

Chapter 4

REGIONAL FISHERIES MANAGEMENT
ORGANIZATIONS: ISSUES OF PARTICIPATION,
ALLOCATION AND UNREGULATED FISHING

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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 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 a 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 Agreement² is particularly relevant in this context. Whereas the Agreement uses

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¹ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 (1833 UNTS 396).

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, 4 December 1995 ((1995) 34 ILM 1542).

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 organizations (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 chapter examines these issues in the context of international law. A first Section starts out with some observations on the linkages between participation, allocation and unregulated fishing. Each of these issues is then separately examined in the next three Sections. The practice of RFMOs has a prominent place in this chapter 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 chapter 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. No account is either taken of “arrangements” in the sense of article 1(1)(d) of the Fish Stocks Agreement or organizations that mainly have an advisory role, for instance the advisory (fisheries) bodies established under article VI(1) or (2) of the Constitution of the United Nations Food and Agriculture Organization (FAO).³ The chapter 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 cooperate” by becoming members of RFMOs or “by 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

³ Text available at <www.fao.org/legal>.

members of RFMOs or States that agree to apply the RFMO's conservation and management measures (cooperating 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. For this reason, South Korea and Taiwan negotiated extensively with the members of the Commission for the Conservation of Southern Bluefin Tuna (C-CSBT)⁴ to ensure they obtained quotas before acceding.⁵ 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" thus usually mean reduced allocations to existing members. New entrants are treated here 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 IPOA on IUU Fishing⁶ is the first global instrument that defines the individual components of IUU fishing. 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.

The status and meaning of the term "unregulated fishing" within the IPOA on IUU Fishing cannot be examined in detail here.⁷ Worth noting is nevertheless that

⁴ Established by the CCSBT (Convention for the Conservation of Southern Bluefin Tuna), 10 May 1993 (1819 UNTS 360).

⁵ See the Report of the 8th C-CSBT Meeting (2001), at 2-3.

⁶ 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>.

⁷ 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 IJMCL 603-623.

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 and that the “toolbox” of measures to deter IUU fishing does not distinguish between the three components. However, for the purpose of this chapter, 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 (e.g. incidental bird mortality). 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 cooperate 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.⁸ 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. General international law and the LOS Convention moreover give States wide discretion in deciding on conditions for the registration of vessels. The need for a “genuine link”⁹ 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.

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

⁸ See *inter alia* art 34 of the Vienna Convention on the Law of Treaties, 23 May 1969 (1155 UNTS 331).

⁹ Art 91(1) of the LOS Convention.

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.¹⁰ 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” are presumably flag States that are actually engaged in fishing for the stock concerned at the time of their application for membership.

It is 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 or 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 to avoid a situation as currently exists under the IWC Convention, where States opposed to harvesting outnumber those in support. 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.¹¹

Practice of RFMOs

An examination of the conditions for membership of various RFMOs¹² shows that there are different types of conditions. First of all, conditions may relate to membership of other international organizations or to the nature of participation. Only the NEAFC Convention¹³ does not impose any conditions of this

¹⁰ 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 *IJMCL* 475-531.

¹¹ See Molenaar, note 10, at 496-498.

¹² This analysis draws on C. Hedley, E.J. Molenaar and A.G. Oude Elferink “The Implications of the UN Fish Stocks Agreement (New York, 1995) for Regional Fisheries Organisations and International Fisheries Management” (2003).

¹³ Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980 (1285 UNTS 129).

kind.¹⁴ Secondly, applications are occasionally only successful if approved by the existing membership.

As regards the first issue, stipulating membership of other international organizations, such as the FAO, the UN or any of its specialized agencies, as a condition for membership of RFMOs is typical for FAO bodies.¹⁵ The International Commission for the Conservation of Atlantic Tunas (ICCAT) also takes this approach.¹⁶ In view of the wide participation in these organizations this will hardly, if ever, cause problems. With respect to the nature of participation, membership is commonly limited to relevant coastal States or flag States. Whereas the Commission for the Conservation of Antarctic Marine Living Resources (C-CAMLR) explicitly provides for membership based on scientific interests,¹⁷ applications on that basis might also be approved by ICCAT and the North-East Atlantic Fisheries Commission (NEAFC),¹⁸ as they do not impose substantive conditions in this sense.¹⁹

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

¹⁴ Art 20(4). Whereas no substantive conditions exist for acceding to the NAFO Convention (Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978 (1135 UNTS 369), arts IV(1) and XII(4)), Membership of the Fisheries Commission, the Northwest Atlantic Fisheries Organization’s (NAFO) main management body, 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)).

¹⁵ See *inter alia* arts I(2) and XI(2) of the GFCM Agreement (Agreement for the establishment of a General Fisheries Council for the Mediterranean), 24 September 1949 (126 UNTS 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), 25 November 1993 (<www.iotc.org>).

¹⁶ Art XIV(1) and (4) of the ICCAT Convention (International Convention for the Conservation of Atlantic Tunas), 14 May 1966 (673 UNTS 63) as amended by its 1984 Protocol (available at <www.iccat.es>).

¹⁷ Arts VII(2) and XXIX of the CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources), Canberra, 20 May 1980 (1329 UNTS 47).

¹⁸ See note 13.

¹⁹ See also note 14 on the situation within NAFO.

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 Honolulu Convention,²⁰ for instance, uses the words “wish to conduct fishing”, which means that prior unregulated fishing is not required for membership.²¹ A similar result is achieved by the NAFO Convention, which links membership to its Fisheries Commission to the need for evidence of intended fishing.²² Applications for membership to C-CAMLR may in reality be dealt with in a similar manner. Finally, due to the many ambiguities in relevant definitions in the Galapagos Agreement,²³ flag States that apply for membership are quite uncertain about their chances of success.²⁴

The fact that applications for membership sometimes require the approval of the existing membership is of considerable concern for the “openness” of RFMOs. 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.²⁵ As 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),²⁶ NEAFC, the Western and

²⁰ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000 ((2001) LOSB No. 45, 79-111).

²¹ Art 35(2).

²² But see note 14.

²³ Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, 14 August 2000 ((2001) LOSB No. 45, 70-78).

²⁴ See *inter alia* arts 1(3) and (4), 16(2) and 19(1).

²⁵ Cf. W. Edeson “Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches” in M. Nordquist, J. Moore and S. Mahmoudi (eds.) *The Stockholm Declaration and Law of the Marine Environment* (2003) 165-182, at 179. See in this respect the provisions for cost sharing, e.g. art XIII(4) of the IOTC Agreement, note 15, and art XIII(3) of the 1997 GFCM Agreement, note 15.

²⁶ Established by the IATTC Convention (Convention for the establishment of an Inter-American Tropical Tuna Commission), 31 May 1949 (80 UNTS 4). At the time of writing, the Working Group on the IATTC Convention, which prepares a modernized version of the convention, had not yet concluded its work.

Central Pacific Fisheries Commission (WCPFC) and, to a lesser extent, NAFO. As the European Community (EC) has experienced with IATTC, approval may be extremely slow.²⁷ 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.²⁸ The difficulties experienced by Iceland in rejoining the IWC Convention²⁹ with a reservation to the moratorium on whaling illustrate this.³⁰

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.³¹ 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) in the light of the undefined concept of real interest.³² 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. The above analysis indicates that the examined RFMOs are “generally open” to new applicants.³³ 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 cooperating non-members.³⁴ Cooperating non-members can participate in meetings of RFMOs,

²⁷ The 1999 Protocol to the IATTC Convention, which would allow the EC to become a party, has still not entered into force.

²⁸ See also art VII(d) of the CCAMLR.

²⁹ International Convention for the Regulation of Whaling, 2 December 1946 (161 UNTS 72).

³⁰ See the information at <www.iwcoffice.org> and <www.highnorth.no>.

³¹ Edeson, note 25, at 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.

³² Edeson, note 25, at 179 takes more or less the same view in relation to art XIV FAO (fisheries) bodies.

³³ But see A.K. Sydnes “Regional Fishery Organizations: How and Why Organizational Diversity Matters” (2001) 32 ODIL 349-372, at 357.

³⁴ This is consistent with par 83 of the IPOA on IUU Fishing.

often receive allocations of fishing opportunities and are exempt from the measures to deter unregulated fishing. Whereas C-CAMLR, C-CSBT, IATTC, ICCAT, the Indian Ocean Tuna Commission (IOTC)³⁵ and NEAFC already (effectively) use this concept, the South East Atlantic Fisheries Commission (SEAFC)³⁶ may do so once it becomes operational.³⁷

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 manner. 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 an "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.

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

³⁵ See note 15.

³⁶ To be established by the SEAFO Convention (Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean), 20 April 2001 (<www.oceanlaw.net>).

³⁷ See *inter alia* CCAMLR Conservation Measure 10-05 (2002); Report of the 9th C-CSBT Meeting (2002), par 19; ICCAT Resolutions 94-6 and 01-17 and par 1 of the ICCAT Allocation Criteria (see note 38); IOTC Resolutions 98/05 and 01/03; Report of the 20th Annual NEAFC Meeting (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 (see also note 58).

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.³⁸ 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. 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 cooperate 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 prioritizing or otherwise suggesting how they are to be applied.³⁹ Reference can be had mainly to 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.⁴⁰ 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.⁴¹ 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 "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

³⁸ Par 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". See also par 83 of the IPOA on IUU Fishing.

³⁹ Cf. "Report of the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks" FAO Doc. FIPP/R695 (En) (2002), at par 49.

⁴⁰ See also arts 7(2)(d) and (e) and 24(a).

⁴¹ Cf. D.A. Balton "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks" (1996) 27 ODIL 125-151, at 139, n. 97.

does not prioritize 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.

General Practice of RFMOs

The practice of RFMOs in allocating fishing opportunities diverges considerably. Some RFMOs, such as the General Fisheries Commission for the Mediterranean (GFCM) and IOTC have up until now not allocated fishing opportunities.⁴² The Galapagos Agreement, SEAFC, the South West Indian Ocean Fisheries Commission (SWIOFC)⁴³ and WCPFC are still not operational. Their constituent instruments generally provide for establishing national allocations or levels of fishing effort.⁴⁴ C-CAMLR determines TACs for specific species in specific geographic areas and, instead of establishing national allocations, commonly uses an Olympic fishery.⁴⁵ National allocations in the form of quotas are *inter alia* used by C-CSBT.⁴⁶

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.⁴⁷ Whereas ICCAT commonly uses its wide mandate⁴⁸ by means of TACs and national quotas,⁴⁹ it sometimes also uses vessel effort limitations⁵⁰ and even Olympic fisheries.⁵¹ The NAFO Fisheries Commis-

⁴² None of the advisory FAO fishery bodies allocate fishing opportunities either.

⁴³ 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.

⁴⁴ 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 Honolulu Convention.

⁴⁵ Art IX(2) of the CCAMLR.

⁴⁶ Art 8(3)(a) of the CCSBT, note 4.

⁴⁷ 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.

⁴⁸ Art VIII(1)(a) of the ICCAT Convention.

⁴⁹ See e.g. ICCAT Recommendations 98-05, 98-07, 99-02, 00-9 and 01-05.

⁵⁰ See e.g. ICCAT Recommendation 00-1.

⁵¹ See ICCAT Recommendation 01-06.

sion uses its wide mandate⁵² commonly by way of TACs and national quotas, but limits also exist in the form of a maximum number of vessels or fishing days⁵³ or Olympic fisheries.⁵⁴ NEAFC uses a wide range of methods to allocate fishing opportunities, including by means of TACs and national quotas.⁵⁵

In view of the conclusion drawn in the Section on participation 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”.⁵⁶ This essentially tells new entrants that they should expect minimal allocations when joining NAFO. 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.⁵⁷ 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 effectively excludes fishing opportunities for (further) new entrants, unless they make arrangements to replace vessels that are already on the Vessel Register.⁵⁸ 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 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

⁵² Art XI(2) of the NAFO Convention.

⁵³ E.g. in relation to shrimp in Division 3M of the NAFO Regulatory Area (NAFO Conservation and Enforcement Measures, Part I(G)).

⁵⁴ 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 NAFO Meeting (2002)).

⁵⁵ Art 7 of the NEAFC Convention.

⁵⁶ GC Doc. 99/9, Annex 13.

⁵⁷ Report of the 21st Annual NEAFC Meeting (2002), at 36. A preliminary version of this recommendation seems to be incorporated in FAO Doc. FIPP/R695, note 39, at 12-13.

⁵⁸ See note 37.

likely be one where new entrants are not offered (prospects of) fishing opportunities at all.⁵⁹ 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 cooperation with relevant RFMOs and, quite importantly, the current deplorable status of marine capture fisheries worldwide.

Allocation Criteria Used or Recognized 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 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 be more successful,⁶⁰ perhaps due to fears for a repetition of the previous year's events.

The review of NAFO allocation practices that was started in 1997 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.⁶¹ 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".⁶² Even though these may enable new entrants without a track record to obtain fishing opportunities, the limited scope of

⁵⁹ See in this respect the realistic objective of progressive implementation of the ICCAT Allocation Criteria (note 38, at par 21).

⁶⁰ See e.g. ICCAT Recommendations 02-02, 02-05 and 02-08.

⁶¹ NAFO Annual Report 2000, at 100.

⁶² 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.

these guidelines clearly contrasts with the ICCAT Allocation Criteria.⁶³ NEAFC has so far not attempted to undertake a general review of its allocation process.

The SEAFO Convention and the Honolulu 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 were added.⁶⁴ 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 C-CSBT,⁶⁵ IATTC,⁶⁶ NAFO⁶⁷ and NEAFC⁶⁸ have nevertheless either used or recognized various different allocation criteria. As the participation in the Fish Stocks Agreement becomes more universal, States cooperating 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.⁶⁹

DETECTING UNREGULATED FISHING

Although unregulated fishing as defined above 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 and/or for transboundary stocks to cooperate with each other but the form of such

⁶³ See note 56 and accompanying text.

⁶⁴ See art 20 of the SEAFO Convention and art 10(3) of the Honolulu Convention.

⁶⁵ Art 8(4) of the CCSBT.

⁶⁶ However, the allocation criteria mentioned in the fleet capacity resolutions of June 1998 and October 1998 (par 1), which are now obsolete, are no longer relevant under the fleet capacity resolution of June 2002.

⁶⁷ Art XI(4) of the NAFO Convention.

⁶⁸ See the Report of the 19th Annual NEAFC Meeting (2000), Annex D.

⁶⁹ Cf. FAO Doc. FIPP/R695, note 39, at par 46.

cooperation is at their discretion.⁷⁰ Moreover, the consequences for a failure to cooperate 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 cooperating 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 organizations' 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.

Firstly, 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.⁷¹ Unregulated fishing is generally dealt with by means of a two-tier approach.⁷² The first tier is based on the need for cooperation between all States involved in fishing for the regulated species. A good example is C-CAMLR's "Policy to Enhance Cooperation between C-CAMLR and Non-Contracting Parties".⁷³ Non-members with vessels involved in unregulated fishing

⁷⁰ See the wording in arts. 63, 64(1) and 66(5), 118 of the LOS Convention.

⁷¹ E.g. arts X and XXII of the CCAMLR and art 15(4) of the CCSBT.

⁷² This is also reflected in pars 83-84 of the IPOA on IUU Fishing.

⁷³ Text at <www.ccamlr.org>, under "Catch Documentation Scheme".

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 a cooperating non-member, to which allocations are often (effectively) available.⁷⁴

The second tier consists of specific measures to deter unregulated fishing by effectively forcing non-cooperating non-members to cooperate with or join the RFMO, or stop fishing altogether. In view of the definition of unregulated fishing provided above, 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."⁷⁵ A comprehensive and integrated approach recognizes the need to utilize the widest range of effective tools available under international law. In order for tools that originated in other fields of international law to be effective in the sphere of the conservation and management of marine living resources, however, adjustments may be necessary. These adjustments may relate to the tools as such, for instance using regional cooperation in port State control for the purpose of fisheries or CITES⁷⁶ in relation to commercial fish species. Alternatively, the use of certain tools may have an impact on both fields of international law, for instance the interrelationship between international trade law and the law of the sea.

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 with States and RFMOs of the need to address IUU

⁷⁴ See note 37.

⁷⁵ For a closer examination of these and other specific measures see chapter 5.

⁷⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973 (993 UNTS 243).

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 specific new measures from being developed, provided these are consistent with international law.

CONCLUSIONS

The strongly related issues of new entrants, allocation of fishing opportunities and unregulated fishing are crucial to the functioning of RFMOs. 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. Many conditions for membership are not restrictive for new applicants. 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 and 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-prioritized and non-weighted lists of allocation criteria and the absence of insight in the way that actual allocations are based on these criteria.

As unregulated fishing threatens the sustainability of an RFMO’s fisheries and in fact the future of the RFMO itself, it needs to be dealt with. Many RFMOs currently 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

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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 deter unregulated fishing by effectively forcing non-cooperating non-members to cooperate 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 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. Hopefully the cooperative 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.