

# Effective Decision-Making

## A Review of Options for Making Decisions to Conserve and Manage Pacific Fish Stocks

Prepared for the third session of the  
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In the Western and Central Pacific

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## Executive Summary and Conclusions

The negotiations to establish a mechanism such as a regional fisheries management organization (RFMO) in the Western and Central Pacific are based upon a shared understanding that an effective cooperative mechanism is needed to ensure the long term health and productivity of the region's highly migratory fish stocks. One of the critical tasks facing negotiators is to define the procedures by which the new mechanism will make decisions, once its general framework and basic principles are established. These procedures must enable effective cooperation among participants, including the timely establishment of catch levels, quotas and other measures that effectively protect stocks in light of the best available scientific evidence and the precautionary approach.

To help negotiators with this important question, this white paper reviews decision-making mechanisms drawn from the state of the art in international law and institutions. Our examination of RFMOs and other regimes and institutions reveals that a diverse array of mechanisms has been developed to enhance the effectiveness of decision-making.\* Options range from strict consensus on one end of the spectrum, through consensus/supermajority voting combinations with "opt-in" or "opt-out" provisions, to various supermajority, multiple majority or simple majority voting mechanisms with no provisions for opting in or out at the other end of the spectrum. The most flexible of these latter options may be the framework-then-details or "prolepsis" approach used in the Montreal Protocol, discussed below.

Our review suggests that the selection of a decision-making procedure depends largely on the nature of the decisions to be made. Each option strikes a different balance between the desire to protect dissenting positions and the need to achieve cooperative action to protect the environment, conserve natural resources, or reach other shared goals.

For example, more flexible approaches to decision-making may be necessary in a multilateral context to allow a regime to respond quickly to evolving scientific understandings or changing conditions. In particular, timely adaptive management of fisheries resources based on the precautionary approach may only be feasible under one of the more flexible decision-making procedures outlined below.

Of course, selection of an effective decision-making approach merely facilitates effective decisions among the parties to an agreement. It does not guarantee them. Other factors play essential roles, in particular, whether the parties have the political will to make difficult decisions and then follow through on their implementation.

**Consensus.** For decisions involving the most *fundamental principles* of an agreement, strict consensus is frequently used. A strict requirement for consensus allows any party to block the adoption and entry into force of a new proposal as it respects all of the parties. Some of the RFMOs, including those with small numbers of members, rely solely upon consensus for their decisions. For example, the North Atlantic Salmon

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\* For a list of multilateral agreements reviewed in the preparation of this paper, see Annex, *infra*.

Conservation Convention (NASCC) requires unanimity of Parties present and casting affirmative or negative votes before an amendment proposal can be adopted.

The problem with consensus in the fisheries regimes is that it gives a major advantage to the participants most resistant to restrictions, and thus leads to “lowest common denominator” decisions that may not effectively deal with the problem the agreement was intended to address. Consequently, most modern multilateral environmental agreements (MEAs), such as the Basel Convention on Hazardous Wastes, require consensus only in very limited circumstances, such as amending the rules for decision-making or financial obligations.

**Supermajority with opt-in/opt-out.** For important decisions on matters other than their most fundamental principles, most MEAs employ consensus/supermajority-vote combinations. Under these arrangements, parties must first make every effort to reach a decision by consensus. If consensus is not possible, then a decision can be taken upon a supermajority vote, usually two-thirds or three-fourths of parties that are present and voting. However, the votes will not necessarily bind dissenting parties, because the decision may be effective only for those who choose to “opt-in,” or it may be effective for a party so long as it does not “opt-out.”

The opt-in requirement is usually required for *amendments to the fundamental agreement*. For example, if parties wish to amend the Basel Convention, they must first attempt to do so by consensus. If consensus fails, they may still adopt the amendment upon an affirmative vote of three-fourths of the parties present and voting. However, the amendment will enter into force only if three-fourths of the parties elect to opt-in by signing and ratifying it. It will not enter into force for those who have not opted-in. This arrangement preserves the traditional notion that states may be bound only by those obligations to which they have specifically agreed.

Many multilateral environmental agreements contain their basic obligations and procedures in the main text, and relegate their precise regulatory specifications to attachments known as “annexes,” “appendices,” or “schedules.” For instance, the Convention on International Trade in Endangered Species (CITES) has appendices that list the names of species threatened with extinction and those that could be threatened with extinction unless strictly regulated. Similarly, some fisheries conventions, such as the North-East Atlantic Fisheries Convention, authorize commissions to promulgate management regulations.

Because these annexes or regulations tend to be of a scientific or technical nature, requirements for their adoption or amendment are usually somewhat less strict than those for amendments to the fundamental agreement. Instead of entering into force only for those parties who elect to opt-in, they enter into force for all parties unless a party takes the affirmative action of opting-out by notifying the convention depositary that it is “unable to accept” the new annex or annex amendment.

The opt-out requirement is thought to be a more effective way of persuading all parties to accept an emerging international standard, because they must give public notice

if they do not want to be covered by it. Its availability can allow new regulations to be adopted, such as the listing of an endangered species under CITES, in cases where adoption may not have been possible had consensus been required. Additionally, because it does not require ratification by each party, it allows annexes to be adopted or amended faster than they would under a consensus or supermajority with opt-in arrangement.

Nevertheless, even these non-consensual voting requirements can push fisheries management decisions toward the lowest common denominator. Any party taking a significant amount of the total catch has the legal right to opt-out from a decision, thus undermining the decision's usefulness and effectively vetoing its adoption.

**Voting procedures with no opt-in/opt-out.** A number of multilateral agreements and institutions have dealt with the problems presented by these decision-making mechanisms by allowing binding decisions to be taken on certain matters with no opportunity to opt-in or opt-out. The Basel Convention and the Montreal Protocol on Substances that Deplete the Ozone Layer have rules of procedure that permit substantive decisions, on matters other than amendments and the financial mechanisms, to be approved by supermajorities of the parties present and voting. These decisions might include determining reporting guidelines under the Montreal Protocol, or establishing subsidiary bodies necessary for the implementation of the Basel Convention.

For purely procedural issues, the Basel Convention and the Montreal Protocol authorize decisions at meetings of the Parties to be adopted by a simple majority of members present and voting. Procedural issues might include deciding on a point of order, agreeing on the dates for future meetings, or deciding how information should be provided to a party.

Some institutions use hybrid voting schemes, which allow decision-making to go forward when consensus is not possible, but still provide guarantees that certain minority blocs or viewpoints will be respected. These include the double majority voting provisions of the Montreal Protocol that apply to all decision-making regarding the Protocol's Financial Mechanism. Proposals can be adopted and enter into force on a two-thirds majority vote of those parties present and voting, provided that a majority of developing countries present and voting *and* a majority of non-developing countries present and voting voted in favor of the proposal.

Similarly, the International Sea-Bed Authority, created under the United Nations Convention on the Law of the Sea, exercises an innovative kind of multiple majority voting. Substantive decisions of a representative Council can be approved by a two-thirds majority vote of those members present and voting. However, the thirty-six Council members are also grouped into four "chambers," three of which represent the largest consumers, investors, and exporters of sea-bed commodities, and the fourth ensuring representation of all geographical regions, and developing countries with special interests. If a majority in any one of the four chambers opposes a decision of the Council, the decision is rejected.

**The framework-then-details or “prolepsis” approach.** Perhaps the most important recent development in decision-making models is the framework-then-details approach—termed “prolepsis” by scholars—employed in the Montreal Protocol. The Montreal Protocol, like other framework agreements, uses annexes to list the particular technical specifications that parties must adhere to in the control of ozone destroying substances.

Although *amendments* to the Protocol’s annexes can be adopted only by supermajority vote with an opt-out opportunity, annexes can be *adjusted* through less strict procedures. Adjustments can include changing the timing of reductions of ozone destroying substances, or changing the allocations for their production and consumption. An adjustment can be adopted by two-thirds of the parties present and voting, so long as they represent at least a majority of the developing countries present and voting and a majority of non-developing countries present and voting. Because there are no opt-in or opt-out provisions, adjustments are effective for all parties even if they vote against them, and they can result in a change in the amount of controlled substances parties are legally permitted to produce or consume.

This voting procedure has been credited with contributing to the effectiveness of the Protocol by permitting it to develop and adapt in response to new scientific information. In situations where states are highly motivated to take action, are confident that their core interests will be represented, and believe that agreed-upon decision-making procedures are fair, a prolepsis approach can allow them to design and implement solutions to problems of the global commons, even when they may not yet have complete scientific information, or may not yet agree on every specific detail of the solution.



## **Effective Decision-Making: A Review of Options for Making Decisions to Conserve and Manage Pacific Fish Stocks**

The negotiations to establish a mechanism such as a regional fisheries management organization (RFMO) in the Western and Central Pacific are based upon a shared understanding that an effective cooperative mechanism is needed to ensure the long term health and productivity of the region's highly migratory fish stocks. Such regional organizations or arrangements are recognized by the United Nations Agreement on Straddling Stocks and Highly Migratory Fish Stocks as essential tools for protecting ocean fisheries throughout the world.<sup>1</sup>

One of the critical tasks facing negotiators is to define the procedures by which the new RFMO will make decisions, once its general framework and basic principles are established. These procedures must enable effective cooperation among participants, including the timely establishment of catch levels, quotas and other measures that effectively protect stocks in light of the best available scientific evidence and the precautionary approach.

To help negotiators with this task, this white paper reviews decision-making mechanisms drawn from the state of the art in international law and institutions. Our review covers a selection of RFMOs and other instruments and institutions relating to marine living resources. It also reviews procedures in other areas, particularly the protection of the environment and endangered species, where a diverse array of mechanisms has been developed to enhance the effectiveness of decision-making.

Part I of this white paper offers an overview of the various approaches to decision-making and highlights the general lessons that emerge. Part II provides a detailed examination of the various approaches to decision-making found in specific international instruments and institutions.

### **I. International Decision-Making: Lessons from a Review of Representative Institutions and Agreements**

The good news for negotiators of the Central and Western Pacific regional fisheries agreement is that a wide variety of approaches have been used in the institutions and agreements studied. This variety gives creative negotiators ample room to adopt innovative approaches to decision-making. Section A of this part presents a brief discussion of the array of approaches. Section B considers how and why these various approaches have evolved.

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<sup>1</sup> See United Nations Agreement on Straddling Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, arts. 8-16, 34 I.L.M. 1542 (1995) [hereinafter Straddling Stocks Agreement]. While not yet in force, the Agreement represents the "state of the art" in the international law of fisheries conservation and management, elaborating upon the principles established in the United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. A/CONF. 62/122, 21 I.L.M. 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

## A. The Spectrum of Decision-Making Models

Contemporary international and regional agreements and institutions display a range of procedures for legislative decision-making.<sup>2</sup> Options range from strict consensus on one end of the spectrum, through various forms of supermajority and multiple majority procedures, to simple majority voting at the other end of the spectrum. Procedures can be divided into four general types:

1. Strict consensus;
2. Supermajority voting where the decision applies only if a party “opts in”;
3. Supermajority voting where the decision applies unless a party “opts out”;
4. Voting arrangements in which decisions apply to all parties, with no opt-in or opt-out provisions.

Our review of a range of treaty regimes suggests that the selection of the type of procedure depends on the nature of the decisions to be made. Each option strikes a different balance between the desire to protect dissenting positions and the need to achieve cooperative action to conserve natural resources, protect the environment, or reach other shared goals.

Consensus tends to be required for decisions that establish the basic framework of rights or obligations under an agreement.<sup>3</sup> Such fundamental decisions include, in the first instance, adopting a convention or protocol.<sup>4</sup> They also may include making changes to rules for financial contributions or rules governing how the decision-making process itself will take place.

The less that a decision will alter fundamental obligations, the less likely it is that consensus will be needed for decision-making. For instance, amendments to an agreement or protocol’s rights and obligations typically can be adopted by a supermajority, if consensus cannot be achieved. Even so, governments are usually not bound by the amendment unless they “opt in” by signing and ratifying it.

Many agreements provide for the amendment of annexes through supermajority decisions that are binding unless a party takes the initiative to “opt-out” of the amendment. Annexes (sometimes called appendices or schedules) usually are lists attached to a treaty that define precisely the scope of application of one or more of the

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<sup>2</sup> The term “legislative decision-making” is used here to refer to decisions about rules of general applicability to all parties, as opposed to “judicial” decisions about the compliance or non-compliance of a specific party, or disputes between specific parties. The scope of this white paper is limited to legislative decision-making.

<sup>3</sup> For the purpose of most multilateral agreements, “consensus” means the absence of any formal objection. *See, e.g.*, UNCLOS, *supra* note 1, at art. 161.8(e). Some of the fisheries agreements use the terminology “unanimous vote of the Parties present and casting affirmative or negative votes” to indicate consensus voting. *See, e.g.*, Convention for the Conservation of Salmon in the North Atlantic Ocean, art. 19.2, Mar. 2, 1982, T.I.A.S. 10789 (entered into force Oct. 1, 1983) [hereinafter NASCC].

<sup>4</sup> A protocol is a “follow-up” agreement that details the general obligations of an initial agreement, typically called a “framework convention.”

treaty's general obligations. In agreements on natural resources or the environment, annexes are designed to be revised with relative ease to respond to changes in the status of resources or advances in scientific knowledge. One example is the Appendices I and II to the Convention on International Trade in Endangered Species (CITES), which contain the names of the specific animal and plant species that are endangered by trade and thus subject to trade regulation. Decisions to amend annexes typically require supermajorities of two-thirds or three-fourths of the parties or members present and voting.

In addition to making fundamental decisions like amending an agreement, or decisions to adopt or amend annexes, parties to international agreements typically engage in a broad range of other kinds of decision-making, including overseeing financial mechanisms, formulating recommendations or guidelines for implementation, applying the rules of procedure at meetings, or administering and managing subsidiary bodies. In many agreements, parties decide some or all of these issues by using non-consensus voting mechanisms that do not provide for an opt-in or opt-out.

The mechanisms are often tailored to the type of issue, so that they safeguard minority interests while reducing the risk that small numbers of self-interested holdouts will block action for the common good. For instance, multiple majority voting arrangements require that a decision must be approved by a majority of two or more categories or "chambers" of parties. "Weighted" voting takes into account the financial resources that each party contributes to an institution. Some types of decisions are made by simple majority; i.e., the approval of more than half of the parties or members present or voting.

Today's array of decision-making mechanisms has evolved over time, in response to the desire of nation states to balance the need to take effective collective action while preserving essential elements of their own sovereignty. It is to this process of evolution that we now turn.

## **B. The Evolution of International Decision-Making: From Consensus to Prolepsis**

International law is traditionally predicated on the premise that sovereign states are bound only by obligations to which they have freely consented.<sup>5</sup> Thus, the adoption of the final text of an agreement is made by a consensus of the negotiators, and each government then decides independently whether to sign and ratify it. Similarly, the most fundamental decisions in multilateral agreements must often be taken by consensus.

Guarantees of consensual decision-making give states the power to veto changes in agreements that run counter to their original expectations. In this way, they can avoid

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<sup>5</sup> *Codified in* Vienna Convention on the Law of Treaties, May 23, 1969, preamble, arts. 11, 24, and 34, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1988). *But cf. id.* art. 53 (stating that peremptory norms accepted and recognized by international community as whole constitute norms from which no derogation is permitted).

finding themselves bound at a later time by an obligation they did not anticipate when they first made the agreement.

However, rigid adherence to the traditional rule of consensus may impede the resolution of shared environmental and natural resource management problems. By leading to commitments to the “lowest common denominator,” consensus can satisfy the most reluctant negotiators, but fail to respond effectively to the shared problem confronting the group of nations concerned.<sup>6</sup> This is especially so in legal regimes that attempt to mitigate pollution or manage the use of natural resources in the global commons. In these cases, parties may be repeatedly tempted to avoid making or meeting commitments, because each party must pay all of its own compliance costs, while the benefits of compliance are shared by all.

Equally important, scientific knowledge and understanding of the risks of inaction may develop too rapidly to be accommodated in a political regime based on consensus. Effective fisheries management must be able to respond rapidly to new situations. Because incomplete information in resource management is widely understood to call for taking greater caution rather than postponing or failing to take conservation and management measures, rigid decision-making mechanisms that favor the status quo may thwart the purposes of an RFMO.<sup>7</sup> As the precautionary approach has increasingly become the guiding light for resource and environmental management, states have come to realize that lowest-common-denominator decision-making can sometimes fail to address problems while cost-effective, preventive solutions are still available.<sup>8</sup>

To ameliorate these shortcomings, many multilateral agreements rely upon modified consensus schemes that allow a supermajority to approve a treaty amendment if consensus cannot be reached. However, these arrangements typically have opt-in provisions by which an adopted proposal applies to a party only upon the party’s formal approval or ratification of it, or opt-out provisions allowing parties to decline to be bound by the proposal. Opt-in provisions are particularly slow and cumbersome, as entry into force occurs only with ratification by individual parties. Moreover, by permitting some parties to decline to adopt proposals that others *do* adopt, opt-in and opt-out provisions can lead over time to agreements containing an unmanageable “hodgepodge” of obligations, with different parties bound by different, uncoordinated sets of rules.<sup>9</sup>

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<sup>6</sup> See David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 791-92 (1994).

<sup>7</sup> See Straddling Stocks Agreement, *supra* note 1, art. 6.2 (requiring states to be more cautious when information is uncertain, unreliable or inadequate, and stating that absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures).

<sup>8</sup> The precautionary approach provides that action to address environmental problems should not be delayed by a lack of complete scientific certainty. See Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, June 16, 1972, 11 I.L.M. 1416 (1972); Straddling Stocks Agreement, *supra* note 1, arts. 5(c), 6.

<sup>9</sup> See Paul C. Szasz, *International Norm-Making*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 41, 57 (Edith Brown Weiss ed., 1992).

These drawbacks, combined with the growing urgency of international environmental and conservation problems, have led negotiators in an increasing number of cases to a phased “framework-then-details” process. Governments reach consensus on the framework of general principles and procedures the regime will employ. The details of parties’ commitments, including technical, scientific, or quantitative specifications, are then included in annexes, which are subject to a relaxed standard of approval.<sup>10</sup> In this process, called “prolepsis” by scholars, nations consent in advance to be bound by norms whose precise content may be unknown at the time of their consent.<sup>11</sup> Perhaps the most widely-noted example, discussed in Part II.D.6 below, is the Montreal Protocol’s procedure for adjusting its annexes.<sup>12</sup> This procedure uses a double majority voting system to make decisions that are binding on all parties, even those that voted against the proposal.

The prolepsis process as adopted in the Montreal Protocol responds to the shortcomings of the consensus and opt-in/opt-out approaches. It can ensure a uniform set of technical obligations for all parties, and it removes the necessity for each party to enter into a detailed cost/benefit calculus for relatively minor changes in its obligations. Moreover, it helps states adhere to the precautionary approach, by allowing timely and agile responses to fast-changing scientific understandings of the underlying problem.<sup>13</sup> At the same time, prolepsis allows states to maintain their sovereign freedom to determine their own obligations, because consensus is required to adopt or alter the fundamental principles of an agreement.

## **II. A Review of Decision-Making Models in Selected International and Regional Agreements and Institutions**

This section reviews specific examples of the decision-making models summarized in Part I.A above. The review reveals that the options available to creative negotiators range far beyond a simple dichotomy between strict consensus and pure majority rule. There is a rich variety of mechanisms that can be used to balance the need for efficient decision-making, the need to respond to advances in scientific knowledge and changed biological and physical conditions, the need to respect majority and minority viewpoints, and other relevant factors.

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<sup>10</sup> See *id.* at 63-4.

<sup>11</sup> See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 273 (1992).

<sup>12</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 2.9, composite text including 1990 amendments, 21 INT’L ENV’T REP. (BNA) 3151 (1993) [hereinafter Montreal Protocol].

<sup>13</sup> Prolepsis incorporates the precautionary approach by allowing parties to take actions incrementally, calibrated to the evolution of scientific understanding of the problem. The draft Western and Central Pacific Migratory Fish Stocks Conservation Convention requires parties to manage stocks in the Convention area by applying the precautionary approach, and it contains detailed guidelines for how parties should do so. See Revised Draft Articles for a Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 5.1(c), 5.2, annex II, *in* Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, 3rd Sess., annex 5 (June 1998) (draft).

The review covers a number of regional fisheries management organizations, several regional agreements to protect the marine environment, other multilateral environmental agreements—including CITES, the Convention on Biological Diversity, the Basel Convention on Hazardous Waste, the Framework Convention on Climate Change, the Convention on Combating Desertification, and the Montreal Protocol—and the International Sea-Bed Authority established under UNCLOS. In addition to this selection of fisheries, marine, and environmental institutions, this section also reviews procedures in the World Trade Organization, the International Monetary Fund, the World Bank, and the International Civil Aviation Organization.<sup>14</sup>

### A. Strict Consensus

A strict requirement for consensus allows any party to block the adoption and entry into force of a new proposal as it respects all of the parties. Most multilateral environmental or natural resource management agreements do not require strict consensus voting for decisions under the agreement.

Some of those that do are regional agreements which do not have a large number of parties.<sup>15</sup> For example, the North Atlantic Salmon Conservation Convention (NASCC) requires an “unanimous vote” of the parties present and casting affirmative or negative votes before an amendment proposal can be adopted.<sup>16</sup> The NASCC currently has seven parties.<sup>17</sup> An adopted proposal enters into force thirty days after the Depositary receives instruments of ratification or approval from all parties.<sup>18</sup>

Similarly, the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), a trilateral agreement, provides that a proposed amendment shall enter into force only by consensus, after the Depositary receives ratification instruments from all parties.<sup>19</sup>

Both the NASCC and the CCSBT establish commissions charged with adopting regulatory measures, including the power to decide upon a total allowable catch and

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<sup>14</sup> A list of all the reviewed agreements can be found in the Annex attached at the end of this paper.

<sup>15</sup> Because collaboration is usually easier between small rather than large numbers, the high degree of cooperation needed to make consensus decision-making effective is more likely to be found in institutions with few rather than many members. See M. J. Peterson, *International Fisheries Management*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 249, 293-94 (Peter M. Hass et al eds., 1994).

<sup>16</sup> NASCC, *supra* note 3, art. 19.2. Although the text uses the term “unanimous vote,” unanimity is required only among parties casting “affirmative or negative votes.” An abstaining party does not count in the determination of whether there is unanimity or not. The NASCC’s “unanimous vote” is thus the same as consensus, as that term is defined in UNCLOS. See *supra* note 3 and accompanying text.

<sup>17</sup> See Michael L. Weber, A Global Assessment of Major Fisheries at Risk, Relevant Management Regimes, and Non-governmental Organizations 71 (Report of the Pew Charitable Trusts, Feb. 1998) (draft, on file at CIEL).

<sup>18</sup> NASCC, *supra* note 3, art. 19.3.

<sup>19</sup> May 10, 1993, art. 20, available in <<http://www.sedac.ciesin.org/pidb/texts/acrc/Bluefin.txt.html>> (entered into force May 20, 1994) [hereinafter CCSBT]. Proposed amendments are discussed and put to a vote if one-third of the parties request a meeting to do so. *Id.* art. 20.2.

allocation.<sup>20</sup> The commissions have from two to five members. Parties are equally represented on each commission whose region is applicable to them.<sup>21</sup> Binding regulations may be adopted upon a unanimous vote of those present, so long as there is a quorum of two-thirds of the parties.<sup>22</sup>

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>23</sup> requires decision-making by consensus in spite of the fact that it has a relatively large number of parties. CCAMLR is the principle instrument for fisheries management in the Southern Ocean. Decision-making is made by a Commission comprised of the twenty-four original contracting parties, plus any state parties that are actively engaged in research or harvesting activities of resources governed by the Convention.<sup>24</sup> Substantive decisions, decisions regarding the budget, and Convention amendments all require consensus.<sup>25</sup>

An analysis of CCAMLR is complicated by the fact that it is part of the Antarctic Treaty System, which has always relied upon consensus decision-making. The primary reason for this consensus requirement is the parties' desire to protect their Antarctic territorial claims.<sup>26</sup> CCAMLR has come under criticism on the ground that this consensus requirement has the side effect of preventing the adoption of effective conservation measures.<sup>27</sup> Some have argued that the Commission adopted stricter conservation measures – including total allowable catch, reporting requirements, and a closed season – only after stocks had become so depleted as to discourage further exploitation on economic grounds.<sup>28</sup> Others respond that the real problem is adequately integrating scientific and technical knowledge into the decision-making process, so that decisions that should be scientifically based are not overwhelmed by political concerns.<sup>29</sup>

This is a recurring problem in fisheries regimes that require consensus on management decisions: because the default position if consensus fails is that there are no conservation restrictions whatsoever, a requirement of consensus gives a major advantage to the participants most resistant to restrictions.<sup>30</sup> An innovative response to this problem

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<sup>20</sup> See NASCC, *supra* note 3, art. 11.2; CCSBT art. 8.3(a).

<sup>21</sup> See NASCC arts. 7- 8; CCSBT art. 6.2.

<sup>22</sup> NASCC art. 11.3; CCSBT arts. 6.7, 7. The NASCC provides that any member can object and thereby veto the proposal within sixty days of receiving notice of it from the Depositary. Art. 13.3.

<sup>23</sup> May 20, 1980, 33 U.S.T. 3476, T.I.A.S. 10240 [hereinafter CCAMLR].

<sup>24</sup> *Id.* art. 7.2.

<sup>25</sup> *Id.* arts. 12.1, 19.1, 30.3.

<sup>26</sup> See Francisco Orrego Vicuña, *The Effectiveness of the Decision-Making Machinery of CCAMLR: An Assessment*, in *THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS* 25, 26-27 (Arnfinn Jørgensen-Dahl and Willy Østreng eds., 1991).

<sup>27</sup> See *id.* at 25.

<sup>28</sup> See *id.* at 28 (citing Matthew Howard, *The Convention on the Conservation of Antarctic Marine Living Resources*, 38 INT'L L. Q. 104, 135 (1989)).

<sup>29</sup> See Vicuña, *supra* note 26, at 26, 30-31. Vicuña observes that the value of the consensus requirement in CCAMLR is that it made the agreement possible. Particularly in light of their territorial concerns, many parties would not have accepted any treaty that did not give them veto power. Accordingly, without guarantees of consensus, there may have been no overall arrangement for the Southern Ocean, leaving in play the open-access system that had caused so much damage to living resources there. See *id.* at 27.

<sup>30</sup> See generally Peterson, *supra* note 15, at 274-76.

can be found in the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Bering Sea Pollock Convention).<sup>31</sup>

The Bering Sea Pollock Convention regulates a specific area located between the territorial seas of Russia and the United States. It has six parties, and pertains only to a single species. Each year, a conference of the six parties is tasked with establishing an allowable harvest level and national quotas for each party for the succeeding year.<sup>32</sup> These amounts must be agreed upon by consensus. However, if all efforts at consensus fail, then the levels are settled by default, in accordance with the Convention's Annex.<sup>33</sup>

Part One of the Annex provides that the allowable harvest level is set on a sliding scale depending on the amount of pollock biomass in the Aleutian Basin.<sup>34</sup> If the biomass is less than 1.67 million metric tons, then the level is set at zero. If the biomass is higher, then specific quantities of pollock are allowed to be harvested.<sup>35</sup> In the event the allowable harvest is set above zero but the parties are unable to agree on the individual national quotas, then the fishery is open to vessels of all parties, the catch is closely monitored, and the fishery is closed as soon as the allowable harvest level is reached.<sup>36</sup>

By pre-authorizing default rules based solely on scientific assessments, the parties were able to avoid the deadlock that so often freezes decision-making in fisheries regimes requiring strict consensus, particularly between the coastal and distant water fishing nations. Their ability to do this was enhanced by the facts that the fishery was located in a relatively narrow area, only six states were involved, only one species (pollock) was targeted, and their stocks had collapsed, making it obvious that serious measures were needed to save the fishery.

Traditional consensus requirements without default positions can make it difficult or impossible for multilateral environmental agreements (MEAs) to evolve in response to changing situations. Accordingly, the major conventions generally do not require consensus insofar as adopting amendments is concerned. The “prolepsis” framework-then-details approach of the Montreal Protocol, discussed in Section II.D.6, below, has evolved as a means of addressing this challenge.

Yet MEAs have not abandoned consensus entirely. Consensus remains a requirement for certain types of decisions. For instance, the Basel Convention, the Convention on Biological Diversity, and the Montreal Protocol permit amendment of their rules of procedure and rules governing financial contributions only by consensus.<sup>37</sup>

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<sup>31</sup> June 16, 1994, 34 I.L.M. 67 (1994) (entered into force Dec. 8, 1995) [hereinafter Bering Sea Pollock Convention].

<sup>32</sup> *Id.* art. 4.1.

<sup>33</sup> *Id.* arts. 7.1-2, 8.1-2.

<sup>34</sup> The biomass amount is established by institutions designated by the two coastal states, Russia and the United States, and must be based on scientific and technical information. *Id.* annex, pt. 1 (a).

<sup>35</sup> *Id.* pt. 1 (c)-(d).

<sup>36</sup> *Id.* pt. 2 (d).

<sup>37</sup> See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, art. 15, 28 I.L.M. 657 (1989) [hereinafter Basel Convention]; Convention on



Additionally, the World Trade Organization (WTO) requires full consensus for amendments making fundamental changes such as amending the decision-making process itself.<sup>38</sup>

## **B. Supermajority Voting, with Decision Effective when Parties Opt In**

Consensus/supermajority combinations allow decision-making to take place even when parties cannot reach consensus. If a small minority of parties block efforts to achieve consensus on a proposal, the proposal can still be adopted by a supermajority vote of two-thirds or three-fourths of the parties present and voting. However, the adopted proposal will enter into force and be binding only upon those members who affirmatively elect to accept it, or “opt in.” This preserves the traditional notion that states may be bound only by those obligations to which they have specifically agreed. Accordingly, *it is primarily required for amendments that alter the fundamental obligations of the agreement or protocol.*

A typical example is the Basel Convention, designed to control the export of hazardous wastes. Parties first make every effort to reach agreement on the proposed amendment by consensus.<sup>39</sup> However, if “all efforts at consensus have been exhausted, and no agreement reached,” then parties may “as a last resort” vote whether to adopt the proposal.<sup>40</sup>

A supermajority is generally required in such procedures. Some agreements, like the Convention to Combat Desertification, require the same majority for adopting amendments to both conventions and protocols.<sup>41</sup> Others stipulate higher majorities for convention amendments than for protocols.<sup>42</sup> An amendment is usually adopted upon approval by two-thirds or three-fourths of those members present and voting at the

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Biological Diversity, June 5, 1992, art. 23.3, 31 I.L.M. 818 (1992) [hereinafter CBD]; Montreal Protocol, *supra* note 12, art. 11.3.

<sup>38</sup> Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. 10.2, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125, at 1144 (1994) [hereinafter WTO Agreement]. This requirement is a response to the situation in the pre-WTO General Agreement on Trade and Tariffs (GATT), in which GATT members received the benefits of the various side agreements whether they agreed to them or not, giving them little incentive to sign them. The increasingly inconsistent obligations assumed between the members because of this loophole threatened the GATT’s premise of liberalized trade, and led negotiators to commence the round of talks leading to creation of the WTO. *See* Frieder Roessler, *The Agreement Establishing the World Trade Organization*, in *THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYER’S PERSPECTIVE* 67, 69 (Jacques H.J. Bourgeois et al. eds., 1995).

<sup>39</sup> Basel Convention, *supra* note 37, art. 17.3; *see also, e.g.*, CBD, *supra* note 37, art. 29.3; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa, June 17, 1994, art. 30.3, 33 I.L.M. 1328 (1994) [hereinafter UNCCD]; United Nations Framework Convention on Climate Change, May 9, 1992, art. 15.3, 31 I.L.M. 849 (1992) [hereinafter FCCC].

<sup>40</sup> Basel Convention, *supra* note 37, art. 17.3; *cf.* WTO Agreement, *supra* note 38, art. 10.1 (requiring vote to be taken if proposal is not adopted by consensus within ninety days of being tabled).

<sup>41</sup> UNCCD, *supra* note 39, art. 29.3 (requiring two-thirds majority for both convention and protocol amendments).

<sup>42</sup> *See, e.g.*, Basel Convention, *supra* note 37, art. 17.3-4 (requiring three-fourths majority for convention, two-thirds majority for protocol).

meeting. “Parties present and voting” means parties who are present and cast an affirmative or negative vote, not an abstention.<sup>43</sup>

If the amendment is adopted, it will enter into force only if a sufficient number of parties elect to opt-in by signing and ratifying the amendment. The number required is usually the same proportion as that required for adoption. For instance, two-thirds of the parties present and voting must vote “yes” to adopt an amendment to the Convention on Biological Diversity.<sup>44</sup> The adopted amendment then enters into force among parties who have accepted it ninety days after two-thirds of the contracting parties deposit their written notices of ratification or approval with the Depositary.<sup>45</sup> For any parties who deposit their acceptance notice at a later time, the amendment enters into force on the ninetieth day after they give their notice.<sup>46</sup> However, it will not enter into force for, and will consequently not bind, any parties who do not opt in.<sup>47</sup>

### **C. Supermajority Voting, with Decision Effective for a Party Unless It Opt Out**

Consensus/supermajority combinations with opt-out provisions can, in principle, be more effective mechanisms for encouraging states to reach agreement and comply with evolving specific requirements under the agreement. Opt-out provisions protect minority interests by giving parties an opportunity to withdraw from being bound by the new decision. However, because a dissenter must affirmatively reject a new, agreed-upon norm, states are thought to be less likely to refuse to support the emerging international standard.<sup>48</sup> This somewhat more persuasive potential means opt-outs tend to be associated in MEAs with procedures for adopting or amending annexes and regulatory measures that implement the obligations undertaken in the underlying convention, rather than with procedures for substantively altering the terms of the convention itself.<sup>49</sup>

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<sup>43</sup> See, e.g., UNCCD, *supra* note 39, art. 30.6.

<sup>44</sup> CBD, *supra* note 37, art. 29.3.

<sup>45</sup> *Id.* art. 29.4; see also UNCCD, *supra* note 39, art. 30.4 (same); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 9.5, 26 I.L.M. 1516 (1987) (same; provides framework under which Montreal Protocol was adopted) [hereinafter Vienna Convention]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. 17.3, 27 U.S.T. 1087, 12 I.L.M. 1085 (1973) (sixty days after notice received from two-thirds of parties) [hereinafter CITES]; Basel Convention, *supra* note 37, art. 17.5 (ninety days after notice received from three-fourths of parties); FCCC, *supra* note 39, art. 15.4 (same). *But cf.* Constitution of the Food and Agriculture Organization of the United Nations, as amended, Oct. 16, 1945, art. 20.2, 12 U.S.T. 980 (providing that amendment involving new obligation takes effect *upon* acceptance by two-thirds of Members) [hereinafter FAO Constitution].

<sup>46</sup> CBD, *supra* note 37, art. 29.4.

<sup>47</sup> The opt-in provisions of the North-East Atlantic Fisheries Convention (NEAFC) effectively make the Convention’s amendment procedures strictly consensual. Amendments enter into force 120 days after notification of approval by three-fourths of the contracting parties. However, if any party objects within ninety days of the Depositary’s notice of receipt of that approval, then the amendment will not go into effect for *any* party. See Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, Nov. 8, 1980, art. 19.3, 1285 U.N.T.S. 130 [hereinafter NEAFC].

<sup>48</sup> See Wirth, *supra* note 6, at 796.

<sup>49</sup> Annexes to MEAs are usually restricted to scientific, technical, and administrative matters. See, e.g., FCCC, *supra* note 39, art. 16.1; Basel Convention, *supra* note 37, art. 18.1; CBD, *supra* note 37, art. 30.1; Vienna Convention, *supra* note 45, art. 10.1. Several of the regional fisheries conventions contain

The requirements to seek consensus by “every effort” and then, failing that, adopt proposals by supermajority vote are the same as they are for the supermajority-with-opt-in provisions discussed in the preceding section.<sup>50</sup> However, once the proposal is adopted by the required majority, it enters into force automatically for every party unless a party elects to opt-out. For instance, adopted annexes and amendments to annexes to the Basel Convention enter into force six months after the date that the Depositary communicates their adoption to all of the parties.<sup>51</sup> A party is bound by the adopted change unless it opts out by notifying the Depositary within that time that it is “unable to accept.”<sup>52</sup>

Unlike the Basel Convention or the Convention on Biological Diversity, the Convention on International Trade in Endangered Species (CITES) does not contain a requirement that parties first seek consensus before voting on amendments to its Appendices I and II. These appendices list species threatened with extinction and those that could be threatened with extinction unless strictly regulated.<sup>53</sup> Once a species is listed in either appendix, international trade in the species is subject to tight restrictions.<sup>54</sup>

Relaxing the requirement that parties first make every effort to reach consensus can help expedite the appendix-amendment procedure. This helps parties respond to the threat of irreversible harm that exists when a species is threatened with extinction. Moreover, moving away from consensus is appropriate for decisions such as this that do not change the basic obligations of parties, but instead constitute specific applications of the parties’ general obligation to regulate or restrict trade in endangered species.

Proposed amendments to the CITES appendices can be considered either at regular meetings of the Conference of the Parties or between meetings.<sup>55</sup> Proposals considered at meetings are adopted upon approval by two-thirds of parties present and voting, and enter into force for all parties after ninety days, except for those parties who opt out by making a reservation.<sup>56</sup> Proposals can also be approved between meetings by two-thirds majority of a postal vote.<sup>57</sup>

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requirements for adopting regulations that are roughly analogous to those for adoption or amendment of annexes; e.g., they must be based upon scientific analysis, etc. Accordingly, these conventions employ supermajority decision-making procedures including an opt-out right. See discussion *infra* pp. 13-13.

<sup>50</sup> See, e.g., Basel Convention, *supra* note 37, art. 18.2(a); CBD, *supra* note 37, art. 30.2; UNCCD, *supra* note 39, art. 31.1; Vienna Convention, *supra* note 45, art. 10.2; FCCC, *supra* note 39, art. 16.2.

<sup>51</sup> Art. 18.2(c).

<sup>52</sup> *Id.* art. 18.2(b). For other MEAs that contain modified consensus with opt-out provisions similar to the Basel Convention, see UNCCD, *supra* note 39, art. 31.2; FCCC, *supra* note 39, art. 16.3; Vienna Convention, *supra* note 45, art. 10.2(c); CBD, *supra* note 37, art. 30.2(b)-(c) (similar to Basel Convention procedures, but providing for expiry period of one year instead of six months).

<sup>53</sup> CITES, *supra* note 45, art. 2.1-2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* art. 15.1-2.

<sup>56</sup> *Id.* art. 15.1.

<sup>57</sup> *Id.* art. 15.2. Proposals considered between meetings are first evaluated by the secretariat and circulated among all the parties. *Id.* art. 15.2(b)-(c). Parties have an opportunity to respond with recommendations and comments. Any communications received are also circulated. *Id.* art. 15.2(d)-(e). If no objections to the proposal are received within thirty days, the proposal automatically enters into force ninety days later. *Id.* art. 15.2(f). However, if an objection is received, then the proposal is subject to a postal vote. *Id.* art.

An approved amendment enters into force for all members, except those that have opted-out by taking a reservation.<sup>58</sup> Any party taking a reservation to an Appendix I or II amendment is subsequently treated as not being a CITES party with respect to trade in the listed species.<sup>59</sup>

The ability to take a reservation from a new CITES listing does not necessarily eliminate the listing's effect on the dissenting party. On one hand, reservations can undermine the effectiveness of obtaining new listings, because not all parties will be obligated to observe them. Even so, the listing may still have a practical effect on a party taking a reservation, because parties that accept the amendment are obligated to apply the defined trade controls to all other countries, including non-parties.<sup>60</sup>

On the other hand, the reservation mechanism has allowed some endangered species to be listed in situations where they never would have been, had consensus voting been required.<sup>61</sup> By creating a way for parties to opt-out from the effects of a new listing, the contracting parties were able to agree that appendices could be changed without first undergoing a formal ratification process. This has introduced considerable flexibility to the CITES regime.<sup>62</sup>

Some of the regional marine pollution and fisheries conventions also permit adoption and amendment of annexes or regulations by supermajority vote with an opt-out right and no preliminary consensus requirement. In the Mediterranean Sea Pollution Convention, annexes or annex amendments are adopted by three-fourths majority vote.<sup>63</sup> Annexes contain, *inter alia*, names of the specific compounds to be regulated under the Convention, or factors to be considered in evaluating the characteristics of listed wastes.<sup>64</sup> The Depositary communicates notice of the amendment to all parties "without delay."<sup>65</sup> A party can opt out by objecting within a "period determined by the Contracting Parties."<sup>66</sup> If an objection is received, the Depositary notifies the other parties. At the end of a prescribed period, the amendment enters into force for all parties that have not given notice of their objection.<sup>67</sup>

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15.2(g). If at least half of the parties respond with an affirmative or negative vote or an abstention, the proposal is adopted if approved by two-thirds of the affirmative and negative votes. *Id.* art. 15.2(i)-(j).

<sup>58</sup> *Id.* art. 15.2(l).

<sup>59</sup> *Id.* art. 15.3.

<sup>60</sup> *See id.* art. 10.

<sup>61</sup> Telephone conversation with Edith Brown Weiss, Francis Brown Professor of International Law, Georgetown University Law Center (Jan. 20, 1999).

<sup>62</sup> *See* ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 155 (1994).

<sup>63</sup> Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, art. 17.2, 15 I.L.M. 290 (1976) [hereinafter Mediterranean Sea Pollution Convention]. For similar provisions, see, e.g., Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, art. 19, 22 I.L.M. 227 (1983).

<sup>64</sup> *See* Mediterranean Sea Pollution Convention, annexes 1, 3.

<sup>65</sup> *Id.* art. 17.3.

<sup>66</sup> *Id.* art. 17.4.

<sup>67</sup> *Id.* art. 17.5-6.

The International Whaling Commission (IWC), North-East Atlantic Fisheries Commission (NEAFC), and International Commission for the Conservation of Atlantic Tunas (ICCAT) are all governed by variations on this form as well.<sup>68</sup> The latter has a particularly complicated opt-out procedure. ICCAT is charged with recommending regulations necessary to maintain tuna populations.<sup>69</sup> Depending on the specific situation, recommendations are adopted either by majority vote of the Commission meeting with a two-thirds quorum, or by a two-thirds supermajority vote of all the contracting parties.<sup>70</sup> Recommendations are binding on all parties after six months unless a party objects.<sup>71</sup> If less than one-quarter of all parties object, the objection has “no effect,” upon which the recommendation enters into force for all parties except for any party that reaffirms its objection.<sup>72</sup> If more than one-quarter but less than a majority of parties object, then the recommendation is effective only for non-objecting parties.<sup>73</sup> Finally, if a majority of parties object, the recommendation does not become effective for any parties.<sup>74</sup>

While moving away from formal consensus decision-making can improve the chances for reaching agreement, supermajority with opt-out voting requirements still tend to push fisheries management decisions toward the lowest common denominator.<sup>75</sup> Because any party taking a significant amount of the total catch can opt-out from a decision, that party can nullify the decision’s usefulness, thereby effectively vetoing its adoption.

#### **D. Voting Arrangements in Which Decisions Apply to All Parties, with No Opt-In or Opt-Out Provisions**

Some multilateral agreements allow defined majorities of parties to take decisions that are subsequently binding upon all parties to the agreement. These arrangements are used in situations where the parties’ fundamental treaty obligations will not be altered and, generally, where the mechanism being voted upon will not function properly if different parties are subject to varying obligations. They include:

- Supermajority or simple majority voting, as provided in the agreement’s rules of procedure, on decisions specifically authorized by the agreement regarding implementation, administration, management, etc. (Subsections 1 and 2 below);
- hybrid voting schemes including double or multiple majority, weighted, and representative voting (Subsections 3 – 5 below); and

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<sup>68</sup> See International Convention for the Regulation of Whaling, as amended, Dec. 2, 1946, art. 5, T.I.A.S. 1849; NEAFC, *supra* note 47, arts. 8, 12; International Convention for the Conservation of Atlantic Tunas, May 14, 1966, art. 8, 20 U.S.T. 2887 [hereinafter ICCAT].

<sup>69</sup> ICCAT art. 8.1(a).

<sup>70</sup> See *id.* art. 3.3, 8.1(b).

<sup>71</sup> *Id.* art. 8.3(a)-(b).

<sup>72</sup> *Id.* art. 8.3(d)-(e).

<sup>73</sup> *Id.* art. 8.3(f).

<sup>74</sup> *Id.* art. 8.3(g).

<sup>75</sup> See Peterson, *supra* note 15, at 276.

- the prolepsis process of the Montreal Protocol, in which double majority voting is used to “adjust” annexes relating to the parties’ substantive obligations (Subsection 6 below).

## 1. Supermajority Voting with No Opt-Out

Several of the major MEAs – including the Basel Convention, the Convention on Biological Diversity, and the Montreal Protocol – provide for decisions by supermajority on substantive matters. These MEAs require their conferences or meetings of the parties to adopt rules of procedure governing how decision-making shall be taken at meetings for matters other than amending the convention and protocols or adopting and amending annexes.<sup>76</sup> These decisions could pertain to any of the powers the conferences or meetings of the parties might have for which the decision-making process is not specifically defined in the fundamental agreement, such as determining reporting guidelines under the Montreal Protocol,<sup>77</sup> or establishing subsidiary bodies necessary for the implementation of the Basel Convention.<sup>78</sup>

To prevent the possibility that a majority of parties could indirectly alter the fundamental obligations of the agreement by changing the rules under which decisions on those obligations are made, the procedural rules themselves must usually be adopted by consensus.<sup>79</sup> However, once the rules are adopted, decisions taken under them need not be solely by consensus. For instance, under the Basel Convention’s rules of procedure, consensus by every effort is required for substantive decision-making. But if consensus is not possible, a vote of two-thirds of the parties present and voting can adopt a decision that is binding on all of the parties.<sup>80</sup>

The World Trade Organization (WTO) allows supermajority voting with no right to opt out for certain kinds of amendments to the WTO Agreement itself.<sup>81</sup> If three-fourths of WTO members agree that an amendment will not affect their rights or obligations, then the amendment takes effect for all members upon acceptance by two-

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<sup>76</sup> See Basel Convention, *supra* note 37, art. 15; CBD, *supra* note 37, art. 23.3.; Montreal Protocol, *supra* note 12, art. 11.3; *see also* FCCC, *supra* note 39, art. 7.3; *cf.* CITES, *supra* note 45, art. 11.5 (stating at any meeting, parties may determine and adopt rules of procedure for the meeting).

<sup>77</sup> See Montreal Protocol, *supra* note 12, art. 11.4(d).

<sup>78</sup> See Basel Convention, *supra* note 37, art. 15.5(e).

<sup>79</sup> See, *e.g.*, *id.* art. 15.

<sup>80</sup> Rules of Procedure for Meetings of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, rule 40.1, U.N. Doc. UNEP/CHW.1/24, annex 3 (1992) *available in* <<http://www.unep.ch/basel/sbc/cop/rules.htm>> [hereinafter Basel Rules of Procedure]; *see also* Rules of Procedure for Meetings of the Conference of the Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol, rule 40.1, *adopted in* U.N. Doc. UNEP/OzL.Pro.1/5 (1989), *available in* <<http://www.unep.ch/ozone/rules.htm>> (stating that, except as otherwise provided in terms of reference for Trust Fund, decisions of a meeting on all substantive matters shall be taken by two-thirds majority of parties present and voting) [hereinafter Montreal Protocol Rules of Procedure].

<sup>81</sup> Consistent with most WTO decision-making, members must try to reach agreement by consensus before putting a question to vote. *See* WTO Agreement, *supra* note 38, art. 10.1.

thirds of the body.<sup>82</sup> Such an amendment might include one proposed for corrective purposes, or one that deals strictly with a procedural issue. If an adopted and accepted amendment *does* affect member rights, then any non-accepting member “shall be free to withdraw from the WTO” or remain only with the consent of the Ministerial Council, if three-fourths of the members decide so to request.<sup>83</sup>

Similarly, the Ministerial Conference and the General Council have exclusive authority to determine how the WTO agreements shall be interpreted.<sup>84</sup> The decision to adopt an interpretation is taken by a three-fourths majority of members.<sup>85</sup>

These provisions help the WTO maintain consistency of obligations among its membership. In the case of the adoption of an amendment, the threat of losing treaty benefits provides potentially dissenting members with a strong incentive to acquiesce to the desires of the majority. Just as consensus decision-making for amendments entailing fundamental changes maintains consistency between all WTO members, supermajority voting with no opt-out option assures that members’ obligations will remain uniform, which is an important consideration for maintaining an ordered trade regime.<sup>86</sup>

## **2. Simple Majority Voting with No Opt-Out**

For purely procedural issues, the Basel Convention authorizes decisions at meetings of the Conference of the Parties to be adopted by a simple majority of members present and voting.<sup>87</sup> Procedural issues might include deciding on a point of order, agreeing on the dates for future meetings, or deciding how information should be provided to a party. If the question arises whether an issue is procedural or substantive, the president presiding at the meeting rules on the question.<sup>88</sup> Any party may appeal that ruling. Appeals are immediately put to a vote, and the ruling will stand unless overruled by a majority of the parties present and voting.<sup>89</sup>

General decision-making by the WTO Ministerial Conference and General Council is also done by majority vote. As usual, members are instructed to “continue the practice of decision-making by consensus. . .”<sup>90</sup> However, if consensus is impossible, a

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<sup>82</sup> *Id.* art. 10.4. The provision also governs amendments to most of the Multilateral Trade Agreements listed in Annexes 1A and 1C, such as the Agreement on Subsidies and Countervailing Measures. *See id.* art. 10.4. Similarly, the FAO Constitution provides that amendments to it not involving new obligations may be adopted by two-thirds votes cast and shall take effect “forthwith,” FAO Constitution, *supra* note 45, art. 20.1-2, while ICCAT provides that amendments deemed not to involve new obligations are binding on all parties upon acceptance by a three-fourths majority. ICCAT, *supra* note 68, art. 13.1.

<sup>83</sup> WTO Agreement, *supra* note 38, art. 10.5.

<sup>84</sup> *Id.* art. 9.2.

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* note 38 and accompanying text.

<sup>87</sup> Basel Rules of Procedure, *supra* note 80, rule 40.2. Abstentions count as not voting and thus do not affect the number of affirmative votes needed for a majority. *See id.* rule 40.5. The Montreal Protocol has similar voting rules. *See* Montreal Protocol Rules of Procedure, *supra* note 80, rule 40.

<sup>88</sup> *Id.* rule 40.3.

<sup>89</sup> *Id.*

<sup>90</sup> WTO Agreement, *supra* note 38, art. 9.1.

majority of votes cast will decide an issue, unless provided otherwise in the WTO Agreement or the Multilateral Trade Agreements.<sup>91</sup>

### 3. Double Majority Voting

Several of the major MEAs have sizable majorities of developing country parties, and include obligations for the wealthy, industrialized country parties to contribute to financial mechanisms that will help underwrite the implementation costs of the agreement.<sup>92</sup> Accordingly, some of the conferences of the parties to those MEAs have been unable to agree on final rules of procedure for decision-making, particularly as they might pertain to financial matters.<sup>93</sup> For example, parties have failed to adopt rules of procedure for the Climate Change Convention because they have been unable to agree on the decision-making rules.<sup>94</sup> Because they do not want to find themselves obligated by financial commitments to which they did not specifically agree, the parties that will provide the bulk of the funds insist on double majority voting instead of, or in addition to, supermajority voting.<sup>95</sup>

The parties to the Montreal Protocol resolved this issue by agreeing that double-majority voting will be used for all decision-making regarding the Protocol's Financial Mechanism.<sup>96</sup> If "all efforts at consensus have been exhausted and no agreement reached," proposals can be adopted and enter into force on a two-thirds majority vote of those parties present and voting, provided that a majority of developing countries present and voting *and* a majority of non-developing countries present and voting voted in favor of the proposal.<sup>97</sup>

Double majority voting can be useful where there are blocs of parties whose interests are both distinct and perceived to be in potential conflict. By replacing opt-in and opt-out provisions, the double majority scheme permits decision-making that is binding on all parties to occur when consensus is impossible, while reassuring sizable minorities that their interests will be respected.

### 4. Weighted Voting

Weighted voting is used by the International Monetary Fund (IMF) and the various institutions comprising the World Bank Group.<sup>98</sup> For example, for voting on

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<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., CBD, *supra* note 37, arts. 20-21; FCCC, *supra* note 39, arts. 4.3-5, 11.

<sup>93</sup> See, e.g., *Adoption of the Rules of Procedure for the Conference of the Parties*, U.N. Convention on Biological Diversity, 1st Sess., Agenda Item 3, ¶ 30 (1994) (explaining that because parties could not agree which version of decision-making rule to adopt, rule 40.1 dealing with substantive matters was not adopted with the rules of procedure.)

<sup>94</sup> Telephone conversation with Seth Osafo, Senior Legal Adviser, FCCC Secretariat (Jan. 8, 1999).

<sup>95</sup> *Id.*

<sup>96</sup> See Montreal Protocol, *supra* note 12, art. 10.9.

<sup>97</sup> *Id.*

<sup>98</sup> However, these institutions rarely resort to formal votes except when they are required to do so, and traditionally take decisions by consensus. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 532 (1995).



amendments to the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), each member has 250 votes, plus an additional vote for each share of stock it holds.<sup>99</sup> Shares are based on the financial contributions each member makes to the bank. After a proposal has been approved by a majority of the Board of Governors, it must be approved by a three-fifths majority of members holding eighty-five percent of the total voting power.<sup>100</sup> While these decisions are important, as they concern significant financial commitments and the procedures and policies for allocating funding, they do not affect basic legal rights and obligations. Amendments that alter fundamental rights, such as the right to unilaterally withdraw from the bank, require a unanimous vote.<sup>101</sup>

Weighted voting for financial regimes gives greater decision-making power to those who make the largest monetary contributions. However, it is not really apt to fisheries management, in which states are not *contributing* to fisheries stocks, but are instead negotiating how they might utilize the stocks. As such, it is difficult to imagine how weighted voting could function, because any proposed weighting criterion – be it members’ population, size of fishing fleet, investment, historic catch, etc. – could always be countered with some other criterion for which another party could argue with equal force.

## 5. Representative Voting

A few specialized international bodies permit decision-making by representative bodies. The International Civil Aviation Organization adopts standards and recommended practices governing international air travel.<sup>102</sup> A permanent, thirty-three member Council is elected by the Assembly of contracting states.<sup>103</sup> The Council can promulgate new standards upon adoption by two-thirds majority vote.<sup>104</sup> Adopted standards are presented as annexes to the Convention, and they enter into force three months after their submission to the contracting states, unless a majority of those states “register their disapproval with the Council.”<sup>105</sup>

The International Sea-Bed Authority, created under the United Nations Convention on the Law of the Sea, is charged with administering the sea-bed, ocean floor

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<sup>99</sup> See International Bank for Reconstruction and Development, Articles of Agreement, as amended, effective Feb. 16, 1989, art. 5.3(a) (1993) [hereinafter IBRD Articles of Agreement].

<sup>100</sup> *Id.* art. 8(a).

<sup>101</sup> *Id.* art. 8(b).

<sup>102</sup> See Chicago Convention on International Civil Aviation, Dec. 7, 1944, art. 37, *available in* <<http://www.lawbusiness.com/chicago/chicago.html>>.

<sup>103</sup> *Id.* art. 50 (a). In electing the Council members, the Assembly must give “adequate representation” to the states of chief importance in air transport, to those that make the largest contribution for international civil air navigation, and to those states not otherwise included to ensure that all major geographic regions of the world are represented. *Id.* art. 50 (b).

<sup>104</sup> *Id.* arts. 54 (l), 90 (a).

<sup>105</sup> *Id.* arts. 54 (l), 90 (a). The Convention has no formal opt-in or opt-out procedures for these newly adopted standards; hence, they are binding on all contracting states. However, if a state finds it “impracticable to comply in all respects,” then it must give immediate notification to the ICAO of all differences between its own practice and the international standard. *Id.* art. 38. The Council then notifies all other states of the differences that exist. *Id.*

and sub-soils located beyond the limits of national jurisdiction.<sup>106</sup> The Authority has a bicameral administrative system comprised of an Assembly of all parties, and a representative Council of thirty-six members. Though the Assembly is “considered the supreme organ of the Authority,” its decisions on matters within the Council’s competency must be based on the Council’s recommendations. If the Assembly does not accept those recommendations, it must send them back to the Council for reconsideration.<sup>107</sup>

The Council exercises an innovative kind of multiple majority voting. Generally it takes decisions by consensus, but if consensus is impossible and a quorum of a majority of members is present, substantive questions can be approved by two-thirds majority vote of those members present and voting.<sup>108</sup> However, the members of the Council are also grouped into four “chambers,” three of which represent the largest consumers, investors, and exporters of Area commodities, and the fourth ensuring representation of all geographical regions, and developing countries with special interests.<sup>109</sup> If a majority of any chamber opposes a decision of the Council, the decision is rejected.<sup>110</sup>

## 6. “Prolepsis” in the Montreal Protocol

The Montreal Protocol, under which nations agreed to eliminate the production, use, and sale of chemicals that destroy the earth’s protective ozone layer, has been cited as one of the great success stories of international efforts to protect the environment.<sup>111</sup> Much of the Protocol’s effectiveness is due to its capacity to develop and adapt in response to new scientific information.<sup>112</sup> Parties accomplished this by agreeing in the Protocol to detailed procedures for reaching their goals. Specific controlled substances, their “ozone depleting potential” (used as a factor in determining how much of a substance a party can produce or consume),<sup>113</sup> and names of products containing the substances (for which trade with non-parties can be controlled) were all included in annexes instead of the main text.<sup>114</sup> *Amendments* to these annexes can be adopted only pursuant to the modified consensus with opt-out requirements of the Vienna Convention for the Protection of the Ozone Layer.<sup>115</sup>

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<sup>106</sup> UNCLOS, *supra* note 1, arts. 1.1(1), 158.1.

<sup>107</sup> *Id.* art. 161; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, annex § 3.4, 33 I.L.M. 1309 (1994) [hereinafter Implementation Agreement].

<sup>108</sup> UNCLOS, *supra* note 1, art. 161.6; Implementation Agreement, annex § 3.2, .5. *But cf.* UNCLOS art. 161.8(d) (requiring amendments and recommendations regarding financial or economic rules to be adopted by consensus).

<sup>109</sup> *See* Implementation Agreement, annex § 3.9(a), .15.

<sup>110</sup> *Id.* § 3.5.

<sup>111</sup> *See, e.g.,* Owen Greene, *The System for Implementation Review in the Ozone Regime*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 89 (David G. Victor et al eds., 1998).

<sup>112</sup> *See id.*

<sup>113</sup> *See* Montreal Protocol, *supra* note 12, art. 3.

<sup>114</sup> *See id.* annexes A-E.

<sup>115</sup> *See* Vienna Convention, *supra* note 45, art. 10.2.

However, the Protocol permits annexes to be *adjusted* through less strict procedures. Parties are required to periodically assess the Protocol's control measures, based upon the reports of expert panels.<sup>116</sup> The parties can then decide whether they should make adjustments to the ozone depleting potentials of the controlled substances and, if so, what they should be. They also can decide whether further adjustments and reductions of production or consumption of the controlled substances should be made and, if so, what their scope, amount and timing should be.<sup>117</sup>

If an adjustment is proposed, parties are required to strive for consensus if at all possible. But if they are unable to reach consensus, then the decision is made by double majority vote. Approval requires two-thirds of the parties present and voting, representing at least a majority of developing countries present and voting and a majority of non-developing countries present and voting.<sup>118</sup>

Importantly, such decisions to adjust annexes are binding on all parties.<sup>119</sup> There are no opt-in or opt-out provisions. An approved adjustment enters into force after six months, is effective for all parties even if they voted against it, and can result in a change in the amount of controlled substances parties produce or consume.

This voting procedure has contributed to the effectiveness of regulation of ozone-destroying substances by empowering parties to make significant changes on a shortened time frame to the phase-out schedule for chemicals that are already covered by the Protocol.<sup>120</sup> For example, at the 1990 meeting in London, the parties agreed to shorten the phase-out of chlorofluorocarbons (CFCs) without triggering the need for subsequent ratification by each party.<sup>121</sup>

Prolepsis can allow sovereign states to design and implement solutions to problems of the global commons even when they may not agree on every specific detail of the solution. However, before states will consent to the process, three broad conditions must be present. First, states must be highly motivated to take action. Factors that motivate states to take adequate collective action include: being faced with a severe threat that is well substantiated; being able to clearly identify the threat's source; understanding the necessary steps for counteracting it; appreciating the costs or risks of continued inaction; and being pressured by the public to act. Before they are willing to surrender a degree of their discretionary powers, states must be able to anticipate that the gains from acting collectively to solve the problem will outweigh the costs they might individually suffer if the resource continues to be managed in an uncoordinated way.

Second, before they will risk being bound by decisions they might not agree with, states must be confident that their core interests will be represented. If they believe majorities of parties with needs or requirements incompatible with theirs might be able to

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<sup>116</sup> Montreal Protocol, *supra* note 12, art. 6.

<sup>117</sup> *Id.* art. 2.9(a).

<sup>118</sup> *Id.* art. 2.9(c).

<sup>119</sup> *Id.* art. 2.9(d).

<sup>120</sup> Telephone conversation with Edith Brown Weiss, *supra* note 61.

<sup>121</sup> See Young, *supra* note 62, at 155 n.16.

command winning voting blocks, they will not commit to procedures that could allow that to happen. Double majority voting under the Montreal Protocol gives developing countries and more developed countries assurance that neither group will arbitrarily be able to impose its will over the other.

Third, states must have confidence that agreed upon decision-making procedures are fair, and that those decisions by which they could be bound even after casting a negative vote are based largely on dispassionate, de-politicized scientific assessments. Expert panels make the recommendations upon which Montreal Protocol parties base their assessments of whether annexes should be adjusted or not. A large and growing body of reliable scientific knowledge has given the parties confidence to accept that some sacrifices are necessary and that they can be fairly apportioned on the basis of that knowledge.

## **Annex: Table of Multilateral Agreements Reviewed**

1. Agreement Establishing the World Trade Organization (WTO Agreement), Apr. 15, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).
2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 33 I.L.M. 1309 (1994).
3. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), Mar. 22, 1989, 28 I.L.M. 657 (1989).
4. Chicago Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, *available in* <<http://www.lawbusiness.com/chicago/chicago.html>>.
5. Constitution of the Food and Agriculture Organization of the United Nations (FAO), as amended, Oct. 16, 1945, 12 U.S.T. 980.
6. Convention for the Conservation of Salmon in the North Atlantic Ocean (NASCC), art. 19.2, Mar. 2, 1982, T.I.A.S. 10789.
7. Convention for the Conservation of Southern Bluefin Tuna (CCSBT), May 10, 1993, *available in* <<http://www.sedac.ciesin.org/pidb/texts/acrc/Bluefin.txt.html>>.
8. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 22 I.L.M. 227 (1983).
9. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 15 I.L.M. 290 (1976).
10. Convention on Biological Diversity (CBD), June 5, 1992, 31 I.L.M. 818 (1992).
11. Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (NEAFC), Nov. 8, 1980, 1285 U.N.T.S. 130.
12. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 12 I.L.M. 1085 (1973).
13. Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, 34 I.L.M. 67 (1994).
14. Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), May 20, 1980, 33 U.S.T. 3476, T.I.A.S. 10240.
15. International Bank for Reconstruction and Development (IBRD), Articles of Agreement, as amended, effective Feb. 16, 1989 (1993).

16. International Convention for the Conservation of Atlantic Tunas (ICCAT), May 14, 1966, 20 U.S.T. 2887.
17. International Convention for the Regulation of Whaling (IWC), as amended, Dec. 2, 1946, T.I.A.S. 1849.
18. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, composite text including 1990 amendments, 21 INT'L ENV'T REP. (BNA) 3151 (1993).
19. Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, June 16, 1972, 11 I.L.M. 1416 (1972).
20. United Nations Agreement on Straddling Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement), Aug. 4, 1995, 34 I.L.M. 1542 (1995).
21. United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 21 I.L.M. 1261 (1982).
22. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa (UNCCD), June 17, 1994, 33. I.L.M. 1328 (1994).
23. United Nations Framework Convention on Climate Change (FCCC), May 9, 1992, 31 I.L.M. 849 (1992).
24. Vienna Convention for the Protection of the Ozone Layer (Vienna Convention), Mar. 22, 1985, 26 I.L.M. 1516 (1987).