

Strengthening International Fisheries Law in an Era of Changing Oceans

Edited by
Richard Caddell
and
Erik J Molenaar

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © The editors and contributors severally 2019

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Caddell, Richard, editor. | Molenaar, Erik Jaap, editor.

Title: Strengthening international fisheries law in an era of changing oceans /
edited by Richard Caddell, Erik J Molenaar.

Description: Oxford, UK ; Portland, Oregon : Hart Publishing, 2019. | Includes bibliographical references and index.

Identifiers: LCCN 2018052063 (print) | LCCN 2018056239 (ebook)
ISBN 9781509923359 (EPub) | ISBN 9781509923342 (hardback)

Subjects: LCSH: Fishery management, International—Law and legislation. |
BISAC: LAW / International. | LAW / Environmental.

Classification: LCC K3895 (ebook) | LCC K3895 .S77 2019 (print) | DDC 343.07/6922—dc23

LC record available at <https://lccn.loc.gov/2018052063>

ISBN: HB: 978-1-50992-334-2
ePDF: 978-1-50992-336-6
ePub: 978-1-50992-335-9

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit www.hartpublishing.co.uk.
Here you will find extracts, author information, details of forthcoming events
and the option to sign up for our newsletters.

6

Participation in Regional Fisheries Management Organizations

ERIK J MOLENAAR*

1. INTRODUCTION

THE ISSUE OF participation in regional fisheries management organizations (RFMOs) is of crucial importance for the performance, credibility and legitimacy of international fisheries law. Concerns over the rules and practices of RFMOs on participation have frequently been raised in global fora, followed by recommendations to address these concerns.¹ While States and ‘entities’ (see explanation below) may have several reasons for participating in RFMOs or for desiring to obtain a participatory status, they are often predominantly motivated by the socio-economic benefits derived from engaging in fishing or fishing-related activities (e.g. provisioning of fuel, water etc., and transhipment of catch) under the auspices of an RFMO. Criticism by an unsuccessful applicant concerning RFMOs that have restrictive rules and practices on participation – or: ‘closed’ RFMOs – will therefore be primarily based on inequitable distribution of resources.

There are nevertheless also instances in which participation is predominantly motivated by the desire to participate in an RFMO’s decision-making process, and thereby influence the substance of individual decisions as well as the wider

* Writing this chapter was made possible by funding from the Netherlands Polar Programme. The author is very grateful for assistance and/or comments received from Richard Barnes, Richard Caddell, Nicola Ferri, Solène Guggisberg, Johanne Fisher, Luis Molledo, Alex Oude Elferink and François Ziegler on an earlier version.

¹E.g. the 2017 United Nations General Assembly (UNGA) ‘Fisheries’ Resolution (UNGA Res. 72/92 of 5 December 2017), para. 142; Report of the 2006 Fish Stocks Agreement Review Conference (Doc. A/CONF.210/2006/15 of 5 July 2006), paras. 72 and 80 of the discussion, and para. 30 of the Outcome (Annex); Report of the 2010 Resumed Fish Stocks Agreement Review Conference (Doc. A/CONF.210/2010/7 of 27 July 2010), paras. 82–83 of the discussion; and Report of the 2016 Resumed Fish Stocks Agreement Review Conference (Doc. A/CONF.210/2016/5 of 1 August 2016), para. 109 of the discussion, and paras. B(4)(a) and (c) and D(2)(a) of the Outcome (Annex).

evolution of the RFMO and its constitutive instrument. Participants could, for instance, be mainly concerned with strengthening an RFMO's performance on conservation in general or minimizing the impacts of fishing on (iconic) non-target species or ecosystems in particular. This chapter refers to this group of participants as 'non-user States'. Moreover, a State or entity could cherish a participatory status within a particular RFMO due to the prestige associated with that status – in particular for RFMOs that are relatively 'closed' – or the evidence it provides of that State or entity's commitment to, and efforts towards, responsible fishing. The latter can be of crucial importance for avoiding restrictions on access to important market States or entities (e.g. the United States (US) or the European Union (EU)) and other measures taken against States and entities whose vessels and nationals are involved in illegal, unreported and unregulated (IUU) fishing.

The rules and practices of RFMOs on participation, allocation and combating IUU fishing are closely linked. As a general rule, allocations of fishing opportunities and other benefits are only available to formal participants in RFMOs. Many RFMOs have two main formal participatory categories for States and entities, namely (full) membership and cooperating status.² RFMOs commonly treat engagement in fishing or fishing-related activities by vessels flying the flag of States or entities that do not have either of these two participatory categories as IUU fishing, thereby triggering a range of measures to combat IUU fishing.³ Such measures can only be avoided by not engaging in fishing or fishing-related activities (abstention) or by obtaining membership or cooperating status. The reality, however, is that membership or cooperating status commonly does not automatically entitle a participant to an allocation.⁴

This chapter only examines participation by States and entities and not by (other) non-State actors (e.g. (other) intergovernmental organizations and non-governmental organizations). For the purpose of this chapter, the term 'entity' relates exclusively to the EU and Taiwan (Chinese Taipei).⁵ In the domain of international fisheries law, these entities are the two exceptions to the general rule that the status of full participant in intergovernmental fisheries bodies is reserved exclusively for States. The international community's recognition of the EU and its predecessors as a full participant in international fisheries law – as well as the international law of the sea more generally – materialized during the third United Nations Conference on the Law of the Sea (UNCLOS III) and was laid down in the LOS Convention.⁶ At present, many international fisheries instruments allow regional economic integration organizations (REIOs) to

² Some RFMOs use another designation (see Subsection 5.4).

³ See in particular Chapter 13 of this volume (van der Marel).

⁴ See note 82 and accompanying text.

⁵ See also note 48.

⁶ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 3). See Art. 305(1)(f) and Annex IX.

become Parties, and Members of their bodies.⁷ So far, the EU has been the only REIO to have exercised this option.⁸

Once Taiwan's significant role in international marine capture fisheries became generally accepted, the international community's recognition of its status was enshrined in the Fish Stocks Agreement.⁹ Many RFMOs now have arrangements to ensure the applicability of their constitutive instruments to Taiwan – rather than entitling Taiwan to become a Party – and/or allow Taiwan's involvement in the bodies established by those instruments. The participation of the EU, EU Member States and Taiwan in selected RFMOs is examined further in Subsection 5.3.

The remainder of this chapter consists of four sections. Section 2 is aimed at clarifying the selection of the RFMOs whose rules and practices on participation are examined in this chapter. Subsequently, Section 3 contains some general observations on participation in intergovernmental instruments and bodies. The provisions in global framework conventions that are relevant to participation in RFMOs – i.e. the LOS Convention and the Fish Stocks Agreement – are examined in Section 4. The analysis of the rules and practices of selected RFMOs on participation is carried out in Section 5. The chapter ends with conclusions in Section 6.

In order to ensure conciseness and avoid consistent cross-references, this chapter refers to individual RFMOs and their constitutive instruments by means of acronyms and abbreviations. Their full titles and details are included in Table 1, further below.

2. SELECTED RFMOS

Chapter 5 of this volume (Harrison) examines the differences between the concepts of an RFMO and a regional fisheries management arrangement (RFMA), and notes that there are at present no generally accepted definitions for either concept. Whereas the Fish Stocks Agreement defines an RFMA in Article 1(1)(d), it is clear that the concepts of an RFMO and an RFMA are not exclusively used in relation to straddling and highly migratory fish stocks, but also for other categories of fish stocks, such as anadromous, shared and discrete high seas fish stocks. Illustrative in this regard is the broad concept of a regional fishery body (RFB) used by the United Nations Food and Agriculture Organization (FAO), to denote a mechanism through which States and entities cooperate

⁷E.g. Arts. 1(g) and 35(2) of the WCPF Convention, note 28.

⁸Interestingly, Arts. 9–11 of the CAOF Agreement, note 36, mention the EU explicitly, rather than the generic notion of REIOs.

⁹Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (2167 UNTS 3), Arts. 1(3) and 17(3).

for the conservation and management of marine living resources – fish as well as marine mammals – and/or the development of marine capture fisheries.¹⁰

This chapter focuses exclusively on RFMOs and RFMAs. These are a subset of RFBs that can ultimately be distinguished from other RFBs on account of the fact that (1) they relate to marine fisheries, rather than inland fisheries; and (2) they have a mandate to impose legally binding conservation and management measures on their members or participants, rather than merely exercising an ‘advisory’ mandate (whether primarily science-oriented or management-oriented). Furthermore, in view of this chapter’s focus on participation, attention is only devoted to RFMOs and RFMAs whose regulatory areas include areas of high seas or consist entirely of high seas.¹¹ At the time of writing, these are the five ‘tuna RFMOs’ and the 11 ‘non-tuna RFMOs and RFMAs’ listed in Table 1.¹²

Four of the latter 11 are regarded as RFMAs and listed separately in Table 1. One of these has a Conference of the Parties (COP), and two a Meeting of the Parties (MOP) as the main decision-making body. The fourth – the Joint Norwegian Russian Fisheries Commission (JNRFC) – seems to be regarded as an RFMA by its two Members, even though they named it a ‘Commission’.¹³ As became evident during the negotiations on the CAOF Agreement,¹⁴ however, several delegations question the JNRFC’s status as an RFMA.¹⁵ Furthermore, while these delegations have so far not exchanged views or positions as to whether the CAOF Agreement qualifies as an RFMA within the meaning of the Fish Stocks Agreement, it is submitted that there are arguments in support of such a qualification.¹⁶

¹⁰ See the information at www.fao.org/fishery/topic/16800/en. It should be noted that while this page distinguishes a ‘regional fishery arrangement’ from an RFB, FAO’s list of RFBs on www.fao.org/fishery/rfb/search/en does not use this distinction. It is important to note that inclusion of a body in FAO’s list of RFBs cannot be regarded as a form of multilateral recognition of the status of these bodies under international law. Unless explicitly provided otherwise, the competence to make such determinations lies with States and entities, whether individually or collectively.

¹¹ The North Atlantic Salmon Conservation Organization (NASCO) and the North Pacific Anadromous Fish Commission (NPAFC) are excluded due to their prohibitions on high seas fishing. Participation in RFMOs and RFMAs whose regulatory areas consist entirely of coastal State maritime zones will logically be limited to coastal States.

¹² The Western Central Atlantic Fishery Commission (WECAFC) is currently engaged in a process to re-constitute itself as an RFMO (Report of the 2016 WECAFC Meeting, para. 55).

¹³ EJ Molenaar “International Regulation of Central Arctic Ocean Fisheries” in MH Nordquist, JN Moore and R Long (eds.) *Challenges of the Changing Arctic. Continental Shelf, Navigation, and Fisheries* (Brill/Nijhoff, Leiden/Boston: 2016) 429–463, at 443.

¹⁴ See note 36.

¹⁵ EJ Molenaar “Participation in the Central Arctic Ocean Fisheries Agreement” in A Shibata et al. (eds.) *Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors* (Routledge: forthcoming in 2019).

¹⁶ The restrictions imposed on exploratory fishing included in Arts. 3(3) and 5(1)(d) of the CAOF Agreement, note 36, seem to qualify as “conservation and management measures” pursuant to the definition in Art. 1(1)(b) of the Fish Stocks Agreement. More importantly, in light of, *inter alia*, its Objective (Art. 2), its qualified and temporary abstention from commercial high seas fishing

Whether or not the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is an RFMO has been debated repeatedly among its Members. One of the principal arguments against such qualification is that CCAMLR is a component of the Antarctic Treaty System (ATS) rather than an RFMO.¹⁷ In 2002, however, there was broad agreement among the Members that CCAMLR has “the attributes of an RFMO within the context of the UN and its subsidiary bodies”.¹⁸ Or – in other words – CCAMLR is ‘more than an RFMO’. A similar argument could be made with regard to the General Fisheries Commission for the Mediterranean (GFCM), on account of its competence relating to aquaculture.¹⁹

In recent years, debates over CCAMLR’s status as an RFMO resurfaced in the context of proposals for the establishment of marine protected areas (MPAs). Advocates for the establishment of MPAs highlighted features of CCAMLR that arguably distinguish it from ‘most RFMOs’, thereby triggering a discussion on the (alleged) supremacy of conservation over rationale use.²⁰ Finally, it is interesting that CCAMLR is not only included in FAO’s list of RFBs but is also treated by the United Nations Environment Programme (UNEP) as an independent regional seas programme.²¹ Listing CCAMLR among RFBs is more convincing, as its competence is in principle limited to fishing, fishing-related activities and research, but does not extend to any other human activity.²² Conversely, the mandates of the principal decision-making bodies under regional seas programmes extend in principle to all human activities, while accepting the primacy of relevant sectoral organizations such as RFMOs.²³

For the remainder of this chapter, references to RFMOs are meant to include RFMAs, unless indicated otherwise.

(Art. 3(1)) and the establishment of a Joint Program of Scientific Research and Monitoring to inform future fisheries management (Art. 4), the CAOF Agreement qualifies as a “cautious conservation and management measure” in the context of the obligations on new and exploratory fisheries included in Art. 6(6) of the Fish Stocks Agreement.

¹⁷ Report of the 14th (1995) Annual CCAMLR Meeting at 70, para. 15.2.

¹⁸ Report of the 21st (2002) Annual CCAMLR Meeting at 88, para. 15.2.

¹⁹ Art. 2(2) of the GFCM Agreement.

²⁰ Report of the 35th (2016) Annual CCAMLR Meeting, 60–61, paras. 9.12–9.21.

²¹ See web.unep.org/regionalseas/.

²² Art. II(1) of the CAMLR Convention stipulates that its objective is “the conservation of Antarctic marine living resources”, while Art. II(2) clarifies that “the term ‘conservation’ includes rational use”. The Preamble and many provisions indicate that CCAMLR’s competence is in principle limited to fishing, fishing-related activities and research (e.g. Arts. II(3), V, VI, IX and XXIX(1)). Moreover, CCAMLR has taken measures to prevent impacts by fishing vessels and scientific research vessels on Antarctic marine living resources by adopting measures relating to maritime safety, vessel-source pollution and the introduction of alien species (see e.g. CCAMLR Conservation Measures 26-01 (2015) and 91-04 (2011), para. 6, and CCAMLR Resolutions 20/XXII (2003), 23/XXIII (2004), 28/XXVII (2008), 29/XXVIII (2009), 33/XXX (2011) and 34/XXXI (2012)).

²³ E.g. the mandate of the OSPAR Commission established under the OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992 (2345 UNTS 67, as amended; consolidated version available at www.ospar.org vis-à-vis fisheries and maritime transport pursuant to Art. 4 of Annex V.

Table 1 Selected RFMOs and RFMAs

Acronym	Name in full	Constitutive instrument
Tuna RFMOs		
CCSBT	Commission for the Conservation of Southern Bluefin Tuna	CCSBT Convention ²⁴
IATTC	Inter-American Tropical Tuna Commission	IATTC Convention ²⁵
ICCAT	International Commission on the Conservation of Atlantic Tunas	ICCAT Convention ²⁶
IOTC	Indian Ocean Tuna Commission	IOTC Agreement ²⁷
WCPFC	Western and Central Pacific Fisheries Commission	WCPF Convention ²⁸
Non-Tuna RFMOs		
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources	CAMLR Convention ²⁹
GFCM	General Fisheries Commission for the Mediterranean	GFCM Agreement ³⁰
NAFO	Northwest Atlantic Fisheries Organization	NAFO Convention ³¹
NEAFC	North-East Atlantic Fisheries Commission	NEAFC Convention ³²

(continued)

²⁴ Convention for the Conservation of Southern Bluefin Tuna, Canberra of 10 May 1993 (1819 UNTS 360; also available at www.ccsbt.org).

²⁵ Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica of 14 November 2003 (also known as the ‘Antigua Convention’; available at www.iattc.org).

²⁶ International Convention for the Conservation of Atlantic Tunas of 14 May 1966 (673 UNTS 63, as amended; consolidated version available at www.iccat.int). At the time of writing, the ICCAT Working Group (WG) on Convention Amendment had essentially concluded its work on ‘modernizing’ the ICCAT Convention (see Docs No. CONV_03C/2018 and CONV_08C/2018). ICCAT will have to resolve the remaining procedural issues at its 2018 Annual Meeting. See also J Spencer, JJ Maguire and EJ Molenaar *Report of the Second Independent Performance Review of ICCAT* (ICCAT: 2016, available at www.iccat.int/en/pubs_spec.htm), *inter alia* at 9–10, 57–58, 60 and 65.

²⁷ Agreement for the Establishment of the Indian Ocean Tuna Commission of 25 November 1993 (available at www.iotc.org).

²⁸ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 5 September 2000 (2275 UNTS 43; also available at www.wcpfc.int).

²⁹ Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (1329 UNTS 47; also available at www.ccamlr.org).

³⁰ Agreement for the Establishment of a General Fisheries Council for the Mediterranean of 24 September 1949 (126 UNTS 239, as amended; consolidated version available at www.fao.org/legal/treaties/treaties-under-article-xiv/en/).

³¹ Convention on Cooperation in the Northwest Atlantic Fisheries – originally named ‘Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries’ – of 24 October 1978 (1135 UNTS 369, as amended; consolidated version available at www.nafo.int).

³² Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries of 18 November 1980 (1285 UNTS 129, as amended; consolidated version available at www.neafc.org).

Table 1 (*Continued*)

Acronym	Name in full	Constitutive instrument
NPFC	North Pacific Fisheries Commission	NPFC Convention ³³
SEAFO	South East Atlantic Fisheries Organisation	SEAFO Convention ³⁴
SPRFMO	South Pacific Regional Fisheries Management Organisation	SPRFMO Convention ³⁵
Non-Tuna RFMAs		
CAOF Agreement	Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (MOP)	CAOF Agreement ³⁶
CBS Convention	Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (COP)	CBS Convention ³⁷
JNRFC	Joint Norwegian Russian Fisheries Commission	JNRFC Agreement ³⁸
SIOFA	Southern Indian Ocean Fisheries Agreement (MOP)	SIOFA ³⁹

3. PARTICIPATION IN INTERGOVERNMENTAL INSTRUMENTS AND BODIES

3.1. The Formation of Grounds and Requirements for Participation

The formation of the grounds (or: bases) and requirements for participation in intergovernmental instruments and bodies depends above all on whether or not the envisaged instrument or body will be negotiated under the auspices of an existing (overarching) intergovernmental body and its constitutive instrument, and whether or not there are other overarching frameworks or rules in place that must be taken into account. In circumstances in which neither are in

³³ Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean of 24 February 2012 (available at www.npfc.int).

³⁴ Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean of 10 April 2001 (2221 UNTS 189; also available at www.seafo.org).

³⁵ Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009 (available at www.sprfmo.int).

³⁶ Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean of 3 October 2018; text included in the Annex to doc. COM(2018) 453 final, of 12 June 2018.

³⁷ Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea of 16 June 1994 (34 ILM 67; also available at www.afsc.noaa.gov/REFM/CBS).

³⁸ Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry of 11 April 1975 (983 UNTS 7).

³⁹ Southern Indian Ocean Fisheries Agreement of 7 July 2006 (available at www.siofa.org).

place, States sharing certain characteristics, interests and/or concerns can form an initiating group – often referred to as the ‘founding fathers’ or ‘(original) signatory States’ (further: Founding Fathers) – and determine the grounds and requirements of participation largely as they see fit. It goes without saying that the grounds and requirements for participation will as a minimum incorporate the characteristics, interests and/or concerns which the initiating States have in common. In some instances, they may even claim a special participatory status, special rights or (implicitly) exclude other States and entities.

The negotiation of the Charter of the United Nations (UN)⁴⁰ is a useful example in this regard. As the League of Nations had neither been able to prevent aggression by the Axis powers in the 1930s nor the outbreak of World War II, the main Allied States – China (Republic of), the Soviet Union, the United Kingdom (UK) and the US; also known as the ‘Big Four’ – decided towards the end of 1943 that the League of Nations had to be replaced by a new intergovernmental body. Subsequently, the Big Four developed an advanced de facto ‘draft UN Charter’ during the 1944 Dumbarton Oaks Conference, which was further developed and adopted by around 50 States during the 1945 ‘United Nations Conference on International Organization’. The ‘draft UN Charter’ already envisaged that the Big Four “and, in due course, France” would be permanent members of the UN Security Council and have a right of veto.⁴¹

3.2. Issues of Statehood

In addition to the special arrangements relating to Taiwan discussed above, reference should be made to Palestine’s accession to the LOS Convention in 2015.⁴² This occurred after the UNGA⁴³ accorded Palestine the status of non-member observer State with the UN in 2012,⁴⁴ thereby comprising Palestine within the ‘all States’ formula contained in Article 305(1)(a) of the LOS Convention.⁴⁵ The only RFMO in which Palestine seems to have participated so far is GFCM, as an observer.⁴⁶

Article 305(1)(c) and (d) of the LOS Convention allows ‘Associated States’ to sign the LOS Convention and thereby become a Party to it. So far, only the Cook Islands and Niue – both in free association with New Zealand – have made use of this entitlement.⁴⁷

⁴⁰ Charter of the United Nations of 26 June 1945 (1 UNTS xvi).

⁴¹ Proposals for the Establishment of a General International Organization at Ch. 6, Sec. A.

⁴² For the status of participation in the LOS Convention, see www.un.org/depts/los/convention_agreements/convention_agreements.htm.

⁴³ Note 1.

⁴⁴ UNGA Res. 67/19 of 29 November 2012.

⁴⁵ See S Rosenne and LB Sohn (vol. eds) and MH Nordquist (ed-in-chief) *United Nations Convention on the Law of the Sea 1982, A Commentary, Volume V* (Martinus Nijhoff Publishers, Dordrecht/Boston/London: 1989) 181.

⁴⁶ Report of the 40th (2016) GFCM Session at 41.

⁴⁷ The status of participation is available at www.un.org/depts/los. For a recent analysis of Art. 305 of the LOS Convention, see A Proelß (ed.) *United Nations Convention on the Law of the Sea*.

Non-self-governing territories are also able to sign, and thereby become a Party to the LOS Convention, pursuant to the somewhat unclear specifications of Article 305(1)(e) of the LOS Convention. While none have done so far, some have argued that Western Sahara would be entitled to do so.⁴⁸

All this notwithstanding, a uniform practice exists within RFMOs relating to ‘non-metropolitan’ components of (federal) States. So far, none have become members in their own right, without formal involvement of the (federal) States in parallel. The Kingdom of Denmark, for instance, is a Member of NEAFC in respect of Greenland and the Faroe Islands, but not mainland Denmark, in view of the latter’s EU membership. The only exception to this uniform practice which could arise relates to Associate Members of FAO, who are entitled to become Members of GFCM and IOTC in their own right.⁴⁹ At the time of writing, neither of the two existing Associate Members – the Faroe Islands and Tokelau⁵⁰ – had made use of this entitlement. SPRFMO and WCPFC have a distinct participatory status for territories, without the right to vote.⁵¹ While the CAOF Agreement recognizes the entitlement of Arctic indigenous peoples to participate in subsidiary bodies established by the MOP, they can only do so as part of the delegations of Parties and not in their own right.⁵²

3.3. The EU and EU Member States

As was already observed above, the EU is generally regarded as qualifying as a REIO in the domain of international fisheries law. The need for the EU and its predecessors to participate in their own right in this arose from the transfer, from EU Member States to the EU and its predecessors, of exclusive competence over “the conservation of marine biological resources under the common fisheries policy”.⁵³ As a general rule, this transfer of exclusive competence implied that the EU and its predecessors would replace EU Member States in

A Commentary (C.H. Beck/Hart/Nomos: 2017). At present, both Niue and the Cook Islands are Members of WCPFC, and the Cook Islands is also an Accessing State to the CAMLR Convention, a Party of SIOFA and a Member of SPRFMO (see Table 2 in Subsection 5.1).

⁴⁸ JJ Smith *From the Desert to the Sea: The Maritime Jurisdiction of an Independent Western Sahara* (LLM Thesis, The Fletcher School, Tufts University: 2010; available at no0ilcanarias.files.wordpress.com/2012/10/westernsahara-doc.pdf) 171–173. Note that the words “no Fishing Entity other than Chinese Taipei” in the ‘Draft Resolution by ICCAT Regarding Participation by Fishing Entities under the Amended ICCAT Convention’ (Doc. No. CONV_08C/2018; see note 26) is aimed at ensuring that it does not apply to Western Sahara.

⁴⁹ This entitlement is based on Art. II(11) of the FAO Constitution (Constitution of the Food and Agriculture Organization of the United Nations of 16 October 1945 (as amended; consolidated version available at www.fao.org/Legal) in conjunction with Arts. 4(1) and 23(1) of the GFCM Agreement, and Arts. IV(1) and XXII(1) of the IOTC Agreement.

⁵⁰ The status of membership is available at www.fao.org/legal/home/membership-of-fao/en/.

⁵¹ See Table 2 in Subsection 5.1 and note 79 and accompanying text.

⁵² Art. 5(2) of the CAOF Agreement.

⁵³ Art. 3(1)(d) of the Treaty on the Functioning of the European Union (TFEU; consolidated version available at eur-lex.europa.eu/collection/eu-law/treaties.html).

intergovernmental bodies relating to marine capture fisheries. Several exceptions to this general rule nevertheless exist, for instance in relation to parts of EU Member States that are not subject to the EU's Common Fisheries Policy, whether as flag States, coastal States or both.⁵⁴ As noted in the previous subsection, this allows the Kingdom of Denmark to participate in several RFMOs in respect of Greenland and/or the Faroe Islands. This, and other exceptions, are reflected in the overview of participation by the EU and EU Member States in the selected RFMOs in Subsection 5.3.

3.4. Evolving Participation due to State Succession, Continuation, Dissolution or Transfer of Competence

Broader geopolitical events such as the end of the Cold War and the progressive cooperation among European States within the European Economic Community (EEC) and its successors, as well as the gradual expansion in the membership of these European institutions, each had significant impacts on participation in RFMOs. NEAFC is again a good example in this regard. Upon its original establishment pursuant to the 1959 NEAFC Convention,⁵⁵ membership still comprised all the European coastal States to the North Sea and the North-East Atlantic. Many of these States had joined the EEC upon the entry into force of the current NEAFC Convention, and several other States discontinued NEAFC membership due to accession to the EU or its predecessors since then. The UK's withdrawal from the EU will lead the UK to formally apply for NEAFC membership. While such an application is only successful if it meets the approval of three-fourths of the existing NEAFC Members,⁵⁶ such approval is highly unlikely to be withheld for various reasons. This includes considerations that are largely similar to those that arise in the context of State succession, as the UK has been a Member of NEAFC or represented within NEAFC since its establishment.

4. RELEVANT PROVISIONS IN GLOBAL FRAMEWORK INSTRUMENTS

Even though the first RFMOs⁵⁷ were already operating at the start of the first United Nations Conference on the Law of the Sea (UNCLOS I), the 1958 High Seas Fishing Convention⁵⁸ did not accord regional fisheries bodies or

⁵⁴ Cf. Art. 355 and Annex II of the TFEU. See also R Churchill and D Owen *The EC Common Fisheries Policy* (Oxford University Press, Oxford: 2010) 359–360.

⁵⁵ North-East Atlantic Fisheries Convention of 24 January 1959 (486 UNTS 157).

⁵⁶ NEAFC Convention, Art. 20(4).

⁵⁷ E.g. IATTC and GFCM.

⁵⁸ Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958 (559 UNTS 285).

comparable mechanisms a prominent role. Rather, the Convention relied above all on the special interests of coastal States in “the maintenance of the productivity of the living resources in any area of the high seas adjacent to [their] territorial sea”, as well as compulsory arbitration.⁵⁹ The only implicit reference to fisheries bodies is included in Article 6(2), which reads:

A coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there.

The phrase “any system of research and regulation” would have certainly comprised the then existing RFMOs, but was presumably also broad enough to encompass other regional and global bodies. The prominent role of the coastal State is reflected in the fact that its entitlement to participate in such bodies even existed when its nationals were not engaged in high seas fishing. It is notable that Article 6(2) only creates a right, but not an obligation, to participate.⁶⁰ Reference must also be made to Article 8(1), which acknowledges the “special interest in conservation” of a State “in an area of the high seas not adjacent to its coast”. However, these are not necessarily exclusively non-user State interests⁶¹ and – in contrast with Article 6(2) – no reference is made to “any system of research and regulation” or an entitlement to participate therein. Attempts by the US at UNCLOS I and during its preparatory phase to garner support for the doctrine of abstention – which aimed to restrict participation in fisheries bodies in case fishing opportunities were fully utilized or allocated – proved fruitless.⁶²

The LOS Convention does not explicitly mention a right of States – whether in their capacity as coastal States, States fishing on the high seas, or otherwise – to participate in existing regional fisheries bodies either. To some extent, however, such a right can be inferred from the phrase “with participation by all States concerned” that is included in Articles 61(5) and 119(2), in the context of the obligation to contribute and exchange scientific information, catch and fishing effort statistics and other data through competent international organizations. Furthermore, a participatory right could be construed based on the entitlements to marine living resources of coastal States

⁵⁹Ibid., Arts. 6(1) and 9. See, however, Resolution III ‘International fishery conservation conventions’ of 25 April 1958; and the International Law Commission (ILC)’s “Commentary to the articles concerning the law of the sea” (*Yearbook of the International Law Commission*, 1956, vol. II) 286–288, containing its Commentary on Art. 49 (which eventually became Art. 1(1) of the 1958 High Seas Fishing Convention), in particular paras. 4, 9 and 19, which refer to earlier proposals involving international fisheries bodies. See A Serdy *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, Cambridge: 2015) 11–13 for a fuller account.

⁶⁰Such an obligation formed part of the earlier proposals discussed by the ILC (see note 59).

⁶¹The ILC, in its Commentary on Art. 55, note 59 at 291 – which eventually became Art. 8 of the 1958 High Seas Fishing Convention – gives the following example: “if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the State concerned do engage in fishing”.

⁶²See the discussion by Serdy, note 59 at 68–72.

(i.e. sovereignty and sovereign rights) and flag States (i.e. their right for their nationals to fish on the high seas, and their entitlement to access to the surplus of the total allowable catch in third States' EEZs) in conjunction with their obligations to cooperate with each other in relation to straddling and highly migratory fish stocks, as well as high seas fisheries in general. As regards highly migratory fish stocks and high seas fisheries, this obligation to cooperate includes the establishment of regional fisheries bodies.⁶³

Article 8(3) of the Fish Stocks Agreement contains an explicit right for "States having a real interest in the fisheries concerned" to become Members of an existing RFMO. As this right is preceded in the same paragraph by an obligation for "States fishing for the stocks on the high seas and relevant coastal States" to become Members of such RFMOs, these States can be presumed to have a real interest. It seems reasonable to assume that the decision to include the requirement of a real interest must have been motivated by a desire to exclude States without it. This might have been inspired by the lack of any substantive restrictions on membership of the International Whaling Commission (IWC),⁶⁴ which has resulted in a situation where whaling States are often outnumbered by non-user States.⁶⁵ Another category of States that existing Members of RFMOs can be expected to be inclined to exclude are so-called 'new entrants', namely States that are not presently fishing but would like to do so.⁶⁶

Whereas Article 8(3) applies to existing RFMOs, Articles 8(5) and 9(2) apply to the establishment of new RFMOs. In case of a "particular straddling fish stock or highly migratory fish stock" for which no existing RFMO has the mandate to establish conservation and management measures, Article 8(5) requires "relevant coastal States and States fishing on the high seas" to cooperate to establish such an RFMO. Once these States have commenced such cooperation, Article 9(2) requires them to "inform other States which they are aware have a real interest in the work of the proposed [RFMO] of such cooperation". While this could denote non-user States or new entrants, it may also relate to coastal States and States fishing on the high seas that are not yet involved in the negotiations. Attention should finally be drawn to the words 'inform' and 'in the work of', which were apparently preferred over an invitation to participate in the (negotiation of) the establishment of the RFMO.⁶⁷

As inclusion of the requirement of a real interest within the Fish Stocks Agreement constrains the freedom of high seas fishing, this raises the question as to whether this is consistent with the LOS Convention, as required by

⁶³ Arts. 64 and 118 of the LOS Convention.

⁶⁴ Arts. III(1) and X(2) of the International Convention for the Regulation of Whaling of 2 December 1946 (161 UNTS 72, as amended; consolidated version available at iwc.int).

⁶⁵ EJ Molenaar "The Concept of 'Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms" (2000) 15 *International Journal of Marine and Coastal Law* 475–531, at 496.

⁶⁶ Ibid. On new entrants more generally, see Serdy, note 59.

⁶⁷ See also Molenaar, note 65 at 495–496, 513 and 522.

Article 4 of the Fish Stocks Agreement. Moreover, even though the Fish Stocks Agreement does not explicitly give RFMOs competence to determine whether or not an applicant for membership meets the requirement of real interest,⁶⁸ the constitutive instruments of several RFMOs that were already in existence during the negotiation of the Fish Stocks Agreement contained restrictions on membership and gave these RFMOs competence to approve or reject (further: approval role) applications for accession and/or membership.⁶⁹ It would therefore not have been difficult to imagine that new RFMOs would follow in their footsteps – if only due to overlaps in participation – and impose similar restrictions on membership and/or claim such an approval role. Furthermore, as the Fish Stocks Agreement lacks a definition of the requirement of real interest and any guidance as to how it should be applied, it is unable to ensure some level of inter-regional uniformity. So far, the (Resumed) Fish Stocks Agreement Review Conferences have not been used for this purpose either.⁷⁰

5. RULES AND PRACTICES OF SELECTED RFMOS

5.1. Introduction

This section contains an analysis of the rules and practices of selected RFMOs concerning participation. Whereas the rules and practices on the substantive requirements and procedures of these RFMOs are examined in Subsection 5.2, the participation of the EU, EU Member States and Taiwan is examined in further detail in Subsection 5.3. Subsection 5.4 then focuses on the various categories of cooperative status used in selected RFMOs.

Table 2 provides an overview of current participation in these RFMOs, revealing significant differences. In terms of the number of participants, for instance, ICCAT is by far the largest. Moreover, the average number of participants in the tuna RFMOs is larger than the average number of participants in the non-tuna RFMOs. Whereas the membership of most RFMOs is a mix of coastal States and high seas fishing States, four RFMOs solely or predominantly have coastal States as Members: namely GFCM, JNRFC, NEAFC and NPFC. While GFCM only has one non-coastal State Member (Japan), this should be

⁶⁸ Art. 11 of the Fish Stocks Agreement does not deal with membership of RFMOs as such, but rather with the “nature and extent of participatory rights”.

⁶⁹ E.g. Art. 20(4) of the NEAFC Convention. Pursuant to the preceding version of the current NAFO Convention – namely the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries of 24 October 1978 (1135 UNTS 369) – any State could accede (cf. Art. XXII(4)) but membership of the Fisheries Commission – then also the main management body under the NAFO Convention – was reserved for Parties already participating in the fisheries or those that had provided satisfactory evidence that they expect to participate in the fisheries within a certain time (Art. XIII(1)).

⁷⁰ See note 1.

seen in light of the fact that if all coastal States were to exercise fisheries jurisdiction up to 200 nautical miles, no high seas pockets would remain. Finally, China, the EU, Japan, Korea and the US participate in most of the selected RFMOs.

Table 2 Current Participation in Selected RFMO/As⁷¹

RFMO/A	Members ⁷²	Other Participatory Status ⁷³
CAOFAgreement	Current: 0 Upon entry into force (10): Canada, China, Denmark, EU, Iceland, Japan, Korea, Russian Federation and US	None
CBS Convention	6: China, Japan, Korea, Poland, Russian Federation and US	None
CCAMLR	25: Australia, Argentina, Belgium, Brazil, Chile, China, EU, France, Germany, India, Italy, Japan, Korea, Namibia, New Zealand, Norway, Poland, Russian Federation, South Africa, Spain, Sweden, Ukraine, UK, US and Uruguay	Acceding States (11): Bulgaria, Canada, Cook Islands, Finland, Greece, Mauritius, Netherlands, Pakistan, Panama, Peru and Vanuatu CNCPs-CDS ^d for 2018 (2): Ecuador and Singapore
CCSBT	6: Australia, Indonesia, Japan, Korea, New Zealand, South Africa	Members of the Extended Commission (2): EU and Taiwan CNMs ^b for 2018: 0
GFCM	24: Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, EU, France, Greece, Israel, Italy, Japan, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Romania, Slovenia, Spain, Syria, Tunisia and Turkey	CPCs ^a for 2018 (4): ⁷⁴ Bosnia and Herzegovina, Georgia, Moldova and Ukraine
IATTC	21: Belize, Canada, China, Colombia, Costa Rica, Ecuador, El Salvador, EU, France, Guatemala, Japan, Kiribati, Korea, Mexico, Nicaragua, Panama, Peru, Taiwan, US, Vanuatu and Venezuela	CNMs ^b for 2017–2018 (5): Bolivia, Chile, Honduras, Indonesia and Liberia

(continued)

⁷¹ Accurate as at 7 June 2018.

⁷² As regards EU Member States, see Subsection 5.3

⁷³ Other than ‘observer’ status.

⁷⁴ The Reports of the 2014–2017 Annual GFCM Meetings also list participation by the Russian Federation in different ways. The 2016 and 2017 Reports list the Russian Federation under the heading ‘Non-Contracting Party’, even though that status is not used in the GFCM’s Rules of Procedure.

Table 2 (*Continued*)

RFMO/A	Members	Other Participatory Status
ICCAT	52: Albania, Algeria, Angola, Barbados, Belize, Brazil, Canada, Cabo Verde, China, Côte d'Ivoire, Egypt, El Salvador, Equatorial Guinea, the EU, France, Gabon, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Honduras, Iceland, Japan, Korea, Liberia, Libya, Mauritania, Mexico, Morocco, Namibia, Netherlands, ⁷⁵ Nicaragua, Nigeria, Norway, Panama, Philippines, Russian Federation, St. Vincent & the Grenadines, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Syria, Trinidad and Tobago, Tunisia, Turkey, UK, US, Uruguay, Vanuatu and Venezuela	Cooperating Status ^c for 2018 (5): Bolivia, Costa Rica, Guyana, Suriname and Taiwan
IOTC	31: Australia, Bangladesh, China, Comoros, Eritrea, EU, France, India, Indonesia, Iran, Japan, Kenya, Korea, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Seychelles, Sierra Leone, Somalia, Sri Lanka, South Africa, Sudan, Tanzania, Thailand, UK and Yemen	CNCPs ^a for 2017–2018 (2): Liberia and Senegal Invited experts and consultants (1): Taiwan
JNRFC	2: Norway and Russian Federation	None
NAFO	12: Canada, Cuba, Denmark, EU, France, Iceland, Japan, Norway, Korea, Russian Federation, Ukraine and US	None
NEAFC	5: Denmark, EU, Iceland, Norway and Russian Federation	CNCPs ^a for 2018 (5): Bahamas, Canada, Liberia, New Zealand and St. Kitts and Nevis
NPFC	8: Canada, China, Japan, Korea, Russian Federation, Taiwan, US and Vanuatu	CNCPs ^a for 2018: None
SEAFO	7: Angola, EU, Japan, Korea, Namibia, Norway and South Africa	None
SIOFA	9: Australia, Cook Islands, EU, France, Japan, Korea, Mauritius, Seychelles and Thailand	None

*(continued)*⁷⁵ See note 96.

Table 2 (Continued)

RFMO/A	Members	Other Participatory Status
SPRFMO	15: Australia, Chile, China, Cook Islands, Cuba, Denmark, Ecuador, EU, Korea, New Zealand, Peru, Russian Federation, Taiwan, US and Vanuatu	CNCPs ^a for 2018 (4): Colombia, Curaçao, ⁷⁶ Liberia and Panama Participating territories (1): Tokelau
WCPFC	26: Australia, China, Canada, Cook Islands, EU, Federated States of Micronesia, Fiji, France, Indonesia, Japan, Kiribati, Korea, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Taiwan, Tonga, Tuvalu, US and Vanuatu	CNMs ^b for 2018 (7): Ecuador, El Salvador, Liberia, Mexico, Panama, Thailand, and Vietnam Participating territories (7): American Samoa, French Polynesia, Guam, New Caledonia, the Northern Mariana Islands, Tokelau, and Wallis and Futuna

^a Cooperating Non-Contracting Parties.

^b Cooperating Non-Members.

^c Cooperating Non-Contracting Party, Entity or Fishing Entity.

^d Cooperating Non-Contracting Party re the Catch Documentation Scheme for *Dissostichus* spp.

5.2. Rules and Practices on Eligibility Requirements and Criteria, and Procedures

A distinction must first of all be made between the formal rules on eligibility requirements and criteria, and procedures laid down in the constitutive instruments of the selected RFMOs on the one hand, and the subsequent practice on the application of those rules and procedures on the other hand. As regards the formal rules, Table 3 below provides an overview of specific eligibility criteria and procedures. Due to spatial constraints, however, this chapter only considers the most pertinent examples of practice rather than providing an exhaustive overview.

In addition to the specific eligibility criteria on accession listed in Table 3, the constitutive instruments of the selected RFMOs also contain other categories of requirements or criteria on eligibility. The first category relates to statehood. Accession to – and thereby membership of⁷⁷ – most of the selected RFMOs is in principle reserved for States. As examined further in Subsection 5.3, however, the EU and Taiwan have become members of several RFMOs. In addition, while membership of GFCM and IOTC is also open to Associate Members to FAO,

⁷⁶ See note 107 and accompanying text.

⁷⁷ See note 81.

this entitlement has so far not been exercised.⁷⁸ The constitutive instruments of NAFO, SPRFMO and WCPFC refer to Article 305(1)(c), (d) and (e) of the LOS Convention – which do not seem to have been used so far – and the latter two instruments also allow participation by territories – which has in fact been used in both cases.⁷⁹

The second category consists of requirements relating to participation in intergovernmental organizations. Only three of the selected RFMOs use these: GFCM, ICCAT and IOTC. As regards GFCM and IOTC, however, States that are not Members of FAO can still accede if their applications secure a two-thirds majority of the votes of the Members of these RFMOs (see Table 3).

The third category consists of criteria relating to Founding Fathers, which provide full participants at the final session of the negotiations on the establishment of an RFMO, or Members of an RFMO's precursor, with a right to accede that is not subject to approval. The constitutive instruments of four RFMOs do not contain such criteria: GFCM, ICCAT, IOTC and JNRFC. The latter is a striking exception to the other selected RFMOs, because it does not provide criteria for accession at all. As regards GFCM and IOTC, the absence of a Founding Father criterion can be explained by the fact that they have been established under FAO, and are therefore at any rate open to Members and Associate Members of FAO. As ICCAT has no specific eligibility criteria or procedure for accession – other than involving a depositary – and is therefore almost entirely ‘open’, it was perhaps felt that there was no pressing need for a Founding Father criterion. As is evident from Table 3, however, the negotiators of other RFMOs decided differently. In some of these cases, they may perhaps have wished to avoid or minimize unanticipated or undesirable interpretations of the provisions on accession and membership by the depositary and members. Finally, Founding Father-criteria are by no means always fully utilized; not even for RFMOs that are relatively ‘closed’, as evidenced by the unused entitlements of, for example, Cuba in relation to NEAFC, and the UK in relation to WCPFC.⁸⁰ The costs of membership must apparently outweigh the benefits.

Table 3 Specific Eligibility Criteria and Procedures on Accession⁸¹ in the Constitutive Instruments of Selected RFMOs

Eligibility criteria	
None	ICCAT Convention (Art. XIV(1)) NAFO Convention (Art. XXIII) NEAFC Convention (Art. 20(4))

(continued)

⁷⁸ See notes 49 and 50 and accompanying text.

⁷⁹ NAFO Convention (Art. I(d)(2)); SPRFMO Convention (Art. 1(2)(b) and 40); and WCPF Convention (Arts. 35(1) and 43). See also Table 2 in Subsection 5.1.

⁸⁰ As regards the UK, see also the discussion on CCSBT, GFCM, ICCAT, SEAFO, SIOFA (MOP) and SPRFMO in Subsection 5.3.

⁸¹ Except for the CAMLR Convention, accession also implies membership.

Table 3 (*Continued*)

Specific	CAOF Agreement: real interest (Art. 10(2)) CBS Convention: wish to conduct fishing (Art. 16(4)) CAMLR Convention Accession: interest in research or harvesting activities (Art. XXIX(1)) Membership: engagement in research or harvesting activities (Art. VII(2)(d)) CCSBT Convention: coastal States, and flag States engaged in fishing (Art. 18) GFCM Agreement: coastal States, and flag States engaged in fishing, or that wish to conduct fishing (Art. 4) IATTC Agreement: coastal States, and flag States engaged in fishing, following consultations with the Parties (Art. XXX) IOTC Agreement: coastal States, and flag States engaged in fishing (Art. IV(1)(a)) NPFC Convention: coastal States, and REIOs or flag States that wish to conduct fishing activities (Art. 24(2)) SEAFO Convention: coastal States, and flag States and REIOs engaged in fishing (Art. 26(2)) SIOFA: coastal States, any other State or REIO interested in fishing activities (Art. 23(1)) SPRFMO: State or entity having an interest in fishery resources (Art. 37(1)) WCPFC: flag States and REIOs that wish to engage in fishing (Art. 35(2))
Procedures on accession other than involving a depositary	
None	CAMLR Convention: except for accession by REIOs, for which approval by consensus is required (Art. XXIX(2)) CCSBT Convention (Art. 18) ICCAT Convention (Art. XIV(1)) NAFO Convention (Art. XXIII) SEAFO Convention: except for accession by REIOs other than the EU (Art. 26(2)) SIOFA (Art. 23) SPRFMO Convention (Art. 37)
Specific	CAOF Agreement: invitation by consensus (Art. 10(2)) CBS Convention: invitation by unanimity (Art. XVI(4)) CAMLR Convention: approval role on membership for all applicants, by consensus (Art. VII(2)(d)) CCSBT Convention: approval role on membership of the Extended Commission by REIOs, entities and fishing entities ('Resolution to Establish an Extended Commission and an Extended Scientific Committee' of April 2001, as replaced in October 2013) GFCM Agreement: approval role on non-FAO Members, by a 2/3 majority (Art. 23(2))

(continued)

Table 3 (*Continued*)

	IATTC Agreement: approval role in residual cases, by consensus (Art. XXX) IOTC Agreement: approval role on non-FAO Members, by a 2/3 majority (Arts. IV(2) and XVII(2)) NEAFC Convention: approval role, by 3/4 majority (Art. 20(4)) NPFC Convention: invitation by consensus (Art. 24(2)), provided that a Party that does not join the consensus must present NPFC in writing its reasons for this (Art. 24(3)) WCPFC Convention: invitation by consensus (Art. 35(2))
--	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Table 3 deals separately with eligibility criteria and procedures on accession other than involving a depositary. As regards both, the constitutive instruments of RFMOs are either grouped together as having no such eligibility criteria and procedures ('None') or specific criteria and procedures. The constitutive instruments listed among 'None' in both can be presumed to be the most open. As noted earlier, however, membership does not automatically entitle a participant to an allocation. For example, NAFO has indicated that its fish stocks are "fully allocated".⁸² The relative openness of some RFMOs is also explained by their low level of fishing effort (e.g. SEAFO) or the absence of fishing at present (e.g. SIOFA).

A closer look at their eligibility criteria sheds further light on the openness of RFMOs. Of the constitutive instruments specifying eligibility criteria, almost all either explicitly mention coastal States, have eligibility criteria wide enough to also cover coastal States (e.g. SPRFMO Convention) or have Founding Father criteria that cover all relevant coastal States (e.g. the CAOF Agreement and the CBS Convention). The only exception in this regard is the WCPF Convention, which is explained by the failure to agree on a northern and a western boundary to the WCPF Convention Area, which was largely caused by the various disputes relating to the South China Sea. As regards Vietnam this means that, even though there is no consensus among WCPFC Members that Vietnam is a coastal State to the WCPF Convention Area, Vietnamese vessels fishing in Vietnam's own maritime zones catch tuna species managed by WCPFC whose distributional range includes waters that are indisputably part of the WCPFC Convention Area. According to the LOS Convention, therefore, Vietnam is a coastal State with respect to those tuna species managed by WCPFC.

Apart from coastal States, several of the constitutive instruments mention flag States engaged in fishing. This raises the dilemma highlighted in the introduction to this chapter, namely that many RFMOs categorize fishing

⁸² NAFO Resolution 1/99 'to guide the expectations of future new members with regard to fishing opportunities in the NAFO Regulatory Area'. For a detailed account on ICCAT, and in particular its reliance on historic catch as the principal allocation criterion, see Serdy, note 59 at 80–89.

by non-Members as IUU fishing, which thereby triggers measures aimed at combating IUU fishing. The experience of the Cook Islands with regard to CCAMLR described below is a case in point. The eligibility criterion “wish to conduct/engage in fishing” avoids this dilemma, but not the potential conflict between the requirement of real interest and the freedom of high seas fishing. Finally, it is noteworthy that membership of three RFMOs is explicitly open to non-user States (CCAMLR, SIOFA and SPRFMO), implicitly so in three other RFMOs (ICCAT, NAFO and NEAFC), and possibly in one other RFMO (CAOF Agreement). This entitlement has been exercised in particular within CCAMLR.

While Table 3 shows there are differences among the procedures on accession involving an approval role, it seems fair to conclude that about half of the selected RFMOs have such a procedure. This is either by qualified majority, consensus or unanimity, with four using the ‘invitation by consensus/unanimity’ approach: CAOF Agreement, CBS Convention, NPFC and WCPFC. Among these are the two newest RFMOs: CAOF Agreement and NPFC. The establishment of SPRFMO – one of the most open RFMOs – in 2013 therefore did not set a new trend.

The extent to which RFMOs are closed or open depends of course on their practices. For academics, however, a thorough and comprehensive analysis of these practices is nearly impossible, since much of the relevant information is not in the public domain. It is nevertheless safe to assume that there are considerable divergences in these practices. While CCAMLR has an approval role by consensus for membership – but not accession (except for REIOs) – it has only once rejected an application. This concerned the application by the Cook Islands in 2007, which was apparently rejected on the ground that the Cook Islands was not engaged in research or harvesting, even though harvesting by Acceding States would at that time have been treated as IUU fishing and have triggered various measures aimed at combating IUU fishing.⁸³ During the negotiations of the CAMLR Convention, requests by Korea and the Netherlands to participate – which, if accepted, would have made them Founding Fathers – and Taiwan, were rejected.⁸⁴

The fact that NPFC, which was only established in 2015, admitted Vanuatu in 2017 as its first ‘non-Founding Father Member’⁸⁵ despite the NPFC’s ‘invitation by consensus’ procedure, can be interpreted as a sign of its openness. This is also true for the innovative requirement for a Party to the NPFC Convention that opposes an invitation for membership to present its reasons in writing to NPFC (Article 24(3)).⁸⁶ The dismissal of the EU’s request for an invitation to accede at

⁸³ Cf. Report of the 26th (2007) Annual CCAMLR Meeting, paras. 4.37–4.48 and 13.10–13.22; files held by the author; and notes made by the author during Annual CCAMLR Meetings.

⁸⁴ See the references to Barnes in notes 94 and 95.

⁸⁵ Report of the 3rd (2017) Annual NPFC Meeting, 1.

⁸⁶ Art. 24(3) of the NPFC Convention.

the NPFC's subsequent Annual Meeting in 2018 casts doubts on the openness of NPFC, however.⁸⁷

A similarly open start was made by WCPFC, which invited the then European Community (EC) to accede to the WCPF Convention at its first Session in 2004.⁸⁸ During the negotiations on the WCPF Convention, the EC's repeated requests to be accepted as a full participant – and thereby become a Founding Father – were all rejected.⁸⁹ For almost a decade, however, several States have expressed an interest in becoming Members or have made explicit requests to be invited to accede. Attempts by these States – notably Ecuador and El Salvador – to raise this issue during plenary at Annual WCPFC Meetings proved largely fruitless until 2017.⁹⁰ Facilitated by a US discussion paper, the opponents of broadening membership then highlighted in particular the special nature of WCPFC and the benefits offered by CNM status.⁹¹ This opposition implies that the prospects for Ecuador, El Salvador and others to become WCPFC Members in the near future are not promising.

5.3. The EU, EU Member States and Taiwan

CAOF Agreement

The EU and Denmark – in respect of its territories – are among the ten Founding Fathers. The CAOF Agreement contains no arrangements for the participation of Taiwan.

CBS Convention

Only Poland – one of the six Founding Fathers – is a Party but, uniquely, not the EU. Once Poland acceded to the EU in 2004, it should in principle have been replaced by the EU. Proposals by Poland (and the EU) to amend the CBS Convention to provide for this have not secured the necessary support, mainly because there has been no high seas fishing since the Convention's adoption, and there have been no indications that this will change in the near term.⁹²

⁸⁷ Report of the 4th (2018) Annual NPFC Meeting, 2.

⁸⁸ Report of the 1st (2004) Annual WCPFC Meeting, 1.

⁸⁹ See Molenaar, note 65 at 509–514.

⁹⁰ See e.g. Report of the 12th (2015) Annual WCPFC Meeting, paras. 761–762; Report of the 13th (2016) Annual WCPFC Meeting, paras. 41–46.

⁹¹ Report of the 14th (2017) Annual WCPFC Meeting, paras. 72–87. It is submitted that the analysis of the rules and practices of other RFMOs contained in the US discussion paper (Doc. WCPFC14-2017-DP18 of 3 November 2017) is insufficiently balanced due to its selection of RFMOs and its exclusion of allocation issues, and thereby incorrectly concludes “that WCPFC stands apart [as] most other RFMOs are relatively open to new members, or at least have a process for, or experience with, inviting new members to join the organization” (at 3). In view of the complexity of the issues – as for instance highlighted by the length of this chapter – putting together a paper that is not only concise but also comprehensive and balanced, is not that easy.

⁹² Report of the 20th (2015) COP to the CBS Convention, para. 8.1.

Reports of the COPs commonly refer to Poland in conjunction with the EU (e.g. Poland/EU, or Poland on behalf of the EU). The CBS Convention also contains no arrangements for the participation of Taiwan.

CCAMLR

The EU, Belgium, France, Germany, Italy, Poland, Spain, Sweden and the UK are Members. Some EU Member States also participate in respect of some of their territories – namely France and the UK – others only on account of CCAMLR’s special status.⁹³ Bulgaria, Finland, Greece and the Netherlands⁹⁴ have acceded to the CAMLR Convention and participate as ‘Acceding States’. The CAMLR Convention contains no arrangements for the participation of Taiwan, and CCAMLR also has not provided Taiwan with any participatory status, even though Taiwan sought to cooperate with CCAMLR.⁹⁵

CCSBT

The EU and Taiwan are Members of the ‘Extended Commission’. For the EU, this is the only RFMO in which it participates as a full Member without being a Party to the RFMO’s constitutive instrument. France and the UK are not Members, even though they have territories and associated maritime zones in which southern bluefin tuna potentially occur.

GFCM

The EU, Bulgaria, Croatia, Cyprus, France, Greece, Italy, Malta, Romania, Slovenia and Spain are Members. The UK was a Member until it withdrew in 1968, even though it remains a coastal State in respect of Gibraltar. This parallel membership is based on, *inter alia*, the GFCM’s competence relating to aquaculture and its broad geographical mandate, which includes the territorial sea and

⁹³ See note 17 and accompanying text.

⁹⁴ Also in respect of its territories. While the Netherlands intended to apply for full membership in 2018 (Report of the 36th (2017) Annual CCAMLR Meeting, paras. 2.4 and 12.15), this may not happen until 2019. During the final stages of the negotiations of the CAMLR Convention, a request by the Netherlands (and Korea) to participate was declined (cf. JN Barnes “The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean” in JI Charney (ed.) *The New Nationalism and the Use of Common Spaces* (Osmun Publishers, Allanheld: 1982) 239–286, at 246 (fn 39) and 258).

⁹⁵ Among other things by requesting Taiwan to participate voluntarily in the CDS (see Table 2) in 2004, and to attend the 24th (2005) Annual CCAMLR Meeting as an observer (based on files held by the author). In 2000 and 2001, CCAMLR had in fact asked Taiwan to cooperate in the implementation of the CDS (cf. Report of the 19th (2000) Annual CCAMLR Meeting, para. 2.44; Report of the 20th (2001) Annual CCAMLR Meeting, paras. 5.27 and 2.31–2.32). Arguably, China’s accession to the CAMLR Convention in 2006 and application for membership in 2007 was to a considerable extent aimed at ensuring that Taiwan would not obtain any formal participatory status with CCAMLR, and thereby the ATS. Barnes observes, note 94 at 239 (fn 3), 241 (fn 12), 245 (fn 37), 258 (fn 76) and 272 that Taiwan had expressed an interest in participating in the negotiations on the CAMLR Convention, but was not invited due to political reasons.

marine internal waters. The GFCM Agreement contains no arrangements for the participation of Taiwan.

IATTC

The EU, France – in respect of some of its territories – and Taiwan are Members.

ICCAT

The EU and France, the Netherlands⁹⁶ and the UK⁹⁷ – in respect of some of their territories – are Members. Taiwan has been granted Cooperating Status⁹⁸ since 2008. In the still ongoing negotiations on the amendment of the ICCAT Convention, the issues of the participation of Taiwan as a Member, and the depositary(ies) are inherently linked.⁹⁹

IOTC

The EU and France and the UK – on account of some of their territories – are Members. Taiwan participates as an observer, in the category ‘Invited consultants and experts’.¹⁰⁰ The many years of discussions on amending or replacing the IOTC Agreement to enhance participation of Taiwan have not led to a solution that is acceptable to all Members.¹⁰¹

*JNRF*C

The only Members are Norway and the Russian Federation, and the JNRF Agreement does not provide for accession at all.

NAFO

The EU and Denmark and France – in respect of some of their territories – are Members. The NAFO Convention contains no arrangements for the participation of Taiwan.

⁹⁶ The Netherlands Antilles and one of its successors – Curaçao – have in the past been granted Cooperating Status by ICCAT. At the time of writing, the ICCAT website and ICCAT documents treated Curaçao as a Party to the ICCAT Convention and a member of ICCAT (e.g. Report of the 2016 Annual ICCAT Meeting, para. 3, and other information at www.iccat.int). This is incorrect, as the Kingdom of the Netherlands acceded to the ICCAT Convention on 6 February 2014 on behalf of Curaçao (*Tractatenblad* 2014, Nr. 76; verdragenbank.overheid.nl/nl/Verdrag/Details/003671) rather than facilitating the accession of Curaçao in its own right. In light of the words ‘any State’ in Art. XIV(1) of the ICCAT Convention, this would also not have been possible. The depositary’s overview of the status of the ICCAT Convention (see www.fao.org/legal/treaties/treaties-outside-fao-framework/en/) also listed the Netherlands, rather than Curaçao, as a ‘participant’. The practice of ICCAT is all the more surprising as both France and the UK have been members in respect of some of their territories since 1 January 1998. See also note 107 and accompanying text on the status of Curaçao within SPRFMO.

⁹⁷ But not in relation to Gibraltar, even though a fishery for Atlantic bluefin tuna occurs there (see Spencer, Maguire and Molenaar, note 26 at 11 and 66–68).

⁹⁸ See also note 96.

⁹⁹ See Spencer, Maguire and Molenaar, note 26 at 9.

¹⁰⁰ E.g. Report of the 21st (2017) IOTC Session, para. 6(d).

¹⁰¹ See Report of the 20th (2016) IOTC Session, 23 and 109.

NEAFC

The EU and Denmark – in respect of its territories – are Members. The NEAFC Convention contains no arrangements for the participation of Taiwan.

NPFC

Taiwan is a Member, but the EU is not. The NPFC Convention nevertheless provides for accession by REIOs, and steps towards making use of this were taken within the EU in February 2018.¹⁰² While Denmark – in respect of the Faroe Islands – participated in the eighth and ninth Sessions of the negotiations on the NPFC Convention and claimed a right to become a Member soon thereafter,¹⁰³ it no longer seemed interested in membership at the time of writing.

SEAFO

The EU is a Member, but there are no EU Member States among the SEAFO Members, even though the UK – in respect of some of its territories – is a coastal State to the SEAFO Convention Area, and one of the Founding Fathers.¹⁰⁴ This situation is probably caused mainly by the low level of fishing effort in recent years. It is likely that the other States that participated in the negotiations on the SEAFO Convention but have not become Members so far,¹⁰⁵ have done so for similar reasons. The SEAFO Convention contains no arrangements for the participation of Taiwan.

SIOFA

The EU and France – in respect of some of its territories – are Parties, but not the UK – in respect of some of its territories – even though it is a coastal State to the SIOFA Area. Article 15 of SIOFA contains an arrangement for the participation of Taiwan, even though Taiwan did not participate in the negotiations on the SIOFA.¹⁰⁶

¹⁰² Note 87.

¹⁰³ See the Record of the 10th (2011) Session of the Negotiations, 1–2.

¹⁰⁴ The UK participated as an observer in the 2nd (2005) and 14th (2017) Annual SEAFO Meetings. Para. 5.4 of the Report of the 4th (2007) Annual SEAFO Meeting reads: “The United Kingdom had communicated to SEAFO that its overseas territories are not in position to implement the Convention and UK can not [sic] join the Organisation on their behalf”.

¹⁰⁵ Iceland and the US signed (information based on www.fao.org/legal/treaties/treaties-outside-fao-framework/en/), and Poland, the Russian Federation and Ukraine participated but did not sign (cf. “Final Minute of the Conference on the South East Atlantic Fisheries Organization and of the Meetings of Coastal States and other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic”, at 3; on file with author).

¹⁰⁶ Cf. “Final Act of the Conference on the Southern Indian Ocean Fisheries Agreement” (available at www.siofa.org/). Taiwan nevertheless participated in the 4th (2017) MOP to SIOFA and indicated that it aspired to make use of the arrangement in Art. 15 prior to the 5th MOP (cf. para. 6 of the Report of the 4th (2017) MOP to SIOFA).

SPRFMO

The EU and Denmark – in respect of some of its territories – and Taiwan are Members, but not France and the UK – in respect of some of their territories – even though they are coastal States to the SPRFMO Convention Area. Curaçao – one of the four countries of the Kingdom of the Netherlands – was granted CNCP status for 2018.¹⁰⁷

WCPFC

The EU and France – in respect of some of its territories – and Taiwan are Members, but not the UK – in respect of some of its territories – even though it is a coastal State to the WCPFC Convention Area and one of the Founding Fathers.

In summary, the EU does not participate in three of the 16 selected RFMOs (CBS Convention, JNRFC and NPFC), one of which – at least so far – is by choice (NPFC). Of the 13 RFMOs of which the EU is a Member, there are only two in which the EU does not participate alongside one or more EU Member States (CCSBT and SEAFO). Taiwan's participation is less extensive than that of the EU, and includes all of the five tuna RFMOs – but as regards ICCAT and IOTC not as Members – as well as two non-tuna RFMOs (NPFC and SPRFMO). So far, Taiwan has not made use of the arrangement for the participation of Taiwan included in the SIOFA. None of the other non-tuna RFMOs contain such arrangements.

5.4. Cooperating Status

As shown in Table 2 in Subsection 5.1, a majority of the selected RFMOs have one or more participatory categories for States and entities other than membership. Most of these categories are based on Article 8(3) and (4) of the Fish Stocks Agreement, which acknowledges that the duty to cooperate with an RFMO can be met and operationalized in different ways. Apart from the status of Acceding States within CCAMLR, cooperating status is commonly granted or renewed at annual meetings and laid down in the reports of these meetings. Arguably, such granting or renewal does not create rights or obligations governed by international law.

Cooperating status can provide limited fishing opportunities or engagement in activities associated with fishing (e.g. provisioning and transshipment), but does not allow for participation in decision-making. In return for participatory rights, status holders are expected to comply with the RFMO's conservation and

¹⁰⁷ Report of the 6th (2018) Annual SPRFMO Meeting, 2.

management measures and other specific conditions, with some RFMOs also expecting them to make ‘voluntary’ financial contributions.¹⁰⁸

A significant disadvantage of cooperating status – from the perspective of status holders – is the considerable lack of stability and predictability that ensues from the RFMO’s competence to revoke or not to renew cooperating status on an annual basis. While the exercise of this competence is legitimate and understandable where a status holder does not comply with the conditions attached to its cooperating status, there is always a risk of abuse of competence.¹⁰⁹ Non-members will therefore often conduct a comparative analysis of the costs and benefits of full membership and other participatory categories. However, as the discussion in Subsection 5.2 has shown, such a comparative analysis is of limited use for quite a few RFMOs, as full membership is simply not attainable for new applicants.

6. CONCLUSIONS

As shown in this chapter, the current participation in the selected RFMOs underscores their uniqueness. The only common denominators that are easily discernable are that participation commonly includes all coastal States as well as some or all of a small group of developed distant water fishing States and entities (China, the EU, Japan, Korea and the US).

The analysis of the rules and practices on participation in RFMOs highlights that a considerable number of the selected RFMOs are essentially ‘closed’ to all or certain new participants, despite their rights concerning high seas fishing and participation in RFMOs enshrined in the LOS Convention and the Fish Stocks Agreement. As the two newest RFMOs – NPFC and the CAOF Agreement – are part of the group of closed RFMOs, there is certainly no indication of a trend towards openness. This, however, needs to be confirmed or rebutted by practice concerning the application of the formal rules on accession. It should also be acknowledged that the preferential position of existing participants is likely to be even more pronounced when account is also taken of the (very) limited fishing opportunities that seem to be available to new participants of many RFMOs that are essentially ‘open’; an issue that is beyond the scope of this chapter.

A crucial question is whether, and, if so, to what extent, the rules and practices of RFMOs on participation that create preferential treatment for existing participants are in conflict with the current global component of international fisheries law. While an explicit right to participate in RFMOs was first recognized

¹⁰⁸ SPRFMO Decision 2–2016, para. 3(g); WCPFC Conservation and Management Measure 2009–11, para. 2(g); and Rule 10.5 of the NPFC Rules of Procedure. For a discussion on Cooperating Status with ICCAT, see Spencer, Maguire and Molenaar, note 26 at 64–66.

¹⁰⁹ E.g. the difficulties experienced by Vietnam in renewal of CNM status by WCPFC in 2012–2015 due to the construction of large-scale tuna fishing vessels in Vietnam (e.g. Report of the 12th (2015) Annual WCPFC Session, paras. 65–66).

in Article 8(3) of the Fish Stocks Agreement, this right is reserved for States with a ‘real interest’. The absence of a definition for this requirement, or any guidance as to how it should be applied, is already problematic due to the lack of inter-regional uniformity which it was bound to generate. Perhaps even more troublesome, however, is that no specific arrangements were included to guide and restrain RFMOs that assert competence to determine whether or not the real interest requirement is met. The dispute settlement procedures in the domain of international fisheries law can offer little or no help in this regard, as they are insufficiently tailored to the scenarios that arise in relation to participation in RFMOs, for instance because the dispute would have to be brought against all or most Members of the relevant RFMO.¹¹⁰ No such dispute settlement proceedings on participation in RFMOs have at any rate been instituted so far.

As there seems at present to be insufficient support to address the inability of many States to exercise their right to fish on the high seas in the context of the Resumed Fish Stocks Agreement Review Conferences, the impending negotiations on the BBNJ Implementation Agreement¹¹¹ or other global fora within the domain of international fisheries law, change could perhaps come from the regional level. It will be interesting to see if checks and balances, such as the requirement for a Party to the NPFC Convention that opposes an invitation for membership to present its reasons in writing to NPFC,¹¹² will gradually be accepted as best practice among RFMOs. Pressure for change could also come from outside the domain of international fisheries law. This could for instance arise within the domain of international trade law, whether in the context of a complaint against a Member’s implementation of an RFMO’s trade measure(s),¹¹³ or perhaps even more directly against an RFMO’s rules and practices on participation.

When considering options for change, the utmost care should be taken to avoid outcomes that are ultimately less desirable than the status quo, for instance in terms of over-exploitation. It is therefore also likely that the dilemma on participation in RFMOs cannot be resolved without first addressing the dilemma on the allocation of fishing opportunities for new entrants.¹¹⁴ Judging by the very slow progress within the IOTC’s negotiations towards a quota allocation system, this is no easy hurdle indeed.¹¹⁵

¹¹⁰See further Serdy, note 59 at 66–67 – in the context of allocation – and EJ Molenaar “Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations” (2003) 18 *International Journal of Marine and Coastal Law* 457–480, at 477–479.

¹¹¹The implementation agreement to the LOS Convention on ‘the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’ envisaged by UNGA Res. 72/249 of 24 December 2017.

¹¹²See note 86 and accompanying text.

¹¹³As contemplated by N Ferri *Conflicts over the Conservation of Marine Living Resources. Third States, Governance, Fragmentation and Other Recurring Issues in International Law* (G. Giappichelli Editore, Turin: 2015) 234 and Ch III. See also Chapter 14 of this volume (Churchill).

¹¹⁴See in this regard Serdy, note 59 at Ch. 5 on quota trading in RFMOs.

¹¹⁵The Technical Committee on Allocation Criteria (TCAC) began its work in 2011 and held its fourth meeting in February 2018, but had not yet secured a breakthrough at the time of writing.