Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations

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Abstract

The interrelated issues of participation, allocation of fishing opportunities and combating unregulated fishing are among the main challenges faced by many regional fisheries management organisations (RFMOs) today. This article analyses the rules of international law that relate to these issues and examines relevant practice of a number of RFMOs. The potential for the institution of international dispute settlement is assessed as a consequence of this practice. One of the article's conclusions is that the formal conditions for participation indicate that RFMOs are generally open to new entrants. However, the very limited fishing opportunities that are generally available to new entrants give RFMOs overall a considerably more restrictive or exclusive character. Dispute settlement procedures are more likely to be instituted in relation to restrictive formal conditions for participation than in relation to allocation practices that are claimed to be inequitable.

Introduction

It is widely acknowledged that fisheries globally are currently under enormous stress. The legal framework for the management and conservation of marine living resources as laid down in the LOS Convention,[1] including the fundamental redistribution of resources between states, has therefore not fulfilled the high expectations for a more sustainable use of marine living resources. Whereas the

* Email. E.Molenaar@law.uu.nl. The author would like to acknowledge the generous assistance of, and/or comments by I. Hay and A. Oude Elferink on an earlier version of this article. The author remains of course responsible for the current text. All information found on the internet was available at 12 May 2003.

[1] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, (1982) 21 *International Legal Materials* 1245; www.un.org/Depts/los.

THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW, Vol 18, No 4

causes for the present global fisheries crisis are varied, they ensue to a large extent from the fundamental characteristics of marine fish, namely that they are a common property and renewable natural resource that is incapable of being spatially confined. The shortcomings of international law, including the LOS Convention, in dealing with these characteristics and the transboundary nature of most fish stocks led to the adoption of several international instruments in the 1990s. The Fish Stocks Agreement[2] is particularly relevant in this context. Whereas the Agreement uses several general provisions of the LOS Convention as a point of departure, it is much more detailed and focused and has incorporated several progressive developments in international law, such as the precautionary approach. The Agreement accords regional fisheries management organisations (RFMOs) a key role in managing straddling and highly migratory fish stocks.

Among the main issues that RFMOs have been dealing with in recent years are participation in RFMOs, allocation of fishing opportunities and unregulated fishing. This article examines these issues in the context of international law. The next section begins with some observations on the linkages between participation, allocation and unregulated fishing. Each of these issues is then examined in separate sections. The practice of RFMOs is given a prominent place even though it is not claimed to be comprehensive and is primarily used by way of illustration. In view of the three issues on which this article focuses, consideration is only given to RFMOs that deal with straddling fish stocks or highly migratory fish stocks. Comparing their practice with that of other ''types'' of RFMOs, for instance those managing shared stocks, would not make much sense as the selected issues are fundamentally different for those RFMOs. Neither is account taken of ''arrangements'' in the sense of Article 1(1)(d) of the Fish Stocks Agreement nor of organisations that mainly have an advisory role, for instance the advisory bodies established under Article VI(1) or (2) of the Constitution of the United Nations Food and Agriculture Organization (FAO).[3] After some brief attention to issues of dispute settlement, the article ends with some conclusions.

Linkages Between Participation, Allocation and Unregulated Fishing

The close relationship between the issues of participation, allocation and unregulated fishing within RFMOs is *inter alia* reflected in Article 8 of the Fish Stocks Agreement. Paragraph (3) builds on the straddling and highly migratory species provisions of the LOS Convention by stipulating that ''States shall give effect to their duty to co-operate'' by becoming members of RFMOs or ''by

[2] 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, New York, 4 December 1995. In force 11 December 2001, (1995) 34 *International Legal Materials* 1542; www.un.org/Depts/los.

agreeing to apply the conservation and management measures'' of such RFMOs. The same paragraph links this obligation to the right of states with a ''real interest'' to become members of RFMOs 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 (co-operating non-members).

An important consideration for non-members of RFMOs that 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. However, due to the current over-capacity in marine capture fisheries, fishing opportunities are often already fully utilised or will be so in the near future. Allocations to ''new entrants'' thus usually mean reduced allocations to existing members. New entrants are here treated as flag states that want to commence fishing in the 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 to new entrants are perceived as inequitable, they are tempted to stay outside RFMOs and thereby maintain or increase their catch. This latter fishing activity is known as ''unregulated fishing''.

The earliest formal use of the acronym IUU (illegal, unreported and unregulated) at the international level seems to have taken place within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in 1997.[4] The year thereafter it was also used by the International Commission for the Conservation of Atlantic Tunas (ICCAT)[5] and from then on more and more frequently in many international institutions.[6] The IPOA on IUU Fishing[7] is the first global instrument that defines the individual components, but not IUU as a whole. Paragraph 3.3 of the IPOA contains a *chapeau* with the text ''Unregulated fishing refers to fishing activities . . .'', after which paragraph 3.3.1 continues:

> ''. . . 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.''

[3] Text available at www.fao.org/legal.
[4] See, *inter alia*, Doc. CCAMLR-XVI, paras 8.7–8.13. See also note 27 below.
[5] See e.g. ICCAT Resolutions 98–18, 99–11 and 99–12. See also note 26 below.
[6] See D.J. Doulman, ''Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action'', paper (AUS:IUU/2000/4) presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organised by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000, text at www.affa.gov.au, at p. 10.
[7] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus by FAO's Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001; text available at www.fao.org/fi.

The status and meaning of the term "unregulated fishing" within the IPOA on IUU Fishing cannot be examined in detail here.[8] Worth noting is nevertheless that paragraph 3.3.1 must be read together with paragraphs 3.3.2 and 3.4 and probably also with various other provisions in the IPOA. More important even is the fact that the IPOA is not a legally binding instrument[9] and that the "toolbox" of measures to deter IUU fishing does not distinguish between the three components. However, for the purpose of this article, which focuses on RFMOs, unregulated fishing is understood to be the fishing activities referred to in paragraph 3.3.1 of the IPOA.

As unregulated fishing occurs in disregard of an RFMO's conservation and management measures, it usually gives competitive advantages and increases the risk of over-exploitation due to ignored catch or effort limitations and often leads to unsustainable fishing practices with ecosystem effects.[10] Moreover, as only members have to bear the burden of conservation measures, frustration with this inequality may tempt them to opt-out from decisions by RFMOs, in particular those on allocation. All this undermines the effectiveness of an RFMO and may even lead to its collapse. An RFMO's measures to deter unregulated fishing are designed to compel non-members to either co-operate more closely with the RFMO or stop fishing altogether.

The crux of the dilemma of unregulated fishing lies in the principle of *pacta tertiis*. This fundamental principle of international law provides that states cannot be bound by rules of international law unless they have in one way or another consented to them.[11] This not only imposes considerable restraints on law formation but also tempts states to ignore commitments made by others and enjoy "free rider" benefits. As these benefits can in principle be enjoyed by all nationals of a state, both natural and legal persons, obtaining the nationality of a free rider state is attractive.[12] General international law and the LOS Convention moreover give states a wide discretion in deciding on the conditions that vessels must meet to register with it (fly its flag or obtain its nationality). The requirement of a "genuine link"[13] between a state and its vessels is broadly accepted as meaning "no more" than that flag states must exercise effective jurisdiction and control over them.[14]

[8] See, *inter alia*, W. Edeson, "The International Plan of Action on Illegal, Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument", (2001) 16 *International Journal of Marine and Coastal Law* 603–623.

[9] See in this context the comment by the EC in the *Report of the 24th Session of COFI* (FAO Doc. CL 120/7, at para. 98).

[10] See, for instance, Doc. CCAMLR-XXI, para. 6.8 where CCAMLR notes the improvements in the levels and rates of seabird bycatch by "legal" operators, but expresses concern over estimates of potential seabird bycatch by IUU vessels.

[11] See, *inter alia*, Art. 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969. In force 27 January 1980, 1155 *United Nations Treaty Series* 331).

[12] See, however, para. 19 of the IPOA on IUU Fishing.

[13] Art. 91(1) of the LOS Convention.

[14] This was, *inter alia*, confirmed by the International Tribunal for the Law of the Sea (ITLOS) in the M/V *Saiga* case (the M/V *Saiga* case (No. 2) (*Saint Vincent and the Grenadines* v *Guinea*), Judgment of 1 July 1999; text at www.itlos.org) at para. 83.

Sadly enough, there is no multilateral agreement on a minimum level of effectiveness or on the consequences if effectiveness should fall below that level.

The distinctions between reflagging, flags of convenience, bare-boat chartering and vessel chartering should also be clarified. Reflagging gives owners or operators of fishing vessels the possibility to change the flag (nationality) of their ships and thereby make use of the new flag state's rights and freedoms relating to fisheries under international law.[15] Bare-boat chartering refers to situations where the change of flag only has a fixed 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 and expertise, all these flexible options provide opportunities for sharing in the marine living resources of the high seas. Provided that these states also take account of their responsibilities in relation to the long-term sustainability of these resources, the term "flag of convenience" does not necessarily have a negative meaning.

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 their responsibilities. These states will use the term "flag of convenience" in a very negative sense. It cannot be denied that some owners or operators intentionally reflag their fishing vessels to states that are either unwilling or incapable of exerting effective control over these vessels. A good example is the sudden popularity of the Bolivian flag for large-scale longliners targeting tuna in the Atlantic in 2001 and 2002.[16] The irony is, of course, that the responsibility for the abuse of flags of convenience lies to a considerable extent with these "traditional fishing" states' own nationals and companies.[17] Their preoccupation with the short-term benefits derived from abusing fundamental constraints of international law is expected to lead to overall losses on the medium and long term. The recently introduced acronym "FONC" (Flag Of Non Compliance) not only has the advantage of avoiding the political sensitivities attached to terms like "flag of convenience" but also that it can apply both to members and non-members of RFMOs.[18]

[15] Arts. 2, 49, 56(1)(a), 77(1) and 116 of the LOS Convention.

[16] See ICCAT Recommendation 02-17 which recommends an import prohibition on Atlantic bigeye tuna from Bolivia.

[17] See, for example, Greenpeace International, "Pirate Fishing Plundering the Oceans and Pirate Fishing Plundering West Africa" (February 2001 and September 2001; available at archive.greenpeace.org/~oceans), which all discloses information on beneficial ownership.

[18] See CCAMLR Resolution 19/XXI and para. 13 of the *FAO Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (Rome, Italy, 4–6 November 2002).

Participation

Whereas the LOS Convention does not address the issue of participation in RFMOs, Article 8(3) of the Fish Stocks Agreement provides: ''States having a real interest in the fisheries concerned may become members'' of RFMOs. Membership of RFMOs is therefore 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.[19] From the structure of Article 8(3) it can nevertheless 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 probably be 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 regarded as having a real interest. 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 in particular 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 opposing harvesting outnumber those in support.[20] 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 states of either category as such from membership to RFMOs.[21]

Practice of RFMOs

An examination of the conditions for membership of various RFMOs[22] shows that there are different types of conditions. First of all, conditions may relate to membership of other international organisations or to the nature of participa-

[19] For a more extensive analysis see E.J. Molenaar, ''The Concept of 'Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms'', (2000) 15 *International Journal of Marine and Coastal Law* 475–531. 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.

[20] See P. Örebech, K. Sigurjonsson and T.L. McDorman, ''The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement'', (1998) 13 *International Journal of Marine and Coastal Law* 119–141, at p. 122. See also note 62 below and accompanying text.

[21] See Molenaar, note 19 above, at pp. 496–498.

[22] This analysis draws on the study ''The Implications of the UN Fish Stocks Agreement (New York, 1995) for Regional Fisheries Organizations and International Fisheries Management'', commissioned by the Division for Agriculture, Regional Policy, Transport and Development, Directorate-General for Research of the European Parliament, and carried out by C. Hedley, E.J. Molenaar and A.G. Oude Elferink, *Final Report*, 31 January 2003.

tion. Only the NEAFC Convention[23] does not impose any conditions of this kind.[24] Secondly, applications are occasionally only successful if approved by the existing membership.

As regards the first issue, stipulating membership of other international organisations, such as the FAO, the UN or any of its specialised agencies, as a condition for membership of RFMOs is typical for FAO bodies.[25] ICCAT also takes this approach.[26] In view of the wide participation in these organisations this will hardly ever cause problems. With respect to the nature of participation, membership is commonly limited to relevant coastal states or flag states. Whereas CCAMLR explicitly provides also for membership based on scientific interests,[27] applications on that basis might be approved by ICCAT and the North-East Atlantic Fisheries Commission (NEAFC)[28] as they do not impose substantive conditions in this sense.[29]

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 (or have) done so. But as such fishing activity may qualify as unregulated fishing, this may trigger deterring measures. However, some RFMOs have not yet adopted such measures and other approaches exist as well. The WCPFC Convention,[30] for instance, uses

[23] Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 *United Nations Treaty Series* 129; www.neafc.org.

[24] Art. 20(4). Whereas no substantive conditions exist for acceding to the NAFO Convention (Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries, Ottawa, 24 October 1978. In force 1 January 1979, 1135 *United Nations Treaty Series* 369; www.nafo.ca; see Arts. IV(1) and XII(4)), membership of the Fisheries Commission, the main management body within the North-West Atlantic Fisheries Organization (NAFO), 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 General Council meeting or during the following calendar year (Art. XIII(1)).

[25] See, *inter alia*, Arts. I(2) and XI(2) of the 1949 GFCM Agreement (Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Rome, 24 September 1949. In force 20 February 1952, 126 *United Nations Treaty Series* 239; amended version available at www.fao.org/fi/body/rfb/GFCM/gfcm_basic.htm. The new GFCM Agreement that was adopted by the FAO Council at its 113th Session in November 1997 is not yet in force (text at www.oceanlaw.net)) and Art. IV(1) of the IOTC Agreement (Agreement for the Establishment of the Indian Ocean Tuna Commission, Rome, 25 November 1993 (105th Session of the FAO Council). In force 27 March 1996, www.iotc.org).

[26] Art. XIV(1) and (4) of the ICCAT Convention (International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, 14 May 1966. In force 21 March 1969, (1969) *United Nations Treaty Series* 9587; www.iccat.es), as amended by its 1984 Protocol (available at www.iccat.es).

[27] Arts. VII(2) and XXIX of the CCAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, (1980) 19 *International Legal Materials* 837; www.ccamlr.org).

[28] See note 23 above.

[29] See also note 24 above.

[30] Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. Not in force, (2001) *Law of the Sea Bulletin* 45, 79–111; www.ocean-affairs.com.

the words "wish to conduct fishing", which means that prior unregulated fishing is not required for membership.[31] A similar result is achieved by the NAFO Convention,[32] 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.[33] Finally, due to the many ambiguities in relevant definitions in the Galapagos Agreement,[34] flag states that apply for membership are quite uncertain about their chances of success.[35]

Attention should here again be drawn to the linkage between the issues of membership and allocation. South Korea (ROC) and Taiwan negotiated extensively with the existing members of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT)[36] to ensure they obtained quotas before acceding.[37] Applications for membership to the NAFO Fisheries Commission will not succeed if the prospective member has no allocation.

The fact that applications for membership sometimes require the approval of the existing membership is of considerable concern for the "openness" of RFMOs.[38] 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-thirds 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.[39] As

[31] Art. 35(2) of the WCPFC Convention.

[32] See note 24 above.

[33] See note 27 above. Note that membership of CCAMLR is not a precondition for acceding states to the CCAMLR Convention that commence relevant fishing activity; at least not for a while (see CCAMLR COM Circ 03/31 on the participation of the Netherlands Antilles in the Catch Documentation Scheme (CDS)). Note also Art. 8(4)(d) of the CCSBT Convention, note 36 below, 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.

[34] Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, Santiago, 14 August 2000. Not in force, (2001) *Law of the Sea Bulletin* 45, 70–78; www.oceanlaw.net/texts/index.htm.

[35] See, *inter alia*, Arts. 1(3) and (4), 16(2) and 19(1).

[36] Established by the CCSBT Convention (Convention for the Conservation of Southern Bluefin Tuna, Canberra, 10 May 1993. In force 20 May 1994, 1819 *United Nations Treaty Series* 360; www.ccsbt.org).

[37] See the *Report of the 8th CCSBT Meeting* (2001), at pp. 2–3.

[38] Obtaining the status of full participant in the negotiation phase of a new RFMO is also of crucial significance as this automatically gives a right to become a contracting party. Worth noting here is that in the negotiations of the WCPFC Convention, the EC only managed to become an observer, and in the negotiations of the Galapagos Agreement the EC was not invited at all (see Molenaar, note 19 above, pp. 509–514).

[39] Cf. W. Edeson, "Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches" in Nordquist, Moore and Mahmoudi (eds.), *The Stockholm Declaration and Law of the Marine Environment* (The Hague, London, New York, Martinus Nijhoff Publishers, 2003), pp. 165–182, at p. 179. See in this respect the provisions for cost sharing, e.g. Art. XIII(4) of the IOTC Agreement, note 25 above, and Art. XIII(3) of the 1997 GFCM Agreement, note 25 above.

most states are nowadays 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 the Inter-American Tropical Tuna Commission (IATTC),[40] NEAFC, the Western and Central Pacific Fisheries Commission (WCPFC)[41] and, to a lesser extent, NAFO. As the European Community (EC) has experienced with IATTC, approval may be very slow.[42] It is often obscure why states withhold their approval or take so long in granting it. A situation like that within NAFO, where admission to the Fisheries Commission is decided by voting during General Council meetings has at least the advantage of expeditiousness. Mention should finally be made of the fact that even though the constituent instrument of an RFMO may not explicitly contain an approval procedure for new applicants, in exceptional circumstances this may still occur.[43] The difficulties experienced by Iceland in rejoining the IWC Convention[44] with a reservation to the moratorium on whaling illustrate this.[45]

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.[46] As the Agreement does not define the concept of real interest, approval can be regarded as a method for ascertaining the presence of real interest. A substantial violation of Article 8(3) can only arise in relation to an actual application for membership (or a request to be invited for membership)

[40] Established by the IATTC Convention (Convention for the Establishment of an Inter-American Tropical Tuna Commission, Washington, DC, 31 May 1949. In force 3 March 1950, 80 *United Nations Treaty Series* 4; www.iattc.org). At the time of writing, the Working Group on the IATTC Convention, which prepares a modernised version of the Convention, had not yet concluded its work.

[41] See note 30 above.

[42] 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 No. L155/37). 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. The new IATTC Convention that is currently in the drafting stage would allow the EC to sign and become a party once it enters into force, and is considerably more open to new parties with vessels fishing in the region to join the Commission (information provided by B. Hallman, IATTC, December 2002).

[43] See also Art. VII(d) of the CCAMLR Convention.

[44] International Convention for the Regulation of Whaling, Washington, DC, 2 December 1946. In force 10 November 1948, 161 *United Nations Treaty Series* 72; www.iwcoffice.org.

[45] After a complex series of (procedural) votes taken at the 5th Special Meeting of the IWC on 14 October 2002, Iceland effectively rejoined the IWC. This now means that a small majority of the IWC membership takes the view that the IWC has no competence to decide on requests for adherence to the IWC Convention. In light of the previous Icelandic participation in the IWC Convention, the correctness of this decision is not beyond question (see also Art. 20(3) of the 1969 Vienna Convention, note 11 above, and the info at www.iwcoffice.org and www.high-north.no).

[46] Edeson, note 39 above, p. 178, n. 13, 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.

in the light of the undefined concept of real interest.[47] 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.[48]

The above analysis indicates that the examined RFMOs are ''generally open'' to new applicants.[49] Many conditions for membership are not restrictive for new applicants. Very relevant in this context is also the fact that a growing number of RFMOs embrace the concept of co-operating non-members.[50] Co-operating non-members can participate in meetings of RFMOs, often receive allocations of fishing opportunities and are exempt from the measures to deter unregulated fishing. Whereas CCSBT, IATTC, ICCAT, the Indian Ocean Tuna Commission (IOTC)[51] and NEAFC already (effectively) use this concept, the South-East Atlantic Fisheries Commission (SEAFC)[52] may do so once it becomes operational.[53]

Allocation of Fishing Opportunities

As an RFMO's core objective is to avoid over-exploitation of the target stocks, one of its principal functions is to allocate fishing opportunities. Even though the use of ''shall'' in the *chapeau* of Article 10 of the Fish Stocks Agreement implies a legal obligation to do so, it is in fact in the long-term interests of all states to address the allocation issue in a mutually satisfactory

[47] Edeson, note 39, p. 179 takes more or less the same view in relation to FAO, Art. XIV (fisheries) bodies.

[48] See also the section ''Issues of Dispute Settlement'' below.

[49] A.K. Sydnes, ''Regional Fishery Organizations: How and Why Organizational Diversity Matters'', (2001) 32 *Ocean Development & International Law* 349–372, at p. 357 seems to answer this question negatively.

[50] This is consistent with para. 83 of the IPOA on IUU Fishing.

[51] See note 25 above.

[52] To be established by the SEAFO Convention (Convention on the Conservation and Management of the Fishery Resources in the South-East Atlantic Ocean, Windhoek, 20 April 2001. Not in force, www.oceanlaw.net).

[53] See, *inter alia*, *Report of the 9th CCSBT Meeting* (2002), para. 19 which refers to a pending resolution on co-operating 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; *Reports* of the 20th Annual NEAFC Meeting (2001), section 12 and the 21st Annual NEAFC Meeting (2002), section 13; 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, note 70 below, essentially excludes fishing opportunities for (further) new entrants (para. 13 does not apply to new entrants; para. 10.1 contains a footnote which recognises that France (as a coastal state) has expressed an interest to develop its tuna fishery; see also note 82 below). Although CCAMLR Conservation Measure 10-05 (2002) allows non-parties to participate in the CDS, this is not intended to apply to states actually fishing for toothfish.

manner.[54] The term ''allocation of fishing opportunities'' is chosen as a general term to capture different methods of allocation. For instance, by means of dividing the total allowable catch (TAC) in national allocations, by providing maximum levels of national fishing effort or simply by means of a so-called ''Olympic-style'' fishery. In the latter situation, a ''race for the fish'' ends with the closure of the fishing season as soon as the TAC is reached. 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[55] but also has its disadvantages, for instance those related to very short fishing seasons that are caused by low TACs and a large number of participants.[56]

Prior to examining the allocation practices of RFMOs, it is important to be aware of the very limited guidance that international law currently offers in this respect. Neither the LOS Convention nor the Fish Stocks Agreement contains a fundamental norm that is capable of acting as a benchmark for the allocation process.[57] The LOS Convention effectively does no more than confirm the respective rights of states in their different capacities.[58] On account of its sovereignty or sovereign rights over the living marine resources in its maritime zones, the coastal state has practically exclusive powers over regulating access to these resources.[59] This also applies to straddling and highly migratory fish stocks within its maritime

[54] The *Report of the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks*, FAO Doc. FIPP/R695 (En) (2002), at para. 47 observes: ''It has to be recognised that each and every participant in a cooperative arrangement must anticipate receiving long term benefits from the cooperative arrangement that are at least equal to the long term benefits, which it would receive, if it refused to cooperate.''

[55] See note 74 below and accompanying text with respect to ICCAT.

[56] Within CCAMLR this is starting to become a problem for more and more fisheries (see CCAMLR-XXI (2002), paras. 9.5; see also note 68 below).

[57] Para. 19 of the ICCAT Criteria for the Allocation of Fishing Possibilities (ICCAT Allocation Criteria; available at 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 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.

[58] See Arts. 56(1)(a) and (3), 77(4) and 116 of the LOS Convention.

[59] Pursuant to Art. 62(2) and (3) of the LOS Convention, coastal states have an obligation to give access to the surplus in the TAC of the EEZ, whereas other states have a right to participate in the exploitation of this surplus pursuant to Arts. 69 and 70 of the LOS Convention. The wording of these provisions, in particular the ground of ''other national interests'' in Art. 62(3), and the limitation on compulsory dispute settlement procedures entailing binding decisions in Art. 297(3), LOSC, makes it clear that flag states are virtually powerless against the coastal state's wide margin of discretion. State practice after the adoption of the LOS Convention confirmed this.

zones.[60] However, it is essential that allocations for transboundary stocks are jointly agreed upon by all the states involved. The coastal state's wide margin of discretion in regulating access to its maritime zones cannot be used in disregard of its duties to co-operate with respect to transboundary stocks. A coastal state therefore has to respect an allocation that is agreed upon at the (sub-) regional or global level, provided the allocation and the way by which it has been agreed are in keeping with the relevant rules of international law.

The Fish Stocks Agreement merely lists criteria that are relevant for the allocation issue without prioritising or otherwise suggesting how they are to be applied.[61] It concerns:

(1) subparagraphs (d) and (e) of Article 7(2), which are part of the exhaustive list of criteria that have to be taken into account to ensure compatibility;
(2) the list of allocation criteria in Article 11 that members of RFMOs shall take into account in determining the nature and extent of participatory rights for new entrants; and
(3) Article 24(a) which concerns the special requirements of developing states.

Whereas the term "nature" in the *chapeau* of Article 11 presumably refers to the type of participatory rights, the "extent" presumably refers to their size. 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.[62] In this last 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 the word "shall", which thereby establishes 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. 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. Wider use of the concept of "zonal attachment" could in limited situations enhance the objectiveness and predictability of the allocation process.[63]

[60] Some states, including the United States, initially took the view that these wide coastal state powers did not extend to highly migratory species.
[61] Cf. FAO Doc. FIPP/R695, note 54 above, at para. 49.
[62] Cf. D.A. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1996) 27 *Ocean Development & International Law* 125–151, at p. 139, n. 97.
[63] See, *inter alia*, Art. 7(2)(d) of the Fish Stocks Agreement, Criterion No. 7 of the ICCAT Allocation Criteria (note 57 above), and E.J. Molenaar, "The South Tasman Rise Arrangement

General Practice of RFMOs

The practice of RFMOs in allocating fishing opportunities diverges considerably. Some RFMOs have up until now not allocated fishing opportunities. The General Fisheries Commission for the Mediterranean (GFCM)[64] and IOTC are examples of these.[65] The Galapagos Agreement, SEAFC, the South-West Indian Ocean Fisheries Commission (SWIOFC)[66] and WCPFC are still not operational. Their constituent instruments generally provide for establishing national allocations or levels of fishing effort.[67] CCAMLR determines TACs for specific species in specific geographic areas and, instead of establishing national allocations, uses an Olympic fishery.[68] National allocations in the form of quotas are, *inter alia*, used by CCSBT.[69]

Many other RFMOs use a variety of methods to allocate fishing opportunities. Measures used by IATTC to avoid over-exploitation include area and seasonal closures, by-catch limits, TACs linked to an Olympic fishery and, most importantly, limitations on fleet capacity.[70] Whereas ICCAT commonly uses its wide mandate[71] by means of TACs and national

contd.
of 2000 and other Initiatives on Management and Conservation of Orange Roughy'', (2001) 16 *International Journal of Marine and Coastal Law* 77–124, at pp. 93–94. FAO Doc. FIPP/R695, note 54 above, at p. 9 questions the usefulness of zonal attachment as an allocation criterion. It was not explicitly discussed at the 2003 COFI Meeting.

64 See note 25 above.

65 Even though 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. 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 and 01/04 by which fishing effort limitations are envisaged. Except perhaps for bigeye tuna, the status of the Indian Ocean tropical tuna stocks is also not yet regarded as requiring stringent fishing effort control. By means of IOTC Resolutions 02/06 and 02/07, an IOTC Vessel Register may be established which may eventually lead to a similar situation as under the IATTC (see note 70 below). Note that none of the advisory FAO fishery bodies allocates fishing opportunities either.

66 Negotiations on an agreement to establish SWIOFC are still under way. At the time of writing the author had access to a draft text of September 2001. The next meeting was scheduled for September 2003, although the venue had not yet been decided.

67 See Arts. 6 and 11(a) of the Galapagos Agreement; Arts. 6(3)(c) and 20(2) of the SEAFO Convention; Art. 6bis(13) of the September 2001 Draft SWIOFC Agreement; and Art. 10(a) of the WCPFC Convention.

68 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 41-04 (2002) and 41-06 (2002)) and in relation to the developed fishery in statistical sub-area 48.4 (information obtained from D. Miller, CCAMLR, 15 November 2002).

69 Art. 8(3)(a) of the CCSBT Convention.

70 Art. II(5) of the IATTC Convention; the IATTC Resolution on Bigeye Tuna, of June 1998; and the Resolution on Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean, of June 2002.

71 Art. VIII(1)(a) of the ICCAT Convention.

quotas,[72] it sometimes also uses vessel effort limitations[73] and even Olympic fisheries.[74] The NAFO Fisheries Commission uses its wide mandate[75] commonly by way of TACs and national quotas, but limits also exist in the form of a maximum number of vessels or fishing days[76] or Olympic fisheries.[77] NEAFC uses a wide range of methods to allocate fishing opportunities, including by means of TACs and national quotas.[78]

In view of the conclusion drawn in the previous section that RFMOs are generally open to new entrants, attention should be drawn to the 1999 NAFO Resolution to Guide the Expectations of Future New Members with regard to Fishing Opportunities in the NAFO Regulatory Area.[79] This essentially tells new entrants that they should expect minimal allocations when joining NAFO.[80] A recommendation to guide the expectations of new members to NEAFC will be discussed during the May 2003 meeting of the NEAFC Working Group on the future of NEAFC.[81] Whether it is to have a similar content is difficult to say, especially in light of the fact that unlike NAFO, NEAFC effectively reserves small allocations for non-members. 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 Register.[82] 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.

Whether or not particular allocation practices are in fact equitable is a separate issue. In view of the many factors and criteria (see below) that are

[72] See e.g. ICCAT Recommendations 98-05, 98-07, 99-02, 00-9 and 01-05.
[73] See e.g. ICCAT Recommendation 00-1.
[74] 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. These recommendations were caused by the difficulty in actually implementing the ICCAT Allocation Criteria.
[75] Art. XI(2) of the NAFO Convention.
[76] E.g. in relation to shrimp in Division 3M of the NAFO Regulatory Area (NAFO Conservation and Enforcement Measures, Part I(G)).
[77] This *inter alia* applies to the "Others" category and the block quotas to Estonia, Latvia, Lithuania and Russia (see the 2003 Quota Table, attached to the Press Release of the 24th Annual NAFO Meeting (2002)).
[78] Art. 7 of the NEAFC Convention.
[79] GC Doc. 99/9, Annex 13.
[80] New members can fish under the "Others" quota. See note 77 above.
[81] *Report of the 21st Annual NEAFC Meeting* (2002), p. 36. A preliminary version of this recommendation seems to be incorporated in FAO Doc. FIPP/R695, note 54 above, at pp. 12–13.
[82] See note 53 above. 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 rights.

relevant to the allocation process, it will not often occur that a particular process is obviously non-equitable. However, if such a verdict is passed on a process at all, it will most likely be one where new entrants are not offered (prospects of) fishing opportunities at all.[83] Where the allocations offered are relatively small but nevertheless equitable in view of all the relevant circumstances, new entrants should in fact rethink their intentions in light of the costs related to exercising effective flag state control and co-operation with relevant RFMOs and, quite importantly, the current deplorable status of marine capture fisheries worldwide.

Allocation Criteria Used or Recognised by RFMOs

Whereas many RFMOs traditionally established national allocations predominantly on the basis of historical catches, the list of allocation criteria in Article 11 of the Fish Stocks Agreement is expected to change the allocation process fundamentally. A good example is ICCAT, which used historical catch as the main allocation criterion but, as the number of new entrants increased, 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 into 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.

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.[84] 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 were depressing as no national quotas could be agreed on for the eligible stocks in 2001 so that an Olympic fishery proved to be the only viable solution. The 2002 allocation process turned out to

[83] See in this respect the realistic objective of progressive implementation of the ICCAT Allocation Criteria (note 57 above), at para. 21.
[84] Cf. FAO Doc. FIPP/R695, note 54 above, at para. 49.

be more successful,[85] perhaps due to fears for a repetition of the previous year's events.

The review of NAFO allocation practices that was started in 1997[86] has not yet been formally concluded. No meetings were held in 2001 and 2002 as there was insufficient support for the review, partly in light of the limited fisheries in the NAFO Regulatory Area.[87] However, a meeting held in March 2003 made some progress by elaborating Draft Guidelines for Future Allocation of Fishing Opportunities for Stocks Not Currently Allocated.[88] Even though these may enable new entrants without a track record to obtain fishing opportunities, the limited scope of these guidelines clearly contrasts with the ICCAT Allocation Criteria.[89] NEAFC has so far not attempted to undertake a general review of its allocation process.

The SEAFO Convention[90] and the WCPFC Convention are both to a great extent inspired by the Fish Stocks Agreement. Both contain lists of allocation criteria that are largely drawn from Article 11 of the Fish Stocks Agreement, even though the order is changed, the wording somewhat amended and some criteria added.[91] The allocation criteria used by RFMOs whose constituent instruments were (largely) negotiated prior to the negotiation of the Fish Stocks Agreement understandably show little resemblance with those in Article 11 of the Fish Stocks Agreement. Many RFMOs, such as CCSBT,[92] IATTC,[93] NAFO[94] and NEAFC[95] have nevertheless either used or recognised various different allocation criteria. As the participation in the Fish Stocks Agreement becomes more universal, states co-operating in RFMOs may feel compelled to treat the list of Article 11 as a minimum. However, as the nature of allocation processes is largely one of negotiation, the role played by individual allocation criteria should not be overestimated. Greater use of "side payments" to broaden the negotiation process is even advocated to enhance its flexibility and resilience over time.[96]

[85] See e.g. ICCAT Recommendations 02-02, 02-05 and 02-08.
[86] For the Terms of Reference of the Allocation Working Group see GC Doc. 99/4, Annex 2.
[87] NAFO *Annual Report 2000*, p. 100.
[88] Info from www.nafo.ca and H. Koster, EC Commission (May 2003). The report of the meeting was not publicly available at the time of writing.
[89] See note 79 above and accompanying text.
[90] See note 52 above.
[91] See Art. 20 of the SEAFO Convention and Art. 10(3) of the WCPFC Convention.
[92] Art. 8(4) of the CCSBT Convention.
[93] However, the allocation criteria mentioned in the Fleet Capacity Resolutions of June 1998 and October 1998 (para. 1), which are now obsolete, are no longer relevant under the Fleet Capacity Resolution of June 2002.
[94] Art. XI(4) of the NAFO Convention.
[95] See the *Report of the 19th Annual NEAFC Meeting* (2000), Annex D.
[96] Cf. FAO Doc. FIPP/R695, note 54 above, at para. 46.

Deterring Unregulated Fishing

Although unregulated fishing was not a new issue, the global legal framework did not seriously address the issue until the early 1990s. The LOS Convention does not accord RFMOs such a pivotal role as the Fish Stocks Agreement. It merely requires states involved in fishing on the high seas or for transboundary stocks to co-operate with each other but the form of such co-operation is at their own discretion.[97] Moreover, the consequences for a failure to co-operate were not clearly spelled out.

This contrasts with the Fish Stocks Agreement, which reserves fishery access on regulated straddling and highly migratory stocks to members and co-operating non-members of RFMOs (Articles 8(4) and 17(2)) and incorporates a number of other provisions relevant to unregulated fishing. Quite innovative are Articles 17(4) and 33(2). The first is aimed against non-members of RFMOs that undermine those organisations' effectiveness and the second against detrimental activities of vessels flying the flag of non-parties to the Agreement. The specific measures that are to be taken must be in accordance with the Agreement and international law. This thereby transforms already existing discretionary powers under general international law into a mandatory treaty obligation for states parties to the Agreement. Moreover, as between states parties to the Agreement, Article 17(4) creates in two instances powers that do not exist under general international law.

First, the 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 example 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 state's 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.

Practice of RFMOs

Many of the constituent instruments of RFMOs incorporate the substance of Article 33(2) of the Agreement.[98] Unregulated fishing is generally dealt with by means of a two-tier approach.[99] The first tier is based on the need for co-

[97] See the frequent use of phrases such as "either directly or through appropriate subregional or regional organizations" in Arts. 63, 64(1), 66(5) and 118 of the LOS Convention.

[98] E.g. Arts X and XXII of the CCAMLR Convention, Art. 15(4) of the CCSBT Convention, Art. 32 of the WCPFC 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.

[99] This is also reflected in paras. 83–84 of the IPOA on IUU Fishing.

operation between all states involved in fishing for the regulated species. A good example is CCAMLR's "Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties".[100] Non-members that have vessels that are 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. Whereas non-members will in general be informed that allocations of fishing opportunities are in principle reserved to members, a growing number of RFMOs has (effectively) embraced the concept of co-operating non-member, to which allocations are often (effectively) available.[101]

The second tier consists of specific measures to deter unregulated fishing by forcing non-co-operating non-members to co-operate with or join the RFMO, or stop fishing altogether. In view of the IPOA's 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.

Paragraph 9.3 of 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". These four (categories of) measures are singled out in view of their presumed significance in terms of effectiveness. Noteworthy is that non-flag state enforcement pursuant to Articles 21 and 22 of the Fish Stocks Agreement is not listed. In fact, as it is not even explicitly mentioned in the IPOA on IUU Fishing,[102] there seems to be little support for these powers in combating IUU fishing. At the time of writing no RFMOs were using these powers.

The scope and pace of developments on each of the four (categories of) measures identified above is such that the discussion here is limited to some observations.[103] The extent to which progress is made on port state control on fishing vessels depends on the persisting disagreement on the scope of port state jurisdiction under

[100] Text at www.ccamlr.org, under "Catch Documentation Scheme". Other RFMOs that have such a policy include CCSBT, IATTC, ICCAT, IOTC, NAFO and NEAFC.

[101] See note 53 above.

[102] See in this context the Canadian statements in the *Report of the 24th Session* of COFI (CL 120/7), at para. 105.

[103] For further information see M. Haward, "IUU Fishing: Contemporary Practice" in A.G. Oude Elferink and D.R. Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses under the LOS Convention* (forthcoming in 2003); D.G.M. Miller, E.N. Sabourenkov and N. Slicer, "Unregulated Fishing – The Toothfish Experience" in M. Richardson and D. Vidas (eds.), *The Antarctic Treaty System in the 21st Century* (London, UK Foreign and Commonwealth Office, forthcoming in 2003).

international law, as briefly touched on above.[104] An integral part thereof are certain unresolved aspects of the relationship between international trade law and the law of the sea.[105] The fact that the EC appears to take a more unilateral stance on port state control in the aftermath of the *Prestige* incident in November 2002 could have an impact on this disagreement.[106] At the time of writing, the prospect of progress with FAO's efforts in using regional co-operation in port state control to combat IUU fishing looked promising.[107]

Wider use of coastal state measures is not constrained by issues of international law but seems to depend above all on their success within states and RFMOs already using them. Norway, for example, went through a lot of effort to ensure that its own (national) measures would be adopted within CCAMLR and NEAFC.[108]

The main issue with the use of trade or market-related measures to combat unregulated fishing is their consistency with the body of law from the World Trade Organization (WTO).[109] The pivotal test of non-discrimination of trade-related measures has given rise to a preference to multilateral solutions to issues relating to the conservation of exhaustible natural resources. Nevertheless, unilateral measures are not ruled out altogether.[110] At the time of writing, three RFMOs were using trade-related measures in the form of trade documentation

[104] Note that although Arts. 23(2) and (3) of the Fish Stocks Agreement are limited to inspections and prohibitions of landings and transshipments respectively, the *Report of the Port State Expert Consultation*, note 18 above, at para. 18 suggests that forfeiture of fish would be a possible sanction.

[105] E.g. those at the heart of the dispute between the EC and Chile on the unloading of (Pacific) swordfish in Chilean ports, which led to the institution of dispute settlement procedures within WTO (WTO Case WT/DS193) and under the LOS Convention (ITLOS Case No. 7). See A. Serdy, "See You in Port – Australia and New Zealand As Third Parties in the Dispute Between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas", (2002) 3 *Melbourne Journal of International Law* 79–119.

[106] See, *inter alia*, COM (2002) 681 final, of 3 December 2002, "Communication from the Commission to the European Parliament and to the Council, on improving Safety at Sea in Response to the Prestige Incident", Section II(1). By way of COM (2002) 180 final, of 28 May 2002, "Communication from the Commission, Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing", the EC expressed its intention to negotiate a multilateral agreement on port state jurisdiction (both documents are available at europe.eu.int/eur-lex).

[107] See the *Report* of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters (FAO Fisheries *Report* No. R637, Rome, 9–11 October 2000); T. Lobach, "Port State Control of Foreign Fishing Vessels", (May 2002) *FAO Legal Paper Online* 29 (available at www.fao.org/Legal) and the *Report* in note 18 above. The FAO is preparing a Technical Consultation on the Role of the Port State in combating IUU fishing in September 2004.

[108] See CCAMLR Conservation Measure 10-07 (2002), para. 11(a) and section 11 and Annex P to the *Report of the 20th Annual NEAFC Meeting* (2001).

[109] Most importantly the 1947 General Agreement on Tariffs and Trade (GATT 1947; text at www.wto.org).

[110] See para. 66 of the IPOA on IUU Fishing. Later phases in the *Shrimp-Turtle* case have explicitly upheld unilateral trade measures by the United States (see WTO Doc. WT/DS58/RW of 15 June 2001 and WTO Doc. WT/DS58/AB/RW of 22 October 2001, at paras. 135–138; see also Serdy, note 105 above, p. 99).

or catch certification schemes.[111] This number is expected to increase in the future. The main developments on trade or market-related measures are expected to come from FAO's Sub-Committee on Fish Trade, which works at harmonising catch certification processes within RFMOs,[112] the efforts of the ICCAT Working Group on Process and Criteria for the Establishment of IUU-Trade Restrictive Measures[113] and closer co-operation between CITES,[114] FAO and RFMOs in relation to trade in commercial fish species.[115]

Similar to coastal state measures, the difficulties in exerting control over involvement in unregulated fishing by a state's own natural or legal persons are not caused by international legal constraints. Many states are unwilling to adopt national legislation that criminalises involvement in unregulated fishing while those that *are* willing experience practical difficulties due to concurrent jurisdiction with other (flag or coastal) states or while trying to actually enforce or execute such legislation. It is disappointing that Spain eventually decided not to apply its recently adopted legislation in the aftermath of the *Eternal* incident.[116] Still, the provisions in the IPOA on IUU Fishing and the growing body of practice by states and RFMOs may lead to the development of an obligation under customary international law for states to exercise jurisdiction over the involvement by their natural and legal persons in IUU fishing. The likelihood of such a development has increased after the tragic events of 11 September 2001, which have led to a wider awareness of the responsibilities of states with respect to natural and legal persons.[117]

[111] CCAMLR (*Dissostichus* spp. Catch Documentation Scheme (CDS) (Conservation Measure 10-05 (2002))), CCSBT (Southern Bluefin Tuna Statistical Document Programme) and ICCAT (Bluefin Tuna, Bigeye Tuna and Swordfish Statistical Docs. (Resolutions or Recommendations 94-3, 95-13, 98-18, 00-22, 01-21, 01-22 and 01-23)). The IOTC Bigeye Tuna Statistical Document (Res. 01/06) is still in an implementation phase and may become more effective if integrated with the IOTC IUU Vessel List (Res. 02-04). At IATTC a catch certification and documentation scheme for bigeye tuna was under consideration at the time of writing.

[112] See the *Report of the Sub-Committee's 8th Session* (2002); FAO Fisheries *Report* No. 673, at paras. 34–38.

[113] See Res. 02-27. Its first meeting took place in May 2003 (see info at www.iccat.es).

[114] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, DC, 3 March 1973. In force 1 July 1975, 993 *United Nations Treaty Series* 243; www.cites.org.

[115] See Doc. CCAMLR-XXI, paras. 10.1–10.75, CITES Conf. Res. 12.4 and CoP Decisions 12.7 and 12.57–12.59 (all available at www.cites.org). See also the *Report of the 21st Annual NEAFC Meeting* (2002), pp. 37–38.

[116] This concerns Royal Decree 1134/2002 of 31 October 2002. For information relating to the case of the *Eternal* see: E.J. Molenaar, "Marine Fisheries in the Netherlands Antilles and Aruba in the Context of International Law", (2003) 18 *International Journal of Marine and Coastal Law* 127–144.

[117] See for instance the SOLAS (International Convention for the Safety of Life at Sea, 1974) Conference that was held in December 2002, which led to the adoption of the ISPS (International Ship and Port Facility Security) Code and a huge number of amendments to the Convention related to maritime security and safety. Regulation 5 to Chapter XI-2 (IMO Doc. SOLAS/CONF.5/32, of 12 December 2002) and Sections 6, 19.3.8–19.3.9 and 19.4.1 of the ISPS Code (IMO Doc. SOLAS/CONF.5/34, of 12 December 2002) which deal with the responsibility of companies.

As a voluntary instrument the IPOA on IUU Fishing 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. In fact, the IPOA's advocacy of a comprehensive and integrated approach recognises the need to utilise the widest range of effective tools available under international law and thereby the search for new tools. This search is in fact very urgent as IUU fishing has, in some parts of the globe (e.g. the Southern Ocean in relation to Patagonian toothfish), by now developed into a highly organised form of international crime.

Two of these tools are worth mentioning briefly. The first is the use of positive/white and negative/black/IUU lists with fishing vessels operating within the area of competence of RFMOs. While the negative/black/IUU lists may lead to direct action against the vessel, its flag state and eventually perhaps even its (beneficial) owners or operators,[118] the positive/white lists may develop into some form of rights-based fisheries.[119] The second is the campaign commenced by the Coalition of Legal Toothfish Operators (COLTO) in May 2003.[120] COLTO is a fishing industry's response to the threat of highly organised IUU fishing for toothfish to the healthy status of toothfish stocks, seabirds (and mammals) due to bycatch and, understandably, the long-term prospects for a sustainable fishery. Its most spectacular campaign aspect is the reward of US$100,000 for information leading to a conviction of serious IUU fishing. The COLTO campaign illustrates that environmental and financial concerns can go hand in hand.

Issues of Dispute Settlement

The discussion has touched on various issues that could lead to the institution of dispute settlement procedures. It must be emphasised that states' adherence to treaties determines not only which dispute settlement procedures would be available but to a large extent also the substantive law that would apply. Non-

[118] See, *inter alia*, CCAMLR Conservation Measures 10-06 and 10-07, ICCAT Recommendations 02-22 and 02-23 and IOTC Res. 02-04. As regards blacklisting, account should *inter alia* be taken of the experience of the Paris Memorandum of Understanding on Port State Control (see www.parismou.org).

[119] See note 65 above with respect to IATTC and IOTC.

[120] For info see www.colto.org.

members of RFMOs would, for instance, not have access to the dispute settlement procedures incorporated within the constituent instruments of RFMOs. Moreover, as RFMOs do not have standing under Part XV of the LOS Convention or Part VIII of the Fish Stocks Agreement,[121] non-members are compelled to institute proceedings against one or more or all of the members of an RFMO.

States could, for instance, institute proceedings 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 or request 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. Whether the dispute would encompass the concept of real interest depends again on applicable treaty law.[122] Where only the LOS Convention would be applicable, the applicant could rely on a failure to co-operate on the management of transboundary stocks and/or a failure to pay due regard to the freedom of fishing on the high seas.[123] Such dispute settlement procedures would in principle even seem available where states have not been able to (fully) participate in the establishment of an RFMO.[124] Finally, both the allocation of fishing opportunities and the specific measures aimed at deterring unregulated fishing could lead to dispute settlement procedures, whether instituted by a member or a non-member of an RFMO.[125]

What a state hopes to achieve by instituting dispute settlement procedures depends of course on the specific circumstances of the case. Examples could be membership of an RFMO or the lifting of certain measures against unregulated fishing in view of inequitable allocation offers by an RFMO. In disputes involving treaties such as the Galapagos Agreement, the claims put forward by the applicant would probably raise the consistency with international law of the agreement as such. With regard to issues of allocation, it was already noted above that these are to a large extent governed by political and negotiation

[121] Cf. Art. 20 of Annex VI to and Art. 187 of the Convention and Art. 30(1) of the Fish Stocks Agreement.

[122] Balton, note 62 above, p. 139 argues that barring non-members from RFMOs may amount to a violation of Art. 1(1)(b) of the Fish Stocks Agreement.

[123] Based *inter alia* on Arts. 87(2), 118 and 119(3) of the LOS Convention. These obligations are also likely to be part of customary international law. However, relevant coastal states are not likely to be refused membership to RFMOs.

[124] E.g. the EC and Mexico were unable to participate as full participants in the negotiation of the WCPFC Convention (see Molenaar, note 19 above, pp. 509–514) and neither the EC nor any other non-coastal state were invited in the negotiation of the Galapagos Agreement (see the *Chile/EC Swordfish* case before the ITLOS where the EC raised the issue whether the Galapagos Agreement "was negotiated into in keeping with the provisions of the [LOS Convention] and whether its substantive provisions are in consonance with, *inter alia*, articles 64 and 116 to 119 of the [LOS Convention]" (ITLOS Order 2000/3, at p. 4)).

[125] See, for instance, the cases that arose within the CCSBT (*inter alia* ITLOS Cases Nos. 3 and 4) and the swordfish cases (see note 105 above).

factors. In such cases the outcome of dispute settlement procedures would therefore be difficult to predict. For this reason, it is more likely that dispute settlement procedures are instituted in relation to restrictive formal conditions for participation than in relation to allocation practices that are claimed to be inequitable.

Conclusions

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 aspect for non-members of RFMOs that consider membership or the status of co-operating non-members is that this brings along an equitable share of the available fishing opportunities. Allocation is becoming increasingly difficult due to decreased fishing opportunities and more new entrants will only aggravate this situation. Measures to deter unregulated fishing are designed to force non-members to either join or co-operate 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 certain RFMOs indicates that these are generally open to new entrants. However, if account is also taken of the fact that new applicants will often receive very limited fishing opportunities, RFMOs have a more restrictive/closed character. Whether or not particular allocation practices are in fact equitable is a separate issue. Subjecting applications for membership to a system of approval does not *a priori* exclude new applicants from participation and is therefore not incompatible with Article 8(3) of the Fish Stocks Agreement or the LOS Convention.

Allocating decreasing fishing opportunities between an increasing number 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 very future of RFMOs. Whereas 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 in fact also in the long-term interests of all to do this in a mutually satisfactory manner. The allocation process is to a large extent governed by political and negotiating 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 lack of transparency as to how actual allocations are based on these criteria.

Unregulated fishing 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 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 IPOA on IUU Fishing. Many RFMOs currently take a two-tier approach in relation to unregulated fishing. The first tier consists of co-operation policies aimed at creating awareness of the problem of unregulated fishing and of the need for co-operation between all states involved in fishing for the regulated species. The second tier consists of specific measures to deter unregulated fishing by effectively forcing non-co-operating non-members to co-operate or join the RFMO, or stop fishing altogether. The ''toolbox'' of specific measures incorporated in the IPOA on IUU Fishing is in principle also available under general international law. The IPOA's advocacy of a comprehensive and integrated approach recognises the need to utilise the widest range of effective tools available under international law and thereby the search for new tools.

The sensitivity of the issues of participation, allocation and unregulated fishing in the context of RFMOs is likely to further heighten in view of the current and future crises in marine capture fisheries worldwide. But whether this means that states are likely to institute dispute settlement procedures in relation to these issues, cannot be predicted. Hopefully the co-operative frameworks of RFMOs will be able to resolve these imminent tensions in the context of the overarching objective of the sustainable use of marine living resources.