

NAMMCO



North Atlantic Marine Mammal Commission

OVERVIEW OF INTERNATIONAL LEGAL INSTRUMENTS PERTAINING TO THE NAMMCO AREA OF COMPETENCE

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Contents

.....	1
OVERVIEW OF INTERNATIONAL LEGAL INSTRUMENTS PERTAINING TO THE NAMMCO AREA OF COMPETENCE.....	1
OVERVIEW OF INTERNATIONAL LEGAL INSTRUMENTS PERTAINING TO THE NAMMCO AREA OF COMPETENCE	3
1 INTRODUCTION	3
1.1 NAMMCO’s objective	3
1.2 NAMMCO’s area of competence.....	3
1.3 Aim and scope of the report	3
1.3.1 Sources of international law	3
2 MARINE MAMMALS AND UNCLOS	6
3 OTHER GLOBAL AGREEMENTS	7
3.1 ICRW.....	7
3.2 CBD.....	8
3.3 CMS Convention.....	8
3.4 CITES	9
3.5 IMO Convention.....	10
3.6 Other non-legally binding instruments.....	10
3.6.1 UNGA resolutions	10
3.6.2 UNFAO codes and guidelines	11
4 REGIONAL AGREEMENTS	11
4.1 OSPAR Convention.....	11
4.2 Bern Convention.....	12
4.3 EU Legislation – seal trade ban.....	12
5 BILATERAL AGREEMENTS	13
5.1 MOU Between Canada and Greenland	13
5.2 Norwegian- Russian North East Atlantic seals Agreement.....	13
5.3 The North West Atlantic Seals Agreement between Canada and Norway.....	13
6 FISHERIES RELATED AGREEMENTS.....	13
6.1 UNFSA.....	13
6.2 RFMOs	14
6.2.1 NEAFC	14
6.2.2 NAFO	15
6.2.3 NASCO.....	15
6.2.4 ICCAT	15
7 CONCLUSIONS	15
References and Related READINGS	15

OVERVIEW OF INTERNATIONAL LEGAL INSTRUMENTS PERTAINING TO THE NAMMCO AREA OF COMPETENCE

1 INTRODUCTION

1.1 NAMMCO's objective

NAMMCO is an international organisation established by the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic ("NAMMCO Agreement")¹. The objective of NAMMCO is to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic².

1.2 NAMMCO's area of competence

There are twenty-three common marine mammal species permanent resident in the NAMMCO management area: seven species of pinniped (seal) and sixteen species of cetaceans (whale and dolphin). Polar bears - also marine mammals, are also resident, but their conservation is not within the remit of NAMMCO³.

NAMMCO's area of competence is the North Atlantic Ocean, without any limits or further description set by the Agreement. Thus, the area is encompassing both national waters of member countries and the high seas. Nevertheless, it should be noted that the majority, if not all, of hunts in the NAMMCO area occurs within the national waters and therefore this area of competence is of particular importance for managing utilisation of marine mammals in NAMMCO waters.

1.3 Aim and scope of the report

The aim of this report is to provide an overview of global, regional and bilateral regimes, other than NAMMCO Agreement, pertaining to the conservation and utilization of pinnipeds and cetaceans in the North Atlantic.

The NAMMCO Agreement contains a general clause in Article 9 stating that 'This Agreement is without prejudice to obligations of the Parties under other international agreements'. Therefore, this review will, at least partially, identify the present scope of this Agreement's provision.

Different factors are affecting the conservation status of marine mammals in the North Atlantic, such as human harvest, prey availability, predation, entanglement and bycatch, climate change, ship strikes, pollution, habitat and feeding ground degradation, and underwater noise. These factors and specific rights determined which legal instruments should be examined to provide, not a complete - but an extensive account of the pertaining regimes. A complete account would have to take into considerations agreements such as those dealing with e.g. climate change, pollution, as well as trade law instruments. For reasons of space and conciseness, these issues are not considered in this report.

1.3.1 Sources of international law

Article 38 of the International Court of Justice (ICJ) lists the sources that the Court will apply when considering a dispute. The Article is considered to provide a foundation of what constitute an international law.

"Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

¹ <https://nammco.no/wp-content/uploads/2016/10/nammco-agreement-with-signatures-and-logo.pdf>

² Art. 2 NAMMCO Agreement.

³ Marine Mammals: A multifaceted Resource, NAMMCO 2017. <https://nammco.no/wp-content/uploads/2017/11/marine-mammals-a-multifaceted-resource.pdf>

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

Following the rationale drawn from the above, the relevant sources of international law concerning the conservation and management of marine mammals in NAMMCO area are the 1982 UN Convention on the Law of the Sea (UNCLOS), other relevant international agreements and relevant customary law.

Global agreements of relevance, beside the UNCLOS, are the International Convention for the Regulation of Whaling (ICRW), the Convention on Biological Diversity (CBD), the Convention of Migratory Species (CMS), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the International Maritime Organization (IMO Convention). Regional agreements are the OSPAR and the Bern Conventions. Relevant bilateral agreements are the Canada-Greenland Joint Commission on Narwhal and Beluga (JCNB), the Joint Norwegian-Russian Fisheries Commission and the North West Atlantic Seals Agreement 1971 between Canada and Norway. Finally, the UN Fish Stock Agreement (UNFSA) and agreements establishing Regional Fisheries Management Organisations (RFMOs) in the North Atlantic - the North East Atlantic Fisheries Commission (NEAFC), the Northwest Atlantic Fisheries Organisation (NAFO), the North Atlantic Salmon Conservation Organization (NASCO) and International Commission for the Conservation of Atlantic Tunas (ICCAT) - are also considered relevant.

The standing of any international agreement depends upon accession of states. NAMMCO is an international organisation with four-member parties. Norway and Iceland are sovereign states, while Greenland and the Faroes Islands are autonomous constituent countries within the Kingdom of Denmark. Thus, the accession to international agreements of these autonomous countries is dependent on Danish concurrence and on the extent to which the countries’ self-government extends to the subject of the international agreement. Usually, Denmark would include reservation when accessing the international agreement excluding applicability to Greenland and the Faroes, if so decided.

All NAMMCO parties are parties to UNCLOS, but not all are contracting parties to all above mentioned agreements (Table 1). In addition, Denmark’s reservations to several of these instruments contain significant territorial exclusions for Greenland and the Faroe Islands, while Norway and Iceland have reservations to various species of marine mammals under the ICRW, CMS, CITES and Bern (Table 1). These limitations should be considered when reviewing and assessing the relevance of international instruments pertaining to NAMMCO. Table 1 contains an overview of NAMMCO member states as parties to these international agreements.

In addition, some jurisprudence is also of relevance for the conservation and management of seals and whales. These decisions are:

- Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering’s sea and the preservation of fur seals⁴;
- European Communities — Measures Prohibiting the Importation and Marketing of Seal Products⁵;
- International Court of Justice (ICJ) Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)⁶.

⁴ http://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf -

⁵ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm .

⁶ <http://www.icj-cij.org/en/case/148/judgments> .

Table 1: Status of NAMMCO Parties as Parties of relevant global agreements.

(Only reservations regarding marine mammals and currently valid are stated, the name of the species, which might be out of use, are the name written in the agreement)

		Denmark (only in respect to the Faroes and Greenland)	Iceland	Norway
Global regimes	UNCLOS	Yes	Yes	Yes
	ICRW	Yes	Yes	Yes ¹
	CBD	Yes	Yes	Yes
	CMS	Yes FO, no GL ²	No	Yes ³
	CITES	Yes GL, no FO	Yes ⁴	Yes ⁴
	IMO	Yes	Yes	Yes
Regional regimes	OSPAR	Yes	Yes	Yes
	Bern	No	Yes ⁵	Yes ⁶
Fisheries regimes	UNFSA	Yes	Yes	Yes
	NEAFC	Yes	Yes	Yes
	NAFO	Yes	Yes	Yes
	ICCAT	No	Yes	Yes

¹Norway is a party to the convention but maintains an objection to paragraph 10(e) of the convention referring to the 1986 moratorium. Therefore, that provision is not binding upon Norway and the 1986 IWC global moratorium does not apply to it.

²Denmark's original ratification of CMS excluded the Faroes and Greenland; the territorial reservation with respect to the Faroes has since been withdrawn but Denmark has taken reservations with respect to *Balaenoptera bonaerensis* (Appendix II), *B. edeni* (App. II), *B. physalus* (App. I+II), *B. borealis* (App. I+II), *Carpera marginata* (App.II) [actual name: *Capera marginata*], *Physeter macrocephalus* (App. I+II) insofar as they apply to the Faroes and Greenland (https://www.cms.int/sites/default/files/uploads/Party_info/territories_reservations_2017.pdf).

³Norway has reservations under the CMS for: *B. physalus* (App. I), *B. borealis* (App. I) and *P. macrocephalus* (App. I) (https://www.cms.int/sites/default/files/uploads/Party_info/territories_reservations_2017.pdf).

⁴Both Norway and Iceland maintain reservations under CITES for a number of cetaceans. For a complete list, see <https://cites.org/sites/default/files/eng/app/2017/E-Reserv-2017-07-05.pdf>

⁵Iceland has a reservation for Appendix II marine mammal species regarding the *O. orca*, *Globicephala melaena*, *Phocoena phocoena*, *Hyperoodon rostratus*, *L. albirostris*, *Sibbaldus musculus* [*B. musculus*], *Megaptera novaengliae*, *Eubalaena glacialis*, *Balaena mysticetus*, *Delphinus delphis*, *Tursiops truncatus* and *L. acutus*, as well as *Thalarctos maritimus* [*Ursus maritimus*] (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/declarations?p_auth=UNfIGThY).

⁶Norway has reservations for the use of semi-automatic weapons used for sealing and whaling, conducted in accordance with Norwegian laws and regulations. Also, Norway has a formal, but provisional reservation to the decision of listing six whale species on Appendix II of the Bern Convention: *O. orca*, *L. albirostris*, *L. acutus*. [Only these three are listed in the text provided by Norway] (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104/declarations?p_auth=UNfIGThY).

2 MARINE MAMMALS AND UNCLOS

The UN Convention on the Law of the Sea (UNCLOS) was concluded in 1982 and came into force in 1994. UNCLOS is important for the conservation and management of marine mammals globally, as well as in the North Atlantic in several ways:

- although international regulations on the conservation and utilization of marine mammals can be traced before UNCLOS entered into force, the Convention for the first time codifies the rules pertinent to ocean governance in a single instrument,
- it establishes and describes maritime zones in the oceans under different jurisdictions,
- it specifically addresses the conservation and management of marine mammals.

UNCLOS lays down a comprehensive regime for the law of the sea, incorporating previous conventions and is partly based on customary international law - although this is not relevant in the case of NAMMCO, as all Parties are parties to the Convention. The Convention establishes rules governing all uses of the oceans and their resources, including both indirectly and directly the conservation and management of marine mammals. The UNCLOS stands out above all the other environmental treaties and it is famously referred as the “Constitution of the Oceans”⁷. The most relevant general rules established in UNCLOS are the duty to conserve living marine resources on the basis of science (e.g. Art.61.2 and Art.119), the duty to cooperate regarding shared resources (e.g. Art.63 and Art.118) and the rule of working through international organisations in fulfilling the duty to cooperate (e.g. Art.63 and Art.118).

UNCLOS divides and defines the maritime zones as follows:

(1) a Territorial Sea that may not exceed 12 nautical miles (Art. 3); (2) a Contiguous Zone that may not exceed 24 nautical miles (Art. 33); (3) an Exclusive Economic Zone that may not exceed 200 nautical miles (Art. 57); (4) the Continental Shelf that, at a minimum, extends 200 nautical miles and potentially much farther (Art. 76); (5) the High Seas (Part VIII); and (6) “The Area” (or the Deep Sea Bed, Part XI). In addition to describing and defining these maritime zones, UNCLOS also describes what are the baselines from which each zone is measured. This is important as the different maritime zones will be under different type of jurisdictions.

Two articles, Articles 65 and 120, directly deal with marine mammals and have marine mammals as subject, the first in Part V addressing the Economic Exclusive Zone, the second in part VII addressing the High Seas.

Article 65 (Under Part V. Exclusive Economic zone) - Marine mammals

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Article 120 (Under part VII. High Seas) - Marine mammals

Article 65 also applies to the conservation and management of marine mammals in the high seas.

Generally, the conservation of living marine resources within a nation’s exclusive economic zone is a matter of national jurisdiction, whereby “the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone” (Article 61.1) as guided by the “best scientific evidence available to it” (Article 61.2) with the goal of “maximum sustainable yield, as qualified by relevant environmental and economic factors” (Article. 61.3). A coastal State has the duty to conserve the living

⁷ “A Constitution for the Oceans”, Remarks by T.B. (Tommy) Koh, President of the Third United Nations Conference on the Law of the Sea.

resources of its EEZ, to cooperate with other states regarding living marine resources that occur both within and beyond areas under its national jurisdiction and shall work through international organisations in fulfilling these obligations.

Specific provisions are made for six categories of living resources: a) Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it, b) Highly migratory species, c) Marine mammals, d) Anadromous stocks, e) Catadromous stocks and f) Sedentary species. Although sedentary species are treated differently, which shows that the Convention can treat different types of species in different ways, the provision for the other five categories, although more specific, are not a deviation from the general rules set out by UNCLOS, but a reaffirmation of those principles, in particular the duty of conserving the resource and of cooperating with other States.

The conservation and management of marine resources of the High Seas follow the same principle. A specific provision is made for marine mammals, but it similarly reconfirms that the general rules that apply to all living marine resources also apply to marine mammal species: the duty to conserve, to cooperate and to work through international organisations in fulfilling these duties.

UNCLOS two brief referrals to marine mammals gives marine mammals a distinctive attention, though without treated them differently than other living marine resources. In a very different ways, ICRW and NAMMCO can be seen as examples of *lex specialis* for marine mammals.

The provisions remain silent, however, on detailing how coastal States should regulate or cooperate for their (marine mammals) conservation. This should not come as a surprise, the UNCLOS is envisaged as a framework convention. Thus, many of its provisions are intended to be further developed under other instruments.

Noteworthy is the “s” attached to the word *organisations* in Article 65: “...[States] ...and *in the case of cetaceans shall in particular work through the appropriate international organizationS for their conservation, management and study*”. At the time when Article 65 was written, the IWC was the only conservation and management body for whales – or any cetaceans. The text nevertheless has the word “organizations” in plural. This is an important detail, which makes explicit that Article 65 is setting out a principle of cooperation in a manner that is clearly not exclusive for the IWC. NAMMCO and other relevant organisations therefore have equal standing under Article 65 to the IWC and States can live up to their obligations under Article 65 through a number of international organisations, even though only one existed at the time Article 65 was drafted.

3 OTHER GLOBAL AGREEMENTS

3.1 ICRW⁸

Unlike for seals and small cetaceans, there is an international body that has global legal competence for the management of large cetaceans. The International Convention for the Regulation of Whaling (ICRW, signed in 1946), and the International Whaling Commission (IWC), which the ICRW establishes, has served as the world’s primary international regime for the management of large whales since it took effect in 1948. The Convention includes a legally binding Schedule which, amongst other things, sets out catch limits for commercial and aboriginal subsistence whaling. The Schedule is an integral part of the Convention, but its provisions, for example catch limits, may be amended by the Commission. In practice, amendments to the Schedule are almost always agreed at the Commission’s (now) biennial meetings. The ICRW has been well covered in the literature and this report will not go in an in-depth analysis of this regime⁹.

⁸ <https://archive.iwc.int/pages/view.php?ref=3607&k=> .

⁹ See, in particular, Caddell 2013.

3.2 CBD¹⁰

The Convention on Biological Diversity (CBD), signed in 1992 and coming into force in 1993, is the first international treaty to explicitly address all aspects of biodiversity, from conservation to sustainable use¹¹. The CBD is clear on its relationship with the UNCLOS and thus positions itself within this hierarchy: the CBD regulates marine living resources only insofar as it does not conflict “with the rights and obligations of States under the law of the sea” (CBD Article 22).

CBD, unlike UNCLOS, does not contain specific reference to marine mammals. But, the following CBD rules also concerns the conservation of marine mammals:

- CBD prioritises ‘In situ’ conservation: although the Convention promotes both in situ (in nature) and ex situ (outside of natural habitats) conservation, in situ conservation is clearly favored. Article 8 identifies in situ obligations that, inter alia, require states parties to establish protected areas, promote ecosystem protection, restore degraded habitat, control and/ or prevent alien invasive species, respect and promote Indigenous knowledge, and legislate to protect threatened species. Further, Article 7 supports in situ conservation by requiring states to identify and monitor important components of biological diversity;
- CBD endorses the ecosystem approach¹²;
- CBD emphasised the importance of using environmental impact assessments to minimize, as far as possible, the impact of human actions or development on biological resources/ diversity¹³.

3.3 CMS Convention¹⁴

The Convention of Migratory Species (CMS), signed in 1979, provides a global platform for the conservation and sustainable use of migratory animals and their habitats, particularly migratory species with an unfavourable conservation status¹⁵. CMS applies to all migratory species, but contains additional provisions in relation to species listed on one of its two appendices:

- Appendix I lists migratory species threatened with extinction¹⁶. CMS Parties strive towards strictly protecting these animals, conserving or restoring the places where they live, mitigating obstacles to migration and controlling other factors that might endanger them. Besides establishing obligations for each State joining the Convention, CMS promotes concerted action among the Range States of many of these species.
- Appendix II lists migratory species that need or would significantly benefit from international co-operation¹⁷. The Convention encourages the Range States to conclude global or regional agreements.

Species can be listed on both appendices simultaneously. Marine mammals are listed as follows.

- Appendix I: bowhead whale, blue whale, humpback whale, North Atlantic right whale;
- Appendix II: long-finned pilot whale (only North and Baltic Sea populations), white-beaked and white-sided dolphins (only North and Baltic Sea populations), narwhal, killer whale, harbour porpoise (North and Baltic Sea, western North Atlantic, Black Sea and North West African populations), Risso’s dolphin (only North Sea, Baltic Sea and Mediterranean populations), Atlantic bottlenose dolphin (North Sea, Baltic Sea, Mediterranean and Black Sea populations), Short-beaked common dolphin (North and Baltic Seas, Mediterranean, Black Sea and eastern tropical Pacific populations), beluga and northern bottlenose whale, grey seal (only Baltic Sea population) and Harbour seal (only Baltic and Wadden Sea populations);
- Appendices I and II: sperm whale, sei whale, fin whale.

¹⁰ <https://www.cbd.int/> .

¹¹ CBD Article 1.

¹² See more about ecosystem approach strategy here: <https://www.cbd.int/ecosystem> .

¹³ See more about EIA here: <https://www.cbd.int/impact/whatis.shtml#environmental> .

¹⁴ <http://www.cms.int/> .

¹⁵ CMS, Article II.

¹⁶ CMS Article III.

¹⁷ CMS Article IV.

CMS encourages Parties to take action with a view to concluding various types of agreements¹⁸. Relating to marine mammals, three such agreements have been concluded: ASCOBANS (Agreement on the Conservation of Small Cetaceans in the Baltic, North East Atlantic, Irish and North Seas, 1994, area extension 2008), ACCOBAMS (Agreement on the Conservation of Cetaceans of the Black Seas, Mediterranean and Contiguous Atlantic Area, 2001), and Wadden Sea Seals (Trilateral Agreement on the Conservation of Seals in the Wadden Sea, 1991). None of them has an overlapping area with NAMMCO. Nevertheless, these are important as it shows that CMS mechanisms may and are used in marine mammals' conservation. Further, CMS's active interest in the conservation status of small cetaceans affects marine mammals in the North Atlantic as well. For example, at its Tenth Meeting in Bergen in 2011, CMS adopted a Global Programme of Work for Cetaceans¹⁹. The resolution calls for collaborative action to address the series of issues concerning cetaceans: entanglement and bycatch, climate change, ship strikes, pollution, habitat and feeding ground degradation, and marine noise.

3.4 CITES²⁰

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed in 1973 and effective in 1975, is an international agreement whose aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

Similarly to CMS, the species covered by CITES are listed in three appendices according to the needed degree of protection, with accordingly application of different trade restrictions.

- Appendix I species (“all species threatened with extinction which are or may be affected by trade”) have a ‘highest degree’ of protection - protected against trade by the strict permitting system described in Article III of CITES,
- Appendix II species (“all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival”) have their protection limited to a level that “will not be detrimental to their survival,” as permitted by Article IV.
- Appendix III listing allows individual nations to limit trade in certain species not listed on the other appendices and facilitates the cooperation of other states²¹.

There are currently 33 species of cetaceans listed in Appendix I, all cetaceans not listed in Appendix I are listed in Appendix 2, and none are listed in Appendix III. For pinnipeds, four species are listed in Appendix I, eight in Appendix II, and one in Appendix III. This includes species residing in NAMMCO area; for example, the large baleen whales are all listed in Appendix I (endangered), some smaller cetaceans such as narwhal are listed in Appendix II (threatened), walrus is listed in Appendix III.

CITES allows that contracting parties may take a reservation with respect to any particular listing²². Iceland and Norway are maintaining reservations in relation to a number of listed cetacean species (see Table 1). Also, parties may propose species for uplisting or downlisting²³. In this regard, Norway (and later Japan) has proposed the downlisting of the Northeast Atlantic and the North Atlantic central stocks of minke whale from Appendix I to Appendix II on multiple occasions²⁴. However, all attempts have failed.

The trade review procedure under CITES offers a mechanism which allows member states to have the relevant CITES committee review trade in specimen of Appendix II species in order to examine whether the point has been reached that continuing trade is no longer “consistent with the position of that species

¹⁸ See CMS Articles IV and V. Details concerning types of CMS agreements are out of scope of this paper.

¹⁹ Available at http://www.cms.int/sites/default/files/document/10_15_cetaceans_e_0_0.pdf .

²⁰ <https://www.cites.org/> .

²¹ CITES Article V.

²² CITES Article XV(3).

²³ CITES Article XV.

²⁴ Bankes 2013 p. 305.

in the ecosystem” and that therefore the scientific authorities of the relevant range states should be making non-detriment findings. Up until now, there have been two such reviews for narwhals²⁵.

3.5 IMO Convention²⁶

The International Maritime Organization Convention (IMO), adopted in 1948, came into force in 1958. Its purpose is "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships" (Article 1a). The Organization is also empowered to deal with administrative and legal matters related to these purposes²⁷. No rules of the Convention are directly aimed towards conservation and management of marine mammals.

Nevertheless, the IMO has the potential to play an important role, regulating a conservation sphere relevant to cetaceans that NAMMCO has not considered to date: calling on states to take measures to reduce the risk of ship strikes with cetaceans. Much of this work is carried out through IMO's Marine Environment Protection Committee (MEPC). The MEPC adopted on 31 July 2009 a Guidance Document for Minimizing the Risk of Ship Strikes with Cetaceans (MEPC.1/Circ.674).

3.6 Other non-legally binding instruments

3.6.1 UNGA resolutions

The United Nations (UN) General Assembly resolutions, with as latest the 2017 Resolution 72/72²⁸ on “Sustainable fisheries...” and Resolution 72/73²⁹ “on Oceans and the law of the sea” reaffirms the importance the Assembly attaches to the long-term conservation, management and sustainable use of the living marine resources of the world and the obligations of States to cooperate on this.

It calls upon States in particular in cooperating to improve the understanding and knowledge of the oceans and the deep sea, to address issues such as climate change, underwater noise, marine debris and other emerging environmental issues, to apply an ecosystem approach and better contribute to the sustainable management of the oceans and their resources. Of particular interest are the following statements, as they are more directly related to marine mammal conservation.

Resolution 72/72:

Expressing concern over continued incidental mortality, in fishing operations, of seabirds, particularly albatrosses and petrels, as well as other marine species, including sharks, fin-fish species, marine mammals and marine turtles.

[138] *Urges States, individually or through regional fisheries management organizations and arrangements, to implement the International Guidelines on Bycatch Management and Reduction of Discards of the Food and Agriculture Organization of the United Nations;*³⁰

Resolution 72/73:

[233] *Recalls that, in “The future we want”, States committed themselves to protect and restore the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development;*

²⁵ EU Submission to the Animals Committee, AC21 Inf.1 (Rev1) “The Need for a New Review of Significant Trade in the Narwhal” (2005) available at <www.cites.org/common/com/AC/21/E21i-01.pdf>.

²⁶ <http://www.imo.org/EN/Pages/Default.aspx> .

²⁷ <http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>

²⁸ <https://undocs.org/A/RES/72/72>

²⁹ <https://undocs.org/A/RES/72/73>

³⁰ Food and Agriculture Organization of the United Nations, document FIRO/R957 (En), appendix E.

[276] *Notes with concern* that human-related threats, such as marine debris, ship strikes, underwater noise, persistent contaminants, coastal development activities, oil spills and discarded fishing gear, together may severely impact marine life, including its higher trophic levels, and calls upon States and competent international organizations to cooperate and coordinate their research efforts in this regard so as to reduce these impacts and preserve the integrity of the whole marine ecosystem, while fully respecting the mandates of relevant international organizations.

3.6.2 UNFAO codes and guidelines

The UN' Food and Agricultural Organization's (FAO) Code of Conduct for Responsible Fisheries (October 1995³¹) requires that member states conduct fishing with due regard for the environment (FAO 1995). It states that members should collect reliable and accurate data, including data on bycatch, discards, and waste, for assessing the status of fisheries. These voluntary guidelines for managing and developing commercial fisheries while achieving conservation objectives requires protection of endangered species through adoption of appropriate scientific evidence-based measures.

The FAO's International Guidelines on Bycatch Management and Reduction of Discards (February 2011³²) are voluntary and "constitute an instrument of reference to help States and RFMO/As in formulating and implementing appropriate measures for the management of bycatch and reduction of discards in all fisheries and regions of the world".

4 REGIONAL AGREEMENTS

4.1 OSPAR Convention³³

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), which was adopted in 1992 and entered into force in 1998, replaced the earlier Paris and Oslo Conventions. It was initially essentially pollution prevention instrument. Its general obligation is to take all possible steps to prevent and eliminate pollution and take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected³⁴.

The Convention contains a series of Annexes which deal with the specific areas. Of particular importance for marine mammals in the North Atlantic is Annex V "On the protection and conservation of the ecosystems and biological diversity of the maritime area". The Annex, which was added to the convention in 1998, calls on Contracting Parties to take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected³⁵. The OSPAR Commission is tasked to draw up programmes and measures for the control of human activities that have actual or potential adverse effects on specific species, communities, habitats or ecological processes. In so doing, it is to review these activities and their effects and develop means for instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to particular habitats or species³⁶.

OSPAR Annex V, as pertaining to 'fisheries measures' does include marine mammals - this has been clarified in Agreement 1998-2. OSPAR assesses the status of marine mammal populations including *inter alia* identifying threats to the populations and considers marine mammals in the context of the ecosystem approach to management of the North-East Atlantic. However, OSPAR does not manage any fisheries/hunting nor propose any specific management measures relating to fisheries/hunting.

³¹ <http://www.fao.org/3/a-v9878e.htm>

³² <http://www.fao.org/docrep/015/ba0022t/ba0022t00.pdf>

³³ <https://www.ospar.org/> .

³⁴ OSPAR Article 2(1)(a).

³⁵ OSPAR Article 2.

³⁶ OSPAR Article 3.

4.2 Bern Convention³⁷

The Bern Convention on the Conservation of European Wildlife and Natural Habitats was adopted in 1979 and came into force in 1982. This binding international legal instrument has three main aims:

- to conserve wild flora and fauna and their natural habitats;
- to promote cooperation between states;
- to give particular attention to endangered and vulnerable species including endangered and vulnerable migratory species³⁸.

Convention's four appendices set out particular protection measure. These are regularly updated by the Standing Committee, upon advises given by Expert Groups.

Species requiring special attention are listed in three Appendices as follows:

- Appendix I – Strictly protected flora species
- Appendix II – Strictly protected fauna species
- Appendix III – Protected fauna species.

30 cetaceans and four pinnipeds are listed in Appendix II (List of strictly protected species). Six pinnipeds and all cetaceans not listed in Appendix II are listed in Appendix III (List of protected species).

Appendix IV list Prohibited means and methods of killing, capture and other forms of exploitation. The Prohibited means and methods of killing, capture and other exploitation are largely identical to those in Annex IV of the Birds Directive. Killing methods of marine mammals in NAMMCO are not contravening measures as listed in the Appendix IV; while use of explosives is a prohibited mean and method of killing mammals, it is not prohibited for whale hunting³⁹.

4.3 EU Legislation – seal trade ban

Although none of the NAMMCO parties are EU members, the EU is still an important market state. In 2009, the European Parliament and the Council adopted a new Regulation (EC) No 1007/2009⁴⁰ banning the trade in seal products in the European Union. The ban applies to seal products produced in the EU and to imported seal products. The Commission adopted implementing Regulation (EU) No 737/2010⁴¹ laying down detailed rules for the implementation of the ban. Both acts became applicable on 20 August 2010.

The ban was amended in 2015 in order to reflect the outcomes of WTO rulings in the EC-Seal products case. The amendments to Regulation (EC) No 1007/2009, which also repeals Regulation (EU) No 737/2010, became applicable on 18 October 2015. The Commission adopted a new Commission Implementing Regulation (EU) 2015/1850⁴², also applicable as of 18 October 2015.

An Inuit exception is included by virtue of Article 3(1) of Regulation (EC) No 1007/2009, as the seal hunt is considered as a part of the socio-economy, culture and identity of the Inuit and other indigenous communities which contributes to their subsistence. It allows the placing on the Union market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities if the conditions under Article 3(1) are met. Before being introduced into the Union's market, seal products that qualify under the Inuit exception must first be attested by bodies recognised in accordance with Article 3 of Commission Implementing Regulation (EU) 2015/1850.

³⁷ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104> .

³⁸ The Bern Convention Article 1.

³⁹ The Bern Convention Appendix IV, p.1, available at: <https://rm.coe.int/1680304357> .

⁴⁰ http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145264.pdf .

⁴¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:216:0001:0010:EN:PDF> .

⁴² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R1850&from=EN> .

5 BILATERAL AGREEMENTS

5.1 MOU Between Canada and Greenland

The Canada-Greenland Joint Commission on Narwhal and Beluga (JCNB) was established in 1991 under terms of a Memorandum of Understanding (MOU) between the federal Department of Fisheries and Oceans and the Ministry of Fisheries and Hunting of the Greenland Home Rule Government⁴³. This Memorandum applies to stocks of narwhals and belugas that migrate between Canadian and Greenlandic waters.

5.2 Norwegian- Russian North East Atlantic seals Agreement

The management of North East Atlantic seals is coordinated by Russia and Norway through the Joint Norwegian - Russian Fisheries Commission signed in 1975. This arrangement is primarily concerned with establishing TACs for shared fish stocks in portions of the Barents Sea/White Sea and part of the Greenland Sea, but the Commission also plays a role in establishing and sharing a total allowable harvest for harp and hooded seals⁴⁴. The Working Group on Seals assesses catch data and scientific information and recommends future catches.

There is a close connection between the Joint Commission's work in relation to seals and the work of ICES/NAFO/NAMMCO joint working group on harp seals and hooded seals⁴⁵ (NAMMCO joined the WG in 2016).

5.3 The North West Atlantic Seals Agreement between Canada and Norway

The North West Atlantic Seals Agreement signed in 1971 between Canada and Norway⁴⁶ strives for "the best possible protection of the seal stocks in this area and a rational utilization of these resources"⁴⁷. The treaty mainly concerns the harp seal but has the potential to be expanded by the Commission to cover the bearded seal, hooded seal, and walrus⁴⁸. Most of the area covered by this treaty is presently within Canada's Exclusive Economic Zone (EEZ), but cooperation is still necessary because Norway engages in pelagic sealing and the harp seal is highly migratory. The majority of the sealing in this region now occurs within Canada's EEZ and, consequently, is managed by the Government of Canada.

6 FISHERIES RELATED AGREEMENTS

6.1 UNFSA

The UN Fish Stocks Agreement (UNFSA), formally, the UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks⁴⁹ was adopted in 1995 and came into force in 2001. It is a multilateral agreement which elaborates on the fundamental principles established in the Convention, that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone⁵⁰. It was initiated as a response to a fisheries management crisis involving a class of transboundary fishery resources, rooted to inconsistencies within the Convention.

As the agreement title indicates, it is applicable solely to straddling stocks (fish stocks that migrate through, or occur in, both one or more exclusive economic zone and on the high seas) and highly migratory stocks (species which undertake ocean migrations and also have wide geographic

⁴³ <http://www.nwmb.com/en/2-uncategorised/83-canada-greenland-joint-commission-on-beluga-and-narwhal> .

⁴⁴ <http://www.jointfish.com/eng> .

⁴⁵ Bankes 2013 p.319.

⁴⁶ Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20870/volume-870-I-12497-English.pdf>

⁴⁷ Preamble of the Agreement.

⁴⁸ Article II of the Agreement.

⁴⁹ http://www.un.org/depts/los/convention_agreements/convention_20years/1995FishStockAgreement_ATahindro.pdf .

⁵⁰ http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm).

distributions and therefore migrate through, or occur in, both one or more exclusive economic zone and on the high seas) – i.e. both occur within and beyond areas under national jurisdiction. The latter – the highly migratory stocks, are those composed of species as listed in Annex 1 of UNCLOS. Thus, this definition is a legal one rather than a scientific one. As cetaceans are included in Annex 1 of UNCLOS of highly migratory species, they could be considered an objective of this agreement. However, at present, the FAO does not consider whaling as addressed in the UNFSA⁵¹.

Nevertheless, the UNFSA is important for reasons - the relevant provisions of the UNFSA elaborates in more detail on the rules established by UNCLOS requiring States to cooperate for the conservation and management of straddling fish stocks and highly migratory fish stocks. It provides a framework for cooperation in the conservation and management of those resources. The UNFSA requires the management of straddling/highly migratory fish stocks on a sub-region by sub-region basis through Regional Fisheries Management Organizations (RFMOs), which are a centrepiece of this international regime. Two were created as a result, namely, the South East Atlantic Fisheries Organisation (SEAFO) and the Western and Central Pacific Fisheries Commission (WCPFC) or the Tuna Commission, other already existed. The relevance of RFMOs for the conservation of marine mammals is explicated below.

6.2 RFMOs

RFMOs are inter-governmental organisations which fulfils two conditions⁵²: they have competence under international law to adopt legally binding conservation and management measures regarding fisheries and the area to which this legal competence applies includes a part of the high seas. There are 3 different types of RFMOs: General RFMOs, Tuna RFMOs, and Specialised RFMOs.

RFMOs generally don't have competence to manage hunting of marine mammals. However, they generally have a mandate to manage fisheries in a manner that takes account of the effects of the fisheries on other parts of the marine ecosystem and on biodiversity, as e.g. illustrated in Article 4.2 of the NEAFC Convention⁵³:

2. When making recommendations in accordance with Article 5 or 6 of this Convention the Commission shall in particular:

- a) ensure that such recommendations are based on the best scientific evidence available;*
- b) apply the precautionary approach;*
- c) take due account of the impact of fisheries on other species and marine ecosystems, and in doing so adopt, where necessary, conservation and management measures that address the need to minimise harmful impacts on living marine resources and marine ecosystems; and*
- d) take due account of the need to conserve marine biological diversity.*

Four RFMOs areas are potentially overlapping with NAMMCO area of competence: 2 General RFMOs, NEAFC and NAFO; one Tuna RFMO, ICCAT; and one Specialised RFMO, NASCO. None of them have marine mammals directly under their management mandate, but the fisheries they manage impact marine mammals, seals and whales, in the North Atlantic – by impacting their prey or/and because of by-catch issues.

6.2.1 NEAFC

The North East Atlantic Fisheries Commission (NEAFC, 1980) Convention covers all resources of “fish, molluscs, crustaceans and including sedentary species, excluding, in so far as they are dealt with by other international agreements, highly migratory species listed in Annex I of the UNCLOS, and anadromous stocks” (Article 1b). “The objective of this Convention is to ensure the long-term conservation and optimum utilisation of the fishery resources in the Convention Area, providing sustainable economic, environmental and social benefits (Article 2).

⁵¹ See the fourth paragraph under 2.1 at: <http://www.fao.org/docrep/009/a0653e/a0653e04.htm> .

⁵² <https://www.neafc.org/system/files/types-of-RFMOs-04.pdf>

⁵³ <https://www.neafc.org/system/files/Text-of-NEAFC-Convention-04.pdf>

6.2.2 NAFO

The Northwest Atlantic Fisheries Organisation (NAFO, 1979) Convention applies to all fishery resources in the Northwest Atlantic except salmon, tunas/marlins and mammals as these are already under the responsibility of other intergovernmental regional fisheries management bodies. It also does not apply to sedentary species such as many shellfish over which coastal States exercise sovereign rights⁵⁴. The objective of NAFO is to “... ensure the long term conservation and sustainable use of the fishery resources in the Convention Area and, in so doing, to safeguard the marine ecosystems in which these resources are found” [amended NAFO Convention from 2007, Article II, not yet ratified].

6.2.3 NASCO

The North Atlantic Salmon Conservation Organization (NASCO, 1984) applies to “... to the salmon stocks which migrate beyond areas of fisheries jurisdiction of coastal States of the Atlantic Ocean north of 36°N latitude throughout their migratory range” (Article 1.1). The objective of NASCO is to “... contribute through consultation and co-operation to the conservation, restoration, enhancement and rational management of salmon stocks subject to this Convention, taking into account the best scientific evidence available to it” (Article 3.2)).

6.2.4 ICCAT

The International Commission for the Conservation of Atlantic Tunas (ICCAT, 1966) Convention applies to the conservation of tunas and tuna-like species in the Atlantic Ocean, including the adjacent Seas. The Convention is “...responsible for the study of the populations of tuna and tuna-like fishes (the Scombriformes with the exception of the families Trichiuridae and Gempylidae and the genus Scomber) and such other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization” (Article IV).

7 CONCLUSIONS

This overview showed that several legal instruments other than the NAMMCO Agreement are relevant for the conservation and utilization of marine mammals in the North Atlantic. Marine mammal conservation is dealt with at different levels of governance, global, regional, and bilateral. Marine mammals are therefore extensively covered by a number of legal instruments that together form the relevant international legal framework.

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⁵⁴ <https://www.nafo.int/Portals/0/PDFs/GeneralInfo/NAFO-Perspectives-booklet.pdf?ver=2016-07-29-101054-407>