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## IMPLEMENTING EXISTING TOOLS: TURNING WORDS INTO ACTIONS

### Decision-Making Processes of Regional Fisheries Management Organizations (RFMOs)

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## 1.0 Introduction

1. The focus of this contribution is on decision-making processes within regional fisheries management organizations (RFMOs). Regarding RFMOs, there is no process within the 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFA) or elsewhere for the designation of a fishery organization as being an RFMO. What UNFA does is obligate its State Parties to cooperate through RFMOs as regards management of straddling and highly migratory stocks. For the purposes of this contribution, the RFMOs under investigation are those with the capacity to adopt management measures respecting either straddling or highly migratory fish stocks.<sup>1</sup> The relevant RFMOs<sup>2</sup> are:

- International Commission for the Conservation of Atlantic Tunas (ICCAT)
- Northwest Atlantic Fisheries Organization (NAFO)
- Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)
- North East Atlantic Fisheries Commission (NEAFC)
- Commission for the Conservation of Southern Bluefin Tuna (CCSBT)
- Indian Ocean Tuna Commission (IOTC)
- General Fisheries Commission for the Mediterranean (GFCM)
- Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC)
- South-East Atlantic Fisheries Organization (SEAFO)
- Intern-American Tropical Tuna Commission (IATTC)<sup>3</sup>

To this list is added the Southeast Pacific Fisheries Organization (SEAFPO),<sup>4</sup> which has a completed agreement that has not yet entered into force.<sup>5</sup>

2. The perception is that the management decisions emanating from RFMOs are not achieving the goal of sustainable management of the fish stocks. The perceived problems

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<sup>1</sup> For some RFMOs, the capacity is to adopt management measures that are directly binding on member States. For other RFMOs, the capacity is to adopt recommendations of management measures with the member States obligated to implement the recommendations. For the purposes of this contribution, these two situations are treated as the RFMO being able to adopt management measures.

<sup>2</sup> See also Annex One – Table Seven: RFMO Conventions and Information.

There are a number of other international fisheries and marine mammal organizations that have management authority, for example: the International Whaling Commission (IWC); the International Baltic Sea Fisheries Commission (IBSFC); and the North Atlantic Salmon Conservation Organization (NASCO). Regarding the selection of RFMOs, see: 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) (prepared for the European Parliament by the Netherlands Institute for the Law of the Sea (NILOS)), at pp. 2-3 and Judith Swan, *Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes* (2004, FAO Fisheries Circular No. 995, available at [www.fao.org/DOCREP/006/Y5357E](http://www.fao.org/DOCREP/006/Y5357E)), section 1.3.2.

<sup>3</sup> The 1949 IATTC Convention came into force in 1950. In 2003 a new IATTC Convention was completed but it has not yet come into force. References herein are denoted as IATTC(1949) and IATTC(2003).

<sup>4</sup> The SEAFPO Convention is usually referred to as the Galapagos Agreement.

<sup>5</sup> On the horizon is the South West Indian Ocean Fisheries Commission (SWIOFC), an agreement for which is being negotiated.

cluster around two nodes: the decisions adopted which engages the decision-making process, and the implementation or compliance with the adopted decisions. Regarding the first of these two nodes, decisions adopted and the decision-making process which is the topic of this contribution, the perceived problems are, amongst other things: non-adherence of decisions to science; lack of timeliness in making decisions; ability of RFMO members to avoid certain decisions; and adoption of management decisions that are not sufficiently rigorous. This contribution will not evaluate the validity of the perception for individual RFMOs or the operational practice of RFMOs, rather this contribution will explore the manner in which RFMO conventions (the constitutive texts of RFMOs) deal with the decision-making process.

3. At the risk of over simplification, respecting fishery stock management under the authority of an RFMO, there are two principal and distinct subject matters on which decisions are made within RFMOs:

- (i) the setting of the total allowable catch (TAC) and the allocation of quotas to members of an RFMO; and
- (ii) the adoption of measures relating to, amongst other things, methods and gear, effort, open and closed seasons, moratoria and size limitations.<sup>6</sup>

However difficult the latter decisions, it is the TAC and quota allocation decisions that are inevitably the most controversial. Decision-making procedures for management measures must encourage and create cooperation among RFMO members in order to achieve timely establishment of catch levels, gear restrictions, seasons, quotas and other measures in light of the best available scientific information.

4. The core reality respecting decision-making within RFMOs is State sovereignty and the consequent need for and influence of political will in RFMO decision-making. As has been noted: “Without the will to agree, the details of the decision-making procedures may make little difference.”<sup>7</sup> State sovereignty manifests itself in the international political reality, reflected in international law, that, except in rare circumstances, without the direct consent of a State, decisions and obligations are not binding on that State. Simply put, a State does not want to place itself in the position of having to explain to its population that a decision or obligation is being thrust upon it without the State’s consent. In the RFMO decision-making context, the centrality of State sovereignty is clear:

- (i) whether a specific decision is made within an RFMO is in the hands of the States that are members of the RFMO; and
- (ii) the creation or amendment of the procedure or mode of decision-making is in the hands of States since international treaties negotiated by States establish RFMOs.

Finally, there is the State sovereignty issue of becoming a party to UNFA and/or to a particular RFMO and the reality that decisions of RFMOs are not binding on non-RFMO member States. The decision-making process in an RFMO is always a factor that is

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<sup>6</sup> There are, of course, many other important decisions considered by RFMOs including decisions regarding: the implementation and enforcement of management measures; matters respecting IUU fishing; and the admission on new members. Note: Swan, *supra* note 2, at section 2.2.

<sup>7</sup> Swan, *supra* note 2, at section 2.1 comments:

weighed by a State in deciding to become a member of an RFMO, even if that State is a party to UNFA,<sup>8</sup> since some States have strong views on whether a particular decision-making process will result in the attainment of their interests.

**5. The challenge regarding decision-making processes within RFMOs is to have a process that respects State sovereignty while minimizing the scope of States to hinder the adoption and effective implementation of conservation and management measures that science and the state of stocks require. Moreover, the decision-making process must be one that attracts States to become members of the RFMO. For the purposes of this contribution, the decision-making process for RFMOs is divided into two elements. First, are the "formal" procedures of decision adoption and objection procedures. These formal procedures involve the direct engagement of State consent (State sovereignty) respecting management decisions. Second, are the directions, factors, considerations and principles that are involved in the elaboration of specific decisions. The two dominant considerations in management decisions (other than for allocation decisions) are scientific information and compatibility of measures between coastal States and the RFMO. Allocation decisions are given their own section in this contribution. Clearly, the two so-called elements of management decision-making are intimately tied.**

6. Regarding the central challenge of RFMO decision-making processes, reference is necessary to UNFA, which is the global framework for consolidating the role and effectiveness of RFMOs. There are several provisions in UNFA regarding RFMO decision-making procedures. Article 10, arguably the most significant, directs that States, in fulfilling their obligation to cooperate through RFMOs, are to: "(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner". Article 6(3)(a) indicates that "in implementing the precautionary approach, States shall improve decision-making ... by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty." In order to prevent disputes, Article 28 directs that States are to "strengthen existing decision-making procedures as necessary" and agree on "efficient and expeditious decision-making procedures."<sup>9</sup> Taken together these provisions identify the need for RFMOs to adopt "sturdy decision-making procedures" to support the effectiveness of RFMOs.<sup>10</sup> However, UNFA leaves to States a wide degree of autonomy of action regarding the adoption and implementation of decision-making processes and there is no suggestion in UNFA that there is or should be a uniform decision-making procedure for RFMOs.

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<sup>8</sup> UNFA Article 8(3) provides that if an RFMO exists and an UNFA State Party does not become a member, that State is required to apply all of the management measures adopted by the RFMO. The curiosity of this provision is that an UNFA State Party may be in a better position to avoid application of an RFMO decision (for example, by use of an objection procedure) as a member of the RFMO, than as a non-member of the RFMO.

<sup>9</sup> Note also Article 12(1) that calls for transparency in the decision-making processes of RFMOs.

<sup>10</sup> Swan, *supra* note 2, at section 4.1: "[T]he Fish Stocks Agreement consolidates the role of RFBs as management bodies, and supports this role by identifying the need for adoption of sturdy decision-making procedures."

7. It is to be noted that, while UNFA provides guidance respecting RFMO activities and directions and principles for decision-making, many members of RFMOs are not party to UNFA, and therefore, are under no direct obligation to consider the wording of UNFA.<sup>11</sup> As a result, while UNFA State Parties may seek UNFA-consistent results, what an RFMO adopts may not be fully consistent with the wording or spirit of UNFA because of the presence of non-UNFA Parties in RFMO discussions and the need to attain the agreement of these States for action.<sup>12</sup> Important non-UNFA Parties are: Denmark (on behalf of Greenland and the Faroe Islands), China, Japan and Korea. Of the RFMOs discussed in this contribution, at present (March 2005) only SEAFO is composed of member States that are all party to UNFA. This could change should Korea, which has signed the SEAFO Convention, decides to become a Party. Of the five parties of NEAFC, only Denmark (on behalf of Greenland and the Faroe Islands) is not a party to UNFA. Of the five members of the Extended CCSBT, Japan and Korea (and Taiwan as a “fishing entity”) are not parties to UNFA. Five of the over twenty members of CCAMLR are not parties to UNFA (Argentina, Chile, Japan, Korea and Poland). For the WCPFC, amongst other members, China and Korea are not UNFA Parties. For other RFMOs, there are numerous members that are not UNFA parties including half or more of NAFO, ICCAT, IOTC, GFCM, and ICCAT(1949). Even among UNFA State Parties there can be disagreement regarding the relationship between UNFA and RFMOs, particularly where the RFMO pre-dates UNFA. For these pre-UNFA RFMOs, UNFA Article 13 notes that UNFA Parties are to “cooperate to strengthen” the RFMOs “in order to improve their effectiveness.” It is to be noted that the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) and other international documents echo some of the UNFA exhortations regarding effective RFMO decision-making.<sup>13</sup>

8. Another cautionary comment is that decision-making procedures for RFMOs, (including the manner for adopting decisions, objection procedures, dispute settlement and the infusion of science and other factors in decision-making) are almost always found within the constitutive treaty establishing the RFMO. Thus, any change to decision-making procedures almost always requires amendment of the RFMO constitutive treaty and each treaty has its own amendment process.<sup>14</sup> Here again, State sovereignty is engaged since the specific consent of a State is required before an amendment to a treaty is binding for that State.

## **2.0 "Formal" Decision-Making: Adoption of Decisions and Objection Procedures**

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<sup>11</sup> As of 15 March 2005, there were 52 UNFA State Parties. This includes the fifteen member States of the European Community as of December 2003, but not new EC members such as, for example, Poland and Estonia.

<sup>12</sup> This matter is noted in Swan, *supra* note 2, at sections 1.3.1 and 2.2.

<sup>13</sup> See the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), paragraph 82.

<sup>14</sup> Examination of the amendment procedures in RFMO conventions is beyond the scope of this contribution.

9. The essence of "formal" decision-making procedures is the direct requirement of State consent or exercise of State sovereignty.

## 2.1 Adoption of Decision Procedures in RFMOs

10. Not surprisingly, different RFMOs have different formal procedures for the adoption of decisions. This reflects the different eras when RFMOs were established and differing mixtures and numbers of States, in particular differing mixtures of States with waters adjacent to the high seas area in question (coastal States) and those with non-adjacent coasts whose primary interest is in harvesting the regulated resources (distant-water fishing States). However, with few exceptions, RFMO decision adoption procedures are premised upon the equality of State Parties in that each member of an RFMO is equal to every other member regarding the making of decisions (one State, one vote). It is to be noted that whatever the "formal" decision adoption process in the constitutive text, the general operational practice within RFMOs is to seek consensus.

### **Table One: DECISION ADOPTION PROCEDURES**

- By Majority:  
ICCAT(1966), NAFO(1978)
- By Consensus or Unanimous:  
CCAMLR(1980), CCSBT(1993), SEAFO(2001), IATTC(1949),  
IATTC (2003)
- By 2/3 Majority  
NEAFC(1980), IOTC(1993), GFCM(1997)
- Complex:  
WCPFC(2000), SEAFPO(2000)

11. The trend in RFMO formal decision adoption procedures is to use consensus or unanimous voting (SEAFO and IATTC(2003)) or complex voting procedures (WCPFC and SEAFPO). The RFMO experience is to have a single decision adoption procedure that applies to all management and substantive matters. The exceptions are the WCFPC and SEAFPO. For the WCFPC, the "general rule" is that of consensus, but if consensus cannot be reached then decisions are to be taken by a three-fourths majority provided that this majority includes three-fourths of members of the South Pacific Forum Agency and three-fourths of the non-members of the South Pacific Forum Agency (hence, a weighted-voting model). It is further provided that "in no circumstances shall a proposal be defeated by two or fewer votes in either chamber."<sup>15</sup> Regarding allocation decisions, however, consensus must be used. For SEAFPO, which is not yet in force, consensus is to be used, however, if consensus is not achievable, decisions are to be made by a two-thirds majority of the States, "including a majority of the coastal States" defined in the SEAFPO Agreement as Chile, Columbia, Ecuador and Peru (again, a type of weighted

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<sup>15</sup> WCPFC Convention, Article 20(2).

voting model).<sup>16</sup> Moreover, where a decision “may affect” the conservation of fish stocks within the waters of a coastal State (Chile, Columbia, Ecuador and Peru), adoption of the decision requires the consent of the affected coastal State. Thus, the nature of the decision dictates the adoption procedure.

**12.** The *challenge* of formal decision adoption procedures is to encourage the “best” outcomes that enlist as many States as possible as supporters and, most importantly, engage the support of the States with the most interest in the outcomes. Consensus decision-making does this but perceptually at the cost of “lowest common denominator” outcomes and, in some cases, only after prolonged debate leading to non-timeliness of adoption of management measures. Methods to assist in reaching consensus, such as a conciliator to be appointed by a commission chair as envisioned for allocation decisions in the WCPFC,<sup>17</sup> might be helpful. Looking at majority voting (simple or two-thirds), the examples in the WCPFC Convention and SEAFPO Agreement, whereby differing processes exist for differing types of measures and the provision of differing weighting for differently situated States, are interesting developments.

**13.** *Meeting the challenge* of having an effective formal management decision adoption procedure requires elaboration of what is meant by effective. Three criteria, amongst others, stand out: acceptability to RFMO members; timeliness; and conservation oriented. Achieving effectivity may be related to the nature of the management decision in question. A hierarchy could be created attaching differing decision adoption procedures to different types of management measures. To a limited extent, this is what has been done in the WCPFC and SEAFO. The more State-sensitive the decision, for example, quota allocation or Total Allowable Catch (TAC), the more important is direct State consent. The less State-sensitive the decision, for example, gear restrictions, the less direct State consent should be necessary. It is an important calculation whether this increased complexity would lead to results (based on the criteria of acceptability, timeliness, conservation) that can be said to be effective or an improvement on existing models. It is worth reiterating that decision-making procedures are facilitative, ultimately decisions come down to political will.

## **2.2 Objection Procedures**

**14.** Intimately tied to formal procedures for decision adoption in many RFMOs is the availability of “objection procedures” that provides the opportunity for members of RFMOs to “opt out” of RFMO decisions. The ramifications of “opting out” can be an undermining of the adopted decision. This is usually of greatest concern where the objection procedure is used respecting quotas and the objecting State elects to utilize a higher quota. Thus, there are two aspects of objection procedures – the triggering of the procedure and the action subsequently taken by the objecting State. While condemnation is the frequent attitude towards objection procedures, the underlying purpose of an objection procedure is to protect a State from being bound by an RFMO decision with which it does not agree and, as such, is consistent with existing international political and legal reality. Moreover, the existence of an objection procedure can facilitate adoption of

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<sup>16</sup> SEAFPO Agreement, Article 12(1).

<sup>17</sup> WCPFC Convention, Article 20(4).

measures where only a single State (or small number of States) is having a difficulty with a measure. This would appear to only arise where there is majority voting (simple or two-thirds) and not be the case where consensus is the method of decision. However, in the SEAFO Convention, despite decision-making being by consensus, an objection procedure exists.

15. It is to be noted that UNFA does not explicitly make reference for or against objection procedures in RFMOs, although implicitly the obligation on UNFA parties not to undermine RFMO measures can be seen as possibly providing a constraint on an UNFA party using a RFMO objection procedure.

**Table Two: OBJECTION PROCEDURES**

- Exists in:  
ICCAT(1966), NAFO(1978), CCAMLR(1980), NEAFC\*(1980), IOTC(1993), GFCM(1997), SEAFO(2001)
  - Does not exist in:  
CCSBT(1993), IATTC(1949), IATTC(2003), WCPFC\*(2000), SEAFPO(2000)
- \* See text paragraphs 17 and 18.

16. The *trend* regarding objection procedures is mixed. Several RFMOs recently negotiated have adopted objection procedures (GFCM and SEAFO) and another RFMO does not have an objection procedure but decision-making is by consensus (IATTC(2003)). Two recently completed RFMOs with complex procedures for decision adoption do not have objection procedures (WCPFC and SEAFPO). The trend evidenced in SEAFO, WCPFC and NEAFC (revisions regarding the objection procedure adopted in November 2004) is to place the burden of explanation regarding use of the objection procedure or seeking an “opt out” on the objecting State.

17. As noted above, despite the consensus requirement for the adoption of decisions by the SEAFO Commission, there is also an objection procedure.<sup>18</sup> Under this procedure, an objecting State is to provide a written explanation of its reasons and provide its proposals for alternative measures it is going to implement. The explanation is to specify whether the reason for the objection is that: the State considers that the decision is inconsistent with the SEAFO Convention; the State “cannot practicably comply with the measure;” the measure unjustifiably discriminates against the State; or “other circumstances apply.” In the face of an objection, any SEAFO member may request the Commission to review the measure and pending the Commission’s review, any member may request an *ad hoc* panel to examine the Commission decision and make recommendations on interim measures. Along somewhat similar lines, in November 2004, NEAFC revisited its objection procedure and is to adopt a process regarding objections whereby, if a State makes an objection, that State is provide reasons for its

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<sup>18</sup> SEAFO Convention, Article 23(1)(c)-(g).

objection and indicate what it intends to do which can include a description of any alternative conservation and management measures which the objecting State intends to adopt.<sup>19</sup>

**18.** While there is no objection procedure in the WCPFC Convention, a member of the WCPFC that has voted against a decision (or was absent at the time of a vote) may seek a review of the decision by a review panel on the grounds that the decision was inconsistent with the WCPFC Convention, UNFA or the 1982 UN Convention on the Law of the Sea (UNCLOS) or that the decision “unjustifiably discriminates” against the member.<sup>20</sup> If the independent review panel finds that the decision does not need to be modified, the WCPFC decision becomes binding on all Contracting Parties. If the review panel finds that the decision needs to be modified, the WCPFC at its next meeting (or if requested, in a special session) is to revoke or modify the decision. Presumably, where a State has claimed “unjustifiable discrimination,” the modification of the decision could include non-application of the decision to that State as an alternative to revocation of the decision and, in this way, an “opt out” equivalent to the results of an objection procedure may arise.<sup>21</sup> The grounds for attaining an “opt out” are very narrow, the burden is on the objecting State and there is a dispute settlement process for dealing with a State’s complaint. It is to be noted that on the key issue of allocation, the WCPFC Convention requires consensus.

**19.** The *challenge* regarding objection procedures is to respect State sovereignty to not be bound by a measure with which it does not agree but to constrain the objection procedure so that its use and the subsequent action by an objecting State does not undermine the management decisions adopted. Indirectly, the WCPFC Convention narrows the acceptable “grounds” for a State to make use of the objection procedure to “unjustifiable discrimination.” The SEAFO Convention articulates the acceptable “grounds” for use of the objection procedure, although these grounds remain broad (see above paragraph 17). The WCPFC, SEAFO and NEAFC place the burden on the objecting State to make its case for using or seeking to attain an “opt out.” As already noted, a major concern about use of the objection procedure is that an objecting State may feel it has a *carte blanche* to adopt its own measure (e.g. quotas) as an alternative to the objected-to decision. The SEAFO and NEAFC approach provides that objecting States are to indicate the alternative proposed measure it intends to take.

**20.** *Meeting the challenge* respecting objection procedures requires less of a “no questions asked” approach to the use of objection procedures by RFMO members. This could involve adopting an approach that makes use of, in differing combinations: placing the burden of explanation on the objecting State; limiting the grounds for use of the objection procedure; restricting the objection procedure to decisions on specific subjects;

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<sup>19</sup> In November 2004, NEAFC adopted a proposed amendment to the NEAFC Convention respecting dispute settlement. Part of this process was a NEAFC decision respecting the objection procedure.

<sup>20</sup> WCPFC Convention, Article 20(6) – (9).

<sup>21</sup> Presumably if the decision is found to be inconsistent with the WCPFC Convention, UNFA or UNCLOS, the decision will be modified or revoked for all members and not just modified for the “complaining” member.

having the objecting State indicating the measures it intends to take as an alternative; and explicitly linking use of objection procedures to dispute settlement procedures respecting an objection, the decision involved and the subsequent action by an objecting State.

### **3.0 Considerations in Making Management Decisions: Science, Precaution, and Compatibility**

21. Beyond what is described above as the “formal” procedure for decision adoption and the ancillary matter of objection procedures, there is the question of the relationship between RFMO decisions and the various directions, factors, considerations, and principles to be looked at and weighed in reaching management decisions. UNFA has much to say on the directions and principles that are to be taken into account by RFMO members in making management decisions. UNFA Article 5 indicates that members of RFMOs, who are also State Parties of UNFA, are to, amongst other things: (a) adopt measures to ensure the long-term sustainability of the stocks and promote their optimum utilization; (b) ensure that such measures are based on the best scientific evidence available; (c) apply the precautionary approach; (g) protect biodiversity; and (h) prevent or eliminate overfishing. Article 9(1)(d) notes that for RFMOs States are to agree on mechanisms for the obtaining of scientific “advice” and where appropriate the establishment of scientific “advisory” bodies. Article 7 introduces that management measures adopted by RFMOs and adjacent coastal States for the same stock are to be compatible. The Article 5 directions and principles, the Article 9 wording respecting “advice” and “advisory,” and the Article 7 “compatibility” of measures wording indicates that States are not yielding their autonomy to promote decisions within RFMOs in their own best interest, however that is determined. Nevertheless, pursuant to UNFA, RFMOs and their members are expected to agree upon management decisions consistent with the directions and principles set out, including scientific information and advice.

#### **3.1 Science and RFMO Management Decisions**

22. The relationship between RFMO decision-making and scientific information, evidence, advice and recommendations is a major component of the central challenge for RFMO decision-making to respect State sovereignty while minimizing the scope of States to hinder the adoption and implementation of management and conservation measures that science and the state of stocks require (see above paragraph 5). What is focused upon here is the specific treaty-mandated relationship between scientific information and management decisions in RFMO conventions. However, equally important issues in the relationship between scientific information and RFMO management decisions are, amongst other things: the procedures that exist for the gathering and evaluation of scientific information; the process for the reaching of agreement on scientific information; the timeliness of the scientific information; and the manner of conveying scientific information to RFMO decision-makers.<sup>22</sup> It is also to be noted that many of the directions and principles that are to inform management decisions,

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<sup>22</sup> Note: Swan, supra note 2, section 3.2.2

for example, the precautionary approach, ecosystem management, protection of biodiversity, reduction of over-fishing, etc., are fundamentally scientific matters and are, or are expected to be, dealt with primarily within the science context.

**Table Three: SCIENCE AND RFMO MANAGEMENT DECISIONS**

- “recommend ... on the basis of scientific investigations” (IATTC(1949), Art. II(5))
- “may, on the basis of scientific evidence, make recommendations” (ICCAT(1966), Art. VIII(1)(a))
- “In considering ... proposals, shall take into account any relevant information or advice provided by the Scientific Committee” (NAFO(1978), Art. XI(2))
- “formulate ... measures on the basis of the best scientific advice available” (CCAMLR(1980), Art. IX(1)(f))
- “shall seek information and advice from” ICES (NEAFC(1980), Art. 14(1))
- “Commission shall take full account of report and recommendations of the Scientific Committee” (CCSBT(1993), Art. 8(6))
- “to adopt, ... on the basis of scientific evidence, conservation and management measures” (IOTC(1993), Art. V(2)(c))
- “Commission shall ... take into account ... the best scientific evidence available” (GFCM(1997), Art. III(2))
- “Members of the Commission shall ... ensure that ... measures are based on the best scientific evidence available” (WCPFC(2000), “Principles,” Art. 5(b)) and “Commission shall take into account the reports and recommendations of the Scientific Committee” (WCPFC(2000), “Functions of the Commission,” Art. 10(5))
- “Contracting Parties ... shall ... adopt measures, based on the best scientific evidence available” (SEAFO(2001), “General Principles,” Art. 3(a)) and “The Commission shall take full account of the recommendations and advice from the Scientific ... Committee in formulating its decisions.” (SEAFO(2001), “The Commission,” Art. 6(6))
- “adopt measures that are based on the best scientific evidence available” (IATTC(2003), Art. VII(1)(c))
- “Measures adopted shall be based on appropriate scientific and technical information” (SEAFPO(2000), Art. 5(1)(a))

23. The *trend* in the terminology is that management decisions “are” or “shall be” “based on” science with this wording being the only direction in some cases, but in others, supplemented by the wording that RFMOs “shall take into account” or “shall take full account of” science (WCPFC, SEAFO, SEAFPO, and IATTC(2003)). What does the trend mean in terms of the fidelity that is to exist between scientific information, advice

and recommendations and RFMO management decisions? Avoiding a detailed discourse on the terminological differences and possible differing legal effect between “on the basis of” and “taking into account,”<sup>23</sup> the bottom line is that the role of scientific information, evidence, advice and recommendations is to inform but not predetermine RFMO decisions on management measures. There is scope for RFMOs and their member States to interpret and disagree with presented scientific advice and recommendations and chart their own courses in crafting (or deciding not to adopt) management decisions. Nevertheless, the trend in convention phraseology is designed to require RFMOs and members to make management decisions that are defensible or legitimized by the existing scientific information.

**24.** The *challenge* is to have, within a context of State sovereignty and state responsibility for decisions, RFMO management decisions that are congruent with scientific advice. While it is tempting to suggest that all management decisions must have total fidelity to scientific information, the reality is that States are unwilling to turn over decisions that have economic, social and cultural implications to uni-dimensional science particularly where it is not uncommon for significant and legitimate differences to exist in the interpretation of scientific information and where scientific information is incomplete.<sup>24</sup> Moreover, while the general tendency is to take the view that non-science reasons result in less-rigorous RFMO management decisions, there is also the experience of the International Whaling Commission (IWC) where some of the management measures adopted have been based on politics with a discounting of the existing science and the adopted measure arguably more rigorous than what the science suggested.

**25.** *Meeting the challenge* of the relationship between RFMO management decisions and scientific evidence, advice and recommendations could involve borrowing from what is occurring in several RFMOs as regards the objection procedure, RFMOs management decisions that depart from scientific advice or recommendations (particularly recommendations that involve specific management decisions such as, for example, setting of Total Allowable Catches (TACs)) could be acknowledged by public declarations as to why the departure has taken place. Another option might be to create a process to allow an RFMO member to question whether a management decision is less rigorous than what is dictated by the scientific evidence, advice or recommendation. The risks of either option are two-fold. First, timeliness of adoption of management decisions could be compromised, particularly if a decision could be held in abeyance pending a further review. Second, these options would put considerable authority in the hands of the various scientific bodies that supply advice to RFMO decision-makers and could result in the overt politicization of the science bodies and the process by which science-based recommendations are made.

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<sup>23</sup> In a different context, the phrase “on the basis of” was seen as implying a closer “fit” than “taking into account,” but did not mean absolute congruence or fidelity. See: T.L. McDorman, “The Role of the Commission of the Limits of the Continental Shelf: A Technical Body in a Political World” (2002), 17 *International Journal of Marine and Coastal Law* 301, at p. 304.

<sup>24</sup> In the face of scientific uncertainty or disagreement, the precautionary approach directs decisions to be conservative and cautious.

### 3.2 Precaution and RFMO Decision-Making

26. The precautionary approach is explicitly noted in all of the recent RFMO conventions and is applied in one way or another in almost all RFMOs.<sup>25</sup> While the idea of precaution as a principled approach or “rule” for decision adoption is sometimes mooted, in the RFMO-context the precautionary approach is better understood as a manner of attempting to deal with scientific information and uncertainty and as a factor to be considered in decision-making. Even where an RFMO convention directs that decision-makers “are to” or “shall” “apply the precautionary approach,” it is in the eyes of the beholder what this means in outcome terms. At a minimum, however, precaution means a conservative approach to the setting of Total Allowable Catches (TACs) and an aggressive approach to other management measures, but beyond this direction precaution is difficult to quantify. Where the precautionary approach can be expected to have a major impact on decision-making is in those situations where an RFMO creates “stock-specific reference points” that trigger or prohibit particular actions and decisions based on the state of a stock reaching or approaching the reference points.

### 3.3 Compatibility and RFMO Management Decisions

27. Compatibility, while a principle to be adhered to in RFMO management decisions, is different than the role of science since it is fundamentally a management measure coordination direction. The essence of compatibility, as derived from UNFA Article 7(2), is that management decisions taken by an RFMO and a coastal State regarding a shared stock are not to undermine or be at cross-purposes to one another. For straddling stocks the importance of compatibility and consistency of management measures by the coastal State and the RFMO with authority respecting the stock in the adjacent high seas area if the stocks are to be properly managed is self-evident. For straddling stocks, compatibility may also be important for another reason since in many situations the stocks in question have a much greater economic, social, and cultural importance to the coastal State than to the fishers on the high seas. Where the model of one State-one vote exists in RFMOs, it is through compatibility that coastal States expect their often-articulated “special interest” to be recognized and accommodated. For highly migratory stocks the same can be also be said but given the migratory range of many highly migratory stocks, the number of coastal States involved may be numerous and thus provide added complexity to attainment of compatibility but also involve a different balance of State involvement with compatibility in the RFMO. The carefully negotiated wording on compatibility in UNFA<sup>26</sup> does not explicitly recognize coastal State “special interest” or special status of coastal States regarding compatibility. It is significant, however, that UNFA explicitly provides for access to dispute settlement in cases where

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<sup>25</sup> See: Hedley, Molenaar and Oude Elferink, *supra* note 2, at pp. 11-15 and Swan, *supra* note 2, at section 3.1.

<sup>26</sup> See: Moritaka Hayashi, “The Straddling and Highly Migratory Fish Stocks Agreement,” in E. Hey, ed., *Development in International Fisheries Law* (The Hague: Kluwer Law, 1999), at pp.62-63.

no agreement is reached between an RFMO and adjacent coastal State regarding adoption of compatible management measures and that this can include provisional measures.<sup>27</sup>

**Table Four: COMPATIBILITY AND MANAGEMENT DECISIONS**

- “The Commission shall seek to ensure consistency” (NAFO(1978), Art. XI(3) and NEAFC(1980), Art. 5(2))
- “Conservation and management measures ... shall be compatible,” “the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures” (WCPFC(2000), Art. 8(1)) and “the functions of the Commission shall be to promote cooperation and coordination ... to ensure that ... measures ... are compatible” (WCPFC(2000), Art. 10(1)(b))
- “The Contracting Parties recognize the need to ensure compatibility.” “To this end, the Contracting Parties have a duty to cooperate for the purpose of achieving compatible measures.” “The appropriate Contracting Party and the Commission shall ... promote ... compatibility of ... measures.” (SEAFO(2001), Art. 19(1))
- “Measures adopted shall not be less strict than those established ... in the zones under national jurisdiction adjacent to the [RFMOs] ... area of application, shall not undermine the effectiveness of the same, and shall be fully compatible with them.” (SEAFPO(2000), Art. 5(1)(e))
- “Conservation and management measures ... shall be compatible.” (IATTC(2003), Art. V(2))

28. The *trend* is that compatibility of measures for a stock within national waters and in areas under the authority of RFMOs is referred to in all of the recent RFMO conventions. Moreover, similar wording respecting consistency of measures is found in earlier RFMOs (NAFO and NEAFC). The SEAFPO Agreement, created by coastal States and to which non-coastal States may become parties only after entry into force of the Agreement,<sup>28</sup> provides the strongest language regarding compatibility and the clearest role for coastal States. Moreover, as noted above, in the SEAFPO Agreement the appropriate coastal State must agree to measures proposed to deal with stocks that are also within their national waters. Except for the SEAFPO Agreement, the wording in other RFMO conventions respecting compatibility is couched in phrases such as “shall seek to ensure” and “shall ... promote” compatibility. None of the RFMOs have the explicit relationship between disagreements over compatibility and the use of dispute settlement as adopted in UNFA Article 7(4).

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<sup>27</sup> UNFA, Article 7(4). While the provision indicates that “any of the States concerned may invoke” the dispute settlement procedures, if the failure to achieve compatible measures is because of a failure of the members of an RFMO to reach agreement and the RFMO contains members who are not party to UNFA, it is not entirely clear how the dispute settlement procedure would work.

<sup>28</sup> The SEAFPO Convention is not yet in force.

29. The *challenge* regarding compatibility of management measures is how to decipher what compatibility means (for example: the same measures; similar results; similar general subject matter; lack of direct conflict; or no advantage for fishing inside or outside 200 nautical miles) and the degree to which a coastal State may expect (reasonably or not) to have the management measures it has adopted within 200 nautical miles to be reflected in the measures adopted by the adjacent RFMO. The compromise wording in UNFA on compatibility and the less than clear wording adopting in RFMO conventions (except for the anomalous SEAFPO Agreement) indicates that meeting the challenge will not be easy.

30. *Meeting the challenge* regarding compatibility of coastal State and RFMO management measures should be seen as a work in progress. This is clear from the explicit linking of disagreements over compatibility to dispute settlement procedures in UNFA Article 7(4). One approach to meeting the compatibility of measures challenge is for RFMOs to embrace either the dispute settlement procedures approach UNFA and encourage formal dispute settlement regarding compatibility disagreements or a process to encourage attainment of compatibility such as technical body, expert or RFMO Secretariat or Chair conciliation/mediation.

#### 4.0 **Decision-Making Regarding Allocations**

31. While it is the determination by an RFMO of the Total Allowable Catch (TAC) or total allowable fishing effort that has the most immediate impact on the resource and the harvesters of the resource, the relationship between these determinations and the directions and principles (science) noted above (in paragraphs 22-23) are well acknowledged, if not always adhered to scrupulously. When it comes to RFMO members' allocations of a TAC or fishing effort (quotas),<sup>29</sup> differing considerations come into play. The considerations listed in UNFA Article 11 respecting "participatory rights" for new RFMO members are useful criteria for allocation decision-making. These are, amongst others: the status of the stocks and existing fishing efforts; existing fishing patterns (historic fishing activity); economic need and coastal State dependence; and contribution to conservation. It is RFMO allocation decisions that usually generate the most tension between members and a sense a grievance in both the member States and their fishing communities (stakeholders) that in turn pressure the member States.

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<sup>29</sup> In UNFA, allocation matters are referred to as "participatory rights." There are different methods of allocation. One method is division of the TAC into State-specific quotas. Another method is to set a TAC and close the fishery when the TAC is reached ("Olympic-style" fishery). Note: Erik Jaap Molenaar, "Regional Fisheries Management Organizations: Issues of Participation, Allocation and Unregulated Fishing" in A. G. Oude Elferink and D.R. Rothwell, eds, *Oceans Management in the 21<sup>st</sup> Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff, 2004), pp. 77-82.

**Table Five: CRITERIA FOR ALLOCATION DECISIONS**

- “Proposals adopted by the Commission for the allocation of catches ... shall take into account” (NAFO(1978), Art. XI(4))
- “In deciding upon allocations ... the Commission shall consider” (CCSBT(1993), Art. 8(4))
- “The Commission shall ... develop, where necessary, criteria for the allocation of the total allowable catch” (WCPFC(2000), Art. 10(1)(g)) and “In developing criteria for allocation ... the Commission shall take into account.” (WCPFC(2000), Art. 10(3))
- “In determining the nature and extent of participatory rights in fishing opportunities, the Commission shall take into account” (SEAFO(2001), Art. 20(1))
- “The Commission shall ... where necessary, develop criteria for ... the allocation of the total allowable catch ... taking into account all relevant matters”. (IATTC(2003), Art. VII(1)(l))

32. The *trend* is for RFMOs to have criteria to be applied (NAFO, CCSBT, ICCAT<sup>30</sup> and SEAFO) or to provide that such criteria can or are to be developed (WCPFC and IATTC(2003)) in making allocation decisions. The wording on the relationship between the allocation decision and the criteria is either “shall take into account” or “shall consider” which harkens back to discussion above on the relationship between scientific information and RFMO management decisions (see above paragraph 23). This wording, when combined with the variety and fluidity of the criteria usually noted, makes allocation decisions somewhat open-ended since the usual situation is that every RFMO member has at least one criterion upon which they can rest their claimed allocation or participation.

33. The *challenge* regarding allocation decisions is to ensure that both the decision-making process and the outcomes of the process minimize State and fishing community grievance that may lead to harvesting non-compliance (and as a result over-fishing) or less cooperation on other management issues being dealt with by an RFMO. There is a high State interest in allocation decisions. The special nature of RFMO allocation decisions is explicitly acknowledged in the WCPFC Convention where, unlike other decisions, allocation decisions must be adopted by consensus.<sup>31</sup> However, consensus for allocation decision adoption can lead to paralysis and continuation of previously agreed quotas that are not necessarily sustainable. Objection procedures provide some relief from consensus paralysis but, when used regarding allocation decisions, may allow the objecting State to set their own quota. This outcome is less than satisfactory.

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<sup>30</sup> Although not provide for explicitly in the ICCAT Convention, ICCAT has adopted criteria for allocation decisions.

<sup>31</sup> Moreover, under the WCPFC Convention where consensus cannot be reached, the Commission Chair may appoint a conciliator to assist in a reaching of consensus.

**34.** *Meeting the challenge* regarding allocation decision-making may involve having a specific decision-making process for allocations (see above paragraph 13) but it must be one that avoids paralysis and easy use of the objection procedure. A bold suggestion is to have all RFMOs adopt consensus decision-making for allocation matters, there be no right to use an objection procedure and provide that in years and for stocks where consensus cannot be reached that the quotas for each member decline by a pre-set amount (e.g. 20%) for each year non-consensus prevails. This can be justified on the basis of precaution and providing an important incentive to agree on allocations. Such a model, however, might deter States from becoming RFMO members.

## **5.0 Dispute Settlement**

**35.** UNFA Article 28 ties “efficient and expeditious decision-making procedures” within RFMOs to dispute prevention but does so within Part VIII on “Peaceful Settlement of Disputes.” Clearly, effective decision-making processes minimize disputes and, conversely, the existence of processes for discussion or resolution of disputes can assist in making decision-making processes, in particular the implementation and compliance with decisions, more effective. The attention here is on formal dispute settlement procedures rather than dispute prevention or less formal dispute resolution, the latter of which is available without the need of treaty provisions.

**36.** For States Party to UNFA, pursuant to Article 30(2), recourse may be had to the UNFA dispute settlement procedures regarding “the interpretation or application” of an RFMO agreement to which they are parties, “including any dispute concerning the conservation and management” of stocks being managed by the RFMO. It is unclear whether the UNFA Article 30(2) dispute settlement procedures are available if the complaint is by an UNFA party against an RFMO decision where not all of the members of the RFMO are UNFA parties or whether the dispute settlement process could be accessed against an RFMO member, also an UNFA party, that had voted in favour of a RFMO decision. Moreover, in light of the *2000 Southern Bluefin Tuna (Jurisdiction and Admissibility) Arbitration Award*,<sup>32</sup> dispute settlement procedures in RFMOs may preclude access to the UNFA dispute settlement procedures.

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<sup>32</sup> *2000 Southern Bluefin Tuna (Jurisdiction and Admissibility) Arbitration Award*, (Australia v. Japan; New Zealand v. Japan), (2000), 39 *International Legal Materials* 1359. This decision arose through the dispute settlement procedures of the 1982 UN Convention on the Law of the Sea (UNCLOS). The *Award* concluded that, because there was a dispute settlement process in the CCSBT Convention and the matter in issue involved the CCSBT, the dispute settlement procedures of UNCLOS were not available.

**Table Six: DISPUTE SETTLEMENT**

- No dispute settlement procedures:  
ICCAT(1966), NAFO(1978), IATTC(1949)
- Non-binding dispute settlement procedures:  
CCAMLR(1980), CCSBT(1993), IOTC(1993), IATTC(2003)
- Binding dispute settlement procedures:  
NEAFC(1980), GFCM(1997), WCPFC(2000), SEAFO(2001),  
SEAFPO(2000)

37. The *trend* is clearly for RFMO conventions to provide dispute settlement procedures. Moreover, the trend is to have, as a last resort, binding third-party dispute settlement (GFCM, WCPFC, SEAFO, and SEAFPO, the exception being IATTC(2003)).

38. An over-looked option in dispute settlement and, in some cases, respecting RFMO management decision-making is the potential role of the RFMO Secretariat or Chair. Without exhaustively studying the existing RFMOs (a subject for further exploration), it appears that RFMO Secretariats and Chairs have little direct or indirect authority in RFMO decision-making or dispute resolution. An exception, noted above, is that the Chair of the WCPFC can appoint a conciliator to assist members in reaching consensus on allocation issues. Consideration of an enhanced role for RFMO Secretariats or Chairs (Executive Directors) as an “independent player or voice” in management decision-making might be fruitful.

## **6.0 Conclusion**

39. As stated in paragraph 5, the *challenge* regarding decision-making processes within RFMOs is to have a process that respects State sovereignty while minimizing the scope of States to hinder the adoption and effective implementation of management and conservation measures that science and the state of stocks require. Moreover, the decision-making process must be one that attracts States to become members of the RFMO. Ultimately, political will is the essential ingredient since, at best, decision-making processes are facilitative. Clearly what is involved is careful balancing.

40. In *meeting the challenge* there is no one model process for decision-making that can be held out as the most appropriate for RFMOs. The difference between RFMOs that manage highly migratory stocks and straddling stocks makes a single model unlikely. As well, differing configurations of member States to RFMOs make a single model unlikely. Nevertheless, based on the trends arising in the negotiation of recent RFMO conventions, several possibilities can be explored to meet the challenge regarding decision-making processes. These possibilities add complexity to decision-making processes. It remains to be evaluated in what situations complexity may lead to more effective management decisions or lead to delays and RFMO abandonment?

**41.** Regarding formal decision adoption processes (see above paragraph 13) a hierarchy could be created attaching differing decision adoption procedures to different types of management measures. The more State-sensitive the decision, for example, quota allocation or Total Allowable Catch (TAC), the more important is direct State consent. The less State-sensitive the decision, for example, gear restrictions, the less direct State consent should be necessary. To a limited extent, this is what has been done in the WCPFC and SEAFO. Regarding objection procedures (see above paragraph 20), less of a “no questions asked” approach should be considered. This is what is being pursued in WCPFC, SEAFO and NEAFC. This could involve adopting an approach that makes use of, in differing combinations: placing the burden of explanation on the objecting State; limiting the grounds for use of the objection procedure; restricting the objection procedure to decisions on specific subjects; having the objecting State indicating the measures it intends to take as an alternative; and explicitly linking use of objection procedures to dispute settlement procedures respecting an objection, the decision involved and the subsequent action by an objecting State.

**42.** Regarding the relationship between RFMO management decisions and scientific evidence, advice and recommendations (see above paragraph 25), what could be considered could involve borrowing from what is occurring in several RFMOs as regards the objection procedure -- RFMOs management decisions that depart from scientific advice or recommendations (particularly recommendations that involve specific management decisions such as, for example, setting of Total Allowable Catches (TACs)) could be acknowledged by public declarations as to why the departure has taken place. Another option might be to create a process to allow an RFMO member to question whether a management decision is less rigorous than what is dictated by the scientific evidence, advice or recommendation.

**43.** Regarding compatibility of coastal State and RFMO management measures (see above paragraph 30), one approach to meeting the compatibility of measures challenge might be for RFMOs to embrace either the dispute settlement procedures approach UNFA (see UNFA Article 7(4)) and encourage formal dispute settlement regarding compatibility disagreements, or a process to encourage attainment of compatibility such as technical body, expert or RFMO Secretariat or Chair conciliation/mediation.

**44.** Respecting the difficult issue of allocation of fishing opportunities (see above paragraph 34), having a specific decision-making process for allocations fits with what has been suggested above, but it must be one that avoids paralysis and the use of the objection procedure. A bold suggestion is to have all RFMOs adopt consensus decision-making for allocation matters, there be no right to use an objection procedure and provide that in years and for stocks where consensus cannot be reached that the quotas for each member decline by a pre-set amount (e.g. 20%) for each year non-consensus prevails. This can be justified on the basis of precaution and providing an important incentive to agree on allocations. Such a model, however, might deter States from becoming RFMO members.

## ANNEX ONE

**Table Seven: RFMO CONVENTIONS AND INFORMATION**

RFMO Convention	Done	Entered into Force	Website
ICCAT	1966	1969	<a href="http://www.iccat.es">www.iccat.es</a>
NAFO	1978	1979	<a href="http://www.nafo.org">www.nafo.org</a>
CCAMLR	1980	1982	<a href="http://www.ccamlr.org">www.ccamlr.org</a>
NEAFC	1980	1982	<a href="http://www.neafc.org">www.neafc.org</a>
CCSBT	1993	1994	<a href="http://www.csbt.org">www.csbt.org</a>
IOTC	1993	1996	<a href="http://www.iotc.org">www.iotc.org</a>
GFCM	1997	2004	<a href="http://www.faogfcm.org">www.faogfcm.org</a>
WCPFC	2000	2004	<a href="http://www.wcpfc.org*">www.wcpfc.org*</a>
SEAFO	2001	2004	<a href="http://www.nfmr.gov/seafo/seafo.htm">www.nfmr.gov/seafo/seafo.htm</a>
IATTC (1949)	1949	1950	<a href="http://www.iattc.org">www.iattc.org</a>
IATTC (2003)	2003	no	<a href="http://www.iattc.org">www.iattc.org</a>
SEAFPO	2000	no	<a href="http://www.cpps-int.org/English/galapagosagreement.html">www.cpps-int.org/English/galapagosagreement.html</a>

\* This website is under construction. See [www.ocean-affairs.com](http://www.ocean-affairs.com).

## ANNEX TWO

### Secondary Materials of Special Note

- 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) (prepared for the European Parliament by the Netherlands Institute for the Law of the Sea (NILOS)).
- Moritaka Hayashi, “The Straddling and Highly Migratory Fish Stocks Agreement” in E. Hey, ed., *Developments in International Fisheries Law* (The Hague: Kluwer Law International, 1999), pp. 55-83.
- Erik Jaap Molenaar, “Regional Fisheries Management Organizations: Issues of Participation, Allocation and Unregulated Fishing” in A. G. Oude Elferink and D.R. Rothwell, eds, *Oceans Management in the 21<sup>st</sup> Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff, 2004), pp. 69-86.
- Peter Orebeck, Ketill 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.
- Olav Schram Stokke, ed., *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001).
- Judith Swan, *Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes* (2004, FAO Fisheries Circular No. 995, available at [www.fao.org/DOCREP/006/Y5357E](http://www.fao.org/DOCREP/006/Y5357E)).

- Are K. Sydnes, “Regional Fishery Organizations: How and Why Organizational Diversity Matters” (2001), 32 *Ocean Development and International Law* 349-372.