THE IMPLICATIONS OF THE UN FISH STOCKS AGREEMENT (NEW YORK, 1995) FOR REGIONAL FISHERIES ORGANISATIONS AND INTERNATIONAL FISHERIES MANAGEMENT
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THE IMPLICATIONS OF THE UN FISH STOCKS AGREEMENT (NEW YORK, 1995) FOR REGIONAL FISHERIES ORGANISATIONS AND INTERNATIONAL FISHERIES MANAGEMENT
EXECUTIVE SUMMARY

Purpose of the Report

The present report addresses the implications of the United Nations 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 December 1995 (Fish Stocks Agreement) for Regional Fisheries Management Organizations (RFMOs) of which the European Union is a member or has an interest in. The study addresses the requirements the Fish Stocks Agreement poses on international fisheries management and to what extent RFMOs have been taking these requirements into account.

Summary of the Analysis and Conclusions on Specific Issues

Introduction

The report starts with a general analysis of the Fish Stocks Agreement and its relationship to other international instruments of relevance for the conservation and management of straddling and highly migratory fish stocks. This concerns first of all the United Nations Convention on the Law of the Sea of 10 December 1982 (LOS Convention), to which the European Community is a party. The Fish Stocks Agreement implements the LOS Convention and has to be interpreted and applied in the context of and in a manner consistent with the Convention. Other instruments of relevance include the FAO Code of Conduct for Responsible Fisheries and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement).

The analysis of the report looks at the provisions of the Fish Stocks Agreement that are most directly of relevance for the conservation and management of straddling and highly migratory fish stocks by regional fisheries management organizations (RFMOs). The outcome of this analysis is compared to the constitutive instruments and practice of a number of RFMOs. The RFMOs included in the study have been selected employing the following criteria:

1. the RFMO is concerned with the conservation and/or management of straddling or highly migratory fish stocks; and
2. the European Union (European Community (EC)) is a member of the RFMO or has an interest in the fisheries in the area of the RFMO.

On the basis of these two criteria the following RFMOs have been selected:

- CCAMLR (Commission on the Conservation of Antarctic Marine Living Resources);
- CCSBT (Commission for the Conservation of Southern Bluefin Tuna);
- CECAF (Fishery Committee for the Eastern Central Atlantic);
- GFCM (General Fisheries Commission for the Mediterranean);
- IATTC (Inter-American Tropical Tuna Commission);
- ICCAT (International Commission on the Conservation of Atlantic Tunas);
- IOTC (Indian Ocean Tuna Commission);
- NAFO (Northwest Atlantic Fisheries Organization);
- NEAFC (North-East Atlantic Fisheries Commission);
- SEAFO (South East Atlantic Fisheries Organization; constitutive instrument in force but Commission not yet operational);
SWIOFC (South West Indian Ocean Fisheries Commission; constitutive instrument under consideration);

WCPFC (Western and Central Pacific Ocean Fisheries Commission; constitutive instrument not yet in force);

WECAFC (Western Central Atlantic Fishery Commission);


Specific Issues under the Fish Stocks Agreement

Definition of Straddling Stock
Whereas Article 64 of the LOS Convention defines highly migratory species by means of listing them in Annex I to the Convention, a definition of straddling species or fish stocks does not appear in the Convention or the Fish Stocks Agreement. Nevertheless, it is commonly understood that straddling stocks means those stocks referred to in Article 63(2) of the Convention, i.e. stocks which “occur both within the exclusive economic zone and in an area beyond and adjacent to the zone”. Although on its face simple, this definition is not without difficulty, however. During the negotiations on the Fish Stocks Agreement, consideration was given to the development of a precise definition, but the participants resolved that it was better to avoid a definition of straddling fish stocks definitions altogether and leave the matter to be resolved at the (sub-) regional level.

In practice, fish stocks should presumably be treated as straddling when their occurrence in both the exclusive economic zone (EEZ) and the high seas leads to transboundary effects that are significant for fisheries management authorities. The precautionary approach has a role to play in situations where no agreement exists on the significance of these transboundary effects. Most importantly, it acts as a presumption that transboundary effects are significant, until this is refuted by sufficient scientific proof. Until that matter has been resolved, the management of fish stocks should be approached primarily on a multilateral basis.

General Principles
Underlying the Fish Stocks Agreement is a broad set of general principles which contain a detailed statement of the duties and responsibilities of States in relation to the conservation and management of straddling and highly migratory fish stocks. These are based on modern concepts of environmentally-sound fishing practices and also on the basic objectives expressed in the LOS Convention, namely the optimum utilization of fisheries and the maintenance or restoration of stocks at levels capable of producing maximum sustainable yield (MSY). Generally speaking, the constitutive instruments of RFMOs established prior to 1995 do not extensively reflect the general principles of Article 5 of the Fish Stocks Agreement, with the exception of the CCAMLR Convention. In contrast, the new organizations established after the conclusion of the Fish Stocks Agreement reflect Article 5 extensively. In the practice of RFMOs to date, some of the principles of Article 5, notably relating to bycatch mitigation and enforcement, have been implemented by regulatory measures. Some, including the precautionary approach, have received extensive attention but have not yet been fully, or effectively, integrated into decision making yet, and some have received little attention.

The Precautionary Approach
Article 6 of the Fish Stocks Agreement is concerned with the application of the precautionary approach to the conservation, management and exploitation of straddling and highly migratory fish stocks. Annex II to the Fish Stocks Agreement (Guidelines for the Application of Precautionary Reference Points in the Conservation and Management of Straddling Fish
Stocks and Highly Migratory Fish Stocks) sets out the specific details that are involved in the implementation of the precautionary approach. The implementation and application of the precautionary approach and precautionary reference points leaves a great deal to be determined by the relevant RFMOs. A review of practice in this respect points out that the Food and Agriculture Organization of the United Nations (FAO) and RFMOs have been addressing the issue of implementation since the 1990s. Work on this issue by the FAO and other international organizations, notably the International Council for the Exploration of the Sea (ICES), can assist or is actually assisting RFMOs in the implementation of these provisions and contributes to the consistency of the approaches taken by different organizations. A number of RFMOs manages fisheries utilizing the precautionary approach and has been drawing up formal procedures to utilize the precautionary approach, although it cannot yet be said that the precautionary approach has been fully adopted, or is fully observed, in decision-making.

Compatibility of Conservation and Management Measures
Article 7 of the Fish Stocks Agreement is one of its central provisions, as it addresses the relationship between the rights of the coastal State in its area under national jurisdiction and the rights of States fishing on the high seas in respect of straddling and highly migratory fish stocks. Article 7 also reaffirms the balance of the rights of coastal States and States fishing on the high seas contained in the LOS Convention, notwithstanding the efforts of several coastal States to redefine this balance of interest to their favour since the EEZ regime was first negotiated in the 1970s and beginning of the 1980s.

The constitutive instruments of a number of RFMOs contain a provision on the compatibility of conservation and management measures adopted for the high seas and those adopted for areas under national jurisdiction. In general these provisions envisage the same approach and result as Article 7 of the Fish Stocks Agreement. The Galapagos Agreement is the one exception to this approach as it establishes a preference for the conservation and management measures established for areas under national jurisdiction.

New Entrants, Allocation of Fishing Opportunities and Deterring Fishing by Non-Members
The strongly related issues of new entrants, allocation of fishing opportunities and deterring fishing by non-members are crucial to the functioning of RFMOs. An important consideration for States that are not yet members of RFMOs but are interested in becoming involved in the fisheries for which those RFMOs have competence, is that this brings along an equitable share of the available fishing opportunities. Allocation is becoming more and more difficult due to declining fishing opportunities and more new entrants will only aggravate this situation. Measures to deter fishing by non-members (unregulated fishing) are designed to force non-members either to join or to cooperate with the RFMO or stop fishing altogether.

Although Article 8(3) of the Fish Stocks Agreement limits membership of RFMOs to ‘States having a real interest’, no well-founded arguments exist to use this as a bar to membership of RFMOs as such. The analysis of conditions for membership of the selected RFMOs indicates that RFMOs are generally open to new entrants. Many conditions for membership will not be perceived as restrictive by new applicants. However, if account is also taken of the limited fishing opportunities for new applicants, the selected RFMOs have a much more restrictive/closed character. Subjecting applications for membership to a system of approval, such as under the Honolulu Convention, does not a priori exclude new applicants from participation and is not therefore incompatible with Article 8(3) of the Fish Stocks Agreement. A substantial violation of Article 8(3) can only arise in relation to a concrete case of an application for membership in the light of the ill-defined concept of real interest. It is
submitted that not only a negative decision on an application may give rise to such a violation. A refusal to take such a decision within a reasonable period of time, or the failure to effectively provide for membership or a similar status within a reasonable period of time may also qualify as violations.

Allocating decreasing fishing opportunities between an increasing group of States poses considerable problems to RFMOs. Existing members may opt-out from painstakingly negotiated allocations whereas new entrants may decide not to join an RFMO. Both are threats to the sustainability of the fisheries and the future of the RFMO. Even though Article 10(i) of the Fish Stocks Agreement legally requires the existing members of RFMOs to agree on means to accommodate the fishing rights of new entrants, it is also in the long-term interests of all to do this in a mutually satisfactory manner.

The list of allocation criteria in Article 11 of the Fish Stocks Agreement is non-exhaustive and the individual criteria only have to be ‘take[n] into account’. This leaves States a considerable margin of appreciation in applying each of the listed criteria. As a general rule, each criterion must be given some weight but there may be special circumstances where ‘taking into account’ does not result in according any weight. Pursuant to Articles 11(c) and 33(2) of the Fish Stocks Agreement, a State’s contribution to conservation and its record of compliance can be used as allocation criteria. New or existing members of RFMOs are thus rewarded or punished by means of larger or smaller allocations of fishing opportunities as a consequence of their (lack of) support to the RFMO’s core objectives. The practice of the selected RFMOs confirms that these criteria can in principle be used (and in some cases are being used) for new as well as existing members.

Fishing by non-members usually occurs in disregard of an RFMO’s conservation and management measures. This not only gives competitive advantages but also increases the risk of over-exploitation due to ignored catch or effort limitations and often leads to unsustainable fishing practices with serious ecosystem effects. As unregulated fishing thus threatens the sustainability of an RFMO’s fisheries and in fact the future of the RFMO itself, it needs to be dealt with. This rationale lies at the heart of Articles 17 and 33(2) of the Fish Stocks Agreement and the 2001 International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA on IUU Fishing). Articles 17 and 33(2) function as obligations imposed on States parties to the Fish Stocks Agreement to take specific measures to combat unregulated fishing. RFMOs are expected to take a two-tier approach in relation to unregulated fishing. The first tier consists of cooperation policies aimed at creating awareness of the problem of unregulated fishing and at the need for cooperation between all States involved in fishing for the regulated species. The second tier consists of specific measures to combat unregulated fishing by effectively forcing non-cooperating non-members to cooperate or join the RFMO, or stop fishing altogether. The IPOA on IUU Fishing contains a wide range of such specific measures. Current practice of RFMOs reflects this two-tier approach.

**Collection and Provision of Data**

The Fish Stocks Agreement sets detailed standards for the collection and provision of data. These obligations are in the first instance addressed to the States parties to the Agreement, but the Agreement also specifies what obligations States have in respect of the RFMOs to which they are a member and what functions an RFMO has in respect of the collection and provision of data. At the global level, the FAO has contributed significantly to standard setting in respect of the collection and provision of data. The FAO is involved in drawing up the Strategy for Improving Information on Status and Trends of Capture Fisheries. The implementation of this Strategy can provide assistance to RFMOs, if needed, to implement the obligations on data collection and provision contained in the Fish Stocks Agreement. Most RFMOs already have a scientific body that is charged with collecting and analysing
data in respect of the stocks that are being managed by the RFMO. A number of RFMOs have evaluated their work concerning the collection and evaluation of data in recent years.

**Flag State Duties**

Article 18(2) of the Fish Stocks Agreement lays down what could be regarded as the core flag State obligation: to exercise its responsibilities over ships flying its flag (that fish on the high seas). The other paragraphs of Article 18 contain a long list of flag State duties that build on this core obligation. Many of these obligations are also laid down with more detail in Articles III-VI of the FAO Compliance Agreement. Article 18 is primarily directed at flag States and not at RFMOs. Members of RFMOs may nevertheless feel the need to confirm and implement these flag State duties at the regional level, *inter alia*, in furtherance of the RFMO’s objectives and/or to ensure a level playing field (fair competition) at the regional level. In view of the length of the list of flag State duties in Article 18 and the limited information obtained from the selected RFMOs, it is difficult to describe their implementation practice. As the current body of EC law which relates to the matters governed by Article 18 is very extensive, compliance by EC Member States with EC law can be viewed, *prima facie* and in a general sense, as compliance with Article 18.

**High Seas Enforcement**

Articles 21 and 22 of the Fish Stocks Agreement contain a carefully defined exception to the primacy of flag State jurisdiction on the high seas by giving enforcement powers to States other than the flag State. These enforcement powers are only available as between States parties to the Fish Stocks Agreement. Whereas a number of the selected RFMOs have adopted high seas enforcement procedures, none of these apply to vessels flying the flag of non-members of the RFMOs on the condition that they are party to the Fish Stocks Agreement. This arguably reflects a hesitation to exercise non-flag State high seas enforcement powers if this is ‘merely’ based on indirect consent by means of adherence to the Fish Stocks Agreement. However, this may change once ratification of the Fish Stocks Agreement becomes more universal.

**Special Requirements of Developing States**

In order to establish which States are covered by the term ‘developing States’, recourse can be had to the lists of developing States that have been drawn up by various international organizations. However, developing States will have to meet the different requirements set out in Part VII (special requirements of developing States) of the Agreement to actually receive the various forms of assistance specified in it.

The analysis points out that there already exist a large number of instruments and mechanisms that can be used to assist developing States in implementing and applying the Fish Stocks Agreement. This indicates that such assistance does not have to be provided through an RFMO. The debates in the General Assembly of the United Nations and at the First Informal Meeting of the States Parties to the Agreement suggest that it is likely that a (voluntary) Trust fund pursuant to Part VII of the Fish Stocks Agreement will be established within the United Nations system.

The language employed in Article 25 of the Fish Stocks Agreement (assistance to developing States *shall* include the provision of financial assistance and other specified types of assistance) indicates that the provision of such assistance is an obligation resting upon States parties to the Agreement. Although it is difficult to quantify such assistance, a number of considerations can be deemed to be relevant in this respect.

A number of the provisions in Part VII of the Fish Stocks Agreement are of relevance for the issue of access to straddling and highly migratory fish stocks. These provisions can result in a
larger share of the TAC for developing States than would be otherwise the case, e.g. if historical catches are taken as the baseline for determining the allocation of catches. However, these provisions do not apply to developing States generally, but only to those of them that meet the conditions set out in this connection. The term ‘facilitating access’ contained in Article 25(2)) of the Agreement is not relevant in this respect.

Practice of RFMOs indicates that States have taken the special requirements of developing States into account in discussing allocation criteria even in cases where the constitutive instrument is silent on this matter. For instance, ICCAT has adopted the *ICCAT Criteria for the Allocation of Fishing Possibilities*. Among the four categories of allocation criteria one category includes a number of criteria of relevance for developing States. The extent to which issues arising under Part VII have been given attention by RFMOs to a large part would seem to depend on whether the membership has raised this issue.

**Relationship with the WTO**

Both the Fish Stocks Agreement and the body of instruments developed within the World Trade Organization (WTO) (e.g. GATT 1947) are part of international law. Due to the unstructured development of international law, there is no general hierarchy or rules on resolving conflict between distinct bodies (fields or branches) of international law. This also applies to the relationship between WTO rules on the one hand and provisions of the Fish Stocks Agreement on the other hand. All that is available is a handful of very general principles such as that more specific rules take precedence over general rules (*lex specialis derogat legi generali*) or that newer rules take precedence over older rules (*lex posterior derogat legi priori*). Due to their specific nature, WTO rules are often *lex specialis* in relation to rules of general international law. Particularly relevant to conflicts between WTO instruments and the Fish Stocks Agreement are Articles XX and XXI of GATT 1947. These provisions contain general and security exceptions that can be invoked to impose trade-related measures that would otherwise be inconsistent with GATT 1947. The legality of trade-related measures may for instance depend on rights and duties under the LOS Convention and the Fish Stocks Agreement to the extent that they apply to the parties to a dispute.

In view of the existing preference for multilateral solutions to environmental problems, the relationship between the Fish Stocks Agreement, RFMOs and the WTO will most likely be one where the Fish Stocks Agreement and RFMOs jointly provide the basis for trade-related measures whose consistency with WTO rules can be assumed. Trade-related measures can be adopted to ensure compliance with concrete conservation and management measures. These are not contained in the Fish Stocks Agreement itself but are to be adopted by RFMOs, in accordance with the provisions of the Fish Stocks Agreement, the LOS Convention and other relevant rules of international law. As a matter of presumption, trade-related measures to ensure compliance with the conservation and management measures adopted by RFMOs are consistent with WTO rules. However, this presumption is open to challenge, especially in the case of RFMOs that unjustifiably bar membership or whose allocation of fishing opportunities is inequitable.

**Role of the FAO**

As the FAO is not allowed to become a party to the Fish Stocks Agreement, the obligations contained therein are not applicable to it. Substantive responsibility for FAO fisheries bodies established under Articles VI or XIV of the FAO Constitution lies first and foremost with the members of these bodies and not with FAO. It could nevertheless be argued that members of the FAO or its fisheries bodies that are also parties to the Fish Stocks Agreement are also obliged to further the general obligations and objectives of the Agreement within FAO and its fisheries bodies. This notwithstanding, agreement already existed within FAO that its
fisheries bodies needed strengthening in 1995. The ensuing process of upgrading is certainly to be influenced by the provisions of the Fish Stocks Agreement. Here again, however, the role of FAO is merely one of facilitator and everything depends on the readiness of States to use the provisions of the Fish Stocks Agreement as a blueprint. More in general, various Sections of the report identify and commend the FAO for its important contribution to assisting States and RFMOs in implementing the Fish Stocks Agreement and in furthering its objectives.

**Dispute Settlement**

The Fish Stocks Agreement ensures that mechanisms for the compulsory settlement of disputes resulting in binding decisions are in principle generally available to its States parties. This not only concerns the interpretation or application of disputes in respect of the Agreement itself, but also concerning the interpretation or application of the constitutive instruments of RFMOs to which they are parties. The report indicates the limitations to the availability of compulsory dispute settlement mechanisms. One important limitation is that a coastal State shall not be obliged to accept the submission to binding dispute settlement procedures of any dispute relating to its sovereign rights with respect to the living resources in the EEZ or their exercise. If a coastal State invokes this provision, the possibility of compulsory dispute settlement in respect of aspects of a dispute related to the high seas are also limited. This provision is relevant for straddling and highly migratory fish stocks, due to their presence in both the EEZ and high seas.

The constitutive instruments of a number of RFMOs do not provide for compulsory dispute settlement. Between States parties to the Fish Stocks Agreement, compulsory dispute settlement is now also available in these cases. To date, compulsory dispute settlement has been used to settle disputes in respect of RFMOs only to a limited extent. This is largely explained by the fact that compulsory dispute settlement will only be resorted to after other means to settle a dispute have been exhausted. Even if such other means have been exhausted, there may be other considerations which deter States from seeking compulsory dispute settlement.

The report analyses the contribution of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals to the settlement of fisheries disputes. It is concluded that courts and tribunals have shown that they are able to deal both with conservation and management measures, including TACs and questions concerning the interpretation or application of general principles and rules of international law. Whether more disputes will be submitted to compulsory dispute settlement in the future will depend in large part on the successful implementation of the Fish Stocks Agreement at the regional level. If RFMOs are effective, they should be able to resolve most issues related to straddling and highly migratory fish stocks without recourse to third party dispute settlement. If an RFMO is ineffective, or does not meet the standards set by the Fish Stocks Agreement, States parties to the Fish Stocks Agreement can use compulsory dispute settlement as one of the options to address these issues.

**General Conclusions**

The practice of States and the selected RFMOs is in a constant state of movement. Among the main future developments are the reviews of the constitutive instruments of FAO fisheries bodies and other RFMOs, like IATTC. The extent to which the Fish Stocks Agreement is used as a blueprint will largely depend on the extent to which the Agreement attracts extensive participation in the near future. The more detailed provisions of the Fish Stocks Agreement must be interpreted as a progressive step in the regulation of straddling and highly
migratory fish stocks in the context of the dynamic nature of international law. The determination of the international community to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU fishing) by means of comprehensive and integrated approaches is likely to convince States and RFMOs of the need and legitimacy to develop international law even further.
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<th>Description</th>
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<tr>
<td>CCAMLR</td>
<td>Commission on the Conservation of Antarctic Marine Living Resources</td>
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<tr>
<td>CCAMLR Convention</td>
<td>Convention for the Conservation of Antarctic Marine Living Resources</td>
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<tr>
<td>CCSBT</td>
<td>Commission for the Conservation of Southern Bluefin Tuna</td>
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<tr>
<td>CCSBT Convention</td>
<td>Convention for the Conservation of Southern Bluefin Tuna</td>
</tr>
<tr>
<td>CECAF</td>
<td>Fishery Committee for the Eastern Central Atlantic</td>
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<tr>
<td>CITES Convention</td>
<td>Convention on International Trade in Endangered Species of Wild Flora and Fauna</td>
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<tr>
<td>CTE</td>
<td>Committee on Trade and Environment</td>
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<td>CWP</td>
<td>FAO Coordinating Working Party on Fishery Statistics</td>
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<tr>
<td>DSU</td>
<td>WTO Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>EC</td>
<td>European Community</td>
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<tr>
<td>EEZ</td>
<td>exclusive economic zone</td>
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<tr>
<td>ERSWG</td>
<td>Ecologically Related Species Working Group</td>
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<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<td>FAO Compliance Agreement</td>
<td>Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas</td>
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<td>FIGIS</td>
<td>Fisheries Global Information System</td>
</tr>
<tr>
<td>Galapagos Agreement</td>
<td>Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GC</td>
<td>General Council</td>
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<tr>
<td>GFCM</td>
<td>General Fisheries Commission for the Mediterranean</td>
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<tr>
<td>Honolulu Convention</td>
<td>Convention on the Conservation and Management of the Highly Migratory Fish Stocks of the Western and Central Pacific Ocean</td>
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>IATTC</td>
<td>Inter-American Tropical Tuna Commission</td>
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<tr>
<td>IATTC Convention</td>
<td>Convention for the establishment of an Inter-American Tropical Tuna Commission</td>
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<td>ICCAT</td>
<td>International Commission on the Conservation of Atlantic Tunas</td>
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<td>ICCAT Allocation Criteria</td>
<td>ICCAT Criteria for the Allocation of Fishing Possibilities</td>
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<td>ICES</td>
<td>International Council for the Exploration of the Sea</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>Term</td>
<td>Definition</td>
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<td>-----------------------------------------------------------------------------</td>
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<td>ICJ Reports</td>
<td>Reports of Judgments, Advisory Opinions and Orders; The International Court of Justice</td>
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<td>IOTC</td>
<td>Indian Ocean Tuna Commission</td>
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<td>IOTC Agreement</td>
<td>Agreement for the Establishment of the Indian Ocean Tuna Commission</td>
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<td>IPOA on IUU Fishing</td>
<td>International Plan of Action to prevent, deter and eliminate Illegal, Unreported and Unregulated Fishing</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IUU fishing</td>
<td>illegal, unreported and unregulated fishing</td>
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<td>IWC Convention</td>
<td>International Convention for the Regulation of Whaling</td>
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<td>MSY</td>
<td>maximum sustainable yield</td>
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<td>NAFO</td>
<td>Northwest Atlantic Fisheries Organization</td>
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<td>NAFO Convention</td>
<td>Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries</td>
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<td>NCP</td>
<td>Non-Contracting Party</td>
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<td>NEAFC</td>
<td>Northeast Atlantic Fisheries Commission</td>
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<tr>
<td>NEAFC Convention</td>
<td>Convention on Future Multilateral Cooperation in the Northeast Atlantic</td>
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<td>REIO</td>
<td>regional economic integration organization</td>
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<tr>
<td>RFMO</td>
<td>regional fisheries management organization</td>
</tr>
<tr>
<td>SEAFO</td>
<td>South East Atlantic Fisheries Organization</td>
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<td>Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean</td>
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<td>SWIOFC</td>
<td>South West Indian Ocean Fisheries Commission</td>
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<td>Draft Agreement for the Establishment of a South West Indian Ocean Fisheries Commission</td>
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<tr>
<td>TAC</td>
<td>total allowable catch</td>
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<td>Technical Specifications</td>
<td>Technical Specifications included in Annex I to the Invitation to Tender IV/2002/11/02</td>
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<td>UNDP</td>
<td>United Nations Development Program</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<tr>
<td>WCPFC</td>
<td>Western and Central Pacific Ocean Fisheries Commission</td>
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<tr>
<td>WECAFC</td>
<td>Western Central Atlantic Fishery Commission</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1. INTRODUCTION

1.1. General


The Fish Stocks Agreement, which was negotiated between 1993 and 1995, is intended to remedy the shortcomings in the regime for the conservation and management of straddling and highly migratory fish stocks. Due to the transboundary nature of these stocks, their conservation and management require cooperation between coastal States and States fishing on the high seas. A general duty to cooperate in respect of these stocks is already contained in the United Nations Convention on the Law of the Sea (LOS Convention) of 1982 and, at the time of the negotiations, there was a substantial body of cooperative practice between States through RFMOs. However, it was felt that most RFMOs were not capable of dealing adequately with the problems posed by the conservation and management of straddling and highly migratory fish stocks. The Fish Stocks Agreement seeks to remedy these shortcomings by elaborating the general principles of cooperation between States contained in the LOS Convention.

As the title of the Fish Stocks Agreement indicates, it is closely linked to the LOS Convention. The relationship the Agreement and the Convention is specified in Article 4 of the Agreement, which provides that:

‘Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.’

This indicates that it is necessary to take account of the LOS Convention in an analysis of the Agreement. A number of other international instruments are also of relevance for the present analysis. This mainly concerns instruments which, like the Fish Stocks Agreement, were adopted in the 1990s to elaborate and reinforce the general regime for fisheries set out in the Convention. This includes, inter alia, the 1995 FAO Code of Conduct for Responsible Fisheries, the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement) and the 2001 International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA on IUU Fishing).

The Fish Stocks Agreement contains general principles applicable to the conservation and management of straddling and highly migratory fish stocks. The duty to cooperate is specified in detail by indicating the criteria such cooperation has to meet. The Agreement puts emphasis on cooperation through RFMOs and indicates the functions and conditions for membership of RFMOs in considerable detail. Other parts of the Fish Stocks Agreement are concerned, inter alia, with the duties of flag States, compliance and enforcement, the requirements of developing States and the peaceful settlement of disputes.

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1 Law of the Sea Bulletin No. 29, p. 25.
3 The texts of all these instruments can be found on the FAO Fisheries Department website, <www.fao.org/fi>.
1.2. Selection of RFMOs Included in the Report

The level of detail contained in the provisions of the Fish Stocks Agreement is such that a study of its implementation by States and RFMOs is a major undertaking. The present report focuses on how a selected number of RFMOs and their member States have been dealing with the Agreement. The analysis of the report looks at the provisions of the Fish Stocks Agreement that are most directly of relevance for the conservation and management of straddling and highly migratory fish stocks by RFMOs. The outcome of this analysis is compared to the constitutive instruments and practice of a number of RFMOs. The selection of specific issues has been based on the questions that were contained in the Technical Specifications included in Annex I to the Invitation to Tender IV/2002/11/02 (Technical Specifications), also taking into account the Tender on which the present report is based. During the research, a number of additional research questions have been formulated.

The RFMOs included in the study have been selected employing the following criteria:

1. the RFMO is concerned with the conservation and/or management of straddling or highly migratory fish stocks; and
2. the European Union (European Community) is a member of the RFMO or has an interest in the fisheries in the area of the RFMO.

On the basis of these two criteria the following RFMOs have been selected:

- CCAMLR (Commission on the Conservation of Antarctic Marine Living Resources);
- CCSBT (Commission for the Conservation of Southern Bluefin Tuna);
- CECAF (Fishery Committee for the Eastern Central Atlantic);
- GFCM (General Fisheries Commission for the Mediterranean);
- IATTC (Inter-American Tropical Tuna Commission);
- ICCAT (International Commission on the Conservation of Atlantic Tunas);
- IOTC (Indian Ocean Tuna Commission);
- NAFO (Northwest Atlantic Fisheries Organization);
- NEAFC (North-East Atlantic Fisheries Commission);
- SEAFO (South East Atlantic Fisheries Organization; constitutive instrument in force, but Commission not yet operational);
- SWIOFC (South West Indian Ocean Fisheries Commission; constitutive instrument under consideration);
- WCPFC (Western and Central Pacific Ocean Fisheries Commission; constitutive instrument not yet in force);
- WECAC (Western Central Atlantic Fishery Commission);

1.3. Research Methodology

The main research methods that have been employed in the study are:

- Legal analysis of relevant global instruments identified above.
- Legal analysis of the constitutive instruments of the RFMOs identified above.
- Legal analysis of the relevant practice of the RFMOs identified above.
• Interviews and questionnaires. As the number of relevant RFMOs is extensive and the research subject to strict limitations, the relevant RFMOs have been approached by telephone, fax, letter or email to make enquiries. The following RFMOs, with active secretariats, provided full or extensive responses to the questionnaire and enquiries: CCAMLR, CCSBT, CECAF, IATTC, ICCAT, IOTC, NAFO, NEAFC. In addition, FAO was consulted on a number of specific issues. Other organizations either did not respond or were unable to because of administrative difficulties.

• Analysis of other international instruments, case law and legal literature. Apart from the global instruments identified above, other instruments have also been taken into account insofar as relevant. The study has also relied on a number of judgments of the International Court of Justice (ICJ) and other international tribunals that are relevant for the interpretation of the international fisheries regime. In addition, the most relevant parts of the vast literature on the international regime of fisheries has been analysed and has been included in the report as appropriate. A select bibliography on the Fish Stocks Agreement has been included at the end of the report.

1.4. Use of the Term RFMO

Different acronyms are used to refer to the regional and subregional organizations and arrangements that are concerned with the conservation and/or management of straddling and highly migratory fish stocks. The present report has opted to use the acronym ‘RFMO’ which stands for ‘regional fisheries management organization’. However, this term is used in a wide sense and also includes fisheries bodies that presently do not have management tasks, such as the Fishery Committee for the Eastern Central Atlantic (CECAF) or the Western Central Atlantic Fishery Commission (WECAFC) and also arrangements that are not formal organizations. It is considered that the use of one term to refer to all organizations, bodies and arrangements provides for easier reading and a clearer presentation. In cases where it is relevant to distinguish between different types of organizations, bodies and arrangements, the report does so explicitly.

1.5. Plan of the Report

Chapter 2 of the report consists of a number of sections, which each deal with a specific subject. In a number of cases, this concerns a specific Article or Part of the Fish Stocks Agreement. However, where different Articles of the Agreement are closely connected, they are dealt with jointly in one section. Each section has the same structure. It starts out with listing which questions of the Technical Specifications it addresses and what other relevant questions have been identified. In the analysis of each section conclusions are included.

Chapter 3 of the report contains general conclusions. This concerns conclusions that are of relevance for all or more than one of the sections of Chapter 2. To avoid unnecessary repetition, Chapter 3 does not repeat the conclusions of each individual section of Chapter 2. A number of Annexes to the report provide general information on the selected RFMOs. A select bibliography on the Agreement is also annexed to the report.

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4 Art. 1(1)(d) of the Fish Stocks Agreement defines 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 conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.’
2. ANALYSIS OF THE RESEARCH QUESTIONS

2.1. Definition of Straddling Stock

The Technical Specifications draw attention to the fact that the LOS Convention does not contain a definition of ‘straddling stocks’ whereas Article 64 of the Convention defines highly migratory species by listing them in Annex I to the Convention. The Fish Stocks Agreement does not provide a definition of straddling stocks either. Which fish stocks are to be regarded as highly migratory can be deduced from the list in Annex I to the LOS Convention.

Although the term does not appear in the LOS Convention, it is commonly understood that straddling stocks means those stocks referred to in Article 63(2) of the Convention, i.e. stocks which “occur both within the exclusive economic zone and in an area beyond and adjacent to the zone”. Although on its face simple, this definition is not without difficulty, however. During the negotiation of the Fish Stocks Agreement several delegations felt a need for a more precise or determinative definition of straddling fish stocks. Some delegations proposed that the wording of Article 63(2) of the LOS Convention should be used, whereas other delegations proposed other approaches or definitions. It is not unlikely that the very complex definitions such as those proposed by the Russian Federation ultimately made the Conference decide that it was better to avoid definitions altogether and leave the matter to be resolved at the (sub-) regional level.

The only guidance for a definition of ‘straddling stocks’ or ‘straddling fish stocks’ that is currently available at the global level thus remains Article 63(2) of the LOS Convention. A straddling stock within the meaning of Article 63(2) simply has to ‘occur’ in both the EEZ and high seas but does not have to migrate between them. Stocks that do migrate, however, must obviously be categorized as straddling stocks. The duty to cooperate under Article 63(2) seeks to deal with transboundary effects and these clearly arise with migrating stocks. Moreover, normal dispersal processes ensure more or less random (passive) movement by individuals of the stock through part or the entirety of the stock’s range of distribution, for

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5 In fact, only highly migratory species are (implicitly) defined. In addition to straddling stocks, other terms like shared/joint stocks, anadromous stocks, catadromous stocks and sedentary species are not defined either.

6 Annex I also includes certain non-fish highly migratory species (e.g. certain cetaceans) which are obviously outside the scope of the Agreement.


8 UN Doc. A/CONF.164/L.11/Rev.1, Art. 1(l) submitted by Argentina, Canada, Chile, Iceland and New Zealand (reprinted in Lévy and Schram, supra note 7, pp. 163 et. seq.).

9 See UN Doc. A/CONF.164/L.14, section IV(1), submitted by Chile, Colombia, Ecuador and Peru, which inter alia envisages that regional agreements would list its (straddling) stocks in Annexes. See also the definitions in UN Doc. A/CONF.164/L.44, Art. 1(xx) and (xxiv), submitted by Ecuador. Both documents are reprinted in Lévy and Schram, supra note 7, pp. 187 et. seq. and pp. 503 et. seq.).


12 See, e.g., R.R. Churchill and A.V. Lowe, The Law of the Sea, Manchester, Manchester University Press, 3rd ed., 1999, p. 305, who observe that ‘straddling stocks are stocks of fish that migrate between, or occur in both, the EEZ of one or more States and the high seas’. Migration is understood to be cyclical (active) movement by more or less the entire (adult) population from one particular place to another.
instance in search of better feeding grounds. Where such transboundary processes take place, fishing in either the EEZ or the high seas causes, in principle, transboundary effects.

In practice, the seriousness of these transboundary effects determines whether management authorities should manage the stock as a single (straddling) stock or as two discrete (non-straddling) stocks. The term ‘stock’ is first of all used by (fisheries) managers to distinguish groups of individuals of the same species. Stocks are distinguished from each other on account of, for example, their range of distribution. From a biological or genetic perspective, however, two stocks may belong to the same ‘population’. No agreement exists on the level at which transboundary effects are so significant that management should be based on one and not on two stocks (even though they belong to the same population). Added thereto are the many complexities related to measuring the seriousness of the consequences of different types of transboundary effects (e.g. loss of genetic diversity). Only a very general definition for straddling stocks may therefore be in reach but during the negotiations of the Fish Stocks Agreement even this could not be achieved.

The precautionary approach has a role to play in situations where no agreement exists on the significance of transboundary effects. It first of all acts as a presumption that transboundary effects are significant, until this is refuted by sufficient scientific proof. Until that matter has been resolved, there is first of all a need for multilateral management, based on the Fish Stocks Agreement. Secondly, as regards the appropriate form of management, the precautionary approach indicates that the fishery should in principle be dealt with as if it consisted of two stocks (or components). Not differentiating management may bring the risk that one stock (or one component) collapses\(^1\).

2.2. General Principles

The Technical Specifications asks if the objectives of the various RFMOs (many of which refer to MSY) are compatible with the objectives contained in Article 5. This question will be dealt with by considering two issues:

1. Do the constitutive instruments of RFMOs contain provisions on such general principles?
2. Are the objectives of the various RFMOs (many of which refer to MSY) compatible with the objectives contained in Article 5?

Brief consideration will also be given to the extent to which RFMOs are incorporating the general principles as set out in Article 5 of the Fish Stocks Agreement.

Article 5 provides a broad set of general principles which contain the most detailed statements to date of the duties and responsibilities of States in relation to the conservation and management of straddling and highly migratory fish stocks. If properly implemented, they have the potential to vastly improve fishery management around the world. Part II of the Agreement represents a comprehensive and detailed elaboration of the duty to cooperate and gives States some real and substantial guidance as to how they should give effect to that duty. Importantly, the provisions apply both within and outside areas under national jurisdiction\(^1\).

Thus, in relation to straddling and highly migratory fish stocks within their EEZs, coastal

\(^1\) Cf. almost the exact wording used by Dr. Maguire in relation to the discussions in NEAFC on *Sebastes mentella* in the Irminger Sea (1998 NEAFC Annual Report, at p. 4, paras 11-12). In addition, the consequential loss of genetic diversity may eventually lead to decreased fitness of the species (or stock).

\(^1\) Article 3.
States agree to abide by the general principles, laid down in Article 5, and to follow the precautionary approach to fisheries management, laid down in Article 6.

Article 5 lays down a comprehensive list of general principles, some of which are elaborated upon later in the text. Some of these principles follow directly from Articles 61, 62 and 119 of the LOS Convention. That is the case, in particular, for Article 5(a), which provides that States are to ‘promote the objective of their optimum utilization’ and Article 5(b) which provides that States are to ensure that conservation measures are:

‘based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global[.]’

The remaining principles in Article 5, however, develop principles in the LOS Convention, in line with modern thinking in international fisheries management, or introduce new principles, not previously elaborated in most international fisheries agreements. Among the criteria listed in Article 5 are requirements to:

- adopt measures to ensure the long-term sustainability of straddling and highly migratory stocks;
- apply the precautionary approach in accordance with Article 6;
- assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or dependent upon or associated with the target stocks;
- adopt, where necessary, measures for the conservation and management of species belonging to the same ecosystem or associated with or dependent upon the target stocks;
- minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species and utilize selective, environmentally safe and cost-effective fishing gear and techniques;
- protect biodiversity in the marine environment;
- take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;
- take into account the interests of artisanal and subsistence fishers;
- collect and share complete and accurate data concerning fishing activities, including vessel location and catch of target and non-target species;
- promote and conduct scientific research; and
- implement and enforce conservation and management efforts through effective monitoring, control and surveillance.

It is clear from these general principles that the basic objectives of fisheries management remain unchanged from the LOS Convention, namely the dual objectives of optimum utilization and the maintenance or restoration of stocks at levels capable of producing maximum sustainable yield (MSY). However, it is equally clear that the application of the general principles and the precautionary approach in the Fish Stocks Agreement fundamentally alters the manner in which these objectives are to be achieved: the general objectives must now be read in light of the specific principles and objectives articulated in

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15 See, in particular, Article 6 on the precautionary approach, Article 7 on cooperation and compatibility and Article 14 on the collection and provision of data.
Article 5. In particular, the application of the precautionary approach implies that, although
the objectives may be optimum utilization and MSY, appropriate fishing levels will, in
almost all cases, need to be set at levels below those which were previously considered
appropriate to achieve MSY.

There has been considerable discussion of the general principles contained in the Agreement
both at the global level and in regional fisheries organizations. Various aspects of Article 5
have been taken up at the global level by FAO in the context of the Code of Conduct for
Responsible Fisheries, Article 7.2 of which largely reflects the general principles of the Fish
Stocks Agreement. Among the issues considered by FAO, are the reduction and management
of fishing capacity, the reduction of bycatch and wastage in fisheries and the development
of general principles of responsible fisheries.

Constitutive Instruments
Generally speaking, the constitutive instruments of RFMOs established prior to 1995 do not
extensively reflect the general principles of Article 5 of the Fish Stocks Agreement. Those
parts of Article 5 which are in common with the provisions of the LOS Convention, for
example the objectives of long-term sustainability of fish stocks, the need to base measures
on the best scientific advice and the attainment of maximum sustainable yield, are reflected in
all instruments. However, in addition to these principles, there are only sporadic references to
the types of general principles listed in Article 5, most of which concern related species.
Examples include the CCSBT Convention (which refers to ‘ecologically related species’); the
IATTC and ICCAT Conventions (‘consideration of the oceanography of the environment of
tuna and the effects of natural and human factors upon their abundance’); the IOTC
Agreement (‘interest of developing States’); the NAFO Convention (‘environmental and
ecological factors affecting regulated fisheries’); and the NEAFC Convention
(‘recommendations for stocks which could have an effect through species inter-relationships
on regulated stocks’). The GFCM Convention refers to ‘regulating fishing methods and
fishing gear; prescribing minimum fish sizes; open and closed fishing seasons and areas; and
regulating the amount of total catch and fishing effort and their allocation’ but these
principles were inserted when the Convention was amended in 1997.

The only pre-Fish Stocks Agreement instrument which extensively reflects Article 5 is the
1980 CCAMLR Convention. Ecosystem and precautionary approaches to conservation are
reflected in Article II of the Convention and Article IX(2) lists, inter alia, the following
conservation measures that may be adopted: designation of protected species; designation of
the size, age and, as appropriate, sex of species which may be harvested; designation of open
and closed seasons and areas; regulation of fishing effort; regulation of fishing methods,
including gear requirements; measures concerned with the effects of harvesting and
associated activities on components of the marine ecosystem other than the harvested
populations.

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16 This has taken place through the Ad Hoc Meeting with Intergovernmental Organizations on Work
Programmes Related to Subsidies in Fisheries (Rome, May 2001); the Expert Consultation on Economic
Incentives and Responsible Fisheries (Rome, November 2000); the Technical Consultation on the Measurement
of Fishing Capacity (Mexico City, December 1999); and the Technical Working Group on the Management of
Fishing Capacity (La Jolla, April 1998). In 1999, FAO adopted an International Plan of Action on the

17 This has taken place through the Technical Working Group on the Reduction of Incidental Catch of Seabirds
in Longline Fisheries; and the Technical Consultation on Reduction of Wastage in Fisheries (Tokyo, October
1996).

18 See, in particular, FAO, Technical Guidelines for Responsible Fisheries: Fisheries Management, FAO
Action of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries.
The new organizations established after the conclusion of the Fish Stocks Agreement reflect Article 5 much more extensively. Article 5 is repeated almost verbatim in the Pacific Tuna Convention and the relevant principles are extensively reflected in the SEAFO Convention. The Galapagos Agreement, although notable for its general rejection of the Fish Stocks Agreement language, also largely reflects the general principles of Article 5.

Compatibility with MSY
Although many of the constitutive instruments do not extensively reflect Article 5, it is clear that the terms of the instruments are broad enough to allow the RFMOs to adopt and implement the types of measures envisaged by Article 5. Furthermore, it is clear that the general objectives of the constitutive instruments and the Fish Stocks Agreement are broadly consistent. The objectives of maximum sustainable yield or optimum utilization in the constitutive instruments are consistent with the Fish Stocks Agreement, which also refers to (and is based on) these concepts. The precautionary approach (discussed in more detail in the next section) should not be seen as an alternative to MSY but a means by which to ensure that maximum yields can be attained in the long-term.

Application by RFMOs
It is apparent that a high priority is attached by States and RFMOs to the implementation of the Agreement’s general principles. It is also apparent that the majority of RFMOs consider that the general principles in Article 5 are being fully or extensively implemented. Nevertheless, in the practice of RFMOs to date, only some of the principles of Article 5 have been implemented by regulatory measures, while some have received extensive attention but have not yet led to the adoption of any binding measures and some have received little attention. Gear regulations, bycatch and waste mitigation measures, the impact on non-target species (including fish, marine mammals and seabirds) and the need to improve monitoring, control, surveillance and enforcement have been the subject of specific measures in many organizations. The precautionary approach has been discussed at length but has not so far been fully introduced into management decisions.

The following is a brief review of recent conservation and management measures adopted by RFMOs. The application of principles (c) [on the precautionary approach], (j) [on data and research] and (l) [on monitoring, control and surveillance] are discussed in more detail later in this report.

CCAMLR
As was mentioned above, CCAMLR implements an ecosystem approach to management. Recently, this has included the adoption of measures designed to limit bycatch of seabirds. Other areas of recent activity include measures to conserve Patagonian toothfish (also known as Chilean sea bass) and various measures to deter IUU fishing. It may broadly be stated that the provisions of Article 5 of the Fish Stocks Agreement are widely reflected in CCAMLR management measures.

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19 This emerges both from the questionnaire responses under this study and from the UN report, The Status and Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and its Impact on Related or Proposed Instruments throughout the UN System, with Special Reference to Implementation of Part VII of the Fish Stocks Agreement, dealing with the Requirements of Developing States, 30 May 2003, para. 10.

20 Ibid.
CCSBT
The operation of the CCSBT has been hampered in recent years by a dispute between members over the total allowable catch. A few actions have been taken which reflect the general principles of the Fish Stocks Agreement. In particular, the Commission has established an Ecologically Related Species Working Group (ERSWG) which considers the conservation of ecologically-related species, notably shark, and recommends bycatch mitigation measures, especially to reduce seabird bycatch. Information on bycatch and discards is collected by observers and observer reports and other data are reviewed by the ERSWG. In order to establish a cooperative mechanism for monitoring, control, surveillance and enforcement, a further subsidiary body has been established – the Compliance Committee – to develop a cooperative monitoring and compliance system under the provisions of the Convention.

GFCM
Partially in response to the Fish Stocks Agreement, GFCM was reorganized in 1997 after amendments to its constitutive instrument and rules of procedure. Prior to 1997, the actions of GFCM did not extensively reflect the Fish Stocks Agreement. There has since been consideration of the general principles of the Fish Stocks Agreement within GFCM, however, and recent management measures more closely reflect those principles. Those measures include gear restrictions for certain vessels, limits on bycatch, minimum sizes for fish that may be landed and measures to limit fishing mortality.

IATTC
IATTC has widely addressed the general principles of the Fish Stocks Agreement in recent years, after a period of inactivity. In particular, an international agreement was adopted under its auspices in 1998 concerning the reduction of dolphin mortality in tuna fishing operations. IATTC has also directly adopted resolutions concerning bycatch mitigation, which reflect an ecosystem approach. Its members have also agreed to measures to reduce fishing capacity. IATTC is currently considering a reformulation of its constitutive instrument to reflect the general principles of the Fish Stocks Agreement.

ICCAT
ICCAT has utilized a wide-range of conservation measures, many of which were introduced prior to the adoption of the Fish Stocks Agreement. Such measures include: total allowable catches and catch quotas, size limits, effort restriction, observer programmes, closed areas and seasons, vessel registration and information exchange, gear restrictions and other measures designed to minimize bycatch and the imposition of trade restrictions on States whose vessels are identified as undermining ICCAT measures.

IOTC
IOTC is a relatively new organization and has not yet adopted an extensive range of conservation measures. The focus to date has been on the establishment of scientific working groups to assess stock status and distribution for various tuna groupings against which the need and type of management measures can be determined. The provisions of the Fish Stocks Agreement, including on the precautionary approach, are considered in the development of management advice. At its most recent annual meetings, in December 2001 and December 2002, it was decided to establish a control and inspection committee and resolutions were adopted on matters such on observer programmes, the control of fishing activities, a scheme to promote compliance by non-contracting party vessels, the limitation of fishing effort by non-members and a programme of port inspection.
NAFO
NAFO utilizes a more extensive range of conservation measures than any other organization. Current conservation tools include the setting of catch limits and quotas, minimum mesh size and other gear requirements, closed fishing areas and seasons, bycatch reduction measures, minimum fish landing sizes, observer, inspection and control schemes. The application of the precautionary approach has also received extensive attention, although it has not been fully implemented yet.

NEAFC
As with NAFO, NEAFC utilizes a wide-range of measures, many of which reflect those adopted by NAFO. Conservation measures thus also include the setting of catch limits and quotas, minimum mesh size and other gear requirements, closed fishing areas and seasons, bycatch reduction measures, minimum fish landing sizes, observer, inspection and control schemes. Consideration is also given to ecosystem approaches to management. A Permanent Committee on Control and Enforcement has recently been established. There is an ongoing discussion about the application of the precautionary approach.

2.3. Precautionary Approach

This section addresses the questions in respect of Article 6 of the Fish Stocks Agreement contained in the Technical Specifications. These questions are:

‘- to what extent, and in what way, are RFOs incorporating the precautionary approach, as defined in Annex II [of the Fish Stocks Agreement]? - specific details should be provided’.

To answer these questions, three specific questions have been considered in looking at the RFMOs included in this study:

1. Does the constitutive instrument of RFMOs contain a provision on the precautionary approach?;
2. Have procedures for establishing precautionary reference points been drawn up?, and
3. Have such reference points been established for specific stocks?

Article 6 of the Fish Stocks Agreement is concerned with the application of the precautionary approach to the conservation, management and exploitation of straddling and highly migratory fish stocks. Article 6(1) provides that:

‘States shall apply the precautionary approach widely to conservation, management and exploitation of straddling and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.’

In addition, Article 6(2) requires that:

‘States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.’

The remainder of Article 6 (paragraphs 3-7) and Annex II to the Fish Stocks Agreement (Guidelines for the Application of Precautionary Reference Points in the Conservation and
Management of Straddling Fish Stocks and Highly Migratory Fish Stocks) set out the specific details that are involved in the implementation of a precautionary approach.\(^{21}\)

Article 6 of the Agreement has to be applied in light of its Article 5 on general principles.\(^{22}\) In this connection it is relevant that Article 5 emphasizes a proper balance between sustainability and utilization and stresses ecosystem protection based on precaution and best scientific evidence.\(^{23}\)

It has been noted that the introduction of the precautionary approach represents a major change in the traditional approach of fisheries management, which until recently tended to react to management problems only after they reached crisis levels. The new regime will allow States and regional fisheries bodies to justify proactive measures more easily.\(^{24}\)

The application of the precautionary approach and the establishment of precautionary reference points leaves a great deal to be determined by the relevant RFMOs. RFMOs will have to elaborate and apply precautionary reference points for the stocks for which they have to establish conservation and management measures. At the same time, consistency in the practice of different RFMOs in this respect will facilitate the exchange of information and coordination of efforts, indicating that this issue also should be addressed through a collaborative effort.

**Practice of the FAO and ICES**

At the global level, the FAO has done work on the elaboration of the precautionary approach and precautionary reference points. Together with the Swedish National Board of Fisheries, the FAO has formulated Guidelines on the Precautionary Approach to Capture Fisheries.\(^{26}\) More recently, the implementation of the precautionary approach has been considered by the Working Group on Precautionary Approach Terminology of the FAO Coordinating Working Party on Fishery Statistics (CWP). The Working Group, consisting of representatives from ICCAT, ICES, NAFO and the FAO met in February 2000 to explore possibilities for agreement on the concepts and terminology to be used in application of the precautionary approach.\(^{27}\)

Another contribution to the development of the precautionary approach to fisheries management is provided by ICES.\(^{28}\) ICES introduced new management procedures, including the use of precautionary total allowable catches (TACs) in 1992. More recently, ICES has


\(^{22}\) As a matter of fact, one of these general principles is that States apply the precautionary approach in accordance with Article 6 of the Fish Stocks Agreement (Fish Stocks Agreement, Article 5(c)).


\(^{24}\) Edeson et al., note 21, p. 32.

\(^{25}\) Edeson et al., note 21, pp. 32-33.

\(^{26}\) Contained in the publication *Precautionary Approach to Capture Fisheries and Species Introductions* (FAO Technical Guidelines for Responsible Fisheries, No. 2 (Rome, 1996).

\(^{27}\) The Report of the 2000 Meeting of the Working Group is contained in the document CWP/19/2(B) of January 2001.

\(^{28}\) ICES provides scientific advise to a number of RFMOs (including NAFO, NEAFC and ICCAT) and the European Union. ICES coordinates research in the area of the North Atlantic Ocean, including adjacent seas such as the Baltic Sea and the North Sea, but does not cover the Mediterranean Sea.
started the formal implementation of the FAO Guidelines on the Precautionary Approach to Capture Fisheries in order to make the precautionary approach part of its standard practices. ICES has contributed to the development of methodology, in particular in the area of biological reference points. Standard limit and target reference points have been defined and adopted.\(^{29}\)

The ICES Advisory Committee on Fishery Management meeting in May 2002 has set out a provisional timetable for the revision of the ICES Precautionary Approach reference points. As part of the revision process, the Study Group on the Further Development of the Precautionary Approach to Fisheries Management met in December 2002 and again in February 2003 to develop technical guidelines.\(^{30}\)

**Practice of RFMOs**

A number of RFMOs that have been established or are being reconstituted after the conclusion of the Fish Stocks Agreement include a reference to the precautionary approach and precautionary reference points in their constitutive instrument. This includes the draft Agreement to reconstitute CCAEF (Article IV(3))\(^{31}\), the SEAFO Agreement (Article 7), the draft SWIOFC Agreement (Article 6 ter) and the Honolulu Convention (Article 6). A general reference to the precautionary approach is contained in the Galapagos Agreement (Article 5) and the 1997 amendments to the constitutive instrument of the GFCM (Article III(2)). With the exception of SEAFO, all of these constitutive instruments have not yet entered into force or still have to be adopted.\(^{32}\)

A reference to the precautionary approach is not included in the constitutive instruments of the other RFMOs included in this study. However, a number of these RFMOs have been actively pursuing the definition of precautionary reference points, the implications of the precautionary approach for their management practice and applied the precautionary approach in establishing conservation and management measures. As has been noted:

‘There is also evidence that in the interpretation of the general obligation to conserve and manage high seas living resources, precautionary thinking is being more widely accepted as the proper course to adopt in the absence of adequate scientific evidence.’\(^{33}\)

The precautionary approach has been under extensive consideration within NAFO, which, together with ICES, has undertaken to develop the scientific basis to implement the precautionary approach since 1997. In elaborating reference points NAFO has taken into account the relevant provisions of the Fish Stocks Agreement.\(^{34}\) In particular, consideration

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\(^{29}\) See the document CWP/19/2(B), p. 21.


\(^{31}\) At its last Session, in October 2002, CCAEF decided not to reconstitute itself. However, the possibility remains that the process will be re-activated in future years and the discussions in relation to the draft text are indicative of the practice of States. That text will therefore be considered in this report.

\(^{32}\) The SEAFO Convention entered into force on 13 April 2003.

\(^{33}\) D. Freestone, note 23, at p. 307.

\(^{34}\) See the document CWP/19/2(B), p. 22-23.
has been given to developing criteria for limit and target reference points, medium-term and long-term considerations and risks and criteria for re-opening fisheries. The Scientific Council has developed reference points and management strategies for a number of NAFO-managed stocks and recommended that these be used in NAFO decision-making. However, a comprehensive application of the precautionary approach has yet to be adopted by NAFO. Work is continuing, however, with the most recent meeting of the Workshop on the Precautionary Approach to Fisheries Management taking place in March/April 2003.

The scientific advice which NEAFC receives from ICES has the precautionary approach built into it on the ecological level. The precautionary reference points employed by NEAFC have also been developed by ICES. The basis for drawing up these reference points has not been discussed in any detail by NEAFC. There have been established reference points for specific stocks managed by NEAFC.

ICCAT instituted an ad-hoc working group on the precautionary approach in 1997 to consider the consequences of the precautionary approach for ICCAT stocks. Since its establishment, the Working Group has summarized existing biological, technological and environmental information relating to the most important ICCAT species, held a meeting to review this information and develop a work plan and has initiated the development of a simulation framework for evaluating management strategies. A first report of this group was prepared in 1999. The work of the group was reviewed at the meeting of the Commission in 2000, which recognized the importance of its work. Like NAFO, ICCAT has taken into account the relevant provisions in the Fish Stocks Agreement in its work on the precautionary approach. The ICCAT Convention specifies MSY benchmarks as targets and these are calculated wherever possible. Catch limits (but not precautionary reference points) have been established for several stocks.

IATTC manages fisheries utilizing the precautionary principle and is the process of incorporating a more formal procedure of scientific advice that utilizes the precautionary approach.

CCAMLR’s approach to conservation is defined by Article II of the CCAMLR Convention. According to the CCAMLR Secretariat, the precautionary approach has been fully implemented through Article II of the CCAMLR Convention. From the principles outlined in this Article, two central concepts have evolved, namely:

1) Management strives to follow a precautionary approach. CCAMLR collects the data it can, then weighs up the extent and effect of the uncertainties and gaps in such data before making a management decision; and
2) The approach aims to minimise the risk of long-term adverse effects rather than delaying decisions until all necessary data are available.

Precautionary reference points are contained in Article II(3) of the CCAMLR Convention and have been established for many stocks in respect of estimates of yield and catch levels. Reference points in the form of decision rules have been applied mostly in respect of the krill and toothfish fisheries.

The precautionary approach has been mentioned in management discussions in the IOTC, but has not been invoked in a formal sense. Procedures for establishing precautionary reference points have not been drawn up by the IOTC and no such reference points have been established for specific stocks. An example of the application of the precautionary approach

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\[35\] Ibid., p. 23-24.
by the IOTC is contained in Resolution 99/01 on the management of fishing capacity and on the reduction of the catch of juvenile bigeye tuna by vessels, including flag of convenience vessels, fishing for tropical tunas in the IOTC area of competence.\textsuperscript{36}

Conclusions

Article 6 of and Annex II to the Fish Stocks Agreement set out in considerable detail how the precautionary approach has to be implemented and applied in fisheries management. Nonetheless, the implementation and application of the precautionary approach and precautionary reference points leaves a great deal to be determined by the relevant RFMOs. A review of practice in this respect points out that the FAO and RFMOs have been addressing this issue since the 1990s. Work on this issue by the FAO and ICES can assist or is actually assisting RFMOs in the implementation of these provisions and contributes to the consistency of the approaches taken by different organizations. Most of the active RFMOs under consideration in this report have considered the implications of the precautionary approach although not all have attempted to draw up formal procedures to utilize the precautionary approach and less still have integrated it formally into decision-making mechanisms. It should also be pointed out that for those RFMOs which have attempted to implement or have in fact implemented precautionary approaches, this has not necessarily been done for all stocks and is not generally a full implementation of the approach as laid out in the Fish Stocks Agreement. In short, it may be said that in general no RFMO fully implements the requirements in Article 6 and Annex II to their full extent and there is a considerable degree of difference in the degree of implementation amongst RFMOs. Factors that may explain the differences between RFMOs in this respect include: the status of the stocks concerned; the resources available to the RFMO to deal with this issue; and how the States participating in the RFMO view the precautionary approach (e.g. is incorporation of the precautionary approach in management actively pursued or not).

2.4. Compatibility of Conservation and Management Measures

The Technical Specifications do not include a question in respect of Article 7 of the Fish Stocks Agreement. It is nevertheless considered appropriate to include discussion of this provision in the present report in view of its importance for international fisheries law and the overall scheme of the Agreement. The following questions have been addressed in looking at the RFMOs that are the subject of this report:

1. Does the constitutive instrument of the RFMOs contain a provision on the relationship between conservation and management measures established for the high sea and those for areas under national jurisdiction?
2. Have the RFMOs addressed the implications of Article 7 of the Fish Stocks Agreement for their activities. If yes, what is the result of this?
3. Have the RFMOs dealt with the relationship between measures adopted for the high seas and those applicable to areas under national jurisdiction?

Article 7 of the Fish Stocks Agreement is one of its central provisions, as it addresses the relationship between the rights of the coastal State in its area under national jurisdiction and

\textsuperscript{36} The Resolution provides in this respect: ‘Noting that the Scientific Committee has considered that, on the basis of certain indicators, if the catches continue at high levels, the stock of bigeye tuna is likely to become overexploited and, taking account of the precautionary approach, there is a need for immediate management action […]’.
the rights of States fishing on the high seas in respect of straddling and highly migratory fish stocks.\textsuperscript{37} Even during the negotiations of the LOS Convention coastal States and States fishing on the high seas disagreed about the relationship between these rights.\textsuperscript{38}

Coastal States have attempted to extend their control over areas adjacent to their EEZ by referring to the provisions on high seas fishing of the LOS Convention. Coastal States have made reference to the fact that Article 116 of the Convention provides that the right to fish on the high seas is subject to the rights and duties as well as the interests of coastal States provided for, \textit{inter alia}, in the Articles 63(2) and 64 of the Convention concerning straddling and highly migratory fish stocks. On the other hand, States fishing on the high seas have rejected the notion that under the LOS Convention coastal States have been accorded special rights in respect of these stocks beyond their EEZ, apart from the duty of States fishing on the high seas to cooperate with the coastal State. Article 7 of the Fish Stocks Agreement does not make a choice between these different interpretations of the rights of coastal States and States fishing on the high seas, but reaffirms the relevant provisions of the LOS Convention.\textsuperscript{39}

Instead of seeking to clarify the implications of these provisions, Article 7 attempts to enhance the mechanisms for achieving a consistent management regime for the stocks concerned throughout their range.

Article 7(2) of the Fish Stocks Agreement requires that conservation and management measures for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure the conservation and management of straddling and highly migratory fish stocks in their entirety. Article 7(2) indicates the considerations that States have to take into account in the determination of compatible conservation and management measures. In this respect, States shall:

- (a) take into account the conservation and management measures adopted and applied in accordance with Article 61 of the Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures;
- (b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;
- (c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;
- (d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;


\textsuperscript{38} During the last phase of the third United Nations Conference on the Law of the Sea coastal States introduced a number of proposals that would have assured a certain precedence of measures adopted by the coastal State to regulate straddling stocks in its EEZ over measures adopted for the same stocks on the high seas. These proposals were not included in Article 63 of the LOS Convention (see further S.N. Nandan and S. Rosenne (eds), \textit{United Nations Convention on the Law of the Sea 1982; A Commentary}, Vol. II (Martinus Nijhoff Publishers, 1993), pp. 644-646).

\textsuperscript{39} See Fish Stocks Agreement, Article 7(1) In particular, Article 7(1) of the Fish Stocks Agreement, which reaffirms the regime for straddling and highly migratory fish stocks contained in Articles 63(2) and 64 of the LOS Convention, and the general safeguarding clause contained in Article 4 of the Agreement.
(e) take into account the respective dependence of the coastal States and the States fishing on
the high seas on the stocks concerned; and
(f) ensure that such measures do not result in harmful impact on the living marine resources
as a whole.’

Article 7(2) does not accord ipso facto precedence to either measures applicable to areas
under national jurisdiction or the high seas in determining compatible measures. The
balancing of these measures always depends on the circumstances of the specific case,
including the contents of the measures concerned.\textsuperscript{40}

Compatible conservation and management measures will be established in the framework of
mechanisms for cooperation established by the States concerned. The form such a mechanism
takes, \textit{e.g.} its membership, area of application or mandate, may influence the contents of
compatible conservation and management measures.

The obligations contained in Article 7 of the Fish Stocks Agreement are addressed to States
parties to the Agreement. This implies that such States have to take these obligations into
account when they participate in an RFMO, even if the constitutive instrument of the RFMO
does not spell out these obligations.

\textit{Practice of RFMOs}

The constitutive instrument of a number of the RFMOs under consideration contains a
 provision on the compatibility of conservation and management measures adopted for the
high seas and those adopted for areas under national jurisdiction. This concerns the
CCAMLR Convention (Article XI), the draft Agreement to reconstitute CECAF (preamble),
the Galapagos Agreement (Article 5(1)(e)), the IOTC Agreement (Article V(2)(c)), the
NAFO Convention (Article XI(3)), the NEAFC Convention (Article 5), the SEAFO
Agreement (Article 19), the draft SWIOFC Agreement (Article 9) and the Honolulu
Convention (Article 8). In general, these provisions envisage the same approach and result as
Article 7 of the Fish Stocks Agreement. They do not establish a precedence for measures
adopted for the high seas or measures adopted for areas under national jurisdiction, but
require compatibility or consistency between the two types of measures, or reference is only
made to the overarching goal of promoting the objective of the optimum utilization of the
stocks concerned throughout the region. The Galapagos Agreement is the one exception to
this approach as it establishes a preference for the conservation and management measures
established for areas under national jurisdiction.\textsuperscript{41}

The IOTC Secretariat has indicated that the IOTC has not addressed the implications of
Article 7 of the Fish Stocks Agreement for its work in a formal sense. It further notes that no
Party has attempted to make a distinction between the high seas and the EEZ in the
management of tuna stocks.\textsuperscript{42}

The CCSBT Secretariat has indicated that the compatibility provision has not played a major
role in the CCSBT. The main management tools, the TAC and national quotas, are applied
irrespective of geographic location. One question that may be relevant to compatibility are

\textsuperscript{40} See further Oude Elferink, note 37, pp. 560-580.

\textsuperscript{41} Article 5(1)(e) of the Galapagos Agreement provides:
‘The measures adopted [for the high seas] shall not be less strict than those established for the same species in
the zones under national jurisdiction adjacent to the Agreement’s area of application, shall not undermine the
effectiveness of the same, and shall be fully compatible with them in all cases’ (see also \textit{ibid.} Articles 5(2) and
12(1)).

\textsuperscript{42} Response to the questionnaire send to the secretariats of the RFMOs under consideration in this report.
the different methods of fishing applied by Australia (purse seining) and the other members of the CCSBT (long lining)\textsuperscript{43}.

A statement on the relationship between the measures applicable to certain areas under national jurisdiction within the area of the CCAMLR Convention and this latter area was made in 1980 by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources\textsuperscript{44}. The Statement indicates that when specific conservation measures are considered within the framework of the Commission and with the participation of the coastal State concerned, that State would be bound by any conservation measures adopted by consensus with its participation for the duration of those measures. This would not prevent that State from promulgating national measures that were more strict than the Commission’s measures or which dealt with other matters. In the absence of consensus, the coastal State can promulgate any national measures which it may deem appropriate.

ICCAT has not dealt specifically with the issue of the relationship between measures adopted for the high seas and those applicable to areas under national jurisdiction\textsuperscript{45}. However, ICCAT regulatory recommendations are to be adopted and implemented domestically by contracting parties for fishing inside and without the EEZ. This should in general lead to the existence of compatibility of the measures existing in both areas.

The issue of compatibility of conservation and management measures has been discussed in the framework of NAFO in connection with certain measures adopted by Canada in respect of cod in its 200 nautical mile zone\textsuperscript{46}. Among others the EU expressed concern over the fact that the stock had become subject to conflicting conservation and management measures, although there were no indications of different stock components for the inshore and offshore. This situation was contrary to the consistency requirement of the NAFO Convention, the precautionary approach and fell short of the compatibility requirement of the Fish Stocks Agreement. In respect of the issue of shared stock, Canada has suggested that the preponderance of interest resided with Canada as the coastal State, noting that the allocation for cod in the area concerned was 95\% for Canada and 5\% for other NAFO parties. In setting the TAC for the cod stock Canada had operated in a manner consistent with its rights and obligations and had not put the sustainability of the stock at risk. Canada held that NAFO did not have the authority to approve or reject Canada’s decision but rather to decide whether it choose to set a TAC for this stock in the NAFO Regulatory Area. Canada has made a commitment in 2001 to conduct a thorough review of the cod stock concerned if there was continued evidence of low abundance of Northern cod. A Canadian official has indicated that the latest scientific update suggests this is the case. According to this source, if prospects for stock recovery remain low following the next assessment, drastic management measures will be required to rebuild the stock\textsuperscript{47}.

Conclusions

Article 7 of the Fish Stocks Agreement is one of its central provisions, as it addresses the relationship between the rights of the coastal State in its area under national jurisdiction and the rights of States fishing on the high seas in respect of straddling and highly migratory fish

\textsuperscript{43} Information provided by Mr. B. Macdonald of the CCSBT Secretariat in a telephone interview with Mr. E. Molenaar on 24 October 2002.

\textsuperscript{44} Text available at <http://www.ccamlr.org/pu/e/pubs/bd/pt1.pdf>.

\textsuperscript{45} Response to the questionnaire send to the secretariats of the RFMOs under consideration in this report.

\textsuperscript{46} Information contained in Northwest Atlantic Fisheries Organization (NAFO); Annual Report 1999, pp. 57, 77-81 and 101; and ibid. 2000, pp. 101-102 (<http://www.nafo.ca/annrep.htm>).

stocks. Article 7 also reaffirms the balance of the rights of coastal States and States fishing on the high seas contained in the LOS Convention. Coastal States had attempted to redefine this balance of interest to their favour since the EEZ regime was first negotiated in the 1970s and beginning of the 1980s. Instead of seeking to clarify the implications of the relevant provisions of the LOS Convention, Article 7 attempts to enhance the mechanisms for achieving a consistent management regime for the stocks concerned throughout their range.

The constitutive instrument of a number of RFMOs contains a provision on the compatibility of conservation and management measures adopted for the high seas and those adopted for areas under national jurisdiction. In general these provisions envisage the same approach and result as Article 7 of the Fish Stocks Agreement. The Galapagos Agreement is the one exception to this approach as it establishes a preference for the conservation and management measures established for areas under national jurisdiction.

The examples of the practice of RFMOs suggest that the provisions on compatibility can contribute to reinforcing the position of those states seeking to achieve a consistent management regime of straddling and highly migratory fish stocks. At the same time, it has to be recognised that the general nature of these provisions leaves open diverging views on how they have to be applied to the specific case.

2.5. New Entrants, Allocation of Fishing Opportunities and Deterring Fishing by Non-Members

This section is composed of three subsections that deal separately with new entrants, allocation of fishing opportunities and deterring fishing by non-members. The questions raised by the Technical Specifications in relation to Articles 8, 10, 11, 17 and 33 of the Fish Stocks Agreement are addressed under the most appropriate subsection. At the outset, it should be observed that these three issues are strongly related. Before considering each issue separately, therefore, a few words should be said on their relationship.

An important consideration for States that are not yet members of RFMOs or have cooperative status with them, but are interested in becoming involved in the fisheries for which those RFMOs have competence, is that this brings along an equitable share of the available fishing opportunities. Due to the current over-capacity in marine capture fisheries, fishing opportunities are often already fully utilized or will be so in the near future. Allocations to ‘new entrants’ will thus usually imply reduced allocations for existing members. (New entrants are here treated as flag States that want to commence fishing in an RFMO’s regulatory area or to resume fishing after a period of inactivity). Under the circumstances just sketched, the equitability of allocation practices of RFMOs is of paramount importance. If the allocations offered are perceived as inequitable, new entrants will be tempted to stay outside RFMOs and thereby be more likely to maintain or increase their catch. If this unregulated fishery becomes significant this will not only pose a threat to the status of the stocks but may also lead to frustration by members of RFMOs that have to bear the full burden of conservation measures. This undermines the effectiveness of an RFMO and could conceivably even lead to its collapse. The RFMOs’ measures to deter fishing by non-members (unregulated fishing) are, in general, designed to force non-members to either join the RFMO (or cooperate with it) or to stop fishing.
2.5.1. New Entrants

In relation to Article 8 of the Fish Stocks Agreement, the Technical Specifications start out with the observation that ‘Paragraph (3) [of Article 8] states that RFMOs must be open to all, but at first glance the new tuna organization in the Pacific (MHLC) would not appear to fulfil this requirement.’ Subsequently, the following Questions are raised:

1. ‘Are other RFOs generally open to all interested parties?’
2. ‘If not, could they be open to a legal challenge?’

The observation made above is presumably related to the following sentence in Article 8(3): ‘States having a real interest in the fisheries concerned may become members’ of RFMOs. Consequently, membership of RFMOs is not intended to be open to all, but is limited to States with a ‘real interest’. As the concept of real interest does not appear in the LOS Convention and is not defined in the Fish Stocks Agreement, its exact meaning and purpose remain unclear.

From the structure of Article 8(3) it can be deduced that ‘States fishing for the stocks on the high seas and relevant coastal States’, have at any rate a real interest. ‘Relevant coastal States’ would be those States whose maritime zones are included in, or are adjacent to, the RFMO’s regulatory area. ‘States fishing’ would presumably include flag States that are actually engaged in fishing for the stock concerned at the time of their application for membership. It is nevertheless unclear if new entrants are seen as having a real interest. Flag States that do not want to engage in fishing as such, but that want to join RFMOs to ensure sustainable management and to safeguard biodiversity, may not be regarded as having a real interest either. The concept of real interest may have been included to avoid membership of this last category of States, in order to avoid a situation as currently exists under the IWC Convention, where States opposed to harvesting outnumber those in support thereof. While this last category of States is very different from new entrants, there seem to be no well-founded arguments in support of interpreting or applying the concept of real interest that justify barring their membership of RFMOs as such.

These conclusions suggest that the difficult issue of new entrants will most likely be dealt with through the allocation of fishing opportunities. An alternative that has been suggested is to interpret the concept of real interest in such a way that it requires flag States to exercise effective jurisdiction and control over ships flying their flag. This could be included in the non-discriminatory terms of participation in RFMOs or as a qualifying criterion for allocation.

Question 1

An answer to Question 1 requires an analysis of the conditions for membership of the selected RFMOs. The words ‘all interested parties’ in Question 1 are interpreted as referring to States that wish to become members of the selected RFMOs. Separate attention is given to

48 For a more extensive analysis see E.J. Molenaar, “The Concept of “Real Interest” and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms”, 15 International Journal of Marine and Coastal Law 475-531 (2000). Note that Art. 9(2) of the Fish Stocks Agreement also refers to the concept of real interest; here in the negotiation phase of RFMOs. See in that context also para. 83 of the IPOA on IUU Fishing.
50 See Molenaar, note 48, at pp. 496-498.
51 Molenaar, note 48, at p. 531.
the issue of participation by the EC as a regional economic integration organization (REIO), but not to the other entities and fishing entities referred to in Article 1 of the Fish Stocks Agreement.

The analysis starts with FAO fisheries bodies. First those established under Article VI of the FAO Constitution (CECAF; WECAFC) and subsequently those under Article XIV (GFCM; IOTC; SWIOFC).

**FAO Bodies**

**CECAF**
Membership to CECAF is currently limited to those FAO (Associate) Members which are (1) relevant coastal States, or (2) which fish or (3) which carry out research in the ‘area’ or (4) which have ‘some other interest in the fisheries thereof, whose contribution to the work of the [CECAF] the Director-General deems to be essential or desirable’. Compared to WECAFC (see below), membership is more restricted and the FAO Director-General has competence to decide on invitations or applications for membership. Non-FAO (Associate) Members are only entitled to participate in CECAF as observers. In the process of review of CECAF, where an upgrading to an Article XIV was under consideration, the issue of membership was to be dealt with in a similar fashion to the IOTC Agreement (see below).

**WECAFC**
Membership of WECAFC is open to all FAO (Associate) Members and notifying the FAO Director-General is all that is required. The FAO Director-General does not seem to have a ground to refuse an application. Non-FAO (Associate) Members are only entitled to participate in WECAFC as observers.

**GFCM**
Under the text of the 1949 GFCM Agreement, the issue of membership of the GFCM is largely similar to that under the IOTC Agreement (see below). The 1997 GFCM Agreement, which is not yet in force, strengthens this similarity even further, *inter alia*, by providing for membership of REIOs.

**IOTC**
Membership of the IOTC is open to those FAO (Associate) Members that are (1) relevant coastal States, or (2) ‘whose vessels engage in fishing in the Area for stocks covered by [the IOTC Agreement]’, or (3) REIOs. Non-FAO (Associate) Members which are ‘Members of the United Nations, or of any of its Specialized Agencies or the International Atomic Energy Agency’, may join the IOTC if they meet any of the first two conditions just set out, and if this is supported by a two-thirds majority vote by the IOTC members. Although these criteria would in principle allow practically all States to apply for membership, whether they are successful, depends on the IOTC membership.

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52 Para. (2) of the CECAF Statutes.
53 Para. (6)(ii) of the CECAF Statutes.
55 Para. (3) of the WECAFC Statutes.
56 Para. (4) of the WECAFC Statutes.
57 See Arts I(2) and XI(2) of the 1949 GFCM Agreement.
58 See Arts I(2) and XIII(3) of the 1997 GFCM Agreement.
59 Art. IV(1) of the IOTC Agreement.
60 Art. IV(2) of the IOTC Agreement.
SWIOFC
Under the current version of the SWIOFC Agreement (Draft of September 2001), the issue of membership to SWIOFC follows the same model as the IOTC Agreement (see above)\(^61\). Article 5 of the Draft SWIOFC Agreement, provides for membership by REIOs on the same terms as the other Article XIV FAO fisheries bodies.

As the EC is an FAO Member, it can in principle become a member of all FAO fisheries bodies and in fact does so in all the selected bodies above.

Non-FAO Bodies

CCAMLR
Membership of CCAMLR (the Commission) must be distinguished from becoming party to the CCAMLR Convention. States can accede to the CCAMLR Convention (so-called Acceding States) when ‘interested in research or harvesting activities in relation to the marine living resources to which this Convention applies’\(^62\). If they also want to become a member of CCAMLR, they can do so ‘during such time as that acceding party is engaged in research or harvesting activities in relation to the marine living resources to which this Convention applies’\(^63\). Arrangements have also been made for REIOs\(^64\). However, any member of CCAMLR may ask that a special CCAMLR meeting be convened to consider an application for membership to CCAMLR. Under special circumstances an application for membership may therefore be (temporarily or conditionally) refused, for instance if doubts exist on the applicant’s ‘willingness to accept conservation measures in force’\(^65\).

CCSBT
Any State ‘whose vessels engage in fishing for southern bluefin tuna’ or any relevant coastal State may accede to the CCSBT Convention and thereby become a party to the CCSBT\(^66\).

Galapagos Agreement
After the Galapagos Agreement has entered into force by means of the deposit of instruments by the four coastal States involved in the negotiation process, ‘other interested States’ may sign, ratify and accede to the Agreement\(^67\). Article 1(3) defines ‘other interested States’ as ‘the States involved in distant-water fishing which have an established interest in specific fishery resources in this subregion, including qualified intergovernmental organizations.’ Article 1(4) defines ‘established interest’ as ‘the interest demonstrated by a State whose nationals habitually fish for one or more fish populations within this Agreement’s area of application and whose participation may fall within the scope of this interest’. These cumulative conditions and their terminology raise a number of questions of interpretation, perhaps partly because of the inaccurate English translation. Irrespective or these ambiguities, however, these provisions seem intended to restrict participation in the Galapagos Agreement, perhaps even more so than envisaged by the concept of real interest. Concrete applications for membership will probably be decided upon by the Commission or the assembly of the (coastal) States parties\(^68\). It must also be pointed out that non-coastal States, including the EC, may not even wish to accede as the Galapagos Agreement was negotiated

\(^{61}\) See Art. 5 of the SWIOFC Agreement (Draft of September 2001).
\(^{62}\) See Art. XXIX of the CCAMLR Convention.
\(^{63}\) See Art. VII(2) of the CCAMLR Convention.
\(^{64}\) See Arts VII(2)(c) and XXIX(2) of the CCAMLR Convention.
\(^{65}\) Art. VII(d) of the CCAMLR Convention.
\(^{66}\) Arts 6(1) and 18 of the CCSBT Convention.
\(^{67}\) Arts 16(2) and 19(1) of the Galapagos Agreement.
\(^{68}\) See Art. 11(1)(a) and (2) of the Galapagos Agreement.
exclusively by coastal States, and its provisions are criticized for their lack of balance between coastal and flag State interests  

IATTC  
Membership of IATTC is open to ‘any government, whose nationals participate in the fisheries covered by this Convention’  

In its present form, the Convention is thus not open to REIOs. Furthermore, all the members of IATTC must agree with an application for membership before that government can deposit an instrument of adherence and become a ‘High Contracting Party’. The 1999 Protocol to the IATTC Convention allows REIOs to become a party after the ratification, acceptance, approval or accession by all other parties, although the Protocol has yet to be formally accepted by existing IATTC members (so far only France and Guatemala have ratified the Protocol). Similarly, the new IATTC Convention – which is currently in the drafting stage – is considerably more open to new entrants, with vessels already fishing in the region being eligible to join the Commission  

ICCAT  
Membership of ICCAT is open to REIOs and States Members of the UN or of any of its specialized agencies  

NAFO  
A distinction has to be made between adherence to the NAFO Convention and membership of its Fisheries Commission. Any State can accede to the NAFO Convention and thereby become a member of the General Council (GC). Membership in the Fisheries Commission, the main management body under the NAFO Convention, is reserved to contracting parties already engaged in the fisheries or those that provide satisfactory evidence that they expect to do so during the year of that annual GC meeting or during the following calendar year. The GC determines and reviews the issue of membership of the Fisheries Commission and takes decisions by simple majority. In general, the GC is the administrative organ of NAFO and its role and functions do not directly concern the conservation and management of the fisheries, although it does address the issue of non-member fishing  

NEAFC  
Membership of NEAFC is open to any State that wishes to accede to the NEAFC Convention. Whereas no substantive requirement, such as being engaged in fishing, has to be met, an application for accession is subject to the approval of three-fourths of all members. At the Meeting of the Working Group on the Future of NEAFC, in May 2003, it was agreed to develop a general approach, with clear guidelines, towards the question of new members and allocation. It was agreed to approach the problems vis-à-vis new entrants through three categories: cooperation quotas; unregulated species; and regulated species.
SEAFO

All contracting parties to the SEAFO Convention become members of the SEAFO Commission. All the States and the EC that were involved in the negotiation of the Convention can ratify, accept or approve it and thereby become contracting parties. Moreover, other relevant coastal States, REIOs and all other States whose vessels fish in the Convention Area for fishery resources covered by the SEAFO Convention can accede to the Convention and thereby become member of the Commission.

WCPFC

Membership of the WCPFC is open to the full participants in the negotiation process of the Convention. Once these participants deposit their instruments of ratification, approval, acceptance or accession, and the Convention has entered into force, they become contracting parties and thereby members of the WCPFC. States (or REIOs) not listed among the full participants in Article 34(1) whose nationals and fishing vessels wish to conduct fishing for highly migratory fish stocks in the Convention Area may, after the Convention’s entry into force, be invited, by consensus, by the contracting parties to accede to the Convention. This approach emphasizes that the initiative lies with the existing members and not with the new applicant. Strictly interpreted, new applicants do not even have a right to apply, but can only hope to be invited. The arrangement for participation in the Preparatory Conference is in this respect somewhat different. States and REIOs that have acceded to the Convention will presumably also become members of the WCPFC.

EC

As the EC is a member of CCAMLR, ICCAT, NAFO and NEAFC, their constitutive instruments obviously provide for membership of the EC. However, neither the CCSBT Convention nor the IATTC Convention provide for membership of REIOs. Once it enters into force, the 1999 Protocol to the IATTC Convention would allow the EC to become a party. The proposed new IATTC Convention, which is currently in the drafting stage, would also allow the EC to sign and become a party once it enters into force.

The SEAFO Convention, the Honolulu Agreement and the Galapagos Agreement all provide for the possibility of membership of REIOs. The EC was a full participant in the negotiation process of the SEAFO Convention, and as such was entitled to sign and ratify – two possibilities which it has in fact exercised. In the negotiation of the Honolulu Convention,

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79 Art. 6(1) of the SEAFO Convention.
80 Art. 25(1) of the SEAFO Convention.
81 Arts 1(c) and 26(1) of the SEAFO Convention.
82 Arts 34 and 35(1) of the Honolulu Convention.
83 Art. 35(2) of the Honolulu Convention.
84 See the Decision of the Preparatory Conference relating to participation in the work of the Conference (Doc. WCPFC/PrepCon/12, of 25 February 2002).
85 Strangely enough, the fact that contracting parties shall be members of the WCPFC is laid down in para. (4) to Art. 34 (which deals with signature, ratification, acceptance and approval) and not in Art. 9 (which deals in general with the WCPFC).
86 Although the 1999 Protocol to the IATTC Convention would allow the EC to become a party, it has not yet attracted the sufficient number of ratifications to enter into force. The EC Council has adopted a decision allowing Spain to accede to the IATTC Convention pending EC Membership (Council Decision 1999/405/EC of 10 June 1999; OJ 1999, L 155/37). While Spain has since then applied for membership, at the time of writing not all of the current IATTC members had yet given their approval, as required by Art. V(3) of the IATTC Convention (information provided by B. Hallman, IATTC, November 2002).
87 Information provided by B. Hallman, IATTC, December 2002.
88 See Art. 35(2) of the Honolulu convention and Art. 25 of the SEAFO Convention. Pursuant to Arts 1(3), 1(6) and 19(2) of the Galapagos Agreement, the EC would probably be entitled as a ‘qualified intergovernmental organization’ to ratify or accede to the Agreement.
however, the EC only managed to become an observer and in the negotiation of the Galapagos Agreement the EC was not invited at all. This means that the EC will face the same difficulties as other States that were not involved in the negotiation processes (see above).

Conclusions

Even though the question whether the selected RFMOs are ‘generally open’ to new applicants leaves a considerable margin of appreciation, the analysis of conditions for membership suggests it is best answered affirmatively. Many conditions for membership will not be perceived as restrictive by new applicants. Very relevant in this context is also the fact that a growing number of RFMOs embrace the concept of cooperating non-members. Cooperating non-members can participate in meetings of RFMOs, often receive allocations of fishing opportunities and are exempt from the specific measures against unregulated fishing. CCSBT, IATTC, ICCAT, IOTC and NEAFC already use this concept and the SEAFO Commission may do so once it becomes operational. However, if account is also taken of the limited prospects of fishing opportunities for new applicants, the selected RFMOs have a much more restrictive/closed character.

As the analysis has shown, there are different types of conditions for membership. Conditions may relate to membership of other international organizations or to the nature of participation. In addition, in most cases applications for membership are subject to approval by a majority or consensus of existing members.

Stipulating membership of other international organizations as a condition for membership of RFMOs is typical for FAO bodies and is also used by ICCAT. In view of the wide participation in the FAO, the UN, its specialized agencies or the IAEA, this will hardly, if ever, cause problems. As regards the nature of participation, membership is commonly limited to relevant coastal States or flag States. Whereas CCAMLR and CECAF explicitly provide for membership based on scientific interests, applications on that basis might also be approved by ICCAT, NEAFC and WECAFC as they do not impose substantive conditions in this sense.

Flag State participation is often referred to by phrases such as: ‘States whose vessels fish for the species under regulation in the regulatory area’. This condition is presumably met as soon as a flag State’s vessel(s) has done so. However, as such fishing activity is in fact unregulated fishing, it may be treated as undermining the effectiveness of conservation and management by the RFMO and thereby trigger specific measures against unregulated fishing (although it should be pointed out that some RFMOs have not yet adopted such measures). Other

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89 For an analysis see Molenaar, note 48, at p. 509-514. See also note 84, which implies a somewhat more favourable status during the Preparatory Conference but no guarantees for accession. The EC seems to have been approved as a participant to the Preparatory Conference.
81 See inter alia the Report of the 9th CCSBT Meeting (2002), para. 19 which refers to a pending resolution on cooperating non-membership; ICCAT Resolutions 94-6 and 01-17 (a Cooperating Non-Contracting Party, Entity or Fishing Entity is in principle entitled to an allocation; see para. 1 of the ICCAT Allocation Criteria); IOTC Resolutions 98/05 and 01/03; Report of the 20th Annual Meeting of NEAFC (2001), Section 12; and Art. 20(2)(c) of the SEAFO Convention. IATTC has allowed non-members to participate in developing their fleet capacity scheme and thereby also to obtain a capacity allocation. However, the IATTC Fleet Capacity Resolution of June 2002 essentially excludes fishing opportunities for (further) new entrants (para. 13 does not apply to new entrants; para. 10.1 contains a footnote which recognizes that France (as a coastal State) has expressed an interest to develop its tuna fishery).
82 See note 158 and accompanying text.
approaches exist as well. The Honolulu Convention, for instance, uses the words ‘wish to conduct fishing’, which means that prior unregulated fishing is not required for membership. A similar result is achieved by the NAFO Convention, which links membership to its Fisheries Commission to the need for evidence of intended fishing. Applications for membership to CCAMLR may in reality be dealt with in a similar manner. Finally, due to the many ambiguities in relevant definitions in the Galapagos Agreement, flag States that apply for membership are quite uncertain about their chances of success.

It should here again be emphasized how much the issue of membership is linked to the issue of allocation. Applications for membership to the NAFO Fisheries Commission, for instance, will not succeed if the prospective member has no allocation. Very typical are the examples of Korea (ROK) and Taiwan, which negotiated extensively with the existing members of the CCSBT to ensure they obtained quotas before acceding. The situation is different for RFMOs such as CCAMLR that do not allocate by means of national quotas or such as IOTC that do not allocate at all.

The fact that an application for membership sometimes requires the approval of the existing membership could be seen as a considerable concern for the ‘openness’ of RFMOs. As the analysis above shows, this approach is not exclusively reserved for non-FAO bodies. Pursuant to Article XIV(3)(b) of the FAO Constitution, non-FAO Members that wish to join an Article XIV FAO (fisheries) body need a two-third majority vote by the membership. The purpose of this requirement was apparently to avoid a situation where non-FAO Members gained many of the financial benefits of FAO membership without actually having to join FAO. As most States are now FAO Members, such a vote will not often be required. Potentially more problematic, however, are the non-FAO bodies that use a system of approval, namely IATTC, NEAFC, WCPFC and, to a lesser extent, NAFO. As the EC has experienced with IATTC, approval may be very slow. The underlying reasons why States withhold their approval may not always be clear. This may be less problematic in situations such as within NAFO, where admission to the Fisheries Commission is decided by voting during General Council meetings. Mention should finally be made of the fact that even though the constitutive instrument of an RFMO may not explicitly contain an approval procedure for new applicants, in exceptional circumstances this may still occur. The efforts of Iceland to rejoin the IWC Convention in 2001 and 2002 with a reservation to the moratorium on whaling illustrate this.

As the use of a system of approval does not a priori exclude new applicants from membership, it is not incompatible with Article 8(3) of the Fish Stocks Agreement. In view of the absence of a definition of the concept of real interest in the Agreement, approval can be

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93 See also notes 62 and 191 and accompanying texts. Note also Art. 8(4)(d) of the CCSBT Convention, which refers to the interests of parties “which have southern bluefin tuna fisheries under development”. See in this respect Attachment 6 to the Report of the 9th CCSBT Meeting (2002), in which South Africa justifies its claim to a quota.
95 Obtaining the status of full participant in the negotiation phase of a new RFMO is also of crucial significance as this commonly automatically gives a right to become a contracting party. See note 89 and accompanying text.
97 See also the situation in CCAMLR, at note 65.
98 Edeson, note 96, at p. 11, n. 12 observes that in the negotiations on the SWIOFC Agreement, the FAO was asked to study the compatibility of Art. XIV of the FAO Constitution with the provisions of the Fish Stocks Agreement, in particular those on membership.
regarded as just one method of ascertaining the presence of real interest. A substantial violation of Article 8(3) can only arise in relation to a concrete case of an application for membership (or a request to be invited for membership) in the light of the undefined concept of real interest\(^99\). It is submitted that not only a negative decision on an application (or on a request for an invitation) may give rise to such a violation. A refusal to take such a decision within a reasonable period of time, or the failure to effectively provide for membership or a similar status within a reasonable period of time may also qualify as violations.

**Question 2**

Question 2 is interpreted as asking whether individual States could institute dispute settlement procedures on the basis of a concrete case of an application for membership (or a request to be invited for membership) of an RFMO, where the application has been rejected, no decision has been taken within a reasonable period of time or where membership or a similar status has not been effectively provided within a reasonable period of time. As Article 8(3) of the Fish Stocks Agreement allows States with a real interest to become a member of RFMOs, the rejection of an application for membership is clearly an issue of interpretation or application of the Agreement\(^100\) that could lead to the institution of a dispute.

RFMOs do not have standing under Part XV of the LOS Convention or Part VIII of the Fish Stocks Agreement\(^101\). The same applies to the dispute settlement procedures within the constitutive instruments of RFMOs, which would not be available to non-members anyway. However, the State whose application for membership is rejected could in principle institute proceedings against one or more or all of the States members of the RFMO, provided the Agreement would be applicable in their mutual relationships. Where only the LOS Convention would be applicable, the dispute could be primarily based on a failure to cooperate on the management of transboundary stocks and/or a failure to pay due regard to the freedom of fishing on the high seas\(^102\). In view of the definition of ‘States Parties’ under the LOS Convention and the Fish Stocks Agreement, international organizations like the EC and certain non-State entities would in principle be able to institute such dispute settlement procedures as well\(^103\).

### 2.5.2. Allocation of Fishing Opportunities

In relation to Article 10, the Technical Specifications observe that ‘Paragraph (i) [of Article 10] states that members must agree on access for new members’. Subsequently, the following Question is raised:

1. ‘What problems will this pose for RFOs, including ICCAT, which is currently discussing this problem?’

In relation to Article 11, the Technical Specifications raise the following questions:

2. ‘What are the implications of paragraph (c) [of Article 11], that rights of access should consider the extent to which States contribute to conservation?’
3. ‘How could RFOs use this to encourage compliance?’
4. ‘Could it be used for both existing members as well as potential new members?’

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\(^99\) Edeson, note 96, at p. 12 takes more or less the same view in relation to Article XIV FAO (fisheries) bodies.

\(^100\) Art. 30(1) of the Fish Stocks Agreement.


\(^102\) Based *inter alia* on Arts 87(2), 118 and 119(3) of the LOS Convention.

\(^103\) See Arts 1(2) and 30(1) of the Fish Stocks Agreement. These procedures would not be available to the fishing entities defined in Art. 1(3). See also Art. 20 of Annex VI to the Convention.
In relation to Article 17 of the Fish Stocks Agreement, the Technical Specifications raise the following Question:

5. ‘In particular, what can be done to implement the last sentence of paragraph (3), that access should be commensurate with the commitment to comply with the regulations?’

The provisions cited, Articles 10(i), 11(c) and 17(3) of the Fish Stocks Agreement, all relate to what is arguably the principal function of RFMOs: to ensure by means of allocating fishing opportunities that over-exploitation of the stocks is avoided. The term ‘allocation of fishing opportunities’ is chosen as a general term to cover different methods of allocation. For instance by means of dividing the TAC in national allocations, by providing maximum levels of national fishing effort or simply by means of an ‘Olympic-style’ fishery where the fishing season is closed as soon as the TAC is reached.

Whereas paragraph (c) of Article 10 refers to the allocation of fishing opportunities in general, therefore in relation to both new and existing members, paragraph (i) requires members in RFMOs to ‘agree on means by which the fishing interests of new members of the organization or new members in the arrangement will be accommodated’. In view of the current over-capacity in fishing effort and the deplorable status of most fish stocks, allocating continuously decreasing fishing opportunities between existing members is already difficult enough, let alone having to divide them between an even larger group. An Olympic fishery clearly poses fewer problems in this respect.

Article 11 is concerned with criteria relevant to determining the ‘nature and extent of participatory rights’ for new entrants. Whereas the term ‘nature’ presumably refers to the type of participatory rights, the ‘extent’ is presumably meant to capture their size. The various types of participatory rights would not only encompass the various ways of allocating fishing opportunities described above, but also the situation where no fishing opportunities are allocated at all. However, in this latter situation new entrants would obviously hesitate in joining RFMOs.

The words ‘inter alia’ in the chapeau to Article 11 indicate that the list of allocation criteria is non-exhaustive. Members in RFMOs may therefore agree to add other allocation criteria to this list. Moreover, even though the chapeau uses ‘shall’, thus establishing a legal obligation, this is considerably softened by the qualification ‘take into account’. The considerable margin of discretion in applying individual criteria thus created is further broadened by the fact that Article 11 does not prioritise or add weight to the individual criteria. Finally, neither the LOS Convention nor the Fish Stocks Agreement contain a fundamental norm that is capable of acting as a benchmark for the allocation process as such.

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106 Para. 19 of the ICCAT Criteria for the Allocation of Fishing Possibilities (ICCAT Allocation Criteria; available at <http://www.iccat.es>) reads: ‘The allocation criteria should be applied in a fair and equitable manner with the goal of ensuring opportunities for all qualifying participants’. At the 1st Meeting of the ICCAT Working Group on Allocation Criteria this objective was still formulated as ‘ensuring equitable fishing opportunities for all members’ (Report, para. 6.87; Annex 6 to the 1999 ICCAT Report, available at <http://www.iccat.es>). Para. 83 of the IPOA on IUU Fishing merely observes that RFMOs ‘should address the issue of access to the resource in order to foster cooperation and enhance sustainability in the fishery, in accordance with international law’. The phrase ‘in a timely, realistic and equitable manner’, which still appeared in an early draft (Doc. AUS:IUU/2000/3 (May 2000), para. 71) was omitted.
In this context mention should be made of reflagging, bare-boat chartering and vessel chartering. Reflagging gives owners or operators of fishing vessels the possibility to change the flag (nationality) of their ship and thereby utilize the fishing opportunities that are made available to the new flag State. Bare-boat chartering refers to situations where the change of flag only has a temporary character. Vessel chartering, on the other hand, does not involve a change in flag. This means that fishing opportunities allocated to one State are fished by vessels of another State. For States that do not have their ‘own’ fishing fleet, all these flexible options provide opportunities to share in the marine living resources of the high seas. States with traditionally strong fishing industries and extensive supporting administrations, on the other hand, accuse new entrants that use these flexible options of being exclusively interested in economic revenue and not in the long-term sustainability of these resources.

Before addressing the five questions spelled out above, some information is given on the methods of allocation of fishing opportunities (e.g. national quotas or fishing effort) and allocation criteria used by the selected RFMOs.

**RFMOs Not (Currently) Allocating Fishing Opportunities**

These are: CECAF\(^{107}\), GFCM\(^{108}\), IOTC\(^{109}\) and WECAFC\(^{110}\).

**Non-Operational RFMOs**

As the Galapagos Agreement, SEAFO, SWIOFC and WCPFC are not yet operational, only their constitutive instruments can be taken into account\(^{111}\). Both the Galapagos Agreement and the SWIOFC Agreement (Draft of September 2001) allow their commissions to use various methods for allocating fishing opportunities. Only SWIOFC is explicitly empowered to establish or propose national allocations\(^{112}\). The (draft) agreements do not stipulate specific allocation criteria.

The SEAFO Convention and Honolulu Convention are both to a great extent inspired by the Fish Stocks Agreement. The SEAFO Commission and WCPFC are both obliged to either determine TACs or levels of fishing effort\(^{113}\). Both are also charged with determining the nature and extent of participatory rights of new and existing members\(^{114}\). Furthermore, the incorporated lists of allocation criteria that shall, *inter alia*, be taken into account, are to a large extent inspired by Article 11 of the Fish Stocks Agreement, even though the order is

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\(^{107}\) See the limited terms of reference in para. 3 of the CECAF Statutes. Allocation of fishing opportunities is currently discussed as part of the review of CECAF. See Art. IV(2)(b) of the Draft Agreement in Appendix VII to FAO Doc. CECAF/XV/2000/6.

\(^{108}\) However, Art. III(1)(b)(i) of the 1997 GFCM Agreement would allow the GFCM to do so. The GFCM nevertheless regularly endorses relevant ICCAT Resolutions.

\(^{109}\) Art. V(2) of the IOTC Agreement does not explicitly mention the power to allocate fishing opportunities. The IOTC may nevertheless decide to do so on an *ad hoc* basis. See IOTC Resolutions 99/01, 01/04 and 02/08 by which fishing effort limitations are envisaged, in particular with respect to (juvenile) bigeye tuna. Japan currently no longer accepts consignments of frozen bigeye tuna caught by non-Contracting Party vessels (based on the reply by IOTC to the Questionnaire).

\(^{110}\) See the limited terms of reference in para. 2 of the WECAFC Statutes.

\(^{111}\) Note, however, the Resolution relating to IUU fishing and limits on fishing capacity adopted at PrepCom 3 (Doc. WCPFC/PrepCom/22, of 22 November 2002) which calls for restraint in the expansion of fishing effort and capacity.

\(^{112}\) See Art. 6bis(13) of the SWIOFC Agreement (Draft of September 2001) and Art. 6 of the Galapagos Agreement. Art. 11(a) of the Galapagos Agreement gives the Commission a wide but rather unclear mandate. Not clear, for instance, is whether the measures in Art. 6 can actually be established or proposed by the Commission.

\(^{113}\) See Arts 6(3)(c) and 20(2) of the SEAFO Convention and Art. 10(a) of the Honolulu Convention.

\(^{114}\) See Art. 6(3)(d) of the SEAFO Convention and Art. 10(1)(k) of the Honolulu Convention. See also Art. 10(b) of the Fish Stocks Agreement.
changed, the wording somewhat altered and some criteria added. An important distinction is that Article 20(2)(c) of the SEAFO Convention allows the Commission to set aside fishing opportunities for non-members whereas the WCPFC has no such powers.

The wide mandates or range of options given to all these commissions mean that the eventual allocation processes may diverge considerably.

*RFMOs Allocating Fishing Opportunities*

**CCAMLR**
CCAMLR determines TACs for specific species in specific geographic areas and, instead of establishing national allocations, uses an ‘Olympic fishery’. Members of CCAMLR that wish to engage in a specific fishery in the coming season must notify, prior to the annual CCAMLR meeting, which vessels will be involved. Once catch-reports sent to the CCAMLR Secretariat indicate that the TAC for a certain species in a certain geographical area will soon be reached, the fishery is closed for that area.

**CCSBT**
Allocation by the CCSBT is done by means of a TAC and national quotas unless decided otherwise on the basis of the report and recommendations of the Scientific Committee. In deciding on national allocations, the CCSBT shall consider a non-exhaustive list of criteria. These criteria show little resemblance with those in Article 11 of the Fish Stocks Agreement.

The CCSBT has experienced considerable difficulties in agreeing both on the TAC and national allocations. Whereas Australia, Japan, and New Zealand agreed on a TAC and national allocations between 1989 and 1997, since then only voluntary catch limits have been in existence. The unilateral increase of the Japanese catch by means of experimental fishing led to the Southern Bluefin Tuna cases before ITLOS. Korea, as a full member, and Taiwan, as a member of an “Extended Commission” both joined CCSBT with agreed catch limits. There has been no agreement on a TAC for several years, although a preliminary “global catch limit” was agreed at the 8th Annual Meeting of CCSBT (2001), and continued at the 9th Annual Meeting (2002), but with no agreement on national quotas. CCSBT is developing a Management Procedure, which is looking, *inter alia*, at rules about how scientific data will be used to determine TACs and quotas, although the procedure will not cover legal aspects of allocation.

**IATTC**
IATTC has a wide mandate for recommending joint action by the parties. Measures to avoid over-exploitation include area and seasonal closures, by-catch limits, TACs linked to

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115 See Art. 20 of the SEAFO Convention and Art. 10(3) of the Honolulu Convention.
116 Art. IX(2) of the CCAMLR Convention. Art. IX(2)(i) would nevertheless allow national allocations to be established. However, CCAMLR occasionally determines a fixed number of boats per country for some exploratory fisheries (e.g. Conservation Measures F12/XXI and F14/XXI) and in relation to the developed fishery in statistical subarea 48.4 (information obtained from D. Miller, CCAMLR, 15 November 2002).
117 See *inter alia* CCAMLR Conservation Measures 40/X, 121/XIX and 122/XIX 217/XX.
118 Art. 8(3)(a) of the CCSBT Convention.
119 Art. 8(4) of the CCSBT Convention. At the 1st Annual Meeting of CCSBT (1994-1995), Australia, Japan and New Zealand agreed on a scheme for Future Adjustments to Quota Allocation which would apply in case of a TAC increase. This scheme may no longer be very relevant in view of the accession of Korea (ROC) and Taiwan.
120 The Second Management Procedure Workshop took place in April 2003, but the results are not to be released until later in the year.
121 Art. II(5) of the IATTC Convention.

Various allocation criteria have been mentioned in developing this fleet capacity scheme\textsuperscript{123}. Whereas IATTC has allowed non-members to participate in developing this fleet capacity scheme and thereby also to obtain a capacity allocation, fishing opportunities for (further) new entrants appear limited\textsuperscript{124}. Work on a Plan for Regional Management of Fleet Capacity, which, \textit{inter alia}, includes capacity reduction, is still continuing. The planned reduction schedule will presumably utilize allocation (reduction) criteria as well\textsuperscript{125}.

**ICCAT**

ICCAT has a broad mandate for making recommendations to its parties\textsuperscript{126}. Whereas ICCAT usually limits fishing capacity by means of TACs and national quotas\textsuperscript{127}, it sometimes also uses vessels effort limitations\textsuperscript{128} and, recently, Olympic fisheries\textsuperscript{129}. Since its inception, the main criterion used by ICCAT to allocate fishing opportunities was historical catch. As the number of new entrants increased, however, so did opposition to this allocation method. A review of the allocation process resulted in the adoption of the ICCAT Criteria for the Allocation of Fishing Possibilities (ICCAT Allocation Criteria), in November 2001. The ICCAT Allocation Criteria follow a different approach than Article 11 of the Fish Stocks Agreement and contain a far more extensive list of factors. The actual allocation criteria (Part III) are subdivided in four categories. This is preceded by Part I, which contains two so-called Qualifying Criteria, which have to be met ‘to receive possible quota allocations’. In line with previous ICCAT practice, non-members may also receive allocations. Part IV finally contains a list of Conditions for Applying Allocation Criteria\textsuperscript{130}.

The complexity of the ICCAT Allocation Criteria is striking. The number of criteria is large and all qualifying participants will be able to rely on more than one criterion simultaneously. Several criteria also have a considerable overlap. In negotiating the criteria, delegations probably reasoned that the more criteria that could be invoked, the larger the allocation would eventually be. This logic is, however, not supported by the ICCAT Allocation Criteria themselves, which remain quite unclear as regards the actual application or weighting of the criteria. This notwithstanding, the fact that the ICCAT Allocation Criteria were established in a democratic way must be satisfactory for new entrants and therefore conducive to ICCAT’s functioning. Whether this promise will be fulfilled remains to be seen. The first signs have not been altogether promising. In 2001, no national quotas could be agreed on for the eligible stocks and an Olympic fishery proved to be the only viable solution\textsuperscript{131}. In 2002, substantially

\begin{footnotes}
\item[122] See note 116 and accompanying text and the IATTC Resolution on Bigeye Tuna, of June 1998.
\item[123] See those in the fleet capacity resolutions of June 1998 and October 1998 (para. 1).
\item[124] See note 91.
\item[125] See the Minutes of the 6th Meeting (Revised) of the Permanent Working Group on Fleet Capacity, Section 5 and the Draft Plan, para. 21.
\item[126] Art. VIII(1)(a) of the ICCAT Convention.
\item[127] See e.g. ICCAT Recommendations 98-05, 98-07, 99-02, 00-9 and 01-05.
\item[128] See e.g. ICCAT Recommendation 00-1.
\item[129] For an explanation of ‘Olympic fishery’, see note 116 and accompanying text. See ICCAT Recommendation 01-06. Note also that ICCAT Recommendation 01-02 sets a TAC but does not provide for a procedure to close the fishery. The need to use Olympic fisheries is caused by the difficulty in actually applying the 2001 ICCAT Allocation Criteria.
\item[130] See No. 27, which prohibits quota trading or selling.
\item[131] See note 129.
\end{footnotes}
more, but not complete, progress was made. TACs and national quota allocations were agreed for a number of stocks, based on the Allocation Criteria. This was the case for North and (partially) South Atlantic swordfish, North Atlantic albacore and Eastern Atlantic and Mediterranean bluefin tuna. For one stock, however, southern albacore, a TAC was established but no quota could be agreed, ICCAT recommending instead a “sharing mechanism”. Furthermore, even for those stocks in which national allocations were established, ICCAT has conceded that the application of the new allocation criteria is to be undertaken on a gradual basis in order to permit adaptation by its parties.

NAFO

The NAFO Fisheries Commission has a wide mandate to adopt proposals for joint action. Whereas the most common way of limiting fishing intensity is by way of TACs and national quotas, limits also exist in the form of a maximum number of vessels or fishing days or Olympic fisheries. In general, allocation of catches in the NAFO Regulatory Area shall take account of historical fishing records but with regard to the Grand Banks and Flemish Cap special consideration is given to the dependency of coastal communities and contributions to conservation and compliance. Also, for shrimp in Division 3L of the NAFO Regulatory Area, the main allocation criterion seems to have been zonal attachment.

In 1997 a review of NAFO allocation practices was deemed necessary and led to the institution of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties. Although the Working Group met intersessionally between 1998 and 2000 and again in 2003, progress has been slow, marked by a lack of consensus on key issues and the Working Group has not yet formally concluded its work. At the 2003 meeting, the Working Group, although noting some progress had been made, was not able to make any recommendations to the Fisheries Commission. Its work has nevertheless led to the Resolution to Guide the Expectations of Future New Members with regard to Fishing Opportunities in the NAFO Regulatory Area, adopted by the General Council in September 1999. This Resolution essentially tells new entrants that they should expect minimal allocations when joining NAFO. Also worth observing is that NAFO allows chartering between contracting parties, but does not reserve allocations for non-members.

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132 See, respectively, ICCAT Recommendations 02-02, 02-03, 02-05 and 02-08. See also Recommendation 02-07 on Western bluefin tuna, in which a TAC and quotas were established, but based on management plans in earlier ICCAT Recommendations.

133 ICCAT Recommendation 02-06. Under the sharing mechanism the TAC is shared between a number of parties, without allocation (on an “Olympic” basis), and when 80 per cent of the TAC has been reached the parties are to be notified so that they may enter into multilateral discussions. The parties have resolved to develop allocations based on the agreed criteria.

134 See, e.g., Preamble to ICCAT Recommendation 02-03.

135 Art. XI(2) of the NAFO Convention.

136 E.g. in relation to shrimp in Division 3M of the NAFO Regulatory Area (NAFO Conservation and Enforcement Measures, Part I(G)).

137 This inter alia applies to the ‘Others’ category and the block quotas of Estonia, Latvia, Lithuania and Russia (see the 2003 Quota Table, attached to the Press Release of the 24th Annual Meeting of NAFO (2002)).

138 Art. XI(4) of the NAFO Convention.

139 Canada was allocated 5/6 of the TAC (see NAFO Conservation and Enforcement Measures, Part I(K)).

140 For Terms of Reference see GC Doc. 99/4, Annex 2.

141 It did not meet in 2001, as there was insufficient support for its work, partly in view of the limited fisheries in the NAFO Regulatory Area (NAFO Annual Report 2000, at p. 100) and no requests were made to reconvene the Working Group in 2002.

NEAFC

NEAFC uses a wide range of methods to allocate fishing opportunities, including by means of TACs and national quotas143. NEAFC is dominated by coastal States, inter alia, because the regulatory area composed of the high seas is smaller than the combined adjacent areas under national jurisdiction. Depending on the type of species, establishing TACs and national quotas is either carried out exclusively within NEAFC or partly by the coastal States and partly within NEAFC. The latter is called the two-pillar system. Accordingly, the coastal States in respect of a straddling stock jointly establish a global TAC, consisting of a TAC for their maritime zones and a TAC for the NEAFC Regulatory Area144. The coastal State TAC must then be allocated between the coastal States by means of various allocation criteria145. The allocation of the NEAFC TAC uses a variety of criteria as well146.

NEAFC currently reserves small allocations for cooperating non-members and allows quota trading between parties. To date, however, little has been done to undertake a general review of the allocation process in NEAFC. As noted above, the Meeting of the Working Group on the Future of NEAFC, in May 2003, agreed to develop a general approach towards the question of new members and allocation. It was also agreed to draw from ongoing discussions in NAFO on allocation criteria. The intention is to be able to publish guidelines to be adopted at the 2003 Annual Meeting in November147.

General conclusions

The above analysis shows that while several RFMOs are addressing the question of allocation, and attempting to develop criteria, much work remains to be done. Furthermore, the case of ICCAT illustrates that even when criteria are agreed, their application can cause considerable difficulty. The issue of allocation also has considerable implications for new entrants. For example, the conclusion drawn in Section 2.5.1 that RFMOs are generally open to new entrants should be viewed in light of, for example, the 1999 NAFO Resolution discussed above. Whether NEAFC will follow this approach is difficult to say in light of the fact that unlike NAFO, NEAFC effectively reserves small allocations for non-members. Furthermore, the IATTC Fleet Capacity Resolution of June 2002 essentially excludes fishing opportunities for (further) new entrants, unless they make arrangements to replace vessels that are already on the Vessel Register148. Other RFMOs such as the Commissions to be established under the Honolulu Convention and the Galapagos Agreement might also follow a similar approach. These practices are evidence of an unwillingness to share fishing opportunities with new entrants and should therefore be taken into account when assessing the openness of RFMOs. It is not unlikely that further evidence to substantiate allegations that RFMOs are effectively closed to new entrants could be found when examining the actual allocations offered to them. This examination could not be carried out here.

Question 1

Question 1 has to a certain extent already been addressed above. The allocation process is already extremely difficult due to decreased fishing opportunities and new entrants will only

143 Art. 7 of the NEAFC Convention.
146 See the Report of the 19th Annual Meeting of NEAFC (2000), Annex D. Also based on the replies by NEAFC to the Questionnaire.
148 See note 91. Replacement can be ensured by monetary compensation to the vessel owner directly or through the vessel’s flag State. This essentially creates a kind of ownership of fishing possibilities.
make things more complex. The constitutive instruments of RFMOs often allow members to opt out of decisions, including those on the allocation of fishing opportunities. In addition, new entrants may choose not to join an RFMO if the allocations offered are unacceptable. Both factors may threaten the sustainability of the fisheries and in fact the very future of the RFMO. Even though the use of ‘shall’ in the chapeau of Article 10 implies a legal obligation, it is in fact in the long-term interests of all States to address the allocation issue in a mutually satisfactory manner.

Members in RFMOs may have access to the dispute settlement procedures under the constitutive instrument of that RFMO, under the LOS Convention or the Fish Stocks Agreement if they disagree with the adopted allocation of fishing opportunities or the decision by one or more other members to opt out thereof. Recourse to the dispute settlement procedures of the LOS Convention or the Fish Stocks Agreement may also be available to non-members of RFMOs, for example if they disagree with the allocation offered to them. Their basic argument would be that the offered allocation constitutes a conservation or management measure that has not been adopted consistent with international law. Consequently, the RFMO’s conservation and management measures would not be opposable to it. A somewhat similar argument can be made with respect to the concept of real interest. This does not mean that this exempts them from any form of cooperation with the RFMO. As the analysis of the procedures for the allocation of fishing opportunities of the selected RFMOs shows, however, these procedures are to a large extent governed by political and negotiation factors, and constrained only by very general rules and principles of international law. This is inter alia reflected by the use of non-exhaustive, non-prioritised and non-weighted lists of allocation criteria and the absence of insight in the way that actual allocations are based on these criteria. The outcome of dispute settlement procedures is therefore difficult to predict.

Question 2
It has already been noted that the non-exhaustive character of the list of allocation criteria in Article 11 of the Fish Stocks Agreement, as well as the words ‘take into account’ in its chapeau, give States a considerable margin of appreciation in applying these criteria. This implies that each of the listed criteria, including criterion (c), must play an undefined role in the allocation process. As a general rule each criterion must be given some weight but there may be special circumstances where ‘taking into account’ does not result in according any weight. Worth noting as well is that not all members of RFMOs that have to decide on allocations are parties to the Fish Stocks Agreement and thus not legally bound by Article 11. In light of this observation and the framework-character of the Agreement, it would also not be objectionable to slightly amend the criteria. Moreover, the non-exhaustive character of the list in Article 11 means that criteria can be added. Whereas none of the lists of specific allocation criteria used by the selected RFMOs are identical copies of Article 11, some bear much more similarity than others. As the participation in the Fish Stocks Agreement becomes more universal, however, States cooperating in RFMOs may feel compelled to treat the list of Article 11 as a minimum. Even so, however, it should be emphasized that the

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149 See Art. 1(1)(b) of the Fish Stocks Agreement and para. 6(d) of the IPOA on IUU Fishing.
150 Balton, note 105, at p. 139 argues that barring non-members from RFMOs may amount to a violation of Art. 1(1)(b) of the Fish Stocks Agreement. Molenaar, note 48, at p. 493 takes the view that a violation of Art. 8(3) already triggers non-opposability.
151 A basic obligation to cooperate in relation to transboundary stocks is part of customary international law. See also Art. 17(1) of the Fish Stocks Agreement.
152 The large extent of similarity in relation to ICCAT, the Honolulu Convention and the SEAFO Convention is due to their negotiation after the adoption of the Fish Stocks Agreement. Much less similarity exists in relation to CCSBT, IATTC and NAFO.
nature of an allocation process is one of negotiation. The role of individual allocation criteria in an allocation process is therefore expected to remain obscure.

Questions 3, 4 and 5
Questions 3, 5 and (to a certain extent) 4, essentially refer to the same idea of using an economic tool to reward or punish members and non-members of RFMOs with larger or smaller allocations of fishing opportunities as a consequence of their (lack of) support to the RFMO’s core objectives. It is hard to disagree in principle with the underlying idea of rewarding or punishing (lack of) support with the core objectives of an RFMO. Furthermore, it is clear that this is a potentially effective tool for encouraging compliance, both in relation to members (in particular) and also non-members (subject, in practice, to a certain degree of willingness to cooperate). However, the success of the practical implementation of this idea depends on the fairness, transparency and objectivity of measuring and assessing the contribution to conservation and management by the RFMO, and compliance with its measures. For instance, how much data and how accurate must this data be to qualify for what percentage of the allocation of fishing opportunities? How much marine scientific research is needed and of what quality and in light of a State’s status as developed or developing State? What extent of compliance is necessary and, no less important, how is information on compliance obtained and verified? The selected RFMOs do not seem to have dealt with these issues yet. A cost/benefit analysis is therefore needed to weigh the considerable effort involved in ensuring the practical implementation of this idea against the benefits for the management and conservation of the stocks and, more in general, strengthening flag State responsibilities.

Concerning question 4 specifically, the criteria in Article 11 apply, *stricto sensu*, to new members only. Nevertheless, they are clearly capable of being applied to existing members also. Paragraph (c) of Article 11 refers explicitly to both new and existing members and most of the other paragraphs do so as well. It could in fact be added that existing members of RFMOs are held not to discriminate between new and existing members with respect to the allocation of fishing opportunities. This can be deduced, *inter alia*, from Article 8(3) of the Fish Stocks Agreement which stipulates that the terms of participation in RFMOs shall not be discriminatory. This does of course not mean that the allocation of new and existing members should be equal in size. None of the selected RFMOs that have allocation criteria relating to the contribution to conservation and management or to the record of compliance, distinguish substantively between new and existing members.

The preceding analysis has shown that, in practice, not only have RFMOs begun to address more widely the issue of allocation amongst existing members, but that also they have used the criteria in the Fish Stocks Agreement as, at the very least, points for consideration. Furthermore, in many cases, the issue of allocating quotas to existing members has been directly connected to the issue of quotas for non-members or new members, through such means, for example, as cooperation quotas and the 1999 NAFO Resolution. However, the preceding analysis has also shown that RFMOs have not found it easy to agree on their own criteria for allocating fishing opportunities and also that, once such criteria have been adopted, their application has also presented difficulties.

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153 See also para. 9.6 of the IPOA on IUU Fishing.
154 Art. 8(4)(e) of the CCSBT Convention (at the 8th CCSBT Meeting, both Japan and New Zealand appeared to invoke this criterion (Report, paras 70-81 and Attachments N-1-N-4)); Art. 10(3)(e)-(f) of the Honolulu Convention; Para. 1 of the IATTC Fleet Capacity Resolution of October 1998; ICCAT Allocation Criteria Nos 2, 16-18 and 22; and Arts 20(1)(c) and (3) and 22 of the SEAFO Convention.
Question 5 raises a question in relation to Article 17(3) of the Agreement. Paragraph (3) of Article 17 was in principle drafted specifically to address the situation of fishing entities like Taiwan. As the status of Taiwan as a subject of international law is disputed, it is in general not possible for Taiwan to obtain a status in RFMOs equal to “regular” States, especially not if China also participates in the RFMO. The application of the last part of paragraph (3) (that access should be commensurate with the commitment to comply with the regulations) is essentially a question of allocation again. Indeed, it may be seen as falling within paragraphs (b) and (c) of Article 11, which refer to the respective interests, fishing patterns and fishing practices of new and existing members and their respective contributions to the conservation and management of the stocks, etc. The same principles and considerations, outlined above, therefore apply. It should perhaps be added that in terms of enabling the commitment to apply the regulations, an arrangement may need to be entered into between the RFMO and the fishing entity concerned. The participation of Taiwan in the “Extended Commission” of the CCSBT, mentioned above, is an example of this. It may also be added, that in view of the non-exhaustive nature of the list of allocation criteria in Article 11, there is no objection to using the rationale of Article 17(3) to all countries. Thus, the principle in paragraph (3) is clearly also applicable to “regular” States.

2.5.3. Deterring Fishing by Non-Members

In relation to Article 8 of the Fish Stocks Agreement, the Technical Specifications observe: ‘Paragraph 4 [of Article 8] notes that only countries which agree to conservation measures shall have access to stocks’. Subsequently, the following Question is raised:

1. ‘What are RFOs doing to implement this?’

In relation to Article 17 of the Fish Stocks Agreement, the Technical Specifications raise the following Question:

2. ‘How can RFOs and [the] international community use this in the fight against [IUU] fishing or fishing by flags of convenience?’

In relation to Article 33 of the Fish Stocks Agreement, the Technical Specifications raise the following Question:

3. ‘What could paragraph (2) lead to in practice?’

Article 8 is in many ways a key provision of the Fish Stocks Agreement. Paragraph (3) builds on the straddling and highly migratory stock provisions of the LOS Convention by stipulating that ‘States shall give effect to their duty to cooperate’ by becoming members of RFMOs or “by agreeing to apply the conservation and management measures” of such RFMOs. This is then linked to the right of States with a “real interest” to become members of RFMOs in the same paragraph and to paragraph (4), which reserves fishery access to members of RFMOs or States that agree to apply the RFMO’s conservation and management measures (cooperating non-members). The Fish Stocks Agreement thus gives RFMOs a key role in the management and conservation of straddling and highly migratory fish stocks. Their authority constitutes a further step in the regulation of the freedom of fishing on the high seas.

Article 17 contains a variety of obligations to ensure that non-members of organizations do not undermine the effectiveness of RFMOs. They are directed both to non-members (but parties to the Fish Stocks Agreement) and members. Whereas paragraph (1) essentially
repeats general obligations on cooperation that would also exist under customary international law, paragraph (2) contains the same message as in Article 8(4). Paragraph (3) deals with the special case of Taiwan (see above). Although paragraph (4) is concerned with specific measures against non-members, only the exchange of information on fishing operations by non-members is expressly mentioned. Other specific measures are to be in accordance with the Fish Stocks Agreement and international law. The novelty of paragraph (4) thus lies mainly in the fact that it transforms a discretionary power under general international law into a mandatory treaty obligation. However, in two instances it creates powers that do not exist under general international law.

Firstly, the Fish Stocks Agreement provides for a qualified right to engage in high seas enforcement by States other than the flag State pursuant to Articles 21 and 22. A second exception can be argued to exist in relation to the powers of port States under Article 23. Some States reject this idea by pointing to paragraph (4), which observes: ‘Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law’. These States thus argue that the port States powers in Article 23 already exist under general international law and that Article 23 is only innovative in the sense that it obliges States parties to the Fish Stocks Agreement to exercise port State powers. Other potentially effective measures that could be imposed on the basis of Article 17(4) or 33(2), are trade-related measures.

Questions 1, 2 and 3
Questions 1, 2 and 3 are so closely related that they can hardly be answered separately. Even though Question 2 refers to IUU fishing in general, the context in which it is raised indicates that it is mainly directed at ‘unregulated fishing’. This is defined in paragraph 3.3.1 of the IPOA on IUU Fishing as fishing activities:

‘in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization’.

Even though this definition gives rise to some complex issues of interpretation, unregulated fishing essentially refers to fishing by non-members of RFMOs. As unregulated fishing occurs in disregard of an RFMO’s conservation and management measures, it not only gives competitive advantages but also increases the risk of over-exploitation due to ignored catch or effort limitations and often leads to unsustainable fishing practices with ecosystem effects. The IPOA on IUU Fishing only makes references to ‘flags of convenience’ in the introduction. Even though the basic meaning of the term ‘flags of convenience’ hardly needs explanation, answering Questions 1, 2 and 3 benefits greatly by using the more objective term ‘unregulated fishing’. In this sense, Articles 17 and 33(2) both function as obligations imposed on States, working individually or through RFMOs, to take measures against unregulated fishing. Whereas the basis for such measures against non-parties to the Fish Stocks Agreement must exist in general international law, in relation to parties to the

155 See Section 2.8. High Seas Enforcement.
157 See below and Section 2.10. Relationship with the WTO.
158 See also paras 3.3.2 and 3.4.
Agreement this instrument can also provide a basis. Many of the constitutive instruments of the selected RFMOs incorporate the substance of Article 33(2) of the Agreement.\footnote{E.g. Arts X and XXII of the CCAMLR Convention, Art. 15(4) of the CCSBT Convention, Art. 32 of the Honolulu Convention and Art. 22 of the SEAFO Convention. See also IATTC Resolution on Fishing by Vessels of Non-Parties, of June 2000, and para. 22 of the IPOA on IUU Fishing, which are both couched in voluntary wording.}

Many RFMOs take a two-tier approach in relation to unregulated fishing. The first tier is based on the need for cooperation between all States involved in fishing for the regulated species.\footnote{This is also reflected in paras 83-84 of the IPOA on IUU Fishing.} A good example is the CCAMLR ‘Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties’. Non-members (NCPs) with vessels involved in unregulated fishing are made aware of that fact, are invited to attend commission meetings and are requested to provide information on their fishing activities, to stop fishing or to become a member of the RFMO. Table I below shows, by way of illustration, some of the selected RFMOs that have cooperation policies. Non-members will also be informed that allocations of fishing opportunities are in principle reserved to members. A growing number of RFMOs has also embraced the concept of cooperating non-member, to which allocations can often be made available.\footnote{In this context, several RFMOs are developing, or considering developing, “black lists” of vessels known to have, or suspected to have, been engaged in IUU fishing. It is further interesting to note that at a recent conference on the implementation of the IPOA-IUU, there was support amongst RFMOs for inter-institutional cooperation to build such lists: see T. Taylor, ‘International Conference on Illegal, Unreported and Unregulated Fishing’, 1 International Fisheries Law and Policy Review, forthcoming (2003).}

It must be emphasized here again that in view of the definition of unregulated fishing, what in fact amounts to unregulated fishing depends on the RFMOs conservation and management measures. In the case of IOTC, for instance, which has not yet allocated fishing opportunities in any way, fishing activity only amounts to unregulated fishing if the reporting obligations in force have not been complied with.

The second tier consists of specific measures to combat unregulated fishing by effectively forcing non-cooperating non-members to cooperate with or to join the RFMO, or stop fishing altogether. The IPOA on IUU Fishing observes that measures should be part of a comprehensive and integrated approach ‘including port State measures, coastal State measures, market-related measures and measures to ensure that nationals do not support or engage in IUU fishing’.\footnote{See note 91.} Examples of such specific measures are incorporated in Table I.

\footnote{Para. 9.3.}
Table I: Measures against Non(Cooperating)-Members

<table>
<thead>
<tr>
<th>Measure</th>
<th>Cooperation Policy</th>
<th>Landings or transhipments</th>
<th>Trade documentation</th>
<th>Reflagging or licensing</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCSBT</td>
<td>Action Plan (2000); Art. 15 of the CCSBT Convention</td>
<td></td>
<td>Trade Information Scheme (TIS; 2000); in 2002 calls were made to upgrade this to a CDS.</td>
<td></td>
</tr>
<tr>
<td>IATTC</td>
<td>Res. June 2000 and June 2001</td>
<td></td>
<td>Catch certification and documentation scheme for Bigeye Tuna under consideration</td>
<td></td>
</tr>
<tr>
<td>ICCAT</td>
<td>Res. 94-6, 94-9, 97-11</td>
<td>Rec. 98-11</td>
<td>Bluefin Tuna, Bigeye Tuna and Swordfish Statistical Documents (Res. or Rec. 94-3, 95-13, 98-18, 00-22, 01-21, 01-22 and 01-23, linked with import bans)</td>
<td></td>
</tr>
<tr>
<td>IOTC</td>
<td>NCP Scheme (Res. 98/05, 01/03)</td>
<td>Res. 99/02; 01/03; 02/01</td>
<td>Bigeye Tuna Statistical Document (Res. 01/06)</td>
<td></td>
</tr>
<tr>
<td>NAFO</td>
<td>NCP Scheme</td>
<td>NCP Scheme, paras 9-11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NEAFC</td>
<td>NCP Scheme</td>
<td>NCP Scheme, paras 9-11</td>
<td></td>
<td>Res. in 2001</td>
</tr>
</tbody>
</table>

Under such schemes, members are, first, to prohibit landings or transhipments of unregulated catch within their ports or onto their vessels. Second, in order to disclose and trace unregulated catch, members are to allow imports or re-exports of the regulated species only when accompanied with various types of trade documents. This paper trail can lead to the identification of States involved in unregulated fishing, which can expect that other measures will be taken against them, including other trade-related measures. Thirdly, members commit themselves not to flag vessels or to license them to fish within their jurisdiction if those vessels have a history of engagement in unregulated fishing.

The specific measures incorporated in Table I also feature in the IPOA on IUU Fishing, in addition to many more examples of specific measures, some of which are already used by RFMOs. For instance the use of satellite-based vessel monitoring systems (VMS) to combat IUU fishing\(^\text{164}\), or that States should urge their importers, transporters and other concerned business people not to become involved in transacting or transporting unregulated catch\(^\text{165}\). A tool that is expected to be used more and more extensively in the future is that of black listing

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\(^\text{164}\) Para. 24.3 of the IPOA on IUU Fishing. See e.g. CCAMLR Cons. Meas. 148/XX and CCAMLR Res. 16/XIX and 17/XX; ICCAT Res. 95-3. See also the VMS conditions that Australia demanded as part of the bond for a vessel’s release in the Volga case before the ITLOS (Case No. 11, Judgment of 23 December 2002, para. 53), although this was ultimately rejected by the Tribunal as a reasonable condition of the bond.

\(^\text{165}\) Paras 18-19 and 73 of the IPOA on IUU Fishing. See e.g. ICCAT Res. 01-18 and 01-19; IOTC Res. 99/02, para. 3.
States, vessels or perhaps even legal persons with a history of engagement in IUU fishing or, alternatively, white lists with vessels authorized to fish. By the end of 2002 CCAMLR, CCSBT, IATTC, ICCAT and IOTC all had taken some action in that respect\textsuperscript{166}. It is also worth nothing that CCAMLR agreed to develop a regional POA on IUU Fishing\textsuperscript{167}.

As the IPOA on IUU Fishing is a voluntary instrument, it is incapable of conferring legally binding rights and obligations on States. All the specific measures incorporated in the toolbox of the IPOA are already available to States under general international law. The usefulness of the IPOA therefore lies to a large extent in creating greater awareness by States and RFMOs of the need to address IUU fishing and the tools available to do so. States or RFMOs may nevertheless stretch the scope of these tools and thereby initiate a process of customary law formation. The IPOA is also not an exhaustive instrument in the sense that it prevents new specific measures from being developed, provided these are consistent with international law.

2.6. Collection and Provision of Data

This section addresses the question in respect of Article 14 of and Annex I to the Fish Stocks Agreement contained in the Technical Specifications. As far as the series of data States must collect the question is: ‘how have RFOs adopted their procedures to comply?’

In view of the relevance of Article 10 paragraphs (d) to (g) of the Fish Stocks Agreement for this issue (see infra), the following question has been submitted to the RFMOs that are considered in this report:

‘Has the organization considered the implications of Articles 10(d) to (g) of the Fish Stocks Agreement for its work and what results has this had? For instance, has it been established if current practices meet the requirements of these provision of the Fish Stocks Agreement?’

Article 14 and Annex I of the Fish Stocks Agreement are addressed to the States parties to the Agreement and not to RFMOs. On the other hand, the question contained in the Technical Specification inquires how RFMOs have adopted their procedures to comply with these requirements. However, although Article 14 of the Fish Stocks Agreement is addressed to States, it does contain a number of provisions which are of direct relevance for RFMOs. First of all, States shall ensure that the data they collect are provided in a timely manner to fulfil the requirements of RFMOs\textsuperscript{168}. Secondly, States shall cooperate to agree on the specification of data and the format in which they are to be provided to RFMOs and to develop and share analytical techniques and stock assessment technologies\textsuperscript{169}.

Article 10 of the Agreement specifies the functions of RFMOs in respect of the collection and provision of information. This concerns the paragraphs (d) to (g), which read:

‘(d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
(e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;’

\textsuperscript{166} See inter alia CCAMLR Conservation Measures 10-06 (2002) [S01/XXI] and 10-07 (2002) [118/XXI] and Doc. CCAMLR-XXI, paras 11.28-11.31; par 26 of the Report of the 9th CCSBT Meeting (2002); and the IATTC Fleet Capacity Resolution of June 2002. The information with regard to ICCAT and IOTC is based on their replies to the Questionnaire.

\textsuperscript{167} Cf. Doc. CCAMLR-XXI, para. 8.15.

\textsuperscript{168} Fish Stocks Agreement, Article 14(1)(b).

\textsuperscript{169} Fish Stocks Agreement, Article 14(2).
(f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;

(g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof.

At the global level, the FAO has taken a number of actions that contribute to the implementation of the obligations contained in Article 10 and 14 of the Fish Stocks Agreement. The FAO has been involved in the formulation and coordination of international standards, practices and formats for data compilation and exchange. RFMOs participate in the FAO’s CWP. The FAO Advisory Committee on Fisheries Research is to advise on ways to improve fisheries research and reporting within FAO and other relevant international organizations. The FAO publishes standards (species names and codes, fishing vessel and gear classifications and codes, etc.) and linkages to other standards prepared by other organizations.

Recent efforts of the FAO to address standards and practices issues include:

- Guidelines for the Routine Collection of Capture Fishery Information;
- Indicators for Sustainable Development of Marine Capture Fisheries;
- Fisheries Global Information System (FIGIS); and
- Strategy for Improving Information on Status and Trends of Capture Fisheries.

RFMOs are involved in the activities of the FAO and provide it with important input.

Apart from their involvement in the work of the FAO, RFMOs are also individually concerned with the provisions on the collection and provision of information. As was noted above, two aspects can be distinguished in this respect. Article 14 of the Fish Stocks Agreement places obligations on States parties to the Agreement to provide RFMOs with the relevant data and to cooperate to agree on the specification of data and the format in which they are to be provided to RFMOs and to develop and share analytical techniques and stock assessment technologies. As these obligations rest directly on States parties to the Fish Stocks Agreement.

170 For an overview see Status and Trends Reporting in Fisheries: A Review of Progress and Approaches to Reporting the State of World Fisheries (FAO Fisheries Circular No. 967 (FID/C967), Rome, 2001), pp. 13-14. The information contained in this paragraph is taken from this report.
171 Mention should also be made of the recent entry into force, on 24 April 2003, on the FAO Compliance Agreement, which contains important provisions on data collection. In particular, Article VI of the Agreement requires Parties to exchange information on vessels authorized by them to fish on the high seas, and obliges FAO to facilitate information exchange. In October 1995, notwithstanding the fact that the Agreement had not entered into force, FAO developed a prototype database (the High Seas Vessels Authorization Record) and requested those States which had accepted the Agreement to provide data on vessel authorisations to facilitate testing. The response to date has been rather slow, however. Currently, only Canada, the USA, Japan, Norway and 13 Community Member States have provided vessel authorization data: <http://www.fao.org/figis/hsvar/index.jsp>.
174 The FAO Fisheries Global Information System is a global network of integrated fisheries information. It can be accessed at <http://www.fao.org/fi/figis/index.jsp>. FIGIS offers an entry point to strategic data, information, analyses and reviews of fisheries issues and trends. Relying on databases and information systems worldwide, users can retrieve, collate and examine a broad range of fisheries domains including species, stocks and resources, vessels and statistics.
175 The Draft Strategy was adopted during the Technical Consultation on Improving Information on the Status and Trends of Capture Fisheries in March 2002 and was approved at the 25th Meeting of the Committee of Fisheries of FAO, in February 2003 (see Report of the Twenty-fifth Session of the Committee on Fisheries, FAO Doc. CL/124/7, paras 59-68).
Agreement, the absence specific requirements in the constitutive instruments of RFMOs does not relieve States from their obligations in this respect\textsuperscript{176}.

As can be appreciated from the above analysis, the provisions on the collection and provision of data addressed to RFMOs contained in Article 10 of the Fish Stocks Agreement are general in nature and have to be further elaborated in the framework of the RFMOs concerned. Each individual RFMO has to establish the mechanisms that are necessary to carry out the tasks set out under Article 10 of the Fish Stocks Agreement. Most RFMOs already have a scientific body that is charged with collecting and analysing data in respect of the stocks that are being managed by the RFMO. A number of RFMOs have evaluated their work concerning the collection and evaluation of data in recent years\textsuperscript{177}.

ICCAT’s scientific committee, the Standing Committee on Research and Statistics (SCRS), collects data on all tuna and tuna-like species in the Atlantic, stock assessments are conducted regularly and the results are communicated annually to the ICCAT Commission. Within the SCRS, the Sub-Committee on Statistics reviews standards for data collection, reporting, verification and exchange of fisheries data. In addition, the Sub-Committees on By-Catch and Environment consider non-target species and the relationships of tunas and their environment. ICCAT also coordinates and exchanges data with other international organizations that deal with tuna and tuna-like species (e.g. FAO, ICES, NAFO, GFCM)\textsuperscript{178}.

The IOTC has considered the implications of Article 10 of the Fish Stocks Agreement for its work. There are mandatory statistical reporting and confidentiality procedures and stock assessment is peer reviewed through working parties dealing with each species. The Secretariat maintains a capability in stock assessment in order to ensure that parties which do not have scientific capabilities have access to the relevant information\textsuperscript{179}.

\textit{Conclusions}

The Fish Stocks Agreement sets detailed standards for the collection and provision of data. These obligations are in first instance addressed to the States parties to the Agreement, but the Agreement also specifies what obligations States have in respect of the RFMOs to which they are a member and what functions an RFMO has in respect of the collection and provision of data.

At the global level, the FAO provides a significant contribution to the provision and collection of data. The FAO is involved in drawing up the Strategy for Improving Information on Status and Trends of Capture Fisheries. The implementation of this Strategy can provide assistance to RFMOs, if needed, to implement the obligations on data collection and provision contained in the Fish Stocks Agreement.

\textsuperscript{176} The constitutive instruments of most RFMOs contain provisions concerning the provision and collection of data, which at times are quite detailed.

\textsuperscript{177} See e.g. the Report of the ad-hoc Working Group on SCRS Organization of ICCAT <http://www.iccat.es/Documents/WG_ORG.pdf>. The CCSBT has restructured its Scientific Committee upon the recommendations of a peer review in 1998.

\textsuperscript{178} Response to the questionnaire send to the secretariats of the RFMOs under consideration in this report.

\textsuperscript{179} Response to the questionnaire send to the secretariats of the RFMOs under consideration in this report. The NEAFC and CCAMLR Secretariats referred to the relevant provisions of the constitutive instruments of their organizations in answer to the question if their organizations had considered the implications of Article 10 of the Fish Stocks Agreement (\textit{ibid.}).
Most RFMOs already have a scientific body that is charged with collecting and analysing data in respect of the stocks that are being managed by the RFMO. A number of RFMOs have evaluated their work concerning the collection and evaluation of data in recent years.

2.7. Flag State Duties

In relation to Article 18 of the Fish Stocks Agreement, which contains various flag State duties, the Technical Specifications ask the following:

1. ‘How are RFMOs implementing these requirements?’
2. ‘Are the Member States of the EU changing their legislation along these lines?’

Article 18 of the Fish Stocks Agreement is entitled ‘Duties of the flag State’. Paragraph (2) contains what could be regarded as the core flag State obligation: to exercise its responsibilities over ships flying its flag (that fish on the high seas)\(^{180}\). They are not to authorize their ships to fish on the high seas if they cannot meet this key obligation. Paragraph (1) specifies this general obligation by stipulating that the flag State must ensure that its vessels comply with conservation and management adopted by RFMOs. The remainder of the article lays down a long list of flag State duties, ranging from basic administrative aspects such as licensing systems and vessel registers, to vessel marking requirements, catch statistics reporting and verification, monitoring, control and surveillance, and the regulation of transhipment and fisheries\(^{181}\). Many of these obligations are also laid down with more detail in Articles III-VI of the 1993 FAO Compliance Agreement.

Question 1

Article 18 of the Fish Stocks Agreement is primarily directed at flag States and not at RFMOs. Members of RFMOs may nevertheless feel the need to confirm and implement these flag State duties at the regional level, \(\textit{inter alia}\) in furtherance of the RFMO’s objectives and to ensure a level playing field (fair competition) also at the regional level. We addressed the following question at the selected RFMOs:

In relation to Article 18 of the Fish Stocks Agreement, has your RFMO taken measures aimed at supporting or ensuring the implementation of these flag State duties? Specifically, has your RFMO adopted procedures/requirements on:

- Vessel registers;
- Vessel marking;
- Catch Reporting;
- Catch Verification Systems (flag State);
- Non-flag State observer systems;
- Satellite-based VMSs;
- Regulation of high seas transhipment.

Unfortunately, as only four RFMOs replied to this question, there is insufficient information for a representative answer to Question 1. The replies by CCAMLR, ICCAT, IOTC and NEAFC, however, indicate that the action taken by CCAMLR and NEAFC is the most comprehensive as it covers all of the bullets. The steps taken by ICCAT are somewhat less...
comprehensive and those by IOTC less than those of ICCAT. The information given by the four RFMOs is displayed in Table II below.

**Table II: Answers of RFMOs**

<table>
<thead>
<tr>
<th>Vessel registers</th>
<th>CCAMLR</th>
<th>ICCAT</th>
<th>IOTC</th>
<th>NEAFC*</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CCAMLR maintains the Vessel Database (see also Conservation Measure 119/XX on licensing requirements)</td>
<td>ICCAT does not have vessel registers per se but maintains two specific lists (all vessels &gt; 24 metres LOA and vessels fishing for north Atlantic albacore)</td>
<td>IOTC keeps both a register of authorized vessels and a list of identified IUU</td>
<td>NEAFC keeps a list of vessels authorised vessels to operate in the Regulatory Area targeting both Regulated and non-Regulated Resources. (Art. 3 and 4)</td>
</tr>
<tr>
<td>Vessel marking</td>
<td>Conservation Measure 146/XVII</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Catch Reporting</td>
<td>Conservation Measures 40/X, 51/XIX, 61/XII, 121/XIX, 122/XIX</td>
<td>Catch reporting is mandatory pursuant to Article IX of the ICCAT Convention</td>
<td>IOTC has mandatory reporting requirements for aggregated data</td>
<td>Fishing vessels targeting Regulated Resources in the Regulatory Area report to the Secretariat (via flag state Authorities)(Art. 5)</td>
</tr>
<tr>
<td>Catch Verification Systems (flag State)</td>
<td>Conservation Measure 170/XX</td>
<td>ICCAT has bluefin tuna, swordfish and bigeye tuna statistical documents</td>
<td>IOTC has sampling of longline landings in a number of longline landing ports (in association with local authorities).</td>
<td>The Secretariat receives from CPs, aggregates and distributes monthly statistics of landed (and transhipped) species caught in the Regulatory Area and catches of Regulated Resources (Annex II) caught in waters under national jurisdiction. (Art. 8)</td>
</tr>
<tr>
<td>Non-flag State observer systems</td>
<td>CCAMLR System of Inspection; Scheme of International Scientific Observation; Conservation Measure 118/XX</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Satellite-based VMSs</td>
<td>Conservation Measure 148/XX</td>
<td>Recommendation 97-12</td>
<td>Arts 9, 10 and 12-17</td>
<td></td>
</tr>
<tr>
<td>Regulation of high seas transhipment</td>
<td>Conservation Measure 170/XX</td>
<td>ICCAT has several relevant recommendations (e.g. 97-11 and 98-11)</td>
<td>The Scheme of Control and Enforcement and the NCPs Scheme regulate both “joint fishing operations” and “high-seas transhipments”</td>
<td></td>
</tr>
</tbody>
</table>

* Cited articles refer to the “Recommendation on a Scheme of Control and Enforcement in respect of fishing vessels fishing in areas beyond the limits of National fisheries jurisdiction in the Convention Area” (from July 1999), which outlines responsibilities for the Contracting Parties operating in the Regulatory Area.
Question 2

An important aspect that is not addressed by Question 2 is the relationship between the legislation of EU Member States on the one hand and EC law on the other hand. In case EC law already requires EU Member States to comply with requirements identical to those in Article 18 or to draw up national legislation to implement Article 18, Question 2 becomes essentially a matter of compliance with EC law. It seems indeed that the body of EC law that relates to the matters governed by Article 18 of the Agreement is so extensive, that compliance with EC law may broadly be assumed to constitute at the same time compliance with Article 18\(^{182}\). The principal instrument of EC law that implements the obligations under Article 18 is Council Regulation (EEC) No 2847/1993 of 12 October 1993 establishing a control system applicable to the common fisheries policy, as amended. Various other instruments are relevant in the context of Article 18 of the Agreement as well\(^{183}\). Council Regulation (EEC) No 2847/1993 deals with a wide range of issues, including inspection and monitoring of fishing vessels and their activities, satellite-based vessel monitoring systems, monitoring and verification of (landed) catches, regulation of transshipment, catch reporting and verification and the limited powers of the EC Commission to verify the monitoring efforts of the EU Member States.

2.8. High Seas Enforcement

In relation to Article 21 of the Fish Stocks Agreement, entitled ‘Subregional and regional cooperation in enforcement’, the Technical Specifications ask: ‘Have any RFOs adopted procedures for such inspections?’ Article 21 appears in Part VI on Compliance and Enforcement. Its basic purpose is to allow, under strict conditions, for various types of enforcement\(^{184}\) by States other than the flag State on the high seas. This provision is an exception to the primacy of flag State jurisdiction on the high seas, as laid down in Article 92(1) of the LOS Convention. However, as this exception can only be invoked under very specific conditions, it can be argued that it hardly affects this flag State primacy. At the same time it is acknowledged that it may contribute to combating unregulated fishing.

There are four main conditions for invoking this exception. Firstly, it only applies in high seas areas that fall within the geographical competence of RFMOs. Secondly, only members of these RFMOs are allowed to take enforcement measures and only for the purpose of ensuring compliance with conservation and management measures of these RFMOs. Thirdly, only fishing vessels flying the flag of a State party to the Fish Stocks Agreement can be subjected to these enforcement measures, whether or not that State is also a member of these RFMOs.

Fourthly, the procedures for high seas enforcement as set out in paragraphs (4) to (18) of Article 21 and Article 22 of the Agreement shall be applicable if RFMOs do not establish their own procedures. Applicability commences after a transitional period of ‘two years [after] the adoption of the [Fish Stocks Agreement]\(^{185}\). As the Agreement was adopted on 4

\(^{182}\) The extent to which compliance is actually achieved is, of course, a different matter.


\(^{184}\) Initially, enforcement is limited to boarding and inspection, but this may proceed to more stringent forms as a consequence of the seriousness of fishing infringements and/or the inaction of the flag State.

\(^{185}\) Para. (3).
August 1995, these enforcement powers would in principle have been available as from 4 August 1997. However, in view of the third condition set out above, these enforcement powers are only available between States parties to the Agreement, and this first of all requires the Agreement’s entry into force. It seems therefore more logical to interpret this provision as saying that the enforcement powers have only become available on 11 December 2001 (but only as between States parties to the Agreement). As a corollary thereto, the transitional period during which RFMOs can pre-empt the Agreement’s high seas enforcement procedures starts on that date as well.

The Technical Specifications refer to Article 21 as ‘procedures for boarding vessels of non-members’. The third condition set out above is indeed the most important one as it allows enforcement action at the regional level based on a State’s prior consent at the global level. That is: by becoming a party to the Fish Stocks Agreement, States consent to their fishing vessels being subjected to high seas enforcement by other States even though they are not members of (certain) RFMOs. The ensuing analysis of the practice of relevant RFMOs is aimed primarily at verifying whether RFMOs have adopted high seas enforcement procedures and if so, whether these apply also to non-members.

Of the selected RFMOs, only CCAMLR, NAFO and NEAFC have adopted high seas enforcement procedures. As will become clear below, these apply only on an inter se basis. This means that rules have been agreed between certain States and also apply exclusively in their mutual relationships and not to so-called third States. Other examples where members to RFMOs have agreed on inter se high seas inspection include the NPAFC Convention and the Bering Sea Pollock Convention. The CCSBT, CECAF, GFCM, IATTC, ICCAT, IOFC, and WECAFC have not developed procedures for high seas enforcement by non-flag States.

CCAMLR
The CCAMLR System of Inspection applies only to vessels flying the flag of members of the CCAMLR Commission and where appropriate, Acceding States.

NAFO
NAFO has a very detailed Scheme of Joint International Inspection and Surveillance (NAFO Scheme) which is not laid down in the NAFO Convention but has been developed by the NAFO Fisheries Commission. Paragraph 19 of the Scheme concerns vessels of non-contracting parties. Initially, no steps are envisaged other than reporting sightings of non-contracting party fishing vessels engaged in fishing activities to the NAFO Secretariat and the vessel’s flag State. However, subparagraph (iii) stipulates:

186 Note that Statements by the European Community (upon signature; interpretative declaration No. 4), Malta (upon accession; para. 5), United Kingdom (upon ratification on behalf of its territories and dependencies; para. 4) reflect the view that, during the transitional period, States would not have been able to unilaterally take the enforcement measures set out in Art. 21. See also the reference to the entry into force in Art. 26(2) of the Honolulu Convention (see also below in main text).
187 See also Orrego Vicuña, note 11, p. 248-249.
191 Doc. CCAMLR-XIV, para. 7.25. For an explanation of the term ‘Acceding States’, see note 62 and accompanying text. This suggests that Acceding States may (temporarily) have vessels engaged in scientific or fishing activities. Bulgaria did so a few years ago.
192 Part VI of the NAFO Conservation and Management Measures (NAFO/FC Doc. 02/9; available at <http://www.nafo.ca>). In force at the time of writing.
‘In the event that the Non-Contracting Party vessel, which has been sighted and reported as engaged in fishing activities in the NAFO Regulatory Area, is boarded by inspectors, the findings of the inspectors shall be transmitted to the Executive Secretary. (…)’

The main intention of this provision seems to be that once boarding and inspection of a non-contracting party vessel is in fact carried out, the results are disseminated. It should not be interpreted as a claim to such enforcement powers proper. A basis for taking such enforcement powers must exist elsewhere, for example in the ad hoc consent of the flag State. This reading is confirmed by the Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Management Measures Established by NAFO (NAFO NCP Scheme)\(^\text{193}\) which contains a more or less similar provision in paragraph 8 which explicitly mentions that the vessel has to consent with boarding.

NEAFC
The NEAFC Scheme of Control and Enforcement (NEAFC Scheme)\(^\text{194}\) is also very detailed and not laid down in the NEAFC Convention as such, but developed by NEAFC over the years. Paragraph (2) of Article 13 of the NEAFC Scheme entitled General Principles for Inspection and Surveillance, makes it clear that enforcement measures only apply on an inter se basis. The Non-Contracting Party Scheme (NEAFC NCP Scheme)\(^\text{195}\) is very similar to the NAFO NCP Scheme. Paragraph 7 of the NEAFC NCP Scheme is identical to Paragraph 8 of the NAFO NCP Scheme.

Galapagos Agreement
Article 8(1) of the Galapagos Agreement stipulates that States parties should cooperate ‘where appropriate, [on] the boarding and inspection of fishing vessels and the escorting of such vessels to port when infractions are discovered, in conformity with the relevant provisions of international law’. This provision is probably limited to inter se enforcement as paragraph (3) of the same provision obliges States parties to ‘hold consultations to determine the most effective measures to prevent [IUU fishing]’ by their own vessels and NCP vessels. As none of the signatory States of the Galapagos Agreement (Chile, Colombia, Ecuador and Peru) have either signed or acceded to the Fish Stocks Agreement, it cannot be assumed that any high seas enforcement procedures for non-members will follow the details of Articles 21 and 22 of the Agreement. However, given the rather extreme coastal State perspective of (some of) these States, high seas enforcement in disregard of flag State primacy cannot be ruled out.

SEAFO
The System of Observation, Inspection, Compliance and Enforcement that is to be developed by the SEAFO Commission pursuant to Article 16 of the SEAFO Convention foresees boarding and inspection at sea, but explicitly mentions that this will be on a reciprocal (inter se) basis\(^\text{196}\).

\(^{193}\) NAFO/GC Doc. 97/6; available at <http://www.nafo.ca>.


\(^{196}\) See para. 3(b).
SWIOFC
The SWIOFC Agreement (Draft of September 2001) does not include a provision on high seas enforcement, but the future functions of the Commission may require the development thereof. Such high seas enforcement procedures are unlikely to extend to non-members.

WCPFC
Article 26 of the Honolulu Convention foresees that the WCPFC establishes procedures for high seas boarding and inspection. An unusual feature is the transitional period established in paragraph (2) of Article 26. The intention seems to be that the enforcement procedures in Articles 21 and 22 of the Agreement only become applicable if ‘within two years of the entry into force of the [Honolulu Convention], the Commission is not able to agree on [its own] procedures’. This effectively means that States parties to the Honolulu Convention agree not to exercise their right to engage in unilateral high seas enforcement on the basis of the Fish Stocks Agreement, for a specified period and only with respect to the high seas parts of the Convention Area of the Honolulu Convention. This period thus allows more time for the development of high seas enforcement procedures at the regional level. In view of the contentious nature of these procedures, this is well understood.

As Article 26 refers in general to ‘fishing vessels’ without any indication that the prospective high seas enforcement procedures only apply on an _inter se_ basis, this does not exclude application to non-members. This is supported by the fact that the high seas enforcement procedures of the Fish Stocks Agreement are used as a ‘fall-back’, and these apply to non-members as well. However, the Commission may of course adopt its own procedures that do not apply to non-members. In view of the fact that the WCPFO is a newly established RFMO, the transitional period gives (third) States additional time to join before being subjected to high seas enforcement.

_Conclusions_

None of the selected RFMOs currently have high seas enforcement procedures that apply to vessels flying the flag of non-members of the RFMOs, provided they are party to the Fish Stocks Agreement. An interesting question is nevertheless whether the high seas enforcement procedures adopted by RFMOs pre-empt those laid down in the Agreement, even if these procedures do not apply to non-members or only in a much less stringent way. Under such circumstances, would States members of those RFMOs be precluded (estopped) from using the wider powers under the Agreement? And if this is so, does this reflect a hesitation to deviate from the principle of flag State primacy in high seas enforcement if this would be based on indirect consent by means of the Agreement and not on direct or _ad hoc_ prior consent?

None of the RFMOs’ high seas enforcement procedures take account of the fact that NCPs to the RFMO are parties to the Agreement. The circumstance that the non-flag State high seas enforcement powers would in principle have been available from 11 December 2001 onwards has apparently not led to an amendment of these procedures. Moreover, it is noteworthy that the IPOA on IUU Fishing does not explicitly mention the powers under Articles 21 and 22 of the Agreement. References to the merits of boarding and inspection at sea are qualified to ensure that they should be ‘consistent with international law’. There was apparently not

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197 See Art. 6bis(10).
198 Cf. Art. 6bis(12) which relates specifically to fishing activities by non-contracting parties, but no high seas enforcement is envisaged.
199 Within the regulatory area of that RFMO.
200 See paras 24.10 and 80.8.
enough support to explicate the fact that high seas enforcement powers can also be applied to non-members of RFMOs, provided they adhere to the Agreement. In view of these developments, there seems indeed support for the contention that there is a hesitation to exercise non-flag State high seas enforcement powers if this is ‘merely’ based on indirect consent by means of adherence to the Agreement. However, this may change once ratification of the Agreement becomes more universal.

2.9. Special Requirements of Developing States

This section addresses the questions in respect of Articles 24 and 25 of the Fish Stocks Agreement contained in the Technical Specifications. These questions are:

‘Do the RFOs which pre-date the [Fish Stocks] Agreement include any specific provisions for developing states, as both the MHLC and SEAFO do? If not, what would they need to do in order to bring themselves in conformity with the new international norms?

[...]
- has any RFO discussed these articles? Especially Article 25(1b) on ‘facilitating’ access?
- what would ‘facilitate’ mean in this case? Providing preferential access to fish stocks?
- can developing states expect to be given substantial aid (financial and other) to implement the [Fish Stocks Agreement]? For instance, the new Pacific tuna RFO specifically mentions a fund, whereas SEAFO does not.’

Part VII of the Fish Stocks Agreement, comprising Articles 24 to 26, is concerned with the special requirements of developing States. Such special attention to the requirements of developing States is a characteristic of most global conventions that have been concluded in the last couple of decades. Part VII of the Fish Stocks Agreement can be seen as an elaboration of Part XIV of the LOS Convention, which addresses the development and transfer of marine technology to developing States in general terms.

Definition of the Term ‘Developing State’

The Fish Stocks Agreement does not provide a definition of the term ‘developing State’. This is in accordance with the approach that has been taken in other global conventions, which all refrain from defining this term. Lists of developing States have been drawn up by a number of international organizations. This concerns, for instance, the DAC List of Aid Recipients drawn up by the Development Assistance Committee of the Organisation for Economic Co-operation and Development and the list of developing countries produced in the framework of the United Nations Development Program (UNDP). The basic criterion in establishing...
these lists is gross national product per capita. It can be noted that the two abovementioned lists, to a large extent, overlap.

Some developing States have an advanced fishing industry and are involved in high seas fisheries. This concerns, for instance, the People’s Republic of China. It has been argued that Part VII of the Fish Stocks Agreement has been worded in such a way as not to benefit such developing States. For instance, it can be noted that Article 25 refers to ‘in particular’ the least developed States and small island developing States. Article 25(1)(b) requires cooperation to assist developing States to enable them to participate in high seas fisheries for straddling and highly migratory fish stocks. This provision clearly is not applicable to developing States that actually are engaged in fishing on the high seas.

These considerations indicate that to establish to which States Part VII of the Fish Stocks Agreement applies, recourse can be had to the lists of developing States that have been drawn up by various international organizations. However, developing States will have to meet the different requirements set out in Part VII of the Agreement to actually receive the various forms of assistance specified in it.

**Technical and Financial Assistance**

Part VII of the Fish Stocks Agreement contains a number of obligations in respect of rendering technical and financial assistance to developing States. Article 24(1) refers to the special requirements of developing States in relation to the conservation and management of straddling and highly migratory fish stocks and development of fisheries for such stocks. To this end, States shall, either directly or through the appropriate international organizations and bodies, provide assistance to developing States. Article 24(1) refers explicitly to the UNDP, the FAO, the Global Environment Facility and the Commission on Sustainable Development. The form this assistance shall take is further elaborated in Article 25 of the Fish Stocks Agreement.

Articles 24 and 25 of the Fish Stocks Agreement are framed in a mandatory way. However, the provisions do not contain a quantification of the levels of technical and financial assistance that have to be provided. It should be noted that financial and technical assistance are already being rendered to developing States either directly or through the organizations and bodies mentioned in Article 24.

Article 26(1) of the Fish Stocks Agreement refers to the establishment of special funds to assist developing States in the implementation of the Agreement. Specific reference is made to the assistance of developing States to meet the costs involved in any proceedings for the settlement of disputes to which they are parties. There exist trust funds which are intended to

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205 Various parts of this report illustrate that the FAO has an important facilitating role in the implementation of the Fish Stocks Agreement. For an overview of the activities of the FAO in this respect see also e.g. W. Edeson “Implementing the 1982 UN Convention, the FAO Compliance Agreement and the UN Fish Stocks Agreement”, in M.H. Nordquist and J.N. Moore (eds), Current Fisheries Issues and the Food and Agriculture Organization of the United Nations (The Hague, 2000), pp. 149-166; D.J. Doulman, “Code of Conduct for Responsible Fisheries: Development and Implementation Considerations”, in Nordquist and Moore, note 205, pp. 307-330; and S.C. Venema, “The FISHCODE Project: Achievements”, in Nordquist and Moore, note 205, pp. 341-359.
assist developing States to meet the costs involved in proceedings before respectively the ICJ and the International Tribunal for the Law of the Sea (ITLOS). Parties to the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 can request financial assistance to meet the costs of arbitrations from the Financial Assistance Fund for the Settlement of International Disputes. Contributions to these funds are voluntary. The existence of these funds, which cover all modes of compulsory dispute settlement, suggests that there is no urgent need for the establishment of further funds of this nature.

The Technical Specifications pose the question as to whether developing States can be expected to be given substantive aid (financial and other) to implement the Fish Stocks Agreement. The analysis provided above points out that existing arrangements can be employed, and as a matter of fact are being used, to assist developing States in the implementation of the Fish Stocks Agreement. This does not exclude that States will agree on additional mechanisms, such as a fund established under the Honolulu Convention to facilitate the effective participation of developing States parties in the work of the WCPFC206.

The language employed in Article 25 of the Fish Stocks Agreement (assistance to developing States shall include the provision of financial assistance and other specified types of assistance) indicates that the provision of such assistance is an obligation resting upon States parties to the Agreement. Although it is difficult to quantify such assistance, a number of considerations can be deemed to be relevant in this respect. Both the financial and other assistance should be of such a nature that they make it possible to implement the objectives that are to be realized by such assistance. These objectives are set out in Article 25(3) and 26 of the Fish Stocks Agreement. Otherwise, it could be argued that the participation of a State in a fishery also involving developing States is a relevant consideration.

The creation of financial mechanisms to assist developing States pursuant to Part VII of the Fish Stocks Agreement has been discussed by the General Assembly of the United Nations and the Informal Meeting of the States Parties to the Fish Stocks Agreement207. A General Assembly Resolution considers that one component of a programme of assistance to be developed should be the establishment of a voluntary trust fund (Part VII fund) within the United Nations system. In connection with the development of the terms of reference of this fund, the General Assembly requests the United Nations Secretary-General to draw up a background study on current activities under Part VII of the Fish Stocks Agreement208. At its 25th Session in 2003, the FAO Committee on Fisheries approved FAO participation in the development and management of the fund.

It can be noted that the EC already provides development assistance under fisheries agreements it has concluded with developing States.

Access to Stocks

A number of the provisions in Part VII of the Fish Stocks Agreement are of relevance for the issue of access of developing States to straddling and highly migratory fish stocks. Article 24(2) of the Agreement provides:

‘In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling and highly migratory fish stocks, States shall take into account the special requirements of developing States, in particular:

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206 Honolulu Convention, Article 30.
(a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;
(b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; and
(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action on developing States.\(^{209}\)

Article 24(2) of the Fish Stocks Agreement can be seen as an elaboration of a provision contained in Articles 61 and 119 of the LOS Convention. These Articles require that in determining measures for the living resources, respectively the coastal State (Article 61) or States fishing on the high seas (Article 119) shall take measures which are designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by \textit{inter alia} the special requirements of developing States.

The considerations listed in Article 24(2) of the Fish Stocks Agreement can result in a larger share of the TAC of a stock for developing States than would be otherwise the case, e.g. if historical catches are taken as the baseline for determining the allocation of catches. Apart from Article 24(2), Article 11(f) provides that in determining the nature and extent of participatory rights for new members of an RFMO, States shall also take into account the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks concerned also occur\(^{210}\).

One question in respect of Article 24(2) is its scope of application. One view would be that it is applicable in case a developing State is a part of the region to which the conservation and management measures apply. Another view would be that it will always have to be taken into consideration by an RFMO if a developing State has an interest in the fishery which the RFMO is regulating. This issue has come up in the negotiations of the constitutive instrument for SWIOFC. Namibia, which is not a coastal State of the area of application of the draft agreement, has argued that the provisions of the agreement on developing States should be applicable to all developing States\(^{211}\).

Article 24(2) does not specify if it is applicable to developing States in general, or only to those developing States in the region of the RFMO concerned. However, it can be noted that the special requirements of developing States listed in Article 24(2) are of a considerable specificity. If developing States do not possess the special requirements contained in Article 24(2), the Article does not have an impact on the establishment of conservation and management measures (including the issue of allocation). Subparagraphs (b) and (c) of Article 24(2) seem to be of particular relevance for developing States that are located in the region of the RFMO concerned\(^{212}\). Finally, it can be noted that Article 11 on new entrants

\(^{209}\) Article 24 provides an elaboration of Article 5 of the Agreement on general principles, which makes a reference to the special requirements of developing States in adopting measures for the conservation and management of straddling and highly migratory fish stocks (Fish Stocks Agreement, Article 5(b)).

\(^{210}\) For a discussion of Article 11 of the Agreement see Subsection 2.5.2 of the report.

\(^{211}\) It can be noted that the SEAFO Convention does refer to developing States \textit{in the region} (see \textit{e.g.} Article 21 of the SEAFO Convention). In this case, Namibia is one of the relevant coastal States.

\(^{212}\) See also A. Tahindro, “Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” 28 \textit{Ocean Development and International Law} 1-58 (1997), at pp. 43-44 where reference is made to the interests of developing States in straddling and highly migratory fish stocks in high seas areas adjacent to their own maritime zones.
refers specifically to the interests of developing States from the subregion or region concerned.

The Technical Specifications pose the question whether the reference to facilitating access in Article 25 of the Fish Stocks Agreement implies that developing States are to be given preferential access to stocks. Article 25(1)(b) provides that States shall cooperate:

‘to assist developing States, in particular the least-developed among them and small island developing States, to enable them to participate in high seas fisheries for such stocks, including facilitating access to such fisheries subject to Articles 5 and 11.’

The Fish Stocks Agreement does not give any further indication concerning of what ‘facilitating access’ consists. One indication is provided by the condition contained in Article 25(1)(b) itself that such facilitation is ‘subject to the Articles 5 and 11’ of the Fish Stocks Agreement. Article 5 establishes the general principles that are applicable to the conservation and management of straddling and highly migratory fish stocks. Article 11 establishes criteria for determining the nature and extent of participatory rights for new members of an RFMO. The fact that the provision on facilitation of access is subject to the provision contained in Article 11, indicates that the facilitation of access is not intended to give the developing States preferential access to the stocks concerned. As the formulation of Article 25(2) indicates, ‘facilitating access’ is a specific aspect of the requirement to assist developing States to enable them to participate in high seas fisheries. In other words, ‘facilitating access’ is part of a provision that is concerned with creating the conditions that will make it possible for these States to enter such fisheries. The actual allocation of catches is governed by other provisions of the Fish Stocks Agreement. As was noted above, some of these other provisions, such as Article 24(2), do require that the special requirements of developing States are taken into consideration in establishing conservation and management measures, including measures allocating fishing opportunities or catches.

As the above analysis indicates, the provisions of the Fish Stocks Agreement regarding the special requirements of developing States are concerned with two distinct issues: a) allocation of fishing opportunities; and b) assistance to developing States. Whereas the first issue has to be addressed in the framework of the RFMO that is responsible for the establishment of conservation and management measures for specific stocks, the second issue in large part can also be addressed outside the framework of RFMOs.

Few RFMOs have addressed the special requirements of developing States as defined in the Fish Stocks Agreement in their constitutive instruments. Only the SEAFO Agreement (Article 21), the Honolulu Convention (Articles 10 and 30) and the draft SWIOFC Agreement (Article 15) address this along similar lines as the Fish Stocks Agreement. Other constitutive instruments address the requirements of developing States in a more general way or not at all.

This absence of a specific reference to the special requirements of developing States as defined in the Fish Stocks Agreement in the constitutive instruments of RFMOs raises the question whether these instruments have to be amended to bring them in line with the Fish Stocks Agreement. This issue in any case only has to be addressed by the States which are both a member to an RFMO and the Fish Stocks Agreement.

As far as the allocation of fishing opportunities is concerned, the relevant provisions of the Fish Stocks Agreement require its States parties to take into account specific considerations, including the special requirements of developing States, in establishing conservation and
management measures. Even in the absence of a similar provision in the constitutive instrument of an RFMO, a State party to the Fish Stocks Agreement is bound by this obligation when it is cooperating through the RFMO to establish conservation and management measures.

**Practice of RFMOs**

The practice of RFMOs indicates that States have taken the special requirements of developing States into account in discussing allocation criteria in cases where the constitutive instrument is silent on this matter. For instance, ICCAT has adopted the *ICCAT Criteria for the Allocation of Fishing Possibilities*. Among the four categories of allocation criteria one category includes a number of criteria of relevance for developing States\(^\text{213}\).

At the October 2002 meeting of the CCSBT South Africa expressed its intention to join the Commission. The current membership accepted the South African claim to a status as a developing State. The Commission welcomed South Africa’s interest in joining the Commission and acknowledged the desirability of it becoming a member in due course. However, the Commission also noted that allocation of southern bluefin tuna would be one issue that needs to be discussed with South Africa\(^\text{214}\).

The NEAFC Secretariat has indicated that NEAFC has not focussed on global issues, such as the special requirements of developing States. However, on the secretarial level NEAFC is willing to assist other RFMOs to develop their expertise and share experience. The NEAFC Secretariat has offered assistance to other RFMOs, especially concerning its expertise in running VMS and control and enforcement\(^\text{215}\).

The CCAMLR Secretariat has indicated that the question of the special requirements of developing States has not been posed by any of the member States of the Commission. No actions have yet been undertaken to implement the relevant Articles of the Fish Stocks Agreement\(^\text{216}\).

The IOTC Secretariat has indicated that the need to take specific actions to implement the Article of the Fish Stocks Agreement concerning developing States has thus far not been perceived\(^\text{217}\).

The ICCAT Secretariat has indicated that no specific actions have been taken by ICCAT to implement Part VII of the Fish Stocks Agreement. The position of developing States has been given specific attention in drawing up allocation criteria\(^\text{218}\).

**Conclusions**

To establish which States are covered by the term ‘developing States’, recourse can be had to the lists of developing States that have been drawn up by various international organizations. However, developing States will have to meet the different requirements set out in Part VII

\(^{213}\) *ICCAT Criteria for the Allocation of Fishing Possibilities* (Adopted by the Commission in November 2001), Section III.C (available at <http://www.iccat.es/criteria.html>).


\(^{216}\) *Ibid.*

\(^{217}\) *Ibid.*

\(^{218}\) *Ibid.* On the latter point see further *supra* text at note 213.
The language employed in Article 25 of the Fish Stocks Agreement (assistance to developing States shall include the provision of financial assistance and other specified types of assistance) indicates that the provision of such assistance is an obligation resting upon States parties to the Agreement. Although it is difficult to quantify such assistance, a number of considerations can be deemed to be relevant in this respect.

A number of the provisions in Part VII of the Fish Stocks Agreement are of relevance for the issue of access to straddling and highly migratory fish stocks. These provisions can result in a larger share of the TAC of a stock for developing States than would otherwise be the case, e.g. if historical catches are taken as the baseline for determining the allocation of catches. However, these provisions do not apply to developing States generally, but only to those of them that meet the conditions set out in this connection. The term ‘facilitating access’ contained in Article 25(2) of the Agreement is not relevant in this respect.

Practice of RFMOs indicates that States have taken the special requirements of developing States into account in discussing allocation criteria even in cases where the constitutive instrument is silent on this matter. For instance, ICCAT has adopted the 

ICCAT Criteria for the Allocation of Fishing Possibilities. Among the four categories of allocation criteria one category includes a number of criteria of relevance for developing States. The extent to which issues arising under Part VII have been given attention by RFMOs would seem to depend largely on whether the membership has raised this issue.

2.10. Relationship with the WTO

The Technical Specifications ask the following questions:

1. ‘What relationship is likely to establish itself between the [Fish Stocks Agreement] and RFMOs on the one hand, and the WTO on the other?’
2. ‘In cases of overt or covert conflicts, which body of law is likely to take precedence?’

The dispute between the EC and Chile on the unloading of (Pacific) swordfish in Chilean ports illustrates the practical importance of these questions. Following years of unsuccessful negotiations, this dispute caused the EC to institute proceedings against Chile before the WTO. As a consequence, Chile instituted proceedings against the EC under Part XV of the LOS Convention. This was the first instance where a single dispute was (more or less) simultaneously instituted under the dispute settlement procedures of the WTO and the LOS Convention. In February 2001, however, the EC and Chile made sufficient progress in
resolving their differences and agreed that both dispute settlement procedures should be suspended. Neither the WTO dispute settlement body nor, in this case, the ITLOS have therefore had an opportunity to offer guidance on the questions raised in the Technical Specifications.

The discussion will now commence with Question 2, after which Question 1 will be addressed.

Question 2

Over the last half century, international law has rapidly expanded to cover a vast number of issues and seen the establishment of a plethora of international organizations with mandates over them. Some of these issues are very technical in character, for example the rules and standards to ensure safety of life at sea and pollution prevention that are developed within the International Maritime Organization, while other issues are very general in nature, for example the efforts of the United Nations in fostering international peace and security. The development of international law has proceeded in a decentralized, largely unstructured, piecemeal fashion and often to satisfy short-term needs.

A consequence of the predominantly unstructured character of international law is the meagre attention to resolving conflicts between rules. Even the notion that the consensual nature of international law does not apply to peremptory norms of international law (jus cogens) is merely accepted as a principle, whereas no consensus exists on which norms would be covered. Even if it were possible to agree on the delimitation or definition of distinct bodies of international law, there is no general hierarchy or rules on resolving conflicts between them. This also applies to the relationship between WTO rules and other rules of international law. All that is available is a handful of very general principles such as that more specific rules take precedence over general rules (lex specialis derogat legi generali) or that newer rules take precedence over older rules (lex posterior derogat legi priori). Due to their specific nature, WTO rules are often lex specialis in relation to rules of general international law.

As both the WTO agreements and the LOS Convention are part of international law, disputes arising under them will take account of other rules of international law that are applicable to the parties to the disputes. The LOS Convention recognizes this in a very straightforward manner in Article 293(1). Moreover, Article 3(2) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) stipulates that the WTO dispute settlement system is intended ‘to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law’. This not

ICJ case on the Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras).


224 See Arts 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT). Art. 38 of the Statute of the ICJ which contains the (traditional) sources of international law, does not contain a hierarchy either.


226 See inter alia Art. 41(1) of the VCLT.

227 Cf. Art. 30 of the VCLT. See also Art. 103 of the UN Charter.

228 Cf. Pauwelyn, note 225, at p. 539


230 See also Arts 7(1) and 11 of the DSU.
only means that the rules on interpretation of treaties as set out in Article 31-33 of the VCLT are applicable\textsuperscript{231}, but thereby implicitly also that rules of international law continue to apply, unless of course WTO rules ‘contract out’ of them\textsuperscript{232}. Moreover, this provision must be presumed to have a dynamic character, thereby recognizing that applicable rules of international law may develop or change over time\textsuperscript{233}. Worth emphasizing here again is that the applicable law depends to a large extent on (1) which States are parties to a dispute; (2) the fact that certain disputes may not be admissible before dispute settlement bodies or (3) that these bodies may not have jurisdiction to hear the disputes.

In case a rule of international trade law conflicts with a rule of the international law of the sea to the extent that it cannot be ‘interpreted away’ (such that the rules, although on the face of it conflicting, are interpreted in such a way that the conflict is avoided), resort must be had to conflict rules in WTO instruments, non-WTO instruments such as the LOS Convention, the Fish Stocks Agreement, and general international law. As regards the latter, this amounts mainly to the \textit{lex specialis} and the \textit{lex posteriori} rules.

Article 311(2) of the LOS Convention provides that the ‘[LOS Convention] shall not alter the rights and obligations of States Parties which arise from other agreements compatible with [the LOS Convention] (…)’ and paragraph (3) stipulates that other agreements may modify or suspend the operation of provisions of the LOS Convention, ‘provided such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of [the LOS Convention], and provided further that such agreements shall not affect the application of basic principles embodied therein (…)’.

Article 4 of the Fish Stocks Agreement stipulates that the Agreement ‘shall be interpreted and applied in the context of and in a manner consistent with the [LOS] Convention’. Paragraphs (1) and (2) of Article 44 of the Agreement are \textit{mutatis mutandis} an exact copy of Article 311(2) and (3) of the LOS Convention. The terms ‘compatibility’ and the ‘basic principles’ are intended to establish a presumption that, in the event of conflict with other treaty provisions, the LOS Convention and the Fish Stocks Agreement will prevail. However, this is no more than a presumption and the terms are not so specific as to rule out considerable differences in interpretation.

Although some WTO instruments address the possibility of \textit{inter se} conflicts\textsuperscript{234}, little attention is given to conflicts with non-WTO rules. Some of the exceptions are the Declaration on the Relationship of the WTO with the IMF and the Decision on Trade and Environment\textsuperscript{235}. However, the Decision on Trade and Environment does little more than establish the Committee on Trade and Environment (CTE), which so far has not produced clear conflict rules\textsuperscript{236}. It is nevertheless clear that WTO rules are not as a matter of principle superior to non-WTO rules. Articles XX and XXI of GATT 1947 contain general exceptions


\textsuperscript{232} Cf. Pauwelyn, note 225, at p. 543 and the Panel Report in \textit{Korea-Measures Affecting Government Procurement} (WTO Doc. WT/DS163/R, of 1 May 2000), p. 183, para. 7.96. Art. 31(3) of the VCLT provides that account may be taken of ‘any relevant rules of international law applicable in the relations between the parties’.


\textsuperscript{234} See \textit{inter alia} Art. XXIV of GATT 1947.

\textsuperscript{235} Both texts are available at <www.wto.org>.

\textsuperscript{236} Cf. Pauwelyn, note 225, at p. 545. However, the CTE ‘endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature’ (WTO Doc. WT/CTE/1, para. 171). See also Principle 12 of the 1992 Rio Declaration on Environment and Development.
and security exceptions that can be invoked to impose trade measures that would otherwise be inconsistent with GATT 1947\textsuperscript{237}. Particularly relevant for the sphere of international fisheries is Article XX(g) as it relates to the ‘conservation of exhaustible nature resources’. In addition to the stringent conditions incorporated in paragraph (g) and the \textit{chapeau} to Article XX\textsuperscript{238}, non-WTO rules may stipulate additional conditions. The legality of trade measures may for instance depend on rights and duties under the LOS Convention and the Fish Stocks Agreement to the extent that they apply to the parties to a dispute. The duty to cooperate in relation to straddling and highly migratory stocks under Articles 63(2) and 64 of the LOS Convention and the right to exercise port State jurisdiction pursuant to Article 23 of the Fish Stocks Agreement are especially relevant here. The relevance of non-WTO rules is also recognized in the IPOA on IUU Fishing\textsuperscript{239}.

In the \textit{Shrimp-Turtle} case, the preference for multilateral solutions to environmental problems led to a rejection of an appeal by the United States to Article XX(b) and (g) of GATT 1947\textsuperscript{240}. It must be emphasized, however, that such a preference does not, by implication, rule out unilateral approaches entirely\textsuperscript{241}. If serious and good faith negotiation efforts do not lead to multilateral agreement, unilateral trade measures may not be in violation of international trade law\textsuperscript{242}. More recent phases of the \textit{Shrimp-Turtle} case have explicitly upheld unilateral trade measures by the United States\textsuperscript{243}.

\textbf{Question 1}

In view of the existing preference for multilateral solutions to environmental problems, the relationship referred to in Question 1 will most likely be one where the Fish Stocks Agreement and RFMOs jointly provide the basis on which trade-related measures can be taken that would otherwise be inconsistent with WTO rules. Thus, consistency with WTO rules cannot be achieved on the basis of the Agreement alone. The Agreement is essentially a framework agreement which relies heavily on implementation by means of bilateral or (sub-) regional cooperation between States within RFMOs. Trade-related measures can only come into view to ensure compliance with concrete conservation and management measures\textsuperscript{244}. These are not contained in the Agreement itself but are to be adopted by RFMOs, in accordance with the provisions of the Agreement, the LOS Convention and other relevant rules of international law\textsuperscript{245}.

\textsuperscript{237}Art. XXI(c) reproduces the substance of Art. 103 of the UN Charter.
\textsuperscript{238}Which \textit{inter alia} stipulates that trade measures should not discriminate unjustifiably or arbitrarily.
\textsuperscript{239}See paras 65-76. Note the crucial importance of the phrase ‘in accordance with international law’ in para. 66.
\textsuperscript{242}Note that para. 66 of the IPOA on IUU Fishing provides ‘(…) Trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and only after prior consultation with interested States. Unilateral trade-related measures should be avoided.’
\textsuperscript{244}See the trade-related measures in Table I above.
\textsuperscript{245}See Art. 1(1)(b) of the Fish Stocks Agreement. See also the Panel Report in the \textit{Shrimp-Turtle} case, note 240, at para. 7.58 where the CITES Convention is not regarded as an instrument which contains specific conservation and management measures, but only relates to trade. Listing in the Annexes of the CITES Convention does therefore not allow trade-related measures other than those explicitly authorized by the CITES Convention. See also Art. 23 of the Fish Stocks Agreement under which the exercise of port State jurisdiction is explicitly linked to ‘subregional, regional and global conservation and management measures’.
The Agreement both confirms and strengthens the central role of RFMOs in the conservation and management of straddling and highly migratory fish stocks. Therefore, as a matter of presumption, trade-related measures to ensure compliance with the conservation and management measures adopted by RFMOs are consistent with WTO rules. However, this presumption is open to challenge. Such a challenge is less likely to succeed with multilaterally agreed trade-related measures than with unilateral trade-related measures. But even multilaterally agreed conservation and management measures or trade-related measures are not beyond dispute. If those measures would, for example, be adopted in RFMOs which unjustifiably bar membership or whose allocation of fishing opportunities is grossly inequitable, this would render these measures inconsistent with international law and thereby also inconsistent with WTO rules.

2.11. Role of the FAO

The Technical Specifications ask the following question:

‘Is the FAO under obligation to ensure that the RFMOs under its jurisdiction are altered according to the [Fish Stocks Agreement]?’

Articles 1(2)(b) and 37-39 of the Fish Stocks Agreement do not allow the FAO to sign, ratify or accede to the Agreement. The obligations contained in the Agreement are therefore in principle not applicable to the FAO. It could nevertheless be argued that Members of the FAO that are also parties to the Agreement are obliged to further the general obligations and objectives of the Agreement within the FAO. Article 24(1) of the Agreement contains a specific obligation to do so in relation to development assistance.

The functions of the FAO are set out in Article I of the FAO Constitution. Particularly relevant to this study is paragraph (2)(c) which obliges the FAO to ‘promote and, where appropriate … recommend national and international action with respect to … the conservation of natural resources and the adoption of improved methods of agricultural production’. Strictly interpreted this provision imposes indeed an obligation on the FAO as an organization. It is nevertheless often primarily seen as a mandate that can be used if sufficient political will for action materializes.

Just like in other ‘common’ intergovernmental organizations, member States play a central role in the FAO. Decision-making power lies with States within the main FAO governing bodies. However, the Director-General of the FAO ‘shall formulate for consideration by the Conference and the Council proposals for appropriate action in regard to matters coming before them’. Arguably, the words ‘matters coming before them’ would entitle the Director-General to a certain measure of initiative. In cases of urgency, the Director-General can even establish committees and working parties and convene conferences. Ultimately,

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246 Note that the frequent insertion of the term ‘relevant’ before ‘regional fisheries management organizations’ in the IPOA on IUU Fishing is meant to capture the notion that an RFMO’s measures are not necessarily consistent with international law.
247 As opposed to supra-national organizations like the EU, where certain bodies are largely independent from the Member States.
248 The Conference, Council and the Commissions, committees, conferences, working parties and consultations that can be established under Art. VI of the FAO Constitution.
249 Art. VII(5) of the FAO Constitution.
250 Art. VI(6) of the FAO Constitution.
however, only FAO governing bodies and through them, FAO Member States, are empowered to take decisions\textsuperscript{251}.

In this context it is also worthwhile to reflect shortly on the words ‘RFOs under its jurisdiction’ in the question formulated by the Technical Specifications. Essentially two types of RFOs have been established under the aegis of the FAO. The first are the advisory bodies established under Article VI(1) or (2) of the FAO Constitution. CECAF and WECAFC are examples of this type. The second type are the bodies established under Article XIV of the FAO Constitution. These are more similar to ‘regular’ RFMOs that are equipped with management functions. IOTC, GCFM and, possibly in the future, SWIOFC are examples of this type. Article XIV bodies ‘have a legal life of their own\textsuperscript{252} and the FAO cannot therefore formally be held responsible for their functioning\textsuperscript{253}. Even with Article VI bodies, however, responsibility lies first and foremost with the members to those bodies. In line with what was concluded at the beginning of this section, States members of these FAO bodies which are also States parties to the Fish Stocks Agreement, are obliged to further the general obligations and objectives of the Agreement within these FAO bodies.

This notwithstanding, agreement already existed within the FAO that regional fisheries bodies needed strengthening in 1995\textsuperscript{254}. Consequently, the FAO Committee of Fisheries (COFI) decided at its 22\textsuperscript{nd} Session in 1997 on the need for a review of FAO regional fishery bodies in order to strengthen them with a view to the sustainable and responsible management of fish stocks\textsuperscript{255}. A likely scenario is for Article VI bodies to be upgraded to Article XIV bodies. This process of upgrading is certain to be influenced by the provisions of the Fish Stocks Agreement\textsuperscript{256}. However, as the negotiations on the SWIOFC Agreement show, support for the Fish Stocks Agreement is not always sufficiently widespread to ensure that (all of) its provisions are implemented into regional agreements. The role of the FAO in these negotiations is merely one of facilitator, although FAO staff may choose to inform the national delegations where inconsistencies with the Agreement may arise.

2.12. Dispute Settlement

This section addresses the questions in respect of Article 30 of the Fish Stocks Agreement contained in the Technical Specifications. These questions are:
- what role has the International Tribunal for the Law of the Sea played in fisheries disputes and how is that likely to evolve in the future?
- ditto of the International Court of Justice.’
In addition the following questions have been analysed in respect of the RFMOs under consideration:
1. does the constitutive instrument of the RFMOs contain a provision on the settlement of disputes?;

\textsuperscript{251} Within FAO, a significant amount of control is also effectively exercised by the Programme Committee and the Finance Committee. See their Rules of Procedure, read in conjunction with Rules XXVI and XXVII of the General Rules of the Organization.
\textsuperscript{253} See e.g. the very limited role of the FAO within the IOTC on the basis of Arts. VI(3), (7) and (8), VIII(1) and (3), XII(6), XIII(7) and XX(3) of the IOTC Agreement.
\textsuperscript{254} See the 1995 Rome Consensus on World Fisheries (available at \textlangle}http://www.oceanlaw.net\textrangle).
\textsuperscript{255} See FAO Fishery Report No. 562, para. 31 and FAO Doc. COFI/97/4.
\textsuperscript{256} Marashi, note 252, at p. 3-6 (in particular para. 12) recognizes that the Fish Stocks Agreement is of particular relevance to the future role of the FAO fisheries bodies. See also FAO Doc. COFI/97/4, para. 3.
2. if yes, does this provision entail compulsory dispute settlement resulting in binding decisions?;
3. does this provision make it possible to establish provisional measures?;
4. if a dispute settlement provision is included, does it address the issue of dispute settlement involving the sovereign rights of the coastal State with respect to the living resources in the EEZ or their exercise?; and
5. has the dispute settlement provision been applied?

There are two aspects to dispute settlement that have to be considered in this section. First of all, it has to be established what dispute settlement procedures are available under the Fish Stocks Agreement and what implications this has for the availability of dispute settlement procedures for members of RFMOs. A second question concerns the impact the ICJ, the ITLOS and arbitral tribunals have had on the development of the substantive provisions of international fisheries law and how they have contributed to resolving disputes.

Dispute Settlement Provisions of the LOS Convention and the Fish Stocks Agreement

The settlement of disputes is addressed in Part VIII of the Fish Stocks Agreement. At the centre of this Part is Article 30, which applies the dispute settlement procedures set out in Part XV of the LOS Convention mutatis mutandis:

‘to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

[…] to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention’.

Part XV of the LOS Convention, which is incorporated into the Fish Stocks Agreement by the reference in Article 30, establishes a comprehensive regime for the settlement of disputes concerning the application or interpretation of the Convention. Part XV establishes recourse to four types of dispute settlement mechanisms:

- the ICJ;
- the ITLOS;
- Arbitration under Annex VII of the LOS Convention; and
- Special arbitration under Annex VIII of the LOS Convention.

Parties to the LOS Convention can indicate a preference for any of these mechanisms. If the parties to a dispute have indicated the same preference that mechanism will be applied. Otherwise, arbitration under Annex VII of the LOS Convention will be applied. The EC does not have standing before the ICJ, but does have standing before the ITLOS and the other dispute settlement mechanisms established by the LOS Convention.

Part XV of the LOS Convention makes it possible to submit most disputes concerning the interpretation or application of the Convention to compulsory dispute settlement at the request of any party to the dispute. However, Part XV contains a number of exceptions to this general rule. For the present analysis, concerned with dispute settlement under the Fish Stocks Agreement, two general provisions excluding compulsory dispute settlement under

257 Ibid., Articles 30 (1) and (2).
258 LOS Convention, Article 286.
Part XV of the Convention are of relevance. In addition, there is one limitation on the compulsory settlement of disputes which is specifically applicable to fisheries disputes.

The first general exception to the application of compulsory dispute settlement procedures of Part XV of the Convention is contained in its Article 281, which provides:

‘1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.’

Article 281 is of relevance for agreements which contain dispute settlement clauses. Depending on the content of the dispute settlement clause concerned, States which are both a party to such an agreement and the LOS Convention can or cannot resort to compulsory dispute settlement under Part XV of the LOS Convention. Article 281 of the LOS Convention is not relevant for disputes over the application or interpretation of the Fish Stocks Agreement, as it applies the dispute settlement provisions of the LOS Convention and does not provide for recourse to other procedures. However, Article 281 may exclude the agreements to which reference is made in Article 30(2) of the Fish Stocks Agreement from the compulsory dispute settlement provisions contained in the LOS Convention.

The exact scope of Article 281 of the LOS Convention was considered in the Southern Bluefin Tuna arbitration, which was brought by Australia and New Zealand against Japan. The parties to this dispute were parties to the LOS Convention and the 1993 CCSBT Convention. This latter Convention contains a provision on dispute settlement (Article 16). Australia and New Zealand maintained that this provision did not exclude the recourse to compulsory dispute settlement under the LOS Convention, a view which was rejected by Japan.

The Arbitral Tribunal concluded that the dispute, while centred on the CCSBT Convention, also arises under the LOS Convention. This conclusion made it necessary for the Tribunal to consider the implications of Article 281 of the LOS Convention. The Tribunal held that Article 16 of the CCSBT Convention on dispute settlement can be seen as an agreement between the parties to that convention as a means for peaceful settlement of their own choice. Such a view could exclude the dispute from the scope of Part XV of the LOS Convention. To establish if this was in fact the case, Article 281 of the LOS Convention had to be examined.

The Tribunal found that the first requirement of Article 281(1) to apply Part XV procedures had been fulfilled. Namely, no settlement had been reached on the dispute although procedures under Article 16 of the CCSBT had been applied. The second requirement of Article 281 is that the agreement between the parties does not exclude any further procedure, such as recourse to the procedures of Part XV of the LOS Convention. Article 16 does not explicitly exclude further procedures. This would on its face suggest that Part XV procedures are applicable. However, the Tribunal found that this was not decisive and that the consensual

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260 Award, para. 54.
261 Award, para. 55.
262 Award, para. 56.
nature of Article 16 was intended to exclude the application of any procedure of dispute resolution not accepted by all parties to the dispute.  

These findings of the Tribunal in the *Southern Bluefin Tuna* arbitration could have significant implications for other treaties which contain dispute settlement provisions excluding the submission to compulsory dispute settlement mechanisms entailing binding decisions by any party to the dispute. However, there are a number of arguments, which suggest that this impact may be less far reaching than appears at first sight. For instance, in the case under consideration:

- the dispute arose under the CCSBT Convention and reference to the LOS Convention was only included at a late date;
- the Tribunal determined that the dispute between the parties regarding the LOS Convention was the same as in regard of the CCSBT Convention;
- Japan had indicated a willingness to arbitrate under the CCSBT Convention; and
- the Tribunal considered that the CCSBT Convention was a comprehensive regime for the management of southern bluefin tuna.

In addition, it has been argued that the impact of Article 281 is different in the context of the Fish Stocks Agreement as compared to the LOS Convention. The drafting history of Article 30 of the Fish Stocks Agreement indicates that its purpose is to provide compulsory dispute settlement mechanisms. Article 30 contains an express agreement to apply Part XV of the LOS Convention to ‘agreements relating to straddling fish stocks and highly migratory fish stocks’. To the extent that prior agreements do not contain clauses providing for compulsory dispute settlement, they would be overridden. The situation is different in respect of agreements concluded subsequent to the Fish Stocks Agreement. Parties are free to include dispute settlement provisions in such a treaty that derogate from compulsory dispute settlement under Part XV of the LOS Convention. The *Southern Bluefin Tuna* arbitration indicates that States should be careful in considering the implications of Article 281 of the LOS Convention in drafting such provisions.

A second limitation on the availability of the dispute settlement mechanisms contained in Part XV of the LOS Convention is contained in its Article 282, which provides: ‘If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.’

Article 282 does not limit the availability of compulsory dispute settlement, but implies that if a regional fisheries agreement contains a binding dispute settlement procedure, that procedure will apply instead of the dispute settlement procedures of Part XV of the LOS Convention.

The availability of compulsory dispute settlement procedures in respect of fisheries disputes is also limited by Article 297(3) of the LOS Convention. Article 32 of the Fish Stocks Agreement establishes that this provision also applies to the Agreement. Article 297(3)(a) provides that a coastal State shall not be obliged to accept the submission to binding dispute settlement procedures of any dispute relating to its sovereign rights with respect to the living

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263 Award, paras 57-58.
264 These examples are taken from the list given in B. Oxman, “Complementary Agreements and Compulsory Jurisdiction”, 95 American Journal of International Law 277-312 (2001), at pp. 292-293.
265 Oxman, note 264, p. 306.
resources in the EEZ or their exercise. This limitation on the possibilities for compulsory dispute settlement is especially relevant for the Fish Stocks Agreement. It is to be expected that most disputes over straddling and highly migratory fish stocks will also involve questions related to the sovereign rights of the coastal State with respect to the living resources in the EEZ or their exercise.

Article 297(3) does not automatically lead to the exclusion of questions related to the sovereign rights of the coastal State with respect to the living resources in the EEZ or their exercise, but the exception has to be explicitly invoked by the coastal State. As Article 297(3) indicates, the coastal State 'shall not be obliged' to accept submission of such disputes. This leaves the coastal State the possibility to decide whether or not in a particular case to accept submission of such a dispute.

If a coastal State does not accept compulsory dispute settlement in respect of its sovereign rights with respect to the living resources in the EEZ or their exercise, the possibility of compulsory dispute settlement in respect of aspects of the dispute related to the high seas are also limited. In this case, it is not possible for a tribunal to rule on questions concerning measures established for the high seas, to the extent they also require an evaluation of measures adopted by the coastal State for areas under its national jurisdiction.

Article 31 of the Fish Stocks Agreement envisages the possibility of a court or tribunal prescribing provisional measures. Such measures can be prescribed by the court or tribunal to which a dispute has been submitted. The court or tribunal may prescribe any provisional measures it considers appropriate under the circumstances of the case to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question. If States are not able to agree on provisional arrangements pending agreement on compatible conservation and management measures, provisional measures may also be requested under Articles 7(5) and 16(1) of the Fish Stocks Agreement by any of the States concerned.

A court or tribunal may prescribe, modify or revoke provisional measures only at the request of a party to the dispute and after the parties have been given an opportunity to be heard. Although this does not require a court or tribunal to prescribe the measures as requested, it cannot go beyond what is requested by a party solely to prevent damage to the stock.

Provisional measures can be indicated in case the court or tribunal establishes that it has prima facie jurisdiction over the dispute submitted to it and the urgency of the case requires such measures. This implies that provisional measures can also be indicated in cases where it is eventually established that there is no jurisdiction in respect of the merits. If a judgment to this effect is given, the provisional measures will be revoked.

Article 29 of the Fish Stocks Agreement establishes a special procedure for disputes concerning matters of a technical nature. Recourse to this procedure is only possible with the

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266 Article 297(3)(b) does provide for the submission to conciliation of certain types of disputes related to the sovereign rights over the living resources of the coastal State in its EEZ.

267 See further Oude Elferink, note 37, p. 600; Oxman, note 264, p. 294, note 74.

268 See further Oude Elferink, note 37, p. 600. It has been suggested that a tribunal whose jurisdiction is limited to the high seas may render a judgment that limits fishing on the high seas by a State on the condition that the coastal State accepts certain limitations within its EEZ (Oxman, note 264, p. 294, note 74). Whether such an approach is possible is doubtful, as it would seem to require a finding on the exercise of the rights of the coastal State in its EEZ, something that in this case is excluded in the first place as the coastal State in this case will have relied on Article 297(3) of the LOS Convention.

269 LOS Convention, Article 290(3).

consent of all the States concerned. This procedure does not replace the binding procedures for the settlement of disputes.

**Fisheries Cases before the ITLOS, ICJ and other Tribunals**

A significant number of the cases that have been decided by the ITLOS since its inception in 1996 concern fisheries disputes. Six of these cases concerned the prompt release of fishing vessels and their crews. Under the LOS Convention, coastal States are obliged to release arrested fishing vessels and their crews upon the posting of a reasonable bond or other security. If it is alleged that the coastal State has not complied with the provisions concerning prompt release, it is possible to make an application to the ITLOS for release by, or on behalf of, the flag State of the vessel. In the cases on prompt release decided by the ITLOS, one of the principle issues that has been addressed is what constitutes a reasonable bond or other security. The ITLOS has in a number of cases indicated a lesser figure than had been established by the coastal State. This has led to the criticism that the Tribunal has not given sufficient weight to the need to deter illegal fishing activities in interpreting the term ‘reasonable’.

In the *Southern Bluefin Tuna* cases the ITLOS has indicated provisional measures to be applied by the parties to the dispute to be submitted to an Arbitral Tribunal. These measures included the setting of annual catches. Although not explicitly mentioned, the ITLOS relied on the precautionary approach in establishing provisional measures. This provides an indication as to how the ITLOS may interpret and apply the precautionary approach in future cases.

Currently, one case concerning fisheries is pending before the ITLOS: *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile-European Community)*. This case illustrates that a court or tribunal can be seized of fundamental questions of international fisheries law. The Tribunal has inter alia been requested to interpret the provisions of the LOS Convention on the regime for high seas fisheries and to establish whether the Galapagos Agreement is in consonance with inter alia Articles 64 and 116 to 119.

The ICJ has decided a number of cases which concerned fisheries. In its judgment in the *Anglo-Norwegian Fisheries* case of 1951 the Court elaborated the legal regime of straight baselines, which has been incorporated almost unchanged in the LOS Convention. In the *Fisheries Jurisdiction* cases between Iceland and the United Kingdom and Germany, the Court indicated provisional measures, including TACs. It also had to address the fundamental question concerning the law applicable to the extent of coastal State jurisdiction over fisheries. This issue was under consideration at the conference negotiating the LOS Convention. The carefully balanced answer of the Court prevented that its judgment might have obstructed these negotiations. The *Éstai* case is the latest fisheries case to have been

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271 LOS Convention, Article 73(2).
272 Under Article 290(5) of the LOS Convention, the ITLOS can indicate provisional measures pending the constitution of an arbitral tribunal to which a dispute is being submitted.
274 On this issue see also Subsection 2.10 of the report.
276 *Fisheries Jurisdiction Cases* (United Kingdom v Iceland; Federal Republic of Germany v Iceland) 1974 ICJ Reports, p. 3 and p. 175.
decided by the Court. The Court was not able to pronounce itself on the merits of this case as it found that it had no jurisdiction to adjudicate upon the dispute.

Fisheries disputes have also been addressed by ad-hoc tribunals. Reference has already been made to the decision of the Arbitral Tribunal in the Southern Bluefin Tuna cases, which has important implications for the availability of compulsory dispute settlement under the LOS Convention and the Fish Stocks Agreement. The Canada/France Fisheries arbitration of 1986 first of all concerned the interpretation of a bilateral treaty, but also touched upon the interpretation of certain fisheries provisions of the LOS Convention.

**RFMOs and Dispute Settlement**

The RFMOs under consideration have varying provisions concerning the settlement of disputes in their constitutive instruments. A number of these instruments make direct reference to the dispute settlement provisions of the LOS Convention and the Fish Stocks Agreement. This concerns the proposed Agreement to restructure CECAF (Article XVII), the SEAFO Convention (Article 24), the SWIOFC Agreement (Draft of September 2001; Article 28), and the Honolulu Convention (Article 31). In respect of these Agreements, the same conditions and limitations on the availability of compulsory dispute settlement apply as under the LOS Convention and the Fish Stocks Agreement in general. In addition, some of these instruments provide for the reference of disputes of a technical nature to an expert panel.

Other constitutive instruments do not contain a provision on dispute settlement. This concerns CECAF, GFCM, IATTC, ICCAT, NAFO, NEAFC and WEC AFC. The absence of such a provision implies, as a result of Article 30(2) of the Fish Stocks Agreement, that disputes concerning straddling and highly migratory fish stocks between member States to these organizations can be submitted to compulsory dispute settlement in case the States to the dispute are also parties to the Fish Stocks Agreement.

Finally, the constitutive instruments of CCAMLR, CCSBT and the IOTC and the Galapagos Agreement and the 1997 Agreement to amend the GFCM contain dispute settlement provisions that do not make a direct reference to the dispute settlement provisions of the LOS Convention or the Fish Stocks Agreement. The Galapagos Agreement and the 1997 Agreement to amend the GFCM provide for the possibility of compulsory dispute settlement. Only the constitutive instruments of CCAMLR and CCSBT do not provide this explicitly. As was argued above, whether the relevant provision of the constitutive instrument of CCSBT (and CCAMLR, which provided the model for the dispute settlement provision of the CCSBT Convention) makes compulsory dispute settlement under the Fish Stocks Agreement available is not altogether clear.

Dispute settlement provisions in the constitutive instruments of RFMOs that refer to the Parts on dispute settlement of the LOS Convention or the Fish Stocks Agreement or provide for reference to the ICJ make it possible to request provisional measures by one of the parties to

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277 *Spain v. Canada Fisheries (Jurisdiction)* case, 1998 ICJ Reports, p. 432.
279 This concerns the proposed Agreement to restructure CECAF, Article XVII; SEAFO Convention, Article 24; SWIOFC Agreement (Draft of September 2001), Article 28.
280 NEAFC is in the process of amending its constitutive instrument to include dispute settlement procedures. In anticipation of this formal amendment the Commission at its extraordinary meeting in April 2002 adopted rules of procedures for panels. Theses rules will be used on a provisional basis pending the formal ratification of the amendments to the NEAFC Convention (response to the questionnaire send to the secretariats of the RFMOs under consideration in this report).
the dispute. The arbitration procedures of the CCAMLR Convention, the CCSBT Convention and the Galapagos Agreement do not provide for the indication of provisional measures at the request of one of the parties.

For almost all RFMOs the disputes involving the sovereign rights of the coastal State with respect to the living resources in the EEZ or their exercise can be excluded by the coastal State from the provisions on compulsory dispute settlement. Only in the case of the IOTC is this not altogether clear, as Article XXIII of the IOTC Agreement provides that it concerns any dispute regarding the interpretation or application of the Agreement and does not indicate any limitations.\(^{281}\)

**Conclusions**

The analysis of the constitutive instruments of the RFMOs selected for this study indicates that compulsory dispute settlement is widely available. The provision in Article 30(2) of the Fish Stocks Agreement makes compulsory dispute settlement available for States that are both a party to it and members of RFMOs that do not have any provision on dispute settlement in their constitutive instrument.

Compulsory dispute settlement has been used to settle disputes in respect of RFMOs only to a limited extent. This is mostly explained by the fact that compulsory dispute settlement will only be resorted to after other means to settle a dispute have been exhausted\(^{282}\). Even where other means have been extensively explored, there may still be other considerations which might deter a State from seeking compulsory dispute settlement\(^{283}\).

It has also been pointed out that the judicial process does not lend itself easily to resolving disputes where the rights of several States are involved (who may not all be involved in the case before the judicial body), especially with regard to the establishment of conservation and management measures\(^{284}\). Moreover, a court or tribunal cannot take into account the complex extra-legal considerations which are taken into account in the framework of negotiations over access to fisheries resources. The judicial process will never be able to replace this process, nor is it intended to do so. At the same time, courts and tribunals have shown that they are able to decide on conservation and management measures, including TACs.

The overview of fisheries disputes brought to courts and tribunals shows that these may involve both the interpretation of rules of fisheries law and the establishment of conservation and management measures. With the adherence of a larger number of States to the Fish Stocks Agreement, compulsory dispute settlement will become more generally available and the number of cases has the potential to increase. Although the Fish Stocks Agreement does much to elaborate the international law of fisheries for straddling and highly migratory fish stocks, there is room for further clarification of this regime by the courts and tribunals. At the same time, these judicial bodies can be expected to be careful not to destabilize the

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\(^{281}\) However, Article XVI of the IOTC Agreement provides:
‘This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.’

\(^{282}\) For instance, the controversy over swordfish between the EC and Chile, which was submitted to dispute settlement under the WTO and the LOS Convention in 2000, has its origins in the early 1990s.

\(^{283}\) See e.g. the consideration indicated *infra*.

compromise nature of the Fish Stocks Agreement. However, in certain cases a judicial body may have to make a choice between fundamentally opposed interpretations. This may be a consideration for States not to seek adjudication of their dispute, as they may prefer uncertainty over a decision that may rule out their interpretation of the law altogether.

Whether more disputes will be submitted to compulsory dispute settlement will depend in large part on the successful implementation of the Fish Stocks Agreement at the regional level. If RFMOs are effective, they should be able to resolve most issues related to straddling and highly migratory fish stocks without recourse to third party dispute settlement. If an RFMO is ineffective, or does not meet the standards set by the Fish Stocks Agreement, States parties to the Fish Stocks Agreement can use compulsory dispute settlement as one of the options to address these issues.
3. GENERAL CONCLUSIONS

The conclusions offered in this Chapter complement the more specific conclusions drawn within each of the separate sections of Chapter 2.

The Agreement, since its adoption, has generated considerable interest. Successive resolutions of the General Assembly, FAO bodies and other fora have called for its implementation. In September 2002, the Plan of Implementation of the Johannesburg World Summit on Sustainable Development encouraged States to ratify or accede to the Agreement, and specified areas for action related to the implementation of the Agreement285. The preceding analysis also shows that, even prior to entry into force, the provisions of the Agreement were widely used as a set of guidelines through which States and RFMOs have sought to enhance their cooperation and considerable attention was given to applying its provisions. In this regard, there can be little doubt that the Agreement has been highly influential and been a catalyst for change and improvement within RFMOs.

It should be pointed out that most of the practice which has been examined in this report has occurred in relation to the Fish Stocks Agreement effectively as a non-binding instrument. The relatively recent entry into force of the Agreement and the small number of parties to it means that there is only limited State practice, through RFMOs or otherwise, under the Agreement as a binding instrument. Connected to this, is the fact that, until very recently, none of the agreements adopted since 1995 to establish new organizations have entered into force (and even in the case of SEAFO, the organization is not yet active). The entry into force of the Fish Stocks Agreement should, in principle, lead to an acceleration in application. There are a number of impediments to this, however. First, there is the fact that the Agreement currently has a relatively small number of parties and, perhaps more importantly, a number of important fishing States, including the European Community, have yet to ratify or accede to it. The future participation of these States should be viewed as a priority issue. A corollary to this is the fact that no single RFMO is composed exclusively of parties to the Agreement. The full application may thus rely on agreement to implement measures by members of RFMOs which are not party to the Fish Stocks Agreement.

Although there has been considerable progress since 1995, it is clear that considerable work remains if the provisions of the Fish Stocks Agreement are to be extensively and effectively applied in all RFMOs dealing with straddling and highly migratory fish stocks. Although the report highlights general progress in the majority of RFMOs, there are clearly many areas where the application or implementation of the Agreement could be strengthened286. These include, among others, developing controls by the flag State, the development of port State measures, more specific implementation of the precautionary approach, development of allocation criteria in all RFMOs and further assistance for developing States. It is clear that States and RFMOs can also draw on other instruments in developing these measures.

A further aspect relevant to the full implementation of the Agreement concerns regions where no organization or arrangement exists. This includes the Central and Western Pacific and the


286 It should be strongly emphasized, however, that the practice of RFMOs is in a constant state of flux. Each of the selected RFMOs has a variety of bodies operating under it that usually meet at least once a year. Moreover, as many States are members to more than one RFMO, this triggers a process of cross-fertilization of ideas that only increases the pace of change.
Southwest Indian Ocean, where progress has been slow towards, respectively, the entry into force and negotiation of instruments. In other regions, progress has been even more lacking. This concerns, inter alia, for straddling stocks, the Southwest Atlantic, the Southeast Pacific and the Caribbean, and for highly migratory stocks, the Southeast Pacific beyond the limits of the IATTC area\(^{287}\). It has been stressed on many occasions that the rights and obligations incorporated in the Fish Stocks Agreement are in principle only directed towards States and not to RFMOs or other intergovernmental organizations such as the FAO. The extent to which ongoing and future reviews of the constitutive instruments of RFMOs, or the negotiation of new constitutive instruments, use the Fish Stocks Agreement as a blue-print is therefore primarily dependent on individual States. The extent to which the Agreement attracts universal participation in the near future will be a decisive factor for this blue-print function.

Finally, in this context, consideration should also be given to the relationship between the LOS Convention and the Fish Stocks Agreement. As was pointed out in Section 1.1, the Agreement must be interpreted and applied consistently with the LOS Convention. The very general nature of the Convention’s provisions on straddling and highly migratory fish stocks, however, to some extent contrast with the detail that characterizes the provisions of the Fish Stocks Agreement. The provisions on the precautionary approach, compatibility, cooperation and developing States are pertinent examples. On one view these differences may be perceived as a departure from the LOS Convention. The better view, however, is that they should be interpreted as a progressive step in the regulation of straddling and highly migratory fish stocks in the context of the dynamic nature of international law. The Fish Stocks Agreement itself should also be placed in this context. The body of customary international law is constantly expanding as a result of the practice by States individually or through RFMOs. The more intensive and wider use of port State jurisdiction and satellite-based VMS illustrate the operation of this process. The determination of the international community to prevent, deter and eliminate IUU fishing by means of comprehensive and integrated approaches is likely to convince States and RFMOs of the need and legitimacy to develop international law even further.

\(^{287}\) United Nations, note 19, para. 38.
Annex 1 - Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)

Establishment

Convention for the Conservation of Antarctic Marine Living Resources
Canberra, 20 May 1980; in force 7 April 1982

Membership

Argentina, Australia, Belgium, Brazil, Chile, European Community, France, Germany, India, Italy, Japan, Korea (Rep. of), Namibia, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, Uruguay

Species covered

The Commission covers all Antarctic marine living resources in the Convention area, meaning the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds. Much recent attention has been focussed on Patagonian toothfish (also known as Chilean sea bass): it has not been conclusively determined by the Commission whether this stock should be treated as a straddling stock.

Geographical scope

The Antarctic Ocean in the area south of 60° South latitude and to the area between that latitude and the Antarctic Convergence. This area coincides directly with FAO statistical areas 48, 58 and 88.

Objectives and functions

The objectives of the Commission are to ensure that all harvesting and research activities are conducted in a sustainable manner; to formulate, adopt and revise conservation measures; to compile, analyse and disseminate information on the status of resources and to facilitate research activities. The Commission is empowered to undertake any activities as are necessary to fulfil the objectives of the Convention, including research, compilation and analysis of data, implementation of a system of observation and inspection and the formulation of conservation measures on the basis of the best scientific evidence available. Conservation measures include, but are not limited to, designation of catch limits for harvested species, designation of protected species, designation of open and closed seasons, designation of protected areas and regulation of the effort employed and methods of harvesting, including fishing gear, with a view, inter alia, to avoid undue concentration of harvesting in any region or subregion. The Commission also adopts measures of enforcement to deter illegal fishing by members and non-members, notably a System of Inspection, which has been in operation for several years, and a Catch Documentation Scheme for toothfish, which was introduced in May 2000.

EC Participation

The EC became a member of CCAMLR in 1981 (Council Decision (EEC) 81/691). The Convention establishing the Commission provides that certain types of international organization – including the EC – may become members. In addition to the EC, six Member
States (Belgium, France, Germany, Italy, Spain and the United Kingdom) are members. The reason for this appears to be that the subject matter of the Convention includes all living marine resources, including birds and marine mammals (and in the case of France, because it has overseas territory in the Commission area). In general, the Community has implemented CCAMLR measures, principally through a series of Regulations applying to the Antarctic. In recent years, there has been concern that overfishing has occurred by vessels flying the flag of, or beneficially owned by, EC countries.
Annex 2 – Commission for the Conservation of Southern Bluefin Tuna (CCSBT)

Establishment

Convention for the Conservation of Southern Bluefin Tuna
Canberra, 10 May 1993; entered into force on 20 May 1994

Membership

Australia, Japan, Korea, New Zealand,
(Taiwan is a member of the “Extended Commission” although for political reasons it has not formally acceded to the Convention).

Species covered

Southern bluefin tuna

Geographical scope

The Convention does not define any specific geographical area

Objectives and functions

The main objective of the Commission is to ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna. The functions of the Commission include: collecting, analysing and interpreting scientific and other relevant information on southern bluefin tuna; and adopting conservation and management measures. The member States of the Commission have agreed to several measures, designed to rebuild stocks to 1980 levels by the year 2020, although the operation of the Commission has been hampered in recent years by a dispute between the parties which has prevented important decisions from being taken. Nevertheless, in recent years CCSBT has worked on several initiatives relevant to the Fish Stocks Agreement, including the adoption of an Action Plan to address fishing by non-members, and it is in the process of developing a management procedure designed to assist in the determination of TACs and quotas.

EC participation

The EC is not a member of CCSBT and has little active interest in its activities.
Annex 3 - Fishery Committee for the Eastern Central Atlantic (CECAF)

Establishment


Membership

Benin, Cameroon, Cape Verde, Congo (Dem. Rep. of), Congo (Rep. of), Cuba, Equatorial Guinea, European Community, France, Gabon, Gambia, Ghana, Greece, Guinea, Guinea-Bissau, Italy, Ivory Coast, Japan, Korea (Rep. of), Liberia, Mauritania, Morocco, Netherlands, Nigeria, Norway, Poland, Romania, São Tomé and Principe, Senegal, Sierra Leone, Spain, Togo, United States

Species covered

The Committee covers all living marine resources within its area of competence, although in practice highly migratory species are managed by ICCAT. There are thought to be very few straddling stocks of commercial interest in the region covered by CECAF.

Geographical scope

The Eastern Central Atlantic from Cape Spartel on the Straits of Gibraltar (Morocco) to Pointe de Moita Seca on the Congo River (Dem. Rep. of Congo). This area mostly coincides with FAO Statistical Area 34.

Objectives and functions

The main objectives of the Committee are: (a) to facilitate the coordination of research and to encourage education and training; and (b) to assist its members in an advisory management capacity in establishing rational policies to promote the rational management of resources. CECAF has no regulatory powers and can only adopt recommendations to advise its members on appropriate actions. Recommendations are not binding on the Committee’s members. CECAF’s main role is to translate scientifically based conservation recommendations into recommendations for management measures for its members, particular with a view to the adoption of harmonized rules on matters such as minimum mesh sizes. One of the main issues in recent years has been whether the Committee should “upgrade” to a body established under Article XIV of the FAO Constitution, such as GFCM or IOTC, or whether it should remain as an advisory body under Article VI(2). After several years of discussion, the Committee decided at its 16th Session in October 2002 to maintain the status quo.

EC participation

The EC is a major donor entity in the African Atlantic region and has participated in CECAF’s activities for many years. It was not able to become a full member of the Committee, however, until its participation in FAO was accepted in 1991. The EC participated for the first time as a member at the twelfth session in 1992. Despite the structural changes in CECAF in the late 1990s, the EC has been able to maintain a prominent role in fisheries in the region.
Annex 4 - General Fisheries Commission for the Mediterranean (GFCM)

Establishment

Agreement for the establishment of a General Fisheries Council for the Mediterranean
Rome, 24 September 1949; in force 20 February 1952

*New agreement adopted by the FAO Council at its 113th Session (November 1997) but not yet in force*

Membership

Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, European Community, France, Greece, Israel, Italy, Japan, Lebanon, Libya, Malta, Monaco, Morocco, Romania, Serbia and Montenegro, Slovenia, Spain, Syria, Tunisia, Turkey

Species covered

The Agreement applies to all living marine resources in the area covered by the Commission.

Geographical scope

The Mediterranean, the Black Sea and connecting waters. This area coincides with FAO Statistical Area 37.

Objectives and functions

The objectives of the Commission are: to promote the development, conservation and management of living marine resources; to formulate and recommend conservation measures; and to encourage training cooperative projects. GFCM carries out various functions. These include keeping the state of Mediterranean resources under review, including their abundance and level of exploitation and to formulate and recommend appropriate measures for the rational management of these resources. Measures adopted include rules on fishing methods and gear, limits on fish sizes and closed seasons and areas. In 1997, the Commission underwent a restructuring, partly in response to the UN Fish Stocks Agreement.

EC participation

The GFCM Convention in its original form did not allow for the participation of the EC and for many years it was represented through the Member States which were members of the Commission and through its position as an observer. Following a general review of the Commission’s functions and structure in 1997, amendments to the Convention were adopted allowing the EC to participate. It acceded to the Convention in June 1998 (Council Dec. 98/416/EC). Amendments to the financial structure of the Commission were also adopted in 1997, which the EC adopted in July 2000, but these have yet to enter into force.
Annex 5 - Indian Ocean Tuna Commission (IOTC)

Establishment

Agreement for the Establishment of the Indian Ocean Tuna Commission

Membership

Australia, China, Comoros, Eritrea, European Community, France, India, Iran, Japan, Korea (Rep. of), Madagascar, Malaysia, Mauritius, Oman, Pakistan, Seychelles, Sri Lanka, Sudan, Thailand, United Kingdom, Vanuatu

Species covered


Geographical scope

The area of competence of the Commission is defined as the Indian Ocean and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean. This area coincides exactly with FAO Statistical Areas 51 and 57.

Objectives and functions

The main objectives of the Commission are to promote cooperation among its members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and to encourage sustainable development of fisheries based on such stocks. For the first few years of its operation the work of IOTC was largely taken up by organizational matters. In recent years, however, the Commission has carried out various scientific, social and economic studies and assessments, and recommended various measures on conservation, management and enforcement to its members. In particular, it is in the process of developing various measures to deal with IUU fishing, including the establishment of lists of IUU vessels, port State measures and measures to prevent the “laundering” of catches by IUU vessels.

EC participation

The EC is a major fishing entity in the Indian Ocean and it has played a prominent role in IOTC, both in the negotiating phase and in the operational phase. The EC approved the IOTC Convention in October 1995 (Council Dec. 95/399/EC) and as such was one of the early members of the Commission. Current issues of concern for the EC in IOTC include IUU fishing, the development of an inspection and control committee and levels of longline fishing by some members.
Annex 6 - Inter-American Tropical Tuna Commission (IATTC)

Establishment

Convention for the establishment of an Inter-American Tropical Tuna Commission
Washington, DC, 31 May 1949; in force 3 March 1950

Membership

Costa Rica, Ecuador, El Salvador, France, Guatemala, Japan, Mexico, Nicaragua, Panama, Peru, United States, Vanuatu, Venezuela

Species covered

The species covered by IATTC are: yellowfin and skipjack tuna; fish used as bait for tuna and other fish taken by tuna vessels.

Geographical scope

The area of competence of the Commission is defined as the Eastern Pacific Ocean. There is no precise definition in terms of longitudes and latitudes.

Objectives and functions

The main objectives of the Commission are to maintain the populations of tuna and other kind of fish taken by tuna vessels in the Eastern Pacific Ocean and to cooperate in the gathering and interpretation of factual information to facilitate maintaining the populations of these fish at a level which permits maximum sustainable catches year after year. IATTC has only played a minor role in tuna management since the 1970s, although it has continued an extensive research program. In recent years there has been some degree of reactivation of its management role, particularly as regards yellowfin tuna and the International Dolphin Conservation Program (IDCP). The latter is a program designed to reduce incidental mortality of dolphins in tuna fisheries and IATTC performs several secretariat and other organizational functions. In 1998, it also set a quota for a tuna stock, for the first time in almost 20 years, following concerns that increasing purse seine effort on floating objects and fish aggregating devices (FADs) was resulting in unsustainable harvests of small bigeye tuna.

EC participation

The IATTC Convention does not currently provide for the participation of REIOs. A protocol amending the Convention which would allow the EC to accede has been drawn up but has not yet been approved by existing members. In the meantime, the EC has sought to cooperate with IATTC and participate as an observer in IATTC meetings as an observer. It also formally applies the IDCP Agreement provisionally and has adopted a Decision allowing Spain to accede to the IATTC Convention pending Community participation (Council Dec. 1999/405/EC). In relation to Eastern Pacific tuna, it should also be noted that relations with the EC have in the past been complicated by the imposition of trade embargoes on the EC and some Member States by the United States for catching or importing tuna which failed to meet US dolphin-safe standards.
Annex 7 - International Commission for the Conservation of Atlantic Tunas (ICCAT)

Establishment

International Convention for the Conservation of Atlantic Tunas
Rio de Janeiro, 14 May 1966; in force 21 March 1969

Membership

Algeria, Angola, Barbados, Brazil, Canada, Cape Verde, China, Côte d'Ivoire, Croatia, Equatorial Guinea, European Community, France (St. Pierre et Miquelon), Gabon, Ghana, Guinea-Conakry, Honduras, Japan, Korea (Rep. of), Libya, Morocco, Namibia, Panama, Russia, São Tomé and Príncipe, South Africa, Trinidad & Tobago, Tunisia, United Kingdom (Anguilla, Bermuda, St. Helena, Turks and Caicos), United States, Uruguay, Venezuela

Species covered

The species covered by the Commission are the tuna and tuna-like species and such other species of fish exploited in tuna fishing in the Convention area that are not under the investigation of any other international organization.

Geographical scope

The Convention applies to all waters of the Atlantic Ocean and adjacent seas, including the Mediterranean Sea. There is no precise definition in terms of longitude and latitude. The longitude of 20°E is used for scientific purposes as the border between the Atlantic and the Indian Ocean.

Objectives and functions

The objectives of the Commission are to cooperate in maintaining the population of tunas and tuna-like species found in the Atlantic Ocean and the adjacent seas at levels that will permit the maximum sustainable catch for food and other purposes. The Commission is empowered to recommend management measures aimed carrying out its objective of maintaining the populations of tuna and tuna-like fishes at levels which will permit maximum sustainable catch. These measures are not binding on ICCAT members, however. Since its establishment, ICCAT has employed a wide range of tools for the conservation and management of the stocks within its competence, including total allowable catches and catch quotas, size limits, effort restriction, observer programmes, closed areas and seasons, vessel registration and information exchange, gear restrictions and enforcement measures. In recent years, it may be regarded as one of the leading organizations concerning the development of measures reflected in the UN Fish Stocks Agreement, including action against IUU fishing vessels and the development of allocation criteria.

EC participation

For many years, the EC was not able to participate fully in ICCAT as the Convention did not allow for its participation. An amendment to the Convention allowing the EC to accede was adopted in 1984, but it was not approved by ICCAT members until 1997. The EC, in November 1997, became a member shortly after the adoption of the amendment by ICCAT
(see Council Dec. 86/238/EEC). In recent years, the EC has not been in agreement with some ICCAT members concerning allowable catches and quotas. The recent adoption of multi-annual management plans and allocation criteria appears to have aided agreement, however.
Annex 8 - Northwest Atlantic Fisheries Organization (NAFO)

Establishment

Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries
Ottawa, 24 October 1978; in force, 1 January 1979

Membership

Bulgaria, Canada, Cuba, Denmark (in respect of Faroe Islands and Greenland), European Community, Estonia, France (in respect of St. Pierre and Miquelon), Iceland, Japan, Korea (Rep. of), Latvia, Lithuania, Norway, Poland, Russia, Ukraine, United States

Species covered

All fishery resources of the Convention area with the exception of sea mammals, sedentary species, and, in so far as they are dealt with by other international agreements, highly migratory species and anadromous stocks. Cod, plaice, Greenland halibut and shrimp are among the main commercial species.

Geographical scope

Northwest Atlantic Ocean, approximately north of 35° N latitude and west of 42° W longitude. It has regulatory competence only in the parts of the Convention Area beyond the limits of national jurisdiction. (This area is known as the Regulatory Area).

Objectives and functions

The main purpose of NAFO is to contribute to the optimum utilization and rational management and conservation of Northwest Atlantic fishery resources. NAFO is one of the most advanced and active regional fisheries organizations in the world. Since its formation, NAFO has adopted a wide range of measures for the conservation and management of the stocks in the Northwest Atlantic. These have included setting total allowable catches and member nation quota allocations; technical conservation measures, such as minimum fish sizes, minimum mesh sizes and chafing gear requirements; measures designed to promote and coordinate scientific cooperation; and measures of surveillance, control and enforcement, including: a Scheme of Joint International Inspection; 100 per cent observer coverage for vessels; satellite tracking of fishing vessels; dockside inspection; and a Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO.

EC participation

The EC was one of the original members of NAFO when it was established in 1978 (Council Reg. 3179/78). Throughout the organization’s history, the EC has played a determinative role. For many years, NAFO was dominated by a dispute between the EC and Canada, the principal coastal State. During this period, which ran from the mid-1980s to the mid-1990s, the EC consistently set unilateral quotas for stocks in excess of NAFO-agreed quotas. This came to an end in the mid-1990s, when moratoria were introduced for most commercial species. Since then, there has been increased stability within NAFO and progress on the development of management measures.
Annex 9 – North-east Atlantic Fisheries Commission (NEAFC)

Establishment
Convention on Future Multilateral Cooperation in the Northeast Atlantic
London, 18 November 1980; in force 17 March 1982

Membership
Denmark (for the Faroe Islands and Greenland), the European Union, Iceland, Norway, Poland, Russia

Species covered
The Commission covers all fishery resources of the Northeast Atlantic, except marine mammals, sedentary species and, insofar as they are dealt with by other international agreements, highly migratory species and anadromous stocks. Herring, mackerel, redfish and blue whiting are the principal stocks.

Geographical scope
The Commission covers the Northeast Atlantic, including dependent seas, but not the Baltic Sea and the Belts or the Mediterranean Sea and its dependent seas. This mostly corresponds with FAO Statistical Area 27.

Objectives and functions
The objects of the Commission are to ensure, through consultation and exchange of information, the conservation and the rational exploitation of fish stocks in the North-East Atlantic and adjacent waters; to encourage international cooperation with respect to these resources; and to recommend conservation measures in waters outside national jurisdiction. For many years NEAFC was a rather inactive organization and few management measures were adopted. Since the mid-1990s, however, a wide range of measures have been adopted setting rules for exploiting fish stocks, establishing a scheme for inspection and enforcement and establishing a scheme to promote compliance by non-member countries. The Commission does not have a scientific body but cooperates closely with the International Council for the Exploration of the Sea (ICES), to which it makes a financial contribution.

EC participation
The EC is a major “coastal State” in the NEAFC region, although it also has an interest in fishing outside its waters. It was one of the original members of the Commission, when it was established in 1982 (Council Dec. 81/608/EEC). In general, the EC has adhered to NEAFC measures, which have been adopted by means of Regulations. The EC is currently involved in a dispute with other NEAFC members, notably Iceland and Norway, concerning the management of blue whiting. This stock is currently largely unregulated by NEAFC.
Annex 10 - western central atlantic fisheries commission (wecafc)

Establishment

Established by the FAO Council at its 61st Session in November 1973 under Article VI(1) of the FAO Constitution: Resolution 4/61 of the FAO Council

Membership

Antigua and Barbuda, Bahamas, Barbados, Belize, Brazil, Colombia, Costa Rica, Cuba, Dominica, France, European Community, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Jamaica, Japan, Korea, Mexico, Netherlands, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Spain, Suriname, Trinidad and Tobago, United Kingdom, United States, Venezuela

Species covered

The Commission has the competence to deal with all living marine resources.

Geographical scope

All marine waters of the Western Central Atlantic Ocean. The area coincides with FAO Statistical Area 31 and part of Area 41.

Objectives and functions

The main objectives of the Commission are to facilitate the coordination of research and to encourage education and training; to assist its members in establishing rational policies to promote the rational management of resources that are of interest for two or more countries. Meetings of WECAFC in recent years have been so infrequent that WECAFC is threatened with becoming defunct. Since 1991, there has been only one meeting of the Commission and one meeting of a subsidiary body, both in 1995. At the eighth session in 1995, need for more regular, and scheduled, meetings was stressed and delegates were asked to consider a reactivation of WECAFC. However, despite these discussions, there has not been an increase in the regulatory of meetings since 1995, and no session of the Commission, although meetings for all four main bodies took place in 1999 and occasional meetings have been held subsequently.

EC participation

As a member of FAO, the EC is able to participate in meetings of WECAFC. It is formally a member, although its does not participate actively to a great extent.
Annex 11 - Organizations not yet established

Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC)

Constitutive instrument

Convention on the Conservation and Management of the Highly Migratory Fish Stocks of the Western and Central Pacific Ocean
Honolulu, 5 September 2000; not yet in force

State of ratification

Fiji, Marshall Islands, Papua New Guinea, Samoa

The Convention will enter into force 30 days after the deposit of instruments of ratification or accession by: three States situated north of the 20° parallel of north latitude; and seven States situated south of the 20° parallel of north latitude. (If, within three years of its adoption, the Convention has not been ratified by three of the ‘northern’ States it shall enter into force 6 months after the deposit of the thirteenth instrument of ratification).

Species covered

Highly migratory fish stocks, defined as all fish stocks of the species listed in Annex 1 of the LOS Convention occurring in the Convention Area, and such other species of fish as the Commission may determine.

Geographical scope

Western and Central Pacific Ocean.

Objectives

To ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the LOS Convention and the UN Fish Stocks Agreement. Several preparatory sessions have been held since the adoption of the Convention. The function of the Preparatory Conference, which will continue until entry into force of the Convention, is to lay the groundwork for the establishment of the Commission and to provide a continuum between the adoption and entry into force of the Convention.

South East Atlantic Fisheries Organization (SEAFO)

Constitutive instrument

Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean
Windhoek, Namibia, 20 April 2001; in force 13 April 2003

Parties
European Community, Namibia, Norway

Species covered

The Convention applies to all fishery resources, including fish, molluscs, crustaceans and other sedentary species, except for sedentary species subject to the fishery jurisdiction of coastal States pursuant to Article 77(4) of the LOS Convention and highly migratory species listed in Annex I of the LOS Convention. The Convention also contains measures pertaining to other living marine resources, defined to mean all living components of marine ecosystems, including seabirds.

Geographical scope

Southeast Atlantic Ocean in waters beyond areas under national jurisdiction.

Objectives

The general objective of the Convention is to ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area. Following its entry into force, an organization – the South East Atlantic Fisheries Organization – will be established. The functions and powers of this Organization closely reflect those envisaged by the UN Fish Stocks Agreement.

Galapagos Commission

The Framework Agreement for the Conservation of the Living Marine Resources of the High Seas of the South Pacific (Galapagos Agreement), signed on 14 August 2000, has the objective of the conservation of living marine resources in the high seas zones of the Southeast Pacific, with special reference to straddling and highly migratory fish populations, although it is currently only open to coastal States. The agreement is not yet in force. The Galapagos Agreement is not yet in force. In December 2002, Chile and Ecuador had ratified the Agreement while parliamentary approval in Colombia and Peru was still pending.288

South West Indian Ocean Fisheries Commission (SWIOFC)

The text of an agreement to establish the South West Indian Ocean Fisheries Commission is still under negotiation.

288 Information kindly provided by V. Carvajal Oyarzo, December 2002.
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