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## **Comments and suggestions by WWF on the Chair's draft text (Revision 2, September 2007) of the proposed Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean**

### **Introduction**

WWF is grateful for the opportunity to provide comments to the Chair's latest draft text for a Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean. WWF is also grateful for the opportunity to participate as an observer in meetings of governments negotiating the establishment of this Convention. As delegates were aware, a draft of these comments was available at the time of the last meeting in Noumea, New Caledonia, and WWF apologises for being unable to finalise and publish these in time for that meeting. Unless otherwise stated, all references are to the Chair's draft text Rev.2 of September 2007.

As set out below, WWF has a range of concerns about the adequacy of the current draft in providing a best practice framework for ecosystem-based management of fisheries in the Southern Ocean. The WWF/TRAFFIC 2006 publication, *Follow the Leader – Learning from experience and best practice in regional fisheries management organisations* and the more recent findings of the Independent Panel on Recommended Best Practices for RFMOs provide an excellent articulation of WWF's expectations of governments, based on their global commitments and regional precedents.

On the basis of WWF's assessment of progress in discussions in Noumea and discussions with NGO colleagues, officials from a number of participating states and independent commentators, WWF remains optimistic that our best practice aspirations for this agreement are potentially within reach. In particular, WWF will continue to advocate for an agreement that:

- a) provides a science-based framework for management of straddling stocks that embraces both high seas areas and EEZs (while obviously limiting the regulatory area to the high seas, as does NEAFC) which effectively deals with the issue of complementarity;

- b) and, to this end, does not involve sub-regional management committees (instead, replaces them with allocation committees for regulated stocks – as preferred by both industry and environmental NGOs as well as fishing nations);
- c) does not provide for opt-out provisions in ratifying measures or resolving disputes (despite new arrangements proposed for NAFO);
- d) facilitates negotiation of MoUs with other bodies with relevant regulatory responsibilities such that EBM can be effectively implemented in an integrated way; and
- e) has a northern boundary that facilitates participation by Pacific Island Countries and negotiation of a parallel agreement covering fisheries in the immediately adjacent north Pacific (without any gaps).

It remains WWF’s contention that these propositions are negotiable – as a package.

WWF’s specific comments are as follows:

**1. The objective of the Convention is confused and unclear.**

The first preambular paragraph recites the commitment of the Contracting Parties to ensure:

“... the long-term conservation and sustainable use of fishery resources in the South Pacific Ocean, and to safeguarding the environment and marine ecosystems in which the resources occur.”

It is unclear what “safeguarding” means in this context and whether it is intended to have priority over the long-term conservation of the resources. Also, what is the difference between “environment” and “marine ecosystems”? One is surely a subset of the other and if the word “environment” is intended to be read broadly as “the marine environment and all its components”, it is difficult to see what is meant by “safeguarded”.

A better version may be:

*Committed to ensuring the long-term conservation and sustainable use of the [fishery resources] in the South Pacific Ocean whilst maintaining the integrity of the marine ecosystems [or environment] in which the resources occur;*

Such a formulation would be consistent with UNFSA, which, in elaborating the precautionary approach, requires States to: (a) assess the impacts of fishing on target stocks and species belonging to the same ecosystem; (b) adopt conservation and management measures for species belonging to the same ecosystem; and (c) protect marine biodiversity.

There is further inconsistency in that, by the end of the Preamble, the reference to environment has been dropped, so that the objective of the Convention is now stated as “long-term conservation and sustainable use of fishery resources in the South Pacific Ocean and the safeguarding of the marine ecosystems in which those resources occur”

Article 2 further confuses the issue. It provides that:

“The objective of this Convention is, through the application of the precautionary approach and an ecosystem approach to fisheries management, to ensure the long-term conservation and sustainable use of fishery resources and in so doing, safeguard the marine ecosystems in which those resources occur.”

It is submitted that this formulation confuses the end (long-term conservation and sustainable use) with the means (precautionary approach and EBM<sup>1</sup>) but also throws in a competing objective, i.e. safeguarding the marine environment, which itself lacks clarity because it is only to be achieved as an adjunct to the primary objective of long-term conservation and sustainable use of fishery resources.

A more concise draft would read:

*“The objective of this Convention is to ensure, through effective management, the long-term conservation and sustainable use of the fishery resources in the Convention Area whilst maintaining the integrity of the marine ecosystems in which those resources occur.”*

If the rest of the Convention is properly constructed, it should be clear that “effective management” requires the application of the precautionary approach and EBM. The language of “whilst maintaining the integrity ...” makes it clear that this is a parallel objective, not in any sense to be construed as a subsidiary objective.

Article 17(1)(a) introduces further confusion by stating that the objective of conservation and management measures introduced by the Commission is to “ensure the long-term sustainability of fishery resources and to promote the objective of their responsible utilisation”, taking into account a range of factors.

Insofar as this is intended to be a restatement of the Convention objective, it is redundant (as well as inconsistent with article 2). It does not accurately describe the nature of any specific conservation and management measure.

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<sup>1</sup> In these comments, EBM (ecosystem-based management) is used as a shorthand synonym for “ecosystem approach to fisheries management” as used in the draft Convention text.

## 2. The scope of the Convention is unclear

There is serious confusion as to the nature of the resources that are intended to be covered by the Convention. The draft text uses two defined terms to describe these resources. “Fishery” is used to describe stocks of fish that are under regulation by the Commission, whilst “fishery resources” is used both to describe the subset of living marine resources to which the Convention as a whole applies and the particular species of fish that may at any given time constitute a fishery.

WWF contends that both definitions and the use of them throughout the Convention text are seriously flawed.

A “fishery” is intended to be the unit of regulation, which the Commission will allocate in accordance with articles 18, 19 and 20. A “fishery” is defined as

“... any fishery resource in the Area that is the object of fishing at the time of entry into force of this Convention or is subsequently opened for such fishing by a decision of the Commission pursuant to article 20 of this Convention”

To understand the scope of the Commission’s regulatory authority, it is necessary to refer to the definition of “fishery resources”. These are defined as:

“... the resources of fish, molluscs, crustaceans and other sedentary species within the Area, but excluding:

- (i) sedentary species subject to the fishery jurisdiction of coastal States pursuant to article 77(4) of the 1982 Convention; and
- (ii) highly migratory species listed in Annex 1 of the 1982 Convention excluding sauries;

It is very hard to understand this definition or what exactly is being regulated. The words “fish ... and other sedentary species” imply that the Convention regulates only sedentary species, except for those referred to in subparagraph (i) on the outer continental shelf (OCS). This clearly doesn’t make sense, because sedentary species (as a term of art defined by the LOSC) exist only on the OCS. Working backwards, we can see that what is **NOT** included within the Convention definition (and thus **excluded** from the overriding objective of long-term conservation and sustainable use) are:

- All highly migratory fish stocks;
- All resources outside the Convention Area<sup>2</sup>;
- All sedentary species on the outer continental shelf; and
- Seabirds.

If this is correct, then the only resources covered by the Convention would appear to be sauries (which seem to have been inadvertently included by reason of an awkward double-negative), the high seas portion of some straddling stocks, some associated and

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<sup>2</sup> See discussion on jurisdictional scope below.

dependent species of fish (but not seabirds) and (possibly, depending on the construction given to the term “sedentary species”) some sessile species on the high seas beyond the outer continental shelf.

It is submitted that this is seriously inconsistent with the letter and spirit of the 1995 Agreement in relation to straddling stocks and incompatible with the requirements of EBM as it relates to highly migratory species and sedentary species.

As far as sedentary species are concerned, there is no need to exclude continental shelf sedentary species from the Convention, because the rights of coastal States to exploit them are already preserved by article 77(2) of the LOSC. This provides that such rights are exclusive in so far as no other State can exploit such species without consent of the coastal State. However, as far as conservation is concerned, there is clearly a relationship between article 118 and article 77(2) that demands cooperation and compatibility in management, given that the waters superjacent to the OCS remain high seas and open to fishing by other States (“different living resources in the same area”).

It may be further noted in this regard that the third preambular paragraph contains a very selective quotation of article 118 of the Convention. It reads:

“Recognising that under the above Agreements [LOSC, UNFSA] States have a duty to co-operate with each other in the conservation and management of living resources in the areas of the high seas and, as appropriate, to co-operate to establish sub-regional or regional fisheries organisations or arrangements with a view to taking the measures necessary for the conservation of such resources;”

There is no reference here to article 117, which provides that “States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”, or to article 116 with its important cross-reference to the provisions of article 63(2) relating to straddling stocks.<sup>3</sup>

It is not at all clear what the coastal States are trying to protect in this regard. Under 77(1) and (2), the coastal States have exclusive rights to explore and exploit sedentary species. They are not under threat of allocation by the Commission (or can easily be excluded from allocation decisions if that is the concern). But by excluding them from the definition of “fishery resources”, it means that the only way such resources are protected is through weak obligations in the draft text to “safeguard the marine ecosystems”, i.e. protection is afforded as an incidental ecosystem component. WWF considered that those obligations fail to meet international standards.

An example is fishing for orange roughy in the high seas superjacent to the OCS. In such a case, the only way in which, e.g., the corals on the OCS would be protected is through

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<sup>3</sup> This is also the first of several references throughout the draft text that WWF considers tend to undermine the principle of compatibility. See also our proposals for a revised draft of the Preamble.

the obligation in draft article 3(1)(h) to protect biodiversity as an adjunct to fishing on “fishery resources”. It is not clear whether the Commission could act under article 17(1)(e) (conservation and management measures), because such measures can only be applied to “fisheries, new fisheries and associated and dependent species” (unless it could be argued that corals are “associated and dependent species”). If they are, then why deal with them differently in article 3 and article 17?

With regard to HMS, whilst one can understand that conservation and management measures by the proposed new Commission should not overlap with measures applied by WCPFC and IATTC, that is an issue that could be dealt with in articles on cooperation with other organizations and decisions as to the scope of conservation measures to be applied. There are some HMS, e.g., oceanic sharks, that are unlikely ever to be regulated by WCPFC.

The total exclusion of in-zone portions of straddling stocks is dealt with below under item (3).

If the current draft of article 2 is retained, the implication is that the only way in which the living marine resources excluded from the definition of “fishery resources” are protected is through a weak subsidiary obligation to “safeguard the marine ecosystems”, i.e. as an ecosystem component.

The rest of the Convention text bears out this interpretation to some extent, but is also highly confused in its use of terminology. Examples of this confusion include the following:

- Article 3(1)(b) implies that “associated and dependent species” are not “fishery resources”, even though some such species would appear to be capable of being included in the definition of “fishery resources”.
- Article 17(1)(a) likewise separates fishing on “fishery resources” from “fishing on non-target and associated or dependent species”.
- Article 17(1)(b) refers to “levels of fishing effort and consequent by-catch of non-target species”
- Article 17(1)(e) implies a conceptual separation between the “marine ecosystems in which fisheries and associated or dependent species occur”

Further confusion in the draft text is added by the inclusion of a definition of “living marine resources” as “all living components of the marine ecosystems, including seabirds”. Yet this term of art appears only three times in the entire Convention text, at article 3(1)(h), article 16(2) and article 30(2). In the latter reference, the phrase appears to convey the sense that there may be other resources, not covered by the Convention, which may include associated and dependent species (i.e. implying that seabirds and

associated and dependent species are not at all covered by the Convention). In article 3(1)(h), the phrase appears in the context of an obligation to “protect biodiversity” taking into account the need to “safeguard living marine resources”. This seems incompatible with article 2, even as currently drafted, which requires the application of EBM to ensure long-term conservation and sustainable use of fishery resources and (as a byproduct) to safeguard marine ecosystems.

It is suggested that a better approach, and one more consistent with the stated intention to apply EBM, would be to delete both definitions and have a general article dealing with the application of the Convention in the following terms:

*This Convention applies to all living marine resources within the Convention Area [some exceptions may be negotiated]. Conservation and management measures under this Convention shall be applied to specific stocks or species, or to specific areas within the Convention Area, as determined by the Commission.*

### **3. The jurisdictional scope of the Convention is inconsistent with international law**

As noted above, all in-zone stocks, even straddling stocks, are expressly excluded from the definition of “fishery resources”. This blatantly contradicts UNFSA and undermines the concept of compatibility that is central to UNFSA. The fact that this must be intentional is underlined by the presence of preambular paragraphs 3 and 4 and article 3(1)(g). The latter provision in particular accords primacy to coastal State rights that is simply in direct contradiction of article 63(2) of LOSC and articles 3 and 7 of UNFSA. Preambular paragraph 4, reads:

“Taking into consideration that, in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982 and general principles of international law, coastal States have waters under national jurisdiction within which they exercise their sovereign rights for the purpose of exploring, exploiting, conserving and managing fishery resources and conserving living marine resources upon which fishing has an impact;”

If waters under coastal State jurisdiction are to be expressly excluded from the Convention Area, then what is the purpose of this preambular statement? The paragraph does not accurately reflect LOSC, article 56, in particular the words “... and conserving living marine resources upon which fishing has an impact.” These are words nowhere to be found in LOSC or UNFSA and seem to imply some primacy of coastal State interest from the effects of high seas fishing. The paragraph is also inconsistent with the core obligation of compatibility set out in UNFSA articles 3 and 7.

A particular problem is that, under the present draft, none of the provisions of article 3 are applicable anywhere outside the Convention Area or to any “fishery resource” that is not situated within the Convention Area. It should be noted that this is not a problem relating to the definition of the Convention Area. It does not matter if EEZs are excluded from the Convention Area, as long as the obligations on coastal State members of the new Commission with respect to management in their EEZs are expressly set out in the Convention in a manner consistent with UNFSA. A model for this is provided by WCPFC articles 5, 6, 7 and 8.

WWF appreciates that this issue of coastal State jurisdiction is important but may not be as intractable as previously assumed. Without at the least some language similar to WCPFC articles 4, 7 and 8, the Convention remains seriously flawed. Some suggested language for the relevant parts of the draft text follows:

***Suggested revised Preamble***

*The Contracting Parties,*

*Committed to ensuring the long-term conservation and sustainable use of the living marine resources in the South Pacific Ocean whilst maintaining the integrity of the marine ecosystems in which the resources occur;*

*Recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995 and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 and taking into account the Code of Conduct for Responsible Fisheries adopted by the 28th Session of the Conference of the Food and Agriculture Organisation of the United Nations on 31 October 1995;*

*Recognizing that, under the 1982 Convention, all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas;*

*Recognizing further that, under the 1982 Convention and the 1995 Agreement, States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas and, as appropriate, shall cooperate to establish subregional or regional fisheries organizations or arrangements with a view to taking the measures necessary for the conservation of such resources;*

*Further recognizing that, under the 1982 Convention and the 1995 Agreement, with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks on the adjacent high seas area shall seek to agree on the measures necessary for the conservation of those stocks in the adjacent high seas area;*

*Determined to cooperate effectively to eliminate illegal, unreported and unregulated fishing in the Convention Area;*

*Mindful that effective conservation and management measures require the application of the precautionary approach and the best scientific evidence available;*

*Conscious of the need to apply an ecosystem approach to fisheries management in order to minimize the risk of long-term or irreversible effects from fishing, avoid adverse impacts on the marine environment, preserve biodiversity and maintain the integrity of marine ecosystems;*

*Convinced that the long-term conservation and sustainable use of living marine resources in the South Pacific Ocean may best be achieved by the conclusion of an international Convention for that purpose;*

*Have agreed as follows:*

***Suggested revised text for “application” article***

*The principles and measures for conservation and management enumerated in article [3] shall be applied by coastal States within areas under national jurisdiction in the Convention Area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.*

*Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under the 1982 Convention and the Agreement. This Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the Agreement.*

***Compatibility (suggested draft text based on exclusion of EEZs from the Convention Area)<sup>4</sup>***

*1. Conservation and management measures established for the Convention Area and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of living marine resources in their entirety. To this end, the*

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<sup>4</sup> Note: Adapted from the WCPFC.

*members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.*

2. *In establishing compatible conservation and management measures for living marine resources in the Convention Area, the Commission shall:*

(a) *take into account the biological unity and other biological characteristics of the resources concerned and the relationships between the distribution of the resources, the fisheries and the geographical particularities of the region concerned, including the extent to which the resources occur and are fished in areas under national jurisdiction;*

(b) *take into account the conservation and management measures adopted and applied in accordance with article 61 of the 1982 Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Convention Area as a whole do not undermine the effectiveness of such measures;*

(c) *take into account previously agreed measures established and applied in accordance with the 1982 Convention and the Agreement in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;*

(d) *take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and*

(e) *ensure that such measures do not result in harmful impact on the living marine resources as a whole.*

3. *The coastal State shall ensure that the measures adopted and applied by it to marine living resources within areas under its national jurisdiction do not undermine the effectiveness of measures adopted by the Commission under this Convention in respect of the same resources.*

#### **4. Application of the precautionary approach, ecosystem-based management and data requirements**

The draft Convention prides itself on applying the precautionary approach and ecosystem-based management principles. In reality, however, the provisions in the draft are weak and do not reflect current best practice.

Article 3(2) (which we have already noted does not explicitly apply to stocks under national jurisdiction) provides that the precautionary approach, as described in the 1995 Agreement and the FAO Code of Conduct, shall be “applied widely to the conservation and management of fisheries resources”, but then goes on merely to require States to “take account of international best practices regarding the application of the precautionary approach, including annex II to the 1995 Agreement.”

This formulation is not only internally inconsistent, in that the content of annex II is an integral part of the 1995 Agreement and binding upon parties, but also a very weak and incomplete formulation of the precautionary approach with respect to fisheries.

Article 17 also requires the Commission, in adopting conservation and management measures, to apply the precautionary approach and EBM. It sets out a number of examples of conservation and management measures that should be developed. As previously noted by WWF, these examples are confusing and inconsistent in their mixed references to “fishery resources”, “non-target species” and “associated and dependent species”. The article does not specifically elaborate how the precautionary approach is to be applied in the context of SPRFMO.

A full statement of best practices in relation to the precautionary approach can be found in the report of the Independent Panel on Recommended Best Practices for RFMOs (Chatham House, 2007) at Chapter 3. See also WCPFC, article 6.

Key elements of the precautionary approach in this context that should be reflected in Convention obligations include:

- More cautious management measures for situations of more uncertainty.
- Clear demonstration, through scientific explanation or models, that fishery management has a high probability of adequately managing the risks of undesirable impacts, for instance violation of the limit reference points, with the information available.
- The levels of fishing activity and their potential impacts are constrained at below limit reference points until information is available to inform and develop strategies that can adequately manage the risks of higher levels of activity and impact.
- Decision rules are scientifically demonstrated to have a high probability of achieving targets and avoiding limits with the kind and reliability of data and understanding that is available.
- Decision rules automatically account for changes in the reliability of data and the precision of estimates.
- Effective provisions and mechanisms for the collection and reporting of data that is necessary for the monitoring and management of fishery operations and the status of the resources and ecosystems. Specifically, data collection and exchange requirements must be consistent with UNFSA, Annex I.

In the case of SPRFMO, data exchange provisions are found at article 21, in a form that does not actually impose any positive obligation upon Contracting Parties to provide and exchange data in an UNFSA-compliant manner, but merely asks the Commission to develop such procedures. An additional aspect, is the question of IUU catch. As proposed by the High Seas Task Force (2006) and developed in the Recommended Best Practices for RFMOs, best practice RFMOs are aware of IUU fishing activities, take measures to estimate it and incorporate knowledge of IUU fishing into management measures. Specifically, best current practice is:

- Estimates of IUU catch and effort, and their likely limitations accounting for potential biases and imprecision, are routinely made.
- IUU and total catch estimates are supported and cross-checked by independent measures of regional and global trade, including by:
  - o comparisons of trade information from different sources;
  - o sampling in markets, to determine the quantities, species and likely origin of products, and comparison of these estimates with reported quantities, species and origin of products;
  - o use of catch documentation systems; and
  - o comparisons and meta-analysis in order to estimate likely catch, including by-catch.
- Data useful to the understanding and estimation of IUU fishing activities, including catch and by-catch, is shared, as appropriate, through common database structures.
- IUU catch, including by-catch, and effort are accounted for in scientific assessments of the status of fisheries and their associated ecosystems and in scientific predictions of the future status under proposed management measures.

None of these best practice requirements can be found in the draft Convention text, which is surprising given the emphasis in the Preamble on the need to eliminate IUU fishing.

EBM acknowledges that fishing and other activities take place within complex communities of organisms and habitats and that fishing is only one of many human activities which impact on these marine environments. EBM considers cumulative impacts of different sectors on the ecosystem. In the fisheries management context the main goal of EBM is sustainability of catches without compromising the inherent structure and functioning of the marine ecosystem.<sup>5</sup>

The draft Convention text makes frequent references to the importance of an “ecosystem approach to fisheries management” and even contains a definition of such an approach. However, there are no provisions that effectively elaborate what EBM actually entails in practice for Contracting Parties or for the Commission.

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<sup>5</sup> This goal is reflected in WWF’s suggested revised draft of Article 2.

A major concern in this respect is article 2, which provides that:

“The objective of this Convention is, through the application of the precautionary approach and an ecosystem approach to fisheries management, to ensure the long-term conservation and sustainable use of fishery resources and in so doing, safeguard the marine ecosystems in which those resources occur.”

WWF suggests that this formulation not only confuses the end (long-term conservation) with the means (EBM) but also adds a competing objective (safeguarding marine ecosystems) which itself lacks clarity. A more concise draft would read:

*“The objective of this Convention is to ensure, through effective management, the long-term conservation and sustainable use of the fishery resources in the Convention Area whilst maintaining the integrity of the marine ecosystems in which those resources occur.”*

An example of an RFMO that is relatively advanced in terms of developing and implementing EBM is CCAMLR. CCAMLR has not only adopted overarching objectives and decision rules for some of its key stocks which incorporate EBM concepts but has also adopted precautionary reference points (targets and limits). CCAMLR has clear precautionary procedures for the development of new and experimental fisheries, including cautious initial caps on the total catch and effort and their spatial distribution, data collection to support assessment and expansion decisions, and agreed methods for those assessments. CCAMLR also serves as a model for its efforts to monitor and remediate impacts on associated and dependent species (e.g., establishing TACs for bycatch species and tying them to TACs for management species, closing areas when bycatch targets are reached and including a set-aside for predators when establishing TACs for target stocks.) Furthermore, CCAMLR has a comprehensive ecosystem monitoring programme (CEMP) which not only monitors the relationship between target and associated and dependent species but also conducts assessments on predator populations.

None of these measures appear in the draft Convention text and indeed, the overall construction of the text (see sections on definitions and jurisdictional competences above) is to enable the Commission to regulate only limited “fisheries” as a subset of an exclusive definition of “fishery resources” that is not intended to cover non-target species, or associated and dependent species and also excludes a number of relevant target stocks (such as in-zone straddling stocks and OCS stocks). This is the antithesis of EBM.

To provide an adequate basis for the application of EBM, it is recommended that the scope of the Convention be expanded to cover all living marine resources within the Convention Area. It is essential that the Commission be empowered to adopt appropriate conservation and management measures relating to by-catch, associated and dependent species and non-target species. Likewise, it is essential that the obligation on Contracting

Parties to apply similar management principles in areas under national jurisdiction also include the obligation to apply similar EBM measures.

## **5. Scientific structure**

The proposed structure for the provision of scientific advice to the Commission does not represent best practice. Article 9 confers limited functions on a scientific committee comprising representatives of members of the Commission.

Based on the findings of the Independent Panel on Recommended Best Practices for RFMOs, best practice RFMOs have a scientific body with appropriate technical expertise that is commissioned to:

- understand and assess issues related to the target species and the broader ecological benefits and impacts of fishing;
- understand and assess issues related to any non-ecological objectives of the fishing, including, as appropriate, economic and socio-economic benefits and the impacts of fishing;
- design and implement monitoring and research programmes;
- design appropriate reference points and management strategies;
- provide stock and broader ecosystem status reports; and
- assess and report on the probability of achieving management goals, for example achieving targets and avoiding limits, by the application of management options suggested from any source.

There should be provision for periodic independent advice and peer review of the assessments, reference points and management strategies. This advice and review is provided directly to both the scientific body and the decision-making body of the RFMO, and they are publicly available. A model for this type of structure is provided by the WCPFC, with its system of “scientific experts”, independent of the Scientific Committee to provide the basic impartial scientific data and advice that is considered by the scientific committee. To link the Scientific Committee with EBM, one of its functions should be to develop an ecosystem monitoring programme.

The advice of the scientific body should also be publicly available, and include performance reporting against the target and limit reference points.

The decisions of the RFMO should follow the advice of the scientific body; and when that advice is not followed, explicit reasons must be given.

## **6. Sub-regional Committees**

Article 11 of the draft text makes provision for two regional management committees, Eastern and Western. The purpose of these committees is to make recommendations to

the Commission on conservation and management measures relating to “fishery resources” in their areas of competence and in particular on TACs and allocations in respect of those resources.

Importantly, the membership of these committees is limited to States adjacent to the relevant area or States fishing in such areas. Furthermore, recommendations from those committees must be adopted by the Commission subject only to a limited renvoi (article 14(6)(a) and (b)).

Within the committees, decision-making is by consensus with a fallback procedure of a two-thirds majority vote (which must include at least two “adjacent” members).<sup>6</sup>

The apparent justification for the existence of the committees is that (a) the one current commercial fishery is of interest only to a limited number of potential participants, and (b) some species in some parts of the area may need different types of measures. The argument therefore is that some States may have different levels of interest in the resources, but the Commission should have an overarching role.

In practical terms, article 11 is based very much on article 11(6) of WCPFC, which established the “Northern Committee” for that Commission. That was a very specific provision, crafted in order to deal with one particular stock of special significance to one participant (Japan) against a specific political background. In principle, the notion of separating stocks in this manner runs contrary to the UNFSA concept of managing stocks “throughout their range” and should not really form a precedent for other commissions.

WWF would prefer that this sub-regional committee structure be abandoned and replaced with one or more allocation committees at the convenience of parties where allocation decisions can be made in a context set by the Commission covering crucial issues such as science-based TACs and opportunities for new entrants.

## **7. Relationships with other bodies**

Although the current draft of article 30 is technically competent, it falls far short of the objectives set out in WWF’s position paper of November 2006.

WWF’s position is that cooperation should extend to include other adjacent and overlapping RFMOs (including CCAMLR) with a shared interest in the biodiversity and living resources of the South Pacific, in addition to coastal states and regional seas agreements and other relevant regional agreements. Of particular note for the SPRFMO is the relationship with the multilateral WCPFC, CCSBT, CCAMLR, the sub-regional CPPS and the South Tasman Rise agreements.

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<sup>6</sup> Note: there is also an apparent internal inconsistency between article 11(5) (voting within the committee) and article 19(2) (allocation), which states that all decisions on participation must be by consensus. It is unclear whether this refers only to decisions within the Commission, or also extends to decisions on recommended allocations made by the committees. The text needs to be clarified.

WWF's position is that SPRFMO must have a constitutional mandate that establishes the organization as responsible for biodiversity conservation, in addition to management of all marine living resources in the region – much as the adjacent CCAMLR regime does (this position is reflected in the comments above relating to species coverage and objectives etc.).

Wherever responsibilities and mandates are found to overlap and boundary issues to arise, Memoranda of Understanding should be developed and maintained to ensure that cooperative relationships are transparent, effective and appropriate – and give primacy to decisions of regional management bodies with the broader mandates and responsibilities.

**This issue is particularly important given the wide geographical scope of the SPRFMO that is proposed.**

Of particular concern for WWF is to ensure that measures are promptly developed to restrict catch limits to levels consistent with scientific advice from subsidiary bodies, and to minimize bycatch and incidental mortality problems for dependent and related species.

The following alternative draft of article 22 is proposed:

*Article 22*

*Cooperation with other organizations*

1. *The Organization [Commission]<sup>7</sup> shall cooperate, as appropriate, with the Food and Agriculture Organization of the United Nations and with other specialized agencies and bodies of the United Nations on matters of mutual interest.*
2. *The Organization [Commission] shall make suitable arrangements for consultation, cooperation and collaboration with other relevant intergovernmental organizations, particularly those which have related objectives and which can contribute to the attainment of the objective of this Convention.*
3. *Where the Convention Area overlaps with an area under regulation by another fisheries management organization, the Organization [Commission] shall cooperate with such other organization in order to avoid the duplication of measures in respect of species in that area which are regulated by both organizations.*

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<sup>7</sup> Throughout the draft Convention text, there is some confusion between the use of the “Organization” and the “Commission”. According to article 5, the Commission is one of the organs of the Organization (the SPRFMO). If this scheme is to be followed, then care needs to be taken to ensure that general obligations apply to the “Organization” as a whole (i.e. the Commission, the subsidiary bodies and the Secretariat).

4. *The Organization [Commission] shall cooperate with the Commission for the Conservation of Antarctic Marine Living Resources, the Commission for the Conservation of Southern Bluefin Tuna, the Inter-American Tropical Tuna Commission and the Western and Central Pacific Fisheries Commission to ensure that the objective set out in article 2 of this Convention is reached. To that end, the Organization [Commission] shall initiate consultation with such organizations with a view to reaching agreement on a consistent set of conservation and management measures, including measures relating to monitoring, control and surveillance, for fish stocks and other relevant components of biodiversity that occur in the Convention Areas of the Organization and such other organizations.*

5. *The Organization [Commission] may enter into relationship agreements with the organizations referred to in this article and with other organizations as may be appropriate, such as ..., with a view to obtaining the best available scientific and other fisheries-related information to further the attainment of the objective of this Convention and to minimize duplication with respect to their work. Such arrangements shall identify and map the distribution of species and other relevant components of biodiversity to be found within the area covered by such other organization that are potentially impacted by those maritime activities which the Organization [Commission] has the capacity to regulate; and the components of biodiversity which are subject to commercial exploitation and regulation by the Commission.*

6. *Any organization with which the Commission has entered into an arrangement or agreement under paragraphs 1, 2 and 5 may designate representatives to attend meetings of the Commission as observers in accordance with the rules of procedure of the Commission.*<sup>8</sup>

A practical precedent for cooperation between organizations with overlapping mandates may be found in the North-east Atlantic. In the North-East Atlantic, the OSPAR Commission is mandated with the task of establishing a network of marine protected areas. The relevant RFMO for that area, NEAFC, has power to make recommendations concerning fisheries beyond national jurisdiction. Several members of NEAFC are also parties to the OSPAR Convention. Without proper coordination and cooperation between the organizations, there is clearly scope for overlap and inconsistency between the measures taken by OSPAR and measures taken by NEAFC. For example, fishing activities authorized by NEAFC might adversely affect a marine protected area established by the OSPAR Commission. Conversely, the establishment of a marine protected area without adequate consultation with other users of the marine environment, including fishers, may not be effective.

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<sup>8</sup> This could be adjusted as necessary to provide for, e.g. mandatory annual consultations.

In order to try to avoid or minimize such conflicts, the Secretariats of NEAFC and the OSPAR Commission meet on a regular basis and have established procedures for informing one another on matters within their respective competences, including fisheries matters and lists of threatened species and vulnerable habitats. The 2006 NEAFC recommendation for the protection of vulnerable deep-water habitats was, for example, formally introduced to the OSPAR Group on Marine Protected Areas in 2007. In future, it is envisaged that NEAFC may present an annual fisheries status report to the OSPAR Commission.

## 8. Membership and cooperating non-members

Among the recommended best practices for RFMOs are the following:

- To ensure that any non-member having a real interest in fishing in the area of competence of the RFMO assumes the full rights and benefits of membership of the RFMO and that, for such non-members, the status of cooperating non-member is regarded as transitional;
- To ensure that no prospective member will be considered for membership unless it has demonstrated its commitment to cooperation by, for example, ratifying either the UN Convention on the Law of the Sea or UNFSA or submitting a written declaration of its commitment to abide by the provisions of both UNCLOS and UNFSA.

Article 31 of the draft Convention text deals with non-parties, while articles 36 and 37 deal with signature, ratification and accession. These are modelled on traditional lines and are not objectionable. It is unlikely in any case that the above policies could be reflected in binding clauses of a Convention. Nevertheless, it is recommended that they should be reflected in the Final Act of the Conference or in a decision or resolution of the Conference adopted at the same time as the final Convention text.

## 9. Re-organization of the Convention Text

There is considerable confusion and redundancy in the way the Convention text is currently structured. The following, which should be read with the document “Revised draft framework” is a suggestion for a more logical order, with division into Parts for added clarity.

<i>New article</i>	<i>Old article</i>	<i>Comment</i>
Preamble	Preamble	Revised
<b>Part I</b>		
Article 1 – Definitions	Article 1	Revised
Article 2 – Objective	Article 2	Revised

Article 3 – Area of application and scope	Article 4	Revised
<b>Part II</b>		
Article 4 – Conservation and management principles	Article 3	Revised
Article 5 – Application of the precautionary approach and ecosystem-based management		New
Article 6 – Implementation of principles in areas under national jurisdiction		New
Article 7 - Compatibility		New
<b>Part III</b>		
Article 8 – The Organization	Article 5	Revised
Article 9 – The Commission	Article 6	
Article 10 – Functions of the Commission	Article 7	
Article 11 – Subsidiary bodies	Article 8	Revised
Article 12 – Scientific Committee	Article 9	Revised
Article 12 bis – Scientific services		New
Article 13 – Compliance Committee	Article 10	Revised
Article 14 – Allocation Committee	Article 11	Revised
Article 15 – Secretariat	Article 12	Revised
Article 16 – Budget	Article 13	Revised
<b>Part IV</b>		
Article 17 – Decision-making	Article 14	
<b>Part V</b>		
Article 18 – Conservation and management measures	Article 17	Revised
Article 19- Establishment of TAC	Article 18	
Article 20 - Participation	Article 19	
Article 21 – New fisheries	Article 20	
Article 22 – Data exchange	Article 21	
Article 23 – Market-related measures	Article 25	
<b>Part VI – Transparency and cooperation with other organizations</b>		
Article 24 - Transparency	Article 15	
Article 25 – Cooperation with other organizations	Article 30	Revised
<b>Part VII</b>		
Article 26 – Obligations of Contracting Parties	Article 22	
<b>Part VIII</b>		
Article 27 – Duties of the Flag States	Article 23	

<b>Part IX</b>		
Article 28 – Compliance and enforcement	Article 26	
Article 29 – Observer programme	Article 27	
<b>Part X</b>		
Article 30 – Port States	Article 24	
<b>Part XI</b>		
Article 31 – Requirements of developing States	Article 16	
<b>Part XII</b>		
Article 32 – Procedures for the settlement of disputes	Article 34	Revised
<b>Part XIII</b>		
Article 33 - Review	Article 29	
<b>Part XIV</b>		
Article 34 – Non-parties	Article 31	
<b>Part XV</b>		
Article 35 - Signature	Article 36	
Article 36 – Accession	Article 37	
Article 37 – Entry into force	Article 38	
Article 38 - Reservations	Article 43	
Article 39 – Annexes		New
Article 40 – Relation to other agreements	Article 33	
Article 41 – Amendment	Article 35	
Article 42 – Withdrawal	Article 41	
Article 43 – Termination	Article 42	
Article 44 – Fishing entities	Article 32	
Article 45 – Territories	Article 40	
Article 46 – Depositary	Article 39	