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## CHAPTER FIVE

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### KEY CHALLENGES RELATING TO THE GOVERNANCE OF REGIONAL FISHERIES

James Harrison

#### 1. INTRODUCTION

International law calls for cooperation in the conservation and management of fish stocks, although it does not specify the precise form that such cooperation must take.<sup>1</sup> Generally speaking, states have chosen to pursue cooperation at the regional level, in order to allow them to respond to the varying ecological, geographical and political particularities of each individual fishery. Most regional fisheries cooperation takes place through some type of international institution, generically referred to as a regional fisheries body (RFB).<sup>2</sup> Yet, the functions of RFBs vary from the collection and dissemination of data to the adoption of legally binding conservation and management measures (CMMs). It is this latter form of cooperation that is of particular interest in the present Chapter, as it offers the best chances of ensuring the effective management of the world's fish stocks.

The purpose of this Chapter is to explore the key trends in regional fisheries management and the extent to which a comprehensive, coherent and effective system of regional fisheries governance has emerged since the entry into force of the LOS Convention.<sup>3</sup> The focus of the Chapter is on the regulation of high seas fisheries, including straddling and highly migratory stocks. The Chapter will question the extent to which common trends have emerged in relation to such governance arrangements. It will address five key issues that are critical to the effective functioning of regional fisheries regulation, namely: drivers of regional fisheries cooperation (Section 2); institutional form (Section 3); decision-making procedures (Section 4); dispute settlement (Section 5); and inter-institutional cooperation (Section 6).<sup>4</sup> The conclusions in Section 7 will draw together the overall trends in this field and will suggest that there are signs of increasing systematization evident through emerging principles by which all RFBs are judged, as well as increasing collaboration between RFBs in order to promote shared goals.

#### 2. KEY DRIVERS OF REGIONAL FISHERIES REFORM

Whilst fisheries cooperation can be traced back to the late nineteenth and early twentieth centuries,<sup>5</sup> there is little doubt that cooperation in this field has intensified since the 1990s when broader considerations of sustainability emerged as an

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<sup>1</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (LOS Convention; 1833 UNTS 3), Arts. 63, 64 and 118.

<sup>2</sup> This is an umbrella term used by the Food and Agriculture Organization of the United Nations; see <http://www.fao.org/fishery/topic/16800/en>.

<sup>3</sup> See note 1. The LOS Convention entered into force on 16 November 1994.

<sup>4</sup> See also Chapter 6 of this Volume (Molenaar).

<sup>5</sup> See e.g. K. Bangert "Fisheries Agreements" in *Max Planck Encyclopedia of Public International Law On-line Edition* (Oxford University Press, Oxford: 2008).

international priority.<sup>6</sup> The political impetus generated by events such as the 1992 Rio Conference on Environment and Development led to further developments in the global legal framework for international fisheries management, as well as to reform of regional fisheries regimes.

One of the most important developments in international fisheries law following the Rio Conference was the adoption of the Fish Stocks Agreement.<sup>7</sup> Much of the Agreement is concerned with improving the governance of fisheries at the regional or subregional level, in order to ensure transparent, timely and effective decision-making.<sup>8</sup> The Fish Stocks Agreement itself explicitly calls for the establishment of new subregional and regional fisheries management organizations or arrangements where none exist<sup>9</sup> and the strengthening of existing organizations and arrangements in order to improve their effectiveness.<sup>10</sup> The principles and policy goals in this Agreement, as reinforced by subsequent international instruments,<sup>11</sup> declarations<sup>12</sup> and meetings,<sup>13</sup> not only provide a check-list for evaluating the functioning of fisheries cooperation, but they also provide an important baseline for states when negotiating the establishment of new cooperative mechanisms, whether they apply to straddling and highly migratory stocks or discrete high seas stocks.<sup>14</sup>

In practice, the follow-up to the Rio Conference and the Fish Stocks Agreement has seen both reform of existing regional fisheries treaties to reflect modern governance principles, as well as the establishment of new fisheries treaties to cover new and emerging fisheries. All of these developments have confirmed RFBs as the main vehicle for managing high seas fisheries. In particular, a key shift in this post-Rio period has been a trend towards the establishment of mechanisms to agree upon legally binding CMMs for high seas fish stocks, largely through the establishment of regional fisheries management organizations or arrangements (RFMO/As).<sup>15</sup>

Significant steps have been taken to fill gaps in the regulatory framework for high seas fisheries, although some gaps remain.<sup>16</sup> In part, gaps arise because existing

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<sup>6</sup> See discussion in e.g. Y. Takei *Filling Regulatory Gaps in High Seas Fisheries* (Brill, Leiden: 2013) 88-111.

<sup>7</sup> Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (2167 UNTS 3).

<sup>8</sup> *Ibid.*, Arts. 10(j) and 12.

<sup>9</sup> *Ibid.*, Art. 8(5).

<sup>10</sup> *Ibid.*, Art. 13.

<sup>11</sup> See e.g. 1995 FAO Code of Conduct on Responsible Fisheries, para. 6.12; 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paras. 78-83.

<sup>12</sup> 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Environment, para. 3; 2005 St John's Declaration on the Governance of High Seas Fisheries, paras. 1, 4; 2005 Rome Declaration on IUU Fishing, para. 5.

<sup>13</sup> See e.g. Report of the Meeting of FAO and Non-FAO Regional Fishery Bodies or Arrangements (*FAO Fisheries Report* No. 597: 1999) para. 41(v).

<sup>14</sup> See e.g. R. Barnes and C. Massarella "High Seas Fisheries" in E. Morgera and K. Kulovesi (eds) *Research Handbook on International Law and Natural Resources* (Edward Elgar, Cheltenham: 2016) 374; Takei, note 6 at 152-153.

<sup>15</sup> J. Swan "Decision-Making in Regional Fisheries Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes" (*FAO Fisheries Circular* No. 995: 2004) 10; Takei, note 6 at 205-272. See below for discussion of the differences between RFMOs and RFMAs.

<sup>16</sup> United Nations General Assembly (UNGA) Res. 71/123 of 7 December 2016, para. 140; Report of the 2016 Resumed Fish Stocks Agreement Review Conference, doc A/CONF.210/2016/5 of 1 August 2016, Outcomes, para. A18.

## KEY CHALLENGES ON THE GOVERNANCE OF REGIONAL FISHERIES

RFMO/As may not necessarily cover all of the relevant species that are fished in the region. The United Nations General Assembly (UNGA) has particularly highlighted the need to ensure the mandates of RFMO/As cover bottom fisheries.<sup>17</sup> In other areas, the relevant RFBs may not have a mandate to adopt legally binding CMMs for the fish stocks under their purview. For example, in the Central and South-West Atlantic and the Central Eastern Atlantic, the two existing regional fisheries institutions do not possess the power to adopt legally binding management measures, although discussions are ongoing about upgrading these bodies to address this shortcoming.<sup>18</sup> In some areas, there is simply a lack of institutions. Whilst coverage is generally considered to be good for tuna and tuna-like species, the situation for other fish stocks is patchier. One gap relates to certain parts of the Central Pacific, in areas that fall between the mandates of the North Pacific Fisheries Commission (NPFCC) and the South Pacific Regional Fisheries Management Organization (SPRFMO). The situation is more complex in the South-West Atlantic, where proposals have been made for the establishment of an RFMO to fill a gap in fisheries regulation, but they have been resisted by coastal States in the region, in part due to on-going territorial disputes.<sup>19</sup> Finally, there is a gap for all fish species in the central Arctic Ocean, where the ice is retreating and opening up new fishing grounds. Although there is not yet any commercial fishing in these areas, there are on-going negotiations on how to address this situation in a pre-emptive manner.<sup>20</sup>

Alongside the drive towards comprehensive regulatory coverage, the international community has also stressed the need to ensure that institutions are effective in fulfilling the mandate that they have been given. Momentum for performance reviews of RFBs began in 2005, when the twenty-sixth session of the United Nations Food and Agriculture Organization (FAO)'s Committee on Fisheries agreed to "extend an invitation to RFMO members and other interested parties encouraging them to participate in the development of parameters for any such review process."<sup>21</sup> These discussions were followed up in the 2005 UNGA Fisheries Resolution, which "[e]ncourage[d] States, through their participation in regional fisheries management organizations and arrangements, to initiate processes for their performance review."<sup>22</sup>

The North-East Atlantic Fisheries Commission (NEAFC) was amongst the first RFMOs to undertake a performance review<sup>23</sup> using criteria developed by its Working Group on the Future of NEAFC.<sup>24</sup> In particular, the review took into account the

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<sup>17</sup> UNGA Res. 59/25 of 17 November 2004, para. 68. See also Chapter 8 of this Volume (Caddell).

<sup>18</sup> For discussion, see Fishery Committee for the Eastern Central Atlantic (CECAF) Performance Review (2012) para. 21; K. Hoydal "Findings of the Independent Cost-Benefit Assessment of the Options for Strategic Re-Oriented of WECAFC" (*FAO Fisheries and Aquaculture Circular* No. 1117: 2016).

<sup>19</sup> See A. Bensch et al "Worldwide Review of Bottom Fisheries in the High Seas" (*FAO Fisheries and Aquaculture Technical Paper* No. 522/Rev.1: 2009) 62.

<sup>20</sup> A process is ongoing in relation to the high seas of the central Arctic Ocean; see <<https://www.state.gov/e/oes/ocns/opa/rls/269126.htm>>. For a discussion of the background to this process, see E.J. Molenaar "International Regulation of Central Arctic Ocean Fisheries", in M. Nordquist, J. Moore, R. Long (eds) *Challenges of the Changing Arctic. Continental Shelf, Navigation, and Fisheries* (Brill, Leiden: 2016) 429-463.

<sup>21</sup> Report of the Twenty-Sixth Meeting of the Committee on Fisheries (*FAO Fisheries Report* R780: 2005) para. 112.

<sup>22</sup> UNGA Res. 60/31 of 29 November 2005, para 60. See also UNGA Res. 61/105 of 8 December 2006, para. 73 and the Report of the 2006 Fish Stocks Agreement Review Conference, doc A/CONF.210/2006/15 of 5 July 2006, Outcome, para. 32(j).

<sup>23</sup> The North Atlantic Salmon Conservation Organization (NASCO) had undertaken a performance review in 2004-2005, although this was an internal exercise linked to reform of the organization.

<sup>24</sup> Report of the 2006 NEAFC Performance Review.

manner in which NEAFC had performed in several core areas with reference to relevant international treaties and other instruments, including the LOS Convention and the Fish Stocks Agreement. Most RFMO/As have now carried out at least one performance review, many following a similar model to NEAFC.<sup>25</sup> Yet, there are key differences between the processes, particularly when it comes to the composition of the review panel. Whilst some RFMO/As involve a mixture of internal and external experts,<sup>26</sup> others have opted for the appointment of a completely independent panel composed of experts in fisheries management, fisheries science and the law of the sea.<sup>27</sup> This latter approach arguably increases the rigor of the assessment process by minimizing any influence that the organization may have upon the findings. Nevertheless, many RFMO/As continue to stress the benefit of including representatives of the organization in order to provide some internal knowledge and guidance as to how cooperation works within the region.<sup>28</sup> The reviews also differ in the manner in which they engage with external stakeholders and civil society. Many RFMO/As have chosen to actively consult stakeholders as part of the review process and some have gone as far as including a representative from a non-governmental organization (NGO) on the review panel.<sup>29</sup>

These periodic reviews, which have become a legal requirement for the most recently established RFMOs,<sup>30</sup> are not only an important tool for assessing the effectiveness of fisheries measures adopted within a particular region, but they are also a way of considering best practices from other regional settings, thus contributing to the systematization of regional fisheries governance.

### 3. INSTITUTIONAL STATUS OF REGIONAL FISHERIES BODIES

The Fish Stocks Agreement makes a distinction between cooperation that is carried out “directly or through appropriate subregional or regional fisheries management

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<sup>25</sup> See M. Ceo et al “Performance Reviews by Regional Fisheries Bodies: Introduction, Summaries, Synthesis and Best Practices” (*FAO Fisheries and Aquaculture Circular* No. 1072: 2012) 43; P.D. Szigeti and G. Lugten “The Implementation of Performance Reviews Reports by Regional Fisheries Bodies, 2004-2014” (*FAO Fisheries and Aquaculture Circular* No. 1108: 2013) 6.

<sup>26</sup> This was the case for the first NEAFC Performance Review in 2006. This model was followed by, *inter alia*, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Western and Central Pacific Fisheries Commission (WCPFC), the South-East Atlantic Fisheries Organization (SEAFO), the Indian Ocean Tuna Commission (IOTC), and the Northwest Atlantic Fisheries Organization (NAFO).

<sup>27</sup> The International Commission on the Conservation of Atlantic Tunas (ICCAT) was the first body to establish a completely independent review panel in 2008 and it has been followed by, *inter alia*, NEAFC in its second review, the General Fisheries Commission for the Mediterranean (GFCM), and (to some extent) the Commission on the Conservation of Southern Bluefin Tuna (CCSBT). The Inter-American Tropical Tuna Commission (IATTC) employed an independent consultancy to conduct its review.

<sup>28</sup> See Report of the NAFO Performance Review virtual Working Group, doc. NAFO/GCDoc.16/02 (2016) 3.

<sup>29</sup> See e.g. Terms of Reference and Criteria to Conduct the Performance Review of the Indian Ocean Tuna Commission (2014); Report of the Thirty-Fifth Meeting of CCAMLR (2016) Annex 8.

<sup>30</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009 (SPRFMO Convention; available at [www.sprfmo.int](http://www.sprfmo.int)), Art. 30; 2012 Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean of 24 February 2012 (NPFC Convention; available at <https://www.npfc.int/>), Art. 22.

organizations and arrangements”.<sup>31</sup> Whilst it reserves the option for direct cooperation, the Agreement goes on to specify that States are under an obligation to “cooperate to establish such an organization or enter into other appropriate arrangements” where one does not already exist.<sup>32</sup> Such a duty to cooperate can only practically operate as an obligation of conduct, not an obligation of result,<sup>33</sup> but it nevertheless sets a clear preference for more institutionalized forms of cooperation. This preference is also reflected in subsequent international fisheries policy documents.<sup>34</sup> Yet, these instruments still leave a choice for States between cooperation through an RFMO or an RFMA and it is therefore pertinent to consider the key differences between these institutional forms.

The Fish Stocks Agreement does not expressly define an RFMO, but there are three key features that are at the core of any international organization. Firstly, the establishment of an organization implies a minimum degree of institutionalization, including distinct legal personality.<sup>35</sup> An organization will thus be subject to the rules of international law, including principles of international institutional law, which define the scope of powers that may be exercised by an organization. In particular, this branch of international law can be used to determine whether or not an international organization is able to regulate matters that are incidental to its main functions,<sup>36</sup> as well as the existence of implied powers that may be necessary to the achievement of its objectives.<sup>37</sup> Secondly, all RFMOs will also have some form of permanent organ that exercises decision-making powers on behalf of its Members.<sup>38</sup> In practice, it is common for RFMOs to have a complex structure of organs and sub-organs, each exercising different functions. Finally, an organization will have a secretariat that arranges meetings and oversees the day-to-day operation of the organization on behalf of the membership. In this regard, modern international relations scholarship posits that the establishment of a secretariat, separate from the individual Members, has significant effects on the dynamics of international law-making by providing “relatively unbiased information to all”,<sup>39</sup> thereby “influencing how problems are framed and discussed.”<sup>40</sup> Indeed, the secretariat may also be ascribed certain functions in relation to implementation and oversight of agreed CMMs, including bringing instances of infractions to the attention of the relevant organs of the RFMO. This is a possibility that is often neglected in the context of regional fisheries management, however, and performance reviews have sometimes recommended that certain aspects of the secretariat should be strengthened in order to provide better support to reviewing compliance with CMMs.<sup>41</sup>

<sup>31</sup> Art. 8(1).

<sup>32</sup> Ibid, Art. 8(5). See also UNGA Res.71/123, note 16; [at](#) para. 140.

<sup>33</sup> See e.g. *Railway Traffic between Lithuania and Poland* (1931) PCIJ Reports, Series A/B, 108, 116.

<sup>34</sup> See e.g. Code of Conduct, note 11 [at](#) para. 7.1.3.

<sup>35</sup> See e.g. International Law Commission, Draft Articles on the Responsibility of International Organizations, Art. 2(a).

<sup>36</sup> See e.g. *Advisory Opinion on the Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (1926) PCIJ Reports, Series B, No. 13, 6.

<sup>37</sup> See e.g. *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174.

<sup>38</sup> See e.g. H.G. Schermers and N.M. Blokkers *International Institutional Law* (3<sup>rd</sup> ed.: Brill, Leiden: 1995) 23.

<sup>39</sup> J. Alvarez *International Organizations as Law-Makers* (Oxford University Press, Oxford: 2005) 341.

<sup>40</sup> E.M. Hafner-Burton, D.G. Victor and Y. Lupu “Political Science Research on International Law: The State of the Field” (2012) 106 *American Journal of International Law* 47-97, 57.

<sup>41</sup> Report of the 2014 NEAFC Performance Review, 99.

The concept of a RFMA implies a lesser degree of institutionalization. The Fish Stocks Agreement defines such an arrangement as:

a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, inter alia, of establishing [CMMs] in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.<sup>42</sup>

This concept is a broad one and it potentially covers a range of different forms of cooperation. On the one hand, it would cover non-binding mechanisms agreed between relevant fishing states. This form of arrangement is most common as a means of promulgating interim measures, either pending the conclusion of a treaty or pending its entry into force. For example, the states and entities negotiating the North Pacific Fisheries Convention agreed in February 2007 to the adoption of (non-legally binding) interim measures for the North-East Pacific and the North-West Pacific, pending the conclusion of a treaty for this region. These interim measures were revised a number of times during their lifetime, demonstrating that such arrangements can evolve over time to reflect new developments. Nevertheless, this sort of arrangement can clearly be distinguished from an RFMO because there is no permanent body with legal personality responsible for overseeing the development of the measures.

At the same time, the term ‘arrangement’ could also include a legally binding agreement on applicable decision-making procedures that falls short of establishing a formal international organization. The Central Bering Sea (CBS) Convention<sup>43</sup> provides an example of such an arrangement in practice. This treaty aims to “establish an international regime for conservation, management and optimum utilization of Pollock resources in the Convention Area”,<sup>44</sup> which operates through an “Annual Conference of the Parties”<sup>45</sup> held in rotation among the Parties.<sup>46</sup> The conference is also supported by a Scientific and Technical Committee, demonstrating that even a RFMA can encompass a more complex institutional structure. One reason for choosing this model was to reduce cost for the Parties, as there is no need for a permanent headquarters or a secretariat.<sup>47</sup> Yet, it is possible for such an arrangement to make provision for an independent secretariat, as one sees in the Southern Indian Ocean Fisheries (SIOF) Agreement.<sup>48</sup> Indeed, it has been argued elsewhere that this type of autonomous institutional arrangement should be treated as international organizations, subject to the rules of international institutional law,<sup>49</sup> thus blurring the distinction with a formal international organization. This observation means that it is more important to

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<sup>42</sup> Art. 1(1)(d).

<sup>43</sup> Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea of 16 June 1994 (34 ILM 67).

<sup>44</sup> Art. II(1).

<sup>45</sup> Ibid., Art. III(1)(a).

<sup>46</sup> Ibid., Art. VI(1). Indeed, since 2010, the Parties have held a virtual conference; see <<http://www.afsc.noaa.gov/refm/cbs/>>.

<sup>47</sup> See D.A. Balton “The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications” in O.S. Stokke (ed.) *Governing High Seas Fisheries* (Oxford University Press, Oxford: 2001) 158. See also E.J. Molenaar, “Addressing Regulatory Gaps in High Seas Fisheries” (2005) 20 *International Journal of Marine and Coastal Law* 533, 545.

<sup>48</sup> Southern Indian Ocean Fisheries Agreement of 7 July 2006 (available at [www.fao.org/legal](http://www.fao.org/legal)), Art. 9.

<sup>49</sup> See R. Churchill and G. Ulfstein “Autonomous Institutional Arrangements in Multilateral Environmental Agreements” (2000) 94 *American Journal of International Law* 623, 633.

consider the detailed functioning of an organization or arrangement, rather than its formal designation or status.<sup>50</sup>

#### 4. RFMO/A DECISION-MAKING PROCEDURES

RFMO/As are established with the primary aim of conferring the power to make decisions relating to the conservation and management of fish stocks, including decisions relating to fishing levels, catch allocation, and other CMMs. Decision-making procedures are a key aspect of negotiations related to the establishment of a regional fisheries treaty, as the precise parameters of these procedures will determine how much control States give up over fishing opportunities and how much influence States have over the decision-making process within the institution.

The Fish Stocks Agreement has emphasized the importance of transparent, timely and effective decision-making procedures within RFMO/As.<sup>51</sup> These requirements have been reiterated by the 2016 Resumed FSA Review Conference, which encouraged RFMO/As to review their decision-making procedures in order to facilitate the adoption of CMMs in a timely and effective manner.<sup>52</sup> The importance of timeliness in the context of fisheries management is self-explanatory. The pursuit of effectiveness is more complex and there is a balance to be achieved between the ambition of adopting decisions on the one hand, and their widespread acceptance on the other hand. In practice, decision-making procedures are the product of political compromises between the States involved in the negotiations. It follows that there is no single model of decision-making.<sup>53</sup> Indeed, decision-making procedures often contain a number of elements, which must be considered side-by-side in order to understand the degree to which Members are constrained.

At one end of the spectrum lie those organizations that operate on the basis of unanimity or consensus, such as the Inter-American Tropical Tuna Commission (IATTC). The IATTC Convention<sup>54</sup> provides that, unless otherwise agreed,<sup>55</sup> decisions of the IATTC shall be made by consensus,<sup>56</sup> which is defined as “the adoption of a decision without voting and without the expression of any stated objection.”<sup>57</sup> Whilst consensus is ordinarily to be distinguished from unanimity, the lack of an alternative voting procedure means that consensus in this context is very close to unanimity. Indeed, the Convention even provides an opportunity for States that were not able to attend the meeting to block the consensus within a certain time-period.<sup>58</sup> Other treaties

<sup>50</sup> See further Section 2 of Chapter 6 of this Volume (Molenaar).

<sup>51</sup> Fish Stocks Agreement, [note 7 at](#) Arts. 10(j) and 12. See also Art. 28.

<sup>52</sup> Report of the 2016 Resumed FSA Review Conference, [note 164](#), at para. B5(d).

<sup>53</sup> See T.L. McDorman “Implementing Existing Tools: Turning Words into Actions – Decision-making processes of Regional Fisheries Management Organizations (RFMOs)” (2005) 20 *International Journal of Marine and Coastal Law* 423, 427.

<sup>54</sup> Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica of 14 November 2003 (commonly known as the ‘Antigua Convention’; available at [www.iattc.org](http://www.iattc.org)).

<sup>55</sup> The Convention further specifies those issues where consensus is always required.

<sup>56</sup> Art. IX(1).

<sup>57</sup> *Ibid.*, Art. I(5).

<sup>58</sup> *Ibid.*, Art. IX(4) and (5).



are more explicit in requiring unanimity prior to a decision being adopted.<sup>59</sup> The two main RFMAs also operate by consensus.<sup>60</sup>

It has been recognized that consensus decision-making has advantages and disadvantages. Thus, it has been argued that “decisions reached by consensus were preferable as they enjoyed greater levels of support and compliance when implemented.”<sup>61</sup> Furthermore, as noted by the performance review of the IATTC, “consensus is the most egalitarian, collaborative decision-making model”, but it also has drawbacks, as it “tends to support the status quo and impede change.”<sup>62</sup> From this perspective, consensus has been criticized as coming at the cost of “lowest common denominator outcomes and, in some cases, only after prolonged debate leading to non-timeliness of adoption of management measures.”<sup>63</sup> Ultimately, this form of decision-making means that all States must consent to a new measure and thus any single State can veto a decision. This can lead to delays in decision-making, but evidence on this point is mixed. In the 2008 performance review of the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR), the panel noted that:

Consensus has worked for CCAMLR over a long period of time [...] The need for consensus on matters of substance has not prevented CCAMLR from addressing any important issues.<sup>64</sup>

However, the operation of consensus decision-making procedures will in practice depend on the number of Members and their diversity of interests.<sup>65</sup>

At the other end of the spectrum lie those organizations that make provision for qualified majority voting. Required majorities vary from two-thirds of Members present and voting<sup>66</sup> to three-quarters of Members casting an affirmative or negative vote.<sup>67</sup> When a vote is taken, such decisions are often also subject to a quorum.<sup>68</sup>

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<sup>59</sup> Convention for the Conservation of Southern Bluefin Tuna of 10 May 1993 (CCSBT Convention; 1819 UNTS 359), Art. 7. This treaty only requires unanimity of Members present at the meeting. See also the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean of 10 April 2001 (SEAFO Convention; 2221 UNTS 189), Art. 17(1), and the Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (CAMLR Convention; 1329 UNTS 47), Art. XII(1).

<sup>60</sup> CBS Convention, note 43 at; Art. V. Balton, note 47 at 158-159 suggests that other decision-making procedures were discussed in the course of the negotiations. See also the SIOF Agreement, note 48 at Art. 8.

<sup>61</sup> Report of the Meeting of FAO and Non-FAO Regional Fishery Bodies or Arrangements, note 13 at para. 36.

<sup>62</sup> Report of the 2016 IATTC Performance Review, 9.

<sup>63</sup> McDorman, note 53 at 429.

<sup>64</sup> Report of the 2008 CCAMLR Performance Review, 81. See also the comments in the Report of the 2010 SEAFO Performance Review, 40 noting that while the “consensus approach to decision-making may effectively weaken the final outcome in some cases, this has not been apparent in SEAFO practice.”

<sup>65</sup> See discussion in the Report of the 2016 ICCAT Performance Review, 50.

<sup>66</sup> International Convention for the Conservation of Atlantic Tunas of 14 May 1966 (ICCAT Convention; 673 UNTS 63, as amended; consolidated version available at [www.iccat.int](http://www.iccat.int)), Art. VIII(1)(b); Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (NEAFC Convention; 1285 UNTS 129, as amended; consolidated version available at [www.neafc.org](http://www.neafc.org)), Art. 3(9); and Agreement for the Establishment of the General Fisheries Council for the Mediterranean (GFCM Agreement; 126 UNTS 239, as amended; consolidated version available at [www.fao.org/legal/treaties/treaties-under-article-xiv/en/](http://www.fao.org/legal/treaties/treaties-under-article-xiv/en/)), Art. XIII(1).

<sup>67</sup> SPRFMO Convention, note 30 at Art. 16(2); NPFC Convention, note 30 at Art. 8(2).

<sup>68</sup> E.g. NPFC Convention, note 30 at Art. 8(4).

## KEY CHALLENGES ON THE GOVERNANCE OF REGIONAL FISHERIES

An even more complex decision-making procedure is found in the Western and Central Pacific Fisheries Commission (WCPFC) Convention, which distinguishes between decisions relating to allocation and decisions relating to CMMs. The former must be adopted by consensus,<sup>69</sup> whereas the latter require a three-quarters majority including three-quarters of the Members of the South Pacific Forum Fisheries Agency (FFA) and three-quarters of non-Members of the FFA.<sup>70</sup> This qualified majority demonstrates how decision-making procedures are often tailored to the particular circumstances of a region.

Many agreements seek to reconcile these two positions and adopt a middle ground, by demanding that an effort is made to seek consensus prior to the casting of a vote.<sup>71</sup> The decision as to when a vote is possible is often granted to the Chairperson. In the case of the WCPFC, the Chair is granted the power to appoint a conciliator for the purpose of reconciling the differences between Members that may be blocking consensus.<sup>72</sup> Consensus may also be adopted as a decision-making practice, even if it is not formally recognized in the constituent instrument of an RFMO. Thus, the International Commission on the Conservation of Atlantic Tunas (ICCAT) has a practice of deferring decisions until consensus can be achieved, even though its constituent instrument allows for majority voting.<sup>73</sup> Similarly, NEAFC Members have agreed through their rules of procedure that “the Commission shall endeavor to make decisions on the basis of consensus.”<sup>74</sup> However, it is less clear in these circumstances when recourse can be had to a vote. Given that the constituent instrument provides for a vote without the requirement to exhaust efforts to reach consensus, it would seem that any contracting party may demand a vote at any time.<sup>75</sup> As a result, the dynamics of negotiations may be subtly different from those organizations in which the limits of consensus decision-making are pre-defined.

Whilst those treaties containing provisions for voting may seem to suggest a move away from traditional consensual law-making, it must also be understood that most treaties grant States the option to object to decisions within a certain time period after they have been adopted in accordance with the applicable decision-making requirements, which prevents that decision from becoming binding on that State.<sup>76</sup> These procedures thus retain some element of consent in the decision-making process. Such opt-out procedures may even apply if a measure has been adopted by consensus.<sup>77</sup> An important feature of the opt-out procedures is that States must object within a specific timeframe, which varies from 50 days<sup>78</sup> to six months.<sup>79</sup> However, an objection by one State can trigger a new period for other States to reconsider their options and

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<sup>69</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 5 September 2000 (WCPFC Convention; 2275 UNTS 43), Art. 10(4).

<sup>70</sup> Ibid., Art. 20(2).

<sup>71</sup> E.g. *ibid.*, Art. 20(3), whereby the Chair “shall fix a time during that session of the Commission for taking the decision by a vote” but the parties may by a simple majority decide to defer the question to a later time.

<sup>72</sup> Ibid., Art. 20(2).

<sup>73</sup> The delay caused by postponing decision-making in an effort to achieve consensus was criticized in the Report of the 2016 ICCAT Performance Review, 2.

<sup>74</sup> NEAFC Rules of Procedure, para. 22.

<sup>75</sup> See the Report of the 2014 NEAFC Performance Review,<sup>105</sup> where the Panel recommends a provision specifying that decisions by voting would only be taken after all efforts to reach consensus have been exhausted. See also the Report of the 2011 GFCM Performance Review, 78-79.

<sup>76</sup> See e.g. NEAFC Convention, note 66 [at](#); Art. 12(2).

<sup>77</sup> SEAFO Convention, note 3059 [at](#); Arts. 17(1) and 23; CAMLR Convention, note 59 [at](#); Art. 9(6).

<sup>78</sup> See NEAFC Convention, note 66 [at](#); Art. 12(a).

<sup>79</sup> See ICCAT Convention, note 66 [at](#); Art. VIII(3).

make their own objection. Moreover, the constituent instruments of some RFMOs allow a Member to terminate its acceptance of a recommendation after a fixed period of time, usually one year.<sup>80</sup>

In practice, objection procedures are widely used<sup>81</sup> and they have been criticized for undermining the effectiveness of measures adopted by RFMOs.<sup>82</sup> The inclusion of such procedures must be understood against the backdrop of the international legal framework for the regulation of fisheries and the historical freedom to fish on the high seas. Thus, as noted by Fitzmaurice

arguably, opt-out procedures have encouraged States to sign up to conventions which they might otherwise have been reluctant to join because of the possibility of finding themselves bound by onerous provisions on the basis of majority decisions in the convention's organs.<sup>83</sup>

From this perspective, failure to accommodate diverse views within the decision-making procedure could lead some States to withdraw from the organization completely; most RFMOs allow withdrawal after a notice period has been served.<sup>84</sup> Whether such arguments continue to provide strong grounds to support the inclusion of the opt-out procedure can be debated, however, in light of further developments in international fisheries law. For Parties to the Fish Stocks Agreement in particular, the situation would appear to have changed, as the Agreement explicitly stipulates:

Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the [CMMs] established by such an organization or arrangement, shall have access to the fishery resources to which those measures apply.<sup>85</sup>

It follows that the right of RFMO members to opt-out of CMMs is no longer about ensuring that such States would not be worse off within the organization than outside the organization. Rather, as noted by McDorman:

the curiosity of this provision is that [a Party to the Fish Stocks Agreement] may be in a better position to avoid the application of an RFMO decision (e.g. by use of an objection procedure) as a member of the RFMO, than as a non-member of the RFMO.<sup>86</sup>

More recent regional fisheries treaties have sought to counter the perceived problem of overuse of objection procedures by introducing limits on the ability of a State to make

<sup>80</sup> NEAFC Convention, note 66 [at](#); Art. 13(1).

<sup>81</sup> Although their use varies from organization to organization - it has been noted that the objection procedure in CCAMLR has only been used twice in 28 years (Report of the 2008 CCAMLR Performance Review, 82). See also the comments in the Report of the 2010 SEAFO Performance Review, 40 noting that the objection procedure had not been invoked at the time of writing.

<sup>82</sup> See discussion in D. Diz *Fisheries Management in Areas beyond National Jurisdiction: The Impact of Ecosystem Based Law-Making* (Martinus Nijhoff, Leiden: 2013) 128.

<sup>83</sup> M. Fitzmaurice *Whaling and International Law* (Oxford University Press, Oxford: 2015) 64.

<sup>84</sup> E.g. SPRFMO Convention, note 30 [at](#); Art. 41 requires one year's notice; NPFC Convention, note 30 [at](#); Art. 31 requires six months' notice.

<sup>85</sup> Art. 8(4). Whether or not this reflects customary international law is controversial.

<sup>86</sup> McDorman, note 53 at 426, footnote 8. McDorman also suggests that "implicitly the obligation on UNFSA parties not to undermine RFMO measures can be seen as possibly providing a constraint on an UNFSA party using an RFMO objection procedure" (430) but this interpretation is not supported by practice. See, for example, the discussion below on Russia's objection under the SPRFMO Convention, despite it being a Party to the Fish Stocks Agreement.

objections to CMMs. To this end, the 2016 Resumed FSA Review Conference encouraged RFMOs to

ensure that post opt out behavior is constrained by rules to prevent opting-out parties from undermining conservation, by establishing clear processes for dispute settlement and for the adoption of alternative measures with equivalent effect that would be implemented in the interim.<sup>87</sup>

In response to this pressure, some RFMOs have done away with objection procedures altogether. Thus, the WCPFC Convention replaces the ability to opt-out with a power to “seek a review of the decision by a review panel.”<sup>88</sup> If the panel finds that the decision is discriminatory or incompatible with the WCPFC Convention, the LOS Convention or the Fish Stocks Agreement, it may recommend to the Commission that the decision is modified, amended or revoked and the Commission is obliged to take action thereon.<sup>89</sup>

Alternatively, regional fisheries treaties have sought to control the exercise of objections. A leading example is the South Pacific Regional Fisheries Management Organization (SPRFMO) Convention, which provides that

the only admissible grounds for an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in [the LOS Convention or the Fish Stocks Agreement].<sup>90</sup>

This provision thus limits the discretion of a Member as to the reasons for making an objection. In addition, the Convention requires an objecting State to advise the Executive Secretary of “alternative measures that are equivalent in effect to the decision to which it has objectives and have the same date of application.”<sup>91</sup> In other words, Members cannot escape regulation completely. Indeed, the SPRFMO Convention goes further by providing that any objection is automatically considered by an independent review panel with a mandate to decide whether the objection is permissible and, if so, whether the proposed alternative measures are equivalent.<sup>92</sup> This procedure thus further limits the possibility of abuse of the objection procedure by introducing an element of independent scrutiny.

This innovative procedure was invoked for the first time in 2013<sup>93</sup> in order to address an objection presented by the Russian Federation to SPRFMO’s CMM 1.01 relating to *Trachurus murphyi*. Ultimately, the Review Panel upheld the permissibility of the objection, but went on to find that the alternative measure proposed by Russia was not equivalent because it could affect the allocations given to other Members.<sup>94</sup>

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<sup>87</sup> Report of the 2016 Resumed FSA Review Conference, note 164 at para. B5(b).

<sup>88</sup> WCPFC Convention, note 69 at: Art. 20(6)

<sup>89</sup> Ibid., Art. 20(9). As noted by McDorman, note 53 at 432: “the modification of the decision could include non-application of the decision to the state as an alternative to revocation of the decision and, in this way, an “opt-out” equivalent to the results of an objection procedure may arise”.

<sup>90</sup> SPRFMO Convention, note 30 at: Art. 17(2)(c).

<sup>91</sup> Ibid., Art. 17(2)(b)(ii).

<sup>92</sup> Ibid., Art. 17(5) and Annex II.

<sup>93</sup> Findings and Recommendations of the Review Panel, 5 July 2013 (available at <https://pcacases.com/web/sendAttach/2082>).

<sup>94</sup> For a more detailed discussion, see A. Serdy “Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries Management Organisation” (2016) 47 *Ocean Development and International Law* 1-28.

The Panel therefore recommended a different alternative measure, which would allow Russia to authorize its vessels to fish in the Convention Area only after Russia had determined that the total catch in 2013 will not reach the overall TAC and only until this limit is reached.<sup>95</sup> The Review Panel’s report reads largely like a legal decision, turning on legal concepts of discrimination and compatibility with the relevant treaties. Indeed, the process itself resembles in some respects arbitration, and two of the nominated panelists were in fact taken from the list of arbitrators held by FAO under Article 2 of Annex VIII to the LOS Convention, with the chair being an expert in the law of the sea. Moreover, despite being designated as “recommendations”, it would appear that States must comply or choose to initiate dispute settlement proceedings under the SPRFMO Convention.<sup>96</sup>

The SPRFMO Convention is the only regional fisheries treaty to automatically trigger an independent review of objections, but other regions have introduced similar restraints on the use of objections that would allow questions of compatibility to be submitted to either an ad hoc expert panel<sup>97</sup> or to international dispute settlement.<sup>98</sup> Some of the older treaties have similarly adopted amendments to treaties<sup>99</sup> or to the applicable rules of procedure<sup>100</sup> in order to increase oversight of objection procedures. Given the specific circumstances of each regional fishery, it is unlikely that a single model will be appropriate for all of them. Nevertheless, the quasi-judicial nature of these emerging procedures could raise expectations of the development of a jurisprudence concerning the interpretation of the common terms related to the validity of objections, as well as the concept of equivalence, which may be applicable across the various new regimes. If this were to happen, it would be a further indicator of an emergent system of RFMOs, all subject to similar principles of operation.

## 5. DISPUTE SETTLEMENT

Another feature of the increasing institutionalization of regional fisheries cooperation is the inclusion of ever more complex and varied third-party dispute settlement mechanisms. Fishing has traditionally been a subject that has provoked litigation between States.<sup>101</sup> Nevertheless, many early regional fisheries treaties did not provide for the compulsory settlement of disputes.<sup>102</sup> For example, neither the NAFO

<sup>95</sup> In reality, the decision was a chimeric victory for the Russian Federation as it ended up with zero catch in 2013, although it has since been allocated a share of the TAC (SPRFMO CMM 4.01 (2016)).

<sup>96</sup> SPRFMO Convention, note 30 [at](#); Annex II, para. 10.

<sup>97</sup> SEAFO Convention, note 59 [at](#); Art. 23(g) – such a request is made pending a review by the Commission. See discussion in H.S. Schiffman *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes* (Martinus Nijhoff, Leiden: 2008) 201-202.

<sup>98</sup> NPFC Convention, note 30 [at](#); Art. 9(c).

<sup>99</sup> See e.g. NAFO Convention (Convention on Cooperation in the Northwest Atlantic Fisheries - originally named ‘Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries’ - of 24 October 1978 (1135 UNTS 369, as amended; consolidated version available at [www.nafo.int](http://www.nafo.int))), Art. XIV.

<sup>100</sup> NEAFC Rules of Procedure, para. 41 (not in force at the time of writing). The legal status of this new arrangement is not clear. See also the discussion in the Report of the 2016 ICCAT Performance Review, 57.

<sup>101</sup> See e.g. *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116; *Icelandic Fisheries Case* (1974) ICJ Reports 175; and *Canada-Spain Fisheries Case* (1998) ICJ Reports 432.

<sup>102</sup> The Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958 (559 UNTS 285) did provide for the settlement of disputes by an expert commission, although the treaty was not widely accepted, with only 37 ratifications.

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Convention nor the NEAFC Convention originally contained a dispute settlement clause. Some of the other earlier regional treaties do contain dispute settlement clauses but they condition the submission of a dispute upon the consent of both of the interested parties and only after attempts at conciliation have failed.<sup>103</sup> Such procedures have been described as “weak” and “unsatisfactory.”<sup>104</sup>

Nevertheless, attitudes towards compulsory settlement for high seas fisheries disputes have strengthened since the conclusion and entry into force of the LOS Convention, which allows such disputes, at least as they relate to the high seas portion of a fishery,<sup>105</sup> to be submitted to one of the compulsory procedures contained in Part XV of the Convention. The LOS Convention emphasizes freedom of choice concerning the forum for dispute settlement,<sup>106</sup> but if States cannot agree on a mechanism, it provides for arbitration of disputes by default.<sup>107</sup> The Fish Stocks Agreement further encourages this trend by requiring parties to “promote the peaceful settlement of disputes.”<sup>108</sup> The Agreement provides for the consensual submission of technical disputes to an ad hoc panel of experts.<sup>109</sup> Otherwise, disputes concerning the interpretation and application of the Agreement may be submitted to the compulsory dispute settlement procedures in the LOS Convention.<sup>110</sup> Indeed, the Fish Stocks Agreement goes further and allows “disputes between States Parties to [the] Agreement concerning the interpretation and application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties” to be submitted to the procedures set out in Part XV of the LOS Convention.<sup>111</sup> This innovative clause would compensate for the lack of dispute settlement provisions in some regional fisheries treaties, if the disputants are Parties to the Fish Stocks Agreement.<sup>112</sup> Nevertheless, limited participation in the Agreement means that it does not fully address this issue.<sup>113</sup> It is particularly unclear whether the dispute settlement provisions under the Fish Stocks Agreement can be utilized to challenge a measure adopted by an RFMO with Members who are not party to the Fish Stocks Agreement.<sup>114</sup> If not, this would be very limiting indeed.

In practice, it is increasingly common to find compulsory dispute settlement in modern regional fisheries treaties. Amendments to this end have been adopted for many

<sup>103</sup> GFCM Agreement, note 66 [at](#); Art. 19; CAMLR Convention, note 59 [at](#); Art. XXV.

<sup>104</sup> Report of the 2008 CCAMLR Performance Review, 84. See also the criticism in the Report of the 2011 GFCM Performance Review, 79-80.

<sup>105</sup> Exclusive economic zone (EEZ) fisheries disputes are excluded from compulsory dispute settlement (see LOS Convention, [note 1 at](#) Art. 297). According to A.E. Boyle “Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks” in O.S. Stokke (ed) *Governing High Seas Fisheries* (Oxford University Press, Oxford: 2001) 100, 113, however, the exception should be construed narrowly to cover fisheries issues that exclusively relate to the EEZ. But, as he himself notes, this is not the natural meaning of the language.

<sup>106</sup> LOS Convention, [note 1 at](#) Art. 280.

<sup>107</sup> *Ibid.*, Art. 287 and Annex VII.

<sup>108</sup> Fish Stocks Agreement, [note 7 at](#) Art. 10(k).

<sup>109</sup> *Ibid.*, Art. 29.

<sup>110</sup> *Ibid.*, Art. 30.

<sup>111</sup> *Ibid.*, Art. 30.

<sup>112</sup> See the discussion of various interpretations of this provision in Boyle, note 105 at 111. He concludes that “the [better view is] that, as between parties to the Fish Stocks Agreement, Article 30(2) amends existing fishery treaties and incorporates into them the disputes settlement provisions of part XV of the 1982 UNCLOS”.

<sup>113</sup> For a discussion of the reasons for non-participation, see E.J. Molenaar, ‘Non-Participation in the Fish Stocks Agreement: Status and Reasons’ (2011) 26 *International Journal of Marine and Coastal Law* 195-234.

<sup>114</sup> McDorman, note 53 at 440.

existing RFMOs, including for NEAFC in 2004 and for NAFO in 2007, although entry into force of these provisions has been slow and the NEAFC amendments remain pending. Most other treaties negotiated after the adoption of the Fish Stocks Agreement have dispute settlement clauses within them, whether they establish an RFMO or an RFMA.<sup>115</sup> As with the global instruments, the regional treaties reflect the principle of freedom of choice,<sup>116</sup> followed by reference to two main types of dispute settlement procedures, mirroring the relevant provisions of the Fish Stocks Agreement.<sup>117</sup>

Firstly, these treaties often provide for the use of expert panels for technical disputes. For example, the SEAFO Convention provides:

In cases where a dispute between two or more Contracting Parties is of a technical nature, and the Contracting Parties are unable to resolve the dispute amongst themselves, they may refer the dispute to an *ad hoc* expert panel established in accordance with the procedures adopted by the Commission at its first meeting. [...]<sup>118</sup>

There are several features of this procedure which merit further comment. Firstly, the procedure would appear to require the consent of both parties. This is confirmed by the more detailed procedure agreed by the Commission, which makes clear that “[t]he other Contracting Party shall communicate whether it accepts or not [the proposal to submit a dispute to an ad hoc expert panel].” In this respect, this procedure is distinct from the role of ad hoc expert panels under the objection procedures, where any Contracting Party can unilaterally initiate panel proceedings. Secondly, the outcome of the process is non-binding. There are no known examples of these procedures being used in practice and it has been pointed out that one of their weaknesses is that the scope of what is a ‘technical dispute’ is highly obscure.<sup>119</sup> Nevertheless, such informal procedures could be quicker and less costly than the pursuit of litigation.<sup>120</sup>

Most modern regional fisheries treaties also provide for compulsory adjudication of disputes. In this respect, the SEAFO Convention,<sup>121</sup> the SPRFMO Convention,<sup>122</sup> the (North Pacific Fisheries Commission) (NPFC) Convention,<sup>123</sup> and the WCPFC Convention<sup>124</sup> all provide for disputes to be submitted to the compulsory procedures set out in the Fish Stocks Agreement, including compulsory arbitration in situations where States do not agree to an alternative forum for settlement. The continuing choice of ad hoc arbitration as the residual forum for the settlement of such disputes suggests that States prefer to retain flexibility in who should be appointed to decide such disputes.

The procedures discussed above both concern the settlement of a dispute between two of the Parties concerning the interpretation and application of a relevant treaty. For a dispute to exist, there must be “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>125</sup> There must also be a State that is willing to bring a claim, and an identifiable respondent. However, not all legal

<sup>115</sup> In the latter context, see SIOF Agreement, note 48 [at](#); Art. 20.

<sup>116</sup> See e.g. SPRMO Convention, note 30 [at](#); Art. 34(1).

<sup>117</sup> Indeed, several agreements simply incorporate in toto Part VIII of the Fish Stocks Agreement; see NPFC Convention, note 30 [at](#); Art. 19; SPRMO Convention, note 30 [at](#); Art. 34(2).

<sup>118</sup> SEAFO Convention, note 59 [at](#); Art. 24(3). See also <<http://www.seafo.org/SEAFO-Bodies/The-Commission/Dispute-Settlement>>.

<sup>119</sup> See the Report of the 2014 NEAFC Performance Review, 110.

<sup>120</sup> See comments of Boyle, note 105 at 109.

<sup>121</sup> SEAFO Convention, note 59 [at](#); Art. 24.

<sup>122</sup> SPRFMO Convention, note 30 [at](#); Art. 34.

<sup>123</sup> NPFC Convention, note 30 [at](#); Art. 19.

<sup>124</sup> WCPFC Convention, note 69 [at](#); Art. 31.

<sup>125</sup> *Mavromattis Palestine Concessions* (1924) PCIJ Reports, Series A, No. 2, 11.

disagreements in the regional fisheries context will necessarily have these characteristics. An alternative option would be to submit legal questions to an advisory process. Advisory opinions can provide useful clarifications on the state or meaning of the law, without the need for a formal dispute to arise. Such an approach would make use of the ability of the International Tribunal for the Law of the Sea (ITLOS) under Article 138 of its Rules of Procedure to “give an advisory opinion on a legal question if any international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.” ITLOS confirmed its ability to grant advisory opinions in 2013<sup>126</sup> when it received a request from the Sub-Regional Fisheries Commission, one of the few bodies to possess such a competence. ITLOS went on to say that “a request for an advisory opinion should not in principle be refused except for compelling reasons.”<sup>127</sup> It remains to be seen whether other RFMOs will be given such a power through continuing reforms of these bodies.

## 6. INTER-INSTITUTIONAL COOPERATION AND COORDINATION

Most RFMO/As are established as autonomous institutions and they are designed in order to reflect the particularities of the region and the interests of the States concerned. Nevertheless, there is little doubt that lessons can be learned between regional regimes. Moreover, in some instances, the effective and efficient management of fish stocks may require the involvement of more than one RFMO/A, where they are responsible for overlapping or adjacent areas.

The power to enter into cooperative arrangements is recognized in the constituent instruments of most RFMO/As,<sup>128</sup> although it can be argued that this ability could be exercised as an implied power in the case of those RFMO/As without an express power. In some regional fisheries treaties, specific organizations are expressly identified as suitable partners for cooperation,<sup>129</sup> whilst leaving open the possibility for cooperation with other organizations. Most treaties, however, do not specify the modalities for cooperation, simply referring to the need for “suitable arrangements”.<sup>130</sup> In practice, cooperation operates at two levels.

Firstly, individual RFMO/As have entered into ‘bilateral’ arrangements with a view to ensuring that they adopt consistent rules in cases where their competence may to some extent overlap or where vessels may fish in areas falling under the competence of more than one RFMO/A. These practices have become even more important following the proliferation of RFMO/As in the past decade.<sup>131</sup>

An example is provided by the relationship between the WCPFC and the IATTC, whose areas of competence overlap in the southern central Pacific. The constituent instruments of both of these institutions call for cooperation with other relevant organizations in order to reach agreement on a consistent set of CMMs.<sup>132</sup> The two

<sup>126</sup> *Fisheries Advisory Opinion* (2015) ITLOS Case No. 21, para. 56. For a critical discussion of this decision, see T. Ruys and A. Soete “Creeping Advisory Jurisdiction of International Courts and Tribunals?” (2015) 29 *Leiden Journal of International Law* 1-22.

<sup>127</sup> Fisheries Advisory Opinion, note 126 at para. 71.

<sup>128</sup> See e.g. NAFO Convention, note 99 at Art. XVII(c); GFCM Agreement, note 66 at Art. 17(1). See also SPRFMO Convention, note 30 at Art. 31(1); NPFC Convention, note 30 at Art. 21(1).

<sup>129</sup> See e.g. CAMLR Convention, note 59 at Art. XXIII; WCPFC Convention, note 69 at Art. 22.

<sup>130</sup> NPFC Convention, note 30 at Article 21(4).

<sup>131</sup> This will be a consideration in the negotiation of a new agreement for the Central Arctic Ocean, discussed above, which may include areas that are already under the competence of NEAFC.

<sup>132</sup> WCPFC Convention, note 69 at Art. 22; Antigua Convention, note 54 at Art. 24.



RFMOs concluded an MOU in 2006 setting out the basic framework for further cooperation, identifying both the areas and modalities of cooperation. The MOU calls for information-sharing, as well as reciprocal participation in relevant meetings.<sup>133</sup> The MOU also establishes a consultative meeting between the secretariats of the two organizations in order to “review and enhance cooperation”.<sup>134</sup> Further practical arrangements were agreed in subsequent instruments. The 2009 Memorandum of Cooperation on the Exchange and Release of Data agreed to the exchange of data relating to fishing effort and catch (including by-catch); observer reports; monitoring, control and surveillance; and unloading, transshipment and port inspections. A further step towards greater coordination of measures was taken in 2011 with the conclusion of the Memorandum of Cooperation on the Cross-endorsement of Observers, which aims to facilitate the operation of vessels that fish in areas falling under the mandate of both organizations on the same fishing trip. Most importantly, however, the two organizations have reached an agreement on how to deal with vessels that fish in the area that falls under both of their competence. Based upon a document jointly prepared by the secretariats of the two organizations, the WCPFC and the IATTC each adopted a recommendation, whereby they agreed that vessels listed on the WCPFC register will apply WCPFC measures, vessels listed on the IATTC register will apply IATTC measures, and vessels that appear on both registers will have the option to notify the commissions of which set of measures it will follow.<sup>135</sup> The organizations also agreed to continue working towards a longer-term solution, which could feasibly include designating a single organization to regulate fisheries in the area, thus removing the overlap.<sup>136</sup> Similar cooperation arrangements have been established between other RFMOs in order to harmonize their regimes.<sup>137</sup>

Another area that has seen cooperation taking place is the establishment of joint measures to prevent and deter illegal, unreported and unregulated (IUU) fishing. Such a step was taken by NAFO and NEAFC when they agreed to transmit information concerning vessels on their individual IUU vessel lists and this cooperation has since been extended to CCAMLR and SEAFO.<sup>138</sup> However, such an arrangement does not guarantee harmonization of the respective lists. Under the NEAFC Scheme of Control and Enforcement, notifications lead to automatic listing of vessels identified by other organizations and the relevant rules provide that “[v]essels placed on the [IUU list] in accordance with [this procedure] may only be removed if the RFMO which originally identified the vessels as having engaged in IUU fishing activity has notified the NEAFC Secretary of their removal of the list.”<sup>139</sup> In contrast, under the equivalent rules adopted by NAFO, a Member has the right to object to the inclusion of a vessel proposed by NEAFC on certain grounds, thus preventing it from being listed.<sup>140</sup> Indeed, not all

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<sup>133</sup> The WCPFC has also entered into similar framework arrangements with the North Pacific Anadromous Fish Commission (NPAFC), CCAMLR, CCSBT, and IOTC.

<sup>134</sup> 2006 MOU, para. 2.2.

<sup>135</sup> IATTC Recommendation on IATTC-WCPFC Overlap Area (2012); WCPFC9 Decision on the WCPFC-IATTC Overlap Area (2012).

<sup>136</sup> See IATTC-WCPFC Overlap Area, doc. IATTC-83 INF-B (2012) 5. Alternatively, regulation in the overlap area could be divided depending upon the gear type.

<sup>137</sup> See e.g. 2015 MOU between the CCSBT and IOTC for Monitoring Transshipment at Sea by Large-Scale Tuna Longline Fishing Vessels; 2016 Arrangement between SPRFMO and CCAMLR. See also the Report of the 2016 ICCAT Performance Review, 62.

<sup>138</sup> See e.g. NEAFC Scheme of Control and Enforcement (2016), Art. 44(5).

<sup>139</sup> *Ibid.*, Art. 44(6).

<sup>140</sup> NAFO Conservation and Enforcement Measures (2017), Art. 53(4)(d). See also SEAFO System of Observation, Inspection, Compliance and Enforcement (2016), Art. 28.

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RFMOs have even accepted the policy of cross-listing; CCAMLR simply circulates its IUU vessel list to other RFMOs but it does not include vessels listed by other RFMOs on its own IUU vessel list.<sup>141</sup> These examples illustrate the challenges of cooperation between organizations with different memberships and internal political dynamics.

Secondly, cooperation between RFMOs also takes place at the global level. In this context, the FAO has provided an important forum for discussing best practice amongst RFMOs. One particular initiative for promoting cooperation between RFMOs is the Coordinating Working Party on Fisheries Statistics, which was first established in the late 1950s as a body for agreeing on common definitions on fisheries statistics in the North Atlantic<sup>142</sup> and was later expanded to cover the entire globe.<sup>143</sup> Representatives of RFMOs also participate in discussions in the Committee on Fisheries (COFI), although as observers. A step to improve direct cooperation between RFMOs was taken in the late 1990s by establishing a forum for these organizations to meet and discuss common challenges. The first meeting of RFMOs took place at FAO headquarters in February 1999 and it was agreed that further meetings should be held in conjunction with meetings of the COFI.<sup>144</sup> In 2005, the name of the arrangement was changed to 'Regional Fishery Body Secretariats' Network' in order to better reflect the informal nature of the meetings, as well as the fact that cooperation continued between meetings.<sup>145</sup> The Network has adopted rules of procedure,<sup>146</sup> although it has been emphasized that it is limited to pursuing administrative coordination, as the RFB secretariats are not able to agree upon policy on behalf of their Members.<sup>147</sup> This feature of the meetings, as well as the heterogeneity of its membership, limits the utility of this arrangement.<sup>148</sup>

A more focused approach to cooperation can be seen through the so-called Kobe Process of Cooperation between Tuna RFMOs, which began in January 2007. Unlike the RFB Secretariats' Network, the Kobe Process is open to Members and co-operating non-Members of RFMOs, as well as other relevant intergovernmental organizations (IGOs) and NGOs. The first meeting agreed upon key areas to be addressed through closer cooperation. One decision of particular interest for present purposes was agreement on a common set of criteria for performance reviews, which have been implemented by all tuna RFMOs.<sup>149</sup> In addition, participants identified four areas of technical cooperation that they would actively pursue, namely harmonization and improvement of trade-tracking programs, including catch documentation schemes; creation of a harmonized list of tuna fishing vessels and a global list of IUU vessels;<sup>150</sup>

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<sup>141</sup> CCAMLR Conservation Measure 10-07 (2016), para. 23.

<sup>142</sup> FAO Conference Res. 23/59 (1959).

<sup>143</sup> See "FAO, The Coordinating Working Party on Fishery Statistics: Its Origin, Role and Structure" (*FAO Fisheries Circular* No. 903: 1995).

<sup>144</sup> Report of the Meeting of FAO and Non-FAO Regional Fishery Bodies or Arrangements, note 13 [at](#) para. 41(i).

<sup>145</sup> See Report of the Fourth Meeting of RFMOs (*FAO Fisheries Report* No. 778: 2005) para. 7.

<sup>146</sup> Albeit on an ad interim basis; see Report of the Sixth Meeting of the Regional Fishery Body Secretariats' Network (FAO Fisheries and Aquaculture Report No. 1175: 2014) Appendix 13, footnote 1.

<sup>147</sup> In discussion of the rules of procedure for the Network, concerns were raised about having a rule relating to decision-making, even though it did expressly say that decisions were non-binding. Ultimately, this rule was deleted.

<sup>148</sup> Suggestions to strengthen the Network were not widely supported at the most recent meeting; see Report of the Sixth Meeting of the Regional Fishery Body Secretariats' Network, note 14 [67](#) at paras. 62-78.

<sup>149</sup> See report of the first meeting of the Tuna RFMOs (2007) Appendix 14.

<sup>150</sup> See <http://www.tuna-org.org/GlobalTVR.htm>.

harmonization of transshipment control measures; and standardization of the presentation form of stock assessment results. Inter-sessional work has been carried out on each of these topics and the tuna RFMOs have since met on two further occasions in order to review progress. Participants have also established a website in order to communicate the results of the cooperation.<sup>151</sup> Certainly, cooperation between the tuna RFMOs has become more focused, even if progress has not been as rapid as some may have wished, and there have been calls to promote greater cooperation of other ‘sectoral’ RFMO/As through similar joint meetings to share experiences and good practices.<sup>152</sup>

It is not only cooperation between RFMO/As that is on the international agenda today. The 2016 Resumed FSA Review Conference also called for states to “strengthen cooperation and coordination between [RFMO/As] and Regional Seas Conventions and Action Plans.”<sup>153</sup> Such cross-sectoral cooperation is becoming increasingly important, particularly as the mandate of RFMOs is extending to address the effect of fisheries on marine biological diversity, meaning that their work overlaps with the work of environmental bodies.<sup>154</sup> Some RFMOs have already taken steps in this direction, particularly NEAFC, which has established a close working relationship with the OSPAR Commission<sup>155</sup> under the so-called Collective Arrangement between Competent International Organizations on Cooperation and Coordination regarding Selected Areas in Areas beyond National Jurisdiction in the North-East Atlantic,<sup>156</sup> and the General Fisheries Commission for the Mediterranean (GFCM), which has worked closely with the Meetings of Parties to the Barcelona Convention in pursuing an ecosystem approach in the Mediterranean.<sup>157</sup> Such arrangements have been identified as a potential model that could be used in other regions to build inter-sectoral cooperation,<sup>158</sup> even though regional differences will dictate that adaptations may have to be made.<sup>159</sup>

<sup>151</sup> See <<http://www.tuna-org.org/>>.

<sup>152</sup> See UNGA Res. 71/123, note 164 at paras. 155 (relating to RFMO/As with competence to manage straddling stocks) and 156 (relating to RFMO/As with competence to manage deep-sea fisheries). In the latter context, see the Record of the meeting of the deep-sea fisheries secretariats contact group (2016), attended by representatives of CCAMLR, NAFO, GFCM, NEAFC, NPFC, SEAFO, and SPRFMO.

<sup>153</sup> Report of the Resumed Fish Stocks Agreement Review Conference, note 16 at para. B3(b).

<sup>154</sup> See e.g. J.A. Ardron et al “The Sustainable Use and Conservation of Biodiversity in ABNJ: What can be achieved using existing international agreements?” (2014) 49 *Marine Policy* 98, 103. The current negotiations towards a new legally binding instrument on the conservation of biological diversity in areas beyond national jurisdiction is also intended to address this issue. See further Chapter 8 of this Volume (Caddell).

<sup>155</sup> The OSPAR Commission was established by the Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992 (2354 UNTS 67, as amended; available at <https://www.ospar.org>).

<sup>156</sup> See discussion in S. Asmundsson and E. Corcoran “The Process of Forming a Cooperative Mechanism between NEAFC and OSPAR” (*UNEP Regional Seas Reports and Studies* No. 196: 2015) 16; D. Johnson “Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement for the North-East Atlantic” in P.A. Beckman and A.N. Vylegzhanin (eds) *Environmental Security in the Arctic Ocean* (Springer, New York: 2013) 341.

<sup>157</sup> MOU between the UNEP MAP-Barcelona Convention and FAO-GFCM (2012); *Draft Elements of a Common Strategy among RAC/SPA, GFCM, ACCOBAMS and IUCN-Med, with collaboration of MedPAN*, doc. UNEP(DEPI)/MED WG.408/17 (2015).

<sup>158</sup> See Johnson, note 156 at 341; D. Freestone et al “Can Existing Institutions Protect Biodiversity in Areas Beyond National Jurisdiction? Experiences from Two Ongoing Processes” (2014) 49 *Marine Policy* 167, 171.

<sup>159</sup> Asmundsson and Corcoran, note 156 at 30. See further Chapter 8 of this Volume (Caddell).

A more radical solution would be the establishment of Integrated Regional Oceans Management Organizations, which combine the functions of regional seas bodies and regional fisheries bodies.<sup>160</sup> However, many authors believe that this is a step too far given the heterogeneity of geographical scopes and participation, as well as the different constituencies that would need to be brought together.<sup>161</sup> The time and effort that would be necessary to promote such an agenda could be better spent on making more effective use of existing tools.

## 7. CONCLUSIONS

The past decades have seen considerable effort put into strengthening regional fisheries management in order to meet the challenges of promoting sustainable fishing. New RFMO/As have been established in order to fill regulatory gaps and existing institutions have been modernized to reflect emerging governance principles. Change has sometimes been slow, particularly when it relies upon treaty amendment or it has been opposed by key States. Nevertheless, the report by the UN Secretary-General to the 2016 Resumed FSA Review Conference reflected significant developments in relation to the issues examined in this Chapter, including “steady progress [...] in strengthening the mandates and measures of the organizations and arrangements”<sup>162</sup> and “some progress [...] in constraining opt-out behavior.”<sup>163</sup>

Not only has there been a clear push for reform within individual RFMO/As, but overall developments would also appear to support the emergence of a system of regional fisheries governance, composed of autonomous yet interconnected institutions. Practice suggests that RFMO/As do not operate in clinical isolation, but they are increasingly subject to a framework of common principles and shared values. Moreover, developments in one region can influence regulatory arrangements elsewhere.

This trend is evident in part through the practices that inform performance reviews of RFMO/As. In its most concrete form, this is illustrated by the agreement amongst tuna RFMOs to apply the same performance criteria in their reviews. However, even when organizations have adopted their own review criteria, panels have made references to global fisheries instruments and the best practices of other RFMOs to support their findings and recommendations.<sup>164</sup> In some cases, the need to take into account best practices has been codified in the constituent instrument of the RFMO itself.<sup>165</sup> Similarly, in recent consultations aimed at addressing high seas fishing in the central Arctic Ocean, participating States agreed to only allow fishing “pursuant to one or more regional or subregional fisheries management organizations or arrangements

<sup>160</sup> See Global Ocean Commission, *From Decline to Recovery: A Rescue Package for the Oceans*, Report Summary (2016) 16.

<sup>161</sup> See e.g. J. Rochette et al “Regional Oceans Governance Mechanisms: A Review” (2015) 60 *Marine Policy* 9, 17, concluding that “trying to fully integrate the governance system formally rather than functionally is but a pipe dream.”

<sup>162</sup> Report of the Secretary-General to the 2016 Resumed FSA Review Conference, doc. A/CONF.210/2016/1 of 1 March 2016, para. 157.

<sup>163</sup> *Ibid.*, para. 198.

<sup>164</sup> See e.g. Report of the 2014 NEAFC Performance Review; Report of the 2016 ICCAT Performance Review.

<sup>165</sup> SPRFMO Convention, note 30 [at](#); Art. 30(2); see also NPFC Convention, note 30 [at](#); Art. 22.

that are or may be established to manage such fishing in accordance with recognized international standards.”<sup>166</sup>

The trend towards systematization is also illustrated by the growing cooperation between RFMOs. Overlaps are being addressed and adjacent regimes have worked towards the harmonization of measures. Yet, practice in this regard demonstrates that successful cooperation is largely the result of horizontal engagement, rather than top-down imposition. There has been some resistance to the development of a formal hierarchy, with particular opposition to the idea that the independent RFMOs could be reviewed by the FAO or any other global institution.<sup>167</sup> Indeed, it is still true that many States are keen to stress the independence of RFMOs<sup>168</sup> and it is unlikely that any formal hierarchy will emerge in the near future. Moreover, entrenched political and geographical differences between regions also mean that, despite the obvious convergence in regional fisheries management, complete harmonization is unlikely to occur.

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<sup>166</sup> 2015 Oslo Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean. See also <https://www.state.gov/e/oes/ocns/opa/rls/269126.htm>.

<sup>167</sup> Report of the Fourth Meeting of RFMOs, note 146 at para. 11, where it was underlined that “FAO is free to review the work of the FAO RFMOs. However, a review of the non-FAO RFMOs could only be initiated by the governing councils of the organizations concerned, although FAO may be able to provide assistance in this regard.”

<sup>168</sup> See e.g. the comments reported in Report of the Secretary-General to the 2016 Resumed FSA Review Conference, note 162~~3~~ at para. 250.