

**SPECIAL ISSUE:
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Thematic Studies

Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries

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A. Introduction

Faced with the reluctance of states to transfer sovereign powers to the international level, traditional international organizations often resort to voluntary instruments when attempting to respond to pressing issues of public concern such as sustainable development. One salient example is the attempt of the United Nations Food and Agriculture Organization (FAO) to improve the dire state of global fisheries resources by means of the nonbinding Code of Conduct for Responsible Fisheries (CCRF).¹ After years of extensive and dynamic development of fishing capacities in response to an increasing demand from a growing world population, the worldwide production of fisheries seems to have now reached its ceiling. The FAO estimates that three quarters of fish stocks are either fully exploited (50 percent) or overexploited and depleted (25 percent).² Any solution to this state of

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¹ Food and Agriculture Organization of the United Nations (FAO), Code of Conduct for Responsible Fisheries (CCRF), Report of the Conference of FAO, Twenty-Eighth Session, 20-31 October 1995, Annex 1 to the CCRF (Background to the Origin and Elaboration of the Code), also available at: <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf>. General literature on the CCRF includes: William Edeson, *Closing the Gap: The Role of 'Soft' International Instruments to Control Fishing*, 20 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 83 (1999); Gerald Moore, *The Code of Conduct for Responsible Fisheries*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 85 (Ellen Hey ed., 1999).

² FAO, *The State of World Fisheries and Aquaculture 2006* (2007), Part I, available at: <http://www.fao.org/docrep/009/A0699e/A0699e00.htm>.

affairs faces complex regulatory challenges. The regulation of collective goods, in this case including the global common space of the high seas, goes beyond mere coordination problems as analyzed by other case studies in this volume.³ It requires cooperation across jurisdictional zones by a multitude of different actors with various economic and social interests in a subject area marked by fierce economic competition. Free riding must be prevented through monitoring and enforcement at sea. Further, it is now understood that long-term sustainable use largely depends on the protection of the living and non-living environment of the resource, from which derives the need for an ecosystem approach. Uncertainty over reproduction levels and impact of environmental degradation makes a precautionary approach to fisheries management indispensable for successful regulation. The complexity and high level of uncertainty additionally calls for a highly flexible and adaptable regulation.

Aware of these complex regulatory exigencies, one is left to wonder whether a voluntary instrument of an organization without any enforcement capabilities could actually be of any use. Clearly, the capacity of the CCRF is indeed limited. It is not an instrument which regulates access to resources or establishes substantive management measures such as quotas. These difficult decisions and their enforcement, which often harbor the greatest potential for conflicts of interests, are left to states and regional fisheries organizations. However, even if management and enforcement is or will have to be conducted in this decentralized way, the FAO by means of the CCRF fulfils other important functions which accommodate some of the regulatory necessities indicated. In addition to setting global principles and standards for fisheries governance, the CCRF and further related bodies of norms constitute a collection of concrete measures that illustrate how these modern principles and concepts could be implemented. The institutional machinery of the FAO further resorts to numerous subtle ways through which states are drawn into flexible and discursive learning processes that often trigger important paradigm shifts of domestic law and policies towards more sustainable practices. These processes are further enhanced through various other actors at various levels of governance which also respond to the activities of the FAO.

If the CCRF and related activities fulfil such significant functions, the question of legitimacy arises. . However, a meaningful legitimacy assessment must be based on a differentiated and regime-specific assessment of the governance potential and the limitations of a particular instrument in exercising public authority. .. And in identify the legitimacy and accountability challenges it is paramount to overcome generalizing assumptions. On the one hand, it is not sufficient to simply point to

³ See Karen Kaiser, in this issue.

the consensual intergovernmental nature of the adoption of an instrument and the formal control of an international organization by states. As this case will illustrate, a number of institutional activities are conducted in relative autonomy from governmental instruction, and oversight mechanisms are often weakly developed. On the other hand, is it not sufficiently differentiated to question the legitimacy of these activities without taking into account existing intra-institutional procedures as well as the possible legitimacy safeguards provided in particular at the domestic level.

With a view to pursue the necessary two-pronged assessment of effectiveness and legitimacy in the case of the CCRF, the study first takes an intra-institutional perspective in order to assess how, and to what extent, the FAO acts as an autonomous actor that is not only the agent of states (Sections B.I-B.III.). In order to achieve this objective, this study will scrutinize the institutional structures and possible dynamics in light of two variables: autonomy and routine. Autonomy indicates the distance from purely intergovernmental processes and control. Routine points to the potential for reiterated interaction through which networks of specialized government officials, international civil servants and private actors establish common norms and identities – a process which may lead to even greater dissociation of the respective institutional bodies from the will and interests of state governments. As indicated, this perspective helps to clear the sight for a number of activities occurring in the context of the CCRF besides the unanimous adoption by governments of the main instrument. The first one is the continuous subsequent norm production by subsidiary bodies under the normative framework of the CCRF (B.II.). Secondly, the decentralized implementation of the norms is centrally administered by the FAO by means of various activities, including promotional activities, capacity building and the monitoring of implementation (B.III.).

Following this intra-institutional analysis, the case study broadens the perspective to assess the particular functions and limitations of the CCRF in governing the issue area of global fisheries. Thus, it takes a look at the horizontal and vertical linkages to other public and private actors as well as institutions other than the FAO. It hereby accentuates the important integrative and coordinative functions of the CCRF and related instruments in a complex and decentralized multi-level system of norm implementation (B.IV.).

On the basis of the analysis of the institutional structure and the functions of the instrument, the concluding remarks will then point to specific legitimacy challenges and possible remedies (Part C.) As will be seen, such legitimacy issues arise from the way in which bureaucrats and largely uncontrolled specialist bodies take over important tasks of norm development and distribution of resources at a level which is largely detached from public discourse. In addressing these concerns with legal

means, legal scholarship cannot simply suggest a return to hard law at the expense of flexibility and effectiveness. It must develop proposals which allow maintaining the effectiveness of the institution while formalizing it to the extent that appears necessary to meet any legitimacy gaps. The final considerations will hint at the potential of procedural law and a rights-based approach to participation in this respect.

B. The Code of Conduct as the Basis of a Complex Governance Mechanism

I. Institutional Framework

The institutional framework of the governance mechanism is crucial for determining the degree of autonomy and routine of the different activities of the FAO.

The CCRF has been unanimously adopted by the Conference of the Food and Agriculture Organization, and thus by all 189 FAO Member States and the European Union.⁴ The main body responsible for FAO fisheries policy is the Committee on Fisheries (COFI), a subsidiary body of the executive organ of the FAO, the FAO Council.⁵ COFI was instrumental in the drafting of the CCRF and oversees the implementation process. It meets every two years and is open to any Member State and Member Organization (EU).⁶ In the last meeting period between 2005 and 2007, 131 Member States of the FAO were members of the Committee. The government representatives attending the meetings of COFI are not diplomats, but government officials from specialized state ministries, usually those responsible for agriculture and fisheries.⁷ In addition, approximately 30 environmental, social and industry NGOs and a great number of the most important international organizations, including the World Bank (WB), the World Trade Organization (WTO), the International Maritime Organization (IMO) and numerous regional fisheries organizations participate in the meetings as observers.⁸ This makes COFI the main international policy and discussion forum for fisheries issues.

⁴ On the FAO in general Jean-Pierre Dobbert, *Food and Agriculture Organization of the United Nations*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 413 (Rudolf Bernhardt ed., 1995).

⁵ Art. V para 6 FAO Constitution.

⁶ Rule III of the Rules of Procedure of the Committee on Fisheries (COFI), available at: http://www.fao.org/Legal/index_en.htm.

⁷ In the case of Germany, this is the Ministry of Food, Agriculture and Consumer Protection.

⁸ Rule III of the Rules of Procedure of the COFI.

Important substantive work, including the drafting of technical guidelines for the implementation of the CCRF, is conducted by two sub-committees established by COFI, namely the Sub-Committee on Fish Trade and the Sub-Committee on Aquaculture.⁹ Also open to all members, the meetings have a smaller number of participants (usually between 40 to 60 government representatives). The meetings usually take place in the gap year between COFI meetings. Taken together, the meetings at COFI and the sub-committees thus establish a meeting routine of three meetings in two years by the main policy makers. These meetings, although a far cry from the daily routine of a bureaucracy, undoubtedly raise the possibility for the emergence of transgovernmental networks comprising sub-units of governments that interact on the basis of particular (and perhaps newly constructed) shared understandings and identities. The substantive outcome of this interaction may be different from that of negotiations through diplomatic channels.¹⁰ This relative independence from diplomacy at the highest political level is further increased by the possibility of decision making by majority vote in the aforementioned bodies.¹¹

The only body exclusively composed of civil servants, formally independent of governments¹² and working on a daily routine is the FAO Secretariat. Its Fisheries and Aquaculture Department is responsible for all CCRF-related activities, and its work is guided by the CCRF. Composed of 74 professional staff at the headquarters alone, the Department disposes of considerable human resources. It does not only indirectly influence the meetings of COFI by preparing drafts and participation in discussion, but carries out important functions in the follow-up procedures and the coordination with other international organizations. Overall, it can be seen that in particular the Secretariat carries out its activities in relative autonomy from governments. Oversight, which could seriously restrain its discretion, is weak. The only relevant mechanisms in this regard are budget decisions of the higher level bodies and an internal reporting mechanism; no formal external review mechanism exists. The same applies to COFI and its Sub-Committees. The weak oversight and the already mentioned voting procedures as well as the composition of these bodies

⁹ These are the Sub-Committee on Fish Trade and the Sub-Committee on Aquaculture. The power to establish sub-committees derives from Rule XXX para. 10 of the General Rules of the Organization, available at: http://www.fao.org/Legal/index_en.htm.

¹⁰ Similarly, albeit in a more general context, JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, 2005, 247; ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, 2004.

¹¹ Art. V(5) FAO Constitution and Rule V of the Rules of Procedure of the COFI.

¹² Art. VIII(2) FAO Constitution.

distance them from intergovernmental diplomatic processes. In this sense, one may also speak of autonomy in their case, even though it is of a different kind and exists only to a much lesser degree than that of the Secretariat.

II. Development of Global Norms for Responsible Fisheries

The following legal and institutional analysis will illustrate how the different organs of the FAO engage in norm production on the basis of broad mandates without substantial procedural or substantive guidance. The different instruments form a cascade of norms which gain in specificity the further removed these activities are from the highest political level.

Three categories of norms produced in the context of the CCRF can be distinguished in the following ways:

1. The main instrument of the CCRF adopted by the FAO Conference;
2. The International Plans of Action (IPOAs) and a Strategy for Improved Information usually adopted by COFI; and
3. The Technical Guidelines and related supplements as elaborated under the auspices of the FAO Secretariat.

1. Mandate for Norm Development

The FAO Constitution does not specifically mandate the FAO Conference to adopt a code of conduct. It only endows the Conference with the power to issue recommendations to members, associate members and organizations.¹³ In addressing individuals, non-state actors, fishing entities and non-Member States besides Member States, the CCRF deviates from the nomenclature provided for in the Constitution. The institutional practice of the FAO thus transcends these formal requirements, a fact that indicates a mission creep with regard to the instruments used. A substantive mandate for these normative activities can be deduced from the very general objectives outlined in the FAO Constitution, namely the promotion of the conservation of natural resources and improvement of processing, marketing and distribution of food and agricultural products.¹⁴ While the adoption of the CCRF and the IPOAs by governing bodies can be directly based on these broadly phrased constitutional provisions, the FAO Secretariat is given a similarly wide

¹³ Art. IV(3) and (4) FAO Constitution.

¹⁴ Art. I(2)c) and d) FAO Constitution.

mandate for the elaboration of Technical Guidelines in Resolution 4/95 of the FAO Conference.¹⁵

2. *Procedural Regime*

Inasmuch as the mandates of the Constitution and the Resolution for all norm-producing activities remain broad and general, specific procedural requirements for the development and adoption of the CCRF and the implementing instruments are largely wanting. In the absence of any pre-existing procedural rules, the organs and sub-entities of the FAO have used their broad unspecific mandates to develop the norms in ad hoc procedures. Particularly in the case of lower level bodies and the Secretariat, the lack of procedural guidance reinforces their relative autonomy from the highest political level. It also facilitates the access and influence of independent experts and NGOs. The lack of specific procedural law thus further reduces the intergovernmental character of norm development.

This is less the case for the main instrument of the CCRF. Even if the drafting was heavily influenced by experts and the FAO Secretariat as well as NGOs, all important decisions in the elaboration processes of the main instrument were taken by higher political bodies. This indicates – as confirmed by participants – that the technical specialist input remained secondary, leaving the political objectives as the dominant influence.¹⁶ Political control is less pronounced in the development of the International Plans of Action and the Strategy for Improving Information. Here, the experts' drafts underwent an elaboration process involving few political decisions. Finally, the procedures of elaboration and adoption of the so-called "Technical Guidelines for Responsible Fisheries"¹⁷ under the auspices of the FAO Secretariat display clear signs of autonomous bureaucratic activity. Acting on the basis of a broad mandate lacking specific procedural rules, the FAO Fisheries Department is almost constantly engaged in the development of guidelines and supplements. It does so with considerable autonomy from any interference of the governing bodies through expert consultations, sometimes with the help of other international or

¹⁵ FAO Conference Res. 4/95 of 31 October 1995, para. 5, empowers the FAO "... to elaborate, as appropriate, technical guidelines in support of implementation of the Code." Compare the Report of the Conference of FAO, Twenty-Eighth Session, 20-31 October 1995.

¹⁶ William Edeson, *The Role of Technical Bodies*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 63, 82 and 90 (Rüdiger Wolfrum & Volker Röben eds., 2005).

¹⁷ As of June 2007, 15 Technical Guidelines had been developed by or under the auspices of the Fisheries Department.

non-governmental organizations.¹⁸ Individual governments most often function as sponsors, but the Fisheries Department mainly relies on its own expertise.¹⁹

Occasionally, following a direct request by COFI, the Secretariat develops a specific set of guidelines. In a recent example, COFI initiated the development of technical guidelines regarding marine protected areas even against the expressly stated will of a Member State.²⁰ This not only suggests that states take this activity seriously even though the matter “only” concerns the elaboration of voluntary technical guidelines supplementing a nonbinding instrument. The incident also illustrates the readiness of COFI to act by majority decisions at this lower level of normative activity, thereby underscoring its autonomy from consensual intergovernmental processes.

3. *Characteristics and Content of the CCRF and Implementing Instruments*

This section takes a closer look at the characteristics and the content of the norms produced by the FAO. It thereby aims to illustrate why the development of these norms is significant for fisheries law and governance. Since various treaty law instruments already deal with fisheries issues, one must question what the added value of such an instrument could be. And considering the variety of different instruments produced at different levels of the FAO, the respective role of each body of norms – and therefore of the different institutional bodies of the FAO – will be addressed with the intent of further exploring the interplay of governmental and expert input.

The expressly voluntary CCRF and its implementing instruments²¹ fill some of the gaps left by the limited scope of other fisheries instruments.²² The framework of the

¹⁸ The Technical Guidelines on Marine Protected Areas are being developed by the FAO with the World Bank and the NGO International Union for the Conservation of Nature (IUCN).

¹⁹ This was the case for the development of the Technical Guidelines on Aquaculture.

²⁰ FAO, Report of the Twenty-Sixth Session of the Committee on Fisheries, 7-11 March 2005, para. 103, available at: <ftp://ftp.fao.org/docrep/fao/008/a0008e/a0008e00.pdf>.

²¹ Art. 1(1) CCRF; e.g. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), para. 4; Technical Guidelines usually include a preliminary phrase that they have “no formal legal status,” e.g. FAO Technical Guidelines on Aquaculture Development, 2007.

²² The potential of the CCRF to complement more limited fisheries instruments is emphasized by Edeson (note 1), 90.

United Nations Convention on the Law of the Sea (UNCLOS)²³ establishes generally worded duties to cooperate,²⁴ but UNCLOS hardly comprises elements of sustainable development or modern ecosystem and precautionary approaches. The UN Fish Stocks Agreement of 1995 (FSA)²⁵ incorporates precautionary and ecosystem considerations and transcends the zonal approach of UNCLOS, but is limited in its scope *ratione materiae*. Neither the FSA nor the FAO Compliance Agreement²⁶ has achieved the ratification numbers necessary for their mechanisms to function effectively.²⁷ In contrast thereto, the norms of the CCRF and implementing instruments are addressed to FAO Member States, but also to non-members as well as fishing entities,²⁸ governmental and non-governmental organizations at all levels of government and – contrasting with other soft and hard law instruments – to all persons involved in some way or another with conservation, management or development of fisheries.²⁹ Facilitated by its non-binding nature, it thus generalizes the requirements of the Compliance Agreement and important parts of the FSA for all states, and concretizes the general duties of UNCLOS with regard to all fisheries and for all states. Similarly wide and comprehensive is the scope of territorial application and the scope *ratione materiae*. The territorial scope of the CCRF is defined as “global,”³⁰ and the CCRF comprises all activities related to fisheries ranging from conservation and management to trade of fish products and aquaculture.³¹ With this extensive scope, the CCRF is

²³ United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, UNTS, vol. 3, 1833.

²⁴ Arts. 64, 118 and 197 UNCLOS.

²⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement, FSA), 4 December 1995, UNTS, vol. 88, 2167.

²⁶ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), 24 November 1993, UNTS, vol. 148, 1860.

²⁷ The FSA had been ratified by 65 States as of 1 March 2007. Important fishing nations such as China and Taiwan, Peru, Chile, Indonesia, Thailand, Republic of Korea, the Philippines, Malaysia, Mexico, Vietnam and Argentina are still missing. As of April 2007, only 35 States had ratified the Compliance Agreement.

²⁸ This term can be understood as a reference to Taiwan, province of China, which is not recognised as a Member State.

²⁹ Art. 1(2) CCRF.

³⁰ Art. 1(2) CCRF.

³¹ Art. 1(3) CCRF.

applicable across the jurisdictional zones of UNCLOS and the regional boundaries of regional fisheries organizations.

The role of the CCRF is not only supplementary. As can be seen, it establishes the only framework for fisheries governance that integrates all actors involved in such activities worldwide. Being nonbinding, the norms of the CCRF can easily link the activities of a large variety of state and non-state actors even across sectoral boundaries. The significance hereby goes beyond mere coordination, but constitutes a step forward in the progressive development towards modern fisheries governance. The main instrument of the CCRF represents a remarkably innovative and complete statement of principles for fisheries and is as such unequalled in international governance and law.³² Two of the central elements of the concept of sustainable development, namely the principle of sustainable use and the principle of integration of environmental considerations and development needs,³³ are specified for the context of fisheries.³⁴ A related principle that is manifest throughout the CCRF and implementing instruments is the precautionary principle.³⁵ What is of importance is finally its clear ecosystem orientation.³⁶

The main achievement of the CCRF and implementing instruments lies in the translation and concretization of the general principles and concepts into fisheries-specific rules and proposals for action.³⁷ If all instruments are seen together, the addressees are confronted with a rather complete system of norms that can be directly implemented without necessitating much further consideration or concretization. The thematic sections in the code constitute a first concretization. They cover a range from fisheries management and operations to aquaculture development, research, coastal management and trade.³⁸ In mostly general-abstract terms, the provisions in these articles outline what actions should be taken by states and private actors in order to implement the principles in the different substantive areas. For example, the thematic section on fisheries management translates the

³² Moore (note 1), at 96.

³³ PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 253 (2nd ed. 2003).

³⁴ Arts. 2(a) and .6(1) CCRF.

³⁵ Art. 6(5) CCRF.

³⁶ The ecosystem approach is manifest in Arts. 6(1), (2),(3) and (8) CCRF.

³⁷ Moore (note 1), at 98.

³⁸ Arts. 7-12 CCRF.

general principle to apply the precautionary approach³⁹ into factors that states need to take into account in fisheries management to implement this approach. These include environmental and social conditions and non-target fisheries as well as natural phenomena.⁴⁰ The CCRF is thus an instrument which combines principles marked by general and abstract language and norms generally circumscribing desirable measures.

While the CCRF nevertheless remains quite general and abstract, a higher degree of specificity is achieved by the International Plans of Action.⁴¹ Their normative-worded rules address specific problems such as the decline of sharks or illegal fishing. IPOAs can contain norms prescribing in detail the requirements for national law and policy. For example, the IPOA on Illegal, Unreported and Unregulated Fishing specifies in detail the kind of information that vessel monitoring systems or authorizations to fish should contain.⁴² Sometimes timetables for the adoption of national plans of action are included.⁴³ The recent Strategy for Improving Information on Status and Trends of Capture Fisheries⁴⁴ aims to concretize and implement the CCRF chapter on research⁴⁵ by calling on states to establish data collection systems at the national and global level.

A further concretization of both CCRF and IPOAs is achieved by the Technical Guidelines and supplementary documents developed by the FAO Secretariat, sometimes in cooperation with other international organizations and NGOs. The Technical Guidelines are texts usually containing general explanations of the provisions of the CCRF that are relevant for the issue.⁴⁶ Most importantly, they

³⁹ Art. 6(5) CCRF.

⁴⁰ Arts. 7(5.2) and (5.5) CCRF.

⁴¹ So far, four IPOAs have been developed. These are the IPOA for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds), the IPOA for Conservation and Management Sharks (IPOA-Sharks) and the IPOA for the Management of Fishing Capacity (IPOA-Capacity), all adopted in 1999, and the IPOA-IUU, adopted in 2001. All IPOAs are available at: www.fao.org/fi.

⁴² IPOA-IUU, paras. 42-49.

⁴³ IPOA-IUU, para. 25.

⁴⁴ FAO, Strategy for Improving Information on Status and Trends of Capture Fisheries, available at: www.fao.org.

⁴⁵ Art. 12 CCRF.

⁴⁶ All Technical Guidelines and Accompanying Supplements are available at: www.fao.org.

additionally include general or specific suggestions and recommendations on how these objectives can be achieved and enhanced. Annexes to the Technical Guidelines include guidance on specific technical subjects.⁴⁷ Recently, the FAO Secretariat has even started to develop supplements to Technical Guidelines – so-called “companion documents” – which reach an even higher degree of specificity.⁴⁸ Finally, the Guidelines often include references to or include as annexes very specific guiding nonbinding instruments of other international organizations. Examples are guidelines of the International Council for the Exploration of the Sea or the Ballast Water Control Forms of the IMO.⁴⁹

The emerging picture points to a division of labor between the CCRF and treaty law on the one hand, and between the various bodies of norms produced at the FAO on the other. As the different sets of norms stem from different institutional levels of the FAO with differing governmental input, their interplay illustrates the various contributions from the political level and the expert-driven bodies of the FAO. The different sets of norms amount to a cascade of soft law norms ranging from the more general and rarely altered norms developed at the highest political level and the more specific action plans adopted by COFI to specific and highly flexible norms developed and administered by the experts of the FAO Secretariat.

It is in particular the norm production of the FAO Secretariat which could be described in terms of autonomous bureaucratic activity. The norms at the most specific and normatively lowest end of the cascade of norms, the Technical Guidelines and supplementary norms, must not be formally adopted by a political body. Rather, a very general mandate and the almost complete lack of substantive or procedurally constraining rules allow the FAO Fisheries and Aquaculture Department of the FAO Secretariat to engage in comparatively autonomous norm production on a routine basis. Sometimes, the Secretariat even develops Technical Guidelines on issues that are not explicitly mentioned in the CCRF, but which should, according to the Secretariat and experts, be dealt with in order to

⁴⁷ See FAO Technical Guidelines for Responsible Fisheries on Fishing Operations contain an Annex III which outlines a “Proposed System for the Marking of Fishing Gear.”

⁴⁸ See “Compliance to FAO Technical Guidelines for Responsible Fisheries: Health management for responsible movement of live aquatic animals” as announced in FAO Technical Guidelines for Responsible Fisheries No. 5 Aquaculture Development, Suppl. 2.

⁴⁹ FAO Technical Guidelines for Responsible Fisheries No 2: Precautionary Approach to Capture Fisheries and Species Introductions, FAO 1996.

implement its objectives.⁵⁰ This underscores its independent input. Autonomy from the political level enables it to swiftly act upon new developments and to adapt the norms of the CCRF to technological or scientific developments, adding flexibility to the overall mechanism.⁵¹ Generally speaking, this division of labor in which the highest political level decides on the main objectives, but delegates the concretization to lower level bodies and bureaucracies, balances political and bureaucratic expert-driven input which is necessary for a functioning mechanism. However, the need for such discretion does not render superfluous the elaboration of specific pre-determined procedural law and improved access of the public to these processes as discussed further below.

Finally, the norms of the CCRF carry the potential to provide the first common framework for the discourse on international fisheries issues of all relevant actors, with the effect that their respective governance is coordinated and altered towards more effective resource protection. The extent to which this potential materializes will be assessed in Part IV.

III. Central Management of Compliance and Implementation

Developing norms in the manner described above is only one part of the institutional activities undertaken by the FAO. Another part that is less visible but nevertheless influential is compliance management. Its main elements are a reporting mechanism as well as implementation assistance. Both are important features of a non-confrontational managerial strategy known from compliance mechanisms in multilateral environmental agreements and highlighted by scholars for their compliance-inducing effects.⁵²

1. Mandate and Procedural Regime

The FAO Conference has mandated the FAO to give advice to developing countries and establish an Interregional Assistance Program.⁵³ The Secretariat is also charged

⁵⁰ For example, the CCRF does not address movement of live aquatic animals, but the FAO Secretariat has developed the FAO Technical Guidelines on Aquaculture Development, Suppl. 2 on "Health Management For Responsible Movement of Live Aquatic Animals," FAO 2007.

⁵¹ Edeson (note 16), at 85.

⁵² Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 RECUEIL DES COURS 25, 110 (1998); ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 154 and 197 (1995).

⁵³ FAO Conference Res. 4/95 (note 15), at para. 4.

with the monitoring of implementation, and must report accordingly to the COFI.⁵⁴ Similar to the norm production activities, these broad and general mandates are hardly qualified or constrained by further substantive or procedural specifications. While the FAO Secretariat remains under the oversight of the COFI for much of the reporting activities, the assistance and advisory functions of the Secretariat take place in relative autonomy from direct political influence. On the basis of the general mandate, the FAO Secretariat enjoys wide discretion in the organization and running of the financial, technical and legal assistance to developing countries and in the collection of information on implementation.

2. Monitoring of Implementation by Means of Voluntary Reporting Mechanisms

The reporting mechanism is based on voluntary questionnaires. They are sent out to states as well as organizations, including regional fisheries organizations and NGOs. The results provide the input for the progress report on implementation presented by the Secretariat to COFI biennially.⁵⁵ The five progress reports between 1999 and 2007 show that a significant number of countries responded to the questionnaires sent to them by the Secretariat.⁵⁶ Certainly as a consequence of the nonbinding nature of the norms in question, the Secretariat has treated the reports from states and organizations in such a manner that it is impossible from outside the Secretariat to individualize the information, i.e. to link information to a specific state. The monitoring mechanism in this respect deviates from most compliance control procedures under international environmental or human rights law. Without the possibility to individually assess a country's compliance, the possibility of naming and shaming largely fails. Instead of assessing individual compliance, the mechanism serves to identify problems and maintain a dialogue on implementation. Thus, notwithstanding its limitations, it fulfils other important functions as a reporting mechanism. These are the generation of information on the behavior of most actors, and therefore an increase in transparency which is essential for achieving cooperation in collective action constellations. In addition, the monitoring by the Secretariat means that states are continuously confronted with the rules of the CCRF, since it generally keeps the issue of implementation on both the national and the international agendas. Since discussions of fisheries issues

⁵⁴ Art. 4(2) CCRF; FAO Conference Res. 4/95 (note 15), para. 6; references to reporting to and of FAO are equally included in all of the IPOAs, see IPOA Seabirds, para. 24, IPOA-Sharks, para. 31; IPOA-Capacity, para. 44, IPOA-IUU, para. 87.

⁵⁵ FAO, Committee on Fisheries, Report of the Twenty-Second Session, 17-20 March 1997, para. 29.

⁵⁶ Numbers of reporting countries: 69 in 1999, 103 in 2001, 105 in 2003, 49 in 2005, 70 in 2007. All reports are available at: <http://www.fao.org/fi/body/cofi/cofi.asp>.

at both levels are accordingly based on the CCRF, the reporting exercise structures the national and international discourse. Finally, the implementation review provided by the reporting mechanism enables national and international actors to receive feedback on effectiveness which is a prerequisite for learning processes.

Although conducted by the Secretariat, the political bodies and in particular the COFI largely guide the reporting process. In concretizing the mandate in the Resolution, the FAO Council in 1997 followed a proposition from COFI on the reporting format. The main content of the questionnaires has also been decided upon and approved by COFI.⁵⁷ The questionnaires are continuously revised by the Secretariat, but it is in this regard acting on the basis of specific suggestions from COFI.⁵⁸ In other words, the functions of the Secretariat in the monitoring process are more or less confined to traditional secretarial functions.

3. Implementation Assistance

The CCRF and the implementing instruments serve as a basis for the formulation and design of capacity building projects and for mechanisms of legal, financial and technical assistance. More concretely, the FAO provides the institutional platform, executive know-how and funding to help local communities and developing states with implementation. For example, the advisory service of the Fisheries Department assists governments in the formulation and revision of fisheries legislation⁵⁹ and multilateral fisheries agreements such as the Convention on the Sustainable Management of Lake Tanganyika.⁶⁰ By means of the Global Partnership for Responsible Fisheries ("FishCode") and a corresponding financing institution ("FishCode trust fund") which draws on external donations as well as regular program resources of the FAO, the FAO further funds and manages capacity building projects designed to help states, but also communities, fishermen and fish workers to shift to responsible fisheries.

Again, the analysis of these compliance-inducing activities reveals a considerable degree of autonomy for the Secretariat of the FAO, but it does not act without a

⁵⁷ FAO Council, Report of its Hundred and Twelfth Session, 1997, CL 112/REP, para. 29; Report of the Twenty-Second Session of the Committee on Fisheries, 1997, FIPL/R562 (En), para. 29.

⁵⁸ The 2001 revision was based on an improved format suggested by COFI at its 23rd session in 1999.

⁵⁹ The FAO Secretariat has recently assisted in the revision of pertinent legislation of a number of developing countries, including Angola, Namibia, Malaysia, The Maldives, Vietnam, Barbados, Antigua and Barbuda.

⁶⁰ The Convention text is available at: www.faolex.fao.org.

mandate. Besides, this relative autonomy for the civil servants of the Secretariat seems warranted, because a political body could hardly conduct these activities effectively. Any improvement of these processes would have to pay tribute to these necessities. The need for improved legitimation of these autonomous activities becomes apparent when they are viewed within the context of the significance of the CCRF in fisheries governance worldwide.

IV. Significance of the Institutional Activities for Fisheries Governance and Law

The significance of the CCRF and the related bureaucratic activities can only be fully appreciated by taking into account the implementation activities of the instrument's addressees and other institutions. Broadening the perspective lets the CCRF emerge as the framework and point of reference for actors at the international, supranational, national, regional, and private levels. The pathways of influence may be structured for the sake of clarity by conceiving of horizontal and vertical linkages, even if communication structures mainly build on non-hierarchical persuasive processes. Within both of these dimensions, instrument-based mechanisms linking different instruments can be distinguished from institutional ones deriving from the way institutions engage with each other as actors.

1. Horizontal Dimension: Integration of Actors and Instruments Across Regime Boundaries

a) Instrument-based Linkages

Linkages between the CCRF and other fisheries instruments are mainly achieved by rules of reference.

As mentioned already, the CCRF and the implementing instruments frequently refer to treaty law (UNCLOS, Compliance Agreement, WTO)⁶¹ and other nonbinding instruments (e.g. IMO Codes)⁶². The effect is the incorporation of the rules of these instruments into the CCRF. The rules of the CCRF are thereby harmonized through these treaties, but more importantly, these norms then provide the common framework for all actors that adhere to the CCRF.

⁶¹ Arts. 6(14) and 11(2) CCRF (WTO), Arts. 1(1), 3(1) and (2) CCRF (UNCLOS); Art. 1(1) CCRF (Compliance Agreement).

⁶² Arts. 8(4.1) and (10.1) CCRF.

Second, other nonbinding and binding instruments entail references to the CCRF. The need for the implementation of the CCRF is explicitly called for in the nonbinding Johannesburg Plan of Implementation which was endorsed by the UN General Assembly.⁶³ It is interesting to observe that this document explicitly mentions the IPOAs and the FAO Technical Guidelines alongside the CCRF – a fact which underscores the significance of the norm production of the FAO Secretariat.

Treaty instruments either explicitly (e.g. Lake Tanganyika Convention⁶⁴) or implicitly incorporate the norms of the CCRF, and thus effectively “harden” them. An implicit reference is the way in which the CCRF supplements the Fish Stocks Agreement (FSA) and UNCLOS through rules of references to international standards in these treaties. The Fish Stocks Agreement contains an obligation to apply “generally recommended international minimum standards for the responsible conduct of fishing operations” through cooperation in regional fisheries management organizations.⁶⁵ As the wording and negotiating history suggests, this can be understood as a clear reference to norms outlined in the CCRF and implementing instruments.⁶⁶ As a consequence, the norms of the CCRF then partake in the enforcement mechanism of the FSA through which non-cooperative states can be excluded from access to the resources.⁶⁷ A similar example of references to “generally recommended international minimum standards”⁶⁸ can be found with respect to the duty of states to maintain the maximum sustainable yield which is included in the FSA and UNCLOS. If understood as a reference to the CCRF, its norms would effectively qualify the kind of management and conservation measures states have to take under both treaties.⁶⁹ The function of the references to rules and standards in UNCLOS is to make certain international

⁶³ World Summit on Sustainable Development, Johannesburg Plan of Implementation, para. 31 (c), endorsed by GA Res. 57/253 of 20 December 2002.

⁶⁴ Article 7 section 2(b) Lake Tanganyika Convention, available through <http://faolex.fao.org/>.

⁶⁵ Art. 10(c) FSA.

⁶⁶ The FSA was elaborated in parallel to the CCRF, often by the same delegates, so that from a historical perspective, a reference to “responsible fishing” is likely to be a reference to the FAO CCRF.

⁶⁷ Art. 8(4) FSA.

⁶⁸ Art. 5(b) FSA and Arts. 61(3) and 119(1)(a) UNCLOS. For the duty to take measures and the duty to cooperate with a view to take such measures compare Art. 64 UNCLOS in conjunction with Art. 5 FSA; Arts. 61(2) and 117 UNCLOS.

⁶⁹ These are the duties that derive from Art. 64 UNCLOS in conjunction with Art. 5 FSA; Arts. 61(2) and 117 UNCLOS.

practices and norms obligatory for all Member States regardless of whether particular states are party to a treaty entailing these norms or not, i.e. regardless of whether they are binding upon these states.⁷⁰ Given this dissociation of the obligations in UNCLOS and the membership to a third treaty, it can be logically concluded that practice but not consent is the decisive criterion, i.e. that even rules and standards of nonbinding instruments such as the CCRF qualify as references if they are widely accepted.⁷¹ By importing precautionary and ecosystem considerations into the law of the sea, the norms of the CCRF in this way contribute to modernization and flexibilization of UNCLOS.

b) Inter-institutional Linkages

The CCRF and implementing instruments play a role in inter-institutional cooperation. An outstanding example is the Global Program on Sustainable Fisheries ("ProFish") established by the World Bank in association with a number of states, organizations and institutions, including the FAO. Financed by the World Bank Development Grant Facility, one of three main activities of the partnership is to build national and regional consensus with a view to implement the CCRF.⁷² An indirect role is played by the CCRF in horizontal cooperation between the FAO Fisheries Department of the FAO and the Secretariat of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). Both cooperate closely in the attempt that only responsibly managed fisheries are

⁷⁰ Rüdiger Wolfrum, *IMO Interface with the Law of the Sea Convention*, in CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION 223, 231 (Myron Nordquist & John Norton Moore eds., 1999); David Vignes, *La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme 'généralement acceptées'*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 712, 716 (1979); Louis B. Sohn, *Generally accepted International Rules*, 61 WASHINGTON LAW REVIEW 1073, 1075 (1986); ROBIN CHURCHILL AND VAUGHAN LOWE, THE LAW OF THE SEA 107-108 (3rd ed. 1999).

⁷¹ Rüdiger Wolfrum, Volker Röben and Fred Morrison, *Preservation of the Marine Environment*, in INTERNATIONAL, REGIONAL AND NATIONAL ENVIRONMENTAL LAW 225, 233 (Fred Morrison & Rüdiger Wolfrum eds., 2000); International Law Association, Final Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution 38 (2000); Bernhard Oxman, *The Duty to Respect Generally Accepted International Standards*, 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 109, 110 (1991-1992).

⁷² World Bank website, www.worldbank.org/fish; David Freestone, *The Role of the World Bank and the Global Environment Facility in the Implementation of the Regime of the Convention on the Law of the Sea*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 307, 322 *et seq.* (David Freestone, Richard Barnes & David Ong eds., 2006).

allowed to be traded under CITES. The cooperation is formalized by a Memorandum of Understanding between the FAO and CITES.⁷³

2. *Vertical Dimension: Coordination of Implementation Efforts in a Multi-level System*

The CCRF also serves to influence and coordinate the policies and fisheries management of various actors at various levels of governance, including the domestic one. Some examples should suffice to highlight this function of the CCRF.

a) *Regional Level*

Cooperation in regional fisheries organizations is emerging as a key strategy for sustainable fisheries, especially where regional organizations have the mandate to issue binding management measures. The CCRF and implementing instruments have proven to be of relevance for these regional administrations. Parts of the CCRF have gradually been transformed into binding measures of regional fisheries bodies.⁷⁴ A particularly salient example for the influence of norms is the implementation of the IPOA-IUU by the Commission for the Conservation of Southern Bluefin Tuna through a binding resolution on Illegal, Unregulated and Unreported Fishing. The Resolution essentially establishes a system of authorized fishing based on a public record of authorized vessels.⁷⁵ In particular regional fisheries bodies of the FAO have adapted their founding documents to correspond with the objectives of the CCRF. The case of the newly created South West Indian Ocean Fisheries Commission illustrates that newly created regional fisheries organizations even include express references to the CCRF instead of enumerating guiding principles.⁷⁶

⁷³ Memorandum of Understanding between FAO and CITES, available at: <http://www.cites.org/eng/disc/sec/index.shtml>.

⁷⁴ FAO, Independent External Evaluation of the Food and Agriculture Organization, *FAO: The Challenge of Renewal*, Working Draft, para. 630 (July 2007), available at: <http://www.fao.org/unfao/bodies/IEE-Working-Draft-Report/K0489E.pdf>.

⁷⁵ Commission on the Conservation of Southern Bluefin Tuna (CCSBT), Res. on Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessel over 24 meters, 7-10 October 2003, amended by a adopted at the Eleventh Annual Meeting of 19-22 October 2004, available at: www.ccsbt.org.

⁷⁶ Statute of the South West Indian Ocean Fisheries Commission, para. 5, available at: <http://www.intfish.net/orgs/fisheries/swiofc.htm>.

It is possible to further chart the influence of the principles of the CCRF and related instruments at the European Union's policy-making level. In particular, the EU Commission draws upon the FAO norms for policy suggestions. For example, the Green Paper adopted by the EU Commission on the future of the Common Fisheries Policies expressly draws on the CCRF as an expression of the "large worldwide consensus on the overall objective of fisheries policy" when suggesting the basic principles of the new policy.⁷⁷ In the context of the reform of the Common Fisheries Policy, the EU Commission has also developed a voluntary "European Code of Sustainable and Responsible Fisheries Practices" directed at its fishing sector which is based on the framework of the CCRF.⁷⁸ Furthermore, the International Action Plans are implemented by Community Action Plans.⁷⁹

b) Domestic Level

Overall, states are increasingly acting in compliance with or working towards achieving compliance with the CCRF. According to the most recent progress report on the results of the self-reporting exercise, 95 percent of the responding FAO Members reported to have legislation and policies in place which are partially or totally in conformity with the CCRF, and 9 out of 10 states reported to be either in conformity or were working towards conformity in both policy and legal domains.⁸⁰ This is confirmed by a recent independent expert evaluation. According to this study, the CCRF and the implementing instruments have had "a very considerable impact" on worldwide fisheries management by both developing and developed states.⁸¹

As nonbinding norms, the CCRF and implementing instruments can be implemented at the national level without specific legislation. They are thus often directly implemented by national administrations, for example by means of

⁷⁷ European Commission, Green Paper on the Future of the Common Fisheries Policy, COM (2001) 135 final, 20 March 2001.

⁷⁸ European Commission, European Code of Sustainable and Responsible Fisheries Practices (2004).

⁷⁹ European Commission, Communication from the Commission to the Council and the European Parliament laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fisheries Policy, COM (2002) 535 final, 9 October 2002, para. 3.4.3.

⁸⁰ FAO, Committee on Fisheries, Twenty-Seventh Session, 5-9 March 2007, COFI/2007/2, Progress in the implementation of the 1995 Code of Conduct for Responsible Fisheries, related International Plans of Action and Strategy, para. 6.

⁸¹ FAO, *The Challenge of Renewal* (note 74), at para. 425.

national plans of action.⁸² Proper implementation of the code however often requires enacting or reforming fisheries legislation. The new fisheries law of Tanzania can serve as an example for a far-reaching legislative implementation of the CCRF. The Tanzanian Fisheries Act of 2003⁸³ incorporates the concept of responsible fishing as well as the principles, objectives and several of the specific tools suggested in the CCRF, such as vessel monitoring systems and fishing authorizations.⁸⁴

c) Private Level

The norms of the CCRF and IPOAs provide an ideal and welcome basis for market-based enforcement activities of NGOs. An outstanding example is the eco-labeling initiative of the Marine Stewardship Council. Its “principles and criteria for sustainable fishing” represent the leading standard against which fisheries are assessed before being certified. It is based on the CCRF.⁸⁵ About six percent of the world’s total wild capture fisheries are now engaged in this program, including 42 percent of the global wild salmon catch.

In contrast to binding norms, codes of conduct are generally well suited for marketing purposes, because compliance indicates ethical business behavior beyond legal requirements. Whether or not this is the main motivation, the CCRF and implementing instruments form the basis for self-regulation of fishermen or industry associations. Illustrative examples in this regard are the Code of Conduct for a Responsible Seafood Industry of the Australian Seafood Industry Council,⁸⁶ the Canadian Code of Conduct for Responsible Fishing Operations designed by

⁸² Compare e.g. the Mexican Plan of Action to implement the IPOA-Sharks, ‘Plan de Acción Nacional para el Manejo y Conservación de Tiburones, Rayas y Especies Afines en México’, available at: ftp://ftp.fao.org/FI/DOCUMENT/IPOAS/national/mexico/PANMCT_VERSIONFINAL.pdf.

⁸³ The Fisheries Act, 2003, available at <http://faolex.fao.org/docs/pdf/tan53024.pdf>.

⁸⁴ The numerous references to responsible fisheries can be understood as dynamic implicit references to the CCRF.

⁸⁵ MSC website, available at: <http://eng.msc.org/>.

⁸⁶ The Code of Conduct is available at: <http://www.seafoodsite.com.au/sustainable/code.php>.

local fishermen⁸⁷ or the code of conduct of the Federation of European Aquaculture Producers.⁸⁸

3. *Implementation Difficulties*

Despite the numerous implementation efforts, the problems “on the ground” are far from being solved. Fish stocks continue to deteriorate in most parts of the world. Part of the reason may be that significant implementation gaps remain in many areas and parts of the world. Indeed, the progress reports to COFI indicate that progress has not been rapid. The largest implementation problems persist with regards to the implementation of the ecosystem and precautionary approach as well as the overexploitation of stocks.⁸⁹ Predominant constraints for more rapid progress are insufficient resources and institutional incapacity as well as awareness deficits in developing countries.⁹⁰ Regarding shrimp aquaculture, for instance, studies suggest that only a few countries have so far implemented the strategies of the CCRF.⁹¹ A case study of Bangladesh – an important shrimp producing country – published in 2005 serves as a case in point. Little effort had been made in this signatory state to understand or implement the CCRF.⁹²

4. *The Division of Labor between Nonbinding and Binding Instruments*

The continuously dire state of fisheries and aquaculture highlights the immense task of achieving cooperation and sustainable resource management under conditions of fierce economic competition and strong market forces. If used as mere alternatives to binding law, voluntary codes of conduct seem to be inadequate to

⁸⁷ The Code of Conduct is available at <http://www.fisheriescouncil.ca/pdf/FCCFishingOperations6.pdf>.

⁸⁸ The Code of Conduct is available at: www.feap.info.

⁸⁹ FAO, Committee on Fisheries, Twenty-Sixth Session, 7-11 March 2005, COFI/2005/2 *Progress in the implementation of the 1995 Code of Conduct for Responsible Fisheries, related International Plans of Action*, paras. 33-36.

⁹⁰ FAO, *The State of World Fisheries and Aquaculture 2006* (2007), Part II, available at: <http://www.fao.org/docrep/009/A0699e/A0699e00.htm>

⁹¹ David Barnhizer, *Waking from Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 18 THE GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 595, 677 (2006).

⁹² Nazmul Alam, Kwei Lin, Amaratne Yakupitiyage, Harvey Demaine and Michael Phillips, *Compliance of Bangladesh shrimp culture with the FAO code of conduct for responsible fisheries: a development challenge*, 48 OCEAN AND COASTAL MANAGEMENT 177, 186 (2005).

solve these kinds of regulatory problems.⁹³ In fact, the CCRF and implementing instruments were not intended as and could not be the sole solution. Binding international, regional and national laws have not become superfluous for effectively dealing with complex collective action problems such as the one at hand. The ratification procedures ensure that national or regional measures, such as the quotas and strict monitoring and enforcement of illegal fishing, confront the contravening economic interests of the fishing industry.

The analysis in this last section however also highlights that the CCRF is not without significance. Supported by the institutional machinery of the FAO, it serves as a flexible framework and point of reference for a truly global and progressive discourse on fisheries issues. By means of this instrument, the FAO coordinates, integrates and ultimately influences the main public and some private actors across sectoral boundaries. What first appears to be a rather toothless nonbinding instrument develops force and impact through horizontal and vertical connections. The soft form facilitates linkages across institutions and regimes in a way that hard law hardly ever could in practice. It further contributes to the emergence of a dialogue between all interested actors which – as it is structured along the lines of these norms – may ultimately contribute to a (re)construction of the values and the interests of these actors.⁹⁴ Nonbinding instruments such as the CCRF therefore perform important tasks in a division of labor between nonbinding and binding instruments.

C. Conclusion

The CCRF proves to be much more than yet another nonbinding intergovernmental declaration of a mere hortatory character. Although implementation is still unsatisfactory, the FAO has managed to establish a modern and influential normative framework and collection of best practices which provides the basis for functional cooperation and management efforts of many important actors in fisheries governance at various levels of governance and across functional divides. By making use of its extensive institutional machinery and institutional relations, it uses a flexible nonbinding instrument to initiate and structure a learning and socialization process that integrates actors which could not necessarily be reached through binding law.

⁹³ Barnhizer (note 91), at 674.

⁹⁴ See on constructivism in the context of international institutions and bureaucracies Ingo Venzke, in this volume.

A closer inspection of the intra-institutional processes and structures reveals that much of the normative development and implementation management central to this mechanism is not occurring at the highest political level of the FAO, but on lower political levels or at the FAO Secretariat. The instrument appears to derive much of its potential from institutional activities marked by significant autonomy from intergovernmental processes and routine. An important amount of externally relevant decisions are taken either by the Secretariat or by lower level organs and experts which are only to a limited extent controlled by the higher political decision-making bodies. In particular the Secretary-General and the Secretariat are insufficiently accountable to the governing bodies.⁹⁵

Now, executive discretion is nothing unusual in legal systems.⁹⁶ The autonomy of bureaucracies is well known from domestic legal systems. The example of the FAO indeed shows that autonomy and related informality are beneficial for a mechanism which strives to instigate flexible learning processes on the basis of progressive norms. Autonomy from intergovernmental processes facilitates the translation of principles into progressive and concrete actionable measures and best practices as well as their continuous revision as learning processes advance. Capacity building efforts that flexibly adapt to the particularities of different regions and local conditions can hardly be pursued at the highest political level.

Inasmuch as the need for flexible instruments and autonomous decision-making leads to the emergence of such structures in international organizations, there is a corresponding need for public law and procedure to provide a legal framework for this exercise of public authority.⁹⁷ It is thus proposed to resolve the underlying tension between flexibility and legitimate exercise of authority through legal formalization not of the instrument itself, but of the intra-institutional processes.

This presumes that first, there is a legitimacy issue at all and second, that procedural law could be an adequate response.

Regarding the first question, it can be generally said that any exercise of public authority with impact on behavior must be legitimate, whether it is exercised

⁹⁵ FAO: *The Challenge of Renewal* (note 74), Box 4.3.

⁹⁶ Eyal Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?*, IILJ Working Paper 2004/3 (GLOBAL ADMINISTRATIVE LAW SERIES), available at www.iilj.org.

⁹⁷ See Jochen von Bernstorff, in this issue.

through binding or non-binding instruments.⁹⁸ More concretely, the legitimacy issue in this case arises in connection with two basic considerations.

One is the necessity for intra-institutional control by states in times where states remain the main actors and the state level the main source of legitimacy. Although the main instrument itself is supported by the approval of state representatives, a legitimacy model which only takes this sole decision into account proves to be insufficient in light of various autonomous institutional activities. Formalization through pre-determined procedural law indicating lines of responsibility and specific decision-making procedures could strengthen the delegational link and thus legitimize these activities without necessarily abrogating flexibility.⁹⁹

The second consideration concerns the linkage between the institution as a whole and the state level. Given the nonbinding nature of the instrument which depends to a large extent on implementation by states, legitimacy seems at first sight to be secured at the national level. While it is beyond the scope of this contribution to comprehensively consider these difficult questions,¹⁰⁰ one aspect should be stressed here. Whether the code is indirectly implemented by acts of the national or supranational executive or a national parliamentary act, the entire exercise only makes sense if the instrument can be implemented without calling into question its content, process of elaboration etc. It is in the interest of all actors that implementation is comprehensive and the package not reopened, so as not to upset the balance of different economic, environmental and social aspects. In particular developing countries, due to limited resources, often need to rely on the international standards as a reliable and legitimate source of norms. In other words, in the name of effective cooperation it is in the interest of all participants in the international processes that the instrument is sufficiently legitimated already at the international level. Inasmuch as environmental decision-making shifts from national parliaments to the international level, and given that a global public sphere is at best in a weak stage of its development, international institutions must even for nonbinding instruments establish pre-determined procedures which ensure that national publics and the political opposition are linked to these processes. This is necessary to uphold the legitimating function of the national public discourse which is essential for the legitimation of both international norm production and national implementation.

⁹⁸ Armin von Bogdandy, *Lawmaking by International Organizations: Some Thoughts on Non-Binding Instruments and Democratic Legitimacy*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY-MAKING 171, 173 (Rüdiger Wolfrum & Volker Röben eds., 2005).

⁹⁹ See also Jochen von Bernstorff, in this issue.

¹⁰⁰ See Rüdiger Wolfrum, in this issue.

Provided that they indeed strive to link international processes to national level debates, regional and local groups as well as NGOs have a role to play in this respect.¹⁰¹ So far, at the FAO, neither associations of affected stakeholders nor individuals or the public play a significant role. Nor have notice-and-comment procedures that include the general public as emerging in particular in the OECD been undertaken. This lack of openness to potentially affected individuals or groups and the general public is a lacuna in particular in environmental law where access to information and participation of the public in environmental policy-making and administration is increasingly seen to be essential.¹⁰²

To be sure, this is not an argument for direct voting rights of NGOs, but rather for more transparency through improved rights-based access to information about these processes, as well as formalized participation of the public in policy-making in international fora, for example through notice-and-comment procedures. A recommendation to this effect has been adopted by the Meeting of the Parties of the Aarhus Convention in the detailed Almaty Guidelines in 2005.¹⁰³ These Guidelines call for the application of the principles of the Aarhus Convention not only at the state or EU level, but also at the level of international institutions. Even if only perceivable as a long-term objective, the extension of Aarhus Principles to the international arena could be a promising step forward, especially if access to information and public participation are secured by means of an institutionalized review. Again, the precondition for such a review is formalization. Legal procedures that formalize decision-making and allow for access to information and public participation thus emerge as a realistic strategy through which the apparent need for flexible instruments and executive discretion could be satisfied while safeguarding the long-term legitimacy of the overall mechanism.

¹⁰¹ Jochen von Bernstorff, *Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenhegemonie?*, in *DEMOKRATIE IN DER WELTGESELLSCHAFT*, SONDERBAND SOZIALE WELT (Hauke Brunkhorst ed., forthcoming 2008).

¹⁰² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28 June 1998, Arts. 6 and 7, UNTS, vol. 447, 2161.

¹⁰³ United Nations Economic Commission for Europe, Report of the Second Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, 25-27 May 2005, Decision II/4 entitled "Promoting the Application of the Principles of the Aarhus Convention in International Forums," ECE/MP.PP/2005/2/Add.5, 20 June 2005.