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## ABSTRACT

For the past 200 years the globe's natural resources have been under an immense pressure. This is not least true for renewable resources like fish-stocks, and with advanced technology – applied in an environment of scarcity and intense competition – it is now possible to degrade a fish stock to a level where it is not able to reproduce itself at a sustainable level. In cases where these resources are harvested from a common-pool they have to be managed in common in order to avoid degradation or even depletion.

The thesis is dealing with *international relations in terms of multi-lateral international negotiations in the field of regional management of straddling fish stocks*.

For decades the North Atlantic coastal states have harvested the North Atlantic mackerel (Latin: *scomber scombrus*). This specie is a so called straddling stock which means that it migrates between the exclusive economic zone of two or more coastal states and eventually the high sea as well. From 1999 to 2008 the coastal states – EU, Norway and the Faroe Islands – had a stable agreement on allocation of the total quota between the parties. The TAC (total allowable catch) is based on recommendation from ICES, and the shares were in general based on the pattern of zonal attachment of the mackerel, allotting the parties in rough numbers 60, 35 and 5 percent, respectively.

A few years ago ICES stated that the migration pattern of the mackerel had changed significantly, as it had extended its spatial habitats further to the west. Accordingly Iceland was recognised as a coastal state based on the concept of 'real interest', and the Faroe Islands was given an argument to claim an increase in its share. Obviously, these changes has affected the arithmetic of the allocation. It is undisputed by EU and Norway that Iceland earns a share and the Faroe Islands earns a bigger share than previously, but since 2008 the parties have not been able to comprise and close an agreement.

However, the lack of an agreement does not (necessarily) mean that the parties abstain from fishing, as they are able to unilaterally fix a quota in their own EEZs; the compulsory dispute-resolution provisions in the Law of the Sea does not apply to management in the EEZ. As the unilaterally fixed quotas on aggregate exceed the TAC significantly, the stock is heavily over-exploited.

The problem formulation of the thesis is asking two fundamental questions in an attempt to come to terms with the complex issue of cooperative regional management of straddling stocks.

- A. What are the reasons for the parties' inability to reach a timely agreement that would ensure a sustainable exploitation of the mackerel?

- B. How does the legal and institutional framework influence the policy process and outcome, and what procedures could be implemented as to reach regular and timely agreements that would ensure a sustainable exploitation of the mackerel?

The empirical chapter introduces the background to the conflict the mackerel itself, the socio-economic importance of the mackerel, the institutional and legal framework, and the history of the controversy. This chapter is based on secondary sources as literature, statistics, law-texts, and media-coverage and partly interviews.

The theoretical approach to the first question is partly based on Robert G. Putnam's two-level game theory, emphasising the link between the domestic and the international level in the case of international relations vis-à-vis negotiations. This theoretical approach is contextualised by J. Samuel Barkin's theory on international fisheries management. The analytical interpretation of the empirical evidences leads to the conclusion that a weak management regime – legal framework, norms and institutional set-up – leads to the fuelling of the bargaining dynamics. The possibility to fix quotas in own EEZ in the case of no agreement and the inability to apply a compulsory allocation in case the parties do not succeed in closing an agreement gives rise the particular concern.

The theoretical framework of the second question is partly Elinor Ostrom critic of conventional economic wisdom as far as the assumptions on common-pool agents is concerned: Exploiting common-pool resources does not necessarily lead to the tragedy of the common. Agents who basically share the interest of sustainable management and are given the opportunity to communicate openly will – under optimal conditions – develop and implement a joint strategy that gives the best net output, and they will develop norms in order to maintain the strategy, but are also willing to pay for monitoring and sanctioning those who do not play according to the rules. These fundamental point to a bridging between the realist tradition (bargaining) and the liberal tradition (problem-solving) in order to establish a regional management bottom-up by the pelagic business itself. On a concrete but still vague level this implies that the traditional process is reversed. The stakeholders – as a community of like-minded with opposite but nevertheless shared interests – would be at the problem-solving table, while the authorities would have to ratify or not-ratify the negotiated agreement. A fundamental premise for such a set-up would be that the parties as a fundamental norm would abstain from fixing unilateral quotas and also accept compulsory applied allocations according to procedures laid down by them self.

## **ABBREVIATIONS**

CFP: Common Fisheries Policy (EU)

DG-Mare: EU's Directorate-General for Maritime Affairs and fisheries

EEZ: Exclusive Economic Zone

ICES: International Council for the Exploration of the Sea

UNCLOS: United Nations Convention on the Law of the Sea

NEAFC: North East Atlantic Fisheries Commission

Pelagic RAC: The Pelagic Regional Advisory Council (EU)

RFMO: Regional Fishing Management Organisation

SPFA: Scottish Pelagic Fishermen's Association

SSB: Spawning Stock Biomass

STEFCF: Scientific, Technical and Economic Committee for Fishery

TAC: Total Acceptable Catch

# CHAPTER 1. INTRODUCTION

## 1.1. The background

The international community has experienced an increasing pressure on the planet's natural resources the recent 200 years. In many cases this pressure leads to conflicts between competing actors about access, be it to ownership rights or user rights, be it within a state community between different business actors and/or citizens, communities, or regions, or between states. On a more general level the pressure leads to (the risk of) over-exploitation, environmental problems, social inequality, and political de-stabilization – all of which are impacts that may have inter-generational consequences. The growing concern, stemming from these issues, is reflected in the flux of documents – statements, conventions etc. – that have been produced by the international community for the last say 50 years, trying to come to terms with these problems. Accordingly, over the last quarter of the century, two new and complementary subjects have had considerable impact on the development of current international law – environmental protection and sustainable development, and the 1992 Rio Declaration on Environment and Development was a milestone within in international law-making<sup>1</sup>.

One of the areas of significant importance in this field are the maritime resources, non-living and – most relevant to this project – living resources as well. This project is about the regional coastal-state management – cooperation vis-à-vis conflict – concerning the of the North-East Atlantic macquerel (Latin: *Scomber scombrus*). The historical background for the legal measures within international law with regard to the managing of fisheries has to be found some 60 years ago. After World War II the international community witnessed a race amongst states control the areas of their adjacent sea; this race – which had started in the beginning of the century already – was indeed made to ensure the rights to the resources in the oceans, including both the living resources in terms of fish, and not least eventual oil in the sub-soil.

This called for an international regulation and lead to the United Nations Conference on the Law of the Sea (UNCLOS), which turned out to be three conferences: UNCLOS I 1956-1958, UNCLOS II 1960, and UNCLOS III 1973-1982. Broadly spoken UNCLOS is a balancing of interests: The interest of any state – also land-locked – to enjoy the freedom of the sea, i.e. the right to innocent passage on the sea, and the interests of the coastal states in extending their jurisdiction in adjacent

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<sup>1</sup> Boyle, Alan and David Freestone (eds.): International Law and Sustainable Development. Oxford University Press. 1999 pg2

waters. One of the main outcomes of the UNCLOSs was the provision stating that every coastal state has the right to its own exclusive economic zone (EEZ) of 200 nautical miles, and that the jurisdiction within the EEZ is exclusively with the coastal state. Part 5, Article 56 in UNCLOS stipulates the rights, jurisdiction and duties of Coastal States in EEZ. States have the right to explore, exploit and manage the natural resources within their EEZ. At the same time article 61 in part 5 also stipulates coastal states' responsibilities to ensure a proper management of natural stocks and to avoid over-exploitation. This article also stipulates that coastal state to promote the objective of optimum utilization within their EEZ according to their capacity.

However, fish species do not respect human-made boundaries, and the mackerel is one example of a migrating species, a so called straddling stock. Straddling stocks are fish stocks that migrate from one coastal EEZ and/or the high sea. UNCLOS is stipulating that the coastal states involved in the utilization of a certain stock that is migrating in two or more EEZs have to co-operate with regard to the management. Straddling fish stock has been an issue of dispute among coastal states during years, as for example in the North Atlantic Ocean between Canada, Spain and Portugal.<sup>2</sup> Canada have several straddling stock within their EEZ and with the collapse of the cod in the late 1980's and early 1990's, the Canadian government deployed a more effective foreign policy within the NAFO (North Atlantic Fisheries Organization) to maintain sustainability and to enforce more effective punishment on countries who overfish in the Grand Banks.

Sustainable fishing is thus not exclusively a matter of national government in an interdependent world but a matter of international or regional cooperation. Government can not achieve sustainability in isolation as today's environment and resources problems are transnational or global in nature.<sup>3</sup> Faroe Islands, Norway, EU countries (Scotland and Ireland) which are all members of NEAFC have for years exploited the North Atlantic mackerel based on multi-lateral agreement. The TAC (total allowable catch) is advised by ICES. In recent years mackerel has occurred significantly in the Icelandic EEZ, and in 2009 Iceland was recognized as coastal state in this context, based on the concept of 'real interest'.<sup>4</sup>

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<sup>2</sup> Thompson, Alexander: Canadian Foreign Policy and Straddling Stocks: Sustainability in an Independent World in: Policy Studies Journal, Vol. 28, no. 1, 2000 2000 pg 4

<sup>3</sup> Thompson, Alexander: Canadian Foreign Policy and Straddling Stocks: Sustainability in an Independent World in: Policy Studies Journal, Vol. 28, no. 1, 2000 pg 1

<sup>4</sup> Molenaar, Erik Jaap: The Concept of 'Real Interest' and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms in: The International Journal of Marine and Coastal Law. Vol. 15, No. 4. 2000.

## 1.2. The situation

From 2000 and until 2008 included the Faroe Islands, Norway and EU agreed upon the allocation of the quota, roughly providing 65 percent to EU, 30 percent to Norway, and 5 percent to the Faroe Islands. However, the last four seasons – from 2009 to 2012 – the parties have failed to reach an agreement; it has to be noticed, that Iceland – recognized as a coastal state in 2009 – is now also one of the parties. The last meeting was in Reykjavík on February 14-16, 2012, but the negotiations collapsed. After the first day of negotiations, the chairman of the Icelandic ship-owners' organization, Mr. Fríðrik J. Arngrímsson, said in an interview with the Faroese television, that to reach an agreement implying sustainable exploitation of the endangered mackerel stock, *“EU and Norway have to come to their senses”*, obviously meaning that they were claiming too big quota portions for themselves. According to Faroese chief of delegates, Mr. Andrass Kristiansen, *“the representatives have met occasionally during the stay, but it appeared impossible for any of the parties to differ from previous statements”*. Norway had a quite different view as head of delegation Ann Kristin Westberg expressed, that *“the Faroes had got an offer that they should have accepted, in my opinion ... our opinion is not that the Faroe Islands shouldn't have more mackerel [allocated], but the Faroese numbers are bigger than the changing in the migration pattern justify”*.<sup>5</sup> The same day EU and Norway broadcasted a 'joint statement', stating that the Faroese and the Icelandic in reality had blocked the negotiations by passiveness, and are undertaking unilateral fishing that are unsustainable. The sustainability that has been built up by EU and Norway (so the joint statement) *“is being directly threatened by the recent development of new and unilateral fisheries by Iceland and the Faroe Islands”*<sup>6</sup>.

As can be seen, the situation has ended up in a dead-lock with two blocks or coalitions, Iceland and the Faroe Islands, and EU and Norway. The coalitions do not speak together any more but are running a blame game to convince the opinion of their innocence vis-à-vis the others' responsibility of

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<sup>5</sup> Dagur & Vika 17th of March 2012, <http://www.kringvarp.fo/netvarp#tab=1;sektion=1;media=14893>

<sup>6</sup> [http://ec.europa.eu/fisheries/news\\_and\\_events/press\\_releases/2012/20120216/index\\_en.htm](http://ec.europa.eu/fisheries/news_and_events/press_releases/2012/20120216/index_en.htm)

the lack of an agreement. Norway has announced that Faroese mackerel can not be landed in Norwegian ports, and EU has passed legal measures against ‘non-collaborating countries’<sup>7</sup>.

### 1.3. The questions

Obviously the situation gives rise to a few questions concerning the coastal states’ ability to effectively execute a co-management of the mackerel. First and foremost it must be kept in mind that the whole problem of co-operative inter-state management has many aspects, adding to its complexity.

**Biologically:** Dealing with a part of nature that is not totally observable indeed inherits a lot of uncertainties. Does the biological data include all relevant aspects desirable to make solid decisions? How valid are the information provided? Does the whole institutional set-up of the information production create legitimacy amongst the parties?

**Economically:** Obviously, there is a lot of money involved in the mackerel fisheries, and thus economic agents have big interests at stake. Even though they may be aware of the importance of long-term sustainability, will they tend to look at the process as a zero sum game and push for as much as possible at any price? It is worth noticing, that representatives for the vessel-owners organizations have been part of the all the delegations. What does this mean to the negotiating process?

**Politically:** On paper all of the parties share the ambition which is sustainability, but it does not work in reality. Why? Are the Faroe Islands and Iceland really blocking the negotiations in order to get the opportunity to fix a high, unilateral quota? And does the same count for EU-Norway? How big is the domestic pressure on the delegations? Are there any external reasons behind the Norwegian-EU coalition, as for example a joint interest in Norwegian products to the EU-market?

**International law:** Since it is the fourth consecutive year that no agreement has been reached, an obvious focal point is the legal and institutional framework of the co-operation. As there are no provisions that can force the parties to close an agreement, one has to ask whether the – legal and non-legal – incentives are too weak. Or even more strongly: Should there be some legal measures that could force through an agreement if the parties fail to do so?

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<sup>7</sup> EU Commission. Commission Staff Working Paper: Commission Proposal for a Regulation of the European Parliament and of the Council on certain measures directed to non-collaborating countries for the purpose of the conservation of fish stocks. 14. Dec. 2011

#### **1.4. Theoretical reflections**

Traditionally theories of international relations are broadly distinguished as either realistic or liberal, and these positions have in turn led to the formulation of new, modified theories within the respective main traditions. The case in question may well be approached theoretically within these frameworks as it questions issues like the presence or absence of an international authority able to make binding decisions, the importance of international institutions, the connections of civic societies etc.

Two-level game theory might be considered as a theory with elements from both these traditions, although predominantly realistic. However, two-level game theory is very general and may be used to approach almost all kinds of international conflicts. For this reason it might be a methodological benefit to integrate it into a more case sensitive theoretical framework, dealing specifically with bargaining on international fisheries agreements.

#### **1.5. The problem formulation**

From these reflections, the thesis will undertake to investigate and answer the following, inter-related questions:

- A. What are the reasons for the parties' inability to reach a timely agreement that would ensure a sustainable exploitation of the mackerel?
- B. How does the legal and institutional framework influence the policy process and outcome, and what procedures could be implemented as to reach regular and timely agreements that would ensure a sustainable exploitation of the mackerel?

#### **1.6. The structure of the project**

The project has four main parts. A general part on methodology and theory (chapter 2 and 3), an empirical part (chapter 4), an analytical part focusing on the parties' actions (chapter 5 and 6) and an analytical part focusing on the frameworks (chapter 7).

**Chapter two** present the project's methodological approach. This includes the data collection for the three parts of the project, and it includes the analytical approach, that is also the relation between data and theory.

**Chapter three** contains the theoretical framework of the project After some initial reflections on theoretical alternatives, it starts with a broad introduction of the rational choice tradition, partly in its original version and then its derived versions. This leads to a presentation of game theory and its critics, and this latter leads to the presentation of Robert Putnam's theory of two-level game theory. The two-level game theory is contextualised in terms of Barkin's theory on power differentials relevant to bargaining on international fisheries management.

**Chapter four** is an introduction to the empirical aspects of the case in question. This chapter includes

- an introduction to the fundamental biology of the mackerel, the concrete state of the North Atlantic mackerel stock as documented in scientific reports, and the institutional framework of the science (ICES)
- a mapping of the socio-economic importance of the mackerel in the countries involved and the profile of the domestic interests involved
- an introduction to the international legal framework (UNCLOS) and the institutional framework (NEACF) and finally
- a presentation of the history of the controversy on the mackerel 2009-2012 with special emphasis on the Faroe Islands and EU-Scotland

**Chapter five** is the main analytical part. The purpose of this chapter is partly to get an understanding of the actions and attitudes of the agents involved, and partly to explain how different factors in the process influence the process of negotiation itself and its outcome. This chapter is based on the empirical evidences from the previous chapter, i.e. the biological and scientific facts, the socio-economic and domestic political profiles, the negotiations' legal and institutional framework, the public appearance of the controversy, and not least my own interviews of relevant actors and experts.

**Chapter six** contains the discussions of the findings, and **chapter seven** is an attempt to draw some preliminary conclusions from the analysis and the discussion.

**Chapter eight** has its point of departure in the fact that – despite politically supporting the ambition of pre-caution and sustainability – for four years in a row the parties involved have not been able to reach an agreement. The chapter outlines the basis for a framework that can increase the likelihood for the parties to reach timely and sustainable agreements on the co-management of the North-East Atlantic mackerel.

**Chapter nine** summarizes the project and draws its final conclusions.

## **CHAPTER 2. METHODOLOGY**

This chapter introduces the methodological approaches to the analyses, including the limitations of the project, the analytical approach and the data collections.

### **2.1. Limitations**

The mackerel conflict involves four different parties, Iceland, Faroe Islands, Norway and EU. Given the restrictions in terms of time limit and financial resources, the project has to be limited in geographical terms. Clearly, Iceland and the Faroe Islands form a coalition and Norway-EU another. Thus I will choose one party within each of the coalitions. As far as the northern countries are concerned, I will choose the Faroe Islands for my study for one two reasons. One is the fact that the fisheries in general, not least the pelagic sector, has an big importance for the Faroese society in general and not only locally, and the that The Faroe Islands' status as subject to Danish constitution but not a member of EU adds an interesting dimension to this particular bargain on international resources.

The similarities of Norway and the relevant EU countries are that the pelagic sectors are strong in certain localities. Choosing Norway would make it able to focus on its position between its usually Nordic allies and EU, including the question whether the coalition is based on mutual interests beyond the mackerel conflict. As far as EU is concerned, the common fisheries policy inherits a potential conflict between EU/Brussels and the member states, and raises the question how strongly EU does fight for different interest groups. As already mentioned in the Faroese case, Denmark's role is interesting in the EU case as Denmark in a way is on both sides of the table. These third level aspects implies that I will choose EU for my case, focusing on the biggest EU holder of mackerel which is Scotland.

### **2.2. Data collection**

Due to the nature of the issue in focus, I have chosen to conduct a qualitative research, using both primary and secondary data. The first part of the project focuses on the basics within the problem, like the mackerel, the socio-economic aspects of the mackerel fisheries in the countries in question,

and finally the relevant international law. This is a necessary step to get familiar with the aspects of the problem of negotiating and deciding on the co-management of straddling stocks. For this predominantly explorative part, I will lean mostly on secondary data – articles, books, academics and reports concerning the biological, socio-economic and legal aspects.

The second part of the project concerns certain agents' behaviour within the context of multi-party, international negotiations. For this predominantly explanatory part I will mostly rely on interviews as to understand the parties' perception of the situation, their strategies, their concrete moves etc. I have chosen to conduct interviews with relevant participants in the issue of allocating the mackerel, including delegates and actors who have interest in the mackerel fishery to get their perspectives on the mackerel fishery and the bargain on the allocation of the resources.

Planning and executing these interviews, it is important to bear in mind that the agents in question simultaneously have different roles during the interviews. As part of the negotiation process they have knowledge of the negotiating process; in this role they are potential providers of data relevant to enlighten the questions of the project. However, they are also representatives of interests of one of the parties involved or even of their own personal interests as well, and for this reason they may not be willing to share their knowledge outright; they may be silent about it, they may share part of it, and they may twist it, or even give you wrong information.

This calls for reflections on how to approach the interviews. However, due to lack of financial resources and unexpected time constraints, the interviews were conducted as e-mail interviews, instead as semi-structured personal interviews. A number of questions have been prepared, organised in grids, and with a corresponding box to the right of each question available for the respective answer. When the interview persons have written all the answers they have returned it via e-mail. Clearly, this way of conducting an interview has its disadvantages, first and foremost that the dynamics of the personal interaction – with all its relevance in terms of emotions and body-language – is not present. Furthermore, it is not possible to come up with follow-up questions immediately after an answer or statement. However, they can be made afterwards via e-mail, but only provided the interviewed are prepared to answer. It has to be said that although answering this way is time-consuming, my respondents have been extremely cooperative in responding to my follow-up questions. On the other hand one should not overlook the advantages as it is not as time-consuming

as personal interviews, the written answers may be well reflected and clear, and not least transcription is not needed.<sup>8</sup>

The final part, asking if there are any suggestions to be made with regard to the legal and institutional framework that can assure a timely, sustainable allocation of the resources in case, the data is overwhelmingly literature on institution-building and on relevant international law, both existing law, be it written or customary, and on law as it – according to the respective authors – ought to be. The literature will be searched for in electronic data bases like JStore, Cambridge and others.

### **2.3. Analytical approach**

Based on my predominantly public knowledge of the controversy and my theoretical reflections on alternatives, I have chosen to analyse the conflict in the perspectives of two-level game theory and a theory on power differentials.

The empirical material, i.e. statistical facts and interview, will be interpreted in the categories of the theories in order to understand the attitudes and actions of those involved in the bargaining on the mackerel. The conclusions will be the point of departure for a discussion of the strengths and shortcomings as far international bargaining on allocation of fish-stocks is concerned.

The analytical approach with regard to the institutional and legal framework will be normative and partly case based. The preconditions for robust institutions will be outlined theoretically, and references will be made to experiences of regional fisheries management organisations.

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<sup>8</sup> On pros and cons when conducting e-mail interviews, see Bryman, Alan: Social Research Methods. Third Edition. Oxford University Press. 2008. pg. 640-643

## CHAPTER 3. THEORETICAL REFLECTIONS

### 3.1.1. Two-Level-Game theory

Most often international relations theories observe the state and institutions as centric when dealing with international matters and negotiations. They tend to overlook the domestic sphere that can have an impact upon negotiations and decision making within the international system. Realism is an example of an international theory that focuses predominantly upon the state as a unitary body within an anarchic international system. However, domestic politics and international relations are somehow entangled; the question is whether it is domestic policy that determines international relations or it is the other way around.

International negotiations give us a more clear insight upon the role of domestic sphere within international relations. During negotiations there are group or institutions (whether political or non-political) that have interests at stake in the issues discussed. Putnam's two-level-game theory gives us an insight upon the role of domestic sphere within international negotiations. Two-level game theory is a school of thought deriving from the rational choice theory. The essence of rational choice theory is that when faced with several courses of action people usually do what they believe is like to have the best outcome.<sup>9</sup> Rational choice is more regarded as a toolkit rather than as a theoretical approach and it has flowered in a variety of direction.

One of the theories that stems from rational choice is game theory which deals with situations where others' choice of strategy affects your best choice and vice versa. Two-level-game theory is a political model of international conflict resolution between liberal democracies derived from game theory. With the failure of the mackerel negotiations these last three years, the two-level game theory is a helpful tool to conduct my research work to analyses the negotiating process and the outcome of the negotiations.

As the name of the theory indicates, Putnam's theory operates with two different levels in the negotiation context. Level I refers to those bargaining at the negotiating table and his constituents, trying to achieve an agreement, whereas level II refers to the various groups of domestic constituents that have interests in the issue and thus also decide whether to ratify the agreement or not<sup>10</sup>.

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<sup>9</sup> Marsh David & Gerry Stoker (eds.): Theory and Methods in Political Science. Second Edition. Palgrave Macmillan. 2002. pg 65

<sup>10</sup> Nikolaev, Alexander G.: International Negotiations. Theory, Practice, and the Connection with Domestic Politics. Lexington Books 2007 pg 51

Level I consist of negotiators and level II may represent bureaucratic agencies, interests groups, social classes or “public opinion”<sup>11</sup>. The interests groups at the level II are in this case the ship-owners representing the vessel categories that make claims on a share of the quota, predominantly purse-seiners but may also be others. With the failure of the negotiations, the question is what are the win-sets involved for the coastal countries.

On the other hand, I will be analyzing the EU within a three level game as the EU is quite complex. It is certainly true that the European Union acts as a single actor during the mackerel negotiation based on its common fishery policy, but the EU single voice is the product of intense internal negotiations, where member states have to agree have upon win sets that are both acceptable to their domestic constituents and on the international stage.

The mackerel fishery has different socio-economic importance for the coastal countries involved. It involves countries within coastal areas that are economically dependent upon fishery. The Faroe Islands is a society which has its primary income from the fishing and fishing industry, so is the case of Iceland although the Icelandic economy is more differentiated. The national economies Norway and the EU-states Scotland and Ireland are not dependent upon fishery but local regions of these countries are dependent upon fishery.

The whole two-level game is about the win-set which means the total outcome of the negotiations. Win-set occurs when the concerns of the actors at both levels overlap, a condition under which an international agreement is likely to happen. The size of the win-set depends on the distribution of power, preferences and possible coalitions among level II constituents<sup>12</sup>. Within international negotiation the level II will have an impact upon level I agreement. Level I attempts to bargain for an outcome which they assume will be acceptable for the constituents at level II. The larger the win-set present at level II, the more likely level I can reach an agreement agreeable to all parties. On the other side, smaller the win-set the greater risk that the negotiation will break down. Large win-set is not always an advantage as other negotiators at level I may push around as they know that the negotiator may get a variety of policy passed which means that the negotiator may be weak at the negotiating table.

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<sup>11</sup> Putnam D. Robert Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988 pg 436

<sup>12</sup> Putnam D. Robert Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988 pg 442

If level II win-set does not overlap, then negotiations may lead to a no-ratification. No ratification means no agreement which represents status quo even if in some cases a no-agreement outcome can worsen the situation negotiated upon. In the case of the mackerel negotiations the win-set of the four coastal countries did not overlap leading to a negotiation failure. The win-set of the Faroe Islands and Iceland were too large and could not be overlapped by Norway and EU win-set. This situation led to an asymmetric relation between Faroe Islands and Iceland on the one side “against” Norway and EU countries on the other.

Zero-sum is a mathematical presentation within economy in which participants gain or loss of utility is exactly balanced by the gain or loss of other participants. In this situation we saw that the Faroe Islands and Iceland fixed their own quotas when no agreement was reached, which means that in reality they changed it to non-zero sum game in the short run.

Putnam also looks at the concept of voluntary and involuntary defection within two-level game theory. The possibility of a failed ratification between negotiating parties can be analyzed through this concept. Voluntary defection refers to reneging, that is one of the party failing to carry out a commitment in the absence of an enforceable contract.<sup>13</sup> On the other side, an involuntary defect reflects the behavior of an agent that is unable to deliver on a promise due to failed ratification. The question is what sort of behavior the coastal countries are adapting. Norway and EU will assert that the Faroe Islands and Iceland are voluntarily defecting the negotiations.

Homogeneous conflict is where constituents are likely to maximize his nation share of the available supply;<sup>14</sup> in other words, it is a matter of more or less and not substance. The mackerel case is a homogeneous conflict for the coastal states that is whatever the result will be, its burdens or benefits will rest equally on the actors involved. The only significant disagreement between level II agents will concern the question of accepting or not accepting a certain volume; some constituent may be reluctant to push too hard in fear of losing the whole agreement. The deal of the negotiations is about how much shall be distributed to each coastal state. The Faroe Islands and Iceland have argued that the mackerel is now more within their EEZ now than it was before, and due to this there shall be a change in the distributions. On the other side, EU and Norway argue, the claim is out of

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<sup>13</sup> Putnam D. Robert: Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988. pg 438

<sup>14</sup> Putnam D. Robert: Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988. pg 443

proportions of the changed migration. With the negotiation reaching a deadlock, the small coastal states (Faroe Islands and Iceland) have unilaterally fixed their own quotas.

The negotiators' main problem in a homogeneous conflict is to manage the constituent's expectation of the negotiable outcome. Very often the negotiations within a homogeneous conflict may end in an involuntary defection. This is the reason why there are common beliefs that domestic politics is a hinder to international politics.

### **3.1.2. Critics of Two-level-game theory**

Two-level-game theory deals with the mechanism of two-level negotiations and uses several variables to conceptualize and model interaction in the particular negotiations. The theory, however, has its critics. Nicolas Alexander criticizes two-level game theory for being static, meaning that it is fixed and it 'black-boxes' the information-processing aspect of negotiators<sup>15</sup>. He also argues that the theory homogenizes heterogeneous actors by disregarding the interests of the negotiating participants.

Another critic of two-level game theory is Jeffrey W. Knopf. He criticizes Putnam and his followers for failing to give attention to the differences between the three forms of domestic-international interaction. He labels the first as trans-governmental, the second as transnational and the third as cross-level<sup>16</sup>. These distinctions, so Knopf, are important because it gives us different understanding of the domestic-international relation's effect on interstate bargaining. Secondly, he states that the theory does not give regard to institutional links among states as exist in a military alliance. He implies that these distinctions show differences within a country negotiating proposals how they are produced and where it is aiming to tip the balance of the other country.

A trans-governmental relation is when officials on one or both sides are internally divided and when one or both seek to influence the like-minded party or group of other government(s). Transnational pathway involves links between actors, actors outside the executive branch or its equivalent on both sides where each seek to add to the like-minded on the other side. Finally cross-level process invol-

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<sup>15</sup> Alexander Nicolaev: *International Negotiations. Theory, Practice, and the Connection with Domestic Politics*. Lexington Books 2007 pg 46

<sup>16</sup> Knopf, W. Jeffrey Beyond two-level games: domestic-international interaction in the intermediate-range nuclear forces negotiations in: *International Organizations* 47, 4, Autumn 1993 pg 599

ves the communication between leaders on one side and domestic constituents on the other side regardless of the connection.

The criticism is that Putnam focuses only upon the win-set and ratification by the level II which is the domestic sphere without taking into consideration different aspects within the domestic sphere as well as the in international sphere.

## **3.2. COMMON-POOL RESOURCES AND INTERNATIONAL MANAGEMENT**

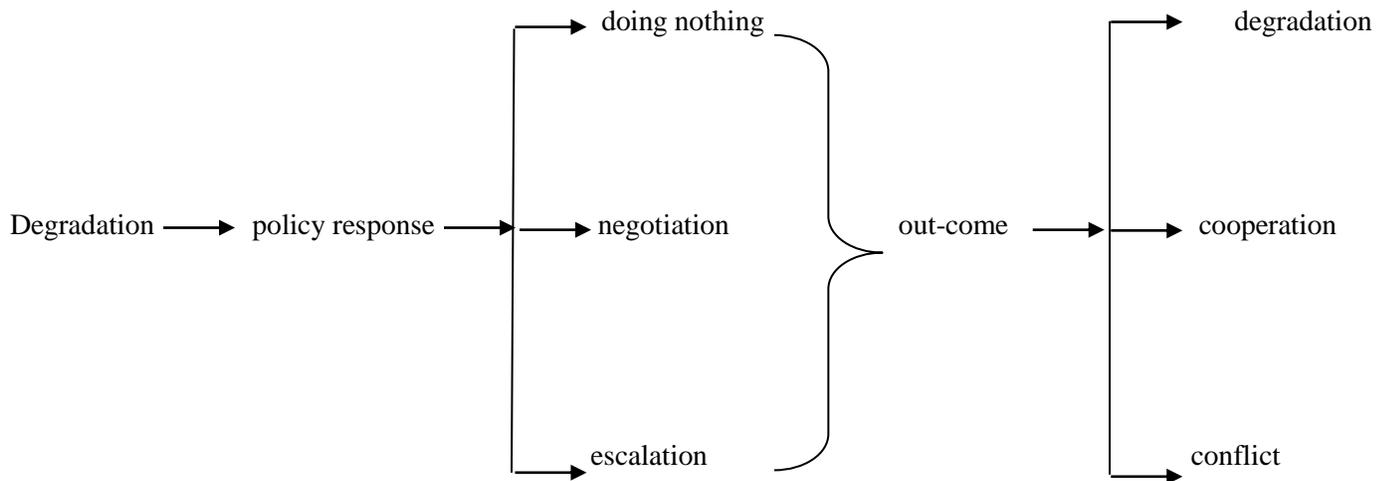
### **3.2.1. Introduction**

Putnam's two-level game theory provides an overarching perspective on international negotiations. However, its ambition is not to be issue-specific but general. Thus the analysis could benefit from adding a framework that focuses on international negotiations on common-pool resources in terms of straddling stocks. I will briefly introduce the theoretic contributions made by Barkin and DeSombre on international fisheries management, which I consider not as an eclectic addition rather a theory complementary to Putnam's in this context.

### **3.2.2. Policy responses to possible degradation of stocks**

Faced with risk of degradation of a vital fish stock, relevant parties are faced with three alternative policy responses: Doing nothing, negotiations, or escalation. The responses may in turn lead to different out-comes, be it degradation, cooperation or conflict.

**Fig. 1. Responses and out-comes to risk of degradation of fish stocks. Based on Barkin 2011**



*Doing nothing* reflects that none of the parties have an interest in ensuring a long term sustainability of the stock in question. Consequently – all things equal – this will in fact lead to degradation of the stock.

The concept of *negotiation* is used in a particularly narrow sense. It refers to “*attempts to negotiate with other states to come to mutually agreed mechanisms for managing the fisheries*”.<sup>17</sup> In other words: In the case of negotiations the group of states in question “*are all motivated by an interest in the effective management of a fishery to create an effective means for doing so*”.<sup>18</sup>

*Escalation*, however, derives from a situation where there is not symmetry in the motivations of the states involved to reach an agreement on sustainable management. Escalation is an attempt “*to create effective management regimes against the opposition of other states*”, and the purpose of the escalation is to encourage or force the latter to negotiate or to change the terms on which they do so. Incentives are the mediators of escalations and may be positive or negative. Positive incentives are any kind of compensations for supporting a management system that they would otherwise not agree to, and may well include side payments or concessions in negotiations on *other* issues. Negative incentives include an array of means like bad publicity, exclusion from markets, trade sanctions, use of force etc.

<sup>17</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 145 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

<sup>18</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 145 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

From these definitions one could ask, when governments choose to do nothing, to negotiate, or to escalate, respectively. The answer is – so Barkin and DeSombre – dependent upon a range of factors, both international and domestic, cf. Putnam. The international aspect refers to the characteristics of the international fishery as based on common-pool resources, whereas the domestic refers to asymmetries in states' time horizon with respect to these resources.

### **3.2.3. Common-pool fish resources and international management**

In 1968 Garrett Hardin published his famous theory about the 'tragedy of the common'.<sup>19</sup> The common-pool resource has the characteristics that it is accessible to anyone. Hardin's main point is that each man is locked into a system that compels him to increase his herd without limit in a world that is limited. By adopting this behaviour, ruin is the ending destination as each man is pursuing his own interests in a society that believes in the freedom of the commons. Hardin even states that freedom of the common brings ruin to all. Hardin's theoretical approach is relevant with as the mackerel is exploited as a common pool-resource. The mackerel is found in four coastal states' EEZs and all of them wants to benefit from the pool. If a sustainable fishery is not institutionalised the mackerel stock will be depleted, and this will have serious consequences both socio-economically and for the consumers.

According to Barkin the economic effect of the common-pool characteristics is that it creates incentives to over-fish.<sup>20</sup> As the fishes are not a private property – at least not until they harvested – the fishers cannot be sure that the fishes will be there tomorrow. This implies that even if it from an objective, biological point of view would be wise to limit the effort, for example by dragging it on, there is no incentive for such restraint as you run the risk that it is a sacrifice. With high-level technology and fishing with no restraints, the most likely outcome is that the stock(s) in question will be depleted, i.e. degraded to such a biological level that it is not able to renew it itself at an economically sustainable level.

In the case of high-seas or straddling stock moving into two or more EEZs, international cooperation is demanded in order manage the stock and maintain it at an economically sustainable level.

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<sup>19</sup> Garrett Hardin: The Tragedy of the Commons *in* Science no. 162, 1968 pp. 1243-1248

<sup>20</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 146-1148 in Dinar, Shlomi (ed.): Global Environmental Accord: Strategies for Sustainability and Institutional Innovation

However, any state that is part of such international management cooperation is to a certain extent inheriting the situation of the individual fishing agents. Partly it is aware of the necessity of restraints in order to ensure long-term sustainability; on the other hand, within the cooperation it has to work in favour of the interests of its own economic agents.

The extent to which a particular state *“is willing to forgo a current ability for its nationals to fish a particular stock will be related to the degree to which it is concerned about the short versus the long term”*.<sup>21</sup> In short, a government that cares more about long-term should be more willing to make short-term concessions, and conversely a government that cares more about short-term benefits from the fishing should be less willing to make short-term concessions in favour of establishing a regime that ensures long-term sustainability. To sum up, *“that international fisheries are common pool resources means both that international cooperation is necessary to manage them, and that to the extent that countries have different shadows of the future, they will have different levels of interest in making short-term sacrifices necessary to do so”*.<sup>22</sup> This means that in order to analyse the extent to which involved parties are interested in contributing to a management agreement we have to look at the parties’ shadows of the future.

#### **3.2.4. Time horizon and its determinants**

Sustainable management is not least a matter of time perspective in terms of harvesting the resource in question. To introduce it in extremes, a government may have a short or a long shadow of the future. A government with a long shadow of the future is willing to make short-term concessions by limiting its fishing effort in order to gain from a management regime that will ensure sustainability in the long-run. Conversely a government with a short shadow of the future will be less willing to make short-term concessions in favour of long-term sustainability as it focuses on the short term benefits.

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<sup>21</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 147 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

<sup>22</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 147 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

According to Barkin, the time horizon of a party is determined of three factors, which are the general level of wealth, the relationship between the fishers and the stock in question, and the socio-political context of the fishery in question.<sup>23</sup>

1. The relative level of wealth. A country that is well off will – other things equal – be more concerned with the long-term relative to the short-term than are poorer countries, i.e. it will have a longer shadow of the future. Also *“richer countries are more able to deal with the short-term cost of co-operation and have a greater economic cushion with which to deal with any economic dislocation caused by the creation of a system of sustainable management”*.<sup>24</sup> Barkin, though, emphasises that this is a general rule that is not without exceptions as some poorer countries focus on long-term sustainability and some richer countries do not.

2. Substitutability. The concept of substitutability refers to the level to which the actors – in this case those with economic interest in the mackerel fishery and thus also in the out-come of the negotiations – are able to substitute the mackerel with other species. The possibility of substitution is related to location and accessibility of other, alternative species, and to the characteristics of the boats, i.e. size, range, and equipment. There is a positive correlation between substitutability and the shadow of the future: The more dependent an actor is upon the resource in question, i.e. the less the substitutability, the longer the shadow of the future and vice versa. Substitutability, and especially significant differences in the relative levels of substitutability, *“generate a certain type of bargaining dynamic”* and are the key predictors of unilateral actions in favour of long-term sustainability.<sup>25</sup> The correlation of this dynamic is illustrated in figure 2 below: In a case with parties who all have a (very) high level of substitutability, the most likely outcome is multilateralism meaning a silent agreement on no agreement; if all parties have a (very) low level of substitutability, the likely outcome will be multilateralism in favour of an agreement. The biggest potential for conflict are situations with significantly asymmetric level of substitutabilities. The bigger the difference in the relative level of substitutability, the more likely the party with low substitutability will act unilaterally in order to encourage or force the other party vis-à-vis parties to enter into an agreement that can ensure long-term sustainability.

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<sup>23</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 148 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

<sup>24</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 148 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011. who refers to Haas, Keohane, and Levy 1993 pg. 404-408

<sup>25</sup> Barkin, J. Samuel and Elizabeth R. DeSombre 2000: Unilateralism and Multilateralism in Global Governance, Vol. 6, No. 3, pg. 342. The concept of 'unilateral action' will be high-lighted below

**Fig. 2. Level of substitutability and likely strategic responses to degradation**

Substitutability		X	
		High	Low
Y	High	Multilateralism	Y's unilateralism
	Low	X's unilateralism	Multilateralism

Based on Barkin, J. Samuel and Elizabeth R. DeSombre 2000: Unilateralism and Multilateralism in *Global Governance*, Vol. 6, No. 3

Indeed, as Barkin and DeSombre note, the substitutability is not either low or high; in the concrete it is somewhere on a continuum ranging from high to low.

3. The socio-political context of the fisheries. This refers to the relation between any specific category of fishing and its degree of cultural embeddedness within a certain community. Especially if a category of fishing has a long tradition, and thus a dependency upon the relevant species, it should be expected to have a long shadow of the future, i.e. interest in managing the stock sustainably. However, in case this implies a reduction in the number of fishers, and in case the community has its identity strongly attached to a living from fishing, a conflict may occur between this identity (in terms of resistance to quit the role as fishers), and sustainable management. This conflict might end up with short-term solutions in terms of non-sustainable quotas or subsidies, in both cases keeping the fishery beyond a limit of what the stock can support.<sup>26</sup>

What are the general implications of the different time horizons or shadows of the future? In a situation with only short-term oriented parties, there will most likely be no agreement to establish a regime that ensures long-term sustainability. Conversely, in a situation with only long-term oriented parties, there might well be disagreements about the terms of such an agreement, but all things equal, this is the most favourable point of departure for negotiations vis-à-vis cooperation. Consequently, the likelihood of escalation and continuing conflict is at the biggest when you have parties with significant relative differences in their shadow of the future.

<sup>26</sup> Barkin, J. Samuel 2011: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 150 in: Shlomi Dinar: Beyond Resource Wars. Scarcity, Environmental Degradation and International Cooperation. MIT Press. 2011.

### **3.2.5. Other power differentials**

In addition to the determinants of the time horizon, Barkin adds two other power differentials that may have an impact as sources when considering escalation.

**Directionality.** In case the resource in question moves within borders of different states in certain, sequential order, the distinction between upstream and downstream is relevant. Such a sequential move implies that a party who is upstream has access earlier to the resource in question than the parties who are downstream, and by this the upstream party is provided with an additional bargaining power. Examples of this could be salmon or the North Atlantic mackerel as we shall see in the empirical chapter.

**Level I's formal autonomy.** State organisations are different, and in a case with a centralised state that state has the formal power to negotiate and make agreements. However, there might be cases where the federal level takes care of the negotiations, but does not have the sovereign power over the issue in question, and thus may have less bargaining power than other parties at the table.

### **3.2.6. The bargaining dynamics and process**

To sum up, the determinants of the shadow of the future, i.e. the general level of wealth in the involved states, the level of substitutability for the economic agents and the socio-political context of the parties' fisheries, as well as eventual upstream/downstream characteristics of the resource and formal political power are all power differentials that contribute to the bargaining dynamics.

If an negotiation does not lead to an agreement or cooperation in Barkin's terminology, the process will continue as moves between the nodes of the triangle negotiation-escalation-conflict. How, what and when is an empirical issue which is dependant upon the parties' concrete moves in the process. The break down can lead to a conflict, then new negotiation and to cooperation. The negotiations can lead to escalation from or more of the parties, the escalation can be taken to a higher level and before leading to negotiations etc.

## CHAPTER 4. EMPIRICAL INTRODUCTION

### 4.1. The mackerel

#### 4.1.1. Basic facts



The North-Atlantic mackerel – in Latin *scomber scombrus* - is a member of a wide-world known family of fish known as *scombridae* in Latin. The *scombridae* family – which is an important ocean food fish related to the tuna – has two main categories, the true mackerel and others. Mackerels are rounded and torpedo-shaped, slender fish, 30 to 56 cm long. The common mackerel (*Scomber Scombrus*) of the Atlantic Ocean averages about 30 cm in length and is blue-green above and silver-white below, with a series of wavy, dark, vertical lines on the upper sides. It has two well-separated dorsal fins and two small keels on either side of the tail base. An Atlantic mackerel weighs from 0.45 to 1.8 kg and has slightly oily flesh. Unlike e.g. the herring, the mackerel has no air bladder, implying that it is difficult to detect mackerel by use of echo-sounding, and this in turns makes it difficult to make precise estimates about the volume of the mackerel stock.<sup>27</sup>

The common mackerel occurs along both coasts of the North Atlantic Ocean, from North Carolina to Labrador and from Spain to Norway. The mackerels congregate in schools and swim actively in the upper 45–55 meters of the water in the warmer months and then descend to as deep as 100 fathoms during the winter. They feed chiefly on shellfish larvae, worms, fish eggs, and small fish, and are themselves eaten by whales, sharks, porpoises, tuna, and sea birds. They spawn during the spring and early summer along coastlines. The female lays from 200,000 to 400,000 eggs. Each egg contains a tiny drop of oil that causes it to float. The eggs hatch in four to six days. Their eggs average 1 mm in diameter, are buoyant, and drift in the uppermost five fathoms of water. The young fish grow rapidly, reaching an average length of 5 cm in two months.

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<sup>27</sup> Belikov et al: Belikov, Sergei V. et al: Migration of mackerel during summer in Norwegian Sea. Working document for the NEAFC Working Group on Mackerel and Blue Whiting. Bergen 25-27 March 1998. page 4

The spawning areas are widely spread, and only the stock in the North Sea is sufficiently distinct to be clearly identified as a separate spawning component. Tagging experiments have demonstrated that after spawning, fish from Southern and Western areas migrate to feed in the Norwegian Sea and the North Sea during the second half of the year. In the fall, the mackerel move out to sea into deeper water. In the North Sea the mackerel mix with the North Sea component. Since it has not been possible to allocate catches to separate stock components, all mackerel in the Northeast Atlantic are considered to comprise a single stock (i.e. the Northeast Atlantic stock). Catches cannot be allocated specifically to spawning area components on biological ground. However, to keep track of the development of spawning biomass in different spawning areas, mackerel in the Northeast Atlantic stock are divided into three area components: the Western Spawning Component (Bay of Biscay, around Ireland and west/northwest of UK), the North Sea Spawning Component, and the Southern Spawning Component (Spanish and Portuguese waters). Inter-annual migration patterns vary and are unpredictable.

#### 4.1.2. ICES

The scientific basis for the allocation of quotas is recommendations made by ICES, the International Council for the Exploration of the Sea. ICES is an intergovernmental institution, established in 1910.<sup>28</sup> All coastal States bordering the North Atlantic and the Baltic Sea are now members of the ICES community, indeed including those relevant for my case: The EU countries Ireland and Scotland, Iceland, Norway and Denmark (representing the Faroe Islands). ICES promotes marine research on oceanography, the marine environment, the marine ecosystem and on living resources in the North Atlantic Ocean.<sup>29</sup> Each member country has two delegates in the council which is ICES's decision and policy-making body. The bureau – one president and five vice-presidents – are elected from the delegates and is ICES' Executive Committee.<sup>30</sup> More than 1600 scientists from 200 institutions around the North Atlantic provide ICES with scientific data on marine ecosystems, including fish stocks. ICES has numerous expert or working groups dealing with specific issues.

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<sup>28</sup> A growing concern in the 19<sup>th</sup> century about the well being of fish stock in the North Sea situation led groups of scientists in neighboring countries to promote and encourage an international scientific marine cooperation. This in turn led to the establishing of ICES in Copenhagen, Denmark on July 22, 1902, by eight founding nations, Denmark, Finland, Germany, The Netherlands, Norway, Sweden, Russia and United Kingdom. Since then, other countries have joined ICES: Belgium (1903), United States (1912), France (1920), Portugal (1920), Poland (1922), Latvia (1923), Estonia (1924), Spain (1924), Ireland (1925), Iceland (1938), Canada (1967), and Lithuania (2006). Italy was a member for two periods, 1927-1931 and 1956-1974.

<sup>29</sup> [www.ices.dk](http://www.ices.dk)

<sup>30</sup> ICES website presents a very clear chart diagram, see <http://www.ices.dk/aboutus/images/structurediagram.htm>

### 4.2.3. The North-Atlantic mackerel stock – assessment and recommendations

ICES has been investigating the mackerel stock in the North Atlantic since 1910 and in 1974 a special department called the Working Group on Mackerel and Horse Mackerel Egg Surveys was established under the ICES. Its main working responsibility is to plan and analyze the ICES triennial mackerel and horse mackerel egg surveys.<sup>31</sup> According to the working group, the spawning stock biomass (SSB) has increased since 2002, and in 2009 ICES classified the stock as having full reproductive capacity.

However, the mackerel stock is at present harvested at increased risk because the total catches probably are exceeding the TAC and the precautionary level. The 2002 year class is the strongest in history, while the subsequent year classes have shown closer to normal variability around the long term average. Scientific analyses in 2008 provided new estimates of several reference points for mackerel, including an increased precautionary approach fishing mortality (F<sub>pa</sub>) from 0.17 to 0.23.

In October 2008 Norway, EU and the Faroe Islands agreed to implement a new long term management plan, which shall limit fishing to an amount consistent with a fishing mortality rate (F) between 0.20 and 0.22, when SSB is above 2,200,000 tons. If SSB is lower than 2,200,000 tons, F should be reduced progressively. ICES concluded that the plan is precautionary under the assumption that the TAC equals the actual, total removals from the stock.

The stock has been measured since 1972. During this period the catches have been assumed to fluctuate between 360.000 and 930.000 tones. The main catches are taken in the North Sea, The Norwegian Sea, west of UK and Ireland, south of Ireland, in the Channel and in the southern area.

In the ICES approach the combined northern Atlantic mackerel is assessed as one stock but compose of three spawning components, the Southern, Western, and Northern, respectively.<sup>32</sup> After spawning in the Southern and Western areas migrate to feed in the North Sea and Norwegian Sea during the second half of the year.<sup>33</sup>

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<sup>31</sup> ICES WGMEGS report 2008 [www.ices.dk](http://www.ices.dk)

<sup>32</sup> ICES Advice 2010, Book 9, page 48

<sup>33</sup> ICES Advice 2009, Book 9, page 4

Based on the scientific reports from the working groups, ICES assesses the stock and gives its advices concerning responsible catches. Below I will summarize ICES' assessments and advices for the recent years.<sup>34</sup>

2010. In its 2009 report, ICES states that the spawning and feeding areas of the mackerel have expanded in the previous years, further west and less north, as it has been fished commercially in areas where it was previously not fished, particularly in the Icelandic EEZ. Together with higher temperature in the western parts, feeding opportunities seemingly affects the distribution. The SSB has increased significantly in the previous years, from a low 1.8 million tons in 2002 to around 2.5 million tons in 2008, which *mutatis mutandis* contributes to the increase of the stock. However, due to the lack of effective international agreements, the catches in 2007 and 2008 "have been considerably in excess of the ICES' advice".<sup>35</sup> This causes concern at ICES. ICES advices that the catches in 2010 should be between 527.000 and 572.000 tons.

2011. ICES repeats that the distribution has changed further to the west and north compares to earlier years. ICES advices the catches for 2011 to between 592.000 and 646.000 tons, stating that this will imply a reduction in catches compare to 2010 of around 30 percent. Again ICES mentions its concern about the stock as it is not likely that the coastal states will reach an agreement. No-agreement, so ICES, will lead to unsustainable fish mortality, despite a significant increase in the SSB, implying harm to the growth of the stock.

2012. ICES states that while close to no catches were reported in Icelandic and Faroese waters prior to 2008, catches from these areas represented 21 percent of the reported catches. Again, the absence of a coastal state agreement "remains a critical concern".<sup>36</sup>

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<sup>34</sup> 2007 refers to the fishing year. The ICES report summarized, containing the recommendations in question, is thus from the previous year, in this case 2006

<sup>35</sup> ICES Advice 2009, Book 9 page 3

<sup>36</sup> ICES Advice 2001, Book 9 page 10

## **4.2. The socio-economic mapping of the mackerel in the North-Atlantic**

### **4.2.1. Scotland**

The fishing industry is of high social, economic and cultural importance in Scotland. Scotland landed 62 percent of the value of the total UK catches in 2002 although it has only 8.6 percent of the UK population<sup>37</sup>. It is relatively remote communities scattered along the western Scottish coastline that have looked to fishing as the main source of employment. Direct employment within the fishing industry (catching, processing and aquaculture) is 19,800 people which is one percent of the Scottish employment, and if indirect aspect is taken into account, the total number people dependent upon the fishing industry is 48.000<sup>38</sup>. This shows that the fishing industry is of high importance for the coastal regions, although it is declining. The number of fishermen employed on Scotland fish vessel in 2011 was 5,005 which is a decrease of 231 (4 percent) compared to last year and also the number of vessels – now 2,096 – above 10 meters is decreasing.<sup>39</sup>

However, the pelagic sector, both fleet and industry – exploiting and processing herring and mackerel – is highly concentrated in the North East of Scotland and in Shetland. The fleet has been significantly modernized and consists of 28 vessels<sup>40</sup>, which is as much as 24 fewer than in 2010; the reason is that the pelagic rights originally belonged to small scale boats. The pelagic fleet generated a gross earning of £164 millions (2011), equal to around 1,5 bill. DK. Compared to 2010 the value increased with 44 percent, stemming from an increase in prices of 33 percent and eight percent in value. The value of the mackerel catches counts for one third of the value of the total Scottish catches.<sup>41</sup>

### **4.2.2. Faroe Islands**

Fishing industry is one of the main sources of income in the Faroe Islands. A large variety of fish stock is utilized in the Faroese EEZ and among the pelagic fishery, the herring, blue whiting and the mackerel are the most important. In terms of GDP the fishing and fishery related production counts for more than 35 percent (2010). Fishing counts for 10.6 percent, processing for 15.6 percent which

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<sup>37</sup> Inquiry into the future of the Scottish Fishing Industry March 2004 pg 5

<sup>38</sup> Inquiry into the future of the Scottish Fishing Industry March 2004 pg 5

<sup>39</sup> <http://www.deadlinenews.co.uk/2012/04/17/value-of-scottish-catch-at-10-year-high/>

<sup>40</sup> Website of Scottish Pelagic Sustainability Group, <http://www.scottishpelagicsg.org/boats.html>

<sup>41</sup> <http://www.deadlinenews.co.uk/2012/04/17/value-of-scottish-catch-at-10-year-high/>

is mostly fish processing, and aquaculture 6.5 percent. The around 1650 fishermen<sup>42</sup> counts for 7,1 percent of the total employment (2011); 5,1 percent (approximately 1200) is employed in fish processing, and 650 in the aquaculture (2,8 percent). The fish and fishery related sector represents 18 percent of the total sum of wages, fishery 11.4 percent<sup>43</sup>, fish processing 3.8 percent and aquaculture 2.8 respectively. Fish and fish products are totally dominating the export as it represents 85.1 percent of the total export (2011), and even 96.5 percent when extraordinary export (vessels, airplanes etc.) are left out.

The beginning of the ocean-going Faroese pelagic fishery dates back to the beginning of the previous century when Faroese vessels were involved in sporadic herring fishery in Icelandic waters and again in the 1920'ies, and in 1938 a herring-meal factory was established. The fishery was not profitable<sup>44</sup>, whereas it was profitable during the war-years.<sup>45</sup> The 1950'ies formed the basis for a significant pelagic sector in the Faroe Islands when big volumes of Norwegian spring-spawning herring were exploited north of the islands. In the beginning the fishery was practised with re-rigged sloops, but during the 1960'ies investments were made in modern pelagic vessels, equipped with advanced tracking instruments and catching gear. From the mid-sixties the herring fishery expands to the North Sea.<sup>46</sup> Since the EEZ's were extended to 200 nautical miles in the late 1970'ies the fishing rights of pelagic fleet has been operating all over the North Atlantic, fishing for capelin (Icelandic waters), herring (Norwegian waters), blue whiting (Faroese and British waters), and mackerel (Faroese and Norwegian waters). The access to fish resources in foreign waters has been based on bi- or multi-lateral agreements, in many cases involving exchange of mutual fishing-rights; also pelagic resources in Faroese waters have been used as exchange for access to Faroese cod-fishing in Russian waters.<sup>47</sup>

Mackerel and mackerel related products count for 13-15 percent of the total export value. The Faroese exclusively pelagic fleet consists of seven highly modern purse seiners, owned by three different companies, one of them with Icelandic and one with Norwegian investors as significant minority-owners. According to a Nordic study, the Faroese vessels are the biggest and most expensive in the

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<sup>42</sup> This does not include those employed on non-Faroese fishing vessels, predominantly Norwegian

<sup>43</sup> See previous note

<sup>44</sup> Patursson, Erlendur: Fiskiveidi – Fiskimenn. Føroya Fiskimannafelag. 1961 pg 187-191 and Betænkning om Færøernes Erhvervsforhold. 1939 page 33-34 and 100-101

<sup>45</sup> Patursson, Erlendur: Fiskivinna og fiskivinnumál 1940-1970. 1. bind. Føroya Fiskimannafelag. 1979. pg 290

<sup>46</sup> Trap, J.P. (1968) page 70-71 and Patursson, Erlendur: Fiskivinna og fiskivinnumál 1940-1970. 1. bind. Føroya Fiskimannafelag. 1979. pg 290-299

<sup>47</sup> See the website of the Faroese Ministry of Fisheries, <http://www.fisk.fo/Default.aspx?ID=5490>

North-East Atlantic pelagic fleet.<sup>48</sup> The number of crew members on each vessel is around 10, each earning around 1.5 mill. DKK pr year.<sup>49</sup>

There are three factories in the Faroe Islands that base their business on pelagic resources, Havsbrún, Kollafjord Pelagic and Delta-Vardin. The founding of the Fuglafjordur based Havsbrún dates back to 1966, the emerging years of modern pelagic fishery, and has also specialized in salmon feed. The number of employees is close to 100. Kollafjord Pelagic is own by a Dutch-Faroese company, and managed by Faroese with connections to one of the pelagic vessel companies (JFK group). The Gøta based Vardin – the biggest of the three vessel-owners – and the locally based fishery and fish processing company Delta has recently built a pelagic factory in Tvøroyri, which is starting its operations in August 2012.

In recent years the Minister of Fisheries has had the legal power to distribute the Faroese quota to Faroese vessels on a year by year basis. In 2011 – with a unilaterally fixed quota to be utilized in Faroese EEZ – the quota was allocated in three different ways. The purse seiners got individual quotas exclusively as their own and landed 60,586 tons (equal to 50 of the catches); another portion was auctioned, and the 19,624 tons of these catches represented 16.1 percent of the catches, and most of it (landed 13,000 tons) was bought for a non-Faroese vessel by a Faroese company fishing in Pacific Ocean. The last part was allocated for so called ‘olympic exploitation’, i.e. accessible for every vessel holding a fishing license (41,837 tons or 34.3 percent of the catches).<sup>50</sup>

In 2012 the unilaterally quota of 148,000 tons has been allocated with 55,000 tons to the purse seiners, and the rest to a range of different vessel types (see fig. 3 page 43).

### **4.2.3 Norway**

In terms of export earning, the fishing industry is the second most important sector in Norway. Fisheries and aquaculture are the most important occupations of most northern coastal community. There are approximately 17,000 fishermen in Norway, of which almost half live in the three northernmost counties. It is said that 30,000 people from the northern counties worked in the fishing

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<sup>48</sup> Nielsen, Max et al: Samfundsøkonomisk afkast af pelagiske fiskerier i nordøstatlanten (2010) page 27-28

<sup>49</sup> Statistics from Føroya Fiskimannafelag (Fishermens’ trade union)

<sup>50</sup> Fiskimálaráðid (Ministry of Fisheries) and Fiskiveidieftirlitid (the public Fisheries Control Agency)

industry with a 460,000 population in northern Norway<sup>51</sup>. Thus fishery, fish processing and aquaculture is crucial for employment and income in these localities. There are 96 communities that are considered to be fishing communities, of these 42 in three northern regions and 31 of these may be defined fisheries-dependent as 5 percent of the inhabitants are employed within the fishing industry<sup>52</sup>.

The pelagic fish sector has grown and became an important fishing sector in the 1980's; 15 percent of the Norwegian quota is allocated to small-scale boats, the rest to highly modern purse seiners, most of them located in the South-Western area. The export value of the pelagic products has increased significantly, from approximately one billion NOK export value in 1990 to 7,3 billion NOK in 2008,<sup>53</sup> mainly Norwegian herring and mackerel, and the export is spread over more than hundred markets around the world. There has been a 2 percent increase within pelagic product from 2009 to 2010 and the stock has a 5 percent increase in value on the Norwegian market. Mackerel products are the pelagic sort that has the biggest growth during the last years in Norway.

#### **4.2.4 Iceland**

In 2011 fishing contributed with 7.1 percent to the Icelandic GDP, fishprocessing with 3.7 and aquaculture 0.1. Icelandic fishing vessels employ 4.600 fishermen which is 2.7 percent of the employed and the fishing industry 4.300 (2.5 percent). Fish and fish products count for 40.6 percent of the Icelandic export value.<sup>54</sup>

The Icelandic pelagic sector – both vessels and processing plants – has expanded and modernized heavily in recent years. The pelagic sector has over time rationalised from a high number of small vessels and fishmeal factories into a much lower number of larger, more efficient vessels, while at the same time the number of fishmeal processing plants was consolidated into larger and more efficient plants. Traditionally most of the pelagic catches, except for herring, has been processed for fishmeal for animal consumption, but gradually an ever greater fraction of the Icelandic pelagic lan-

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<sup>51</sup> International Arctic Science Committee: Fisheries and Aquaculture the North East Atlantic (Barents and Norwegian Seas) in: The Encyclopedia of the Earth. February 9, 2010

<sup>52</sup> International Arctic Science Committee: Fisheries and Aquaculture the North East Atlantic (Barents and Norwegian Seas) in: The Encyclopedia of the Earth. February 9, 2010

<sup>53</sup> Norsk Pelagisk fisk – markedplan 2010-2012 pg3

<sup>54</sup> All numbers from Hagstofa Íslands (Iceland's Statistical Bureau), [www.statice.is](http://www.statice.is) which does not have up-dated statistics for total wages on occupational groups

dings are used for human consumption through filleting and round freezing. There are several vessels freezing at sea now and freezing and fishmeal factories have also merged. In this way, the offal from filleting and processing for human consumption could be utilized without unnecessary transport.<sup>55</sup>

### **4.3. The legal and institutional framework**

#### **4.3.1. The Law of the Sea**

In the context of our analysis, UNCLOS distinguishes between two areas of jurisdiction as far as the oceans are concerned: The exclusive economic zone and the high sea. In the EEZ – which is 200 nautical mile – the coastal state has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living” (article 55). The high sea is waters that belong to no national state but to the international community as such. Both are relevant to us, as straddling stocks migrate between EEZs and/or between EEZ(s) and the high sea.

UNCLOS has two main, complementary principles concerning living resources in its EEZ. Article 62 provides that the coastal state “promote the objective of optimum utilization of the living resources in the exclusive economic zone”. This has to be done without prejudice to article 61 which states that the coastal state is responsible for the conservation of the stocks in its EEZ and keeping them at a level that provides maximum sustainable yields.

The sustainability of straddling stocks – i.e. stocks that migrate between two or more EEZs or between one or more EEZs and the high sea – is, however, a matter of joint, regional responsibility. In these cases the relevant states shall “either directly or through appropriate sub-regional or regional organizations [...] agree upon measures necessary to coordinate and ensure the conservation and development of such stocks” (UNCLOS art. 63). The coastal states in question are all members of the regional organization NEAFC, but in the case of the mackerel they negotiate directly in a multicultural forum.

Thus the high sea is an international common-pool in any respect. As far as straddling stocks is concerned all the EEZs (and high sea areas) within which the stock in question migrates are

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<sup>55</sup> Ingvason, Gunnthór (2010), presentation at the conference ‘The Pelagic Complex’ in The Nordic House, Tórshavn, Faroe Islands, Sept. 7, 2010.

included into the common. However, if there is no regional agreement, the common-pool is non-existing as a state can not utilize the resources in another state's EEZ without the latter's accept.

However, non-agreement does not necessarily mean any fishing. As we have seen, this situation has witnessed that involved parties allocate themselves quotas that they consider fair to be harvested within their own EEZ only. The problem is, indeed, that on aggregate the quotas of the individual states are not sustainable. Typically – due to the conflict on allocation – the level of exploitation will be way beyond the recommended TAC.

The problem we are facing is that while any coastal state is obliged to manage the stocks inside its EEZ, including straddling stocks, sustainable, amongst other using the precautionary principle, the coastal state management duties are exempted from the provisions of UNCLOS dealing with compulsory settlements of disputes.<sup>56</sup>

#### **4.3.2. NEAFC**

The NEAFC is one of the oldest regional organizations for the regulation of fisheries. It dates back to the 1970's where the main purpose of the commission was the fisheries jurisdiction of coastal state parties within 200 nautical miles<sup>57</sup>. Since then the commission went through some changes, in the 1980's, the Fisheries Commission became operational but did not function properly until the mid 1990's. In the 1990's, several parties made the agreement to regulate the fisheries for several straddling stocks in the high seas part of the Convention Area<sup>58</sup>.

The commission consists of five states: EU, Norway, Iceland, Russia and Denmark in respect of Faroe Islands and Greenland. Membership is primarily to those countries that are signatories, i.e. countries who are contracting parties. However any state may attain to the NEAFC Convention and become a member, provided that its application for accession is approved by three-fourths of the signatory countries.

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<sup>56</sup> Churchill, R.R. and A.V. Lowe: *The Law of the Sea*. Manchester University Press. 1999 pg 289

<sup>57</sup> Henriksen, Tore, Geir Grønneland og Are Sydnes: *Law and Politics in Ocean Governance. The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*. Martinus Nijhoff Publishers. 2006. pg 98

<sup>58</sup> Henriksen, Tore, Geir Grønneland og Are Sydnes: *Law and Politics in Ocean Governance. The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*. Martinus Nijhoff Publishers. 2006. pg 98

Straddling stocks – and indeed also the mackerel – is among one of the main issues of the NEAFC, . The NEAFC only regulates fisheries in international waters and not on the coastal line of member country. Each year, the NEAFC comes together to allocate mackerel stock in cooperation with the International Council for the Exploitation of Sea (ICES) to maintain sustainable fishery. Countries fishing the mackerel have their own quota according to how and where the mackerel is spawning and migrating.

#### **4.4. Brief outline of the controversy**

The mackerel dispute has created controversies between Norway and EU (Scotland and Ireland) on one side and Faroe Islands and Iceland on the other. The controversies stems from the fact that the Faroe Islands and Iceland have amountd their own quotas of mackerel for three years in a row now. Norway and EU countries label the fishing unsustainable.

The controversy started in 2009 with Iceland acknowledged as a new-comer as a coastal state fishing the mackerel, but they already started to fish the mackerel in 2008, a volume of 110,000 tons<sup>59</sup>. With Iceland setting its own quota, the EU Commission expressed their concern and disappointment and accused Iceland of “*completely undermining the successful multilateral management of the stock of the EC, Norway, and the Faroe Islands since 1999*”.<sup>60</sup> In 2009 the NEAFC set its mackerel quota at 605,000 tons which was divided between the EU, Norway and the Faroe Islands. Iceland fixed its own quota at 112,000 tons in 2009. The EC Fisheries Commissioner in 2009 Joe Borg, expressed his concern about Iceland allocating its own quota which has “no scientific or historical jurisdiction” and is compromising the NEAFC effort to maintain and protect sustainable catch.

In 2009 the Ministry of Fishing and Agriculture in Iceland responded to the accusation by saying that Iceland is dependent upon fishery, and thus it is of high priority, and Iceland has accordingly been an active advocate of sustainability. The ministry argued that mackerel has consistently been in the Icelandic EEZ and in recent years the mackerel has increased in volume within the Icelandic national jurisdiction.<sup>61</sup> For a number of years, Iceland has requested participation in the NEAFC to

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<sup>59</sup> <http://www.seafoodsource.com/newsarticledetail.aspx?id=3109>

<sup>60</sup> <http://www.seafoodsource.com/newsarticledetail.aspx?id=3109>

<sup>61</sup> <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9633>

allocate their TAC without any success. Iceland argued that it was shunned out from the mackerel negotiations by the coastal states.

In 2010 attempts to resolve the controversy over mackerel quotas in Faroese and Icelandic waters failed. Both the Faroe Islands and Iceland fixed their own quota without coming to an agreement with Norway and the EU. The main argument of the Faroe Islands and Iceland was that the migration pattern of the mackerel has changed and proved that the mackerel has moved more to the north-western areas<sup>62</sup>. The Faroe Islands fixed their own quota to 85.000 tons which is about 15 percent of the TAC recommendation made by ICES. On the other hand, Iceland set their quota to 130.000 tons, which is about 23 percent of the TAC recommendations from the ICES<sup>63</sup>. The Faroese and Icelandic quota is considered to be unsustainable by ICES, Norway and the EU countries.

The situation gave concern to the EU (Scotland/Ireland) and Norwegian fishermen's well-being and economy. The president of the Scottish Pelagic Fishermens' Association, Ian Gatt, told BBC News that the situation is alarming and that he was disappointed by the lack of progress but not surprised: *"What we've been told is that there's been no movement from by any side"*.<sup>64</sup> The stock has been at the centre of dispute for four years in a row now, and this lead to Scottish fishermen taking action in 2011 by blocking the harbor of Peterhead in order to prevent the Faroese purse seiner "Jupiter" to land its load.<sup>65</sup> Two planes were even based at Inverness airport to regularly patrol the median line to check if any Faroese vessels were crossing into Scottish waters. *"We're not going to stand by and just let them get up to what they want to get up to, we're going to make sure that they don't come over that line into Scottish waters"*, Scottish Fishery Secretary Richard Lochhead says on BBC News on the 28<sup>th</sup> of September 2011.

Scottish fishermen as well as the fishermen's association demanded the EU to sanction the Faroe Islands and Iceland for not fishing the stock sustainably as stipulated in UNCLOS and the straddling stock agreement.<sup>66</sup> In September 2010, Scottish leaders within fishing business and fishermen welcome EU's intention of taking a 'tough approach' over the mackerel dispute with the Faroe Islands and Iceland. *"Europe sent out a powerful message to Iceland and the Faroe Islands that their irresponsible decision to set massive unilateral mackerel quotas out with international agreements will*

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<sup>62</sup> Press release from the Faroese Ministry of Fisheries about the mackerel August 2010

<sup>63</sup> ICES Advice 2010, book 9

<sup>64</sup> <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-11531603>

<sup>65</sup> <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-15081670>

<sup>66</sup> European commission, Brussels, 14.12.2011 SEC(2011)1576 final pg 7

*not be tolerated,*” said Richard Lochhead Scottish Fishert Secretary with BBC News on the 27th September 2010. To Scottish fishermen’s disappointment the threat made by the EU against Iceland and Faroe Islands was never carried out in practical terms.

In 2012 as well there has been no agreement on managing the mackerel stock. The Faroe Islands and Iceland have fixed their own quota again this year. The Fishing minister of the Faroe Islands Jacob Vestergaard announced a total catch limit for mackerel in the Faroese water in 2012 to be 148,375 tons.<sup>67</sup> He stated that the limit is slightly lower this year in consideration of ICES recommendation of sustainable catch. The decision to allocate own catch was made after the failure of the coastal state to come to an agreement concerning the stock. *“Without an agreed measure between the coastal states which exploit this shared resource in the North Atlantic, it is clear that the Faroe Islands have both a right and the duty to set the catch limit for mackerel in waters under the Faroese jurisdiction 2012”*, says the Faroese minister of fisheries Jacob Vestergaard.

The minister also expressed his disappointment that the four coastal countries did not reach an agreement of allocation. He also noted his concern that Norway and EU still seem to unwilling to acknowledge the changes of the mackerel distribution, the legitimate interests in and the national dependency of the Faroe Islands upon the mackerel stock. *“From the Faroese perspective the proposals for sharing of the stock put on the table by EU and Norway during negotiations have been far from equitable”*,<sup>68</sup> Mr Vestergaard said.

The Faroese government’s chief negotiator Andras Kristiansen blames the EU and Norway, saying that their fleets have been too greedy in setting a quota which is 95 percent of the TAC recommended by ICES. Consequently, Norway and EU have to share the quota more equitably with the Faroese and Icelandic fleets<sup>69</sup> *“The Scottish vessels should come along and put a lot more effort into getting a solution – if they can’t uphold their certification,<sup>70</sup> I can’t comment on that; that’s not our business,*” said the Chief negotiator Andras Kristiansen.

The Scottish delegation on the other side blames the Faroe Islands and Iceland for not reaching an agreement again this year. Ian Gatt, chief executive for Scottish Pelagic fishermen association, said

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<sup>67</sup> <http://www.worldfishing.net/news101/faroese-mackerel-catch-limit-set>

<sup>68</sup> <http://www.worldfishing.net/news101/faroese-mackerel-catch-limit-set>

<sup>69</sup> <http://www.worldfishing.net/news101/faroese-mackerel-catch-limit-set>

<sup>70</sup> ‘their certification’ refers to the organization MSC – Marine Stewardship Council – that works in favor of sustainable fisheries, primarily by certifying fish products as deriving from sustainable fishery. According to MSC, a stock is sustainably exploited or not. The Scots’ opinion is that the Faroe Islands and Iceland are responsible for the non-sustainable catch of mackerel, but nevertheless it implies that no North Atlantic mackerel gets the certification from MSC

that the negotiations on February 16, 2012, which took place in Iceland, was like a “wild goose chase” where neither the Faroe Islands nor Iceland were willing to come to an agreement<sup>71</sup>. He said “*We condemn Iceland for inviting coastal states to Reykjavik for further talks when they had no intention of compromising or tabling a realistic solution to this mackerel catching dispute ... We should also ask the question why the Faroe Islands turn up to these talks when they contribute nothing to the debate, remain silent and are clearly intent of hammering the mackerel stock again this year*”. Other arguments were raised against the Faroe Islands trawlers’ capacity to fish the amounting quotas. During an interview, Richard Lochhead, the Scottish Fisheries secretary said that “*The Faroe Islands don’t even have the capacity to catch so many mackerel; foreign vessels are invited to plunder the stock on their behalf*”.<sup>72</sup>

On the 28<sup>th</sup> and 29<sup>th</sup> of November 2011 the Faroe Islands and Russia agreed upon an international agreement on exchanges of fishing rights. According to the agreement the volume for the Russian vessels was 63,000 tons of fish, of which 13,000 was of the mackerel stock.<sup>73</sup> The Faroe Islands obtained 19,106 tons quota volume from Russia in exchange of which 15,206 is cod, 2,000 tons of haddock, 1,000 tons of shrimps and 900 tons of flatfish. In other words: before the last negotiations between the Coastal states which were held in Reykjavík in February 2012, the Faroe Islands had already disposed of a share from a yet-unknown volume.

Around 90 percent of Norway’s fishery is conducted by stocks shared with other states.<sup>74</sup> Most of the Norwegian fish stocks quotas levels and management are therefore set in cooperation with other countries. For this reason sustainable fishing is of high importance for Norwegian fishermen. In August 2011, Norway formally banned all landings of mackerel and mackerel products from Iceland and the Faroe Island in protest of the two countries behavior concerning the mackerel quota.<sup>75</sup> In a joint statement the EU Fisheries Commissioner Dalmanaki and the Norwegian Minister of Fisheries Lisbeth Ber-Hansen stated that they are concerned with the ‘irresponsible’ acting of Iceland and Faroe Islands. The ministers agree that sanctions must be implemented against the two countries: “*The European Union and Norway are examining all possible options for stopping this damaging exploitation – we intend to coordinate our action*”.

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<sup>71</sup> SPFA Scottish Pelagic Fishermen Association News and Views

<sup>72</sup> <http://www.guardian.co.uk/environment/2012/mar/25/mackerel-fishing-curbs-imposed>

<sup>73</sup> Sosialurin(Faroese Newspaper) 11th December 2011

<sup>74</sup> [http://www.regjeringen.no/upload/FKD/Brosjyrer\\_percent20og\\_percent20veiledninger/folder.pdf](http://www.regjeringen.no/upload/FKD/Brosjyrer_percent20og_percent20veiledninger/folder.pdf) pg 9

<sup>75</sup> [http://www.fishupdate.com/news/fullstory.php/aid/15873/Norway\\_brings\\_down\\_mackerel\\_curtain\\_on\\_Iceland\\_and\\_Faroe\\_Islands.html](http://www.fishupdate.com/news/fullstory.php/aid/15873/Norway_brings_down_mackerel_curtain_on_Iceland_and_Faroe_Islands.html)

Clearly this situation has developed into an asymmetric relation between the Coastal States with a EU and Norway alliance on one side, and the Faroe Islands and Iceland on the other side. The EU (Scotland/Ireland) and Norway have requested once again this year sanctions against the Faroe Islands and Iceland for not managing the aforementioned mackerel stock properly. Since then several meetings have been taking place to explore different options, and finally it was agreed to that the commission should prepare a proposal for a legal instrument to prohibit – in legal and effective manners – the imports from countries that are non-cooperative.<sup>76</sup> The legal instrument that was intended by the most radical critics was a general warrant to implement measures towards non-cooperative countries, not only a ban against landing of Faroese mackerel in Norwegian and EU ports, as well as import of Faroese mackerel in Norway and EU, which is already implemented, but also the possibility of banning Icelandic and Faroese import in general. If these restrictions come into being, it will have huge economic impact upon the economic situation in the Faroe Islands as most of the Faroese fish export goes to EU. The legal measures that actually will be passed in the EU system will however only be directed towards species that by EU are considered to be unsustainably harvested; the reason for this limitation is likely the concern of breaking WTO rules.

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<sup>76</sup> EU Commission. Commission Staff Working Paper: Commission Proposal for a Regulation of the European Parliament and of the Council on certain measures directed to non-collaborating countries for the purpose of the conservation of fish stocks. 14. Dec. 2011 pg 4

# CHAPTER 5. ANALYSIS OF THE CONFLICT

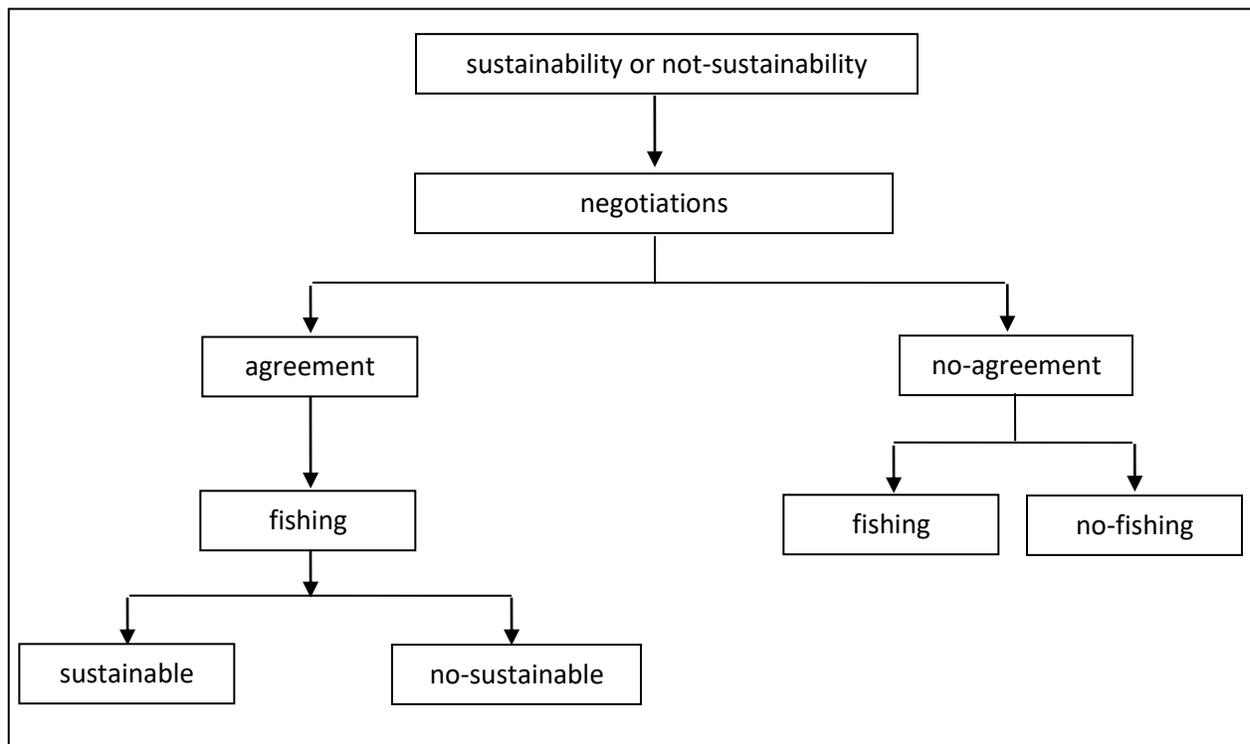
## 5.1. Introduction

Although international politics in most peoples' mind may be associated with so called 'high politics' (stability and security), most of it is in fact dealing with 'low politics', that is cultural, social, and economic issues. Indeed, economic issues may have an impact on the welfare for the parties involved, and negotiations about fishing rights is a case in point. As far as the North Atlantic mackerel is concerned, the quotas are of big economic importance, both for the business entities and for the welfare in the communities involved in the mackerel fishing, in our analysis the Faroe Islands and EU/Scotland, although in different ways.

Thus they should both have an interest in setting up robust regimes in order to ensure the long-term sustainability of the mackerel stock. For a fourth year in a row now – while ICES is ringing the alarm bells, pointing to the risk of a collapse of the stock in 2014 – the parties have not managed to agree. The main question of this project is why the parties were not able to reach an agreement.

Analytically the process of negotiations can be illustrated in a route diagram as in figure 1 below.

**Diagram 1. Pathways of negotiation processes**



All parties involved are legally bound to international law in terms of the provisions in UNCLOS, and thus the objectives of the negotiations should be an out-come that ensures a sustainable management of the North-Atlantic mackerel. In case the alternatives agreement/no-agreement leads to agreement, it – we suppose with reference to the parties’ acceptance of the recommended TAC – leads to sustainability.<sup>77</sup> However, a non-agreement will not logically lead to not fishing, and this implies that a non-agreement – depending on the price – is an alternative to consider compared to what is considered a non-favourable agreement.

My attempt to get to an answer includes two analytical aspects. First I will contextualise the conflict in terms of Barkin’s concepts, focusing on the power differentials of the respective parties. The aim of this part of the analysis is *to expose the contours of structural leverages that are available to the parties*. Secondly, and given the structural analysis, I will analyse the negotiations, escalation, and conflict in terms of Putnam’s concepts. The aim of this part of the analysis is *to understand the parties’ positioning – in actions and rhetoric – in the two-level game of international bargaining*.

## **5.2. Negotiations with not-overlapping win-sets**

Compared to the years 1999-2008, there have been two changes with regard to the point of departure for the negotiations on allocating the TAC into national quotas. Partly, the number of coastal states increased from three to four when Iceland was recognised as a coastal state in relation to the North Atlantic mackerel; and partly the migration pattern of the mackerel has changed, and all parties have recognised that this fact implies a bigger share to the Faroe Islands than was previously the case.

But how much should Norway and EU-Scotland surrender in favour of the North-Western parties? At the final meeting between the parties in Iceland in February 2012, Norway and EU were willing to let the Faroe Islands have 7.5 percent of the TAC compared to 5 percent in previous agreements. On the other hand, the Faroe Islands demanded 15 percent, and the parties faced a situation with not over-lapping win-sets. By definition ‘negotiation’ – so Barkin – includes a game where all parties

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<sup>77</sup> The actual fishing may turn it into non-sustainability because of discharge, not-reported landings etc.

are mutually motivated to agree upon a regime that ensures sustainability, so in principle further negotiations – in an attempt to adjust the claims in order to make the win-sets to over-lap – were an option.

However, EU-Scotland questioned the Faroese willingness to reach an agreement, meaning that the motivations of the parties were in fact not mutual. According to Ian Gatt, EU and Norway had made their efforts to create over-lapping win-sets: *“EU and Norway have compromised a long way from the original positions but Iceland and Faroe have behaved terribly during the negotiations and have not moved at all from starting positions”*.<sup>78</sup> The opinion was that the Faroe Islands attended the negotiations without any intentions to reach an agreement and had their arms folded during the meeting, waiting for it to be over. The Faroe Islands accused the counter parts to act in a patronising way as if they were the owners of the North Atlantic mackerel: *“It is not EU and Norway that are entitled to allocate something of theirs to the two other parties in the negotiations, as they ‘own’ nothing or do not have in advance a ‘self-evident right’ to a certain share before other parties”*, says Faroese chief negotiator Andras Kristiansen,<sup>79</sup> and the representative for the Icelandic pelagic fleet said, that EU and Norway had to come to their senses if an agreement was to be reached.<sup>80</sup>

### 5.3. Considerations on concessions

By nature, the process of concrete negotiations is difficult to analyse. Negotiations begin to take place in the agenda setting phase when the parties involved formulate their matter of interests and preferred outcome. The parties prepare their claims, and their minimum and maximum win-sets are partly based on criteria that the parties agree as relevant, but partly on their judgement about the counter parties’ strategies. As EU and Norway have acknowledged a bigger zonal attachment in Icelandic and Faroese EEZ, it is clear that their share of the TAC will be reduced. However, how much should they give in? On one side they have to take into account the scientific facts concerning the mackerel (the distribution of zonal attachment), in so far the parties have agreed to this as allocation criterion; at a point this fixes the minimum that the parties have to give in. However, the economic interests in Level II will push for a win-set that tries to minimise the reduction, and to this end

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<sup>78</sup> Personal interview

<sup>79</sup> Personal interview

<sup>80</sup> Dagur & Vika [news program in the Faroese television] on February 17, 2012

the Norwegians and the Scots may argue in favour of interpretations of the scientific facts that may support a win-set that legitimises their position.

However, the parties' preparations do not take place in a political vacuum. The win-set that a party is preparing has to take into account the interests of Level II, i.e. first and foremost those who have economic interest in the mackerel. As far as EU-Scotland is concerned, the pelagic sector contributes significantly to the creation of income in Scotland, not only the landings, but also the processing is important for employment, especially in certain local communities. As it is a homogeneous conflict, i.e. more is better, the fleet and the processing plants have shared interest in upholding a quota that is as big as possible without degrading the stock. As level II fractions the processing industry and the fleet have the same preferences and form a coalition with common interest.

The Scottish pelagic fleet – which is new, highly modernised and constructed to exploit the North-Atlantic pelagic resources – is highly dependent upon the mackerel fisheries, as 90 percent of its catches is mackerel. Faced with the certainty, that the EU-Scottish share will be reduced, the Scottish pelagic fleet has to consider how much decrease they are able to cope with. With the profitability as the point of departure they have to consider partly the space for rationalisations of work processes on board, new technology etc. that may reduce the costs or add to the value, but also consider alternatives to the mackerel fishing which is a matter of substitutability. According to Ian Gatt, there are no alternatives in near-by waters as *“all the other pelagic species are managed by TAC's and are fully allocated at either Coastal State level for straddling stocks and at Member State level for stocks wholly within EU jurisdiction”*.<sup>81</sup> Distant-waters opportunities are also difficult to spot. Ian Gatt refers to one Scottish pelagic vessel which has operated in Morocco, *“but as there is no agreement with EU-Morocco this year [so] the boat is tied up in Scotland. It seems there are problems with a lot of the African FPA's and the South Pacific fisheries have been over-exploited so it's difficult to identify where the boats could deploy”*.<sup>82</sup>

From this we can repeat the question: Where is the bargaining limit for EU-Scotland? According to Ian Gatt, the answer is that *“if it's more than say 10 percent it would probably mean further rationalisation [i.e. reduction in numbers] of the fleet ... Since we basically operate on a quasi ITQ basis the vessels with the smaller mackerel entitlements may be squeezed out and would end up selling*

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<sup>81</sup> Interview answer on e-mail June 25, 2012

<sup>82</sup> Interview answer on e-mail June 25, 2012

their entitlement to some of the remaining boats”,<sup>83</sup> adding that “obviously this will have an effect on jobs in the local communities”; this latter statement confirms a coalition between the fleet and the processing plants based on shared interest within the Scottish Level II. As far as the whole Scottish economy is concerned, Scotland could easily bear the short-term costs of a reduction in the quota, but one have to bear in mind that as the sector is strongly embedded in certain communities, these communities would be disproportionately affected from economic dislocation.

#### 5.4. Hypothetical calculations on the concession

If we rely on this answer<sup>84</sup> – that 10 percent reduction is the limit that will provoke (considerations) on reduction of the Scottish pelagic fleet – what does this mean to the win-set in the bargaining context? In the agreement from 1999 (see table below, period I) – which has been unchanged until 2008 included – Iceland was not a party, the Faroe Islands had 5 percent, Norway 35 percent and EU 60 percent; from the EU share Scotland had 52 percent or 31.2 percent of the total quota. In case the Faroe Islands would accept 7.5 percent - which they have in fact rejected – and Iceland 3.5 percent (which is not realistic) the reduction of the (Scottish) share would be 6.3 percent, see period II in the table. If these numbers are increased to 5 percent (Iceland) and 10 percent (Faroe Islands), i.e. in total 15 percent, the reduction of the (Scottish) quota is 10.5 percent or at the limit mentioned by Ian Gatt, period III in the table. Whatever the internal proportion between Iceland and the Faroe Islands is, the 10 percent limit will be reached at a total of 15 percent for Iceland and the Faroe Islands.

**Table 1: Hypothetical allocations between the bargaining parties\***

	<b>Iceland</b>	<b>Faroe Islands</b>	<b>Norway</b>	<b>EU</b>	<b>Scotland</b>	<b>Diff</b>
<b>I</b>	0	5.0	35.0	60.0	31.2	-
<b>II</b>	3.5	7.5	32.8	56.2	29.2	6.3
<b>III</b>	5.0	10.0	31.3	56.7	27.9	10.5
<b>IV</b>	7.5	12.5	29.5	50.5	26.3	15.8

\* I in the first column to the left expresses the allocation in the 1999-2008 agreements, while II-IV are hypothetical calculations

<sup>83</sup> Interview answer on e-mail June 25, 2012

<sup>84</sup> From a methodological point of view I am fully aware of that these thesis are writing while the bargaining process has not been closed; this means that the parties may be cautious – and even tactical – when providing me with information and judgments that may be important to the bargaining process and thus also its out-come

As far as the Faroe Islands is concerned it is a small and open economy. It is a relatively wealthy society. It is considered a Nordic welfare society, with a high rate of redistribution for welfare purposes. From this perspective we would – according to Barkin – expect the Faroe Islands to be concerned about the fish-stocks as a main source of (continuous) income, and thus motivated to come up with a win-set that over-lap the ones of their counter-parts. Given the size of the community and the volume of the pelagic fishery, the pelagic sector has a significant affect on the whole society, and not only on local communities, in case of fluctuations, be they positive or negative. In case of an agreement the Faroe Islands would – contrary to the pelagic sector in Scotland – not have to bear any burdens as the Faroese quota would be increased: The acknowledgement of the changed migration pattern of the mackerel would earn the Faroe Islands a bigger share of approximately the same TAC, which will – all things equal – imply bigger incomes. However, margins in the increase of percentage may play a role, as changes in catches and prices would have an impact on the actual income from the mackerel fishery.

### **5.5. Why did the Faroese delegation defect**

Why did the Faroese not continue the negotiations to make the win-sets over-lap? From an empirical point of view it is difficult to find evidences that the Faroese purse-seiners have a higher substitutability – and thus should be less dependent upon the resource in question – than Scottish.<sup>85</sup> There is no reason to doubt the seriousness of the concerns about the future of the regional management, expressed by Felagid Nótaskip in a letter to the government in 2010. The association appeals to the government to make a roll-over – that is in fact to accept the distribution from previous years – in order to avoid a break-down of the management system, until the parties are better prepared to cope with the new and difficult situation.

However, there is an interesting difference between the Faroe Islands and Scotland as far as the composition of the pelagic fleet is concerned. In both cases the mackerel has been exclusively harvested by purse seiners for years. However, 2-3 years ago a change occurred in the Faroe Islands, as the Ministry of Fisheries decided to give other types of vessels access to the mackerel in the Faroese EEZ, including those usually fishing in distant waters, see fig. 3 below. It is noteworthy that of the

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<sup>85</sup> 90 percent of the Scottish pelagic catches are mackerel (source: Interview with Ian Gatt). The mackerel is only one of the pelagic species caught by the Faroese purse seiners, but the herring, blue whiting etc. are not alternatives

vessels listed, only industrial fishing trawlers (besides the purse seiners, indeed) usually harvest pelagic species. The political argument was that it was important that the Faroe Islands was able to harvest the quota which it had fixed unilaterally. For many of the new actors – the freeze-trawlers, the prawn trawlers, and the Pacific fleet – the mackerel is an extraordinary opportunity that may have lead to short-term attitude as far as the mackerel fishing is concerned, as most of them were already part of profitable fisheries in distant waters.<sup>86</sup> These new actors may have caused a pressure that – amongst other reasons – did not make 7,5 percent acceptable, provided the purse seiners should not be worse off from the increased quota.<sup>87</sup> There may be if not a conflict then at least a cleavage within the Faroese level II, representing doves (the purse seiners) and hawks, the newcomers that are given an opportunity for additional incomes.<sup>88</sup>

**Fig. 3. The internal Faroese allocation of the 2012 quota**

Purse seiners 55.000 tons	Distant Waters North Cod 4.000 tons	Local Waters trawlers 30.000 tons		
	Distant Waters North Prawns 8.000 tons	Local Waters Long-liners 5.000 tons		
	Industrial Fishing Trawlers 9.000 tons	Local Waters Small Trawlers 2.000 tons		
	Distant Waters South/International 6.000 tons	Local Small Scale "3.000 tons/3	Local Gill Netters "3.000 tons/3	Shell + 'Bait'- fish "3.000 tons/3

Comment: The 'vertical boxes' bottom right has to be read as 3.000 tons for the all the group on aggregate

<sup>86</sup> The fleet in Faroese waters – who are also given the opportunity to harvest mackerel – are in a different situation; their main catches are cod, haddock, and saith, but these species are under severe pressure, highly affecting the profitability, partly because the mackerel invasion has undermined the cod and haddock stock

<sup>87</sup> Managing director of THOR Ltd., a Faroese based company with an array of fishing activities on the Southern hemisphere, has accused Felagid Nótaskip disguise the fact about the increasing volumes of mackerel in Faroese waters, in order keep other Faroese actors away from the Faroese share of the quota. See the article 'purse-seiner barons honoured for wasting billions' at the website <http://www.vagaportal.fo/pages/posts/--notabaronar-heidradir-fyri-at-sopla-milliardir-burtur-20084.php>

<sup>88</sup> Managing director of Thor, Hans Andreas Joensen has accused Felagid Nótaskip to cry down the volume of mackerel in Faroese waters in order to avoid other parts of the fleet to get involved in the fishery

We might believe that EU-Scotland is prepared to bear a loss that gives the Faroe Islands and Iceland 15 percent, eventually slightly higher, depending on the size of the tactical element of the offer. Even without any explicit knowledge about the parties' minimum win-sets, it is most likely that they are far from over-lapping and thus causing a dead-lock in the negotiations. Even though the Faroese 15 percent might reflect that they are willing to accept a slightly smaller share, due to the tactical element, much was needed to make the win-sets over-lap as you had to add an Icelandic quota to the Faroese. The Icelanders consider themselves to have a strong case, asking a share of the TAC that equals to the Faroese claim.<sup>89</sup> Even in a situation where the Faroe Islands and Iceland were willing to accept 10 percent each, it is not likely to create an over-lap, as it would imply a reduction of 15.9 percent for EU-Scotland.

## 5.6. Escalation

The break-down of the negotiations – followed by unilaterally fixed quotas by both Iceland and the Faroe Islands – caused an escalation initiated by EU and Norway. While the Western parties fixed unilateral quotas, EU and Norway decided to act unilaterally in favour of what they expressed as responsibility as far as the mackerel stock is concerned. In other words: Negotiations were transformed into escalation, i.e. an attempt to force or encourage the 'irresponsible parties' to change their attitude.<sup>90</sup>

The initiative was prepared in the EU Commission report concerning actions towards non-cooperating countries as far as sustainable harvesting of fish stocks is concerned. As the immediate measure is a ban against landings of Icelandic and Faroese mackerel in Norway and EU harbours, the incentives are clearly negative. Furthermore, the set of rules passed by EU gives the measures to take step against non-cooperating countries as far as sustainability is concerned; the original proposal was far-reaching in terms of measures, but was in the end limited to initiatives against mackerel landings.

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<sup>89</sup> "Iceland underlines its determination to reach an agreement, provided its legitimate and major interests as a coastal state are given due and fair consideration. A very substantial portion of the annual mackerel runs are within the Icelandic EEZ. Large quantities of feed are consumed by the mackerel from the biosphere in Icelandic waters during its stay of several months, and there is now reliable evidence available that mackerel are both spawning and maturing in Icelandic jurisdiction. All of this makes a strong case for Iceland at the negotiating table", the Icelandic Ministry of Fisheries and Agriculture states on its website on June 6<sup>th</sup>, 2012

<sup>90</sup> Zartman, I. William and Guy Olivier Faure (eds.): Escalation and Negotiation in International Conflicts. Cambridge University Press 2005

However, besides the ability to fix their own quota in its EEZ, the Faroes Islands do have another power differential. The migration pattern of the North-Atlantic mackerel implies that to the extent the concept of upstream/downstream makes sense in this context Iceland and the Faroe Islands have the advantage of the ‘upstream’-location. However, it is worth noticing, that this is not an advantage comparable to as for example an upstream location in the case of a water resource where it may be possible to appropriate the whole resource or control how much you leave to the rival(s) downstream. Furthermore, and most importantly, due to the increase of fat, the mackerel increases in value as it moves ‘downstream’, and the mackerel leaves the Faroese EEZ before the fat-containment reaches its maximum. The price of mackerel is related to the fat-containment, the higher the fat-containment, the higher the prices.

### **5.7. The formal mandate of the negotiator**

The Faroe Islands are a home rule community within the Danish Kingdom. Foreign policy issues – indeed signing of international treaties – have been taken care of by Danish authorities. However, Faroese representatives were always a part of the Danish delegation in international negotiations in matters of particular Faroese interest, and gradually the Home Rule made negotiations on fisheries and trades on their own, although formally on behalf of the Danish state.<sup>91</sup> This arrangement has now been formalized as law – ‘the law on foreign policy power – according to which international treaties *”indgås på rigets vegne af Færøernes landsstyre under betegnelsen Kongeriget Danmark, for så vidt angår Færøerne”*’.<sup>92</sup> The Faroe Islands is authorised to sign international treaties concerning issues that are taken over by the Faroese Home rule; fisheries are one of these issues, hence the Faroese government negotiates and signs bi- and multi-lateral agreements concerning fisheries. However, the provisions does not limit the Danish authorities constitutional responsibility and remedies concerning negotiations, signing, and terminations of international treaties, including those signed on the basis of the law on foreign policy power, cf. §1 section 5. Notwithstanding this formal arrangement within the Danish Kingdom, the frustrations on the Scottish side lead Ian Gatt to bring in Denmark into a three-level game: *“Why is Faroe Islands able to hide under the skirts of Denmark*

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<sup>91</sup> Harhoff, Frederik: Rigsfællesskabet. København 1993 pg 227 ff.

<sup>92</sup> Lov nr. 579 fra 24. juni 2005 om Færøernes landsstyres indgåelse af folkeretlige aftaler, §2, 1st section

*in this issue? This particular incident highlights the weakness in the Danish Parliamentary system.*"<sup>93</sup>

### **5.8. Level I and II constituent in the mackerel conflict**

**The Faroe Islands.** The Ministry of Fisheries is formally responsible for the negotiations on the mackerel; however, the minister himself has not been taking part in the negotiations. The negotiations have been exercised by a delegation of bureaucrats from the ministry, lead by chief negotiator Andras Kristiansen, who is the leader of the fishery department and educated as fisheries economist from the University of Tromsø, Norway. Summarized, the minister and the delegation form the Faroese level I constituents, and the minister authorizes the mandate for the delegation prior to any round of talks.

As mentioned in chapter 4, the Faroe Islands have had a modern pelagic fleet since the mid 1960ies, and this business sector has an evident interest in the negotiations on the straddling stocks, in case the mackerel. For this reason the pelagic fleet's organisation Felagid Nótaskip has been close to the delegation, and in fact travelling with the delegation to the negotiations, usually represented by its chairman but in recent years also by its secretary Jógvan Jespersen, a former journalist and managing director of the public Faroese Broadcasting Corporation. *"Our role is fact to act as advisers during the negotiations"*, says one Level II representative<sup>94</sup>. Likewise the vessel-owners organisation Føroya Reidarafelag has been doing so as well, as part of the mackerel quota is used as 'currency' in exchange for rights to Faroese cod-fishing in Russian waters. Since the mackerel changed its pattern and has occurred in vast volumes, and the Faroe Islands decided unilaterally to fix its own quota, other vessels categories have lobbied to get a share of the resource, implying that their representatives' advices have been heard, although they have not accompanied the delegation.

Thus it can be said – as far political institutions is concerned, cf. Putnam – that the Faroese Level II is strongly attached to Level I.

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<sup>93</sup> Interview with Ian Gatt

<sup>94</sup> Interview with Jógvan Jespersen, managing director of Felagid Nótaskip

**EU-Scotland.** The Scottish interests are represented by the EU; it is the European Commission (level I), represented by the Directorate-General for Maritime Affairs and fisheries (DG MARE) which is in charge of the negotiations. Regarding the TAC and fishing quotas, DG MARE with collaboration of the Scientific, Technical and Economic Committee for Fishery (STECF) are consulted. However there are many other actors (Level II) which are involved in the internal process of the mackerel negotiation.

The Pelagic Advisory Council (Pelagic RAC) is among one of the several regional advisory council set up since 2004 to provide advice to the DG MARE fisheries. DG MARE is the part of the European Union which is responsible for the administration of the common fishery policy (CFP)<sup>95</sup>. The Pelagic RAC plays an important role in the EU level II mackerel negotiation.

The members of the General Assembly (members of the Pelagic RAC) are representatives of the European Fishing Sector and other interests groups. The fisheries sector includes other sub sectors such as ship owners, small scale fishermen, employed fishermen and producer organizations<sup>96</sup>. During the intense phase of the mackerel negotiation, there is frequent contact between DG MARE (level I) and the Pelagic RAC (level II).

Level III actors are the regional and national level of the coastal states represented by the EU. Ireland and Scotland (represented by UK) are the countries fishing the mackerel. The mackerel stock has an important socio-economic importance in several Scottish coastal communities. Like the Faroese purse seiners association, the Scottish Pelagic Fishermen's Association (SPFA) has played an important level II actor during the mackerel negotiations. The association represents and defends the fishermen and the purse seiners' interests. The Chief executive Representative of the SPFA, Ian Gat, has followed closely the mackerel negotiation and has criticized Faroe Islands and Iceland self amounting TAC and recommends the EU to sanction Faroe Islands and Iceland.

The mackerel negotiation shows that domestic actors and domestic interests groups do have an impact upon international negotiations. With the failure of the negotiation, the question is what are the win-sets are for the coastal countries (Scotland and Faroe Islands).

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<sup>95</sup> Hegland Troels Jacob & Douglas Clyde Wilson: Participatory Modelling in EU Fishery Management: Western Horse Mackerel and the Pelagic RAC pg 1

<sup>96</sup> <http://www.pelagic-rac.org/about-us>

The Faroe Islands is a small group of islands heavily dependant upon fishing industry – some villages are more dependant upon the fishing industry than others. It must also be taken into consideration that felagid Nótaskip has participated actively to the mackerel negotiations. The Faroese Level II constituent is a strong actor during the mackerel negotiation and they are the one deciding if there will be any win-set during the negotiation or not.

The fact that the level II constituent can affect Level I constituent during the mackerel negotiation is not a conundrum, as the Faroe is dependant upon fishing industry and has socio-economic importance, it is an important lobbyism within Faroese politics. If politics work against the fishing industry they could risk to not getting re-elected.

The mackerel negotiation is represented by delegations: these delegations are representatives for the fishing authorities, the chief negotiator, political leadership representing the fishermen association and leaders representing “ship owners”. The chief negotiator is the one communicating the matter of interests of the parties and mediating it between the parties.

The mackerel is of high socio-economic importance for the fishermen in the coastal states and due to this the representatives have to take in consideration national interests during the negotiation. The outcome of the international mackerel negotiation does have an impact upon the domestic sphere of the states participating.

### **5.9. Non-overlapping Win-Set**

The whole two-level-game is about the win set which means the total outcome of the negotiation. Win-set occurs when the outcome of the actors participating in the negotiation overlaps and leads to an agreement.

The coastal countries who are members of the NEAFC shared the migrating common stock sustainably since 1999. Countries involved were Norway, EU (Scotland and Ireland) and the Faroe Islands- they agreed upon the TAC amounted to each country according to the migration pattern of the mackerel. The situation changed in 2009 with Iceland as a new comer among the coastal states. Iceland claimed that they have the right to explore the mackerel stock within their own EEZ. The migration pattern of the mackerel stock has changed and the stock is migrating in great amount within the Faroe and Icelandic EEZ.

In 2010, Iceland was recognized as a coastal state by the NEAFC, and joined the mackerel negotiation with the other coastal states. For the annual mackerel negotiation in 2010, the Faroe Islands requested an increase in TAC due to an increase of the mentioned stock in their EEZ. The amount demanded by the Faroe Islands was considered as unsustainable by EU and Norway (even if it was scientifically proven that the migration pattern of the mackerel has changed). The Faroese chief negotiation who represents the Level I constituent presented the Faroese agenda and demand to the other coastal states. The chief negotiator represents Level II constituents during the negotiation and tries to bargain for an outcome which is assumed will be acceptable for level II constituents.

The negotiation process and outcome is to get a win set that overlaps for all parties involved. An overlapping win-set means that all parties concerned around a negotiation table agreed upon the final outcome of the negotiation and bargaining process. If the win set overlaps then there is an agreement which leads to documents ratification.

In this particular situation, the Faroe Islands, EU and Norway could not come to an agreement concerning an increased share of the quota for the Faroe Islands and Iceland. Scotland chief executive for pelagic fishery, Ian Gatt, mentioned that the amount demanded by the Faroe Islands is out of proportion as the Faroe Islands have increased their catch from 7 percent to 15 percent (quote). Putman mentioned in the two-level-game theory that *“the larger the win set present at level II, the more likely level I can reach an agreement agreeable to all parties and the smaller the win-set, the greater risk that the negotiation will break down”*. In this particular case, the Faroese Level II constituents wish for a larger win-set (mackerel quota) but the EU and Norway Level I and II constituents define the wish as unsustainable. (Small win-set may lead to no ratification- this is what EU and Norway wanted and Faroe Islands did not agree)

Scotland Pelagic fleet is 90 percent reliant upon the mackerel stock, and it is specially a huge employment factor in the communities of Fraserburgh, Peterhead and Lerwick<sup>97</sup>. To maintain the stock sustainably is of high socio-economic importance. If the stock is depleted it will results to serious economic consequences for both Scotland and the Faroe Islands. Scotland and Norway does accept the fact there the mackerel has change migration pattern and that the amount of mackerel has increase the Faroese and Icelandic EEZ. The Faroe Islands is a society dependent upon fishing industry and mackerel fishery is of high importance. The Faroese Minister of Fishery Jacob Vestergaard

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<sup>97</sup> E-mail interview with Ian Gatt Chief executive of the Scottish Pelagic Fishermen’s Association

said that the Faroe Islands are entitled to fish the mackerel in their own EEZ as said article (law of the sea). The win set of the mackerel is of huge economic interests for both Coastal States.

The mackerel stock has been the centre of dispute among the Coastal States three years in a row now. Norway together with EU cannot agree upon the quota amounted by Iceland and the Faroe Islands. Their respective countries win set has not overlapped with any agreement and ratification. There seems to be a blame game going on among the countries creating an asymmetric relationship among the countries- with EU and Norway on one side and the Faroe Islands and Iceland on the other. The Win set wished by the Faroe Islands and Iceland is qualified to be unsustainable by Scotland and Norway. The latter countries do recognize the change of migration pattern of the mackerel but they can't come to a sustainable agreement. Ian Gatt, said that "*The situation needs to be resolved, but not by giving away unfair quota allocations to Iceland and Faroe*".<sup>98</sup>

On the other hand, the Faroe Islands blame Scotland and Norway for not reaching an agreement. The Faroese Fisheries Minister Jacob Vestergaard also expressed his disappointed for the non-overlapping win set of the mackerel stock "From the Faroese perspective, the proposals for sharing of the stock put on the table by EU and Norway during negotiations have been far from equitable". The Minister expressed his disappointment and also noted his concern that Norway and EU still seem unwilling to acknowledge the changes of the mackerel distribution.

There are three set of factors that are especially important to understand what circumstances affect the win-sets. The three major factors which affect win sets are:

- level II preferences and coalitions
- Level II institutions and
- Level I negotiator strategies

The Scottish Level II (SPFA) constituents expressed their collaboration with the Level I collaboration (the EU) "In the mackerel case we don't think and I stress think that the commission would

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<sup>98</sup> E-mail Interview with Ian Gatt Chief executive of the Scottish Pelagic Fishermen's Association

strike a deal without the consent of Scotland as we are the biggest stakeholder at 52 percent of the EU quota<sup>99</sup> ”. The Scottish Level II constituents have also expressed their disappointment concerning the Faroese and Icelandic uncooperative behavior and are now encouraging EU to find punishing measures against Faroe Islands and Iceland.

With the blame game going on by both parties, no overlapping agreement was reached concerning the distribution of the stock. The question in this case, is how these four coastal states would come to a satisfactory overlapping win set in the future. With Level II win set not overlapping, the negotiation leads to no-ratification. No ratification means no agreement and represents in this case status quo, Putnam states in the two-level-game theory that the lower the cost of “no-agreement” to constituents the smaller the win-sets<sup>100</sup> . In case of no agreement, the NEAFC does not have any tools or written agreement to penalize coastal states. The Faroe Islands and Iceland have now for third year in a row been able to allocate their own quotas with mild consequences<sup>101</sup> . The Faroe Islands and Iceland did not lose anything with a “no-agreement” in fact they did allocate themselves higher quotas and “gained” economically from it- which is important at a domestic level. They latter countries have been able to create a non-zero sum behavioural game.

### **5.10. Voluntary and Involuntary Defection**

Ratification failures are not unfamiliar in International Relations and it reminds us that international negotiation is of high complexity. Domestic level is of high importance during negotiation, if the win sets are not overlapped for the level II constituents (domestic level) there will be no ratification. In the case of failed ratification, Putnam distinguishes between voluntary defection and involuntary defection. Defection is a rejection of international agreement – and in this case it is about the allocation share of the mackerel.

Since the late nineties, the coastal countries (without Iceland) met each year to allocate the mackerel quota among them. EU and Norway were the one getting the most due to the spawning and migration pattern of the mackerel and the Faroe Islands was allocated 5 percent of the catch and with right to fish within the EU and Norway EEZ as well. With the change of the mackerel migration pattern

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<sup>99</sup> E-mail Interview with Ian Gatt Chief executive of the Scottish Pelagic Fishermen’s Association

<sup>100</sup> Putnam D. Robert: Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988.pg 442

<sup>101</sup> Scotland did not allow a Faroes ship to land mackerel and Norway did ban mackerel products from the Faroe Islands.

the Faroe Islands together with Iceland (the new comer) requests a bigger share of the quotas. The question in this particular situation is, was the non ratification of the mackerel negotiation a voluntarily or involuntarily defect.

EU and Norway has described the defection as voluntary defection due to the fact that the Faroe Islands did not “wish” to come to an agreement. With his interview with the BBC Ian Gatt the SPFA chief executive mentioned that he is disappointed by the lack of progress but not surprised by the Faroese and Icelandic behaviour.

Voluntary defection is going back to one’s word in a rational egoist way in the absence of enforceable contracts<sup>102</sup>. The coastal countries with ICES recommendation have fished the mackerel sustainably during the last years. With the migrating change of the mackerel the situation changed as the coastal countries could not come to a sustainable agreement. Dealing with a homogeneous conflict can be quite complex as the constituents participating are likely to maximize his nation share of the available supply (here it is the mackerel); in other words it is a matter of more or less or no substance at all. With EU and Norway not accepting the quota demanded by the Faroe Islands they decided to maximize and to unilaterally fix their own quota.

SPFA chief executive described the last mackerel negotiation held in Reykjavík this year as a “wild goose chase”. He mentioned in an interview that he wondered why the Faroe Islands turned up to the talks when they did not contribute anything to the debate; remain silent and clearly intent of hammering the mackerel stock again. The situation can be described as voluntary defection if seen from the Scottish perspective.

Analytically, the Faroese defection is two-edged sword. On one side the defection changes the negotiations from a zero-sum game (based on the TAC) to a non-zero sum game in the short run. The party may claim that its unilaterally fixed quota is only representing its fair share of the TAC; however, as there is no agreement, there is no guarantee that the other parties will voluntarily lower their share in order to comply with the recommended TAC. On the contrary! On the other side, the defection may turn the homogeneous conflict into a heterogeneous one. The reason is that in case Norway and especially EU escalate their punishing initiatives against the Faroe Islands, the burdens from a non-agreement will be loaded on other than the agents with economic interests in the mackerel. This

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<sup>102</sup> Putnam D. Robert: Diplomacy and Domestic Politics: The Logic of Two-Level-Games in: International Organizations, Vol. 42, No. 3. 1988.

may lead to a conflict within the Faroese domestic sector that may change the pressure on the Faroese Level I.

On the other hand, the Faroese delegation and interest groups would describe the defection as an involuntary defection as the parties involved could not come to an agreement that was fair for all parties. Faroese chief negotiator Andras Kristiansen mentioned “ *Neither Norway nor EU shall act as if they are the “owner” of the mackerel and shall allocate the quota to the other coastal states...none of the parties own or have primary rights upon the quotas...the only way is to come to an equitable allocation for all parties* ” <sup>103</sup>. From a Faroese point of view they perceived the cause of non ratification due to pure greediness from the EU and Norway’s fleets. The claim that the EU and Norwegian fleets have been greedy in setting themselves a quota that is 95 percent of the ICES recommended limit. Putnam mentioned in his theory that it is hard to distinguish between voluntary and involuntary defection. In this particular case it is hard to define if the Faroe Islands did defect the negotiation voluntarily or involuntarily due to the blame game on both sides. The Faroese delegation insinuated that they don’t wish to deplete the stock as the nation is heavily dependent upon fishery and it would have been best if all parties could come to an equitable agreement. But at the same time the Faroe Islands did sell 13.000 tons mackerel quota to Russia in November 2011 before the last mackerel negotiation took place in Reykjavík February 2012.

The defection of the negotiation has its pros and cons for all parties. Either a voluntary or an involuntary defection has a negative impact for the Faroe Islands. On the contrary the Faroe Islands are beneficiating socio economically from the defection as they are able to allocate their own quotas (from 5 percent to 15 percent). But on the other side they are seen as draggers within international relations and may lead to loss of reputation.

On the other hand, one can ask if sustainability is important for Scotland when it comes to the mackerel stock why have the EU not pushed more to reach an agreement. They could for example has allocated themselves lower quotas and accept the fact that the Faroe Islands and Iceland could get more quotas (maybe a 10-11 percent) as the mackerel migration pattern has change. The question is, is the EU acting greedy as the Faroese delegations insinuate and are they being sustainable when they are still (together with Norway) still setting themselves a 95 percent quota.

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<sup>103</sup> E-mail interview with Faroese Cheif negotiator Andras Kristiansen

## 6. Discussion

As mentioned in the introduction the natural resources of the globe have been and still are under an immense pressure. The international community is trying to cope with this pressure in terms of international treaties. This analysis has high-lighted some of the problems involved and provided us with some answers to the questions asked. However, it has also left us with some questions, some of empirical and others of theoretical nature.

The main purpose of international law with regard to renewable natural resources is to ensure sustainable management. As we have seen in the case of the North Atlantic mackerel, this is not easily achieved. The problems are in this case mainly related to two phenomenons. Iceland is a newcomer as a coastal state as far as the mackerel is concerned, and this calls for an answer on what rights should be given to newcomers in terms of quota allocation. The other is the fact, that the mackerel has changed its migration pattern, which has lead to a discussion on how to interpret this change and how it shall affect the distribution.

Indeed, a newcomer which 'real interests' are recognised – as in the case of Iceland – is in indeed a full member of the group. However, it will certainly affect the distributional arithmetic of the previous allocations, and certainly it will hurt those involved to some extent, depending on how much is allocated to the newcomer. We have to bear in mind, that in the mackerel case we are dealing with high-tech vessels that have involved considerable investments. Iceland as claimed its fair share, meaning a quota which justifiable according to the generally accepted criteria. As EU and Norway have rejected these claims as totally unrealistic, the negotiations have turned into dead-lock. Insofar the parties agree upon the general criteria for allocation this rejection can only be understood with reference to the fact that Iceland is a newcomer.

To avoid the situation of non-agreement, one might consider whether the newcomer should be absorbed gradually into the allocations, meaning that the initial share should be less than its legitimate share according to the generally accepted criteria, as for example the zonal-attachment. In this case the newcomer would be phased in over a period of time, say five years until full quota share is attained. By this the established agents would not experience a drastic cut of their share. Future quota shares in terms of percentages would be predictable for both newcomers and the established players, giving the latter the opportunity to adjust to the changed realities. However, in cases where this is not a binding norm – whether legal or non-legal – and the newcomer is not satisfied with his

share, he might undertake fishing that exceed the quota share, again leading to unsustainable management of the stock.

As far as the allocation criteria is concerned, there are seemingly no ultimate or precise criteria applied. The main criterion has been the so called zonal attachment. Clearly, and as the conflict has demonstrated, this is not a one-dimensional criteria. For this reason different interpretations have occurred, as different interpretations lead to different conclusions with regard to allocation of shares. First of all there is the question of why at all the mackerel has extended its locations of living. Is it because the stock has been managed sustainably so it has not only been maintained but has even increased, forcing it to expand its usual feeding areas? Or does this happen for totally different and so far unknown reasons? Secondly, how should zonal attachment be measured? The attachment can be measured as the time-span in each national zone; as a time and volume aggregate; as a time and value aggregate etc. However, even if the parties had a consensus on which criteria to apply, they are still left with the problem of the migration as such: Significant changes in the migration will always affect the agents' unevenly, causing threatening problems for the disadvantaged; this highly questions whether zonal attachment is suitable as (exclusive) criteria for allocation of straddling stocks.

For good reasons one might expect that the parties called off their fishing as long as there is no agreement. However, this is not a norm that is rooted in the tradition of regional management. On the contrary. While expressing their concerns for the stock in question, the parties continue to exploit it at a severely unsustainable level, as the aggregate of the unilaterally fixed quotas is way beyond what ICES (and the parties themselves) considers responsible. Furthermore, because of their up-stream location Iceland and the Faroe Islands harvest the mackerel at a time when it is far from optimal as far as value is concerned. All this is possible because of the rights to an exclusive zone that is ensured in international law. Thus it might be a natural conclusion to argue in favor of an exception of the national state's sovereign jurisdiction within the EEZ as far as straddling stocks are concerned. On the other side, those countries – both heavily dependent upon fisheries – might well argue that in case they were not able to unilaterally fix quotas in their own EEZs, they would have been at the mercy of EU because of the asymmetric market-relation. How can this power struggle be turned into an interaction of constructive dialogue?

According to Barkin the general level of wealth is one of the determinants of a state's shadow of the future; this should imply that the higher the general level of wealth, the bigger the concern and thus the interest in regimes that will ensure sustainable management of a certain stock. However, Barkin does not qualify this statement, and to be true, it is difficult to think any reasonable argument in favor of the statement. Why should a state with a low level of wealth – as a general rule – not be interested in long-term sustainability of natural resource? Barkin has a point when stating that a state with high level of general wealth is more able to cope with the short-term costs of a reduction in quota for example. However, it appears far more relevant to relate this resource aspect to the situation of escalation. In a public controversy – trying to get the international opinion on your side – one could think of a situation where a party consider to stop its fishing of the resource in question for a limited time to demonstrate 'responsibility and prevent a collapse of the stock'. Definitely, the Faroe Islands could not do this, whereas EU has the financial resources to support those involved during the initiative. Wouldn't it then be more reasonable to consider the general wealth as a strategic power differential of its own (and not of the shadow of the future) alongside with market power, military power etc.?

One of the most significant issues within the literature of international negotiations is the one of asymmetric power relations. As the case with the North Atlantic mackerel has demonstrated, the coastal states' EEZ are of vital importance in their bargaining strategy. The difference between the high-sea and the EEZ is that anyone in principle can harvest the resources in the former, whereas in the case of no agreement a state does not have the right to fish in another states' EEZ. Despite the stipulations on sustainability and precaution in international law, nothing in the real world prevents a state from unilaterally fixing its own quota. From a theoretical point of view this status of the EEZ implies that it has to be conceptualized as the most important power differential as the international community has no legal measures to prevent this from happening.

As mentioned in the introduction the natural resources of the globe have been under an immense and increasing pressure during the 20th century. The international community has tried to cope with the problem, which is expressed in a number of treaties and conventions since the Second World War. The living and renewable resources are a case in point, as for example fish. The analysis has dealt with one particular category of fishes, which is straddling stocks, in this case the North Atlantic mackerel.

Straddling stock management is of high complexity. The mackerel stock is not the first stock experiencing negotiation failure; countries like Canada, Spain and the United States have experience failure within regional fishing management organization (RFMO). These failures have either been solved unilaterally or within multiparty organization. Regional fisheries management organizations play an important in the global system of fishery governance. They are the primary mechanism for achieving cooperation between and among coastal countries, including coastal states that are essential for the effective management of international fishery. In the absence of cooperative management among all parties, that claim rights to migratory stocks, they are likely to be depleted.

The mackerel stock is by the moment not sustainably managed by the coastal states. The stock is said (by ICES) to be overfished in 2014 if current fishery continues. The Faroe Islands is highly dependant upon fishery and the mackerel fishery is economically important. If the mackerel is not handled sustainably there will be economic consequences for the Faroese trawlers fishing the mackerel. The degree of substitutability for the Faroese purse seiners fishing the mackerel is low as for the trawlers fishing the mackerel have higher substitutability. Faroese trawlers do get an amount of quota which they normally sell to Russian trawlers in exchange of other fish stock within the Russian EEZ.

If the substitutability is low, then in the long run Faroe Islands will not benefit from the short term risks they are willing to take. On the other hand, Scotland which is represented by EU have lower substitutability, the coastal areas are dependant upon the mackerel stock. But it is worth to take into account that EU might have a greater financial power to re-structure or reduce the EU/Scottish fleet than the Faroese authorities. But on other side, it will be on the costs of those working in the fishing industry and the purse seiners.

To get an overlapping win set is the most important during an international negotiation. It is the responsibility of the coastal states to cooperate with the RFMO to reach an agreement. Unsustainability of the stock and the unilaterally based Iceland and Faroe Islands increased quotas are to blame according to EU and Norway for not reaching to an agreement.

From a theoretical point of view, the analysis have confirmed Putnam's point that on an empirical level it is difficult to verify whether an apparently voluntarily defection has taken place. The Faroese delegation mentioned that they were ready to cooperate but could not due to the uncooperative attitude from EU and Norway and inequitable quota. On the other hand, EU (Scotland) and Norway

blame the Faroese and Icelandic uncooperative and unsustainable attitude towards the stock. With an increased amount of mackerel within the Faroese EEZ and with Scotland and Norway not willing to diminish their own quota in order to have an equitable share and maintain sustainability, it is difficult in this case to distinguish if the Faroe Islands is in fact defecting the negotiations voluntarily or involuntarily. Norway and Scotland did get 95 percent and are still fishing 95 percent of the mackerel stock even if they think and blame the Faroe Islands and Iceland for their high unilaterally amounted quota. If sustainability is the most important issue for EU and Norway then they could have diminish their own quota until the coastal states could reach an equitable solution.

The profitability of the resources (mackerel) is high for both communities (Faroe Islands and Scotland), and both Scotland and Faroe Islands therefore they are reluctant to either diminish their catches voluntarily or to agree upon an allocation. With high profitability resources the objective of long term sustainability and the optimum utilization of fishery resources become extremely difficult in the long run. However, the only way to avoid over exploitation of the resources is through an effective cooperation management regime.

The NEAFC as the regional body in the North Atlantic Ocean regulates the mackerel and other straddling stock as well. The member states within the regional body are entitled to cooperate even if they fail to reach agreement on the allocation of quotas for a particular species or in a particular area. The members remain under a legal duty to cooperate. The current situation reflects lack of cooperation among the coastal states. Neither the EU and Norway nor Faroe Islands and Iceland are willing to diminish their allocation of quota; the question is how will the RFMO resolve the lack of cooperation issue among the coastal states.

Negative escalation has been used against the Faroe Islands last year, where the Faroese purse seiners could not land their mackerel in the Scottish harbor. And Faroe Islands could not export any mackerel product (processed and unprocessed) to the Faroe Islands. Even though Scotland and Norway have used escalation with mediated by negative incentives, there is no progress again this year concerning the stock. And there seem that the coastal countries would probably not come to an agreement again this year if the if the parties involved don't feel they are receiving an equitable win-set. The question is how would this situation be solved? Apart from negative and positive escalation, the regional agreement lacks tools to resolve dispute other than they have to come to negotiate to come to an agreement.

The Commission for the Conservation of Southern Blue fin Tuna (CCSBT) is an intergovernmental organization responsible for the management and optimal utilization of the stock. Member countries are Australia, Japan, Republic of Korea and New Zealand. The blue fin tuna quota is allocated each three years; meaning that the coastal states do not negotiate each year to allocate the stock. Prior to 2006, there were many years in which the CCSBT failed to reach consensus upon the TAC. When this has happened, members have voluntarily agreed to restrict their catch to their previous allocation. Due to a low biomass in 2006 and 2009, the stock required to be rebuilt and a Management Procedure was set based upon scientific procedure for setting the TAC based upon pre-specified data inputs. The MP sets the TAC in three years block.

With the current situation, NEAFC members fishing the mackerel should maybe consider to create an MP settlement with cooperation of ICES and to also allocate TAC in long term block. This would maybe be a fair solution where all members can get a fair allocation. The Faroese chief negotiator mentioned that EU and Norway are reacting as if they “own” the mackerel and shall distribute it for the other two coastal states (Faroe Islands and Norway). In creating an MP like the CCST can maybe be a solution as it will not be the coastal countries allocating the TAC.

## 7. Legal framework, norms and institution-building

### 7.1. Introduction

Despite annual meetings, each with several sessions, the coastal states have not been able to solve the puzzle of sharing the North Atlantic mackerel for several years. Although they politically lend support to international law with the goal of ensuring sustainable management, they harvest the stock – now in their own EEZs only – at a highly unsustainable level as the aggregated quotas are way beyond the limitations recommended by ICES. The consequences are numerous: The non-agreement leads to unilaterally fixed quotas that on aggregate are way beyond the TAC recommended by ICES, bad relations between otherwise cooperating countries, trade conflicts etc.

The fact is that some states – in accordance with international law – enjoy the privilege to harvest a certain resource of what has been called the common heritage of man. Besides being business, basically it provides the markets with essential food, containing vitamin and Omega3. If it is managed at a sustainable level, the stock can work as a continuous source of nutritional value in endless, intra-generational perspective.<sup>104</sup> From a fundamental, normative point of view it is thought-provoking that it is possible at all to manage such a privilege in a way it is over-exploited at around 60 percent, implying that it is not long-term sustainable.

Despite the apparent concern for the maritime resources, Barkin does not leave us with much optimism regarding the possibilities of sustainability based on international cooperation. According to Barkin, economic agents – the fishers – are purely rational in the sense that they are not willing to make short-term sacrifices in order to get long-term benefits, and the agents' states will inherit the dilemma of defending their subjects' interests and a long-term management of the stock in question.

For this reason international management of straddling stock, so Barkin, will necessarily be a power struggle, which outcome is depending on the different power differentials each party can mobilize in favor of its position. Consequently, we are therefore left with the problem that the powerful not necessarily always act to the benefit of sustainable management. The actual out-come depends entirely upon the intentions of the escalating state.<sup>105</sup> Actually, questioning this conclusion leads us to one

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<sup>104</sup> See Palma, Maria Cecilia Engler: Allocation of Fishing Opportunities in Regional Fisheries Management Organizations: A Legal Analysis in the Light of Equity. MA Thesis. University of Dalhousie, Halifax. 2010

<sup>105</sup> Barkin, J. Samuel: Degradation and Cooperation on the High Seas: The Case of International Fisheries Management pg. 154 in: Global Environmental Accord: Strategies for Sustainability and Institutional Innovation. Beyond Resource Wars: Scarcity, Environmental Degradation, and International Cooperation. MIT Press 2011

of the classics in political theory, the cleavage between realism and liberalism, including the issues of collaboration and institutions.

This chapter has a limited ambition, which is to clarify and outline the pre-conditions for the management of international common-pool resources as in the case of straddling stocks. The question is whether it is possible to establish a regime, i.e. a legal framework, norms and institutional settings that can a) fulfill the international community's goal on sustainable management b) does not contradict international law and c) has support from the parties involved.

## **7.2. Realism, liberalism and international cooperation<sup>106</sup>**

The realist tradition considers the international community as anarchic and the role of the unitary state is to prioritize its own security, whereas liberals believe that the anarchy can be overcome by joint decisions. Likewise, the traditions differ on the issue of cooperation: International cooperation, so the realist tradition, can be used to reach short-term interest, whereas liberals think that international cooperation can be used to achieve long-term goals, even if short-term interests may differ.<sup>107</sup>

The most relevant of the differences between the two traditions is the distinction between relative and absolute gains as it relates directly to the issue of international negotiations. The realists measure the gains of a state as relative to a competing state, whereas the liberalists see value in gaining greater absolute gains, even if others benefit as much or even more.

Related to the theories of negotiation Hopmann draws a line of affinity from realism/relative gains to the concept of bargaining approach, and a line from liberalism/absolute gains to problem-solving approach.<sup>108</sup> The bargaining approach to international negotiations emphasizes the achievement of national interests. The outcome is measured according to the amount of utility produced for the state. The tactic is competitive, in order to unilaterally gain settlements that are favorable to the states interest: “... *the forgo agreements that will produce benefits greater than the status quo or their next best alternative to an agreement, if their potential competitors are perceived to be gaining more*

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<sup>106</sup> Jönsson, Christer: Diplomacy, Bargaining and Negotiations in: Carlsnaes, Walther, Thomas Risse and Beth A. Simmons: Handbook of International Relations. SAGE 2002

<sup>107</sup> Keohane, Robert O.: International Institutions: Two Approaches in: International Studies Quarterly, Vol. 32, No. 4. Dec 1988

<sup>108</sup> Hopmann, P. Terrence: Two Paradigms of Negotiations: Bargaining and Problems Solving in: Druckman, Daniel and Paul F. Diehl: Conflict Resolution. SAGE Publications. 2006 p. 185

*than they from the agreement”*.<sup>109</sup> The realist state would also to the extent possible rely on the right “*to verify and enforce the implementation of agreements, including a unilateral right to renounce and violate an agreement, rather than accepting any major role for international institutions in verification and enforcement*”<sup>110</sup>

The problem-solving approach considers the goal of international negotiations is to solve common problems in a way that will benefit everyone. The security issue is not an isolated one but rather one factor of many, intertwined other issues as for example political, economic, cultural and social. This approach does not dismiss the importance of interest, but where the realist works unilaterally in favor of its own interests the liberalist take into account the interests of domestic interests of the other state(s). According to this perspective states do not enter negotiations as unitary, independent and autonomous actors. They believe that “*international regimes and institutions create a set of norms within which negotiations take place ... [and which] limit their sovereignty and constrain many aspects of their behavior, both in negotiations themselves and in the implementation of negotiated agreements*”.<sup>111</sup>

### **7.3. The basis for cooperation in common-pool situation**

Aiming at escaping from the tragedy of the commons, a crucial question to answer is if there are any pillars to rely on. Economist Elinor Ostrom has questioned the basic theoretical assumptions of conventional wisdom on common-pool economics: finite and predictable supply of resources units, complete information, homogeneity of users, their maximization of expected profits, and their lack of interaction with one another or capacity to change their institutions.<sup>112</sup> Based on laboratory experiments she and her colleagues conclude, that “*the prediction of excessive appropriation from common-pool resource by appropriators who are constrained not to communicate but unconstrained by prior appropriation rules is supported by evidence from experimental studies*”<sup>113</sup>

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<sup>109</sup> Hopmann, P. Terrence: Two Paradigms of Negotiations: Bargaining and Problems Solving in: Druckman, Daniel and Paul F. Diehl: Conflict Resolution. SAGE Publications. 2006 p. 185

<sup>110</sup> Hopmann, P. Terrence: Two Paradigms of Negotiations: Bargaining and Problems Solving in: Druckman, Daniel and Paul F. Diehl: Conflict Resolution. SAGE Publications. 2006 p. 185

<sup>111</sup> Hopmann, P. Terrence: Two Paradigms of Negotiations: Bargaining and Problems Solving in: Druckman, Daniel and Paul F. Diehl: Conflict Resolution. SAGE Publications. 2006 p. 186

<sup>112</sup> Ostrom, Elinor: Common-Pool Resources and Institutions: Toward a Revised Theory in: Gardner, B. and G. Rausser: Handbook of Agricultural Economics, Volume 2. Elsevier Science B.V. 2002 pg 1318

<sup>113</sup> Ostrom, Elinor: Common-Pool Resources and Institutions: Toward a Revised Theory in: Gardner, B. and G. Rausser: Handbook of Agricultural Economics, Volume 2. Elsevier Science B.V. 2002 pg 1319

However, the out-come is different when the pre-conditions for the agents' actions are changed compared to the conventional assumptions, one of these being the absence of communication amongst the appropriators. What happens if the appropriators are allowed to communicate? Leaving out the details, Ostrom and colleagues conclude that overall it increases the outcome significantly as it enables the agents to accomplish three potentially important activities: a) to identify the joint strategy that would enable them to get close to an optimal return b) to agree on a joint strategy with an agreed division of labor, also leading to trust and the willingness to risk a strategy other than the one giving individual optimum (Nash-optimum) and c) to establish a practice of verbal sanctioning of the group in case of defection from the occurred agreement. In all these experiments the agents themselves – and not an outside authority – enforced the agreements that were made. The only outcome on the negative side was that in high-endowment cases the temptation to defeat is greater and defections occur more often.

Another aspect that was studied in laboratory setting was the impact of sanctioning, and its relation to the cost. When sanctioning is imposed by the experimenter, i.e. an outside authority, and there is no communication between the appropriators, there will be many requirements for sanctioning, the more the lower the costs of requiring a sanction vis-à-vis a fine. The yield will increase, but most of the increase would be absorbed by the costs in terms of fees and fines. The outcome was totally different when communication and sanctioning is combined, i.e. the sanctioning is established and enforced by the group itself, the results were 'entirely different'. Even fees and fines were subtracted, the outcome was close to optimum, and the defection rate from agreement is close to zero. In sum, *“subjects who use the opportunity to communicate to agree to a joint strategy and a majority vote on whether they would use sanctioning mechanism achieve close to optimal results based entirely on the promises they make, their own efforts to monitor, and their own investments in sanctioning ... this is especially impressive in high-endowment environment”*<sup>114</sup>

#### **7.4. Norms and institutions**

As can be seen Ostrom's approach provides us with a far more optimistic fundament for managing a common-pool resources than Barkin. From a liberal point of view institutions – including interna-

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<sup>114</sup> Ostrom, Elinor: Common-Pool Resources and Institutions: Toward a Revised Theory in: Gardner, B. and G. Rausser: Handbook of Agricultural Economics, Volume 2. Elsevier Science B.V. 2002 pg 1319

tional institutions – are established achieve goals that were otherwise not achievable. Furthermore institutions contribute reduce the costs of reaching the goal in question. From a realists view institutions is a mean to protect interests and achieve goals in an anarchic international community. Taking the point of departure from Ostrom’s theoretical assumptions on the agents way of acting in the case of open communication and strategic coordination, is there any hope that we can bridge the gap between the realists and the liberalists?<sup>115</sup>

On a fundamental level the economic agents in the pelagic business share the interest in a sustainable management of the stock. However, the current system does have all the characteristics of zero-sum bargaining instead of problem-solving. Two institutional factors are contributing to this fact. One is the fact that the parties unilaterally are able to fix their own quota in their own EEZ in case no agreement is achieved. Thus the sovereign jurisdiction of the EZZ as power differential works as an effective veto in the case of no agreement. Secondly, in the case of no timely agreement, i.e. before the harvesting season starts, there are no legal mechanisms that can prevent the parties from fishing or to apply a compulsory allocation with binding effect for the parties.

According to Ostrom certain conditions concerning the resource in question, the basic rules and the actors and their attitudes should be in place. It is not possible to be concrete on this, the parties will be fully aware of this and how to balance the management. A case in point would be the balance between core categories and more marginal categories of vessels, i.e. vessels with high degree of substitutability.

From Ostrom’s insights it might be wise to consider reversing the process of negotiating. The current process has level I – the state representatives – at the negotiating table trying to reach an agreement, while level II – the business representatives – are those who ratify the outcome. In that case the stakeholders – the representatives of a community of like-minded with opposite but nevertheless shared interests – would have the mandate to negotiate an agreement whereas the state indeed, at least for a foreseeable future, has the ratifying role. This might well in an environment with a high level of trust and common understanding of what is at stake would maybe have a more problem-solving rather than bargaining attitude.<sup>116</sup>

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<sup>115</sup> Hurrell, Andrew: Norms and Ethics in International Relations in: Carlsnaes, Walther, Thomas Risse and Beth A. Simmons: Handbook of International Relations. SAGE 2002

<sup>116</sup> Hopmann, P. Terrence: Two Paradigms of Negotiations: Bargaining and Problem Solving in: Druckman, Daniel and Paul F. Diehl: Conflict Resolution. SAGE Publications. 2006

An absolute precondition, though, for a such a system to work is that the parties – including the states – strongly support a stipulation stating that a party can not unilaterally fix its own quota in its own EEZ, and that all parties are subject to procedures and binding decisions on compulsory allocation in case the parties have not agreed and ratified an agreement before a relevant deadline.

## 8. CONCLUSION

This project has dealt with the regional management of the North Atlantic mackerel. Of the four parties involved in the management the project has focused on EU/Scotland and the Faroe Islands, the others being Norway and Iceland. The project put forward two questions to answer. The first dealt with the process of negotiations, trying to find out why they have not been successful and ended in a deadlock for the fourth season in a row now. The second question was normative in nature, asking about guidelines for a regime in order to reach regular and timely agreements that would ensure a sustainable exploitation of the mackerel.

EU, Norway, and the Faroe Islands did have a stable agreement on the allocation the years 1999-2008. Since then the parties have not been able to agree upon an allocation. The negotiations have not been able to overcome the hurdles stemming from two new facts: that the number of parties in 2009 increased from three to four as Iceland was recognized as a coastal state, and that the mackerel stock has changed its migration pattern, extending its spatial habitat further west. As previous allocations have used zonal attachment of the mackerel as the main criterion, and EU and Norway have recognized the changed pattern of migrations, the latter fact implies that EU and Norway have to reduce their share not only for the benefit of Iceland but also the Faroe Islands.

The first issue is quite complex and involves several factors to why no sustainable agreement could be made. The Faroe Islands defected the last session of negotiations in February 2012, rejecting a proposal from EU/Norway to get 7.5 percent of the TAC compared to 5 percent in the previous agreements, the increase being substantiated by the recognized fact of changed migration. However, the Faroe Islands claim its right to 15 percent of the TAC, also referring to the change in the migration pattern. Due to the nature of the case – negotiations where the parties to a wide extent keep their secrets – there are no clear evidences whether the defection happened voluntarily or involuntarily. It might be voluntarily if it is based completely on the legitimacy of the ‘migration’-argument. However, it might also be involuntarily because the win-set of 7.5 percent has been turned down by (a dominating alliance of) of the Faroese level II. In this latter case one has to bear in mind that the number of Faroese actors that might possibly gain from the mackerel fisheries has increased hugely; many of the vessels belong to categories that are already in profitable fishing or have a high degree of substitutability. As the Faroese authorities for the last season have fixed its own quota in its own EEZ, significantly higher than equal to 7.5 percent, these categories may have less interest

in a win-set at the proposed level. The sovereign jurisdiction of the EEZ is decisive in this case as it makes it possible to veto an agreement without any (short-term) costs.

The fact that EU/Scotland and Norway have to reduce their quotas, not only in favor of Iceland as newcomer but also to the Faroe Islands will clearly hurt the business of the agents in these countries. It is assumed that an equitable share would imply a reduction that those parties' level II are not willing to accept. Thus finding the acceptable pain-threshold has been decisive. In order to limit its concession EU/Scotland (and Norway) – who had 95 percent of the quotas – clearly have tried to shift the focus of the negotiations. They have been blaming the Icelanders to be too greedy as newcomers, and particularly the Faroese as they – apparently with the authorities' support in order to demonstrate Faroe Islands' ability to harvest a significantly bigger quota – have mobilized non-pelagic vessels to participate in the fisheries, and also Faroese vessels usually operating in distant waters and even vessels from foreign countries. Whatever the motives, the latter is done with some right as a big involvement of vessels of different types and with alternatives will impact the balance of the agreement negatively. In this perspective the coalitions between the small parties (Iceland and the Faroe Islands) and the bigger parties (Norway and EU) is mirroring what has been experienced within other issues of international negotiations as for example the one the carbon dioxide emission (COP), in which case some of the bigger, industrialized countries have been the 'draggers'.

Only a few decades ago fish stocks was seen as a non-extinctable but due to the development of high-tech within all aspects of fishing, several fish stocks have been depleted or are endangered. As we are dealing with access to the some of the most valuable resources – providing the markets with important nutritious food – those who are in receipt of the privileges are obliged to act responsibly, i.e. manage the stocks in question sustainable from an inter-generational point of view. The second question of the project tried to outline what it takes to set up a robust regime that can realize this goal on behalf of the international community. Two-level game theory is actually based on the national state as the main actor in international relations, represented by level I, but to a considerable extent dependent upon the ratification from level II. Given the complexity of the issue and the gravity of the national and economic interests involved, this is not an easy task. The interviews show that the parties do not support the idea of having a third party to execute the allocation. Despite the poor outcome in recent years, the parties insist that they are the ones who have to agree upon the allocations. However exploiting the stocks despite there is no agreement is not acceptable to the international community. Based on the theoretical findings it is worth considering if the process

should be reversed, implying that level II representatives are the ones at the negotiating table while level I, the national authorities is executing the ratification of the management solutions agreed upon. This bottom-up perspective – which at the initial stage in some cases will involve bargains on who should represent the business – would make the agents themselves responsible for finding the joint strategy that will ensure the biggest out-come in a long-term perspective. Certainly this will also include the guidelines about the criteria for the allocations; on how to deal with newcomers; on how to cope with reductions; on how to monitor and sanction those who do not play according to the rules; on how to balance the ratio between a core fleet and marginal fleet within the fisheries etc. The case analyzed show that it would be important to get support to two ultimate principles in order to ensure regular and timely allocations: a) All party should accept that unilateral fixing of own quota in a party's own EEZ is not acceptable; b) in case a timely agreement is not reached the parties – including the states in question – should be subject to a binding allocation made by an instance established according to prescribed rules by the parties themselves. Formally and in the end the agreements achieved for a foreseeable future will still be bi- or multi-lateral agreements between states or other political entities as for example EU, who are able to veto an agreement proposal, and many of the functions involved will still rely on the state authorities. However, although there is a long way to go, ownership to an agreement made collectively by likeminded agents who truly are aware of the importance of sustainable management would most likely be more robust than what we have experienced so far.

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