

# The Loophole of the Barents Sea Fisheries Regime

*By*

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The Barents Sea Loophole is a high seas pocket located between the exclusive economic zones of Norway and Russia. Throughout most of the 1990s, vessels from a number of states, especially Iceland, targeted cod in this high seas area without having been allocated quotas by the regional management regime. This chapter assesses the *interplay* between efforts to accommodate this straddling stock problem within the existing regional framework and the partially parallel evolvement of the United Nations Fish Stocks Agreement.<sup>1</sup>

After a brief discussion of the regional regime and its adaptation to the Loophole challenge, the extent to which this particular regional dispute influenced state positions and outcomes at the New York negotiations will be assessed, as well as the likely impacts of the Fish Stocks Agreement on effective management of the Loophole fishery.

## **1 Regional management in the Barents Sea: bilateralism challenged**

Due to the extension of coastal zones from the mid-1970s, a new and largely bilateral fisheries regime evolved as the most appropriate means for management of Barents Sea fish stocks. The new regime replaced a wider regional regime that had its basis in the North-East Atlantic Fisheries Convention.<sup>2</sup>

Three agreements between Norway and the Soviet Union provided the core of the new regime.<sup>3</sup> The 1975 *Framework Agreement* stresses the need for conservation, rational utilization, and the building of good, neighbourly relations between the two nations.<sup>4</sup> It also provides for the Norwegian-Russian Fisheries Commission as the institutional hub of the regime.<sup>5</sup> The Commission meets annually to make consensual recommendations on total quotas of the three shared stocks – cod, haddock and capelin, each of which are seen as a single biological unit. It allocates quotas to the parties, decides on the shares to be allocated to third parties, and determines operational restrictions. It also coordinates scientific research among institutions in the two countries.

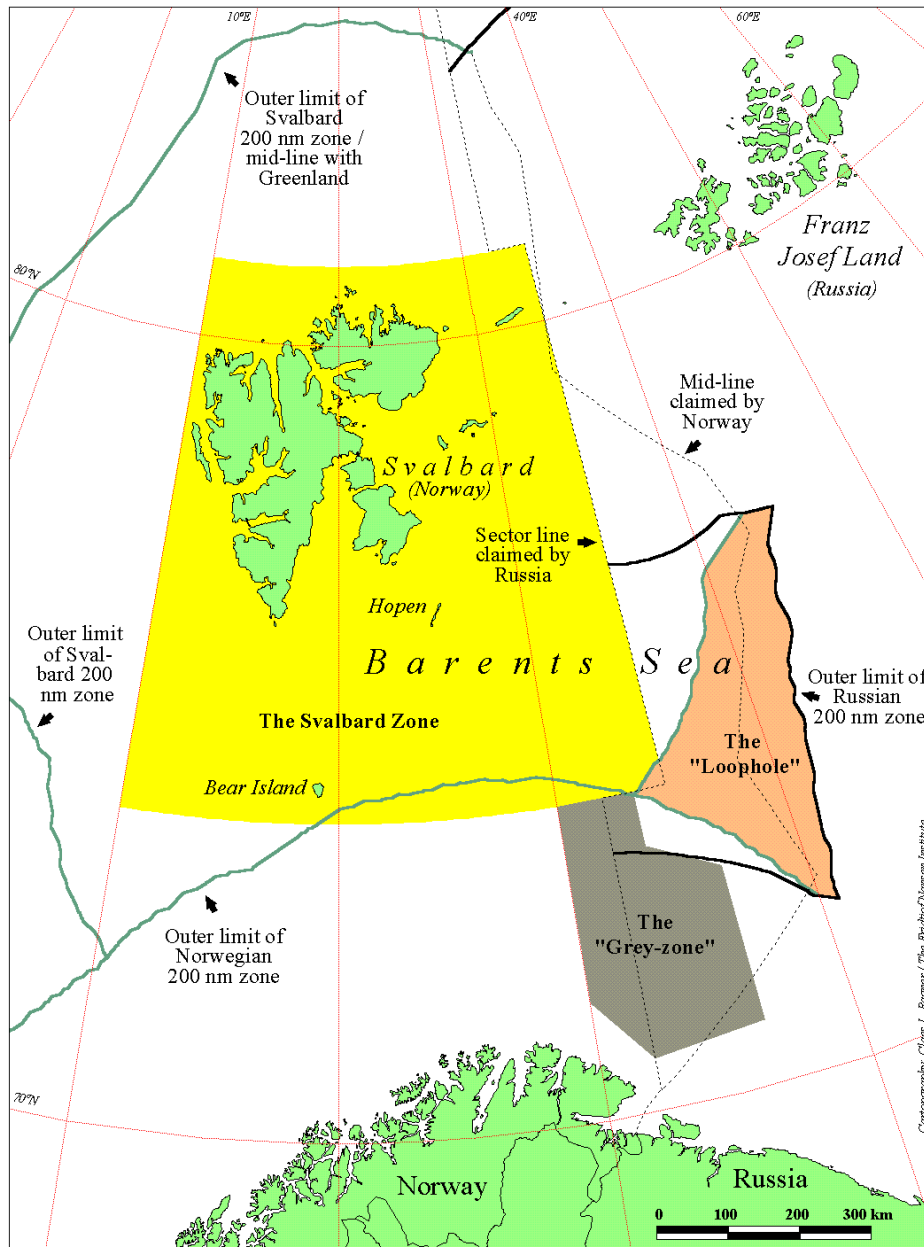
The *Mutual Access Agreement* supports this framework and paves the procedural ground for reciprocal fishing; this Agreement secures parties' access to the 200-mile zone of the other, i.e., access within agreed-upon quotas, beyond 12 miles, and subject to coastal state rules and licensing.<sup>6</sup> The third agreement, the *Grey Zone Agreement*, provides for a system of enforcement applicable, *inter alia*, to a disputed part of the Barents Sea (see map).<sup>7</sup> This Agreement acknowledges parallel jurisdiction in an 'adjacent area' that also covers most of the disputed waters. Russia and Norway have agreed that the enforcement of conservation and management measures in the Grey Zone is to be exercised by the state that has issued the licence to operate there – and both coastal states may issue licenses within agreed quotas. The purpose of this arrangement is to avoid situations where Norwegian fishermen are subject to Russian inspections in waters claimed by Norway, and vice versa, as this would be seen as jeopardizing the respective claims of these countries to sovereignty over the disputed area.

In addition to these agreements between Russia and Norway, a set of other agreements between these two coastal states and non-coastal user states forms part of the basis for the Barents Sea fisheries regime. In essence, the latter agreements imply that certain non-coastal states obtain access to the Barents Sea fisheries within the overall regulatory framework set up by the coastal states.<sup>8</sup> Such an arrangement, centered on one bilateral decision-making body but supported by a cluster of external bilateral accords, can be coined bilateralist.<sup>9</sup>

### ***1.1 The emergence of high seas operations***

Because of changes in temperature and salinity, the availability of cod in the Barents Sea Loophole, which spans some 62,400 square kilometres, increased markedly around 1990. Cod thus became a straddling as well as a shared stock, and despite the short season due to ice conditions, this new fishing opportunity soon attracted the attention of distant water vessel operators. In 1991 the fishery began cautiously, with vessels from the European Community, Greenland and the Faroes; but two years later it accelerated when Iceland turned its attention vigorously to this fishery. A drop in the total cod quota in domestic waters to a historic low – combined with a rapid growth in the harvesting capacity of Iceland's fleet – prompted the Icelandic interest. Illustrating the interdependence of regional management efforts, this growth in capacity had occurred in part by purchases of very inexpensive trawlers from the

Canadian offshore fleet following the closure of the Northern cod fishery in the Northwest Atlantic. By 1995, as many as eighty Icelandic trawlers had operated in the Loophole,<sup>10</sup> and the Icelandic press reported very good catches: when the factory trawler *Akureyrin* returned to Iceland in the late autumn of 1995, after 67 days at sea, the catch was considered to be the most valuable ever taken by an Icelandic ship.<sup>11</sup>



Whereas the third party catch was a moderate 12,000 metric tonnes in 1993, this increased to roughly 50,000 tonnes the following year.<sup>12</sup> In that peak year of 1994, high seas

catches comprised around seven per cent of the total cod harvest in the Barents Sea ecosystem. For several years afterward the fishing effort remained high, but catches declined as the migration pattern of the cod again shifted southwards. By 1998, high seas catches were down to little more than 2,000 tonnes.

## ***1.2 Dealing with the challenge: coastal state strategies***

Faced by newcomers in the Barents Sea, Norway and Russia argued fervently that both zonal attachment and historical fishing suggested that the cod stock was binational. Noting also that the stock was fully utilized, the coastal states rejected the legitimacy of the unregulated activity in the Loophole. Many of the foreign fishing vessels that operated in the area were flying flags-of-convenience, and this rendered the traditional, diplomatic channel less effective as a means of dealing with such a problem.<sup>13</sup>

The Barents Sea fisheries regime did not serve as an effective tool for the coastal states in their efforts to cope with the Loophole challenge. The gradual phasing-out of non-coastal state fishing from the region in the 1970s had been validated by the acceptance of EEZs in international customary law, but no such support from broader normative developments was forthcoming in the early 1990s. On the contrary, the Icelandic appearance in the Loophole coincided with the first session of the UN Fish Stocks Conference, which implied that the rules governing the interaction between coastal states and distant water fishing nations on the high seas were in a state of flux.

The measures available to Norway and Russia were therefore largely diplomatic and economic. Unlike the Sea of Okhotsk case, no naval exercises have occurred in the most relevant fishing area that could be perceived as partly motivated by fisheries concerns.<sup>14</sup> Although the coastal states soon agreed to step up diplomatic pressure on flag states and to enhance coastal state presence in the area in terms of control vessels, there was a lack of willingness to use those vessels for anything more drastic than observing the unregulated harvesting activity in the region.<sup>15</sup> Instead, what may be coined the 'quota card' became the most powerful means to dissuade newcomers from engaging in unregulated harvesting. Coordinated allocation of parts of the total quota to third parties was provided for in the annual bilateral protocols drawn up by the coastal states. After bilateral negotiations with Norway in 1991-92,

Greenland and the European Community decided to limit activities in the Loophole and keep total harvests in the Barents Sea within the overall quotas allotted under reciprocal access agreements.<sup>16</sup> The Faroes agreed in 1996 to prohibit landings of fish that had been taken without quotas in international waters.<sup>17</sup>

Not surprisingly, the coastal states had been eager to avoid the impression that quotas in national waters would subsequently be awarded to any state engaging in the Barents Sea fishery. Regarding the agreement with Greenland, Norway insisted that there was no relationship whatsoever between on-going Greenlandic harvesting in the Loophole and the allocation of quotas,<sup>18</sup> and the Agreement itself stressed the reciprocal nature of this

allocation. Nevertheless, few were in doubt that obtaining Greenland's acceptance of a coastal state role beyond the EEZ had come at a price for Norway – for Greenland for the first time had been granted a Barents Sea cod quota.<sup>19</sup>

The coastal state diplomatic strategy versus Iceland, the remaining challenger, proved much less effective. When the Icelanders first appeared in the area, Norway and Russia argued that Iceland had no historic record of harvesting in the region and refused to negotiate Icelandic demands for a Barents Sea cod quota.<sup>20</sup> As a result, although their vessels fished on the same stock, coastal and non-coastal user states remained unable to achieve compatible measures through coordination of their management policies. Formal negotiations began in 1995, partly because the Icelanders, refusing to yield to political pressure, had rapidly acquired some 75 per cent of the unregulated harvests in the Loophole, and partly because the coastal states were reluctant to stretch international law regarding unilateral enforcement measures beyond 200 miles, an issue that at the time was under negotiation in the UN. The coastal states sought to establish an arrangement that would give Iceland a share of a separate Loophole quota; the size of the total Loophole quota would correspond with the zonal attachment of the cod stock to the high seas area, estimated at two per cent.<sup>21</sup> After years of negotiations, however, no agreement had been reached, despite various economic sanctions launched by the coastal states to render unregulated harvesting more costly. In Norway, domestic legislation was introduced in 1994 prohibiting the landing of high seas catches taken without a quota;<sup>22</sup> in practice, even port calls were rejected.<sup>23</sup> On one occasion, Iceland complained to the EFTA Surveillance Authority that Norway's refusal to render repair services to an Icelandic vessel that had been engaged in Loophole fishery was a violation of the Agreement on the European Economic Area.<sup>24</sup> The Authority's response was cautious; it acknowledged the occurrence of such a violation, but no further action was taken because 'the underlying conflict concerned a dispute between Norway and Iceland over Icelandic fishing rights in the Barents Sea.'<sup>25</sup>

Another significant coastal state measure to deter unregulated high seas activities was the practice of *blacklisting* Loophole vessels from subsequent access to the Norwegian EEZ, even if the vessel had changed ownership in the meantime.<sup>26</sup> In 1998, such blacklisting was extended to port calls and the result was to reduce the second-hand value of vessels with a history of contravention of rules created by the Norwegian-Russian Fisheries Commission, especially on the European Community market.<sup>27</sup> Like blacklisting of vessels, industry-level sanctions cannot be challenged on the basis of international trade rules, and during the peak years of the Loophole fishery, a series of private *boycott* actions were introduced that aimed at strangling Norwegian supplies of provisions, fuels, and services to Loophole vessels,<sup>28</sup> as well as punishing domestic companies that failed to adhere to such boycotts.<sup>29</sup> The Russian Fisheries Committee exerted similar pressure to bear even in Icelandic ports by encouraging the Murmansk-based industry to discontinue landings of cod from Russian vessels at ports in Iceland.<sup>30</sup> Because of the cod crisis in Icelandic waters, supply contracts with Russian companies were important to the processing industry of that country during the 1990s.<sup>31</sup> The public and

private sanctions did not deter unregulated harvesting activities, mainly for two reasons: The fleets operating in the Loophole were able to operate independently of the Russian and Norwegian fishing industries, and the Icelanders were determined to establish a sizable fishery in the Loophole. In the long run, however, reliance on Icelandic ports, some four day-trips away, would add considerably to the over-all costs of fishing in the Barents Sea. This is especially true for new, efficient trawlers, the profitability of which tends to be highly sensitive to reductions in the number of annual fishing-days.

To *summarize*, the Loophole problem emerged in the early 1990s because the existing bilateralist regime, centred on the Norwegian-Russian Commission but including reciprocal access agreements with non-coastal states, was no longer perceived as legitimate by all significant user states. The Loophole issue differs from the Doughnut Hole situation on the other side of the Russian Arctic in that the proportion of the cod stock found in the Loophole is very small compared to that in the EEZs – and the stock was in fairly good shape in the period when unregulated fishing occurred on a large scale.<sup>32</sup> Moreover, while there has been some activity by flags-of-convenience vessels in the Loophole, the dispute has been largely trilateral, involving two coastal states and one newcomer. All considered, the bilateralist regime played a minor role in the efforts to cope with unregulated harvesting in the region. The regime helped to harmonize coastal state measures on the issue, the most powerful of which was regulation of access to national waters and ports.<sup>33</sup> Except with regard to the disputed area, however, both the allocation of quotas to those who would follow the coastal state rules and the blacklisting of vessels that engaged in unregulated Loophole harvesting would have been perfectly feasible even without the Norwegian-Russian Fisheries Commission.

### ***1.3 The trilateral Loophole Agreement***

In 1999, four years after all the parties involved in the Loophole dispute had signed the UN Fish Stocks Agreement, a regional accord was finally reached.<sup>34</sup> The terms of the Agreement are similar to those previously drawn up bilaterally between Norway and Greenland and the Faroes. In exchange for cod quotas in the EEZs of the Barents Sea, Iceland must refrain from harvesting cod or seeking new fishing rights for the cod stock beyond the coastal zones; Iceland must also open its national waters to vessels from the other two countries.<sup>35</sup> Other provisions oblige the parties to discourage their nationals from operating vessels under flags of convenience in the Barents Sea, to prohibit landing of catches that are taken without a quota, and, subject to other obligations under international law, to deny port access to vessels that engage in these activities.<sup>36</sup> As a result of the Agreement, Icelandic vessels were removed from the ‘black list’ of vessels that are banned from the Norwegian EEZ.<sup>37</sup> The steep decline of the Loophole fisheries in the years preceding the signing of the Agreement had served to reduce the distance between coastal state quota offers and Icelandic demands,<sup>38</sup> and the Agreement provides for a stable Icelandic share of a little less than two per cent of the TAC. Industry groups both in Iceland and in the coastal states were highly critical of the Agreement.

The Chairman of the Federation of Icelandic Fishing Vessel Owners complained that the quota was ‘simply too small’, whereas the Chairman of the Norwegian Fisherman Association told the press he was ‘nearly shocked’ at how much the Icelanders had achieved in the negotiations.<sup>39</sup>

As the Loophole dispute partially overlapped in time with the UN Fish Stocks Conference, it is significant to consider the possible influences of the Loophole dispute on the negotiation of the Fish Stocks Agreement and thus on the specification of the global high seas fisheries regime; it is also relevant to consider whether the Fish Stocks Agreement is likely to facilitate or impede high seas management in the Loophole in the future.

## **2 The effect of the Loophole dispute on the Fish Stocks Conference**

When regional management disputes and global negotiations are addressing similar issues, there are generally at least two ways in which the politics of the former can influence the course and outcome of the latter. By

a process that may be termed *diffusive interplay*, the substantive or operational solutions to difficult problems that regional negotiations may provide can be adapted for use at the global level; and through political interplay, regional disputes may influence the relative bargaining power of competing blocs or encourage or facilitate various types of leadership activities at global negotiations.<sup>40</sup>

### ***2.1 Diffusive interplay***

In the one and a half year it took to negotiate the Fish Stocks Agreement, regional efforts to manage the Loophole fishery moved from disappointment to disillusion. Several rounds of negotiations, bilateral and trilateral, were held without the emergence of any substantial improvements. The only allocative ‘solution’ discernible in the Loophole case was the usage by the coastal state of the quota card to dissuade long-distance fishing operations; and apart from the ineffectiveness of this measure against Iceland, the quota card solution hardly corresponded with the emphasis in the Fish Stocks Agreement on a multilateral approach to regional management. Rather tangential to the Loophole discussion, Norway and Canada agreed in 1995 to grant each other inspection and enforcement rights in the international waters adjacent to their respective EEZs;<sup>41</sup> but the model for those particular provisions was the Agreed Minute between Canada and the European Community, which in turn reflected draft material of what was later to become Articles 20-22 of the Fish Stocks Agreement.<sup>42</sup>

### ***2.2 Bargaining power***

Rather atypically, the three main antagonists in the Loophole dispute all belonged to the *coastal state bloc* during the negotiation of the Fish Stocks Agreement; but each of these also had a tradition for distant water fishing operations. True to tradition, Iceland was among the original members of the so-called ‘core group’, the group of coastal state parties that played an active role in the process that led up to the Fish Stocks Conference. Throughout the

negotiations, the core group remained a salient forum for joint action, including the drafting of proposals on controversial issues.<sup>43</sup> When a large fleet of Icelandic vessels became engaged in controversial high seas activities in the Barents Sea, however, Iceland's participation in the core group became more problematic.

Because of its distant water fishing interest, and also with a view to upcoming membership negotiations with the European Union,<sup>44</sup> Norway responded with caution to the idea of convening a straddling stocks conference under the UN and did not support the so-called 'Santiago

Document' at the Fourth Preparatory Committee Meeting to the UN Conference on Environment and Development in 1991.<sup>45</sup> The fisheries bureaucracy had entered the process at a fairly late stage and it was only in the months prior to the first substantial session of the Fish Stocks Conference (July 1993) that a broader assessment was made of the various interests involved. Influenced partly by the Loophole situation but also by the expected resumption of high seas fisheries for Norwegian spring-spawning herring by non-coastal states in the North-East Atlantic, Norway landed firmly on the coastal state side of the straddling stocks issue.

Russia, for its part, has traditionally loomed large in the global distant water fishing league. However, a decade of phase-outs from coastal zones had prompted a partial return to domestic waters that was accelerated by the economic decline of the 1990s and the rapid privatization of the fishing industry, both of which implied greater attention to the fleet's operational costs. Whereas an estimated half of the Russian catch was taken in waters beyond its jurisdiction in 1980, the share had fallen to 22 per cent in 1994.<sup>46</sup> However, the Barents Sea situation was hardly decisive for Russia's position as being 'like-minded' with the coastal state core group on key issues at the Fish Stocks Conference. This position preceded the escalation of the Loophole issue in 1993 and was largely shaped by the already well-established high seas dispute in the Far East, a region where today no more than two per cent of the harvest is taken outside the EEZ.<sup>47</sup>

Thus, the relative bargaining power of coastal states and distant water fishing nations were scarcely affected by the Barents Sea situation. Russia's position was already firm, whereas Norway's movement toward the coastal state core group position was balanced out by Iceland's adjustment in the opposite direction.

### **2.3 Leadership**

Whereas several forms of leadership were exercised by the parties to the Loophole dispute during the Fish Stocks Conference, on closer inspection none of these leadership roles appears to have been triggered by the Barents Sea situation.<sup>48</sup> Historically, *Iceland's* dependence on fisheries and overall reliance on proximate fishing grounds that traditionally had also been exploited by others largely explains the structural leadership this country was able to provide in the early 1970s. Structural leadership implies the ability to bring material capabilities to bear on the negotiation of particular issues. Iceland's establishment and stubborn enforcement



of first a 50-mile and then a 200-mile exclusive fishery zone placed Iceland among the coastal state front-runners in the Law of the Sea context.<sup>49</sup> In the pre-negotiation stage of the UN Fish Stocks Conference, Iceland had

again actively promoted coastal state interests. The emergence of the Loophole fishery, however, blended these interests with a concern for the rights of newcomers on the high seas and a corresponding reluctance to extend coastal state enforcement rights in such waters.

Having one foot in each camp can sometimes be expedient in producing another type of leadership – entrepreneurial brokerage rallying support for compromise solutions.<sup>50</sup> There are, however, few indications that Iceland assumed such a role. On the contrary, after a change in the leadership of Iceland’s delegation to the Fish Stocks Conference in 1994, when the Loophole fishery was at its most rewarding, Iceland’s visibility at the negotiations faded markedly. Toward the end of the Conference, however, Iceland championed, with only partial success, the inclusion of an allocative principle that would give preferential treatment to newcomer states whose economies are overwhelmingly dependent on the exploitation of living marine resources. This proposal, apparently motivated by Iceland’s interests in the Barents Sea as well as in the North-East Atlantic herring fisheries, was strongly opposed by Norway, and it was included in the Fish Stocks Agreement with the important qualification that it applied only to coastal states.<sup>51</sup> As elsewhere in the Agreement, and also in the Law of the Sea Convention, the term ‘coastal state’ refers restrictively to states having jurisdiction over parts of the area where the stock in question occurs, this criterion would not be relevant in the Loophole.<sup>52</sup>

The Barents Sea situation was not conducive to motivating the *coastal* states to take coercive measures and thus provide the type of structural leadership that had been provided by Iceland in the 1970s and more recently by Canada in the high seas detention of the Spanish trawler *Estai*.<sup>53</sup> As unregulated fishing in the Loophole continued to grow, fishery organizations in Norway and Russia called for emergency measures and demanded a more activist approach to unregulated harvesting, including intrusive enforcement measures towards foreign vessels. In 1997, a centre-liberal coalition government was formed in Norway on a political platform that included ‘consideration of...a Norwegian-Russian initiative to extend the Norwegian and Russian exclusive economic zones to 250 nautical miles’.<sup>54</sup> Once in position, however, the new Prime Minister assured that no unilateral measure was contemplated and that any initiative would occur within the framework of international law.<sup>55</sup> The tactical wisdom of any type of unilateral measures in this case would indeed have been highly questionable. Such measures, were they to contribute to the making of international law, would require consent or acquiescence on the part of those subject to them as well as third parties. Dealing with a much more threatened fish stock, a leading scholar, W. T Burke, has argued that even for a stock that occurs mainly within the EEZs, customary international law does not authorize unilateral measures from the coastal states unless *bona fide* efforts to reach an agreement with the high seas fishery nations have failed; and even then only if no scientific doubt remains that the unregulated fishery will jeopardize the

health of the stock.<sup>56</sup> Partly for this reason the United States and Russia have abstained from unilateral or bilateral regulation of high seas activities in the Bering Sea Doughnut Hole, even when the level of overfishing was known to be utterly destructive to the pollock.<sup>57</sup> Compared to the Bering Sea situation, or Canada's high seas problem in the Northwest Atlantic, the Loophole case would be an unlikely candidate for yielding such consent. Even in the record year of 1994, the unregulated cod catch was no more than one third of the *increase* in the total quotas from the preceding year. While certainly a nuisance, such level of unregulated fishing could hardly be said to create a state of emergency. This, combined with the fact that Iceland repeatedly declared its willingness to negotiate with the coastal states, implied that unilateralism on the part of Norway or Russia would have been very hard to justify.<sup>58</sup>

Instead of structural leadership, *Russia* resorted primarily to ideational leadership during the Fish Stocks negotiations, that is, sustained argument in favour of certain clearly defined solutions. The period in which the UN negotiations were held was marked by economic disruption, political tension, and administrative reshuffling in Russia, with strong reverberations in the fisheries sector; but the Russian delegation remained stable and was among the most active parties in the negotiations.<sup>59</sup> Documents submitted by Russia in the course of the negotiations, all with a very marked coastal state slant, contained suggestions for the definition of key principles and concepts in the instrument under negotiation and also proposed schemes for compliance control.<sup>60</sup> However, the main thrust of Russian contributions focused on provisions pertaining to enclosed and semi-enclosed seas, spurred not by the Loophole issue but by the management problems in the Sea of Okhotsk.<sup>61</sup>

*Norway* for its part had maintained a very high profile during the Third Law of the Sea Conference, not least because its delegation head had the role of leader of the informal 'group of legal experts', which hammered out compromises on some of the more controversial issues.<sup>62</sup> Also at the Fish Stocks Conference, Norway sought an influential position by assuming a high level of activity and seeking out powerful allies. After clarification of its position during the preliminary stages, Norway first joined forces with the group referred to as 'like-minded' with the coastal state core group before being admitted as a new member of the core group in 1994. Among the issues given particular attention by the delegation was that of improved means of non-flag state enforcement. Norway eagerly supported proposals for port state measures, including prohibition of landings, which affected vessels engaged in unregulated fishing operations on the high seas.<sup>63</sup> During the fourth session, moreover, Norway came forward with a formula for the division of duties and responsibilities between inspecting state and flag state, a formula that advanced the negotiation of one of the most controversial aspects of the Fish Stocks Agreement.<sup>64</sup> The Norwegian proposal also contained the idea that the enforcement procedures agreed to would be applicable even to parties of the Agreement that were not members of the relevant regional management body, thus laying down global minimum standards on enforcement applicable in all regions.<sup>65</sup>

In *summary*, compared to some of the other regional straddling stocks issues, such as that of the Northwest Atlantic and in a more restricted sense that of the Sea of Okhotsk, the high seas problem in the Barents Sea had scant impacts on the Fish Stocks Conference.<sup>66</sup> The failure to reach agreement at regional levels before 1999 implied that there was no material linkage to be drawn from the Loophole dispute into the evolving UN Fish Stocks Agreement. The relative strength of the major bargaining blocs was largely unaffected. Nor did the Loophole issue provide sufficient urgency to prompt structural leadership in the form of unilateral measures on the outer edge of international law. And finally, most of the rather moderate entrepreneurial and ideational leadership provided by the parties to the Barents Sea dispute was only loosely related to the specifics of the Loophole case.

### **3 The Fish Stocks Agreement and governance of the Loophole fisheries**

When discussing whether and how the Fish Stocks Agreement influences the management situation in the Barents Sea, the three main tasks of fisheries management come into focus – science, regulation, and compliance enhancement.<sup>67</sup>

#### **3.1 Scientific practices**

The science problem of fisheries management is to generate high-quality, consensual assessment of stock dynamics and translate such knowledge to practical regulatory advice. Today, Norwegian-Russian scientific cooperation, nested within the broader cooperation under the International Council for the Exploration of the Sea (ICES), ensures that the Barents Sea stocks are comparatively well covered with respect to scientific investigation.<sup>68</sup> An elaborate reporting system has traditionally formed the backbone of the data input, but as the incentive to under-report catches has gradually grown, fisheries-independent analysis has gained in importance. Cooperative Norwegian-Russian survey programmes are elaborated and implemented each year, ensuring inter-calibration of measurement and data processing for the entire ecosystem.<sup>69</sup> Regarding the Loophole, coastguard vessels from the two coastal states, and at times even from Iceland, maintained a presence in the area throughout the years of large-scale fishing, allowing rough estimates of the amounts taken by foreign vessels. In addition, Iceland published data concerning domestic landings from the Loophole. Icelandic catch statistics have also included the harvest from vessels under Icelandic ownership but which were flying flags-of-convenience, presumably an attempt to accumulate some track level of fishing in the area.

If implemented in the Barents Sea, the Fish Stocks Agreement will only moderately affect the scientific aspect of fisheries management. Firstly, the general provision that high seas conservation measures shall be based ‘on the best scientific evidence available to the States concerned’ is already found in the Law of the Sea Convention,<sup>70</sup> although also specified somewhat in the Fish Stocks Agreement.<sup>71</sup> Secondly, the 1975 Agreement that underpins the Norwegian-Russian Commission already emphasized that decisions were to be based on the

best available scientific knowledge,<sup>72</sup> and in this respect the Icelandic regulatory process is no different. The generation and sharing of data required by the Fish Stocks Agreement is already met by all the states engaged in the Barents Sea fisheries through their cooperation in ICES, or, in the Norwegian-Russian case, through their even more elaborate bilateral scientific linkages. The compilation instructions of Annex I of the Agreement make some procedural adjustments necessary, but in the Norwegian context the additional work associated with this compilation of data is not expected to exceed two man-years.<sup>73</sup>

Another relevant component of the Agreement is the elaboration of the precautionary approach to management.<sup>74</sup> Since 1998, the scientific component of the Barents Sea management regime has established precautionary reference points for the shared stocks, including cod, as called for by the Agreement.<sup>75</sup> Such reference points, corresponding to the state of the stock and of the fishery, are intended to guide fisheries management decisions.<sup>76</sup> Whereas defining precautionary reference points is an extension of, rather than a deviation from, existing scientific practices in the Barents Sea, the additional research implied by implementing this provision for all commercial stocks in the region has not been estimated.<sup>77</sup>

In short, the substantive and operational elements of the Fish Stocks Agreement concerning generation of scientific knowledge broadly confirm the existing provisions in the bilateral regime. While some minor

adjustments in the compilation of data and the setting of precautionary reference points imply some additional work for the scientific organizations, the scientific aspect of Loophole management will be scarcely affected by the Fish Stocks Agreement.

### ***3.2 Means of regulation***

Potentially far more influential than the science provisions are the substantive and operational provisions in the Fish Stocks Agreement that considerably strengthen the duty of user states to cooperate on the establishment of conservation and management measures regarding straddling stocks. At a general level, the framework for this obligation was already established by the 1982 Law of the Sea Convention.<sup>78</sup> The Fish Stocks Agreement specifies this obligation by stipulating that where a regional management regime has the competence to regulate harvesting of straddling stocks, only states that join the regime or adhere to its conservation and management measures shall have access to the fishery.<sup>79</sup> The application of this rule to the Loophole situation has proved to be a matter of contention. Whereas the coastal states argued that the Norwegian-Russian Commission with its allocation of coordinated third-party quotas is the appropriate mechanism for ensuring such cooperation, Iceland held that other users also have a right to be included in decision-making regarding the size and division of the Loophole harvest. The Fish Stocks Agreement provides that the terms for participation in a regional management regime shall not preclude states with a 'real interest' in the fisheries concerned.<sup>80</sup> The relative openness to new participants implied here was among the victories achieved by the distant water fishing nations during the Fish Stocks Conference.<sup>81</sup>

It would be a simplification to argue, as some authors do, that it follows from the Fish Stocks Agreement that after cod became available in the Loophole, the Norwegian-Russian Commission was no longer the appropriate as a body for management of this stock and that regulative decisions should be transferred to the North-East Atlantic Fisheries Commission.<sup>82</sup> Firstly, it was very important to the Norwegian delegation during the Conference that the Fish Stocks Agreement directed states to pursue cooperation ‘*either directly or through appropriate subregional or regional fisheries management organizations or arrangements.*’<sup>83</sup> The bilateralist Barents Sea regime, with its Norwegian-Russian Commission and cluster of external agreements with other user states, is clearly such an ‘arrangement’: in conjunction these regime components provide a decision-making mechanism (the bilateral Commission) that generates overall regulative measures that (1) pertain throughout the stock’s migratory range, including the high seas, and (2) are recognized by third-parties (confirmed in annual agreements).<sup>84</sup> Secondly, an assessment of the relative appropriateness of this arrangement and a broader decision-making system would require careful attention to the question of which regime would provide the most powerful means to realize the broader objectives of the Fish Stocks Agreement. In practical terms, this latter question can be dealt with by investigating the relative strength of the present bilateralist regime and the North-East Atlantic Fisheries Commission in meeting the three tasks of management – science, regulation, and compliance control. While a thorough comparative exercise is beyond the scope of this chapter, some parameters can be specified without difficulty.

The centrality of ICES in both regimes suggests that the level of *scientific* problem solving would be roughly similar. The *regulatory* task, however, would clearly be more complicated if placed within the NEAFC framework, by the participation of a larger number of states and the fact that binding recommendations would require a two-thirds majority.<sup>85</sup> NEAFC’s record in seeking to overcome this difficulty in the case of oceanic redfish, the only straddling stock managed largely by that organization, is not reassuring. Only in 1996 did the Commission agree on quantitative restrictions for this species, despite considerably higher fishery pressure than what was recommended by ICES during the preceding five years. And when the Commission did finally agree on quantitative restrictions, the TAC was set higher than any previous annual harvesting.<sup>86</sup> In addition, states that do not approve of the recommendation may file an objection and thus avoid being bound by it.<sup>87</sup> On the other hand, broadening participation in decision-making would be one way of accommodating determined newcomers in a less conflictual manner than demonstrated in the Loophole case throughout the 1990s. In terms of high seas *enforcement*, NEAFC has recently established a Scheme of Control and Enforcement that mirrors the relevant provisions of the Fish Stocks Agreement, as well as a Scheme to promote compliance by non-members.<sup>88</sup> Port state measures, especially the prohibition of landings of fish taken without a quota, have been used under the bilateralist Barents Sea regime as well, accompanied by the blacklisting of vessels with a history of unregulated fishing. The main approach, however, is to direct non-coastal state vessels to national waters where the full range of coastal state enforcement measures are

permitted, including inspection, detention, and legal prosecution. Whereas this latter approach is quite powerful today, it works only as long as access to national zones is more attractive than exploitation of high seas resources.

This brief discussion shows that there is little to suggest that NEAFC would have been able to more effectively address the high seas management of cod in the region throughout the 1990s than the arrangement centred on the Norwegian-Russian Fisheries Commission.<sup>89</sup>

Science

would have been unaffected; regulation would likely have been complicated by more participants, several of whom do not engage in the Barents Sea cod fishery; and while NEAFC's enforcement scheme provides for inspection and detention on the high seas, these provisions were not in place before the Loophole fishery had been curbed by the declining availability of fish and the inclusion of Iceland into the Barents Sea regime. Two circumstances will determine the stability of this conclusion: firstly, the share of the stock that is fishable on the high seas; and secondly, the number of states that are unprepared to accept the primacy of the coastal states inherent in the bilateralist regime. Presently, both of those circumstances are favourable to *status quo*.

On the whole, the normative influence of the Fish Stocks Agreement on the operational side of the Barents Sea fisheries regime has been to increase pressure on all user states to find cooperative solutions on conservation and management. With the passing of time, Iceland's acquirement of a catch record in the region made it steadily harder for the coastal states to maintain that this country had no legitimate place at the negotiations table regarding Loophole management. At the same time, the operational requirements laid down by the Fish Stocks Agreement are broad enough to also embrace the bilateralist arrangement of the present Barents Sea fisheries regime, as long as the regime provides an opening for states with a real interest in regional harvesting.

### **3.3 Norms of management**

The typical regulatory task of fisheries management regimes is twofold; measures shall ensure long-term conservation of stocks and allocate the benefits derived from resource use in an agreed manner. Regarding the first aspect, an important substantive component of the Fish Stocks Agreement is the principle of *compatibility* between conservation and management measures adopted for areas under national jurisdiction and for high seas area adjacent to these areas.<sup>90</sup> In the Barents Sea context, it was decisive to the coastal states that this matter was resolved by echoing the differentiation made in the Law of the Sea Convention between highly migratory stocks on the one hand and straddling stocks on the other. For highly migratory fish stocks, measures taken internationally would apply also in waters under national jurisdiction; for straddling stocks, international measures would apply to the high seas area only.<sup>91</sup>

Another salient component of the Fish Stocks Agreement is the detailed elaboration of the *precautionary* approach, i.e., that preventive measures be taken when threats of serious or

irreversible damage exist, even in the absence of full scientific certainty.<sup>92</sup> In the past, scientific uncertainty has often been used as a reason for postponing or failing to take conservation

measures. Whereas the Norwegian-Russian agreements, which form the core of the Barents Sea regime, make no explicit mention of a precautionary approach, the concept had made its way into regional management practice well before the adoption of the Fish Stocks Agreement. The principle of erring on the side of the fish stock whenever there is scientific uncertainty about its ability to replenish itself has to a considerable extent been followed since the 1989 near-collapse of the Barents Sea cod stock. Throughout most of the 1990s, the Norwegian-Russian Commission tended to opt for quota levels toward the lower end of the ranges recommended by ICES.<sup>93</sup> Iceland, the main challenger to the legitimacy of the bilateral Commission in managing the Loophole fishery, has similarly been careful to emphasize that its own harvesting behaviour in the region has indeed been responsible. When the advisory body of ICES in 1997 recommended substantial reductions in the Barents Sea cod quotas, the Icelandic Minister of Fisheries stated that Iceland would consider a reduction of harvesting in the area and that Iceland had always been ready to take the overall condition of the fish stock into consideration.<sup>94</sup> Both in 1995 and 1996, an Icelandic Coast Guard vessel was sent to assist and monitor the activities of Icelandic fishing vessels.<sup>95</sup>

This is not to argue that the elaboration of the precautionary approach in the Fish Stocks Agreement has had no impact on regional management practices. In response to the Agreement, ICES established a Study Group on the Precautionary Approach to Fisheries Management; and in 1997, a report was issued that elaborated upon the implications of this approach for the technical and advisory work of the ICES.<sup>96</sup> The following year, this procedure was implemented in the recommendation offered on cod by the application of a safety margin larger than that of earlier years.<sup>97</sup> Despite this development, the health of the cod stock has deteriorated in recent years.<sup>98</sup>

The precautionary approach is part of a broader set of principles of responsible fishing that includes science-based decisions, biodiversity protection, and ecosystem awareness.<sup>99</sup> Like compatibility and precaution, these general principles are applicable not only on the high seas but also within national zones.<sup>100</sup> The *ecosystem* approach is reflected in the longstanding bilateral multispecies modelling effort that focuses on cod-capelin interactions and is based on an extensive stomach analysis programme covering the entire ecosystem.<sup>101</sup> The simplicity of the Barents Sea ecosystem, where there are few species at each level of the food chain, make the plankton-eating herring and capelin particularly vital as links between the primary production in the region and species at higher trophic levels. Despite the rapid recovery first of capelin and then of herring in the early 1990s, low-end quotas were agreed to for the pelagic fisheries in those years; this reflected the multispecies premise that these species comprise an important part of the diet for cod, which economically is the most significant fish in the Barents Sea.<sup>102</sup> Efforts to implement an ecosystem approach in the management of marine living resources are influenced not only by international fisheries

agreements but also by work under the UN Convention on Biological Diversity, the UN Commission on Sustainable Development, and a series of regional environmental agreements.<sup>103</sup>

To sum it up, the general management principles elaborated upon by the Fish Stocks Agreement have largely confirmed management practices that were already well underway in the Barents Sea region. For straddling stocks, the compatibility principle laid down by the Agreement retained the asymmetry between EEZs and high seas areas established by the 1982 Law of the Sea Convention. Furthermore, parties to the Loophole dispute regarded the provisions for a precautionary approach and ecosystem management as unproblematic because stricter domestic provisions were already in place.<sup>104</sup> The more recent precautionary quotas for cod suggest that the potential of this concept to influence management was somewhat larger than anticipated.

### **3.4 Allocation of quotas**

The matter of quota allocation tends to be a highly controversial aspect of fisheries management, and the Loophole dispute is no exception in this regard. Whereas in 1995 the coastal states bowed to the principle of an Icelandic quota, the three parties went through four years of on-and-off negotiations before agreement could be reached on the appropriate size of the quota. Among the main assets held by the coastal states was access to their EEZs, and as catches in the Loophole declined, the value of that asset rose.

The most relevant part of the Fish Stocks Agreement in this context is Article 11, which lays down criteria to be considered when states determine the extent of participatory rights for newcomers to a fishery. Arguably, there is a fairly good fit between some of these criteria and the *leitmotif* of the coastal state argument that the stock is already fully utilized and belongs to states that have historical track records in the area, manage the stock throughout its migration area, and govern the predominant part of the stock's migratory range.<sup>105</sup> The Agreement highlights 'the status of the straddling fish stocks...and the existing level of fishing effort in the fishery', as well as 'the respective interests, fishing patterns and fishing practices of new and existing members or participants'.<sup>106</sup> Furthermore, Article 7 obliges states negotiating high seas measures that are compatible with those of the coastal states to take into account not only the 'biological unity and other biological characteristics of the stocks...

including the extent to which the stocks occur and are fished in areas under national jurisdiction' but also the 'respective dependence...on the stock concerned'.<sup>107</sup>

On the other hand, the criterion emphasizing 'the needs of coastal fishing communities which are dependent mainly on fishing for the stocks' could play into several hands in the Loophole dispute.<sup>108</sup> And we noted in section 3.3 that the provision that negotiators should take into account 'the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources' is the final version of a proposal that would have favoured Iceland in the Loophole dispute had it not been modified by the



insertion of the word ‘coastal’.<sup>109</sup> All things considered, by providing a list of six criteria without internal priority, Article 11 is too vague to close discussions on allocation and the Fish Stocks Agreement only scarcely affected the allocative negotiations over Loophole cod.

### 3.5 *Compliance control*

It is the the third task of regional management, that of enforcing compliance with conservation measures in the Barents Sea, that has the greatest potential for being affected by the Fish Stocks Agreement. In this discussion, the elaboration of port state measures and the rules for non-flag state inspection and detention on the high seas are especially relevant.

The *port state measures* provided for in the Fish Stocks Agreement were strongly supported by Norway during the negotiation of that Agreement. These include the right to inspect vessels that are voluntarily in port and, if violations are revealed, to prohibit landing and transshipment.<sup>110</sup> Already by 1994, Norway had banned the landing of unregulated Loophole catches, a measure that highlights an interesting type of interplay between international resource management regimes and those aiming at liberal trade practices among states.<sup>111</sup> It has been argued, for instance, that the port state provisions of the Fish Stocks Agreement may conflict with rules under the General Agreement on Tariffs and Trade,<sup>112</sup> and in the Barents Sea context, the regional regime that is based in the Agreement on an European Economic Area may also may be relevant. Both at global and regional levels, trade agreements typically require that such measures are applied in a non-discriminatory manner. As long as these circumstances are met, the Fish Stocks Agreement undoubtedly provides normative confirmation to the port state measures that have been taken in the region because parties to the Agreement have explicitly accepted landing prohibitions whenever inspections by the port state have ‘established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.’<sup>113</sup>

In terms of *inspection* and *detention*, the Fish Stocks Agreement significantly modifies the traditional high seas compliance regime under international law, which is centred on flag state enforcement. Drawing largely upon a previous FAO instrument, the Agreement strengthens the responsibility of the flag state to monitor and enforce conservation measures.<sup>114</sup> In addition, the Agreement provides procedures for involvement of non-flag states in cases where the flag state fails to comply with the specified obligations. The regional enforcement scheme that is envisaged by the Agreement includes reciprocal inspection rights on the high seas and, in cases where the flag state is unable or unwilling to act on severe violations, ultimately the right of to bring the vessel to port.<sup>115</sup> So far, such provisions have not been incorporated into the agreements that Norway and Russia have drawn up with non-coastal user states to manage the Loophole fisheries. Instead, other user states are largely obliged to conduct their harvesting inside the EEZs.<sup>116</sup> This solution may become unstable, as noted earlier, if the share of the stock that is fishable on the high seas were to grow significantly, as it did in the early 1990s. A resumption of unregulated harvesting on a large scale in the Loophole would call

for either an elaboration of procedures for high seas boarding and inspection within the bilateralist regime or an application of the already existing Scheme of Control and Enforcement under NEAFC. The latter option would imply that NEAFC also be involved to a greater extent in the regulatory process;<sup>117</sup> and both options would draw heavily on the enforcement provisions of the Fish Stocks Agreement.

In *summary*, if the bilateralist regime were again to be challenged by considerable high seas harvesting, the Fish Stocks Agreement would provide a broader and more powerful set of compliance mechanisms than has hitherto been available. Regional port state measures, such as the prohibition of landings of catches taken in defiance of international regulations, is validated by the Agreement, and the legal and political basis for elaboration of an intrusive enforcement system involving action by non-flag states is much stronger than was the case prior to adoption of the Agreement.

#### **4 Conclusion**

Six years of significant, unregulated harvesting took place before the Loophole dispute was settled by a trilateral agreement involving the two coastal states, Norway and Russia, and the main distant water challenger, Iceland. During the negotiation of the Fish Stocks Agreement, the Loophole challenge galvanized Norway's and Russia's allegiance with the coastal state bloc, whereas Iceland's engagement in this fishery motivated this state to move from active participation in the coastal state core group to a more mixed position.

The bilateralist Barents Sea fisheries regime, centred on the Norwegian-Russian Fisheries Commission, has had only moderate impact on efforts to cope with the Loophole problem. Some harmonization of coastal state measures has occurred. Coordinated diplomatic pressure has been exerted on relevant distant water fishing states, and requirements to limit activities in high seas areas have been included in their accords with other user states.

The potential influence of the Fish Stocks Agreement on the high seas fisheries problem in the Barents Sea differs from one aspect of management to another. The generation of scientific knowledge will be little affected. Regarding regulation and compliance control, however, the Fish Stocks Agreement places much greater pressure on all the user states to reach agreement on coordination of adequate measures. On the question of allocation, the provisions in the Fish Stocks Agreement which lay out criteria for newcomers' access to a regulated high seas fishery, lend themselves to regional application, but they fail to clarify the balance among the criteria involved. A regional solution could only be achieved through negotiations that were shaped largely by the relative need of the parties to reach an agreement; when the availability of cod in the Loophole diminished in the second half of the 1990s, the bargaining position of the coastal states improved. Finally, the provisions in the Fish Stocks Agreement that sets global standards for compliance control schemes under regional management regimes strengthen considerably the basis for effective enforcement of high seas conservation and management measures in the Barents Sea.

\* Very helpful comments are appreciated from David Balton, Kjell Olav Gammelsæter, Alf Håkon Hoel, Tore Henriksen, Geir Hønneland, Geir Ulfstein, Davor Vidas, and John Williams.

<sup>1</sup> 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 (1995); 34 *ILM* 1547.

<sup>2</sup> The North-East Atlantic Fisheries Convention (1959) was superseded by the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (1980); *OJ*, L227 (1981) (hereinafter NEAFC Convention), covering the remaining high seas areas in the region.

<sup>3</sup> Russia is the legal successor of the Soviet Union in these agreements. According to Russia, the Treaty concerning Spitsbergen (1920) (2 *LNTS* 2) is also a part of the Barents Sea fisheries regime, but this is denied by Norway. This Treaty gives sovereignty over Svalbard to Norway with some specified limitations. The Norwegian view, shared only by Canada and Finland in principle but widely accepted in practice as regards fisheries, is that these limitations, including an obligation not to discriminate against foreigners in certain issue areas, is limited to the onshore areas and territorial waters and does not concern the EEZ; R. R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (London: Routledge, 1992).

<sup>4</sup>

<sup>5</sup> *Ibid.*, Art. III.

<sup>6</sup> Overenskomst mellom Regjeringen i Kongeriket Norge og Regjeringen i Unionen av Sovjetiske Sosialistiske Republikker om gjensidige fiskeriforbindelser (1976), *OMFM* (1977), 974.

<sup>7</sup> The disputed maritime area is located between a median line drawn from the territorial boundary (and favoured by Norway) and the sector line (favoured by Russia). The 'adjacent area', which is considerably larger than the disputed area, is usually referred to as the Grey Zone; 'Avtale mellom Norge og Sovjetunionen om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet' (1977), *OMFM* (1977), 436.

<sup>8</sup> Based in reciprocal access agreements, the European Community, the Faroes, Greenland, and Iceland presently have fishing rights in specified national zones in the Barents Sea. In addition, and based on historical fishing, Poland has certain quotas in Norway's EEZ and in the Svalbard zone; and on similar grounds, Canada, Estonia, and Lithuania are granted access to the shrimp fishery in the Svalbard zone; Report to the Storting, Norway, *St.meld.* 11 (1997-98), Sec. 3; a broader discussion is found in *St.meld.* 49 (1994-95).

<sup>9</sup> On the distinction between bilateralism and regionalism, see the Conclusions.

<sup>10</sup> *Daily News of Iceland* (online at [www.icenews.is/](http://www.icenews.is/)), 3 November (1995).

<sup>11</sup> The catch had been around 1,100 metric tonnes; *Daily News of Iceland*, 17 November (1995).

<sup>12</sup> Materials of the Norwegian Coast Guard, on file with the author. As the Coast Guard cannot require catch reports or on-board inspections in international waters, estimations of catches are largely based on visual observation from Coast Guard vessels operating in the area and are therefore somewhat imprecise.

<sup>13</sup> See the discussion by Vukas and Vidas, Ch. 2.

<sup>14</sup> A proposal for such exercises as a means of dealing with unregulated fishing in the Loophole was put forward in *Krasnaya Zvezda*, the newspaper of the Russian Ministry of Defence, in June 1996, but the proposal was subsequently rejected by a spokesman for the Russian Navy; *Aftenposten* (Oslo; online at [www.aftenposten.no](http://www.aftenposten.no)), 20 June (1996), 9. In the Sea of Okhotsk Peanut Hole, Russian military exercises and weapons testing were conducted prior to negotiating with a group of distant water fishing nations on the terms for their abstention from high seas fisheries outside Russia's EEZ; Oude Elferink, Ch. 6.

<sup>15</sup> 'Protokoll fra den 22. sesjon i Den blandete norsk-russiske fiskerikommisjon' (1993), 14-5, available from Ministry of Fisheries, Oslo.

<sup>16</sup> 'Avtale mellom Norge og Grønland/Danmark om gjensidige fiskeriforbindelser' (1992), *OMFM* (1994), 1500. In the EC case, high seas activities are not mentioned explicitly in the relevant bilateral agreements; Agreement on Fisheries between the European Economic Community and the Kingdom of Norway (1980), *OJ* L226/48 (1980); and Agreement in the Form of an Exchange of Letters between the European Community and the Kingdom of Norway Relating to the Agreement on Fisheries between the European Communities and the Kingdom of Norway (1992), Proposition to the Storting, Norway, *St.prp.* 102 (1991-92).

<sup>17</sup> Norway, Ministry of Fisheries, 'Felles norsk-færøysk pressekommuniké om kvoteavtalen for 1996', *Press Release* 23 February 1996.

<sup>18</sup> In 1991, after reaching agreement on the contents of the Framework agreement that was adopted the following year, negotiations between Norway and Greenland on an annual quota broke down, allegedly over Greenlandic linkage of Loophole engagement and quotas from Norway; Bjarne Myrstad of the Norwegian Ministry of Fisheries cited in *Fiskaren* (Bergen), 23 August (1991).

<sup>19</sup> Criticism from Norwegian industry on this account is cited in *Fiskeribladet* (Harstad), 5 August (1992), 4.

- <sup>20</sup> Norway's Foreign Minister, Johan Jørgen Holst, cited in *Aftenposten*, 25 August (1993), 4, after the collapse of informal talks on the matter.
- <sup>21</sup> *St.prp.* 74 (1998-99), Sec. 4.
- <sup>22</sup> *Ibid.*, Sec. 2.2; on parallel developments under the Northwest Fisheries Organization, Joyner, Ch. 7.
- <sup>23</sup> *Daily News of Iceland*, 13 and 14 July (1995) (the vessel *Mår*) and 22 July (1996) (the vessel *Klakkur*)
- <sup>24</sup> The incident involved the vessel *Mår*; the Agreement on the European Economic Area (1992) was adopted by the European Community and its member states and the members of the European Free Trade Association (EFTA); ([www.efta.int/docs/EFTA/LegalTexts/EEAAgr&RelAgr/TABLE%20OF%20CONT.AF.pdf](http://www.efta.int/docs/EFTA/LegalTexts/EEAAgr&RelAgr/TABLE%20OF%20CONT.AF.pdf)). See in particular Art. 20 in conjunction with Protocol 9, and more generally Art. 36 of the Agreement.
- <sup>25</sup> 'Freedom to Provide Services', *EFTA Surveillance Authority: Annual Report 1998* (<http://www.efta.int/structure/SURV/efta-srv.cfm>). Art. 5 of Protocol 9 to the EEA Agreement provides for access to ports and associated facilities but exemption is made for landings of fish from stocks, the management of which is subject to severe disagreement among the parties.
- <sup>26</sup> *St.prp.* 73 (1998-99), Sec. 2.2; legislation providing for such blacklisting was introduced in 1994 but not used in practice until 'around 1997'; *ibid.*
- <sup>27</sup> The European Community is granted considerable quotas of several species in the Norwegian EEZ.
- <sup>28</sup> *Aftenposten*, 9 June (1994), 4, reports that two Icelandic vessels were rejected at Norwegian shipyards on such grounds.
- <sup>29</sup> Robert Hansen, leader of a regional County Fisherman Association, maintains that shipyards accepting Loophole vessels will be blacklisted; *Nordlys*, 8 June (1994), 12. When it became known that the Faroese branch of the Norwegian oil company Statoil had served Loophole vessels, representatives of several County Fisherman Associations threatened to boycott this company; *Nordlys*, 17 June (1994), 15.
- <sup>30</sup> *Fiskaren*, 6 May (1994), 5, notes that the Russian Fisheries Minister threatened to sever cooperative relations with Iceland; and in the 1 July (1994) issue, that the Russian party, encouraged by the Russian Fisheries Committee, had broken industry-level negotiations on direct deliveries to Iceland. According to Icelandic newspapers, Russian authorities again in 1996 suggested to Russian fish companies that they should not sell fish to Iceland if Icelandic vessels reappear in the Loophole; *Daily News of Iceland*, 18 July (1996).
- <sup>31</sup> According to Icelandic imports statistics, Russian landings were somewhat reduced in 1994 compared to the two preceding years, but they still reached almost 11,000 tonnes; figure reported in *Fiskaren*, 7 March (1995), 15.
- <sup>32</sup> For an analysis of the Doughnut Hole case, see Balton, Ch. 5.
- <sup>33</sup> In annual Protocols since the 1992 Commission meeting, Norway and Russia pledged to include Loophole activities in the scope of any quota agreements drawn up with non-coastal states; 'Protokoll fra den 22. sesjon i Den blandete norsk-russiske fiskerikommisjon', 13.
- <sup>34</sup> Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation concerning Certain Aspects of Co-operation in the Area of Fisheries, with Protocols; reproduced in *International Journal of Marine and Coastal Law*, 14 (1999), 484.
- <sup>35</sup> *Ibid.*, Art. 4 in conjunction with Arts. 2 and 3; an important implication of this is that Iceland may not require fishing rights in the Svalbard zone, which it has in the past.
- <sup>36</sup> *Ibid.*, Arts. 6 and 7.
- <sup>37</sup> *St.prp.* 74 (1998-199), Sec. 2.2.
- <sup>38</sup> *Daily News of Iceland*, 22 October (1998).
- <sup>39</sup> See, respectively, Kristján Ragnarsson in *ibid.*, 14 April (1999) and Oddmund Bye in *Aftenposten*, 14 April (1999).
- <sup>40</sup> On those two types of interplay, see the Introduction and the Conclusions.
- <sup>41</sup> Agreement between the Government of Canada and the Government of the Kingdom of Norway on Fisheries Conservation and Enforcement (1995; not in force); Proposition to the Odelsting, Norway, *Ot.prp.* 3 (1995-96); also Joint Communiqué on Canada-Norway Reciprocal Enforcement Agreement (*Pressemelding fra Fiskeridepartementet*, 9 January (1995). Oslo: Ministry of Fisheries).
- <sup>42</sup> Joyner, Ch. 7.
- <sup>43</sup> On the role of Iceland as a coastal state protagonist in international fisheries law and politics, see the Introduction.
- <sup>44</sup> The conspicuous management dispute over Northwest Atlantic groundfish implied that, at an early stage, the European Community was the most sharply profiled champion of distant water fishing interests; A. C. de Fontaubert, 'The Politics of Negotiation at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks', *Ocean and Coastal Management*, 29 (1995), 79, at 85. Norway's application for

European Union membership was sent in 1992; the negotiated agreement was rejected by the Norwegian Storting after a referendum in 1994.

<sup>45</sup> The 'Santiago Document', drawn up at the initiative of a group of Latin American states prior to the Third Preparatory Committee Meeting in August 1991, argued strongly in favour of the coastal states' having a greater say in the management of high seas fisheries.

<sup>46</sup> The estimate is made in 'Seafood', Report of the American Embassy, Moscow, cited in Oude Elferink, Ch. 6. More recently, Russian attention to distant water fisheries is reportedly again on the rise.

<sup>47</sup> V. Monakhov, 'The Fishery Industry in the Russian Far East', *Eastfish Fishery Industry Profile*, 19 (Copenhagen: Eastfish, Food and Agriculture Organization, 1998), 16.

<sup>48</sup> For an interesting discussion of four types of leadership in multilateral negotiations, see O. R. Young, 'Political Leadership and Regime Formation: On the Development of Institutions in International Society', *International Organization*, 45 (1992), 281.

<sup>49</sup> For an overview, see J. T. Thór, *British Trawlers and Iceland 1919-1976* (Gothenburg: Department of Economic History of the University of Göteborg, 1995).

<sup>50</sup> Young, 'Political Leadership and Regime Formation.'

<sup>51</sup> Fish Stocks Agreement, Art. 11(d).

<sup>52</sup> Law of the Sea Convention, Art. 63; see discussion in T. Henriksen, 'FN-avtalen om fiske på vandrende fiskebestander: nye bidrag til havretten?' (Tromsø: University of Tromsø, Department of Law. Draft, August 1998).

<sup>53</sup> Details on the 1995 *Estai* incident are given by Joyner, Ch. 7.

<sup>54</sup> *Sentrumsalternativet - Vilje til ansvar*; ([www.aftenposten.no/spesial/valg97/sentrum.htm](http://www.aftenposten.no/spesial/valg97/sentrum.htm)), Sec. 2.2.2.8; my translation.

<sup>55</sup> Kjell Magne Bondevik to Aftenposten, 17 October (1997).

<sup>56</sup> W. T. Burke, 'Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries', *Ecology Law Quarterly*, 1989, 285.

<sup>57</sup> Balton, Ch. 5.

<sup>58</sup> Chairman of the Fish Stocks Conference, Satya Nandan, had told the international media that 'unilateral enforcement could be fatal to the agreed regime of the Law of the Sea,' *Newsweek*, April 25 (1994), 31.

<sup>59</sup> Russia submitted, alone or with other states, eight working documents and one information paper; for an overview, see J.-P. Lévy and G. G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (The Hague: Martinus Nijhoff, 1996), 813-29.

<sup>60</sup> UN Doc. A/Conf./164/L.25, UN Doc. A/Conf./164/L.26, UN Doc. A/Conf./164/L.27, UN Doc. A/Conf./164/L.32 and UN Doc. A/Conf./164/L.38.

<sup>61</sup> UN Doc. A/Conf./164/L.21, UN Doc. A/Conf./164/L.25, UN Doc. A/Conf./164/L.33 and UN Doc. A/Conf./164/L.38.

<sup>62</sup> This group, widely known as the Evensen Group, was in operation from the very first (organizational) session in New York in December 1973, and the group played a significant role *inter alia* by drafting negotiating texts.

<sup>63</sup> Fish Stocks Agreement, Art. 23.

<sup>64</sup> Fish Stocks Agreement, Art. 21; on Norway's role, see M. Hayashi, 'Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks', *Georgetown International Environmental Law Review*, 9 (1996), 1, at 16, citing an Informal Paper of the Chairman of the Conference, 'Issue Raised by Norway' (25 August, 1994). Compare in this context (then) Art. 20 of the Draft Agreement prepared for the fourth session (UN Doc. A/Conf.164/21) with the corresponding article in the Draft Agreement presented to the fifth session (UN Doc. A/Conf.164/22/Rev.1).

<sup>65</sup> Fish Stocks Agreement, Art. 21(1-3); Hayashi, 'Enforcement by Non-Flag States', 16.

<sup>66</sup> On the significance of the situation off Canada for the convening of the Conference as well as some of the key issues discussed there, including new measures for enforcement, see e.g., D. H. Anderson, 'The Straddling Stocks Agreement of 1995 – An Initial Assessment', *International and Comparative Law Quarterly*, 45 (1996), 463.

<sup>67</sup> On this trisection of the resource management task, see the Introduction.

<sup>68</sup> G. Borsting and O. S. Stokke, 'International Cooperation in Fisheries Science: Research Effectiveness and the Barents Sea Fisheries Regime', *FNI Reports* (Lysaker: The Fridtjof Nansen Institute, 1995).

<sup>69</sup> Since 1997, however, despite efforts of Russian fisheries authorities, Norwegian research vessels have either been denied access to the Russian zone or been severely limited in their operations, a policy widely perceived as originating in naval quarters. This impediment of long-standing cooperation is believed to have arisen from dissatisfaction in the Northern Fleet with a parallel set of joint Norwegian-Russian investigations – the measurement programme on nuclear contamination; O. S. Stokke, 'Nuclear Dumping in Arctic

Seas: Russian Implementation of the London Convention', in D.G. Victor, K. Raustiala and E. B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, MA: MIT Press, 1998), 475.

<sup>70</sup> Law of the Sea Convention, Art. 119.

<sup>71</sup> Fish Stocks Agreement, Arts. 5 and 14; also Annex I.

<sup>72</sup> The Framework Agreement, Preamble.

<sup>73</sup> *St.prp.* 43 (1995-96), 11.

<sup>74</sup> Fish Stocks Agreement, Art. 6 and Annex II; for a more extensive discussion, see Orrego, Ch. 1, and the Conclusions.

<sup>75</sup> *ICES Cooperative Research Report*, 229, Part 1 (Copenhagen: International Council for the Exploration of the Sea, 1999), 17-39 and 79-84.

<sup>76</sup> Fish Stocks Agreement, Annex II.

<sup>77</sup> The Norwegian Government, when submitting the Fish Stocks Agreement to the Storting (parliament), notes that compliance with Art. 6 may require additional resources for scientific purposes; Norway, *St.prp.* 43 (1995-96), 11.

<sup>78</sup> For straddling stocks, see Art. 63; on the duty to cooperate, see Arts. 116-120

<sup>79</sup> Fish Stocks Agreement, Art. 8(4).

<sup>80</sup> Fish Stocks Agreement, Art. 8(3); Art. 8(1) obliges states, pending establishment of such an arrangement, to act in good faith and with due regard to the rights and interests of other states.

<sup>81</sup> Note that 'openness' refers to participation in decision-making and not to access to the resources. The degree of openness required by the Agreement, defined by what constitutes a 'real interest', is debatable. See, on the one hand, Orrego, Ch. 1, and on the other, A. Tahindro, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks', *Ocean Development and International Law*, 28 (1997), 1, at 20.

<sup>82</sup> P. Örebeck, K. Sigurjonsson and T. L. McDorman, 'The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement', *International Journal of Marine and Coastal Law*, 13 (1998), 119, at 124.

<sup>83</sup> Fish Stocks Agreement, Art. 8(1); emphasis added.

<sup>84</sup> R. R. Churchill finds the claim that the Barents regime is an arrangement 'debatable'; 'The Barents Sea Loophole Agreement – A 'Coastal State' Solution to a Straddling Stock Problem', *International Journal of Marine and Coastal Law*, 14 (1999), 467, at note 26. His argument is that neither the Norwegian-Russian Fisheries Commission nor the agreements with non-coastal states qualify as 'arrangements' under the Fish Stocks Agreement; the latter because there is no decision-making mechanism and the former because it 'was not established for the purpose of high seas management of straddling stocks nor does it have such a role'. However, this does not seem to acknowledge the relationship between these regime components (see also Sec. 1 above). Norway was among the states pushing for inclusion of the 'arrangement' term in the Fish Stocks Agreement. After the adoption of the Agreement, Norway's Minister of Fisheries went further than the view submitted here by holding that the Norwegian-Russian Fisheries Commission itself is an 'arrangement' as defined by Art. 1 of the Fish Stocks Agreement; J. H. T. Olsen, 'Fiske på det åpne hav', *Fiskeribladet*, 21 September (1995), 6.

<sup>85</sup> NEAFC Convention, Arts. 5 and 12 in conjunction with Art. 2.

<sup>86</sup> *ICES Cooperative Research Report*, 221, Part 1 (1996), 50-1.

<sup>87</sup> NEAFC Convention, Art. 12(2).

<sup>88</sup> On NEAFC's schemes, see Churchill, Ch. 8; on enforcement provisions in the Fish Stocks Agreement, see Hønnand, Ch. 4; on port state measures, see Vukas and Vidas, Ch. 2.

<sup>89</sup> See also Churchill, 'The Barents Sea Loophole Agreement', 479-80.

<sup>90</sup> Fish Stocks Agreement, Art. 7.

<sup>91</sup> *Ibid*, Art. 7(1)(a) and 1(b) respectively; Orrego, Ch. 1. For the significance of this matter for Norway's acceptance of the Fish Stocks Agreement, see Recommendation of a Standing Committee of the Storting, Norway, *Innst.* 29 (1995-96), Annex I. Here, attention is also drawn to the procedural safety valve regarding matters pertaining to coastal state jurisdiction in that Art. 32 ensures that the compulsory dispute settlement

procedure laid out in Arts. 27-31 does not apply to coastal state measures taken within the EEZ; see the discussion of this view by Boyle, Ch. 3.

<sup>92</sup> Fish Stocks Agreement, Art. 6 and Annex II.

<sup>93</sup> *ICES Cooperative Research Report*, Vol. 229, Part 1 (1999), 27-32; for an extensive discussion, see O. S. Stokke, L. G. Anderson, and N. Mirovitskaya, 'The Barents Sea Fisheries', in O. R. Young (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (Cambridge, MA: MIT Press, 1999), 91.

<sup>94</sup> *Daily News of Iceland*, 5 November (1997).

<sup>95</sup> *Daily News of Iceland*, 3 August (1995) and 14 August (1996).

<sup>96</sup> G. L. Lugten, 'A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues', *FAO Fisheries Circular*, 940 (1998), 85.

<sup>97</sup> *ICES Cooperative Research Report*, 229, Part 1 (1999), 27.

<sup>98</sup> *St.meld.* 44 (1999-2000), Sec. 1; in 2000 the agreed cod quota was 390,000 metric tonnes, down from 850,000 tonnes in 1997; *St. meld.* 11 (1997-98), Sec. 1.

<sup>99</sup> *Ibid.*, Art. 5.

<sup>100</sup> *Ibid.*, Art. 3; Orrego, Ch. 1.

<sup>101</sup> The project began in 1988; Børsting and Stokke, 'International Cooperation in Fisheries Science.'

<sup>102</sup> A. H. Hoel, 'The Barents Sea: Fisheries Resources for Europe and Russia', in O.S. Stokke and O. Tunander (eds.), *The Barents Region: Cooperation in Arctic Europe* (London: Sage, 1994), at 122.

<sup>103</sup> *St.meld.* 43 (1998-99), Sec. 3.3, and *Fiskeridepartementets miljøhandlingsplan 2000-2004* (Oslo: Ministry of Fisheries, 2000), Sec. 4.1.1.

<sup>104</sup> See, for instance, *Innst.* S. 228 (1995-96), Annex 1, 5, referring to Arts. 5 and 6 of the Fish Stocks Agreement.

<sup>105</sup> The latter, zonal attachment, criterion has been used explicitly *inter alia* in the trilateral agreement between Iceland, Norway, and Greenland regarding sharing of the joint capelin stock in the Norwegian Sea and between Norway and the European Community regarding the North Sea Herring; S. Engesæter, 'Scientific Input to International Fishery Agreements', *International Challenges*, 13 (1993), 85.

<sup>106</sup> Fish Stocks Agreement, Art. 11(a)(b).

<sup>107</sup> *Ibid.*, Art. 7(2)(e) and 2(d) respectively.

<sup>108</sup> *Ibid.*, Art. 11(d).

<sup>109</sup> *Ibid.*, Art. 11(e).

<sup>110</sup> *Ibid.*, Art. 23; also Food and Agriculture Organization, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993), Art. V(2); 33 *ILM* 368.

<sup>111</sup> Sec. 2.2 above.

<sup>112</sup> General Agreement on Tariffs and Trade (1947), 55 *UNTS* 194, as updated by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Agreements (1994), 33 *ILM* 1125; D. Freestone and Z. Makuch, 'The New International Environmental Law of Fisheries: The 1995 Straddling Stocks Convention', *Yearbook of International Environmental Law*, 7 (1996), 3 at 38-41; also the Conclusions.

<sup>113</sup> Fish Stocks Agreement, Art. 23(2).

<sup>114</sup> Fish Stocks Agreement, Art. 20; Hønneland, Ch. 4, offers a compliance-oriented comparison between the Fish Stocks Agreement and the FAO Compliance Agreement.

<sup>115</sup> Fish Stocks Agreement, Arts. 20-22; see Sec. 3.2 above. For a detailed account of the contents and evolution of those provisions, as well as their interplay with regional regimes, see Vukas and Vidas, Ch. 2; also Hayashi, 'Enforcement by Non-Flag States'.

<sup>116</sup> The Norwegian-Canadian 1995 agreement on compliance mentioned above, which does include provisions reflecting the Fish Stocks Agreement, is only symbolic in this context as Canadian vessels do not operate in the Barents Sea.

<sup>117</sup> Whereas the scope of the NEAFC Scheme of Control and Enforcement is 'all fishing vessels' engaged in harvesting of 'all fishery resources of the Convention area' except sea mammals, sedentary species, and highly migratory species (Scheme, Arts. 1-2 in conjunction with NEAFC Convention, Art. 1(2)), NEAFC inspectors are authorized to board and inspect vessels only to the extent that this is deemed 'necessary to verify compliance with the measures established by NEAFC'; Scheme, Art. 17(2); see also Arts. 18-20.