 1992, the northern cod fishery represented 46% of total available cod quotas, and 21% of all groundfish quotas. DFO, "Northern Cod," Background, February 1992. Northern cod spawns during January to April, then migrates to the Nose of the Grand Banks (3L).

(30) The federal government exempted the measure from the jurisdiction of the International Court of Justice. Canada's reservation pertained only to actions that Canada would take in the NAFO Regulatory Area. The ICJ subsequently decided it did not have jurisdiction to try a case brought before it by Spain on 28 March 1995.

(31) On 26 March 1995, the warps of the Spanish fishing vessel *Pescamaro Uno* were cut by a Canadian patrol boat after the Spanish fleet refused to withdraw from the NAFO Regulatory Area while bilateral negotiations on fish quotas were being conducted.

The immediate dispute was resolved by the conclusion, in April 1995, of a groundbreaking agreement between Canada and the EU on new control and enforcement measures in the NAFO Regulatory Area, the main provisions of which were adopted by NAFO later that year. In addition to settling the specific turbot quota dispute, the Canada-EU settlement provided for an expansion of inspection capabilities, independent and full-time observers on board vessels at all times, the introduction of satellite coverage, verification of gear and catch records, the creation of a class of major infringements, new minimum fish size limits, and improved dockside monitoring.

The events of March 1995 were said to have resulted in a number of long-term positive outcomes. There were fewer violations (at least for a time), the Fisheries Commission more closely followed the advice of the Scientific Council, and relations improved. It was noted at our meetings that, besides exposing the gaps in the LOS Convention, the “turbot war” had greatly contributed to the successful conclusion of UNFA a few months later. In addition, there was a reduction of sightings of non-member vessels in the Regulatory Area from four in 1998, to two in 1999, to zero in 2000. For many Canadians, Canada’s assertiveness is a model for future actions in this matter.

By the end of the 1990s and the beginning of 2000, the situation had changed considerably, with non-compliance on the increase. The number of violations was growing and the Objection Procedure was again being used. In January 2002, at a NAFO meeting in Helsingor, Denmark, Canadian officials detailed Canada’s concerns over non-compliance and the apparent unwillingness of NAFO members to control their fishing fleets. Canada submitted proposals to address the problems of excessive bycatches of species under moratoria, misreporting, and exceeding quotas. Some of the proposals were accepted (e.g., increasing mesh size in the skate fishery, and implementing daily reporting of shrimp catches in 3L), while others were rejected (e.g., a restriction on the depth of the turbot fishery). In response to Canada’s disclosure of non-compliance by some members, NAFO undertook, for the first time in its history, a compliance review to identify areas where compliance could be improved.⁽³²⁾

At the September 2002 Annual Meeting of NAFO and at subsequent meetings, Canada brought the matter of compliance to the attention of NAFO. The problems identified included: directed fishing/excessive bycatch of species under moratoria; exceeding allocations/misreporting catches; the use of small mesh gear/liners; and non-impartiality of observers/non-submission of observer reports.⁽³³⁾

(32) NAFO prepared its first official compliance report in 2004.

(33) DFO, “Canadian Assessment of Compliance in the NAFO Regulatory Area,” Background, September 2003, http://www.dfo-mpo.gc.ca/media/backgrou/2003/nafo_e.htm.

In 2004, the Government of Canada implemented a new federal strategy against overfishing, and increased diplomatic interventions. Canada's approach to the overfishing issue has since been threefold: maintaining vigilant monitoring and surveillance; actively engaging in diplomatic and advocacy activities to compel countries to take responsibility for the actions of their fleets and create the conditions for change; and improving international fisheries governance over the longer term.

In March 2004, the Minister of Fisheries and Oceans outlined a five-year, \$17.5-million strategy to expand aerial surveillance and at-sea patrols. In May, an additional \$15 million was announced to enhance surveillance and patrols, increase diplomatic efforts, and finance a long-term strategy to change international fisheries governance. The *Coastal Fisheries Protection Regulations* were also amended to enable Canada to apply UNFA's enforcement procedures to parties fishing in the Regulatory Area.⁽³⁴⁾ As part of a strengthened enforcement strategy in the Regulatory Area, DFO and the Department of National Defence conducted a joint enforcement operation in 2004.

The evidence suggests that increased surveillance had increased compliance and changed international fishing behaviour, at least to some extent. For example, the number of vessels fishing in the Regulatory Area fell by 17% from 2003 (113 vessels) to 2004 (94 vessels) and the number of citations dropped by 32% (from 22 issued in 2003 to 15 in 2004).⁽³⁵⁾ Non-compliance, however, remained a problem.

On 13 December 2004, Canada's Minister of Fisheries and Oceans announced the creation of a three-member Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic. The Panel, chaired by Dr. Art May,⁽³⁶⁾ was asked to provide advice on how to reduce overfishing in NAFO, and recommend ways to strengthen Canada's rights, as a coastal state, with respect to the straddling stocks. The Panel's report, which the Minister released on 1 September 2005, succinctly summarized what were by then, the well-known and amply documented shortcomings of NAFO, as follows:

- the lack of a precautionary and sustainable management approach based on realistic conservation objectives [...];
- the current voting procedure which allows minority interests to influence events out of all proportion to their own involvement in the fishery;

(34) DFO, "New Measures to Combat Foreign Overfishing – Update," *In-Focus*, June 2004, http://www.dfo-mpo.gc.ca/media/infocus/2004/20040506_e.htm.

(35) DFO, "Monitoring and Surveillance Measures in 2004," Background, January 2005, http://www.dfo-mpo.gc.ca/media/backgrou/2005/enforcement_e.htm.

(36) The other two members of the Panel were Derrick Rowe, the Chief Executive Officer of Fishery Products International, and Dawn Russell, then Dean of Dalhousie Law School.

- the existence of an Objection Procedure which allows those “opting out” of a majority decision to proceed to fish as they decide, without consequence except to the detriment of the area’s resources and the interests of other participants; and
- the lack of a compulsory dispute settlement mechanism.⁽³⁷⁾

THE SEPTEMBER 2006 ANNUAL MEETING OF NAFO

NAFO today is very different from the way it was three weeks ago.

– *The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006*

We have had much better co-operation with the European Union in recent years than in years past. I think that is another reason to have some confidence in what we are doing.

– *Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006*

We do not believe the problems with NAFO are fixed and we remain to be convinced.

– *The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006*

The increase in patrol ships has clearly made it more difficult for violators, and there are some pretty brazen customers operating fishing vessels out there. It has not fixed the problem, but it has helped make violations more difficult.

– *Earle McCurdy, President, Fishermen, Food and Allied Workers, Committee Proceedings, 9 November 2006*

[I]t was really time for another showdown in NAFO, [...] to see if some of the more progressive UNFA measures could be incorporated meaningfully into the NAFO convention or whether, as Dr. May argued, NAFO needed to be replaced by a new RFMO.

– *Bill Rowat, Former DFO Deputy Minister (now retired), Committee Proceedings, 19 October 2006*

[C]urrently, there is an atmosphere of cooperation, which is relevant to the fact the stocks are so depressed.

– *Bob Applebaum, Former DG of DFO’s International Directorate (now retired), Committee Proceedings, 19 October 2006*

Since the issuance of [the Advisory Panel’s report], events have moved in the direction of reform [...]. Recently the members of NAFO seem to have become more serious about managing their vessels.

– *Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006*

The breakdown of NAFO began some 20 years ago. The repair is starting only now. Better late than never.

– *Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006*

(37) *Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic, June 2005.*

At its annual meeting in September 2005, NAFO initiated a reform process to modernize the organization, its procedures and standards.⁽³⁸⁾ One year later, following its 22 September 2006 Annual Meeting, NAFO announced “great progress with its ground-breaking reform agenda.” DFO’s News Release announced that changes were being made on two levels. First, new monitoring, control and surveillance measures were to take effect on 1 January 2007:

- Vessels caught misreporting their catch will be directed to port for immediate inspection. Other serious infringements, including directing for moratoria species and repeat offences will lead to similar consequences;
- NAFO now has guidelines for sanctions when vessel owners are caught breaking the rules: countries will be obliged to impose a fine, suspend or withdraw a licence or catch quota, or seize fishing gear or the illegal catch;
- Captains on vessels that do not have 100% observer coverage will have to report their catches in real-time, so enforcement personnel can immediately detect at-sea patterns of misreporting and illegal fishing. NAFO will calculate catch data based on vessel monitoring system collection, lessening dependence on on-board observers.⁽³⁹⁾

Other changes included NAFO members agreeing to combine its blacklist of vessels engaged in Illegal, Unreported and Unregulated (IUU) fishing with that of the North East Atlantic Fisheries Commission, with a view to denying port access to rogue vessels fishing in the North Atlantic. NAFO members also decided to take action to better understand the effects of fishing on several seamounts in the Northwest Atlantic Ocean, which, according to DFO, demonstrated, “in practice, a shift in NAFO’s management process to incorporate science and the ecosystem approach.”

Second, more basic reforms were announced that relate to NAFO’s Convention.

- Procedures for dispute settlement as outlined in [UNFA] will be made part of the NAFO Convention so countries that object to a NAFO decision cannot simply set out to fish a unilateral quota. They must enter a dispute settlement process with an impartial panel;

(38) A group was established to examine the Convention and suggest improvements. NAFO’s Standing Committee on International Control was asked to review NAFO’s monitoring, control and surveillance measures with a view to strengthening the regime.

(39) DFO, “Canada Achieves Major Reforms at Historic Meeting of the Northwest Atlantic Fisheries Organization,” News Release, September 2006, http://www.dfo-mpo.gc.ca/media/newsrel/2006/hq-ac33_e.htm.

- NAFO’s fisheries management process must now take into account the precautionary approach and the ecosystem approach. This means basing its decisions on science, and considering fish habitat and marine sensitive areas, closer in line with Canadian practices.⁽⁴⁰⁾

Officials of the Department of Foreign Affairs and International Trade (DFAIT) reported to the Committee that “a real breakthrough with the NAFO reform exercise [was] under way.”⁽⁴¹⁾ The Minister of Fisheries and Oceans and officials noted “significant,” “real and unprecedented” progress in the way NAFO will in future deal with overfishing. The Minister also indicated that attitudes were changing, with conservation decisions now being more generally accepted and NAFO members not invoking the Objection Procedure as often.⁽⁴²⁾ Canada’s diplomatic efforts at deeper bilateral cooperation with EU members, with more contact at the political level, were said to be achieving results. For example, the Government of Spain was showing leadership and a willingness to work with Canada to end overfishing, as seen by the quick removal from the Regulatory Area of fishing vessels found breaking the rules and subsequent invitations to Canadian inspectors to participate in port inspections in Spain. We heard that Canada had been negotiating a cooperative agreement with Spain with respect to science, and that Canada and the EU had conducted joint at-sea inspection patrols.

The Minister, however, also described what transpired at the September 2006 NAFO Annual Meeting as a “last ditch effort” at reform. Indeed, it was widely reported in the media that Canadian delegates nearly walked out of the meeting because Canada’s proposals for reform were not being taken seriously.

While the magnitude of the overfishing problem may be less now than previously, other participants in the Committee’s discussions were sceptical and suggested that a “new era of cooperation” may have more to do with the fact that there are so few fish left. The recent increase in patrols and surveillance in the Regulatory Area, which everyone welcomed and supported, may also have deterred illegal fishing activity. Overall, EU fishing effort decreased by about 60% between 2003 and 2006.

(40) *Ibid.*

(41) Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, *Committee Proceedings*, 26 October 2006.

(42) While no longer abused as much, the Objection Procedure was invoked by Denmark in 2004 when it objected to its 144-tonne 3L shrimp allocation. Denmark, which participates in NAFO on behalf of the Faroe Islands and Greenland, unilaterally set an autonomous quota of 1,344 tonnes, or nearly 10 times its allocation.

Most groundfish fisheries on the Grand Banks are currently under moratoria, with the exception of turbot, some redfish stocks and yellowtail flounder.⁽⁴³⁾ There are few, if any, signs of improvement despite more than a decade of fishing moratoria. Some fisheries that are still open, such as turbot and redfish, have had their catch levels sharply restricted.⁽⁴⁴⁾ Stock recovery was undoubtedly impeded by non-compliance over the last 20 years; Canadian enforcement officers issued over 504 citations to foreign vessels for alleged infractions during this period.

All individuals and organizations that spoke with the Committee agreed that the *status quo* is totally unacceptable. NAFO needs a major transformation because, from a fisheries conservation standpoint, the organization has amply demonstrated its ineffectiveness in conserving and managing the resource it is mandated to protect. We were also told that success in reforming NAFO will depend on the good will of member states, not always operative in the past. As noted earlier, the management of the Grand Banks straddling stocks has been characterized by varying degrees of cooperative and uncooperative behaviour over time. A number of witnesses cautioned that, while NAFO may have entered a new cooperative period, this could change if/when circumstances change and fisheries begin to recover.

Three broad questions emerged from our hearings. First, are the proposed reforms effective and sufficient? Second, should Canada pursue other options beyond NAFO? Third, what, if anything, should be done about high-seas bottom trawling?

REFORMING NAFO

A. Changes to NAFO's Conservation and Enforcement Measures

[W]hen we boarded a boat and issued a citation, usually nothing happened. The boat very seldom was called back. [...] Now, [...] the minute we board a boat and find infringements, if they are in this serious category, the boat has to be ordered to port immediately.

– The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006

[F]rom the text of the actual adopted regulation, the [redirection to port] requirement can, in some cases, be avoided; and, of course, the system depends on flag states doing what is required of them.

– Bob Applebaum, Former DG of DFO's International Directorate (now retired), Committee Proceedings, 19 October 2006

(43) Canada is allocated 97.5% of the yellowtail stock, which was under moratorium between 1993 and 1996. One company, Fishery Products International of Newfoundland, holds 90% of the Canadian share.

(44) DFO, "The Grand Banks and the Flemish Cap," http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/bk_grandbanks_e.htm.

[T]he inspection and ordering to port, and the guidelines on penalties and how well they are enforced, will be critical to whether we get some progress on the problem of flag state responsibility.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

When an inspector now finds a vessel in serious violation of fishing regulations, the vessel can be ordered into port. [...] It is something that a flag state which was serious about the NAFO regime could have done any time, but did not.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

Only the flag state can prosecute its own vessels for violations. This will continue to be an Achilles heel until, if ever, states agree to cede sovereignty.

– Bill Rowat, Former DFO Deputy Minister (now retired), Committee Proceedings, 19 October 2006

Countries cannot guarantee that there will always be a penalty for every infraction, because they do not control the courts, in the same way that the Canadian government cannot guarantee what the courts will do in any particular situation.

– Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006

There is an inherent advantage to having a human body as an observer rather than a microchip. [...] Our concerns have been taken into account and there will be a three-year monitoring situation before that is cut back to 25 per cent.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

[T]he jury is still out. I do not know how effective those measures will be. I am not ready to put up the victory sign just yet.

– Earle McCurdy, President, Fishermen, Food and Allied Workers, Committee Proceedings, 9 November 2006

NAFO provides for an international regime for at-sea boardings by authorized inspectors from NAFO member states. The Scheme of Joint International Inspection and Surveillance was said to contain some of the toughest control measures found in any RFMO in the world.⁽⁴⁵⁾ In the case of a vessel suspected of breaking the rules, NAFO allows Canadian fisheries inspectors to board, inspect, remain on board until the inspector from the flag state

(45) The regulations in force and inspection procedures are found in NAFO's *Conservation and Enforcement Measures*. Fishing activity in the Regulatory Area is monitored using at-sea patrols, aerial surveillance, and satellite tracking devices known as vessel monitoring systems (VMS) on board fishing vessels. Canadian DFO officers on board specially equipped aircraft contracted by DFO through Provincial Airlines Limited (PAL) note where fishing activity is taking place, and look for signs of possible violations. This information, which is relayed to patrol vessels and DFO's Regional Operations Centres, is factored into the process for deciding whether a vessel is to be boarded for inspection. Other NAFO contracting parties, such as the EU, can also provide a patrol presence and conduct inspections. See: DFO, "Canada's Strategy to Combat Global Overfishing and Improve International Fisheries and Oceans Governance," http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/bk_strategy_e.htm.

arrives, and stay on board (with the permission of the flag state) until the vessel arrives at dockside.⁽⁴⁶⁾ The Committee learned that up to three dedicated Canadian patrol vessels are on duty to maintain a constant presence in the Regulatory Area.

With respect to the new enforcement measures announced in September 2006 (now in effect), we were told by some witnesses that Canada's "biggest gain" is that vessels will be brought to port when there are cases of serious infringements (e.g., misrecording of catches, directed fishing for moratoria species, and repeat offences of serious infringements). Flag states will be required to redirect their vessels immediately to port for full inspection, at the cost of lost fishing time and at the expense of the bottom line of vessel owners.⁽⁴⁷⁾ According to DFO officials, there were similar provisions in the past, but "it was often left to the discretion of the flag state or the contracting party, the European Union, as to whether the vessel would or would not be brought to port."⁽⁴⁸⁾ With the new measures in place, "ordering the vessel to port is mandatory." According to Mr. Phillip Saunders, an expert in international law and Dean of Dalhousie Law School, the requirement that vessels return to port for full inspection would – if it is truly mandatory – constitute "a very significant improvement and important advance." Even under UNFA, flag states are not required to send vessels to port.

Mr. Bob Applebaum, however, pointed that the redirection to port may, in some cases, be avoided.⁽⁴⁹⁾ If flag state inspectors are in the Regulatory Area, they would need to approve the redirection. Normally, when Canadian inspectors detect an offence by an EU vessel, an EU inspector takes over (the EU usually has a patrol vessel in the Area) and approves sending the non-complying vessel to a port of the flag state's choosing. In the end, redirections to port

(46) NAFO members must ensure that port inspections are completed on all fishing vessels and that species and quantity caught are verified.

(47) DFO, "Outcomes of the NAFO 2006 Annual Meeting," Backgrounder, 29 September 2006, http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/bk_naf02006_e.htm.

(48) Paul Steele, Director General, Conservation and Protection Directorate, DFO, *Committee Proceedings*, 3 October 2006.

(49) According to Mr. Applebaum, paragraph 3 of NAFO's *Control and Enforcement Measures* for 2007 states that "If no inspector [...] [of] the flag state [...] is present in the Regulatory Area, the flag state [...] shall require the vessel to proceed immediately to a port [...]" Assuming the EU, as in the past, maintains an inspection vessel in the Regulatory Area when EU fishing vessels are present, paragraph 3 will not be activated for EU vessels. For EU vessels, paragraph 4 would apply: "4. When completing the investigation [...] the flag state shall ensure that the physical inspection and enumeration [...] takes place [...] in port." In other words, following any finding by the EU inspector who comes to an EU vessel in response to a non-EU inspector's finding of a serious infraction, the flag state is free to allow the vessel to continue its operations, and can complete the inspection when the vessel finally returns to its home port. See NAFO, *Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures*, NAFO/FC Doc. 07/1.

are directed by the flag state. Flag states remain in charge, and enforcement therefore depends on their doing what is “morally right.” As former DFO Deputy Minister Bill Rowat noted, flag state enforcement remains NAFO’s “Achilles heel.”⁽⁵⁰⁾

In his presentation, Mr. Applebaum, who was a key official in the development of UNFA, mentioned there are provisions in UNFA that Canada may implement at any time. For example, the possible suspension of a vessel’s operations in the middle of its fishery (believed to be a powerful disincentive against fishing violations) is one of the key elements of the Agreement, which is predicated on the assumption that flag states cannot be relied upon to take quick and costly action against their vessels. UNFA, which applies to RFMOs around the world, allows flag states to board and inspect the vessels of other state parties to the Agreement in order to verify compliance. Boarding and inspection require prior notice and compliance with certain rules and procedures, as set out in Article 21. In this regard, the Committee heard that some countries have not ratified the Agreement because of the possibility that their vessels might be boarded.

In fisheries, compliance is a function of detection through fisheries observers, surveillance and inspections, but also of deterrence, the likely consequences of being found to be breaking the rules. In NAFO, deterrence has been problematic because under the NAFO Convention and the LOS Convention, only flag states have the right to decide whether or not to prosecute a violator under the violator’s judicial system. Participants in our discussion said that the follow-up by flag states has been woefully inadequate, “a slap on the wrist” as the Minister of Fisheries and Oceans called it.

In order to “help ensure compliance, discourage further infringements, and ensure offenders do not benefit from their illegal activity,” new guidelines for sanctions were adopted in September 2006. According to the Minister, the principle is that the “punishment fits the crime.” NAFO members are now expected to apply significant penalties by levying fines, seizing illegal fishing gear and catches, reducing quotas and removing licences.⁽⁵¹⁾ The Committee also heard that legal action could be taken against flag states that do not live up to their obligation to impose appropriate penalties.⁽⁵²⁾ Mr. Phillip Saunders viewed this as a major improvement over UNFA, which leaves some “weasel room” for parties who might be acting in bad faith.

(50) Flag state enforcement is a problem shared by all RFMOs throughout the world.

(51) DFO, “Outcomes of the NAFO 2006 Annual Meeting,” Background, 29 September 2006.

(52) *Ibid.*

A number of witnesses suggested that the next step would be for NAFO to draw up a schedule of penalties or common standards, so that flag states are not left to define what the courts will consider appropriate.⁽⁵³⁾

The “turbot war” in 1995, and the ensuing settlement, introduced 100% observer coverage for vessels fishing in the Regulatory Area. Beginning in 1998, NAFO’s Observer Program, the cornerstone of the enforcement system, required that all vessels carry an independent and impartial observer on board to report on fishing activities and discards, verify entries in logbooks, collect data on catch and effort, collect samples for scientific work, monitor the satellite system, and report infringements to NAFO fisheries inspectors. Their reports provide invaluable information regarding the level of compliance.

Since January 2001, all vessels fishing in the Regulatory Area must be equipped with satellite-based vessel monitoring systems (VMS), which transmit position and other information to fisheries monitoring centres every two hours. Several members have since sought changes to the Observer Program, arguing that alternative surveillance and monitoring systems could provide equal coverage at a reduced cost. Committee members learned that NAFO implemented a pilot project in 2004 to test the effectiveness of 100% observer coverage against real-time satellite tracking (with increased reporting requirements).⁽⁵⁴⁾

It was announced in September 2006 that, effective 1 January 2007, captains on vessels that did not have 100% observer coverage could report their catches in real time. Apparently, NAFO members fishing have the option of reducing observer coverage to 25% when using increased electronic surveillance. DFO officials who appeared before the Committee believed that rules requiring daily reporting of catches would compensate for this lessening of dependence on observers.

Although witnesses agreed that VMS are a useful tool for verifying vessel location during fishing operations, concerns were expressed that the systems do not provide evidence on the manner in which fishing is carried out, or confirm the type of gear used. For example, Mr. Tom Rideout, Newfoundland and Labrador’s Minister of Fisheries and Aquaculture, expressed a good deal of apprehension about the unproven nature of electronic surveillance.

(53) In May 2006, a United Nations Review Conference on UNFA similarly recommended that RFMOs develop regional guidelines for sanctions in order to evaluate the effectiveness of their sanctions systems.

(54) Compliance between vessels with observers and those without observers were compared to determine whether new technology could provide better compliance and lower costs.

Fishing violations in Canada are taken very seriously. Fishermen who commit them face stiff penalties that may include heavy fines, even jail time. Canada uses observer data to take enforcement action. However, at a briefing by DFO staff at the Northwest Atlantic Fisheries Centre in St. John's, the Committee was astounded to learn that while fisheries observers may give evidence against offenders in Canadian courts, NAFO observers on EU vessels are not compellable to give evidence. The EU does not use observer information to follow up with legal charges.

Moreover, if a Canadian vessel has an inoperative VMS for whatever reason, the vessel must immediately return to port for repairs, at the cost of fishing time, or be charged. In the case of a foreign vessel fishing in the Regulatory Area, there is no such requirement to immediately return to port.⁽⁵⁵⁾ The difference in the Canadian and EU requirements is all the more disconcerting given that there would appear to have been past instances of VMS tampering, with records being deliberately falsified to indicate, for example, that vessels had not been in a particular area.⁽⁵⁶⁾

B. Proposed Changes to the Convention

Whether we have obtained perfection in the Objection Procedure or in dealing with these matters, we truly do not know; but time will tell.

– The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006

For something that has such a small number of members, it depends on the goodwill of members. The willingness of countries to agree to the reforms is a good sign.

– Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006

[W]e do acknowledge that in this past round in 2006 perhaps more progress was made than has been made in recent times, but is that enough, is that the end of it; the jury is out and we are going to wait until the jury reports.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

[A]t some point in the future if the stocks rebuild, and let us hope that they do, we can anticipate problems.

– Bob Applebaum, Former DG of DFO's International Directorate (now retired), Committee Proceedings, 19 October 2006

[M]oving to a two-thirds majority to get something through is not a progressive step.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

(55) Instead, "manual reports" are to be sent (e.g., by e-mail, radio, facsimile or telex) at least every six hours.

(56) Rosemary Rayfuse, "To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries," St. John's Conference on the Governance of High Seas Fisheries and UNFA, June 2005, http://www.dfo-mpo.gc.ca/fgc-cgp/documents/rayfuse_e.htm.

The trouble is that we have a crisis of low expectations when it comes to NAFO, so we have to wait and see.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

Now that the major players are party to the LOS Convention and UNFA, there appears to be a more serious effort and greater momentum to conclude the new [NAFO] Convention.

– Earl Wiseman, Former DG of DFO’s International Affairs Directorate (now retired), Committee Proceedings, 19 October 2006

While we may find parties cooperative [...] for the next few years, I think the real issue could be in a number of years out when fisheries start to recover. [Y]ou are redesigning a convention to last another 25 years [...].

– Bill Rowat, Former DFO Deputy Minister, Committee Proceedings, 19 October 2006

While changes concerning monitoring, control and surveillance (MCS) took effect on 1 January 2007, other reforms were agreed to in principle in September 2006, and require amendments to NAFO’s Convention. DFAIT officials assured the Committee that the key protections afforded Canada in the 1978 Convention would be conserved, including special consideration for Canada when allocating fish quotas, and the obligation that NAFO’s management system is consistent with that adopted by the coastal state (i.e., Canada). Other witnesses, however, pointed to rather disconcerting flaws in what was proposed in a draft text of the amended Convention dated 13 October 2006,⁽⁵⁷⁾ hereafter referred to as “the draft document,” or “draft Convention.”

For example, Canada’s coastal state interests would seemingly be less protected. The current Convention strictly limits NAFO’s management and conservation function to the Regulatory Area (Article XI). The draft document, however, does not include this provision; instead, Article VI provides that the NAFO Fisheries Commission shall “adopt proposals for the conservation and management measures to achieve the objective of the Convention within the Regulatory Area.” According to Mr. Bob Applebaum, who headed DFO’s International Directorate over many years, this means, literally, that in order to conserve the resources in the NAFO Regulatory Area, the Commission can adopt proposals that are legally binding inside Canada’s 200-mile EEZ, in the absence of an objection by the coastal state (i.e., Canada). In an extreme example, fisheries inside the 200-mile limit could be closed down to improve fisheries outside 200 miles. According to Mr. Applebaum, these actions were never possible under NAFO’s 1978 provisions.

(57) NAFO, Reform W.G. W.P. 06/1 Revision 4, Working Paper by the Chair, Convention on Cooperation in the Northwest Atlantic Fisheries, 2006.

In addition, a new non-prejudice clause in the draft Convention appears to protect distant-water states from coastal state claims. Mr. Applebaum pointed out that Article I (paragraph 5) of the current Convention stipulates that “Nothing in this Convention, shall be deemed to affect or prejudice the positions or claims of any Contracting Party in regard to internal waters, the territorial sea, or the limits or extent of the jurisdiction of any Party over fisheries; or to affect or prejudice the views or positions of any Contracting Party with respect to the law of the sea.” By contrast, Article IV (paragraph 3) of the 13 October 2006 draft states the opposite: “Nothing in this Convention shall constitute recognition of the claims or positions of any Contracting Party concerning the legal status and extent of waters and zones claimed by any such Contracting Party.”⁽⁵⁸⁾

Participants in our discussions expressed a great deal of frustration about Canada’s limited influence in NAFO. The organization has 12 members, each having one vote regardless of the level of its fishery in the Regulatory Area. Members with small allocations (or even no allocations) have the same voting power (one vote) as Canada, the major coastal state adjacent to the Regulatory Area, and the European Union, a large entity with many national fleets. The current Convention states that, whenever possible, decisions should be reached by consensus; but when there is no consensus, a simple (50%) majority of votes is required to approve quotas and fishery regulations. The net effect has been that Canada is not always able to secure sufficient votes to support its conservation and enforcement proposals.⁽⁵⁹⁾ Many participants felt that Canada’s vote should somehow have additional weight. Phillip Saunders, for example, espoused “changes to the voting system to reflect a weighting for degree of interest and involvement in a fishery” in his 2003 study for the Newfoundland and Labrador Royal Commission.⁽⁶⁰⁾ When asked why there had been no progress on the issue in September 2006, the Minister’s response was the following:

[T]o try to exert ourselves to have a greater say or more influence would, we felt, be met with negativity up front and would destroy what we were trying to do. We showed that we were doing it for everyone.

(58) *Ibid.*

(59) For example, a proposal to establish a “marine protected area” was rejected when put to a vote in January 2002.

(60) Phillip M. Saunders, *Policy Options For the Management and Conservation of Straddling Fisheries Resources*, Royal Commission on Renewing and Strengthening Our Place in Canada, March 2003, <http://www.exec.gov.nl.ca/royalcomm/research/pdf/Saunders.pdf#search=%22saunders%20%22Royal%20Commission%20on%20Renewing%20and%20Strengthening%20our%20Place%20in%20Canada%22%22>. In 2003, the Senate Committee recommended in *Straddling Fish Stocks in the Northwest Atlantic* that the Government of Canada forcefully begin to advance the notion, in international forums, that adjacent coastal states like Canada should have a greater say in decision-making, and an enhanced role in administering RFMOs, like NAFO.

Under the draft Convention, not only will each NAFO member continue to have one vote in the voting proceedings of the Commission, the voting rule will be different. Decisions by the Fisheries Commission would be taken “by two-thirds majority of the votes of all Contracting Parties present and casting affirmative or negative votes.”⁽⁶¹⁾ A two-thirds majority voting rule is cause for serious concern; it could make it harder for Canada to win votes. Had the two-thirds majority rule existed earlier, Canada and its allies in NAFO would have lost many past votes on conservation. There would be fewer conservation rules.

The long-standing debate in Canada over how to update, improve or modernize NAFO has largely focused on its Objection Procedure, which everyone we spoke with considered to be the major flaw in the current Convention. Any member of the Fisheries Commission who presents an objection to a proposal within the required time limit is not bound by the measure, and there is no limit on the number of objections that can be made or the type of proposal to which an objection may relate. Worse, there is no binding dispute settlement mechanism to resolve conflicts and disputes.

According to DFAIT officials, NAFO agreed to “significantly restrict” the Objection Procedure in September 2006. A country objecting to its fish allocation, for example, would no longer be able to establish its own unilateral quota, and would have to enter a dispute settlement process with an impartial panel. It was explained that once the reforms were implemented, a dissatisfied contracting party would need to justify its objection before an independent panel, under only two prescribed grounds: when a NAFO decision is seen to undermine the NAFO Convention, or when it is considered to be discriminatory against one or more NAFO members. Under the proposed reforms, a dispute settlement procedure would also allow parties to submit disputes to the LOS Convention and UNFA dispute settlement procedures, of which Canada has yet to take full advantage.⁽⁶²⁾

On dispute settlement, Mr. Bob Applebaum drew attention to another potentially serious flaw in the draft Convention. The setting up of an *ad hoc* panel could be blocked if an objecting member found enough allies, which would be easier under a two-thirds voting rule.⁽⁶³⁾ Also, a panel’s decision would have no legal force to overrule or suspend an objection; it would

(61) NAFO, Reform W.G. W.P. 06/1 Revision 4, Working Paper by the Chair, Convention on Cooperation in the Northwest Atlantic Fisheries, 2006.

(62) UNFA adopted by reference, the dispute settlement process under the LOS Convention, which can be applied to settle disputes about the interpretation or application of regional fisheries management agreements. Philip Saunders, Dean, Dalhousie Law School, Dalhousie University, *Committee Proceedings*, 2 November 2006.

(63) No single contracting party *opposed* to the objection, or any combination of Contracting Parties *other than a two-thirds majority*, could require the establishment of a panel.

lead to another Commission meeting, whose decision could again be open to the Objection Procedure. At that point, there would be recourse to UNFA's binding dispute settlement procedures, legal remedies already available to Canada.

The testimony also suggested that, under the proposed dispute settlement procedures, if disputes were to arise over fishing rules, vessels could continue fishing by their own rules while arguments proceed for as long as six months. According to Mr. Bill Rowat, the practical next steps should be to find ways to ensure that objecting parties are not allowed to fish while the dispute resolution process is under way, perhaps by penalizing the following year's quota.

At the time of writing, work was ongoing on the legal text of the Convention. A meeting of the NAFO Council was scheduled for April 2007, at which time it is hoped that countries would proceed to adopt the text. This Committee has asked to look at the reworked text when it becomes available in April.

GOING BEYOND NAFO

A. Custodial Management

Being part of NAFO has given us a chance to improve it.

– *The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 30 May 2006*

[I]t seems that the silver bullet of custodial management has lost some of its lustre, in part, because Canada is now a party to the 1982 LOS Convention and, as such, is subject to the mandatory dispute settlement procedures contained in that convention.

– *Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006*

Maybe the NAFO reforms will be satisfactory. Maybe they will not. Time will tell, but we are certainly not going to say that custodial management does not have a role to play in the future management of Canada's fisheries outside of the 200-mile limit.

– *The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006*

Like every Newfoundlander and Labradorian, I would dearly love to see the Canadian government have the power to enforce regulations on fishing right to the edge of our continental shelf. [...] I think the only way the Observer Program would have functioned effectively would be if we had had Canadian observers [...].

– *Earle McCurdy, President, Fishermen, Food and Allied Workers, Committee Proceedings, 9 November 2006*

If a renewed and effective NAFO is not achievable within a reasonable time frame acceptable to Canada, we have no recourse but to find a legal avenue to implement some form of custodial management of our fish stocks to the extent of our continental shelf.

– *Tom Best, Committee Proceedings, 9 November 2006*

It does not make sense to say that you can accomplish a custodial management overnight. [...] A thorough document would tell the story of foreign overfishing.

– Gus Etchegary, Retired industry executive and former Canadian commissioner to ICNAF and NAFO, Committee Proceedings, 9 November 2006

This is political rhetoric; this is not serious. I am dumbfounded that practically everybody down here thinks custodial management is a sensible concept.

– The Hon. John Crosbie, Former Minister of Fisheries and Oceans, Committee Proceedings, 9 November 2006

If you tried to do it unilaterally, you would immediately be taken to the World Court, whose jurisdiction you would have to recognize as a signatory to the LOS Convention, and it is very clear that you would lose that case in court.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

In Newfoundland and Labrador, the province most directly affected by foreign overfishing, the level of frustration with NAFO is such that extending Canada's role in fisheries management beyond 200 miles – the establishment of a new “Canadian custodial management” regime – is viewed by many as a viable option for dealing with NAFO's shortcomings. The idea of some form of Canadian guardianship, stewardship or trusteeship over the straddling fish stocks beyond 200 miles has been talked about over the last two decades.⁽⁶⁴⁾

In June 2002 and in March 2003, the House of Commons Standing Committee on Fisheries and Oceans called for the establishment of custodial management on the Nose and Tail of the Grand Banks and the Flemish Cap, and Canada's withdrawal from NAFO. In March 2003, a Newfoundland and Labrador All-Party Committee on northern and Gulf cod also urged that a Canadian-based fisheries management regime be implemented to protect the straddling stocks.⁽⁶⁵⁾ In July 2003, the Newfoundland and Labrador Royal Commission on Renewing and Strengthening Our Place in Canada concluded that, while unilateral action by Canada to assume responsibility for areas outside the 200-mile limit posed serious legal, diplomatic and enforcement risks, rejecting custodial management as an immediate option was not good enough, and that one last effort should be made to strengthen NAFO.⁽⁶⁶⁾

(64) Custodial management or the extension of Canadian fisheries jurisdiction, in one form or another, on the high seas, is not an entirely new idea. The Government of Newfoundland and Labrador, the Fisheries Council of Canada, the Northern Cod Review (Harris) Panel, the Standing Senate Committee on Fisheries and other groups and individuals called for this course of action in the 1980s.

(65) The Newfoundland and Labrador All-Party Committee on the 2J3KL and 3Pn4RS Cod Fisheries, *Stability, Sustainability and Prosperity: Charting a Future for Northern and Gulf Cod Stocks*, A Position Statement, 17 March 2003.

(66) Government of Newfoundland and Labrador, *Our Place in Canada*, Royal Commission on Renewing and Strengthening Our Place in Canada, 2 July 2003.

As proposed by the Commons Committee, custodial management would involve Canada's asserting control of fishing activity: "Canada would conduct the science, set the TACs, and implement and administer a conservation-based management system that would include monitoring and enforcement." By the term "custodial management," the Committee "did not intend that Canada should claim sovereignty over or exclusive rights to the resources."⁽⁶⁷⁾

Mr. Tom Rideout, Newfoundland and Labrador's Minister of Fisheries and Aquaculture, noted that significant progress was being made at the NAFO's September 2006 meeting, but also expressed the view that, unless non-compliance is effectively addressed, Canada should consider a custodial management framework. The province has proposed that Canada, the coastal state, would assume responsibility for the management and conservation of straddling fish stocks out to the limits of the continental shelf. Canada would enforce the consistent application of measures inside and outside the 200-mile limit, including surveillance and enforcement, but would also respect the historical shares of other nations. NAFO would retain responsibility for access and allocation decisions, scientific recommendations, and the management of the discrete stocks.

Minister Rideout firmly believed international support could be generated if the federal government sold the idea as "not just a solution for Canada and for Newfoundland and Labrador, but for all countries that fish in the northwest Atlantic." Custodial management outside 200 miles would preserve not only Canada's interests, but also those of the international community in conserving the fish.

Other witnesses, however, were sceptical, the main reason being that international law does not recognize "custodial management." The concept is essentially a political one, which does not exist in state practice and which has no legal definition. It was also pointed out that custodial management lacks a widely accepted definition.

The term that was developed to get around the idea of what would look like a unilateral extension of jurisdiction beyond 200 miles, which is clearly prohibited under the United Nations LOS Convention. [...] It was partly undefined. Some people thought [custodial management] was for an area, some for particular fisheries, some defined the jurisdiction quite broadly, others very narrowly. Some iteration, including the All-Party Committee, would have extended it to species that were not straddling stocks; they were discrete high-seas stocks clearly under high-seas jurisdiction. They were not even part of the NAFO picture in that sense.⁽⁶⁸⁾

(67) House of Commons Standing Committee on Fisheries and Oceans, *Custodial Management Outside Canada's 200-Mile Limit*, March 2003.

(68) Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, *Committee Proceedings*, 2 November 2006.

We were advised that, as proposed, custodial management would amount to an extension of Canada's fisheries jurisdiction by another name. Because the proposal goes well beyond what is accepted in international law, it offers little prospect for success. Canada would receive very little, if any, support. Unilateral action on Canada's part to impose a new system would be vigorously opposed by other fishing nations (particularly NAFO members), potentially leading to confrontation. According to the federal Minister of Fisheries and Oceans, it is doubtful that Canada would be able to take the enforcement measures necessary "to make it stick." In his presentation, Dr. Art May stated that while custodial management "is a wonderful concept if only we could convince other people," "the trouble seems to be that nobody else believes that is what we would actually do." Mr. John Crosbie asked: "Why should other countries give Canada custodial management over areas on the high seas where they have the right to fish?" The Committee is unaware of any NAFO members ever having expressed support or interest in having Canada take custody of the straddling stocks outside 200 miles.

Committee members were also reminded that circumstances had changed considerably since custodial management was first proposed. Unilateral action on the part of Canada would likely provoke a diplomatic furore and violate international law and treaty obligations Canada voluntarily assumed, such as UNFA, which Canada ratified in August 1999, and the LOS Convention, which Canada ratified in December 2003. Canada would face significant legal challenges, be subject to the mandatory dispute-settlement provisions of the LOS Convention, and (we were told) would lose.

B. Replacing NAFO

The recommendations that were made by the Panel were probably made out of frustration.

– The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006

Perhaps the existence of a report that suggests replacement of NAFO, and I assume that many informed countries have read the report, has helped in the thrust for reform.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

I think we have completed a fairly major home renovation rather than build a new house.

– Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006

I do not share the Panel's enthusiasm for creating a new RFMO to replace NAFO. Such an exercise would take an inordinate amount of time to negotiate amongst parties who are and who have been active in the Northwest Atlantic.

– Bill Rowat, Former DFO Deputy Minister (now retired), Committee Proceedings, 19 October 2006

I did prepare one of the background papers for the May Panel, but I was not entirely convinced that complete replacement of NAFO was necessary or that it would be as complicated and time-consuming to simply reform NAFO.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

If NAFO cannot do the job, and God knows NAFO has been around long enough to prove it can do the job, then another organization has to replace it.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

[I] tend to agree with those who suggest that trying to put a new system in place would be a long, time-consuming process.

– Tom Best, Petty Harbour Fishermen’s Cooperative, as an individual, Committee Proceedings, 9 November 2006

Now that NAFO is evolving into an organization which will be based on [...] UNFA principles, when the new Convention is ratified, I think it will become a new and different organization.

– Earl Wiseman, Former DG of DFO’s International Affairs Directorate (now retired), Committee Proceedings, 19 October 2006

On 1 September 2005, the Minister of Fisheries and Oceans released the report of a three-member Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic. The Panel, chaired by Dr. Art May, President Emeritus of Memorial University, was asked in December 2004 to provide advice on how to reduce overfishing in NAFO, and recommend ways to strengthen Canada’s rights, as a coastal state, with respect to the straddling stocks. In its report entitled *Breaking New Ground, An Action Plan for Rebuilding the Grand Banks Fisheries*, four options were considered: reform of NAFO (as it then existed); replacement of NAFO with a new Convention; imposition of custodial management; and use and improvement in the provisions of UNFA and the LOS Convention.

The May Panel concluded that, without advances in international law (and given the slow pace at which international law develops), the shortcomings of the LOS could not be remedied quickly enough. The only realistic option for corrective action would be to change the current NAFO arrangement. The Panel doubted that a reform initiative would be successful: NAFO had “fatal flaws,” had lost all credibility in Canada because of its record of delays, half-measures and failures, and too many members in NAFO had little or nothing to gain from the extent of the reforms needed (i.e., effective conservation would benefit only the major members).

The Panel proposed that NAFO be replaced, as an immediate priority, with a new RFMO. A new RFMO would incorporate the modern approaches and principles for sustainable ecosystem management contained in UNFA and in other recent international agreements,

explicitly recognize the special interest of the coastal states in the sustainable management of stocks, and have better enforcement and a compulsory dispute settlement mechanism. While the Panel devoted considerable space in its report to custodial management, the concept was essentially rejected: a new RFMO would be more easily attainable and achieve the same objectives.

The previous government decided to pursue the Panel's objectives within the existing organization (by attempting to fix NAFO), rather than trying to create a new RFMO. The present government is following the same path, so that replacing NAFO "is off the table." Speaking as the first chairman of NAFO (from 1977 to 1981-1982), Dr. May commended the present Minister and his officials for the progress they made because "it would not have happened without some very sharp elbows in the corners." He added that:

I can only emphasize that our conclusion at the time was that NAFO was a tired and hidebound organization that did not seem amenable to change. [...] If they continue the momentum that they started this time, if this is not the end, then things can improve [...].

The recent reform proposals appear to have breathed at least some hope into NAFO. Witnesses tended to disagree with the "replace NAFO" approach, citing the advances made in September 2006, but especially the length of time it would take to negotiate a new RFMO. Some participants in our discussions felt that if the proposed reforms go through (as announced) and are accepted, NAFO will in effect be a new organization. The majority were of the view that the more productive course of action would be to enhance the management capabilities of the organization already in place. Mr. Tom Rideout, Newfoundland and Labrador's Minister of Fisheries and Aquaculture, indicated that if custodial management could not be implemented, the province would continue to urge the Government of Canada to pursue that option through other means, such creating a new RFMO as suggested by the Art May Advisory Panel.

C. Rebuilding Stocks

I believe that rebuilding is what this is all about. We have so little left.
 – The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006

We seem to be content to share 10% or less of what used to be there, and we now just go fighting among ourselves for the scraps that fall off the table. The Grand Banks was once a tremendously productive marine ecosystem.
 – Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

Believe me, after 50 years of knowing the Spanish, the Portuguese, and the rest of these people, particularly the owners who run the fishery, not the governments, I can tell you that despite what they say, [...] there will never be any recovery of the fishery on the Grand Banks.

– Gus Etchegary, Retired industry executive and former Canadian commissioner to ICNAF and NAFO, Committee Proceedings, 9 November 2006

We still have a number of NAFO stocks under moratorium, which is a huge wasted economic opportunity for coastal communities that desperately need them.

– Earle McCurdy, President, Fishermen, Food and Allied Workers, Committee Proceedings, 9 November 2006

If people are serious about rebuilding the marine ecosystems, rather than just letting them go on a long slide, [...] we are going to have to have better science.

– Dr. George Rose, Division of Degree Studies and Research, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

If these fishing nations have changed their attitude [...], they should be willing to show some real gesture of commitment to bringing recovery about. [...] We have to find out what is wrong with the stocks on the outer shelf, why they are not recovering.

– Tom Best, Petty Harbour Fishermen's Cooperative, as an individual, Committee Proceedings, 9 November 2006

What is perhaps even more important now is not only the state of the stocks but understanding the interrelationship of the stocks, the whole ecosystem approach. There is a great deal of work that still needs to be done.

– Earl Wiseman, Former DG of DFO's International Affairs Directorate (now retired), Committee Proceedings, 19 October 2006

[O]ur government firmly believes that a greater level of funding for science is required and we encourage the federal government to increase funding.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

Five centuries ago, the fishing ports of northern Europe were rife with stories of groundfish off Canada's Atlantic Coast so abundant that they impeded the progress of ships and could be caught by simply lowering a basket over the side. Today, most stocks on the Grand Banks and the Flemish Cap – fishing grounds considered one of the most ecologically productive areas of the world's oceans – have been fished down to a small fraction of their former abundance. Ten NAFO stocks are under moratoria.⁽⁶⁹⁾ Many stakeholders believe that an important economic benefit is being forfeited by NAFO's inability to bring about a recovery. The obvious challenge is not only to ensure that harvesting is held to sustainable levels, but also to promote rebuilding.

(69) Stocks under moratoria include 3NO capelin and 3L cod (since 1993), and 3NO cod, 3M cod, 3LNO American plaice, 3M American plaice, 3NO witch flounder, 3L witch flounder, 3NO shrimp (since 1995), and 3LN redfish (since 1998). Stocks for which status is uncertain are 3LNO thorny skates, 3O redfish, and 3NO white hake (recently regulated). Turbot is under 15 year rebuilding plan. Evelyn Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks," St. John's Conference on the Governance of High Seas Fisheries and UNFA, June 2005, <http://www.dfo-mpo.gc.ca/fgc-cgp/documents/meltzer/NAFOfinal.pdf>.

Besides tighter enforcement and sanctions to curb overfishing, the testimony suggested that much more needs to be done to support rebuilding.⁽⁷⁰⁾ According to Dr. May, what NAFO lacks “first and foremost” is a broad vision and “a commitment to rebuild the resources, a plan to get there, and a time frame to implement the plan”:

The trouble is that we have a crisis of low expectations when it comes to NAFO, so we have to wait and see. [...] Meanwhile, within NAFO, where is the commitment to rebuilding stocks? Where is the plan to restore the Grand Banks? Where is the threat to remove repeat offenders from the fisheries once and for all? What is the timeline for restoration? All of these questions are hanging and I see no answers in place or on the horizon. [...] The resources in NAFO were decimated in the late 1980s. That is 20 years ago. What have we been doing for the last 20 years? The answer is fishing at a level that makes sure rebuilding never occurs.⁽⁷¹⁾

Besides tighter enforcement and sanctions, witnesses suggested the implementation of management tools, such as establishing management areas that limit the use of certain harvesting technologies at specific times during the year and in specific locations to protect juvenile fish and spawning stocks, and reduce bycatches of “non-target” species.⁽⁷²⁾ We heard that, in future, non-governmental organizations (NGOs) will increasingly force governments to move faster and further. The World Wildlife Fund, Greenpeace, and other groups are already there because of the lack of measurable progress in restoring stocks.

Throughout the world, “marine protected areas” were said to be increasingly regarded as having a critical role to play in the conservation and protection of marine species and habitats. Dr. George Rose, a renowned fisheries biologist who holds the research chair in fisheries at Memorial University, underscored the need for major changes in the way marine fisheries are managed inside and outside the 200-mile limit, “the way we look at them, our whole attitude and philosophy towards them.” Dr. Rose called for the creation of large-scale marine reserves, like those which were established for endangered land animals and birds where special efforts were needed to restore populations. He wondered why people can accept, without question, ways to conserve land-based wildlife but yet have an entirely different attitude about conserving marine resources.

(70) The Committee heard that yellowtail stocks had been successfully rebuilt, and that a rebuilding plan for turbot (Greenland halibut) had been adopted in 2003.

(71) Dr. Art May, President Emeritus, Memorial University of Newfoundland, *Committee Proceedings*, 9 November 2006.

(72) According to the Panel report, fisheries for some species were being conducted essentially to get the permitted bycatches of more desirable moratoria species. According to a study prepared for the World Wildlife Fund, approximately 90% of the total cod stock population on the southern Grand Banks in 2003 was caught as bycatch, or a 30-fold increase in bycatch since that fishery was closed. A. Rosenberg, M. Mooney-Seus and C. Ninnes, *Bycatch on the High Seas: A Review of the Effectiveness of the Northwest Atlantic Fisheries Organization*, WWF-Canada, 2005, http://www.panda.org/about_wwf/where_we_work/north_america/news/index.cfm?uNewsID=23370.

Witnesses emphasized the importance of taking an “ecosystem approach” to fisheries management – an approach that takes other marine resources, marine habitat and other parts of the oceans ecosystem into consideration when making management decisions. Mr. Tom Best of the Petty Harbour Fishermen’s Cooperative spoke about modern high-tech tracking and detection technology employed in commercial fisheries having created a significant imbalance in fish populations, which in turn has resulted in an imbalance in predator-prey relationships, which are not fully understood. Patrick McGuinness of the Fisheries Council of Canada said that the single-species approach did not deliver the sustainability and predictability the fishing industry needs. Committee members frequently heard participants say that UNFA’s principles, which are to be incorporated into a new NAFO Convention, make several references to “ecosystem” considerations and issues.

So far, NAFO has generally managed fish on an annual, stock-by-stock, single-species basis. We learned that NAFO had agreed in September 2006 to update the Convention to ensure that decision-making will be based on science and ecosystem considerations. Its mandate will also be expanded to minimize harmful impacts “on living marine resources and marine ecosystems, and that preserve marine biological diversity.”⁽⁷³⁾ In this connection, as part of a Canadian-led proposal, fishing activity will be curtailed on four seamounts (undersea mountains) in the Regulatory Area until 2010, and scientific protocols will be developed to collect ecosystem data. The Scientific Council was also asked to assess corals to allow for their future protection. According to DFO, NAFO decisions will be based on science, taking into consideration fish habitat and marine sensitive areas – an approach closer in line with Canadian practices.⁽⁷⁴⁾

In December 2005, Canada invested some \$11 million over three years to fund research activities on sensitive marine areas and aquatic species on the Grand Banks, and on straddling and highly migratory fish stocks on both the Atlantic and Pacific coasts, as well as in support of initiatives to promote sustainable fisheries practices and harvesting strategies.⁽⁷⁵⁾

(73) NAFO, “NAFO Reform in Full Swing,” Press Release, 22 September 2006, <http://www.nafo.int/about/frames/about.html>.

(74) In the fall of 2006, spokespersons from conservation organizations on the West Coast stated that progress in Canadian waters had been slow in establishing Marine Protected Areas (MPAs) under the *Oceans Act*. The Act requires DFO to lead and facilitate the development of a national oceans strategy to guide the management of Canada’s estuarine, coastal and marine ecosystems. Between 1996 (when the *Oceans Act* was passed) and 2005, the total ocean area under protection was said to have increased only from 0.43% to 0.51%, despite a 10% federal commitment by the year 2012.

(75) DFO’s Newfoundland and Labrador Region will receive the majority of these funds, or \$7.6 million, in support of 14 research projects in Newfoundland and Labrador.

The bigger picture, according to Dr. George Rose, is that years of neglect in fisheries science have resulted in Canada losing its reputation as a world leader in fisheries and marine science. While most bench-level scientists are able to obtain funding to attend international meetings, he said very little funding is available to do actual work. Once the envy of the world, DFO science has been shrinking as older scientists retire. Dr. Rose called for more adequate funding, as did other participants in our discussions, including Mr. John Crosbie, who asked the Committee to bring as much pressure as possible to bear on the government to provide a major increase in funding for scientific research.

In 2005, the May Panel concluded that “inadequate knowledge exist[ed] as to the requirements for a proper ecosystem approach to management of these once lucrative fish stocks,” and that “the knowledge to manage single species fisheries in ways that minimize the possibility of irreversible changes to the system as a whole [did] not exist.” The Panel underscored the urgent need for a major scientific review of Grand Banks fisheries management in an ecosystem context. The objective of the review would be “to define conservative management practices designed to restore and preserve this unique system,” and “to contemplate the possibility of low or no fishing for some species and such other measures as may be necessary.”

The May Panel also called for a rebuilding plan, and strongly urged “that Canada engage the European Union with the objective of developing a bilateral agreement to rebuild groundfish stocks and to better manage the straddling stocks as well as those entirely outside 200 miles.”⁽⁷⁶⁾ A concerted effort on the part of Canada to ally itself with the European Union on fisheries management was proposed because most of the quotas for the straddling stocks (approximately 80%) are held by Canada and the EU, two NAFO entities having coastlines in the Regulatory Area.⁽⁷⁷⁾ In the Panel’s words:

We believe that Canada itself should mount a substantial scientific research program to document the current situation and to inform rebuilding strategies, and encourage other NAFO members to cooperate in this effort. The objective should be to rebuild the system by 2015, as urged by the Johannesburg Declaration, to the level and variety of productivity existing before the current degradation, i.e., to the situation prevailing in the 1950s.⁽⁷⁸⁾

(76) A more direct approach to foreign fishing corporations was also suggested, as there might be business solutions to overfishing and non-compliance issues, solutions “which could cut through the knots that tie up processes at the government to government level.”

(77) In the case of the EU, through Greenland (Denmark) and St. Pierre and Miquelon (France). The United States was also seen as a natural and important partner.

(78) *Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic*, June 2005.

BOTTOM TRAWLING

A. The 2006 UN General Assembly Resolution on Sustainable Fisheries

The minute we say it is bad outside, we had better be prepared to say it is damaging inside; whatever we do out there, as I mentioned with NAFO, we have to do inside.

– *The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006*

The fishing industry is worried that these widespread moratoriums are the thin edge of the wedge. They are worried about blanket moratoriums. They prefer to focus on having more protected areas. There is a move toward marine protected areas around seamounts, for example.

– *Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006*

[W]hat that issue is about is whether anybody should fish on the high seas in the absence of scientific advice, in the absence of a management body. The issue is about fishing on the high seas. It has become an issue about trawling inside the 200-mile limit. It has suddenly shifted.

– *Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006*

[T]he proposed ban is not a ban on dragging. It is a proposal to properly regulate, to impose moratoria in new areas [...].

– *Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006*

[RFMOs] do not yet exist or are under construction on much of the high seas. It is essentially the Wild West out there. There are no quotas, no research vessels, no fish cops, and so on.

– *Mark Butler, Managing Director and Coordinator, Marine Issues, Ecology Action Centre, Committee Proceedings, 5 December 2006*

I want to be very clear: [...] we are not asking for a moratorium in domestic waters.

– *Jennifer Lash, Executive Director, Living Oceans Society, Committee Proceedings, 17 October 2006*

The moratorium on bottom trawling is [...] supported by over 1,200 scientists from 62 countries. It is backed by quite a substantial amount of scientific background.

– *Fred Winsor, North-East Avalon Group, Sierra Club of Canada, Committee Proceedings, 9 November 2006*

[T]he United Nations [...] has decided to reject the across-the-board ban on the so-called unregulated areas of the high seas for bottom trawling. We think that is a fantastic direction because it refocuses the debate on conserving sensitive areas and away from demonizing a long-standing and important fishing gear.

– *Patrick McGuinness, President, Fisheries Council of Canada, Committee Proceedings, 5 December 2006*

As most people know by now, decades of abuse have transformed the world's oceans. The factors contributing to the worrisome state of affairs in fisheries include an enormous growth in the size and capacity of fishing fleets,⁽⁷⁹⁾ poor selectivity of fishing gear and large bycatches that are discarded,⁽⁸⁰⁾ land-based pollution, the destruction of critical fish habitats, and illegal, unregulated and unreported fishing activity, both within areas under national jurisdiction, where about 90% of the world's fishing activity takes place, and on the high seas. Because of a projected increase in the world's population and per capita fish consumption, the demand for seafood products is expected to continue to grow, which will drive up prices and provide even greater incentive to harvest fish stocks beyond sustainable levels.

The vast majority of global catches have come from the continental shelves under the jurisdiction of coastal states. As a result of technological development, however, fishing can now take place in previously inaccessible areas on the high seas, outside national jurisdictions, where RFMOs do not exist and where fishing is unregulated in large expanses of ocean,⁽⁸¹⁾ where seamounts are located. Seamounts, where slow-growing corals and sponges are often found, provide habitats for many species of fish, such as the long-lived orange roughy off New Zealand and Australia.

In February 2004, 1,300 of the world's leading marine scientists collectively called on governments and the United Nations to protect imperilled corals and sponge ecosystems from the immediate threat posed by commercial fishing, especially bottom trawling.⁽⁸²⁾ Worldwide, on the high seas in international waters, there are perhaps no more than 200 vessels involved in such fishing activity, also known as "dragging." Approximately 95% of

(79) Subsidies to bottom trawlers are estimated to total US\$152 million a year. University of British Columbia, Fisheries Centre Research Reports, *Catching More Bait: A Bottom-up Re-estimation of Global Fisheries Subsidies*, Vol. 14, No. 6, 2006, <http://www.fisheries.ubc.ca/publications/reports/14-6.pdf>. The fisheries policies of European Union usually do not rate highly in economic terms because of the financial assistance the EU has provided under its Common Fisheries Policy. In Europe, which includes the majority of NAFO-member countries, years of disregard for scientific advice and conservation have resulted in a very depleted resource on that side of the Atlantic Ocean.

(80) Global bycatches are estimated to amounts to 20 million tonnes each year, or approximately 25% of all fish caught. Kristina M. Gjerde, *Ecosystems and Biodiversity in Deep Waters and High Seas*, Report prepared for the United Nations Environment Programme, UNEP Regional Seas Report and Studies No. 178, Switzerland, 2006, http://www.unep.org/pdf/EcosystemBiodiversity_DeepWaters_20060616.pdf.

(81) According to one estimate, only one-millionth of the deep ocean floor has been subject to biological investigations. *Ibid.*

(82) Bottom trawling is a fishing method that employs a large cone-shaped net that is dragged behind a boat along the sea floor. The net is kept open horizontally by large steel doors in contact with the ocean bottom, and may be weighted down by chains and cables with heavy discs or rollers, which enable the net to trawl fish over rough seabed or corals. Bottom trawling increased in the 1980s with the advent of "rock-hopper" gear which allowed vessels to fish rougher and previously inaccessible areas.

the damage inflicted on deep-water systems associated with seamounts are believed to be the result of bottom trawling, even though this sector is estimated to represent only about 0.2% of the world marine catch.⁽⁸³⁾ Only 11 countries have distant-water fleets operating in waters outside their country's 200-mile limit: Denmark, Estonia, Iceland, Japan, Latvia, Lithuania, New Zealand, Norway, Portugal, Russia, and Spain.⁽⁸⁴⁾

In November 2006, negotiations took place at the United Nations on the adoption of a draft Resolution for Sustainable Fisheries; discussions about how to deal with the effects of trawling, however, received by far the most attention. The "Deep Sea Conservation Coalition," a worldwide consortium of environmental and conservation NGOs, called on the United Nations General Assembly (UNGA) to adopt an immediate moratorium on deep-sea bottom trawl fishing on the high seas until legally-binding regimes could be developed, implemented and enforced by the global community. As proposed by Deep Sea Conservation Coalition, the UNGA resolution would have called for a temporary halt to bottom trawling on the high seas until such time as:

The extent of deep-sea biodiversity and ecosystems, including populations of fish species, and their vulnerability to deep sea fishing on the high seas ha[d] been assessed;

Legally-binding regime(s) to conserve and manage high seas biodiversity, including bottom fisheries, consistent with the LOS Convention, UNFA, the 1993 UN FAO Compliance Agreement, the Convention on Biological Diversity, the UN FAO Code of Conduct for Responsible Fisheries, and any other necessary governance reforms, ha[d] been adopted and implemented; and

Adequate measures [were] in place to deal effectively with Illegal, Unreported and Unregulated (IUU) fishing in noncompliance with international agreements.⁽⁸⁵⁾

In their presentations to the Committee, spokespersons from Canadian conservation/environmental NGOs emphasized that what they were seeking was an interim ban (a moratorium) in unregulated areas *outside* national 200-mile limits, and *outside* areas already covered by RFMOs, which they urged the Minister of Fisheries and Oceans to support. Trawling in Canada's domestic waters and in areas regulated by NAFO would continue as usual.

(83) Deep Sea Conservation Coalition, *Out of Their Minds?: How One Nation Was Allowed to Orchestrate a Global Tragedy*, 23 November 2006, <http://www.savethehighseas.org/display.cfm?ID=149>.

(84) University of British Columbia, Fisheries Centre Research Reports, *Catching More Bait: A Bottom-up Re-estimation of Global Fisheries Subsidies*, Vol. 14, No. 6, 2006.

(85) Deep Sea Conservation Coalition, "Save the High Seas," Moratorium Terms, <http://www.savethehighseas.org/moratorium.cfm>.

Mr. Mark Butler of the Halifax-based Ecology Action Centre stressed that no major Canadian environmental organization had called for a moratorium on dragging in Canadian waters. He also stated that the Centre had never called for a ban on dragging in the 15 years it had worked on fishing gear issues.

The Minister of Fisheries and Oceans however referred to the proposed moratorium as a blanket ban on trawling on the high seas, as did DFAIT officials. Those opposed to the moratorium appeared to view it as the thin edge of the wedge, a lever to ban or reduce bottom trawling within national jurisdictions.⁽⁸⁶⁾ In his remarks to the Committee, Mr. Patrick McGuinness, the FCC's President, emphasized that for some species (e.g., for shrimp, scallops, clams), bottom-impact fishing gear is the only type capable of harvesting the resource.⁽⁸⁷⁾ Newfoundland and Labrador's Minister of Fisheries and Aquaculture, Mr. Tom Rideout also felt that the moratorium "would result in tremendous pressure for [Canada] to implement the same ban within 200 miles." DFAIT officials mentioned the need to maintain a degree of consistency between management measures inside and outside the 200-mile limit.

Phillip Saunders, Dean of Dalhousie Law School, however, questioned the logic of the argument, and said it had no legal basis:

I can say from a legal perspective that the fact that you agree that it is a good idea to regulate, control, or impose a moratorium on a fishing technique in new and unexplored areas of the high seas has no legal connection to what you do in a regulated, managed fishery that may allow that same technique. There is no legality that says that because you agreed to that you must now do this. The political calculation that may be involved in it is a different one upon which I cannot comment.

According to Mr. Butler of the Ecology Action Centre, proponents of the proposed moratorium included Australia, New Zealand, the United States, Norway, India, Germany, and the European Union, which includes Spain – a NAFO member and flag state with the largest high seas fleet in the world. In the weeks leading up to the UNGA negotiations, a handful of countries opposed the idea, including Spain (despite its EU membership), Iceland, and Canada. The Minister of Fisheries and Oceans, who said that that "real solutions" needed to be "practical, enforceable and fair," announced Canada's opposition in October 2006⁽⁸⁸⁾ – a position that was fiercely criticized in the media.

(86) FCC, Letter to the Minister of Fisheries and Oceans, 6 July 2006.

(87) Worldwide, approximately 40% of fisheries were said to employ bottom-impact gear.

(88) See DFO, "Canada in Good Company With Other Fishing Nations In Finding Solutions to Protect Vulnerable Marine Ecosystems," Minister's Statements, 6 October 2006, http://www.dfo-mpo.gc.ca/media/statem/2006/20061006_e.htm.

On 23 November 2006, when negotiations ended, it was announced that countries had failed to agree on a moratorium. Iceland was singled out for derailing a possible consensus. On 8 December 2006, the UN General Assembly instead adopted a resolution calling on RFMOs to study the impacts of deep sea bottom trawling and to put an end to any type of bottom fishing found to be destroying vulnerable ecosystems by 31 December 2008. Where RFMOs lack authority to do this, it calls on countries to take the same steps by the end of 2007.⁽⁸⁹⁾ According to Mr. Mark Butler, the debate demonstrated that one sector of Canada's fishing industry has a disproportionate influence on DFO:

It has shown that regardless of the science, of Canadian public opinion, of the support of many Canadian fishermen and fishing organizations – and there are fishing organizations on record as supporting the moratorium – of the endorsement of editorial boards across this country, of the position of the majority of the world's nations, including Canada's traditional allies such as the United States, the Canadian government listens to only one sector of the fishing industry on this issue. I believe that must change.⁽⁹⁰⁾

B. Bottom Trawling: An Ongoing Issue

There are two things to do. Number one, try to avoid destroying habitat where we can. Number two, which not a lot of people talk about but some people are doing something about, develop technology that is less damaging.

– The Hon. Loyola Hearn, Minister of Fisheries and Oceans, Committee Proceedings, 3 October 2006

The people at the Marine Institute in Newfoundland and Labrador will tell you that there is considerable work with companies such as Fishery Products International and others. [...] Right now most of the money is being put not into increasing efficiency but into reducing the impact of the technology on the environment.

– Patrick McGuinness, President, Fisheries Council of Canada, Committee Proceedings, 5 December 2006

We must address this issue objectively on the basis of science and on the basis of good economics. We have not done so to date domestically, and now we have seen the result within the last year when it comes to setting foreign policy.

– Mark Butler, Managing Director and Coordinator, Marine Issues, Ecology Action Centre, Committee Proceedings, 5 December 2006

There is always a need for more research on bottom trawling and the effects on the bottom. I think that is pretty conclusive. This type of fishery can be very destructive; there is no question about that.

– The Hon. Tom Rideout, Minister of Fisheries and Aquaculture, Government of Newfoundland and Labrador, Committee Proceedings, 9 November 2006

(89) United Nations, "General Assembly Calls for 'Immediate Action' to Sustainably Manage Fish Stocks, Protect Sea Ecosystems from Harmful Fishing Practices," Department of Public Information, 8 December 2006, <http://www.un.org/News/Press/docs/2006/ga10551.doc.htm>.

(90) Mark Butler, Managing Director and Coordinator, Marine Issues, Ecology Action Centre, *Committee Proceedings*, 5 December 2006.

There should be much tighter restrictions on where you can use trawls and go dragging both inside and outside the 200-mile limit, and there are certain areas, as the minister said, where no trawling should be allowed.

– The Hon. John Crosbie, Former Minister of Fisheries and Oceans, Committee Proceedings, 9 November 2006

We need more evidence of the effects of bottom trawling. I think that there are other ways to catch fish than bottom trawling, although for some species it is not very obvious.

– Dr. Art May, President Emeritus, Memorial University of Newfoundland, Committee Proceedings, 9 November 2006

[P]erhaps we could leverage our jurisdiction over sedentary species into broader jurisdiction over these activities. [...] [However] the presumption is that, unless international law gives you jurisdiction over something, the default position is that it is high-seas freedoms.

– Phillip Saunders, Dean, Dalhousie Law School, Dalhousie University, Committee Proceedings, 2 November 2006

Canada is a coastal state with a continental shelf extending beyond 200 miles, and has sovereign rights for the purpose of exploring the continental shelf and exploiting the natural resources [...]. These sovereign rights do not apply with regard to most kinds of fishing.

– Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau, DFAIT, Committee Proceedings, 26 October 2006

DFO and NAFO are reportedly moving towards an ecosystem approach to management. Such an approach requires that the effects of human activities on the ecosystem be considered, including the effects of trawling on marine species and communities living on the seafloor (e.g., corals, sponges and other flora and fauna). The severity and extent of the impacts of bottom-contact fishing gear was a much-discussed subject in our meetings. According to the Ecology Action Centre, Canada's unwillingness to support a moratorium on high seas trawling was a reflection of its long-standing and flawed domestic fisheries policy.

According to the Fisheries Council of Canada, "bottom impact" fishing accounts for about 40% of the quantity of fish harvested in Canada, 24% of the value (approximately \$534 million in 2003), and some 14,500 fishermen and processing workers. The provinces most dependent on trawling are Newfoundland and Labrador and Nova Scotia. Marine commercial fisheries in the eastern Arctic are also very dependent on bottom trawling for their current and future fishing opportunities.

With regards to Canadian waters, DFO's position has been that "all gear types can have negative impacts, depending on how they are used and in what circumstances," and that no one gear type is inherently more destructive than another. In areas where there are unique and highly sensitive marine ecosystems, and where there is scientific evidence showing that fishing practices have long-term adverse effects, the policy has been to:

- Mitigate these effects through the application of management measures which may include gear modifications, mesh and hook size considerations, and other measures to ensure that fishing practices conform to specific habitat conservation requirements.
- Implement seasonal and area fishing closures if impacts cannot be mitigated.
- Establish Marine Protected Areas in areas where long-term protection measures are required that cannot be adequately addressed through fishing closures and other measures.
- Monitor the area for compliance and management effectiveness.⁽⁹¹⁾

In Canada, bottom trawling has been an ongoing issue in both the Atlantic and Pacific regions for several decades. The Committee heard there are no regulations under the *Fisheries Act* to protect habitat from potentially destructive fishing technologies. Some witnesses said that bottom trawling was disruptive of sea life on the sea floor, while others told us there was no clear evidence that bottom trawling in itself disrupts fish productivity. In its submission, the FCC asserted that “the perception that trawlers continue each day to ‘clear fell’ large areas of new ground is simply untrue,” adding that “the areas fished have been extensively fished for over 50 years, in some cases 100 years.”

We learned that a DFO study published in 2006 concluded that mobile bottom-contact fishing gears *did* have impacts “on benthic populations, communities, and habitats.” The study also found, however, that those impacts were not uniform and depended on “the specific features of the seafloor habitats, including the natural disturbance regime; the species present; the type of gear used, the methods and timing of deployment of the gear, and the frequency with which a site is impacted by specific gears; and the history of human activities, especially past fishing, in the area of concern.”⁽⁹²⁾ Frontier areas, places with no history of fishing, were said to require special considerations in managing the risks posed by mobile bottom-contact gears.

(91) DFO, “Canada’s Practices With Respect to Fishing Activities That May Have an Effect on Highly Sensitive Benthic Marine Ecosystems,” Backgrounder, November 2004, http://www.dfo-mpo.gc.ca/media/backgrou/2004/hq-ac89a_e.htm.

(92) In the fall of 2005, the Policy, the Oceans and Habitat Management, and the Fisheries and Aquaculture Management sectors of DFO joined in a request for science advice on the potential impacts of mobile bottom-contact gears on benthic habitats and communities. Experts prepared an overview working paper that reviewed and consolidated the results of five major international reviews or symposia, and several additional working papers that considered results of regional studies of these impacts in Canada. DFO, Canadian Science Advisory Secretariat, Science Advisory Report 2006/025, *Impacts of Trawl Gears and Scallop Dredges on Benthic Habitats, Populations and Communities*, June 2006, http://www.dfo-mpo.gc.ca/csas/Csas/status/2006/SAR-AS2006_025_E.pdf.

Both federal and provincial ministers of fisheries talked about mitigating the impact of trawl gear by avoiding sensitive ecosystems, and the need to develop smart technologies and fishing techniques. The Marine Institute of Memorial University was said to be a world leader in this regard. Dr. May was optimistic that less destructive fishing techniques could be found, especially if the right incentives were put in place. In L'Anse-au-Clair, members of the Labrador Fishermen's Union Shrimp Company mentioned the development and introduction of a device called the "Nordmore grate" in the early 1990s, which markedly reduced, if not virtually eliminated, groundfish bycatches, allowing the shrimp fishery to expand.

Could damage to seabed habitat by trawling, the main fishing method in the NAFO Regulatory Area, be preventing the recovery of fish stocks? Witnesses told us that very little is known about fishing gear impacts, seabed habitats and the role they play in marine ecosystems and commercial fisheries. Dr. May was not aware of any specific studies on the restoration of ocean bottoms, but saw no reason to suppose that they would not regenerate if "simply given some rest and some time to do so." Mr. Tom Rideout, the provincial Minister of Fisheries and Aquaculture, proposed that the federal government fund more research on bottom trawling and its impacts.

With respect to the seabed and fish habitat protection, the Committee heard about a possible option for Canada to pursue should there be insufficient political will in NAFO to effect meaningful change. In areas where a continental shelf extends beyond 200 miles, a coastal state, like Canada, has sovereign rights for the purpose of exploring the continental shelf and exploiting the natural resources there, both living, that is, sedimentary species, and non-living, such as oil and gas found on the seabed in the subsoil. The relevant provision of the LOS Convention which relates to the continental shelf is Article 77(4):

The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

It was explained that, from Canada's standpoint, the essence of the problem is that Canada does not own the fish that swim in the water column above the shelf outside 200 miles. The LOS Convention refers only to the "exploitation" and "exploration" of "sedentary species,"

which would include, for example, clams, scallops, corals and sponges.⁽⁹³⁾ While groundfish are closely associated with the shelf in an ecological sense⁽⁹⁴⁾ (as is clear from the name), they are not explicitly recognized as such in the LOS Convention.

Given that coastal states are entitled to prohibit any exploration or exploitation of the natural resources of their continental shelves, could Canada leverage its jurisdiction over sedentary species up to a broader jurisdiction over particular fishing techniques that damage fish habitat? Could Canada's sovereign rights to explore the continental shelf and exploit its natural resources be used to regulate, even prohibit, trawl fisheries in order to protect sedentary species, such as corals? Mr. Phillip Saunders, Dean of Dalhousie Law School, who very much liked the idea, said the argument would be a difficult one to make. This is because, unlike a coastal state's sovereign rights within its Exclusive Economic Zone, the LOS Convention does not explicitly mention coastal state rights in conserving and managing fishery resources outside 200 miles.

The LOS Convention, which provides for shelf jurisdiction, establishes a procedure whereby a coastal state like Canada can have the exact limits of its extended continental shelf (i.e., where the shelf ends) recognized internationally under the Convention. We learned that, following Canada's ratification of the LOS Convention in 2003, Canada has 10 years in which to establish the outer limits of its juridical continental shelf beyond 200 miles⁽⁹⁵⁾ and file a claim to the Commission on the Limits of the Continental Shelf, which considers such requests. Article 76 of the LOS Convention provides a complex formula for determining the legal definition of a state's continental shelf beyond 200 miles. Canada, we were informed, would be making an application and a submission is being prepared. At the time of writing, Australia, Brazil, Russian Federation, Ireland, New Zealand, Norway, and France, Ireland, Spain and the United Kingdom jointly, had made submissions, but none had yet been finalized.

(93) Icelandic scallops on the Nose of the Grand Banks (shelf outside Canada's 200-mile limit) were the subject of a dispute between the United States and Canada in 1994. Two U.S. vessels had fished the scallops without licences. The United States eventually recognized Canada's jurisdiction and conceded that Icelandic scallops were sedentary, even though they can propel themselves by clapping their shells together.

(94) Some species of groundfish reportedly spend up to half their lives buried in the sea floor.

(95) This can be done by establishing the foot of the continental slope, by meeting the requirements stated for the thickness of sedimentary rocks, by satisfying geo-morphological requirements and by meeting distance and depth criteria, or by any combination of these methods.

CONCLUSION AND RECOMMENDATIONS

Participants in our discussions were encouraged by NAFO's apparent movement towards reform and renewal, but also cautious in their support. A good deal of scepticism was expressed, and justifiably so. NAFO's problems are long-standing, and it was unclear how the proposals announced in September 2006 would be reflected in a new NAFO Convention.

Some participants pointed to apparent flaws or loopholes in the fourth revision of the legal text of the draft Convention, as amended in Brussels (dated 13 October 2006). In that document, Canada's coastal state interests appear to be less protected than before, and a new non-prejudice clause would protect distant-water fishing states from coastal state (i.e., Canadian) claims.

As well, the voting rule in NAFO would be different. Instead of a simple majority (the current rule), decisions by the Fisheries Commission would be taken by a two-thirds majority of votes, which could make it harder for Canada to win votes. Under the proposed dispute settlement process, the setting up of *ad hoc* NAFO panels could be blocked if objecting members found enough allies, which would be easier to do under a two-thirds voting rule.⁽⁹⁶⁾ The decisions of *ad hoc* panels appear to have no legal force to overrule or suspend objections, and could lead to further Fisheries Commission meetings whose decisions could again be open to objections. In the case of disputes arising over fishing rules, vessels could apparently continue fishing for as long as six months while arguments proceed.

These apparent shortcomings appear serious. It is true that, under the draft legal text, Canada, if stymied within NAFO, would still have recourse to the legal remedies available under UNFA; but international courts, we learned, tend to defer to regional dispute resolution processes, such as that being proposed for NAFO.⁽⁹⁷⁾ The Committee has asked to see the Convention's reworked legal text once it is finalized.

(96) NAFO's September 2006 News Release refers to a new objection procedure "being considered to place extra burden on individual parties that do not want to implement Commission decisions," and that "the planned provisions foresee a mechanism for impartial review panels and dispute settlement procedures." NAFO, "NAFO Reform in Full Swing," Press Release, 22 September 2006.

(97) Under Article 27 of UNFA, there is an obligation on states to settle their disputes by "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice." For disputes of a technical nature, they may refer disputes to *ad hoc* panels of experts which they establish (Article 29).

Will NAFO's control and enforcement measures for 2007 be effective? DFO staff at the Northwest Atlantic Fisheries Centre view them as a step in the right direction. How the measures are implemented will become more obvious in the coming months. Countries having an inspection presence in the Regulatory Area (e.g., EU-member states) will apparently remain in charge of redirecting vessels to port, so that the system will still rely on their doing what is morally right. Will flag states "walk the talk" of change and reform and put words in practice? The immediate ordering of vessels to port was something flag states could have done at any time in the past if they had been serious about NAFO and conservation. It also remains to be seen how well countries will follow up on fishing violations, and how the new guidelines on sanctions will be applied.

NAFO members have the option of reducing on-board observer coverage when using increased electronic surveillance. Is more honest or accurate reporting likely with fewer fisheries observers? This is surely not a step forward, given the unproven nature of electronic surveillance, the penchant of fishermen and vessel owners to circumvent the rules, and the fact that foreign boats are not required to return immediately to port if their Vessel Monitoring Systems are inoperative. Observers on fishing vessels perform important functions, not the least of which is monitoring compliance with NAFO's Conservation and Enforcement Measures. Indeed, "there is no control measure more effective than 100 per cent observer coverage."⁽⁹⁸⁾ The testimony we heard left the impression that rather than removing many observers, NAFO should be strengthening their role. The Committee was stunned to learn that observers on EU vessels do not give evidence against violators in their domestic courts.

NAFO's problems are far from being resolved. Outside 200 miles, where there is freedom of fishing on the high seas in international waters, Canada's continuing challenge will be to ensure that foreign vessels comply with the rules, and that the management and conservation measures needed to protect fish stocks are adopted by NAFO. Moreover, even if a new NAFO Convention includes the desired reforms, there could be delays in having their adoption and implementation. Amendments to the Convention require the approval of three-quarters of the parties, who will need to have them approved by their individual legislatures. In the case of the European Union, ratification is a very complex procedure. For example, the EU ratified the 1995 UNFA eight years later in December 2003.

(98) DFO, "NAFO Confirms 100 Per Cent Observer Program," News Release, 18 September 1998.

Should Canada pursue options beyond NAFO? As Newfoundland and Labrador's Minister of Fisheries and Aquaculture made clear, the concept of custodial management is certainly "not dead" in that province. Nonetheless, the threat of unilateral action by Canada to impose custodial management outside 200 miles is perhaps not as credible as it once was. Canada, as a legal party to UNFA (since 1999) and the LOS Convention (since November 2003) – two international treaties that it had a prominent role in shaping – would risk being subjected to the compulsory and binding dispute settlement provisions of Part XV of the LOS Convention. It should be noted, however, that Canada could also take full advantage of those very legal remedies. Although untested so far, UNFA may provide the legal impetus for change in NAFO if current reforms efforts produce less-than-satisfactory results, or if political will is lacking on the part of NAFO members to effect further reforms.

Moratoria on fishing have been in place for 15 years since the first cod moratorium, yet, with the exception of yellowtail flounder, depleted fish stocks have not recovered. Missing from NAFO's reform agenda is an action plan or "grand vision" to restore the Grand Banks to their original state. The Committee views such a plan as long overdue. Rebuilding will require a sizeable investment in scientific research, perhaps foregoing fishing opportunities in some areas, temporarily or even permanently – measures that may not suit some members who may still view NAFO as only a means to gain access to fish and a system for allocating quotas.

Canada, for its part, has a very large economic stake in the fishery, which explains why Canada has always abided by NAFO conservation measures, never once invoking the Objection Procedure to opt out of a conservation measure or unilaterally set a quota for itself. The EU also has a large vested interest in the fishery. At least in theory, Canada and the EU both share a common interest in taking action. In this regard, the ministerial Advisory Panel's proposal that Canada engage the EU with the objective of developing a bilateral agreement on rebuilding should be seriously considered:

This would be to the continued benefit of those regions which have historically fished these resources and which continue to depend on them with such strong economic and cultural attachments. It is surely in the interest of these regions, these countries and the larger European Union to make common cause with Canada in a situation where more than 80% of groundfish allocations are assigned to these two entities. There is almost nothing left to lose, but much to gain if such understandings can be developed and new ground can be broken.⁽⁹⁹⁾

(99) *Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic*, June 2005.

With regard to bottom trawling, the Committee questions Canada's decision to oppose a proposed UNGA resolution on temporarily banning the practice on the high seas in international waters, where there are no RFMOs. The moratorium was a reasonable, precautionary response to protect ecologically sensitive marine habitats. Despite statements to the contrary, Canada's fishing industry would have been unaffected; it is our understanding that the interim ban would have applied only on the high seas, in unregulated international waters where no Canadian fishermen even venture. Canada had nothing to lose in another respect: the proposed moratorium was a UN resolution and, as such, would have been unenforceable in the same way that international Conventions are enforced. In the early 1990s, Canada's support of a resolution in favour of an international moratorium on large-scale high seas pelagic driftnet fishing did not result in banning the use of gillnets, albeit on a much smaller scale, in Canadian waters.⁽¹⁰⁰⁾

The compromise resolution adopted by UNGA in December 2006 calls on RFMOs, such as NAFO, to study the impacts of bottom trawling and put an end to bottom fishing if and where it is found to be destroying vulnerable ecosystems, by 31 December 2008. In areas where RFMOs lack authority, the resolution leaves it to the flag states to take the same steps by the end of 2007. It is far from certain that the compromise will have the desired effect on the 11 countries having distant high-seas fishing fleets, or on the 200 or so vessels involved in the fishery.

Canada's actions in the 1980s and 1990s, both at sea and in international forums, produced reactions that ended up improving the system. For example, the 1995 turbot war, which many Canadians remember with a certain amount of national pride, created the context for the UNFA negotiations to succeed. UNFA, in turn, set the stage for NAFO's recent reform agenda, which includes the adoption of the precautionary approach and ecosystem-based fisheries management, fundamental principles enunciated in UNFA.

Globally, there has been growing recognition of the importance of taking into account ecosystems, biodiversity, and habitat conservation in fisheries management decision-making. A number of countries have endorsed the precautionary approach, including Canada.

(100) Driftnets are gillnets used to catch pelagic fish, such as herring and salmon. UNGA resolutions can however lead to further developments, such as international Conventions. At the same time as the UNGA resolution on large-scale high seas driftnets was adopted, Canada, the United States, Russia and Japan signed the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, which prohibits fishing on the high seas with driftnets exceeding 2.5 kilometres. DFO, "High Seas Driftnet Fishing – Illegal, Unreported and Unregulated Fishing," Backgrounder, September 2006, http://www.dfo-mpo.gc.ca/media/backgrou/2006/hq-ac35b_e.htm.

Inside Canada's 200-mile limit, the precautionary approach is articulated in the 1996 *Oceans Act*⁽¹⁰¹⁾ and in various DFO fisheries policy documents. Article 8 of the 1995 UNFA calls for the enhanced application of the precautionary approach.⁽¹⁰²⁾ NAFO adopted a "Framework for a Precautionary Approach" in 2004.

According to NAFO's September 2006 announcement, the organization is "committed to an ecosystem approach to fisheries management which will be reflected in the Convention." New provisions in an amended Convention would "include an expansion of NAFO's mandate to minimize harmful impact on living marine resources and marine ecosystems, and that preserve marine biological diversity." While recent measures concerning four seamounts in the Regulatory Area may be the first signs of a change in ethos, it remains to be seen how well the ecosystem and precautionary approaches will be implemented. If fisheries management in the Regulatory Area is to consider ecosystems, more scientific research will be needed. If stocks are ever to recover, ecologically sensitive areas may need to be better protected, and species not currently managed will need to be taken into account.⁽¹⁰³⁾

Under the LOS Convention (Part XII), Canada has environmental protection obligations under the LOS to protect and preserve the marine environment. Also under the Convention (Article 77(2)), no one may exploit the natural resources of the continental shelf beyond 200 miles without the express consent of a coastal state, such as Canada. Would significant damage to species or habitats in NAFO's Regulatory Area constitute a form of exploitation? Does freedom of fishing in international waters also imply freedom to damage or destroy sedentary species and critical fish habitat? The Committee believes this line of inquiry should be thoroughly investigated and researched by Canadian experts in maritime law. Under UNFA, courts or tribunals adjudicating disputes can use "generally accepted standards for the conservation and management of living resources and other rules of international law not incompatible with the Convention," and can act "with a view to ensuring conservation of the straddling fish stocks and highly migratory fish stocks concerned."

(101) Canada's *Oceans Act* defines the precautionary approach in decision-making as "erring on the side of caution" where there are threats of serious or irreversible environmental damage.

(102) UNFA provides Guidelines for the Application of the Precautionary Approach which stipulate, among other things, "that management strategies shall seek to maintain or restore populations of harvested stocks and, where necessary, associated or dependent species, at levels consistent with previously agreed to precautionary reference points" (Annex II, 4).

(103) NAFO's website reports that the NAFO fishery targets approximately 25 commercial species of fish, and that 11 species (19 stocks) are managed. NAFO, Some Facts About Fishing Activities in the NAFO Regulatory, <http://www.nafo.int/fisheries/frames/fishery.html>.

The Committee acknowledges that the Minister of Foreign Affairs and the Minister of Fisheries and Oceans announced the appointment of Loyola Sullivan to the new post of Ambassador for Fisheries Conservation on 25 January 2007.

RECOMMENDATIONS

- 1. The Committee recommends that Canada support a prohibition on bottom dragging in unregulated areas of the high seas. To condone bottom dragging in such areas runs counter to Canada's stated objectives in sustainable development and responsible management of the oceans.**
- 2. The Committee recommends that Canada appoint a national panel of scientific and legal experts in the Law of the Sea to determine whether Canada could prohibit dragging on the ocean floor by foreign fishing fleets on Canada's continental shelf outside 200 miles.**
- 3. The Committee recommends that Canada immediately demand that all foreign fishing fleets on Canada's continental shelf be subject to the same laws and penalties as are Canadian fishermen in that all vessels should have observers and active Vessel Monitoring Systems on board at all times or face immediate return to port and prosecution, and the evidence of fisheries observers should be made admissible in court proceedings.**
- 4. The Committee recommends that the Department of Fisheries and Oceans undertake a comprehensive scientific review of the Grand Banks ecosystem, and invite NAFO members to cooperate in this endeavour. The review, which should include habitat considerations, would be the basis for devising conservation objectives and ecosystem rebuilding measures over a ten-year timeframe.**
- 5. The Committee recommends that Canada immediately inform NAFO and its members that Canada considers the legal text of the draft NAFO Convention (fourth revision, 13 October 2006) unacceptable in its current form. Canada, as the major coastal state and fishery interest, should take the lead in drafting a new version of the legal text to take forward to negotiations. In so doing, Canada should refuse the imposition of the two-thirds voting rule and any other changes that could weaken Canada's control within the 200-mile limit and its position outside 200 miles.**
- 6. The Committee recommends that expert parties outside of the Department of Fisheries and Oceans and the Department of Foreign Affairs and International Trade should advise on the draft Convention and procedural changes. These parties should include former DFO and other former officials experienced in the field, as well as academic and industry representatives.**

- 7. The Committee recommends that the Department of Fisheries and Oceans hold discussions with the European Union with the aim of concluding a bilateral agreement on rebuilding fish stocks in the NAFO Regulatory Area. Canada should indicate to the European Union its willingness to make a sizeable investment in research to rebuild those stocks if the EU agrees to match Canada's contribution in this effort.**
- 8. The Committee recommends that, in future, Canada take full advantage of the options for enforcement, dispute settlement, and other provisions made possible under the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFA).**
- 9. The Committee recommends that the Department of Fisheries and Oceans indefinitely maintain the recent increase in Canadian surveillance and enforcement activity in the Regulatory Area. Further use should be made of Canadian Forces vessels and aircraft in fisheries patrols as part of their training and manoeuvres.**
- 10. The Committee recommends that Canada press its partners in the Northwest Atlantic to make NAFO a model and much more successful Regional Fisheries Management Organization, with a bigger voice for the coastal state and with appropriate provisions for the European Union as the other major member.**
- 11. The Committee recommends that the Department of Foreign Affairs and International Trade and the Department of Fisheries and Oceans jointly evaluate the effectiveness of NAFO's sanctions system to determine whether the guidelines adopted in September 2006 are deterring violations in the Regulatory Area, and report to this Committee no later than 31 December 2008.**

APPENDICES

A - BRIEF OVERVIEW OF THE LEGAL FRAMEWORK

B - WITNESSES

APPENDIX A

BRIEF OVERVIEW OF THE LEGAL FRAMEWORK

THE 1982 LOS CONVENTION

In 1982, after nine years of negotiation, the Third United Nations Conference on the Law of the Sea (UNCLOS III) adopted the text of the Law of the Sea Convention (the “LOS Convention”).⁽¹⁾ Often referred to as “the Constitution of the Oceans,” the LOS Convention consists of 320 articles and nine annexes governing such matters as rights of navigation (civil and naval), the protection of coasts and the marine environment, rights over living and non-living resources, and marine scientific research. The Convention was opened for signature on 10 December 1982, and came into force in November 1994 after it received the required 60 ratifications. Canada was at the forefront of diplomatic negotiations leading up to the Convention and signed it, along with 119 other countries, in December 1982. Canada did not ratify the Convention, however, until November 2003.⁽²⁾

The reasons for Canada’s lengthy delay in ratification are twofold. First, there were concerns about the deep seabed mining portions of the LOS Convention; these were addressed in July 1994 with the adoption of an agreement relating to the implementation of Part XI of the LOS Convention. By then, the protection of straddling fish stocks had become an issue, which is the second reason why Canada delayed ratification. Canada argued that the fish needed special recognition and protection in a legally binding UN agreement. That argument resulted, in 1995, in the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, also known as the United Nations Fish Stocks Agreement, or UNFA. Only when it became clear the European Union and its member states were about to ratify UNFA did Canada proceed to ratify the LOS Convention in November 2003.⁽³⁾ There are currently 152 legal parties to the LOS Convention.

(1) The United Nations convened the UNCLOS in 1958. The full text of the LOS Convention and UNFA are available at the UN Division for Ocean Affairs and the Law of the Sea Web site: <http://www.un.org/Depts/los>.

(2) By then, 143 states had ratified the LOS Convention. The “signature” of an international agreement is a means for a state to express a political intention to assume the obligations of a binding agreement. “Ratification” is the step by which signatories assume legally binding obligations. The timing of Canada’s ratification corresponded with Prime Minister Chrétien’s last day in the House of Commons before retirement.

(3) The EU and its member states simultaneously ratified UNFA on 19 December 2003.

The LOS Convention affirms the sovereign rights of coastal states to exploit, conserve and manage all living and non-living resources in their EEZs (Article 56), which may extend out to 200 nautical miles (Article 57). Within an EEZ, a coastal state enjoys a monopoly over the exploitation, management and conservation of living resources; it can establish total allowable catches for fish stocks, determine its harvesting capacity, and allocate any surplus fish to other countries (Articles 61 and 62).

In the areas beyond EEZs on the high seas, there is “freedom of fishing.” The LOS Convention, however, qualifies this freedom. For example, states have a duty to adopt measures for the conservation of living resources (Article 117). States are to cooperate with each other in the conservation and management of living resources (Article 118). Parties to the Convention are to assume their obligations in good faith (Article 300). Article 63(2) specifically addresses straddling fish stocks:

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 sub-regional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article 63, however, does not specify the nature or scope of the arrangements to be negotiated, nor does it discuss the functions of sub-regional or regional organizations (such as NAFO). No time limits are set wherein agreement must be sought.

Where a continental shelf extends beyond 200 miles, a coastal state has rights over the seabed and subsoil, and the exclusive right to explore and exploit sedentary species of fish. The relevant provision of the LOS Convention is Article 77(4):

The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

THE 1995 UNFA

At the Earth Summit held in Rio de Janeiro in 1992 – the first major international gathering to address issues related to “sustainable development” at the global level – a good deal of emphasis was placed on oceans and marine resources. While a plan for achieving sustainable development in the 21st century was adopted (Agenda 21), the issues of marine pollution and straddling stock fisheries were deemed to need further international agreements. Subsequent negotiations on the question of straddling fish stocks led to the 1995 UNFA.

It was a Canadian initiative that led to the development of UNFA; its purpose was to close the gaps in the international legal framework that had been problematic for Canada’s Atlantic fisheries and for fisheries in other parts of the world.⁽⁴⁾ Consisting of 50 articles and two annexes, UNFA elaborates considerably on the LOS Convention. The Agreement’s full title underlines its relationship with the LOS Convention: *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. The Agreement, which came into force in December 2001 after receiving the 30 required ratifications, currently has 63 parties. Canada ratified UNFA in August 1999.

UNFA emphasizes the use of RFMOs, and sets out a number of conservation obligations.⁽⁵⁾ States fishing on the high seas and coastal states are to give effect to their duty to cooperate in accordance with the LOS Convention by adhering to 12 general principles (Article 5). They are required to:

- Adopt measures to ensure long-term sustainability and promote optimal use;
- Ensure that measures are based on the best scientific evidence available;
- Apply the “precautionary approach” to the establishment of fishing levels;

(4) For example, in the southwest Atlantic on Argentina’s Patagonian shelf (hake and squid); on the Challenger plateau in the high seas off New Zealand (orange roughy); in the South Pacific (tuna, dolphin, and shark); in the east-central and southeast Pacific off Chile and Peru (blue whiting and jack mackerel); in the “Doughnut Hole” in the Central Bering Sea and in the “Peanut Hole” in the centre of the Sea of Okhotsk off Russia’s Pacific coast (pollock); in the Barents Sea “Loop Hole” off the coast of Norway (cod); and in the “Doughnut Holes” of the Northeast Atlantic (herring and salmon). See DFO, “The International Consensus on Conservation of Fish Stocks,” Background, March 1995.

(5) UNFA focuses on straddling fish stocks adjacent to EEZs, and does not directly apply to all fish in international waters. Discrete or non-straddling stocks are not covered by UNFA.

- Assess impacts of fishing and other human activities and environmental factors on stocks belonging to the same ecosystem;
- Adopt an “ecosystem approach” with a view to maintaining and restoring fish populations;
- Minimize pollution, waste, discards, catches by lost or abandoned gear, catches of non-target species and endangered species, through the use of selective, environmentally safe and cost-effective fishing gear and techniques;
- Protect biodiversity in the marine environment;
- Take measures to prevent or eliminate overfishing and excess fishing capacity;
- Take into account the interests of artisanal and subsistence fishers;
- Collect and share, in a timely manner, complete and accurate data concerning fishing activities (e.g., vessel position, catch of target and non-target species, and fishing effort);
- Promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and
- Implement and enforce conservation and management measures through effective monitoring, control and surveillance.⁽⁶⁾

Notably, UNFA provides for a high seas enforcement regime in areas covered by RFMOs, such as NAFO. Part VI of UNFA covers flag state responsibilities, international and regional cooperation, basic procedures for boarding and inspection, and measures by port states. On the high seas, UNFA gives a flag state that is party to the Agreement and a member of a relevant RFMO the right to board and inspect fishing vessels of other flag states (even when they are not a member of the RFMO). Article 21 sets out a procedure whereby an inspecting state can secure evidence and promptly notify the flag state when an alleged violation is detected. Part VIII of UNFA provides for the settlement of disputes between parties through provisions that incorporate the binding dispute settlement procedures of the LOS Convention (Articles 27 to 32).⁽⁷⁾ Article 7 of UNFA calls for “compatibility” of conservation and management measures for straddling and highly migratory stocks inside and outside 200-mile zones.

(6) Standing Senate Committee on Fisheries and Oceans, *Straddling Fish Stocks in the Northwest Atlantic*, June 2003, pp. 40-41.

(7) The procedures for dispute settlement set out in Article XV of the LOS Convention apply to any dispute concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling stocks, including any dispute concerning the conservation and management of such stocks.

OTHER AGREEMENTS

Other global codes, guidelines and agreements have also emerged as a result of a growing international interest to ensure long-term, sustainable use of high seas fisheries resources.

In 1995, the FAO adopted the non-binding (soft law) Code of Conduct for Responsible Fisheries, which set out “principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources.” The Code, which Canada ratified in May 1994, led to the development of voluntary International Plans of Action on specific issues, including the IPOA To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated (IUU) Fishing.⁽⁸⁾ The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which specifies the responsibilities of a state for vessels flying its flag when fishing on the high seas, entered into force in April 2003.

At the 2002 World Summit on Sustainable Development (or “Earth Summit 2002”), world leaders made a commitment to apply the ecosystem approach by 2010, restore depleted stocks by 2015, and establish networks of marine protected areas by 2012. Following a meeting of the Organisation for Economic Cooperation and Development Round Table on Sustainable Development, a High Seas Task Force composed of the fisheries ministers from the United Kingdom, Australia, Chile, Namibia, New Zealand and Canada was established in December 2003. In March 2006, the Task Force (now dissolved) outlined practical measures to expose and deter IUU fishing and improve enforcement.⁽⁹⁾ Canada and the United Kingdom agreed to develop a model RFMO which will outline standards and criteria to assess the performance of RFMOs.

(8) The IPOA addresses the problem of flags of convenience. In March 2005, DFO released Canada’s own National Plan of Action to Prevent, Deter and Eliminate IUU Fishing. In 1998, the Canadian fishing industry developed its own Canadian Code of Conduct for Responsible Fishing Operations.

(9) High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, 2005, <http://www.high-seas.org/>.

APPENDIX B

WITNESSES

First Session, 39th Parliament

May 30, 2006

Hon. Loyola Hearn, P.C., M.P., Minister of Fisheries and Oceans

Fisheries and Oceans Canada:

Larry Murray, Deputy Minister

David Bevan, Assistant Deputy Minister, Fisheries and Aquaculture Management

October 3, 2006

Hon. Loyola Hearn, P.C., M.P., Minister of Fisheries and Oceans

Fisheries and Oceans Canada:

Larry Murray, Deputy Minister

Michaela Huard, Assistant Deputy Minister, Policy Sector

Wayne Follett, Regional Director General, Newfoundland and Labrador Region

Paul Steele, Director General, Conservation and Protection Directorate

Jeff MacDonald, Director, Atlantic Fisheries and International Governance International Affairs Directorate

October 17, 2006

Living Oceans Society:

Jennifer Lash, Executive Director

Kate Willis, Marine Planning Specialist

T. Buck Suzuki Environmental Foundation:

James McIsaac, Clean Water Director

October 19, 2006

Earl Wiseman

Bob Applebaum

Bill Rowat

October 26, 2006

Foreign Affairs and International Trade Canada:

Richard Ballhorn, Director General and Deputy Legal Advisor, Legal Affairs Bureau
Keith Lewis, Legal Officer, Oceans Law Section
Michael Shewchuk, Legal Officer, Oceans Law Section

November 2, 2006

Philip Saunders, Dean, Dalhousie Law School, Dalhousie University

November 9, 2006

Honourable Tom Rideout, M.H.A., Minister of Fisheries and Aquaculture, Province of
Newfoundland and Labrador

Department of Fisheries and Aquaculture, Province of Newfoundland and Labrador:

Dave Lewis, Assistant Deputy Minister
Tom Dooley, Director, Sustainable Fisheries and Oceans Policy

Arthur May, President Emeritus; Memorial University of Newfoundland
George Rose, Division of Degree Studies and Research, Memorial University of Newfoundland
Gus Etchegary
Tom Best, Petty Harbour Fishermen's Co-operative
Honourable John Crosbie, P.C.
Earle McCurdy, President, Fishermen, Food and Allied Workers
Julie Huntington, Newfoundland and Labrador Coalition for Healthy Oceans
J. Leonard Barron
Carl Powell
Fred Winson, North-East Avalon Group, Sierra Club of Canada
D. H. Steele
Raymond Walsh

November 21, 2006:

Sabine Jessen, Conservation Director, Canadian Parks and Wilderness Society, B.C. Chapter
Manfred Krautter, Professor, The Sponge Reef Project

December 5, 2006:

Patrick McGuinness, President, Fisheries Council of Canada
Mark Butler, Managing Director and Co-ordinator, Marine Issues, Ecology Action Centre

FACT-FINDING TRIP TO EASTERN CANADA

Tuesday, November 7, 2006

L'Anse Aux Clair, Newfoundland and Labrador

Labrador Fishermen's Union Shrimp Company:

Claude Rumbold
Brian Shebib
Gilbert Linstead, General Manager
Dwight Russel
Ken Fowler

Fisheries Council of Canada:

Patrick McGuinness, President

Wednesday, November 8, 2006

St. John's, Newfoundland and Labrador

Fisheries and Oceans Canada:

James Baird, Associate Regional Director General, Newfoundland and Labrador Region
Leo Strowbridge, Director, International Programs and Corporate Services
Morley Knight, Director, Conservation and Protection
Bill Brodie, Senior Science Co-ordinator/Advisor, NAFO
Gerry Walsh

Provincial Aerospace Ltd.:

Keith Stoodley, Senior Vice President, Marketing
Derek F. Scott, Vice-President