

Consensus: a good goal but a bad rule? Decision making in regional fisheries management organisations and the implementation of the UN Fish Stocks Agreement

By Bill Mansfield

The [South Pacific Regional Fisheries Management Organisation](#) (SPRFMO) is now in its fourth year of operation. Some of the most innovative provisions in its founding [Convention](#) are those intended to give effect to Article 10(j) of the [UN Fish Stocks Agreement](#), the obligation to 'agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner.'

These provisions provide that decisions shall normally be taken by consensus but if all efforts at consensus have been exhausted then substantive decisions can be taken by a three-fourths majority. However this is coupled with a unique and carefully limited objection procedure governed by strict time limits, designed so that a clear and effective result is produced within the relevant fishing year.

In my view, a rule that requires conservation and management measures be adopted by consensus does not fulfil the obligation in Article 10(j) of the UN Fish Stocks Agreement as it does not facilitate the adoption of such measures 'in a timely and effective manner'. Certainly all efforts should be made to achieve consensus before a vote is taken, but voting should not be ruled out altogether. The effect of doing so is to provide every member with a veto and therefore, at the very least, an effective stalling device.

In a regional fisheries management organisation it is essential that primacy is given to scientific advice and that that advice is publicly available. This way, it is clear to the wider world when management decisions are taken that are inconsistent with that advice. A consensus rule on the adoption of conservation and management measures can operate to provide political cover for a member that does not wish to exercise the necessary restraint recommended by the scientists. Instead of being publicly exposed as voting against a science-based decision everyone else is prepared to accept, the decision can simply be blocked.

In fisheries management it is essential that all real interests are accommodated which is why all efforts must be made to achieve consensus. It is also the case that consensus (the absence of formal objections) can help delegations whose instructions make it difficult for them to formally agree to a result that does not meet their objectives. However, consensus as the only means of taking a decision can be misused and have the unintended effect of providing every member with a disguised veto. In my view, we do well to remember that while it was the Law of the Sea Conference itself that first emphasised the importance of making all efforts at consensus before resorting to voting, in the end that Conference had to vote and we would not have the [United Nations Convention on the Law of the Sea](#) today if it could have been adopted only by consensus.

Nonetheless it is also reasonable to have a safeguard, such as an objection procedure, to ensure that a majority decision is lawful and does not unjustifiably discriminate against a member or members. It is critical, however, that any such procedure cannot be misused as a delaying tactic. The SPRFMO objection procedure requires an objection (the grounds for which are limited to discrimination or unlawfulness) to be lodged within two months of the decision and the objecting party must at the same time adopt and notify alternative measures it will take, equivalent to the decision to which it is objecting. A Review Panel must then be established within a month and the Panel must within a further 45 days present its findings and recommendations on whether the objection is justified and whether the alternative measures are

equivalent in effect to the decision in respect of which the objection has been lodged. The SPRFMO Convention spells out in detail how the findings and recommendations are to be dealt with and to have effect. In essence it ensures that the issue is resolved promptly or is formally submitted to binding dispute settlement in accordance with Part VIII of the UN Fish Stocks Agreement.

In its short life to date, the SPRFMO Commission has had occasion to test both its objection and its voting procedures. In my observation, the possibility of voting affects the negotiating dynamics and increases the pressures to achieve consensus. In the case where it proved necessary to adopt the jack mackerel conservation and management measure by vote, the [Commission's report](#) recorded that the circumstances were unusual and it was anticipated that similar decisions in the future would be able to be achieved by consensus. This proved to be the case the following year. In terms of giving effect to Article 10(j) of the UN Fish Stocks Agreement, what is particularly noteworthy, in my view, is that on all four occasions, the resulting catch limits were set and maintained at the level recommended by the Scientific Committee. In my judgement, the possibility of a vote was also an important element in the background to the Commission's consensus decision at its meeting in February 2015 to place two vessels on the SPRFMO's list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the SPRFMO Convention Area.

I believe the SPRFMO is now well founded and will play an increasingly effective role not just in relation to the conservation and management of the main commercial species but also on the next order of related issues such as seabird bycatch, appropriate marine protected areas, the climate change implications for the health of the oceans and the fisheries food chain and, perhaps more controversially, the working conditions of fishers. In my view, SPRFMO's uniquely effective decision-making procedures have played a key role in its development into a contemporary, best-practice regional fisheries management organisation.

About the author: Bill Mansfield was the first Chairperson of the South Pacific Regional Fisheries Management Organisation and the negotiations that led to its establishment. He has also served as Counsel for New Zealand before the International Tribunal on the Law of the Sea and for a five-year term as a member of the United Nations International Law Commission. Prior to these roles Bill held senior positions in New Zealand's Public Service in several different Ministries. Bill was a member of the New Zealand delegation to all negotiating sessions of the Third United Nations Conference on the Law of the Sea.

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