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Legal constraints and future prospects for enhancing RAC participation in decision-making within a reformed CFP

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Nobel Prize 2009

- Professor Elinor Ostrom
- Economics
- Possible to have social control mechanisms over common resources such as fish stocks without resorting to private property rights or to government regulation...
- Key is stakeholder participation



Nobel Prize 2009

- Her research shows:

“Rules that are imposed from the outside or unilaterally dictated by powerful insiders have less legitimacy and are more likely to be violated.

Likewise, monitoring and enforcement work better when conducted by insiders than by outsiders.”



Nobel Prize Jury

Overview

I. History

II. RACs

III. Legal Constraints

IV. Reform Options



Some Key Dates

- 1970 - Regulation...equal access
- 1976 - extension jurisdiction to 200 n.m.
- 1983 - CFP
- 2002 - Reform
- 2004 - RACs
- 2012 - Reform



Features of Reform in 2002

- Long term management plans
- Effort management
- CFCA
- End to direct subsidies for fishing capacity
- Environmental measures
- Stakeholders involvement



Origin of RACs

- Advisory Bodies in CFP
 - Advisory Committee on Fisheries and Aquaculture
 - Scientific, Technical and Economic Committee for Fisheries
- Green Paper 2002
 - Advisory bodies **not satisfactory** as unsuited to local conditions and emergency circumstances
 - Needed stakeholder led organisation(s)



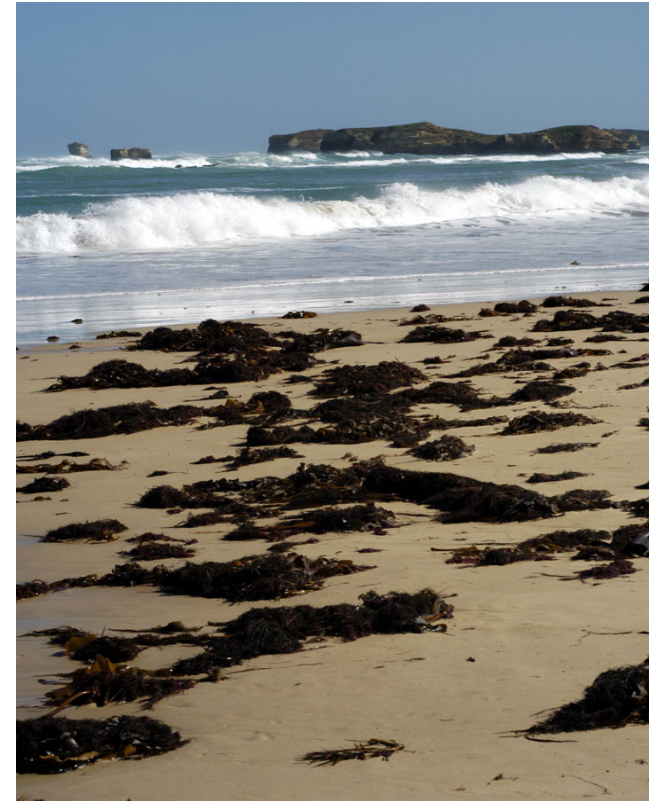
RAC Legal Framework

1. Council Regulation (EC) No 2371/2002
2. Council Decision 2004/585/EC
3. Commission Decisions....make operational



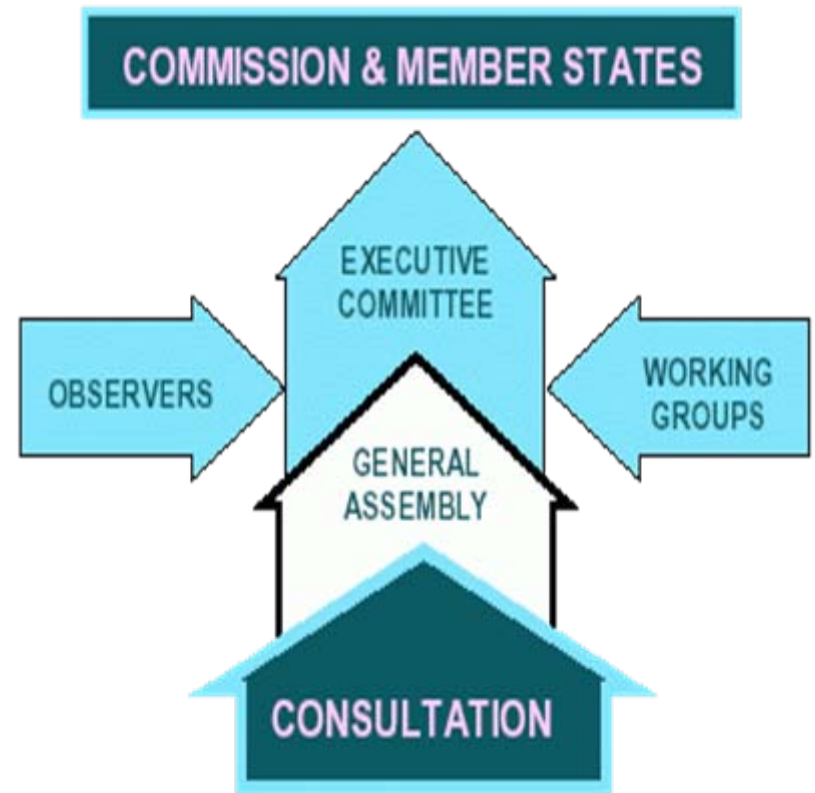
General comments on legal framework

- Guided by principles of good governance
- Must conform with CFP
- Commission has discretion in seeking advice.....have right to accept or reject advice
- Intended to be **evolutionary** structure(s)



Coverage, structure & composition

- Supra-national entities
- Ecosystem regions
- Equilibrium in membership
 - fisheries sector & other interest groups
 - Commission and MS observers
- Inter-RAC coordination



RAC Objectives

- No list in regulationbut aim is to integrate the views of stakeholders into the decision-making process
- Founding parties to provide a statement of objectives with their request to establish an RAC
- Must be compatible with the objectives, principles and guidelines of the CFP



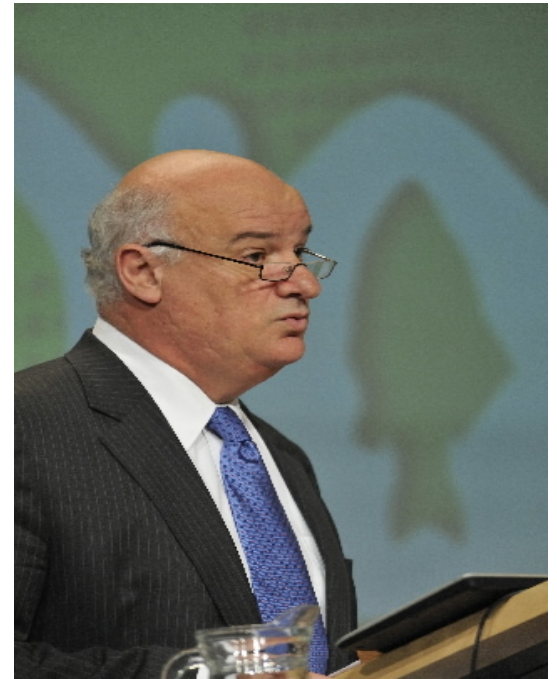
Legitimacy, Transparency & Efficiency

- Broad constituency
- Transparent procedures ...GA meetings open to public.....recommendations available immediately to the GA, the Commission, Member States and, upon request, to the public
- Consensus based approach & procedures for recording dissenting opinions
- Commission and, where relevant, the Member States must reply (3 months)
- Commission review of the functioning of the RACs (2008)...arrangements working well



Reform 2012

- 2009 Green Paper
 - Vision 2020
 - 2002 CFP Reform
 - Structural failing
 - Further improvements
 - Questions



How has the CFP done so far?

“CFP characterised by overfishing, fleet overcapacity, heavy subsidises, low economic resilience and decline in the return for the industry”



2009 Green Paper

Five Failings

1. fleet overcapacity
2. imprecise policy objectives
3. a decision-making system that encourages a short-term focus
- 4. a framework that does not give sufficient responsibility to the industry**
5. lack of political will to ensure compliance and poor compliance by the industry



Reform of Decision-making Constraints & Prospects



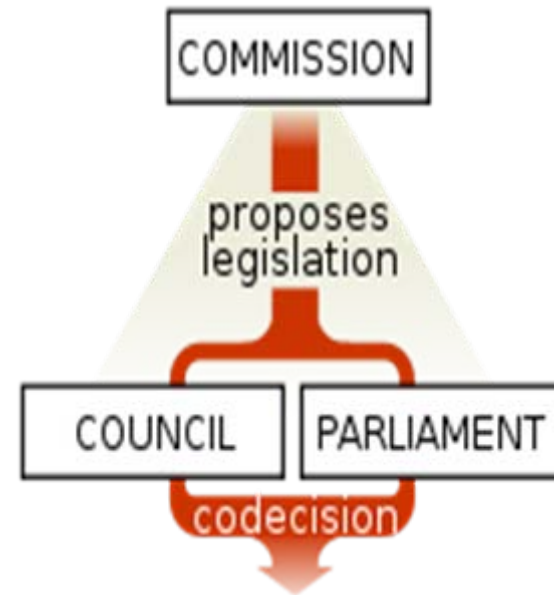
Legal Constraints

- Lisbon Treaty
- fisheries...exclusive competence ...in conservation of marine biological resources
- Fisheries are dealt with in Title III of the treaty under the chapeau "Agriculture and Fisheries"



Legal Constraints

- Law-making rests with European institutions
- Supremacy of EC law and Commission's right of initiative remains
- European Parliament ... extension of the ordinary legislative procedure to fisheries, apart from those establishing annual TAC/Quota opportunities
 - more democratic
 - slower...2 years



Legal Constraints on Reform

- Reform measures will continue to be informed by principles of CFP
- Not possible to rely on principle of subsidiarity to enhance role of RACs



Reform Proposals

- Lisbon Treaty changes EU procedures
- 2009 Green Paper
- Hierarchy for decision-making:
 - Fundamental principle and policy...rests with Council and Parliament
 - Implementation...Commission, MS, industry
- Two options
 1. More delegation to the Commission
 2. Delegation of implementation to MSs
 3. Other models?



Option One

- Delegation to the Commission
 - Comitology procedure:
 - Committee for Fisheries and Aquaculture
 - Matters of detail...
 - Lisbon Treaty...extends powers of oversight to Parliament...equal footing with Council



Option One

- **Advantages**
 - MS Experts with experience
 - Expeditious
- **Disadvantages**
 - More of the same micro-management...has not delivered success
 - Difficult to separate out technical detail from policy decisions
 - Transparency?
 - Limited resources available to the Commission
 - No formal role for RACs under current arrangements



Option Two

- Delegation of implementing decisions to Member States
- Regional management solution
- Principles at Council & EP level
 - Examples: MSY...fleet capacity... discards
- Member States implement decisions at marine region level



Option Two

• Advantages

- Clear hierarchy.. allows Council, EP and Commission focus on policy
- Implementation by network of MSs
- Regionalisation & ecosystem approach
- Enhance advisory role of RACs
- Simpler & cheaper
- Respond to local conditions

• Disadvantages

- New set-up...resource requirements
- Role of ACFA?
- Requires clear demarcation of responsibility and MSs coordination



Option Three!

- **Delegation of powers to autonomous regulatory agency (ies)**
- Not mentioned in 2009 Green Paper
- Lisbon Treaty enhances powers of Commission to sub-delegate powers to autonomous executive regulatory agencies established pursuant to the Treaties



Option Three

Advantages

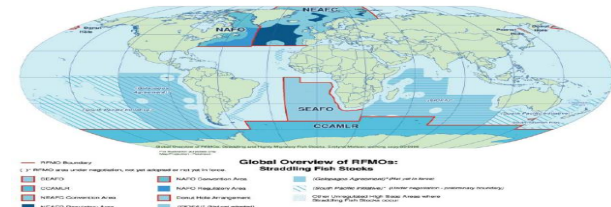
- Legal basis in EU law
- Allow Council, EP and Commission focus on policy
- Facilitates...expertise...technical areas
- Political independence
- Permanent structures
- Amenable to regionalisation and application of ecosystems approach
- Possible to combine rule making with compliance



Option Three

Advantages

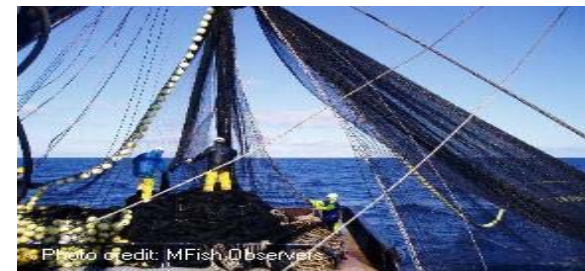
- Amenable to investigation by Ombudsman
- Possibility of European institutions bringing actions for annulment or failure to act
- Seek preliminary references from Court of Justice in respect of their activities
- Closest to RFMO model and RMO models in USA/Australia
- Output legitimacy...capable of integrated RACs into decision-making
- Structure balance various interests
- Closer to industry and not in Brussels!



Option Three

- **Disadvantages**

- Decisions would be based on technical considerations and focus is on implementation
- Limited discretionary powers...however Lisbon Treaty provides more scope for range of agency powers
- Disturbs European institutional balance which prevents any single interest from becoming dominant



Option Three

- **Disadvantages**

- Undemocratic as the prime actors are regulators and experts
- Will require accountability mechanism
- Will require adjudicatory processes and appeal mechanism
- Great diversity in agency practice regarding consultation and participation rights
- Will require political support...proliferation of agencies
- Expensive



Considerations for RACs

- Seek mandatory legal right of consultation in new Basic Fishery Management Regulation
- Seek decision-making structures which reflect your interests



Considerations for RACs

- Regionalisation
- Integrated Maritime Policy
- European Parliament



CFP reform process

- Adoption of Green Paper 22 April 2009
- Presentation in Council April 2009
- Council discussion May 2009
- Public debate until 31 December
- Summary of debate first half of 2010
- Impact assessment
- Proposal beginning 2011...2012
- Adoption end 2012





Thank You!