

# Fisheries enforcement

Related legal and institutional issues:  
national, subregional or regional  
perspectives

FAO  
LEGISLATIVE  
STUDY

71



Food  
and  
Agriculture  
Organization  
of  
the  
United  
Nations



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for the

Development Law Service

FAO Legal Office

Food and  
Agriculture  
Organization  
of the  
United Nations

**Rome, 2001**

## **FOREWORD**

A number of international instruments, binding and non-binding, have recently been formulated to address the issues of responsible fishing and sustainable management of fish stocks. At the global level two important instruments have been adopted under the auspices of FAO and the United Nations. They are the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (the 1993 FAO Compliance Agreement) and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the 1995 UN Fish Stocks Agreement). This study was written when neither of these Agreements had entered into force. At the time of publication, the Compliance Agreement had not entered into force, however, the UN Fish Stocks Agreement enters into force on 11 December 2001, 30 days after the receipt of the thirtieth instrument of ratification or accession, which was deposited by Malta. Nevertheless, some states have translated the basic provisions of the agreements into their national laws. Several regional fisheries bodies have also begun to implement these agreements in different ways.

The present study attempts to identify the approaches taken by national governments and by sub-regional and regional fisheries bodies to contribute towards the implementation of the agreements. A special focus is put on monitoring, control and surveillance. The study finds that, at national, sub-regional or regional level, there is no best or preferred method of implementation that would seem to fit all countries or all regional fisheries bodies. It is hoped that the analysis of different methods may provide guidance to governments in achieving the important objectives of the agreements.

The present study was prepared within the framework of the FAO/Norway Inter-regional Programme for Assistance to Developing Countries for Implementing the Code of Conduct for Responsible Fisheries (FISHCODE - GCP/INT/648/NOR).

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## INTRODUCTION

This report deals with the study of fisheries control related legal and institutional issues at the national, sub-regional and regional level. It includes four parts.

Part 1 briefly sketches two crucial elements of the general **international legal setting** which form the backbone of the present study. It concerns first of all the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which was concluded under the auspices of the Food and Agriculture Organisation (hereinafter cited as FAO).<sup>1</sup> The second document, which will be mentioned in this Part 1, is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>2</sup>

Part 2 intends to identify, analyse and compare **national legal systems** governing fisheries control. In particular, Part 2 focuses on issues such as reporting, boarding and inspection, powers of authorised officers, prosecution procedures and the sanctions for illegal, unregulated and unreported fishing in the following countries: Australia, Namibia, New Zealand, Norway, United States of America and Canada. Moreover, Part 2 will highlight the respective characteristics of the aforementioned legal systems, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.

Part 3 deals with the identification, analysis and comparison of some existing or proposed **sub-regional and regional agreements** establishing regional fishery organisations (hereinafter cited as RFOs) or other legal instruments covering fisheries reporting (and verification), inspection and boarding schemes, regional registers, observer schemes (for scientific or other purposes), as well as other enforcement provisions/schemes. The study covers the CCAMLR, EC, FFA, ICCAT, IOTC, NEAFC, NAFO, MHL/C/WCPOFC, and SEAFO.<sup>3</sup> Finally, Part 3 will highlight the respective characteristics of the above-mentioned sub-regional and regional arrangements, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and especially the 1995 Fish Stocks Agreement, which is totally centred around the RFO concept.

Part 4 of the report contains a number **recommendations** concerning possible efficient monitoring, control and surveillance systems relating to fishing vessels, as well as compliance

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<sup>1</sup> Approved by Resolution 15/93 on 24 November 1993, reprinted in 10 *International Journal of Marine and Coastal Law* pp. 417-425 (1995) and available on Internet: <[www.fao.org/Legal/default.htm](http://www.fao.org/Legal/default.htm)>. This agreement has not yet entered into force (see *infra* note 5 and accompanying text). Hereinafter cited as 1993 FAO Compliance Agreement.

<sup>2</sup> UN Document A/CONF.164/37, signed on 8 September 1995, reprinted in 34 *International Legal Materials* pp. 1542-1580 (1995) and available on Internet: <[www.un.org/Depts/los/convention\\_agreements/exts/fish\\_stocks\\_agreement/CONF164\\_37.htm](http://www.un.org/Depts/los/convention_agreements/exts/fish_stocks_agreement/CONF164_37.htm)>. This agreement has not yet entered into force (see *infra* note 13 and accompanying text). Hereinafter cited as 1995 UN Fish Stocks Agreement.

<sup>3</sup> See Table 1 for more details on these different RFOs or other organizations covered. The table provides the following information: The meaning of the acronym, the year of establishment, the area of application, the species covered, as well as the full title of the founding document (including dates of signature and entry into force), together with a convenient Internet reference.

and enforcement mechanisms applicable to fisheries regulations, whether national, sub-regional or regional.

The author is very much indebted to Cédric Van Assche and Dries Vervoort for their participation in the present study, as well as to Dinh Ngoc Linh who also provided assistance. They are all researchers at the Centre for International Law of the Free University of Brussels (VUB). Their contributions related to particular entries in Parts 2 and 3, i.e. those parts of the study containing country and RFO reports. Also the people of the FAO Legal Office, and in particular Annick Van Houtte who served as contact person for the present study, deserve a special word of thanks for their most useful comments and suggestions on a first draft of this study, as well as for sharing their thoughts with us on recent developments. Nevertheless, the final responsibility of this study remains solely with the present author.

## PART 1 - INTERNATIONAL LEGAL SETTING

The present part intends to highlight especially those provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement relating to monitoring, control and surveillance of fishing vessels, as well as compliance and enforcement mechanisms found in fisheries regulations in order to provide the reader the general background against which this study is undertaken. Instead of trying to be exhaustive, only the key provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement will be mentioned by means of which these two instruments attempt to introduce new mechanisms to curb the illegal, unregulated and unreported fishing on the high seas. Special attention will thereby be given to those provisions relating to monitoring, control and surveillance of fishing vessels, as well as compliance and enforcement mechanisms applicable to fisheries regulations. This part ends up with highlighting some particular distinguishing factors between the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement *inter se*, which will help the reader in better understanding the following parts of the present study.

### I. THE 1993 FAO COMPLIANCE AGREEMENT

As indicated by its abbreviated title, this agreement was concluded under the auspices of the FAO. The agreement is open to acceptance by any member or associate member of the FAO and to any non-Member State that is a member of the United Nations, or of any of the specialized agencies of the United Nations or of the International Atomic Energy Agency.<sup>4</sup> It has not yet entered into force, but is approaching the required threshold.<sup>5</sup> The area of application is the high seas, without any restrictions as to species.

In simplified terms, one could state that this agreement tries to tackle the problem of overfishing on the high seas by means of the introduction of new rights, but foremost new obligations in the head of one single actor, namely the flag state.<sup>6</sup> The latter is required to exercise control over all vessels<sup>7</sup> flying its flag, which fish on the high seas by means of a system of obligatory licensing. No such licence should be granted if the flag state is not able to exercise effective control in order to fulfil its obligations under the agreement, or if a vessel, previously registered in the territory of another state, has undermined the effectiveness of international conservation and management measures. A record of fishing vessels has to be maintained by the flag state, which is moreover required to ensure that all its vessels fishing on the high seas are properly marked and provide detailed information about catches (amount as well as area where caught) and landings.

Since one of the main objectives of the agreement is to try to limit the practice of shopping around for a convenient flag, these national registers can only become effective if they are

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<sup>4</sup> 1993 FAO Compliance Agreement, Article X(1).

<sup>5</sup> The agreement needs 25 instruments of acceptance before it enters into force. At the time of writing, that number was 22. *Ibid.*, Article XI(1). Information available on Internet: <[www.fao.org/Legal/default.htm](http://www.fao.org/Legal/default.htm)>.

<sup>6</sup> It is therefore not surprising that the first article containing substantive rules is entitled 'Flag State Responsibility'. *Ibid.*, Article III. This paragraph describes the content of the said article.

<sup>7</sup> Vessels less than 24 meters long may nevertheless be exempted. *Ibid.*, Article II(2).

merged into a global register, covering the whole world. Detailed provisions have therefore been included in the agreement entrusting the FAO with this task.<sup>8</sup>

As far as compliance and enforcement is concerned, it is noteworthy that the agreement contains no specific part bearing this title. This can be explained by the fact that, as mentioned above, the whole agreement centred on the Flag State.<sup>9</sup> The only compliance and enforcement provisions are therefore to be found in the article governing the responsibilities of the Flag State, where one can read in the last paragraph:

'Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas'.<sup>10</sup>

Ensuring the compliance with this agreement as well as securing its enforcement, in other words, are both issues completely left in the hands of the Flag State.

## II. THE 1995 UN FISH STOCKS AGREEMENT

This agreement was the result of multilateral negotiations, which were concluded in December 1995. Since this agreement 'implements' the United Nations Convention on the Law of the Sea,<sup>11</sup> membership is open to all states and certain entities, which had already the authority to sign the latter convention.<sup>12</sup> The agreement has not yet entered into force, but is only lacking one more instrument of ratification or accession.<sup>13</sup> As indicated by its full title, the field of application of this agreement is restricted to straddling stocks and highly migratory species. Nevertheless, a further restriction has to be made *ratione loci*, since these stocks, even though they also spend part of their existence in areas over which coastal states exercise functional jurisdiction, are only covered by the agreement as far as they find themselves on the high seas.<sup>14</sup>

To a large extent, the 1995 UN Fish Stocks Agreement covers similar ground as the 1993 FAO Fish Stocks Agreement, but unlike the latter it is not solely focused on the Flag State. A substantial part of the agreement indeed concerns international cooperation, of which the importance is underlined by the fact that it precedes the part on the duties of the Flag State in the structure of the agreement.<sup>15</sup>

<sup>8</sup> The article entitled 'Exchange of Information', in which this transfer of information is regulated, is the second basic pillar, besides Article III (see *supra* note 6 and accompanying text), on which the agreement is based. *Ibid.*, Article VI.

<sup>9</sup> See *supra* note 6 and accompanying text.

<sup>10</sup> *Ibid.*, Article III(8).

<sup>11</sup> Signed on 10 December 1982, reprinted in 1833 *United Nations Treaty Series* (hereinafter cited as *UNTS*) 3 and available on Internet: <[www.un.org/Depts/los/losconv1.htm](http://www.un.org/Depts/los/losconv1.htm)>. The convention entered into force on 16 November 1994. Hereinafter cited as 1982 Convention.

<sup>12</sup> 1995 UN Fish Stocks Agreement, Article 37, referring back to Article 1 (2)(b).

<sup>13</sup> *Ibid.*, Article 40. Of the required 30 ratifications, 29 were already deposited as at 27 August 2001. Information available on Internet: <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>14</sup> *Ibid.*, Article 3 (1).

<sup>15</sup> These mechanism for international cooperation are contained in Part III, the duties of the flag state only in Part V.



The obligations of the flag state, as a consequence, are quite similar to those already found in the 1993 FAO Compliance Agreement: States have to introduce a system of obligatory licences, exercise effective control, keep a record of fishing vessels, properly mark their fishing vessels, report catches and landings, e.a. No requirement has been included similar to Article VI of the 1993 FAO Compliance Agreement,<sup>16</sup> which would oblige states to transmit information gathered from their fishing vessels to the FAO or any other global organisation.<sup>17</sup> Nevertheless, it can safely be concluded that the 1995 UN Fish Stocks Agreement does not intend to downgrade the importance of flag-state enforcement. Instead it tries, as was the case with respect to the 1993 FAO Compliance Agreement, to strengthen the responsibilities of the Flag State in this respect. It only tries to enhance enforcement methods even further by involving other actors as well, thereby covering the eventuality that a flag state proves either unwilling or unable to discharge its obligations.

As far as international cooperation is concerned, the agreement attributes a central role to RFOs, whether already in existence, or still to be created. Conservation and management measures are conceived in the framework of these RFOs. States fishing in the area covered by a particular RFO are supposed to join that organisation or give at least effect to the measures taken by it. If one of these latter elements is lacking, the state in question may no longer licence its vessels to fish in the convention or regulatory area of that RFO.

Even though a specific part of the agreement concerns the monitoring, control and surveillance by the flag state of its vessels,<sup>18</sup> is clear that these national systems have to yield if they do not correspond with similar systems established by RFOs on a regional level.<sup>19</sup> The latter forms part of a chapter of the agreement on compliance and enforcement,<sup>20</sup> which is not only a structural novelty when compared with the 1993 FAO Compliance Agreement,<sup>21</sup> but also contains the crux of the substantially novel provisions introduced by this agreement.<sup>22</sup> Not only must the flag state enforce conservation and management measures adopted by RFOs as against its own vessels, but also must it accept that the vessels flying its flag will be subjected to a system of regional surveillance and enforcement. The latter entails that all members of a regional body may board and inspect vessels flying the flag of any state being a party to the 1995 UN Fish Stocks Agreement. The Flag State certainly retains a pre-emptive right to investigate and take enforcement action, but it may as well allow the inspecting state to do so. If the violation has a certain minimum level of severity, as defined by the agreement, and the Flag State remains inactive, however, the vessel may be taken into port. Besides, port states have a general right, and even obligation to inspect documents, fishing gear and catches if vessels are voluntarily in their ports.

<sup>16</sup> See *supra* note 8 and accompanying text.

<sup>17</sup> 1995 UN Fish Stocks Agreement, Article 18 (3)(c), seems to limit such exchange of information to directly interested states, but even then only at the request of the latter and while taking into account the national laws of the flag state regarding the release of such information.

<sup>18</sup> *Ibid.*, Article 18 (3)(g).

<sup>19</sup> *Ibid.*, Article 18 (4).

<sup>20</sup> *Ibid.*, Part VI. This paragraph describes the content of the said part.

<sup>21</sup> See *supra* note 9 and accompanying text.

<sup>22</sup> As already stressed by the present author in another study prepared for the FAO. See Franckx, E., '*Pacta Tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks', FAO Legal Papers Online # 8, pp. 7-9 (June 2000), as available on Internet: <[www.fao.org/Legal/default.htm](http://www.fao.org/Legal/default.htm)>. See also by the same author '*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea', 8 *Tulane Journal of International and Comparative Law* pp. 49, 56-58 (2000).

As was the case with respect to the 1993 FAO Compliance Agreement,<sup>23</sup> sanctions to be imposed by the Flag State in case of violations should

'be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, *inter alia*, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.'<sup>24</sup>

### III. DISTINGUISHING FACTORS

Even though the two international agreements were both inspired by the same ultimate goal, i.e. to tackle the problem of overfishing on the high seas, a number of distinguishing features are nevertheless to be noted. For the purpose of the present study, the following differences deserve to be mentioned:

- First of all, the field of application of the 1993 FAO Compliance Agreement is not restricted to straddling stocks and highly migratory fish stocks as the 1995 UN Fish Stocks Agreement, but rather applies to all species;
- secondly, vessels of less than 24 meters may not normally be exempted from the operation of the 1995 UN Fish Stocks Agreement, as was the case with respect to the 1993 FAO Compliance Agreement;
- thirdly, the requirements to maintain records are much more developed under the FAO system than under the UN system;
- fourthly, if the Flag State is the main target of the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement involves other actors as well, such as coastal states, through the RFOs, and port states, in order to achieve its objectives. It can moreover be sustained that the RFO concept is the central element of the latter agreement;
- fifthly, the cornerstone of the 1995 UN Fish Stocks Agreement implementation mechanism, namely that ships may be boarded and inspected on the high seas by Member States of an existing RFO whether or not the flag state of the boarded or inspected vessel is a member of that organisation,<sup>25</sup> is totally absent in the 1993 FAO Compliance Agreement; and
- sixthly, a similar remark can be made with respect to another clear example of progressive development of international law introduced by the 1995 UN Fish Stocks Agreement, namely the creation of a system of port-state jurisdiction in the area of fisheries.<sup>26</sup>

<sup>23</sup> See *supra* note 10 and accompanying text.

<sup>24</sup> 1995 UN Fish Stocks Agreement, Article 19 (2).

<sup>25</sup> *Ibid.*, Article 21 (1).

<sup>26</sup> Compare the 1995 UN Fish Stocks Agreement, Article 23 (1-3) with the 1993 FAO Compliance Agreement, Article V (2). In the latter hypothesis, port states simply have to forward reports of violations to the flag state for flag state action.

## PART 2 - ANALYSIS OF NATIONAL LEGAL SYSTEMS

Part 2 intends to identify, analyse and compare **national legal systems** governing fisheries control. In particular, Part 2 focuses on issues such as reporting, boarding and inspection powers of authorised officers, prosecution procedures and the sanctions for illegal, unregulated and unreported fishing in a number of national legal systems. Moreover, Part 2 will highlight the respective characteristics of the aforementioned legal systems, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.

The following legal systems will be examined:

- I. Australia;
- II. Canada;
- III. Namibia;
- IV. New Zealand;
- V. Norway;
- VI. Spain; and
- VII. United States of America.

### I. AUSTRALIA

#### A. Introduction

**Australian Fisheries Management Act 1991.** The current fisheries legislation in force in Australia is the Fisheries Management Act 1991, as amended (hereinafter cited as the Act). The Act intends to implement efficient and cost-effective fisheries management, taking into consideration the principle of sustainable development and the precautionary principle. It particularly aims at ensuring, through proper conservation and management measures, that the living resources in the Australian Fishing Zone (hereinafter cited as AFZ) are not endangered by over-exploitation on the one hand and at achieving the optimum utilisation of the living resources of the AFZ on the other hand.

**Area of Application.** In relation to the AFZ and to fishing for sedentary organisms outside the AFZ, this Act applies to all persons, including foreigners, and to all boats, including foreign boats. However, in relation to so much of a fishery to which an Australian plan of management relates, as is outside the AFZ, this Act also applies to Australian boats and all persons, including foreigners, on Australian boats, but not to foreign boats.

**Fishing Concessions and Other Permits.** The Act prohibits fishing in the AFZ without a fishing concession (statutory fishing rights, fishing permits and foreign fishing licences) granted by the Australian Fisheries Management Authority (hereinafter cited as AFMA). See the Fisheries Administration Act 1991, as amended. Moreover, the master of foreign fishing vessels is required to be holder of a foreign master-fishing licence. Finally, the AFMA may, upon application, grant to certain persons a fish-receiver permit authorising only these persons to receive some species of fish from commercial fishing vessels.

## **B. Reporting**

**Reporting Obligations.** The Act does not impose specific reporting obligations upon fishing vessels or the holders of fishing concessions. However, the Act does not prevent including such reporting obligations in the conditions and requirements contained in the fishing concession or in general regulations. According to the Act, these regulations may provide for the holders of fishing concessions to record, and furnish returns, information in relation to (1) the taking of fish under fishing concessions and the sale or disposal of such fish; (2) the carrying and transshipping of fish taken under fishing concessions or (3) the processing of fish taken under fishing concessions and the sale or disposal of fish so processed. Moreover, the Act states that it is a condition of a fishing concession that the holder of the fishing concession will comply with the requirements of any such regulations.

## **C. Boarding, Inspection and Powers of Authorised Officers**

Section 84 of the Act sets forth a complex set of detailed rules dealing with powers of authorised officers appointed by the AFMA.

**Boarding and Inspection.** Such officers are entitled to board a boat in the AFZ or in Australia or a boat that the officer has reasonable grounds to believe has been used, is being used, or is intended to be used, for fishing in the AFZ. They may search the boat for fish, fishing equipment, or for any document or record and may break open any hold, compartment, or container on the boat. Furthermore, authorised officers may board any vessel in relation to which a fishing concession is in force for the purpose of ascertaining whether a condition of the fishing concession is being complied with. In furtherance of that purpose, these officers may search the boat and break open any hold, compartment, container on the boat.

For the purpose of boarding, authorised officers may require the master to stop the vessel at such a place to allow the officer to board it. If the master does not stop the vessel as required and the vessel is not an Australian-flagged boat, they may use any reasonable means consistent with international law to stop the boat. This includes firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat.

**Seizure.** The act allows authorised officers to seize, detain, remove or secure (1) any fish that the officer has reasonable grounds to believe has been taken, processed, carried or landed in contravention of the Act; (2) any vessel, net, trap or other equipment that the officer has reasonable grounds to believe has been used, is being used or is intended to be used in contravention of the Act; or (3) any document or other thing that the officer has reasonable grounds to believe may afford evidence as to the commission of an offence against the Act.

**Detention.** Authorised officers may detain a foreigner in Australia for the purposes of determining during the period of detention whether or not to charge him with an offence if some reasonable grounds exist to believe that the person is not an Australian citizen or an Australian resident and was on a foreign vessel engaged in some illegal fishing activities in the AFZ. The duration of the detention must not exceed 168 hours after the detention began.

## **D. Prosecution Procedures**

**Issue of Search Warrants.** A magistrate may, upon application by an officer, issue a warrant to search premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises.

**Fishing without a Fishing Concession.** Fishing without concession is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.

**Favourable Treatment of US Vessels.** A specific rule applies to US vessels. Prosecution for an offence against the Act or the regulations that is alleged to have been committed with the use of foreign fishing vessel of the United States, must not be instituted except with the Chief Executive's written consent. See also the 1987 Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

## **E. Sanctions and Penalties**

**Fishing with Australian Vessels without Fishing Concessions.** A person engaged in commercial fishing without a fishing concession authorising commercial fishing at that place is guilty of an offence punishable, on conviction, by a fine not exceeding 500 respectively 250 penalty units, depending on whether the offence is dealt with by a jury or by a court of summary jurisdiction.

**Fishing with Foreign Vessels without Fishing Concessions.** A person using a foreign vessel for fishing without a fishing concession is guilty of an indictable offence punishable, on conviction, by a fine not exceeding 5 000 penalty units. As regards the foreign vessel, the Court must order its forfeiture to the Commonwealth.

**Breach of Conditions Contained in Fishing Concessions.** A holder of a fishing concession contravening a condition contained in this fishing concession is guilty of an offence punishable, on conviction, by a fine not exceeding 250 penalty units. Moreover, the court may, in addition, order that the person must not, during such period as the court determines, be on a boat in the AFZ for the purposes of engaging in commercial fishing. A person who contravenes such an order is guilty of an offence punishable, on conviction, by imprisonment for 12 months. Besides, the AFMA or the Court may also decide to suspend the operation of the concession or even cancel the fishing concession itself. As regards the vessel, the Court may order the forfeiture of the vessel, net or equipment as well as the fish on board and the proceeds of the sale of any such fish.

**Certain Foreign Vessels not to Enter Australian Port.** A person, being the master of a foreign fishing boat who, otherwise than in accordance with (a) a foreign fishing licence or a port permit; or (b) the provisions of a prescribed agreement between the Commonwealth and another country; or (c) the direction of an authorised officer, brings the boat into a port in Australia is, in principle, guilty of an offence punishable on conviction by a fine not exceeding 500 penalty units.

**Foreign Vessels not to Land Fish in Australia.** A person, being the master of a foreign vessel, who, otherwise than in accordance with the terms of a foreign fishing licence, without reasonable excuse, causes any fish that were brought to the place by the boat, to be landed at any place in Australia is guilty of an offence punishable on conviction by a fine not exceeding 500 penalty units. Such offence is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction. If such offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

**Strengths.** The strength of the legal system is the wide range of powers granted to authorised officers for offences relating to fishing in the AFZ.

**Weaknesses.** However, the weakness of the Australian legislation would be that the Act does not provide specific provisions applicable to its high seas fishing vessels nor to its citizens using foreign or national high seas fishing vessels. See *infra*. Moreover, The Act does not impose specific reporting obligations upon fishing vessels or the holders of fishing concessions, even though it must be admitted that the Act does not prevent including such reporting obligations in the conditions and requirements contained in the fishing concession or in general regulations.

## **G. Implementation of the 1993 FAO Compliance Agreement**

Australia is not a party to the 1993 FAO Compliance Agreement and is thus not bound by the provisions of this agreement. It is therefore not surprising to notice that Australian fisheries legislation does not contain specific legal requirements as set forth in the 1993 FAO Compliance Agreement such as those dealing with high seas authorisations, high seas permit registers, high seas conservation and management measures or port-state control in case a suspected high seas foreign fishing vessel of a flag-state party to the 1993 FAO Compliance Agreement voluntarily enters its ports.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

On 23 December 1999 Australia ratified the 1995 UN Fish Stocks Agreement. Australian legislation allows therefore for implementation of the 1995 UN Fish Stocks Agreement.

First of all, Section 8A of the Act allows regulations to be taken providing for placement by the AFMA of persons as observers on board foreign fishing vessels operating outside the AFZ and setting out the functions, powers and duties of observers so placed provided (1) the placement is authorised under a regional arrangement, or a bilateral or multilateral treaty, to which Australia, or a body acting on behalf of Australia, is a party and (2) the functions, powers and duties conferred or imposed on persons so placed are consistent with the terms of that arrangement or treaty.

Furthermore, the Fisheries Legislation Amendment Act (No. 1) 1999 (No. 143, 1999) amending Fisheries Administration Act 1991 allows the AFMA to liaise and cooperate with

overseas and international bodies on matters relating to global, regional or sub-regional fisheries management organisations or arrangements. However, this provision is not yet in force.

Finally, the Fisheries Legislation Amendment Act (No. 1) 1999 (No. 143, 1999) amending Fisheries Administration Act 1991 allows the AFMA to take action in accordance with international law to deter the use of vessels on the high seas for activities that contravene or reduce the effectiveness of measures for the conservation and management of fish stocks that are established by a sub-regional or regional fisheries management organisation that Australia is a member of; or a sub-regional or regional fisheries management arrangement in which Australia participates. However, this provision is also not yet in force.

## **II. CANADA**

### **A. Introduction**

**Legislation in Force.** The legislation in force consists of (1) the Coastal Fisheries Protection Act (last amended on 12 May 1994) and (2) the Oceans Act (1996) which came into force on 31 January 1997. The Coastal Fisheries Protection Act was amended in 1994 to cover the protection of the straddling stocks in waters beyond national jurisdiction.

**Area of Application.** The Oceans Act intends to reaffirm Canada's role as a world leader in oceans and marine resource management. In the Act, Canada promotes the understanding of oceans, ocean processes, marine resources and marine ecosystems to foster the sustainable development of the oceans and their resources. Canada holds that conservation, based on an ecosystem approach, is of fundamental importance to maintaining biological diversity and productivity in the marine environment. The Canadian Oceans Act endorses a wide application of the precautionary approach to conservation, management and exploitation of marine resources so as to protect these resources and preserve the marine environment.

**Coastal Fisheries Protection Act.** This Act aims at protecting coastal fisheries, and in particular, the straddling stocks in Canadian Fisheries Waters (all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada), as well as in the North Atlantic Fisheries Organisation (NAFO) Regulatory Area (since 1994).

### **B. Reporting**

**Persons Subject to Report Obligations.** The following persons may be required under the Coastal Fisheries Protection Act to provide information or to keep records relating to the number, sex, size, weight, species, product form, value or other particulars of any fish caught, cultured, processed, transported, sold or purchased, books of account or other documents: (1) Any person who engages in fishing; (2) A person who purchases fish for the purpose of resale; (3) An owner, operator or manager of an enterprise that catches, cultures, processes or transports fish.

The time and place at which any fish was caught or landed and the person, enterprise or vessel by which the fish was caught or landed should be reported as well as the vessels' gear and methods used and the number of persons employed for the purpose of catching fish.

**Reporting Obligations on Foreign Fishing Vessels Entering or Leaving Canadian Waters.** A master of a foreign fishing vessel operating under the authority of a licence shall at least 24 hours or such shorter period as may be approved by the Regional Director-General prior to the entry of that vessel into Canadian fisheries waters, notify the Regional Director-General of the estimated time of entry of the vessel into such waters, the location of such entry, the approximate schedule of activities to be conducted, and the quantity in metric tons of fish by species and product form on board the vessel. When entering the Canadian fisheries waters, the master shall notify a protection officer or Regional Director-General of the name, flag state, location, route and destination of the vessel and of the circumstances under which it entered Canadian fisheries waters. The estimated time of departure shall be reported at least 72 hours prior to that departure.

### **C. Boarding, Inspection and Powers of Authorised Officers**

**Powers of Inspectors.** An inspector may at any time enter any steamship, vessel or boat used for the carriage or storage of fish and may open any container that he has reason to believe contains fish; require to be produced for inspection or for the purpose of obtaining copies thereof or extracts there from any books, shipping bills, bills of lading or other documents or papers; and take any samples for inspection. Moreover, an inspector or constable may arrest without a warrant any person found committing an offence against the Fish Inspection Act and shall forthwith take any person so arrested before a justice of the peace to be examined and dealt with according to law. A person arrested without a warrant shall not be detained in custody for longer than 24 hours without an order of a justice of the peace.

**Use of Force.** In executing a warrant, the inspector shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorised in the warrant.

**Obligation to Cooperate.** The master of a foreign vessel shall permit, when requested by the Regional Director-General, observers to go on board and remain on board the vessel at a time and for a period specified in the request for the purposes of recording scientific data, making observations and taking samples, and shall pay all costs related to the presence of the observers on board the vessel. The master shall embark or disembark the observers at a time and place specified in the request. He shall take all reasonable precautions to ensure the safety of any protection officer or observer boarding or leaving the vessel at sea including the observance of practices of good seamanship and, where necessary, the placing of a pilot ladder over the side of the vessel. The master shall where a protection officer or an observer is on board the vessel and remains on board the vessel for a period of more than four consecutive hours, provide the protection officer or observer with food and accommodation equivalent to that received by officers of the vessel.

Also, the master of the foreign vessel shall provide all reasonable assistance in his power to enable a protection officer or an observer on board the vessel to carry out his duties. Furthermore, the master shall while in Canadian fisheries waters, at the request of a Regional Director-General or a protection officer proceed forthwith to the place at sea or the port specified in the request for the purpose of inspection; and he shall ensure that the vessel at all times while in Canadian fisheries waters is flying the flag of its flag state.



**Territorial Scope of Powers.** A protection officer may for the purpose of ensuring compliance with the Coastal Fisheries Protection Act board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and, with a warrant, search any fishing vessel and its cargo found within Canadian fisheries waters or the NAFO Regulatory Area.

**Enforcement on High Seas for Unauthorised Fishing in Canadian Fisheries Waters.** If a protection officer believes on reasonable grounds that a fishing vessel of a participating state or of a state party to a treaty or an arrangement that regulates the regional fisheries management, has engaged in unauthorised fishing in Canadian fisheries waters and the officer finds the vessel in an area of the sea, regulated by a regional organisation or arrangement, the officer may, with the consent of that state, take any enforcement action that is consistent with the Coastal Fisheries Protection Act. However, this does not affect any powers the protection officer may have in the case of pursuit that began while the vessel was in Canadian fisheries waters.

**Seizure.** A protection officer who believes on reasonable grounds that an offence under the Coastal Fisheries Protection Act has been committed may seize any fishing vessel by means of which or in relation to which the officer believes on reasonable grounds the offence was committed; he may also seize any goods aboard a fishing vessel, including fish, tackle, rigging, apparel, furniture, stores and cargo.

**Perishable Goods.** Where fish or any other perishable articles are seized, the protection officer or other person having the custody thereof may sell them, and the proceeds of the sale shall be paid to the Receiver General or deposited in a bank to the credit of the Receiver General. Any fishing vessel or goods seized or the proceeds realised from a sale shall be returned or paid to the person from whom the fishing vessel or goods were seized if the Chief Executive decides not to institute a prosecution in respect of an offence under the Coastal Fisheries Protection Act, and in any event shall be so returned or paid on the expiration of three months after the day of seizure unless before that time proceedings in respect of the offence are instituted.

**Redelivery.** Where a fishing vessel or goods have been seized and proceedings in respect of an offence under the Coastal Fisheries Protection Act have been instituted, the court or judge may, with the consent of the protection officer who made the seizure, order redelivery thereof to the person from whom the fishing vessel or goods were seized on security by bond, with two sureties, in an amount and form satisfactory to the Chief Executive.

#### **D. Prosecution Procedures**

**Forfeiture.** When a person or a fishing vessel is convicted of an offence, the convicting court or judge may, in addition to any other punishment imposed, order that any goods aboard the fishing vessel, including fish, tackle, rigging, apparel, furniture, stores and cargo be forfeited.

Where a fishing vessel or goods have been seized and proceedings in respect of an offence under the Coastal Fisheries Protection Act have been instituted, but the fishing vessel or goods or any proceeds realised from a sale are not at the final conclusion of the proceedings ordered to be forfeited, they shall be returned or the proceeds shall be paid to the person from whom the fishing vessel or goods were seized.

Where the proceedings result in a conviction and a fine is imposed, the fishing vessel or goods may be detained until the fine is paid, the fishing vessel and the goods may be sold under execution in satisfaction of the fine or the proceeds realized from a sale of any of the goods may be applied in payment of the fine.

**Extension of Jurisdiction.** An act or omission that would be an offence under an Act of Parliament if it occurred in Canada is deemed to have been committed in Canada if it occurs:

- in the course of enforcing the Coastal Fisheries Protection Act
  - (a) in the NAFO Regulatory Area on board or by means of a foreign fishing vessel on board or by means of which a contravention regarding illegal fishing has been committed;
  - (b) in an area of the sea regulated by a regional organisation or arrangement on board or by means of a fishing vessel of a participating state or of a fishing vessel without nationality;
- in the course of continuing pursuit that commenced while a foreign fishing vessel was in Canadian fisheries waters or the NAFO Regulatory Area.

**Jurisdiction of Court.** A justice of the peace or judge in any territorial division in Canada has jurisdiction to authorise an arrest, entry, search or seizure related to an offence committed in an above-mentioned area.

**Appearance of Vessel.** A fishing vessel on which a summons is served must appear by counsel or agent. If a vessel doesn't appear, the court may proceed with the trial in the absence of the vessel.

## **E. Sanctions and Penalties**

Every person who contravenes the Coastal Fisheries Protection Act or the regulations is guilty of:

1. An offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding CAD 100 000 and, for any subsequent offence, to a fine not exceeding CAD 100 000 or to imprisonment for a term not exceeding one year, or to both; or
2. an indictable offence and liable, for a first offence, to a fine not exceeding CAD 500 000 and, for any subsequent offence, to a fine not exceeding CAD 500 000 or to imprisonment for a term not exceeding two years, or to both.

## F. Characteristics: Strengths and Weaknesses of the Legal System

**Strengths.** In 1994 Canada amended its Coastal Fisheries Protection Act, and thereby extended its jurisdiction to the NAFO Regulatory Area. New section 5.1 of the Act contains the following declaration:

'5.1 Parliament, recognising

- (a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers,
- (b) that those stocks are threatened with extinction,
- (c) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No. 11, and
- (d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures,

declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d).'

Section 5.2 reads as follows:

'5.2 No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures.'

Protection officers may board and inspect any fishing vessel to ensure compliance with this Act.

**Weaknesses.** Under its Coastal Fisheries Protection Regulations, Canada operates a distinction between fishing vessels of different states. Vessels of Belize, the Cayman Islands, Honduras, Panama, Saint-Vincent and the Grenadines and Sierra Leone are prohibited to fish or prepare to fish straddling stocks. In 1994, certain prohibitions were also imposed upon European vessels. However, after the *Estai* incident, these prohibitions were revoked. It seems to us that such discrimination could be incompatible with Articles 21 (2) and 23 (1) of the 1995 UN Fish Stocks Agreement.

## G. Implementation of the 1993 FAO Compliance Agreement

On 20 May 1994 Canada deposited its instrument of acceptance of the 1993 FAO Compliance Agreement. Canada transformed the 1993 FAO Compliance Agreement into national law by enacting a regulation pursuant to the Coastal Fisheries Protection Act. The following important provisions have been identified.

**Territorial Application of Coastal Fisheries Protection Act.** The provisions of the Coastal Fisheries Protection Act and the regulations apply to any or all of Canadian fisheries waters, without anything in the context of those provisions indicating that they apply to any specified area of Canadian fisheries waters, shall, in relation to any fishing vessel or aircraft on or over the high seas that is subject to the jurisdiction of Canada, be deemed to extend and apply to the high seas. More specifically, as required by Article III (2) of the 1993 FAO Compliance Agreement, under the Coastal Fisheries Protection Act, no person shall use a vessel, and no owner of a vessel shall permit another person to use the vessel, in fishing for any species of fish referred to in the Act unless:

- (1) A vessel registration card has been issued in respect of the vessel;
- (2) The use of the vessel to fish for that species of fish is authorised by a licence; and
- (3) The person who is using the vessel is named in the licence.

**Canadian Code of Conduct for Responsible Fishing Operations.** Canada developed a Canadian Code of conduct based on the FAO Code of conduct for responsible fisheries, but this Canadian Code also reflects the specific needs and conditions of the various fisheries in Canada. The Code consists of two parts. The first part includes the basic assumptions and principles that supported the development of the Code. The second part consists of general guidelines for implementing the Code by fishers.

## H. Implementation of the 1995 UN Fish Stocks Agreement

On 3 August 1999 Canada deposited its instrument of ratification of the 1995 UN Fish Stocks Agreement.

**National Strategy for Marine Environment Conservation.** The principles of the strategy of the Canadian Government are outlined in the Oceans Act (1996). The national strategy will be based on the principles of (1) **sustainable development**, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs; (2) **integrated management** of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law; and (3) **the precautionary approach**.

**Collection of data.** The master of a fishing vessel is required to write daily reports on his catch.

**Non-discrimination.** As required by Articles 21 (2) and 23 (1) of the 1995 UN Fish Stocks Agreement, Canada has taken measures to ensure the effectiveness of the NAFO system. However as already pointed out the measures taken with regard to vessels of Belize, the

Cayman Islands, Honduras, Panama, Saint-Vincent and the Grenadines and Sierra Leone could be incompatible with the article.

**Under-reporting.** As required by Article 5 of the 1995 UN Fish Stocks Agreement, Canada took measures against this problem. Where the transport of fish from fishing grounds is authorized by a licence only the species and quantities of fish set out in the licence shall be taken on board the vessel. The master of the vessel must keep, and produce on the demand of a protection officer, accurate daily logs that set out all catches, by species and area of capture, and all production, by species and product form. Moreover, he will permit, when requested by the Regional Director-General, observers to go on board the vessel for the purposes of recording scientific data, making observations and taking samples, and shall pay all costs related to the presence of the observers on board the vessel. Finally, he will provide them with access to the vessel records and logs pertaining to its fishing activities, to all areas of the vessel involved in the fishing, processing and storage operations.

### III. NAMIBIA

#### A. Introduction

**Marine Resources Act 2000.** The current fisheries legislation in force in Namibia is the Sea Fisheries Act 1992, as amended. The Marine Resources Act 2000 (hereinafter cited as the Act) has recently been adopted by the Namibian Parliament and this part will discuss the provisions of this Act which mainly improve the Sea Fisheries Act 1992.

**Area of Application.** The Act applies to the management, protection and utilisation of marine resources in Namibia and Namibian waters. For the purposes of the Act, 'Namibian waters' mean the internal waters, the territorial sea, the contiguous zone and the exclusive economic zone (hereinafter cited as EEZ) of Namibia, and including the sea bed up to the high water mark. Also, for the purposes of this Act, 'marine resources' mean marine plants and animals of all vertebrate and invertebrate species and their shells, spawn, larvae, guano and other products.

**Fishing Permits and Licensing of Fishing Vessels.** The Act deals, *inter alia*, with compulsory fishing permits (rights; exploratory rights; fisheries agreement rights) as well as with licensing of fishing vessels. Indeed, this Act prohibits harvesting any marine resources for commercial purposes, except under a right, an exploratory right or a fisheries agreement. Moreover, a holder of such fishing permit who wishes to use a fishing vessel for commercial purposes in Namibian waters or a person who wishes to use a Namibian flag vessel for harvesting marine resource outside Namibian waters must apply for a fishing vessel licence. This licence allows him to use his fishing vessel to harvest marine resource.

**Transshipment and Landing Licences.** Vessels in the Namibian Waters and Namibian flag vessels inside and outside those waters may not tranship, land, attempt to tranship or land, or assist any other vessel to tranship or land any marine resources, unless such transshipment or landing is authorised by a licence or authorisation obtained from the Minister and is executed in accordance with any conditions contained in the licence or authorisation in question.

## **B. Reporting**

**Reporting Obligations.** The Act only states that every person holding a fishing permit, in relation to the activity subject to such permit, keeps such records, and furnish the Permanent Secretary of the Fisheries Ministry with such information, in such form as may be prescribed. Such reporting obligations may thus be included in the fisheries permitting conditions.

## **C. Boarding, Inspection and Powers of Authorised Officers**

**Fishing Inspectors.** Fishing inspectors are authorised officers appointed by the Ministry of Fisheries and Marine Resources. Fisheries inspectors may exercise their power (1) with respect to Namibian flag vessels inside and outside Namibian waters; and (2) with respect to foreign flag vessels inside Namibian waters and, to the extent authorised by international agreements to which Namibia is a party, outside Namibian waters.

**Powers of Fishing Inspectors.** According to the Act, a fishing inspector may, at any time and without a warrant, *inter alia*, (1) board any vessel and inspect such vessel, its fishing gear, cargo and stores, any marine resources aboard and any document or other item to be kept, and may for the purposes of that inspection, stop that vessel; (2) enter any premises, other than a dwelling house, or any vehicle, in which marine resources or any fishing gear are kept or are being transported, as the case may be, and inspect the premises or vehicle and may, for the purpose of inspecting such vehicle, stop that vehicle; (3) question any person who, in his opinion, may be capable of furnishing any information which he may require; (4) stop any vehicle for the purpose of carrying out a routine check for marine resources; and (5) examine any fishing gear or object which he has reasonable grounds to suspect is being used or intended to use in the harvesting, handling or processing of marine resources.

**Other Enforcement Powers.** Furthermore, where a fishing inspector has reasonable grounds to suspect that an offence under the Act has been committed, he may, where reasonably necessary to preserve evidence or items subject to forfeiture or to prevent the continuation or repetition of the offence, (1) seize any vessel, vehicle, fishing gear, marine resources, document or other item; and (2) order the master of the vessel to transit to a specified port.

**Fisheries Observers.** According to the Act, fisheries observers shall be appointed by the Fisheries Observers Agency (hereinafter cited as FOA) with the following functions: (1) observe the harvesting, handling and processing of marine resources and related operations and to record data concerning such operations; (2) collect and record biological and other information; (3) collect samples of marine resources harvested; (4) report to the FOA any observations and information obtained; (5) perform such other activity as may be agreed upon between the Minister and the FOA.

## **D. Prosecution Procedures**

**Jurisdiction.** The Act provides clear rules as regards criminal jurisdiction of Namibian courts. If a person is charged with having committed an offence under the Act in Namibian waters, the following magistrate's courts shall be competent to try the charge: (1) The High Court of Namibia; (2) any magistrate's court whose area of jurisdiction borders on or includes any part of the sea in the vicinity where the offence has allegedly been committed; or (3) any

magistrate's court whose area of jurisdiction includes the port where the vessel has been taken. For all purposes connected with or consequential upon the trial of the charge, the offence shall be deemed to have been committed within the area of jurisdiction of such magistrate's court.

**Evidence.** The Act also sets forth some presumptions concerning evidence relating to fisheries offences. For example, where a vessel or a vehicle has been used in connection with an offence, or if any marine resources or fishing gear in respect of or by means of which such an offence has been committed, is found or proved to have been upon or in a vehicle, the offence shall, in the absence of evidence to the contrary, be deemed to have been committed in respect of all marine resources or by means of all fishing gear which were found or are proved to have been upon or in that vessel or vehicle at that time. Moreover, if in any criminal proceedings, it is proved that samples taken of marine resources on board a vessel have certain characteristics or are of a particular species, it shall be presumed, in the absence of evidence to the contrary, that the whole cargo has the same characteristics or is composed of marine resources of that species.

**Bail.** Where an accused person who is the master of a vessel has been released on bail, he shall not be allowed on the vessel until criminal proceedings relating to that offence are concluded.

**Custody of Seized Items.** Any vessel seized by a fishing inspector shall be taken to such Namibian port as the Permanent Secretary of the Fisheries Ministry may direct. Any perishable item seized by a fisheries inspector may be sold or destroyed on order of the Permanent Secretary, and the proceeds if any retained in place of the item. The Permanent Secretary shall transfer all seized vessels, other items and proceeds thereof to the custody of the Minister as soon as is practicable.

## **E. Sanctions and Penalties**

**Owners and Masters of Foreign Flag Vessels Fishing in Namibian Waters without Valid Fishing Vessel Licence.** Owners, lessees, charterers or masters of foreign flag vessels using such vessel in Namibian waters for harvesting marine resources, or allowing it to be used so without the authorisation of a valid Namibian fishing vessel licence, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NAD 2 000 000.

**Owners and Masters of Foreign Flag Vessels Fishing outside Namibian Waters in Breach of Conditions Sets forth in a Valid Fishing Vessel Licence.** Owners, lessees, charterers or masters of foreign flag vessels validly licenced under Namibian law, using such vessel for harvesting marine resources outside Namibian waters, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NAD 2 000 000.

**Owners and Masters of Namibian Flag Vessels Fishing without Valid Fishing Vessel Licence.** Owners, lessees, charterers or masters of Namibian flag vessels, using such vessel to harvest marine resources, or allows it to be so used, without the authorisation of a valid fishing vessel licence in respect thereof, shall be guilty of an offence and liable on conviction to a fine not exceeding NAD 2 000 000.

**Fishers Engaged in Illegal Fishing Activities.** Persons harvesting marine resource without fishing permit or in contravention of a fishing quota shall be guilty of an offence and liable on conviction to a fine not exceeding NAD 1 000 000. Furthermore, persons fishing in breach of the conditions contained in a fishing permit or harvesting any marine animal by means of driftnets with a total length exceeding 2.5 kilometres shall be guilty of an offence and liable, on conviction, to a fine not exceeding NAD 500 000.

**Illegal Transshipment and Landing.** All vessels in the Namibian Waters and Namibian flag vessels inside and outside those waters may not tranship, land, attempt to tranship or land, or assist any other vessel to tranship or land any marine resources, unless such transshipment or landing is authorised by a licence or authorisation obtained from the Minister and is executed in accordance with any conditions contained in the licence or authorisation in question. Any person landing or transshipping any marine resource in any place or manner not authorised by or under the Act, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NAD 1 000 000.

**Determination of Monetary Value of Advantage in Consequence of Offence.** If a person is convicted of an offence under the Act, the Court shall summarily enquire into and determine the monetary value of any advantage or potential advantage which such person has or could have gained in consequence of that offence, and, in addition to any other penalty that may be imposed in respect of that offence, impose a fine equal to three times the value so determined.

**Forfeiture.** Where a Court convicts a person of a fishing offence, the Court may, in addition to any other penalty it may impose, order any marine resource, fishing gear, vessel, vehicle or item in respect of which the offence was committed or the amount guaranteed in respect of the value thereof in case of a guarantee was furnished, to be forfeited to the state.

**Suspension, Cancellation or Reduction of Rights Granted in Permits or Licences.** Furthermore, the Court or the Permanent Secretary of the Ministry of Fisheries and Marine Resources may also decide to suspend, cancel or reduce the rights granted in the fishing permit or fishing vessel licence.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

**Strengths.** The Act has a broad scope of application as it applies to all marine resources in the Namibian Waters. Furthermore, it confers to fishing inspectors a broad range of monitoring, boarding, inspection and seizure powers which may be exercised (1) with respect to Namibian flag vessels inside and outside Namibian waters; and (2) with respect to foreign flag vessels inside Namibian waters and, to the extent authorised by international agreements to which Namibia is a party, outside Namibian waters. Finally, the Act provides for a clear set of sanctions and penalties in case of offences relating to fishing activities.

**Weaknesses.** The Act does not appear to present any structural weaknesses.

## **G. Implementation of the 1993 FAO Compliance Agreement**

Namibia deposited its instrument of acceptance of the 1993 FAO Compliance Agreement on 7 August 1998.



The Act allows to implement the 1993 FAO Compliance Agreement to some extent. A person holder of a fishing permit who wishes to use a Namibian flag vessel for harvesting marine resource outside Namibian waters, i.e. on the high seas, must apply for a fishing vessel licence to the Minister of Fisheries. The Minister may refuse an application for a licence if he is satisfied that the approval might threaten the sustainability of a particular marine resource or the issue of the licence would be inconsistent with an international agreement to which Namibia is a party. Moreover, as regards Namibian flag vessels, fisheries inspectors have the same enforcement powers whether the vessel is fishing in the Namibian EEZ or in the high seas.

However, Namibian fisheries legislation does not contain specific legal requirements as set forth in the 1993 FAO Compliance Agreement such as those dealing with high seas permit registers, high seas conservation and management measures or port-state control in case of a suspected high seas foreign fishing vessel of a flag-state party to the 1993 FAO Compliance Agreement entering voluntarily its ports.

## **H. Implementation of the 1995 Fish Stocks Agreement**

Namibia deposited its instrument of ratification of the 1995 UN Fish Stocks Agreement on 8 April 1998. The following compatible provisions could be identified in the Namibian Fisheries Legislation:

Namibian fisheries inspectors may exercise their power (1) with respect to Namibian flag vessels inside and outside Namibian waters; and (2) with respect to foreign flag vessels inside Namibian waters and, to the extent authorised by international agreements to which Namibia is a party, outside Namibian waters.

The Act also establishes the Fisheries Observers Agency whose functions are, *inter alia*, to provide fisheries observers for the benefit of the Ministry and to, pursuant to an agreement managing marine resources outside Namibian waters, and to which Namibia is a party, make fisheries observers available on a commercial basis to organisations managing marine resources outside Namibian waters and established by that agreement.

## **IV. NEW ZEALAND**

### **A. Introduction**

**Fisheries Act 1996.** The current fisheries legislation in force in New Zealand is the Fisheries Act 1996, as amended. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability. It sets forth environmental principles according to which (1) associated or dependent species should be maintained above a level that ensures their long-term viability; (2) biological diversity of the aquatic environment should be maintained; and (3) habitat of particular significance for fisheries management should be protected.

**Area of Application.** The Fisheries Act 1996 applies to the New Zealand Fisheries Waters (EEZ, territorial sea and the internal waters) as well as, since 1999, to the high seas. To this

end, the Fisheries Act 1996 was amended in 1999 by inserting a specific Part 6A entitled 'High Seas Fishing'. This part deals with taking and transportation of fish on the high seas using New Zealand ships as well as with the use of foreign vessels on high seas by New Zealand nationals.

**Fishing Permits.** The Act prohibits fishing in the New Zealand Fisheries Waters without a fishing permit granted by the Chief Executive. Furthermore, the Act states that no person shall at any time hold more than one fishing permit and no fishing permit holder may transfer that permit to any other person. The fishing permit shall specify the stocks to which it relates and may be subject to such conditions (including conditions relating to areas, quantities, methods, the use or non-use of vessels and the specific vessel or types of vessels (if any) that may be used, types and amounts of fishing gear, the taking or handling of fish, aquatic life, or seaweed, places where fish, aquatic life, or seaweed may be landed, and periods of time) as the Chief Executive considers appropriate.

**Foreign Fishing Vessels Fishing Licence.** Operators of foreign fishing vessels are required to be holder of a New Zealand foreign fishing licence in order to fish within the EEZ the foreign allowable catch in respect of any stock as determined by the Chief Executive.

**Fishing Vessel Registration.** Every fishing permit holder is required to register any fishing vessel used by the fishing permit holder to take fish, aquatic life, or seaweed. The vessel shall be registered in the Fishing Vessel Register (see *infra*) as a fishing vessel.

**High Seas Fishing Permits.** See *infra*.

**Registers.** The Chief Executive shall keep three registers: (1) The Fishing Permit Register; (2) the Fishing Vessel Register; and (3) the High Seas Permit Register.

(1) The Fishing Permit Register contains, *inter alia*, the following particulars: (a) The name and postal address of the permit holder; (b) the period for which the permit is valid; (c) whether the permit is for the time being in force or suspended; (d) the stocks the permit authorises to be taken; (f) the species and areas the permit authorises to be farmed; (g) the fishing methods authorised by the permit; and (h) such other particulars as may be required by regulations implementing this Act;

(2) The Fishing Vessel Register contains, *inter alia*, (a) the name of the vessel; (b) the name and postal address of the owner of the vessel; (c) the name and postal address of the operator and notified users (if any) of the vessel; (d) the name and address of the authorised agent (if any); (e) the vessel identification number; (f) whether the vessel is registered as a fishing vessel or a fish carrier; (g) the period for which the vessel is registered; (h) such other particulars as may be required by regulations implementing this Act; and

(3) The High Seas Permit Register contains all particulars required by regulations implementing this Act. To the best of our knowledge no such regulations have been adopted yet.

## **B. Reporting**

**Reporting Obligations.** The Fisheries Act 1996, as amended allows regulations to be taken for the purpose of requiring the installation and maintenance of equipment to monitor fishing or transportation and the payment of any associated prescribed fees and charges. However, to the best of our knowledge, no such regulation has been taken yet.

Furthermore, the Act requires that every fishing permit or licence holder must complete and provide the required records and returns relating to the taking of fish, aquatic life, or seaweed in accordance with any regulations made under this Act. Also (1) owners, operators, and masters of vessels registered under this Act; (2) owners and persons in charge of any premises where fish, aquatic life, or seaweed are received, purchased, stored, transported, processed, sold, or otherwise disposed of; and (3) persons engaged in the receiving, purchasing, transporting, processing, storage, sale, or disposal of fish, aquatic life, or seaweed, shall keep such accounts and records, and provide to the Chief Executive such returns and information, as may be required by or under regulations made under this Act.

These regulations may require that fish, aquatic life, or seaweed be landed at designated landing sites or designated weighing stations, at specified times, with an appointed person present. The Act provides that such regulations may also require owners, operators, or masters of vessels, or any permit holders, or any of them, to notify appointed persons of the intention to land fish, aquatic life, or seaweed.

## **C. Boarding, Inspection and Powers of Authorised Officers**

**Powers of Fishery Officers.** Fishery officers are authorised officers for the purposes of the enforcement and administration of the Fisheries Act 1996. This Act confers on them, *inter alia*, the following powers: Power of entry, search and questioning, power of arrest, power to give directions to the master, power to use reasonable force, power to take copies of documents and power to seize.

**General Powers.** A fishery officer may do all such acts and things and give such directives as are reasonably necessary for the purposes of exercising any of his or her powers under this Act. The powers of a fishery officer under this Act are exercisable (1) within New Zealand; (2) in New Zealand fisheries waters (internal waters, territorial sea and EEZ); (3) beyond New Zealand fisheries waters to the extent specified in the provisions of the Act related to the right of hot pursuit.

**Right of Hot Pursuit.** According to the Act, a fishery officer is not authorised to exercise any powers under this Act in respect of any foreign vessel or any person aboard any such vessel unless the fishery officer (1) believes on reasonable grounds that any person on board the vessel has committed an offence in New Zealand fisheries waters; and (2) is in fresh pursuit of, or has freshly pursued, the vessel; and (3) commenced that pursuit in New Zealand fisheries waters.

**High Seas Fishery Inspectors.** See *infra*.

**Powers of Entry, Search and Questioning.** A fishery officer may, at any reasonable time, (1) stop, enter, or pass across any land in order to enter and examine any vessel or vehicle, or

enter and examine any premises or place, or examine any record, document, article, and any gear, apparatus, device, or contents of any kind therein; or (2) stop any person and examine any record, document, article, container, gear, apparatus, device, fish, aquatic life, or seaweed in the possession of that person. However, a fishery officer shall not enter a place that is a private dwelling place, or the enclosed garden or curtilage of a private dwelling place, or any Maori reservation, unless he or she is authorised in writing by a Justice, District Court Judge, or Registrar of a District Court.

In this case, a Justice, District Court Judge, or Registrar of a District Court shall not grant such authority unless he or she is satisfied that the fishery officer has reasonable grounds for requiring entry into the private dwelling place, garden or curtilage, or Maori reservation.

If a fishery officer believes on reasonable grounds that a person is or has been engaged in the taking or selling of fish, aquatic life, or seaweed; or a person has purchased or is or has been in possession of fish, aquatic life, or seaweed; or a person is committing or has committed an offence against this Act, the fishery officer may, at any reasonable time, (1) question that person or any other person and (2) require the person being questioned to provide an answer, including any explanation or information concerning any vessel, or any place or thing, or any fish, aquatic life, or seaweed, or fishing method, gear, apparatus, record, document, article, device, or thing relating to the taking, sale, purchase, or possession of any fish, aquatic life, or seaweed; and (3) require that person or any other person to produce any permit, authority, approval, permission, licence, or certificate issued in respect of any vessel or person. However, the Act also sets forth the protection principle against self-incrimination. Indeed, the Act states that nothing in this Act shall be construed so as to require any person to answer any question tending to incriminate himself or herself.

**Power of Arrest.** A fishery officer may, if he or she believes on reasonable grounds that any person is offending the Act, order that person to forthwith desist from offending. Moreover, a fishery officer may, at any reasonable time, if he or she believes on reasonable grounds that any person is offending or has committed an offence against this Act, request that person to supply to that fishery officer the name by which that person is commonly known and the person's family name or surname, date of birth, actual place of residence, and occupation. Furthermore, if the fishery officer believes on reasonable grounds that any of the details supplied are false or misleading, the fishery officer may request that person to supply to that fishery officer such verification of those details as it is reasonable in the circumstances to require the person to provide. If any person continues to offend after being required to desist, or refuses to comply with the above-mentioned requests, the fishery officer may arrest that person without warrant. If a fishery officer arrests such person, the fishery officer shall cause the person to be delivered into the custody of a member of the police as soon as practicable.

**Power to Give Directions to Masters.** A fishery officer may, if he or she believes that a vessel is being or has been used in contravention of the provisions of this Act or of the conditions of any permit, authority, approval, permission, licence, registration, or certificate issued under this Act, require the master to take the vessel, as soon as reasonably practicable, to the nearest available port, or such other port as is agreed between the master and the fishery officer. If a fishery officer has given such direction, he or she may also give to the master or any person on board the vessel any reasonable directions in respect of any activity, method, procedure, item, gear, document, fish, aquatic life, seaweed, property, or thing while the vessel is proceeding to port.

**Power to Use Reasonable Force.** For the purpose of the enforcement of this Act, a fishery officer is justified in using such force as may be reasonably necessary to enable the exercise of his or her powers under this Act.

**Powers of Seizure.** A fishery officer may seize (1) any vessel, vehicle or other conveyance, fishing gear, implement, appliance, material, container, goods, equipment, or thing which he or she believes on reasonable grounds is being or has been or is intended to be used in the commission of an offence against this Act; (2) any fish, aquatic life, or seaweed which he or she believes on reasonable grounds are being, or have been, taken, killed, transported, bought, sold, or found in the possession of any person, in contravention of this Act; or any fish, aquatic life, or seaweed with which such fish, aquatic life, or seaweed have been intermixed; (3) any article, record, document, or thing which he or she believes on reasonable grounds is evidence of the commission of an offence against this Act. Any property seized shall be delivered into the custody of the Chief Executive.

On application by the owner or person entitled to possession of the property seized, the Chief Executive may, at any time until an information or charge is laid for the alleged offence in respect of which the property was seized, release the property to any such person under bond in such sum and under such sureties and conditions (if any) as the Chief Executive may specify.

#### **D. PROSECUTION PROCEDURES**

**Proceedings for Offences.** Any offence against this Act shall be deemed to have been committed in New Zealand.

**Minor Offence Procedure.** If a charge is brought against any person for an offence against this Act which carries a fine not exceeding NZD 1 000, a summons to that person shall not be issued unless the Chief Executive or a fishery officer satisfies the District Court Registrar that a summons should be issued. Except where a summons is issued, all proceedings brought in respect of such an offence shall be commenced by the Chief Executive, or a fishery officer, by filing a notice of prosecution in the form prescribed for the purposes of the Summary Proceedings Act 1957.

**Strict Liability.** In any proceedings for an offence against this Act, it shall, in principle not be necessary for the prosecution to prove that the defendant intended to commit the offence.

**Defences Available under the Act.** It is a defence in any proceedings for an offence against the Act, if the defendant proves that (1) the contravention was due to the act or default of another person, or to an accident or to some other cause beyond the defendant's control; and (2) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

In the case of an offence concerning the taking of any fish, aquatic life, or seaweed in contravention of any provision of the Act prohibiting the taking, or requiring the taking to be under the authority of a licence, permit, or annual catch entitlement, it is also a defence if the defendant proves that (1) he immediately returned the fish, aquatic life, or seaweed to the waters from which they were taken except where such return was prohibited by this Act; and

(2) the defendant complied with all the requirements of this Act in respect of the recording and reporting of the taking, return, or landing of the fish, aquatic life, or seaweed.

**Rewards to Informants.** The Chief Executive may make such payments as he thinks fit to any person who has supplied information that has assisted in the detection of offences against this Act. All payments shall be made from money from time to time appropriated by Parliament for the purpose.

## **E. Sanctions and Penalties**

The Act sets forth a long list of sanctions and penalties. The most important offences and sanctions for this study are listed below.

**Persons using Foreign Fishing Vessels for Fishing in New Zealand EEZ without a valid New Zealand Foreign Fishing Licence.** Person taking any fish, aquatic life, or seaweed using a foreign fishing vessel without a valid New Zealand foreign fishing licence, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NZD 500 000.

**Persons Using Foreign Fishing Vessels for Fishing in New Zealand Fishing Waters in Breach of Conditions set forth in a valid Foreign Fishing Licence.** A person holder of a valid New Zealand foreign fishing licence taking any fish, aquatic life, or seaweed using a foreign fishing vessel, but in breach with the conditions as set forth in the licence, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NZD 250 000.

**Persons Fishing in New Zealand Fisheries Waters without a Valid Fishing Permit.** Person fishing without a valid fishing permit or with more than one fishing permit, shall be guilty of an offence and liable, on conviction, to a fine not exceeding NZD 250 000.

**Persons Fishing in New Zealand Fisheries Waters in Breach of Conditions Enshrined in a Valid Fishing Permit.** Persons fishing in New Zealand EEZ in breach of conditions contained in a valid fishing permit shall be guilty of an offence and liable, on conviction, to a fine not exceeding NZD 100 000.

**Illegal Buying, Selling or Possessing Fish.** Every person commits an offence who buys, sells, or possesses any fish, aquatic life, or seaweed the taking or landing of which has not been recorded or reported in accordance with this Act. Such persons shall be guilty of an offence and liable on conviction to a fine not exceeding NZD 250 000, except that if, in the case of an individual defendant, the defendant establishes that the fish, aquatic life, or seaweed was purchased or possessed otherwise than for the purpose of sale, the fine shall not exceed NZD 100 000.

**Knowingly Using False Documents to Obtain Benefit or Making False Statement.** Every person commits an offence who knowingly makes any false or misleading statement, or knowingly omits any information, in any communication, application, record, or return prescribed by or in accordance with this Act, or required for its administration; or uses a false document, communication, application, record, or return to obtain a benefit. Such persons shall be guilty of an offence and liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding NZD 250 000, or to both.

**Imprisonment of Foreign Persons.** In the absence of an agreement to the contrary made between the Government of New Zealand and the government of another country, the Act prohibits the imposition of a term of imprisonment on any person (other than a New Zealand citizen or a person entitled to reside in New Zealand indefinitely) who is convicted of an offence against this Act in respect of a foreign fishing vessel. If such person would be liable to suffer imprisonment for the commission of any offence, the person shall instead of such imprisonment be liable on summary conviction to a fine not exceeding NZD 500 000.

**Matters to be Taken into Account by Court in Sentencing.** If any person is convicted of an offence against this Act, the Court takes, in imposing sentence, into account the purpose of this Act and has regard to (a) the difficulties inherent in detecting fisheries offences; and (b) the need to maintain adequate deterrents against the commission of such offences.

**Forfeiture.** The Act sets forth a set of rules regarding forfeiture of fish or property according to which the Court may order the forfeiture of the vessel, net or equipment as well as the fish on board and the proceeds of the sale of any such fish.

**Suspension, Cancellation or Reduction of Rights Granted in Permits or Licences.** Furthermore, the Chief Executive may also decide to suspend, cancel or reduce the rights granted in the fishing permit or fishing vessel licence. Finally, in case of reoffending, the Court may also rule that a person be prohibited from being engaged in fisheries or any associated activities.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

**Strengths.** New Zealand Fisheries Act 1996 as amended, constitutes a single act providing a set of numerous and detailed rules regarding fisheries. It includes provisions dealing with areas or topics such as fisheries administration, sustainability measures, quota management system, fishing permits, fishing vessel registration, Taiapure-local fisheries and customary fishing, record-keeping, reporting, disposal of fish, appointment and powers of fishery officers, observer programmes, offences and penalties, cost recovery and high sea fishing. Furthermore, it conferred to fisheries officers a broad range of monitoring, boarding, inspection and seizure powers which may be exercised (1) within New Zealand; (2) in New Zealand fisheries waters (internal waters, territorial sea and EEZ); (3) on the high seas to the extent specified in the provisions of the Act related to the right of hot pursuit and (4) on the high seas with respect to New Zealand flag vessels and (5) on the high seas with respect to foreign flag vessels to the extent authorised by international agreements to which New Zealand is a party (see *infra*). Finally, the Act provides for a clear set of sanctions and penalties in case of offences relating to fishing activities.

**Weaknesses.** New Zealand Fisheries Act 1996 as amended does not present any structural weaknesses.

## **G. Implementation of the 1993 FAO Compliance Agreement**

New Zealand is not a party to the 1993 FAO Compliance Agreement. Nevertheless, the New Zealand legislation is to a very great extent compatible with the FAO agreement. Indeed, the Fisheries Act 1996 Amendment Act (No. 2) 1999 amends the New Zealand 1996 Fisheries

Act by inserting an additional part, namely Part 6A entitled 'High Seas Fishing'. The following provisions listed below are compatible with the 1993 FAO Compliance Agreement.

**Use of Foreign Vessels on High Seas by New Zealand Nationals.** According to the amended Act, no New Zealand national may use a foreign vessel to take (by any method) on the high seas any fish, aquatic life or seaweed for sale, or to transport any fish, aquatic life, or seaweed taken on the high seas, except in accordance with an **authorisation** issued by the following states: (1) A state party to the 1993 FAO Compliance Agreement; (2) a state party to the 1995 UN Fish Stocks Agreement; (3) a state that is a party to, or has accepted the obligations of a global, regional or sub-regional fisheries organisation or arrangement to which the authorisation relates; or (4) by a state that is a signatory to the 1995 UN Fish Stock Agreement; and has legislative and administrative mechanisms to control its vessels on the high seas in accordance with that agreement. Every New Zealand national using foreign fishing vessels to harvest marine resources on the high seas for sale, or to transport any such marine resources taken on the high seas without such authorisation, shall be guilty of an offence and liable on conviction to a fine not exceeding NZD 250 000.

**Use of New Zealand Fishing Vessels on the High Seas.** The amended Act requires persons using New Zealand fishing vessels in order to harvest or transport marine resources on the high seas to be holder of a **high seas fishing permit** issued in respect of that vessel. All high seas fishing permits are registered in the **High Seas Permit Register**. Moreover, the ship must be registered in the Fishing Vessel Register as a fishing vessel and the holder of the high seas permit is named in the Fishing Vessel Register as an operator of that vessel. Every person using New Zealand fishing vessels on the high seas without a high seas fishing permit shall be guilty of an offence and liable, on conviction, to a fine not exceeding NZD 250 000.

**Issue of High Seas Fishing Permits.** The Chief Executive may issue a high seas fishing permit only if he is satisfied that three conditions are met. Firstly, the vessel to which the permit relates must be registered under New Zealand law and in the Fishing Vessel Register as either a fish carrier or a fishing vessel. Secondly, the applicant operator of the vessel must not have been engaged in fishing or transportation (i) in a manner that undermined the effectiveness of international conservation and management measures; and (ii) that has resulted in a high seas fishing permit, or an equivalent authorisation granted by a participating state or a party to the 1993 FAO Compliance Agreement, being suspended or revoked during the three years immediately preceding the application (hereinafter cited as the three-year period). Thirdly, the applicant must not have been engaged in fishing or transportation on the high seas during the three-year period (i) without a high seas fishing permit (or equivalent authorisation granted by a participating state), if a high seas fishing permit was required for that fishing or transportation; and (ii) in a manner that undermined the effectiveness of international conservation and management measures.

Moreover, before issuing a high seas fishing permit the Chief Executive may have regard to (1) the previous offending history (if any), in relation to fishing or transportation (whether within the national fisheries jurisdiction of New Zealand or another country, or on the high seas), of the vessel's owner, operator, foreign charter party, notified user, master, or crew; and (2) such other matters as the Chief Executive considers relevant.

**Terms and Content of High Seas Fishing Permits.** According to the Act, high seas fishing permits may be issued for a period not exceeding five years. Furthermore, a high seas fishing



permit must specify (1) the name of the permit holder; (2) the fishing vessel or fish carrier to which the permit relates; and (3) the conditions to which the permit is subject.

**Compliance with Conditions and Regulations.** A person taking fish on the high seas under the authority of a high seas fishing permit must comply with (1) any conditions contained in the permit as well as (2) any regulations made under this Act. Every persons who contravenes a condition enshrined in a high seas fishing permit commits an offence and is liable, on conviction, to a fine not exceeding NZD 100 000.

**Conditions of High Seas Fishing Permits.** A high seas fishing permit may be subject to such conditions as the Chief Executive considers appropriate, including conditions relating to the following:

- (a) The areas in which fishing or transportation is authorised;
- (b) the seasons, times, and particular voyages during which fishing or transportation is authorised;
- (c) the species, size, age, and quantities of fish, aquatic life, or seaweed that may be taken or transported;
- (d) the methods by which fish, aquatic life, or seaweed may be taken;
- (e) the types, size, and amount of fishing gear or equipment that may be used or carried, and the modes of storage of that gear or equipment when not in use;
- (f) the use, transfer, transshipment, landing, receiving, and processing of fish, aquatic life, or seaweed taken;
- (g) procedures or requirements, or both, enabling the verification of fish, aquatic life, or seaweed taken or being taken by the vessel, including procedures or restrictions relating to the species of, quantities of, or areas from which, fish, aquatic life, or seaweed are being or have been taken by the vessel;
- (h) entry by the vessel to New Zealand or foreign ports, whether for the inspection of its catch or for other purposes;
- (i) reports and information required to be given to the Chief Executive by the permit holder, and records required to be kept by the permit holder;
- (j) management controls regarding fishing-related mortality of fish, aquatic life, or seaweed;
- (k) the conduct of specified programmes of fisheries research;
- (l) the marking of the vessel and other means for its identification;
- (m) the placing of observers on the vessel and the payment of any associated prescribed fees and charges by the permit holder;
- (n) the installation and maintenance of equipment to monitor fishing or transportation under the permit and the payment of any associated prescribed fees and charges by the permit holder;
- (o) the installation on the vessel and the maintenance of any automatic location communicator or other equipment for the identification and location of the vessel, and of adequate navigational equipment to enable the vessel to fix its position, and the payment of any associated prescribed fees and charges by the permit holder;
- (p) the carriage on board the vessel of specified charts, publications, and instruments;
- (q) the disposal of fish, aquatic life, and seaweed; and
- (r) measures to give effect to international conservation and management measures.

Furthermore, the Chief Executive may from time to time, by written notice to the holder of a high seas fishing permit amend, add to or revoke any conditions of the permit with effect from the date specified in the notice.

**High Seas Fishing Permit to be Carried on Vessel.** The Act states that persons taking or transporting fish under the authority of a high seas fishing permit must (1) carry the permit (or a copy of the permit) on board the vessel to which the permit relates at all times; and (2) show the permit to a fishery officer or high seas fishery inspector (see *infra*) or foreign high seas inspector on demand. Persons failing to carry their high seas fishing permits on vessel commit an offence and shall be guilty, on conviction, to a fine not exceeding NZD 100 000.

**Suspension and Revocation of High Seas Fishing Permits.** The Chief Executive may always revoke a high seas fishing permit if he is satisfied that any information or evidence supplied with the application for the permit was false or misleading in any material particular. Moreover, the Chief Executive may also suspend or revoke a high seas fishing permit if he is satisfied that (1) the vessel to which the permit relates is no longer registered under New Zealand law or is no longer registered in the Fishing Vessel Register as either a fish carrier or a fishing vessel; or (2) the permit holder, or any person authorised to fish under the authority of the permit, has been convicted of a high seas fishing offence; or (3) the permit holder has been convicted of a fishing-related offence under the laws of a country other than New Zealand; or (4) the permit holder is no longer the owner or operator of the vessel.

## H. Implementation of the 1995 UN Fish Stocks Agreement

New Zealand signed the 1995 UN Fish Stocks Agreement on 4 December 1995. However, no instrument of ratification has been deposited by New Zealand. Nevertheless, the following provisions listed below have been identified as compatible with the 1995 UN Fish Stocks Agreement.

**Issue of High Seas Fishing Permits.** See *supra*.

**High Seas Fisheries Inspectors.** According to the Act, every fishery officer (see *supra*) is a high seas fishery inspector.

**Full Powers of High Seas Fishery Inspectors in Relation to New Zealand Vessels.** A high seas fishery inspector has all of the enforcement powers (see *supra*) of a fishery officer in relation to a vessel on the high seas that (1) is registered under New Zealand law; or (2) flies the New Zealand flag.

**Powers of High Seas Fishery Inspectors in Relation to Foreign Vessels.** According to the amended Act, a high seas fishery inspector may, for the purpose of ensuring compliance with international conservation and management measures adopted by a global, regional, or sub-regional fisheries organisation or arrangement of which New Zealand is a member or in which New Zealand is a participant, board and inspect a vessel in an area of the high seas that is covered by that organisation or arrangement, or in New Zealand fisheries waters, if (1) the vessel is not registered under New Zealand law; and (2) the flag state of the vessel is (a) a party to the 1995 UN Fish Stocks Agreement, whether or not the flag state is a member of, or a participant in, that organisation or arrangement; or (b) a member of, or participant in, a global, regional, or sub-regional organisation or arrangement that has established boarding

and inspection procedures as provided in Article 21 (2) of the 1995 UN Fish Stocks Agreement.

If such flag state authorises the New Zealand Chief Executive (in accordance with Article 21 (6)(b) of the 1995 UN Fish Stocks Agreement) to investigate whether the vessel has engaged in an activity contrary to those international conservation and management measures, high seas fishery inspectors have, in relation to the vessel, (a) all of the powers of a fishery officer; or (b) if the flag state specifies the powers of a fishery officer that the high seas fishery inspectors may exercise, those powers.

**Boarding and Inspection Procedures Relating to Foreign Vessels.** A high seas fishery inspector who boards such foreign vessel must (1) give the master of the vessel evidence of the inspector's identity and of the fact that he or she is a high seas fishery inspector; and (2) provide to the master of the vessel a copy of a report on the boarding and inspection, including any objection or statement that the master has advised the high seas fishery inspector that the master wishes to have included in the report; and (3) promptly leave the vessel after completing the inspection unless he or she finds evidence that the vessel has committed a serious violation. Moreover, the Chief Executive must provide a copy of such report to the authorities of the Flag State of the vessel. At the time of a boarding and inspection, the Chief Executive must initiate action to give notice of the boarding and inspection to the authorities of the flag state of a vessel that is boarded and inspected. Furthermore, high seas fishery inspectors must not interfere with any attempt by the master of the vessel to communicate with the authorities of the Flag State of the vessel during the boarding and inspection.

Finally, when undertaking a boarding and inspection of foreign vessels, high seas fishery inspectors are authorised, in order to verify compliance by the vessel with the relevant international conservation and management measures, to inspect (a) the vessel; (b) the vessel's authorisation to fish, or transport fish, aquatic life, or seaweed, in the relevant area of the high seas; (c) the vessel's fishing gear and equipment; (d) facilities; (e) fish and fish products; and (f) records and other relevant documents.

**Investigations of Serious Violations Committed by Foreign Vessels.** If, as a result of a boarding and inspection of a foreign vessel, a high seas fishery inspector believes that the vessel has been used to commit a serious violation, the high seas fishery inspector must notify the Chief Executive as soon as practicable; and the Chief Executive must advise the authorities of the flag state of the vessel as soon as practicable. Moreover, the high seas fishery inspector may remain on board the vessel and may require the master to assist in further investigations for so long as the flag state fails to respond to the advice or fails to take action under its own law in respect of the serious violation. Finally, the high seas fishery inspector may require the master to bring the vessel without delay to a port specified by the high seas fishery inspector if the flag state fails, within three working days after receipt by the authorities of the flag state of the advice, to respond to such advice; or take action under its own law in respect of the serious violation. 'Working day', in relation to a flag state, means any day of the week other than (a) Saturday or Sunday; or (b) a public holiday in that state.

**Boarding and Inspection Procedures Modified by a Global, Regional, or Sub-regional Fisheries Organisation or Arrangement.** The provisions of the Fisheries Act 1996 as amended, related to the powers of high seas fisheries officers apply where (1) a global, regional, or sub-regional fisheries organisation or arrangement of which New Zealand is a

member, or in which New Zealand is a participant, establishes procedures for boarding and inspection of vessels as provided in Article 21 (2) of the 1995 UN Fish Stocks Agreement; and (2) a high seas fishery inspector boards and inspects a foreign vessel for the purpose of ensuring compliance with international conservation and management measures established by that organisation or arrangement. However, to the extent that the procedures established by the organisation or arrangement are different from the above-mentioned requirements, the high seas fishery inspector and the Chief Executive must comply with the procedures established by the organisation or arrangement.

**Persons on New Zealand Ships to Cooperate with Foreign High Seas Inspectors.** The master of a ship must cooperate with a foreign high seas inspector appointed by a participating state that is a member of or participant in a global, regional, or sub-regional fisheries organisation or arrangement where (1) the ship is registered under New Zealand law or flies the New Zealand flag; and (2) the ship is on the high seas in an area covered by that organisation or arrangement; and (3) the organisation or arrangement has not established procedures for boarding and inspecting vessels as provided in Article 21(2) of the 1995 UN Fish Stocks Agreement. Moreover, the master of a ship must also cooperate with a foreign high seas inspector appointed in relation to an area covered by a global, regional, or sub-regional fisheries organisation or arrangement where (1) the ship is registered under New Zealand law or flies the New Zealand flag; and (2) the ship is on the high seas in an area covered by the organisation or arrangement; and (3) the organisation or arrangement has established procedures for boarding and inspecting vessels as provided in Article 21(2) of the 1995 UN Fish Stocks Agreement.

Furthermore, every person on such ship must (a) accept and facilitate prompt and safe boarding of the ship by the foreign high seas inspector; (b) cooperate with and assist in the inspection of the vessel; (c) not obstruct, intimidate, or interfere with the foreign high seas inspector in the performance of his or her duties; (d) allow the foreign high seas inspector to communicate with the authorities of New Zealand and of the state that appointed the inspector; (e) provide reasonable facilities to the foreign high seas inspector, including food and accommodation (where appropriate); and (f) facilitate safe disembarkation from the ship by the foreign high seas inspector. Persons on New Zealand vessels who do not cooperate with foreign high seas inspectors, commit an offence and are liable, on conviction, to a fine not exceeding NZD 250 000.

**Powers of foreign high seas inspector when requested to investigate.** The Chief Executive may authorise a foreign high seas inspector to investigate a New Zealand flag vessel, under Article 21(6)(b) of the UN Fish Stocks Agreement, if (1) the inspector has boarded the ship under (a) the Fish Stocks Agreement; or (b) boarding and inspection procedures established as provided in Article 21.2 of this Agreement; and (2) the Chief Executive receives a report from the inspector stating that there is evidence that the ship has taken or transported fish, aquatic life, or seaweed in contravention of international conservation and management measures. If the Chief Executive authorises the foreign high seas inspector to investigate under Article 21(6)(b) of the 1995 UN Fish Stocks Agreement, the foreign high seas inspector has the powers of a New Zealand fishery officer in relation to the ship; and the Chief Executive must advise the master of the ship as soon as practicable.

For the purposes of any proceedings for an offence under the provisions of the 1996 New Zealand Fisheries Act related to high seas fishing, evidence obtained by a foreign high seas

inspector in the exercise of his or her powers is admissible as if the evidence were obtained by a New Zealand fishery officer.

**Chief Executive May Withdraw Authorisation to Fish under High Seas Fishing Permit.**

The Chief Executive may, by notice to the master of the ship (notice which may be given orally or by any form of electronic communication), suspend the high seas fishing permit under which the ship is taking or transporting fish, if he receives a report from a foreign high seas inspector that a person on a ship is (1) failing to comply with the section entitled 'Persons on New Zealand Vessels to Cooperate with Foreign High Seas Inspectors'; or (2) failing to cooperate with or obstructing the foreign high seas inspector in the exercise of his or her powers under (i) the 1995 UN Fish Stocks Agreement; or (ii) boarding and inspection procedures established as provided in Article 21 (2) of that agreement.

**Visits by Foreign Ships in New Zealand Internal Waters.** The master of a fishing vessel or fish carrier that is not a New Zealand ship, a New Zealand fishing vessel, or a registered fish carrier, who intends to bring the vessel into the internal waters of New Zealand, must give the Chief Executive at least 72 hours' notice, in the approved manner, of his or her intention to do so. If the Chief Executive is satisfied that a vessel has undermined international conservation and management measures, the Chief Executive may, by notice to the master of a vessel, direct the vessel not to enter the internal waters of New Zealand or if it has entered the internal waters of New Zealand, to leave those waters.

Moreover, if the Fisheries Minister is satisfied on reasonable grounds that it is necessary for the purpose of the conservation and management of fish, the Minister may, by notice in the Gazette, direct any class or classes of fishing vessel or fish carrier not to enter the internal waters of New Zealand.

The master of a vessel to which an above-mentioned notice applies, who brings the vessel into the internal waters of New Zealand knowing that the notice applies to the vessel, commits an offence and is liable on conviction to a fine not exceeding NZD 100 000.

However, the above-mentioned provisions do not prevent a vessel from entering or remaining in the internal waters of New Zealand for such period as is necessary for the purposes of obtaining the food, fuel, and other goods and services necessary to enable the vessel to proceed safely and directly to a port outside New Zealand.

**Administrative Penalties for Minor High Seas Fisheries Offences.** The amended Act sets forth an administrative penalty procedure for minor high seas fisheries offences (fines not exceeding NZD 250 000). If the person admits the high seas fisheries offence, the Chief Executive may impose on that person a monetary administrative penalty not exceeding one-third of the maximum penalty to which the person would be liable if the person were convicted of the offence by a Court. However, the person has always the right to require that the alleged high seas fisheries offence be dealt with by a Court.

## V. NORWAY

### A. Introduction

Norway's high seas fishing policy is based on legislation adopted prior to the conclusion of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. Norwegian vessels had already in 1917 the obligation to register in order to obtain a licence from the Fisheries Directorate.

**Sea Water Fisheries Act.** The current fisheries legislation in force is the Sea Water Fisheries Act (hereinafter cited as the Act).

**Area of Application.** The Act applies to the management, protection and utilisation of marine resources in waters under Norwegian jurisdiction, in waters outside any national fisheries jurisdiction and in waters under the fisheries jurisdiction of a foreign state if fishing is being conducted using a Norwegian vessel.

### B. Reporting

**Catch Data Reporting Obligations.** The owner or user of a fishing or hunting vessel has to submit reports to the fisheries administration and sales organisations concerning catch sizes, fish species, catch periods, catch areas, fishing gear, catch values, the time of departure from fishing grounds, the time of arrival at port, to whom and for what purpose the catch is to be delivered and accounts for the operation of the vessel. Moreover, he or she has to submit reports and provide information, including separate provisions on processing on board, prior notification, delivery of catches and when and how often reports are to be submitted.

Furthermore, participants in hunting or fishing operations shall keep a watch on particular radio frequencies at given times to receive notification of any regulatory measures that are being implemented. The Ministry may issue further rules on the announcement of such reports. Owners or operators of fishing vessels shall keep a radio watch and answer calls on the radiotelephone.

Finally, any person who receives or sells catches from a Norwegian or foreign vessel shall submit reports and provide information, including prior notification of intention to call at a port, to the fisheries administration and the sales organisations.

**Norwegian Vessels Fishing on the High Seas.** Norwegian nationals and persons resident in Norway who engage in fishing operations with Norwegian vessels in waters outside the jurisdiction of any state, for stocks that are not regulated by the Norwegian authorities, shall send notification when fishing operations begin and when they are discontinued. They shall send weekly reports to the Directorate of Fisheries on the catch that was taken.

**Foreign Vessels Fishing in Waters under Norwegian Jurisdiction.** Fishing in Norwegian waters is prohibited for foreigners, unless they have obtained a licence from the Fisheries Director. Once they have obtained this licence, they shall report regularly to the Directorate. Before the commencement of the fishing operations they have to notify the Directorate at the earliest 24 hours and at the latest 12 hours prior to the fishing. The notification shall contain

information on the name, the registration number, the call signal, the date and position and the catch on board of the vessel. Moreover, during the activities in the waters under Norwegian jurisdiction, the vessel shall send weekly reports on the catch. Finally, a monthly report has to be sent by the fisheries authorities of the Flag State to the Fisheries Directorate. This report shall contain information on the quantities of the different species of fish in kilograms live weight.

### **C. Boarding, Inspection and Powers of Authorised Officers**

**Powers of the Directorate of Fisheries.** When exercising its control duties, the Fisheries Directorate shall be given unimpeded access to vessels, processing facilities, storehouses and harbour areas. The person in command of a vessel or such facilities shall give the Fisheries Directorate any necessary assistance and information, produce relevant objects and documents etc., certify copies and allow comments on the contravention to be entered in the catch logbook, sales note and the like. Vessels may be stopped for inspection. The Fisheries Directorate may if necessary request the assistance of the police in carrying out the inspection.

The Fisheries Directorate may inspect shipowners' accounts and order deep-freezing enterprises to provide information about catches which are temporarily stored on their premises. Moreover, the owner and the person in charge on board a vessel which supplies fish to foreign countries or to foreign ships, and businesses or companies which supply fish or fish products abroad may be ordered to provide the necessary information.

**Powers of Fishing Inspectors.** Inspectors may be placed on board to carry out inspection duties and observers may be placed on board to observe and register fishing operations. Necessary board and lodging shall be provided at the vessel's expense. The inspector or observer shall have use of the radio and other communication equipment without charge. The person in command of a vessel shall give the inspectors any necessary assistance and information, produce relevant objects and documents, including log books, hand over copies of documents etc., certify copies, and permit comments on any contravention to be entered in the catch logbook. The person in command may be ordered to haul in trawls or other gear.

**Costs.** The costs of the inspection and observation schemes shall be divided among all participating vessels in a specified vessel class. Vessels that have not paid the costs imposed in connection with the inspection and observation schemes may be refused permission to take part in fishing operations.

**Powers of the Coast Guard.** The Coast Guard may investigate offences committed within Coast Guard jurisdiction. The Coast Guard may take the necessary steps to maintain peace and order on fishing grounds.

To ensure compliance with the provisions set out in or issued pursuant to the Act, the Coast Guard may stop and inspect vessels.

If there is just cause to suspect that an offence has been committed, the prosecuting authority or the Coast Guard may order the suspected vessel to proceed to a Norwegian port. If necessary, a prize crew may be placed on board. The prize crew shall take over command of the vessel insofar as this is necessary to sail it to a Norwegian port.

If necessary, the police or Coast Guard may search persons. Arrests, and seizure may also be carried out.

**Pursuit Beyond Norwegian Fisheries Jurisdiction.** If a suspected contravention took place within the limits of the Norwegian fisheries jurisdiction and the vessel has been pursued without interruption, the vessel may be pursued beyond Norwegian fisheries jurisdiction.

#### **D. Prosecution Procedures**

**Seizure and Detention.** If the Coast Guard has seized a vessel or carried out any seizure or arrest, the matter shall promptly be handed over to the competent police authority for further action. The prosecuting authority may decide to detain the ship as security for any financial penalty for the contravention of provisions set out in or laid down pursuant to the Act. A decision to seize a vessel or to detain it shall as soon as possible be brought before a court of law, which shall decide whether to attach a lien to the vessel or to release it.

**Liens.** To secure payment of a fine which is likely to be imposed, as well as of costs which are likely to be awarded, the court may at the request of the prosecuting authority decide to attach a lien to the vessel for a specified amount, if there is reason to fear that execution proceedings will otherwise fail or face considerable difficulty. Such a lien may be attached even if the vessel does not belong to the person charged. When there is a lien on a vessel, it must not leave the place where it lies. If the vessel is not in port, the decision to attach the lien shall contain an order to sail to a specified place. A lien may be avoided if another satisfactory security is provided. A lien ceases to apply when it is waived by the prosecuting authority, or when a court so rules because the grounds for the lien no longer exist.

#### **E. Sanctions and Penalties**

**Fines and Imprisonment.** Any person, who wilfully or negligently contravenes or is accessory to the contravention of any provisions set out in the Act or issued pursuant thereto, is liable to a fine. If the offender has been previously convicted pursuant to this Act, or if there are other aggravating circumstances, imprisonment for a term not exceeding six months may be imposed alone or in addition to a fine.

Any person who fails to obey orders given by the Coast Guard, or fails to give the assistance required or provide necessary information, etc., or submits incorrect documents or seeks by other means to mislead the Coast Guard, is liable to a fine or to imprisonment for a term not exceeding six months or both. When lawful and unlawful catches have been mixed together, the entire catch may be confiscated.

Contravention is to be regarded as a misdemeanour. An attempt is subject to the same penalty as a completed offence.

If the contravention has been committed by any member of the crew of a vessel, and criminal liability may be imposed on the master of the vessel in this connection, the subordinate shall not be liable to a penalty.



**Confiscation.** In case of a contravention of provisions set out in or issued pursuant to the Act, the vessel used in the contravention and its fittings, and any catches and gear on board may be confiscated, irrespective of who the owner is. Instead of any object, its value may be confiscated wholly or in part from the offender or from the person on whose behalf he has acted or from the owner. It may be decided that liens on or other rights to objects that are confiscated shall wholly or partly cease to apply.

If a vessel exceeds the total allowable catch, the excess catch or its value accrues to the sales organisation responsible for first-hand sales of the catch. This applies irrespective of whether a penalty is incurred.

Decisions regarding such excess catches shall be made by the sales organisation, which shall also calculate the size of the excess catch and its value.

**Foreign Vessels.** In cases of contraventions by foreign vessels in the area between four and 200 nautical miles from the baselines, the offender cannot be imprisoned.

**Removal of the Vessel from the Register.** A Norwegian vessel can lose its licence, when it engages in unregulated fishing, irrespective of whether this occurred inside or outside waters under Norwegian jurisdiction. A licence may be also refused in case the vessel had been used in the past for illegal fishing in waters under Norwegian jurisdiction, or in waters that are regulated by a regional fisheries organisation.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

Norway decided already in 1917 to counter unregulated high seas fishing by its vessels. Although at first sight the legislation appeared to be outdated, a more detailed study of the provisions indicate this is however not the case. The regulations are still effective, when controlling its vessels. Therefore there seems to be no real weaknesses in the Norwegian legal system.

## **G. Implementation of the 1993 FAO Compliance Agreement**

On 28 December 1994 Norway deposited its instrument of acceptance of the 1993 FAO Compliance Agreement. The following provisions can be identified as compatible with the agreement:

**Duty to Keep Catch Logbooks.** Norwegian vessels shall keep catch logbooks and notify the content of such books to the Directorate of Fisheries whether they are fishing in waters under Norwegian fishery jurisdiction, or in waters under jurisdiction of other countries and outside fisheries jurisdictions.

**Duty to Register.** Norwegian citizens and residents of Norway shall not fish in marine waters that are beyond the fisheries jurisdiction of any state without prior registration for a period of one calendar year with the Directorate of Fisheries. The Director may deny registration if (1) the proposed fishing is against fisheries interests of Norway; (2) an international agreement compels the Director to do so; (3) the fishing is regulated by a regional or sub-regional fisheries body; and if (4) rational and sustainable management of fisheries would urge the

director to do so. The vessel may be crossed from the registry should it infringes rules of the 'DECREE TO REGULATE FISHING IN MARINE AREAS WHICH DO NOT COME UNDER THE FISHERIES JURISDICTION OF ANY STATE' or rules established by a regional or sub-regional fisheries body.

**Fishing in the FN Convention on the Conservation of the Antarctic Marine Living Resources (CCAMLR) Area.** On 13 March 1998, Norway laid down very strict regulations requiring fishing vessels flying the Norwegian flag to hold special licences granted by the Norwegian authorities before they were allowed to conduct fishing operations in the Regulatory Area of the CCAMLR, in accordance with relevant decisions of the Commission. Norwegian vessels would be required to carry satellite tracking equipment, inspectors and observers on board, and may be prohibited fishing for specific species or in specific areas. They would also be required to stop fishing operations when the total quota has been reached and provide notification and reporting of catch data.

**NEAFC FN North East Atlantic Fisheries Commission.** Norway provided inspectors, inspection vessels and aircraft to NEAFC control and enforcement scheme in respect of fishing vessels operating in the NEAFC Regulatory Area. The scheme, which entered into force on 1 July 1999, included, *inter alia*, provisions on authorisation to fish, notification of entry into and exit from the regulatory area, vessel-monitoring system (hereinafter cited as VMS), catch reporting, inspection and surveillance, and infringement procedures.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

On 30 December 1996 Norway deposited its instrument of ratification of the 1995 UN Fish Stocks Agreement. Norway entered into agreements with other states in respect of the high seas area of the Barents Sea and also adopted new fisheries regulations concerning the conservation and management of living marine resources.

**Loophole Agreement.** Following trilateral negotiations between Norway, Iceland and the Russian Federation, an agreement to end unregulated fisheries of regulated stocks in the high seas area of the Barents Sea (the so-called 'Loophole Agreement') was signed by the three parties in St. Petersburg on 15 May 1999. The agreement recognised the need for a management regime that would take into account the straddling and highly migratory nature of several fish stocks found in the loophole. The parties would allot each other quotas of fish within their respective EEZ. The Agreement entered into force on 15 July 1999, and is of particular importance for the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks in the region, because:

- (1) It improves cooperation between the signatory states;
- (2) It manages the straddling fish stocks and the highly migratory fish stocks;
- (3) It intends to curb over-utilisation of the fish stocks;
- (4) The parties shall discourage vessel reflagging;
- (5) Iceland agreed to stop fishing in the high seas area of the Barents Sea; and
- (6) In the literature this agreement has been described as fulfilling the same goals as the 1995 UN Fish Stocks Agreement.

**Refusing Licences.** On 19 February 1999, Norway amended its 1994 regulations establishing the conditions for refusing or withdrawing fishing licences to or from foreign nationals in its

EEZ on account of unregulated fishery on the high seas of a fish stock subject to regulations in Norway's EEZ, to include also fishing operations that had contravened regulatory measures laid down by regional or sub-regional fisheries management organisations or arrangements.

**Prohibition to Land Certain Catches.** It is prohibited to land fish that was caught illegally in waters under Norwegian jurisdiction, or in waters that are regulated by a regional fisheries organisation.

## VI. SPAIN\*

### A. Introduction

**Spanish Royal Decree regulating the National Fishing Activity.** Royal Decree 681/1980 of 28 March 1980 regulating the Spanish fishing activities requires Spanish fishing vessels engaged in high seas fishing to be holder of a provisional fishing permit granted by the General Department for Maritime Fishing and containing the fishing conditions and fishing areas. According to the Royal Decree, the validity of the provisional permit may not exceed one year.

**Law 14/1998 to Control the Protection of Fisheries Resources.** *Ley 14/1998 de 1 de junio, por la que se establece el régimen de control para protección de los recursos persqueros* (hereinafter cited as Law 14/1998) establishes administrative sanction regimes for all maritime fisheries offences and fishery regulated market offences. It is noteworthy that the Law 14/1998 does not provide for a territorial application.

**Spanish NAFO Order.** Spanish Order of 21 December 1999 regulating the Fishing Activities of the Spanish Fleet in the NAFO Area (hereinafter cited as Spanish NAFO Order) fixes per species the sharing out of the Spanish part of the total allowable catches among the different Spanish fishing companies. To this end, the order requires Spanish fishing vessels engaged in fishing activities in the NAFO Regulatory Area to be registered in a special register.

**Spanish North Atlantic Tuna Order.** The Spanish Order of 17 February 1998 intends to implement ICCAT regulations as regards tuna fishing in the Atlantic Ocean above latitude 36° North. The Order applies to Spanish fishing vessels engaged in the fishing of red tunas (*thunnus thynnus*) or white tunas (*thunnus alalunga*) in waters under sovereignty or jurisdiction of the Member States of the European Union as well as in international waters. The Order requires shipowners of fishing vessels engaged in such activities to be holder of a fishing licence.

**Spanish Mediterranean Tuna Order.** The Spanish Order 71/1998 of 23 January 1998 regulating the Tunas Fishing in the Mediterranean Sea applies to Spanish fishing vessels engaged in fishing of red and white tunas and some related species in the Mediterranean waters under Spanish jurisdiction or part of the high seas. The Order requires fishing vessels engaged in such activities to be holder of a fishing licence granted by the Spanish Ministry of Agriculture, Fisheries and Food. The Order also regulates the use of fishing tackles.

\* It is understood that there may have been additional information to that which is reported here. However, this was not available before the deadline for publication of this study.

**Spanish NEAFC Order.** The Spanish Order of 12 June 1981 regulating the fishing of high seas fishing vessels engaged in fishing in the NEAFC Area applies to Spanish fishing vessels. The Order, establishing a NEAFC register, requires Spanish fishing vessels engaged in such fishing activities to be registered in the NEAFC register. Moreover, the Order grants fishing rights to these registered vessels. These rights specify the fishing zones within the NEAFC Area as well as the fishing periods.

**1994 and 1999 Spanish Royal Decrees on Spanish Fishing Companies abroad.** The Spanish Royal Decree 2112/1994 established the Official Register of Fishing Companies Abroad. These companies include principally joint ventures as well as companies capitalised by Spanish assets and incorporated abroad. The Spanish Royal Decree 601/1999 of 16 April 1999 sets forth the registration conditions in order to allow these companies on a voluntary basis to be registered in the Official Register of Fishing Companies Abroad. Application to this end must be submitted to the Secretary-General for the Maritime Fisheries. The advantage of such registration is that registered companies could benefit from administrative or tax benefit. The registration conditions include, *inter alia*, certain levels of Spanish participation in the capital (at least a 34 percentage stake) as well as in the labour (at least 25 percentage) of the company, and the commitment to supply the market of the European Union first. Moreover, the Order prevents companies to be registered in the Official Register of Fishing Companies Abroad in case such company is established in a foreign state that either does not cooperate in implementing fisheries conservation measures whether adopted at national, sub-regional or regional level or that does not have living resources in the EEZ which could economically be exploited.

## **B. Reporting**

**Fishing Diary.** Fishing operators are required to report in their fishing diary particulars such as their total catches per species, the fishing ports of unloading, their fishing zones and other fishing information. A person reporting false information on his catches commits a grave offence.

**Vessel-monitoring System.** Moreover, all fishing vessels listed in Annex 1 of the VMS Order dated 12 November 1998 as amended must be equipped with a certified VMS. Such fishing operators commit a grave offence in case they neglect to install such VMS or alter or manipulate it.

**Other requirements.** Finally, fishing operator who neglect to communicate information as required on their movements, transshipments, landings, fishing efforts and fish catches commits a grave offence.

**Spanish NAFO Order** requires fishing vessels engaged in the NAFO Area to report periodically to the Secretary-General of the Maritime Fisheries the date and fishing port of unloading, the quantities of catches per species, the fishing periods and fishing zones.

**Spanish North Atlantic Tuna Order** requires fishing vessels engaged in fishing of red or white tunas to periodically report to the General Division of the Fisheries Resources the date and fishing port of unloading, the quantities of tunas caught and unloaded, the fishing periods and the fishing zones.

**Spanish Mediterranean Tuna Order** requires fishing vessels engaged in fishing of red or white tunas to periodically report to the Spanish General Division of the Fisheries Resources the date and fishing port of unloading, the quantities and weight of tunas caught and unloaded, the fishing periods and the fishing zones.

**1999 Royal Decree on Spanish Fishing Companies Abroad** requires companies registered in the Official Register of Fishing Companies Abroad to submit periodically to the Secretary-General for Maritime Fisheries reports containing information such as the total number of fishing vessels owned or used by the company, quantities and weight of the fish caught and unloaded, the fishing ports of unloading.

### **C. Boarding, Inspection and Powers of Authorised Officers**

**Inspection.** Law 14/1998 shortly provides that inspection may be exercised on vessels or on land. Moreover, the competent authorities may take all provisional measures, including the seizure of the fishing vessel and its contents, in order to cease the offence, to take evidence or in the general interest.

**Inspection.** Royal Decree 1797/1999 of 26 November 1999 provides for an inspection of foreign fishing vessels present in the waters under Spanish jurisdiction in order to verify whether the species on board have been harvested in accordance with the legislation in force.

### **D. Prosecution Procedures**

**Administrative Procedure.** As Law 14/1998 establishes a regime of administrative sanctions, the prosecution for maritime fisheries offences is initiated by the competent administrative authorities. Depending on the degree of gravity of the offence, different actors may be competent. Government delegates (*Delegados del Gobierno*) have jurisdiction over slight offences. The Director-general of the Marine Resources (*Director general de Recursos Pesqueros*) has jurisdiction over grave offences. The Secretary-General of the Maritime Fisheries (*Secretario general de Pesca Marítima*) has jurisdiction over very grave offences provided the maximum fine does not exceed ESP 25 000 000. Finally, the Minister of Agriculture, Fisheries and Food has jurisdiction over very grave offences in case the maximum fine exceeds ESP 25 000 000.

### **E. Sanctions and Penalties**

**Administrative Sanctions.** Law 14/1998 divides the maritime fisheries offences into three categories: Slight, grave and very grave offences. Persons committing light offences are punished with a warning or an administrative fine between ESP 10 000 and ESP 50 000. Grave offences are punished with fines from ESP 50 001 to 10 000 000 and very grave offences with fines from ESP 10 000 001 to 50 000 000. Besides these principal sanctions, accessory sanctions could be imposed such as the forfeiture of the vessel, net or equipment as well as the fish on board and the proceeds of the sale of any such fish; the suspension, revocation or non-renewal of the fishing permit or the prohibition to be engaged in fisheries or associated activities.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

It resulted from the exposition of the motives of Law 14/1998 that due to lack of means, priority should be given to inspections in ports and on land. Inspections should, in particular, be concentrated on landings of fish. Unlike the other national systems, the Spanish system establishes an administrative regime of sanctions, mainly fines. It is not quite clear what the exact territorial scope is of Law 14/1998 and whether all its provisions apply to foreign vessels.

## **G. Implementation of the 1993 FAO Compliance Agreement**

The European Community (hereinafter cited as EC) deposited its instrument of acceptance on 6 August 1996.

Royal Decree 681/1980 of 28 March 1980 regulating the Spanish fishing activities requires Spanish fishing vessels engaged in high seas fishing to be holder of a provisional fishing licence granted by the General Department for Maritime Fishing and containing the fishing conditions and fishing areas. According to the Royal Decree, the validity of the provisional permit may not exceed one year.

Spanish Law 14/1998 punishes fishing operators harvesting without fishing licence or in breach of the fishing conditions contained in such licence or whose fishing activities undermine the management and conservation of the living marine resources in the Spanish EEZ with an administrative fine from ESP 50 001 to 10 000 000.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

On 27 June 1996 and on 3 December 1996, the EC respectively Spain signed the 1995 UN Fish Stocks Agreement. However, until now no instrument of ratification has been deposited by Spain or the EC.

Royal Decree 1797/1999 of 26 November 1999 on the Control of Foreign Fishing Vessels within the Waters under Spanish Jurisdiction prohibits any landings of fish by foreign vessels in Spanish ports or any transshipment of such fish in the Spanish waters without an authorisation to land or tranship granted by the Spanish authorities. To obtain such authorisation, the fishing operator must submit an application. The application includes information such as the species of fish, the total catch and the fishing zones where the catches occurred. In case the catches have been taken in the high seas, no authorisation to land or tranship shall be granted unless the catches took place outside high seas fishing zones regulated by competent regional or sub-regional fisheries organisations to which the EC is a party or, if taken in such zones, the species were harvested in full respect of the conservation and management measures adopted by such competent regional or sub-regional fisheries organisations to which the EC is a party. Fishing operators landing or transshipping fish without such authorisation commit a grave offence and could be liable to a fine from ESP 50 001 to 10 000 000.

## VII. UNITED STATES OF AMERICA

### A. Introduction

**1996 Sustainable Fisheries Act.** Sustainable Fisheries Act (1996) is an amendment of the Magnuson Fisheries Conservation and Management Act. This Act purposed to (1) take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States as well as fishery resources in the special areas. These 'special areas' refer to areas defined in the Maritime Boundary Agreement between the United States of America and the former Union of Soviet Socialist Republics. Furthermore, the Act intends to (2) support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary; (3) promote domestic commercial and recreational fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing; (4) provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield for each fishery.

**Area of Application.** This Act applies within the EEZ established by Presidential Proclamation 5030, dated 10 March 1983, and under the exclusive fishery management authority beyond the EEZ over such anadromous species and Continental Shelf fishery resources and fishery resources in the special areas. In relation to US Fishing Zones (USFZ), this Act applies to all vessels including foreign fishing vessels operating in the USFZ in accordance with the agreements between the United States and such foreign nations as well as to foreign vessels operating under a fishing permit granted by US authorities. Moreover, the Act applies to all persons regardless of their nationality but does not apply to persons and vessels operating in the high seas.

Together with the Sustainable Fisheries Act and the Implementation Plan for the Code of Conduct for Responsible Fisheries set up by the US National Marine Fisheries Service (hereinafter cited as NMFS under the Department of Commerce), the 1995 Fisheries Act plays an important role in the US system for the implementation of the 1993 FAO Compliance Agreement and the 1995 UN Fish stocks Agreements.

**1995 Fisheries Act.** This Act amends Fishermen's Protective Act (hereinafter cited as the Act). The Act constitutes a comprehensive legal document covering all matters relating to the implementation, enforcement and amendment of US fisheries laws, international conventions and agreements, in which the United States is a party. The Act includes eight 'Titles' or 'sub Acts' dealing with the operation of US fishing vessels in the high seas (Title I, referred to as the High Sea Fishing Compliance Act), the implementation of the convention on future multilateral cooperation in the Northwest Atlantic Fisheries, the Atlantic Tunas Convention and the Yukon River Salmon Act (Titles II, III & VII); the amendment of the Fishers' Protection Act (Title IV); the enforcement of fisheries law in the Central Sea of Okhotsk (Title V), the implementation of Driftnet Moratorium (Title VI); and other amendments.

**Area of Application of the High Seas Fishing Compliance Act (Title I):** The Act applies to individuals regardless of their nationality, including cooperation partnership, association, or other entities; to any Federal, state, local or foreign government or any entity of any such

government. This Act applies to all US fishing vessels used or intended for use **on the high seas**. A US vessel is defined under section 103(9) as including a vessel documented by US authorisations or a vessel owned by the United States or a vessel that was once documented under the law of the United States.

**Fishing Concessions and Other Permits:** The Act prohibits US high seas fishing vessels to engage in harvesting operations on the high seas without a valid permit. The Act provides a complex set of detailed criteria dealing with eligibility, application and conditions to apply and to be granted with permission as well as fees, duration of permit. The high seas fishing permits are issued by the Secretary of Commerce (hereinafter cited to as the Secretary).

## **B. Reporting**

Reporting obligations are imposed upon vessels as a condition for permission (or licence). Indeed, according to section 104(d) of the Act, permit holders shall report such information, as the Secretary by regulation requires, including area of fishing operation and catch statistics.

## **C. Boarding, Inspection and Powers of Authorised Officers**

**Boarding, Inspection, Seizure and Detention.** Section 107 defines the powers of authorised officers. Their enforcement powers regarding inspection, seizure and detention are provided in sections 107(a), (c) and (d). Such officers are authorised by the Secretary through arrangement with other related US agencies. An authorised officer may with or without a warrant or other process arrest any person, if the officer has reasonable cause to believe that such person has committed an act, which was strictly prohibited under sections 106 (6) (7) (8) and (9) of this Act. Such acts include, *inter alia*, interference by any means towards an authorised officer in the conduct of any search or inspection and resistance to a lawful arrest or detention. Moreover, officers are also authorised to board, and search or inspect, any high seas fishing vessels; seize any high seas fishing vessels (together with its fishing gear, furniture, appurtenances, store and cargoes); seize any living marine resources in connection with or as a result of the violation committed, including any evidence, regulation and permit issued. Finally, authorised officers execute any warrant or other process issued by a competent court and exercise any other lawful authority under US laws.

**Issuance of Citations.** If an authorised officer finds that a high seas fishing vessel is operating or has been operated in violation of any provision of Title 1 of the Act, such officer may issue a citation to the owner or operator of such vessel. The officer can also be authorised to note on the issued permit, which will then be stored in a record kept at the Secretary.

## **D. Prosecution Procedures**

**District Court Jurisdiction.** Section 107(b) grants to the district courts of the United States exclusive jurisdiction over any case or dispute relating to the provisions of Title 1. However, due to the specific territory regime, the district court of Guam has jurisdiction over the cases occurred in Guam and any Commonwealth, territory or possession of the United States in the Pacific Ocean. Also the district court of Hawaii has jurisdiction over cases taking place in Hawaii and in American Samoa.



**Unlawful Activities.** Section 106 contains a list of all unlawful activities such as:

- (1) To use a fishing vessel on the high seas in contravention of international conservation and management measures accepted by the United States;
- (2) to use a fishing vessel on the high seas without a valid permit;
- (3) to use a fishing vessel in violation of the condition or restriction of an issued permit;
- (4) to falsify any information required to be reported, communicated or recorded, or to fail to submit in a timely fashion any requirement information, or to fail to report to the Secretary immediately information changes leading to receive false information;
- (5) to refuse to board an authorised officer for purpose of conducting any search or inspection;
- (6) to forcibly assault, resist, oppose, impede, intimidate or interfere in the conduct of a research or inspection of an authorised officer;
- (7) to resist a lawful arrest or detention;
- (8) to delay, prevent the apprehension, arrest, or detention of another person;
- (9) to possess any marine living resources, taken or retained in violation of US laws or regulations; and
- (10) to violate any other provision of Title 1.

**Hearing and Judicial Review.** The Secretary may issue subpoena for attendance and testimony of witnesses. Moreover, in case of contempt or refusal to obey subpoenas, district courts have jurisdiction. Finally, any person has the right to fill a complaint against the Secretary before a district court within 30 days from the date the penalty was imposed.

## **E. Sanctions and Penalties**

Under the High Seas Fishing Compliance Act, section 109, a wrong committed on the high seas can either be a civil wrong (civil penalty) or a criminal wrong (criminal sanction).

**Civil Penalties and Permit Sanctions.** After notice and opportunity for hearing, persons who committed a violation listed above may be sentenced with civil penalty not exceeding USD 100 000 for each violation. Moreover, in certain cases, issued permits may be revoked, suspended, denied or subjected to additional conditions and restrictions. In this regard, transfer of ownership of a vessel shall not extinguish any permit sanction in effect or pending at the time of transfer of ownership. The civil penalty being paid, the permit shall be reinstated by the Secretary. Finally, no sanction shall be imposed if there is no prior opportunity for hearing.

**Criminal Offences.** According to section 109, a person is guilty of an offence if the person commits any act prohibited by paragraphs (6) (7) (8) and (9) of section 106. Such offences shall be punished in accordance with the United States Code. The punishment ranges from one to ten years imprisonment.

**Collection.** If any person fails to pay an assessment of civil penalty, after the final judgement had entered in favour of the Secretary and has been referred to the Attorney General for recover, there is no longer opportunity to review the validity and appropriateness of such judgement. A vessel including its fishing gear, furniture, appurtenance, store, and cargo used

in commission of a violation shall be liable *in rem* for any civil penalty assessed for such violation.

**Forfeiture.** A high seas fishing vessel (including its gear, furniture, etc.) used and any marine living resources taken or retained as a result of the commission of any act prohibited shall be subject to forfeiture to the United States. District courts have jurisdiction over these cases. In this regard, any property or other interest declared forfeited to the United States may be seized. Living resources shall be solved but it can be rebutted by an appropriate showing of evidence that the marine living resources concerned are not in connection with the prohibited act.

## **F. Characteristics: Strengths and Weaknesses of the Legal System**

**Strengths.** To some extent US fisheries law and enforcement mechanisms present the features of a strong legal system, especially in comparison with some Regional Fisheries Management mechanism. The Magnuson Act created eight Regional Fishery Management Councils, tasked with developing Fishery Management Plans to improve the sustainability of fisheries in the EEZ. The councils are comprised of principal state officials with fishery management responsibility, individuals nominated by the governors of the states within the councils' areas and NMFS regional directors. These members are representatives of the fishing industry, the recreational fishing community or others with substantial knowledge of fisheries. The Coast Guard provides enforcement and safety guidance on proposed management regulations and updates on existing regulation enforcement.

**Weaknesses.** However a weakness can be found in the High Seas Fishing Compliance Act, where it defines a high seas fishing vessel. This definition is too narrow because unlike other states, the United States omitted the inclusion of stateless vessels in that definition.

## **G. Implementation of the 1993 FAO Compliance Agreement**

On 19 December 1995, the United States deposited their instrument of acceptance of the 1993 FAO Compliance Agreement. The United States is implementing the 1993 FAO Compliance Agreement in the form of the High Seas Fishing Compliance Act of 1995. President Clinton signed the Act during the month of November 1995, and the United States immediately took steps to start its implementation on national level.

The major US responsibility that flows from this agreement is the obligation to licence and control all US-flagged fishing vessels operating on the high seas. Under the 1993 FAO Compliance Agreement and the implementing US legislation, these vessels must receive appropriate permission to operate in these fisheries.

The purpose of the 'High Seas Fishing Compliance Act' is to implement the 1993 FAO Compliance and to establish a system of permits, reporting, and regulation of vessels of the United States fishing on the high seas.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

On 21 August 1996, the United States deposited its instrument of ratification of the 1995 UN Fish Stocks Agreement. The National Marine Fisheries Service and the Department of State decided to implement the agreement as soon as possible and in cooperation with various international fisheries management organisations and arrangements.

The salient features of the 1995 UN Fish Stocks Agreement -the precautionary approach; transparency; conservation and management principles; fishing by non-members; compliance and enforcement; and provisions dealing with new members of international conservation regimes- are the same as in the Code of Conduct.

The United States prepared a report on the implementation of the 1995 UN Fish Stocks Agreement in certain regional international fishery organisations, and distributed this report to a large number of governments and to five such regional fisheries management organisations. These organisations are: (1) The ICCAT; (2) the NAFO; (3) the Inter-American Tropical Tuna Commission; (4) the Central Bering Sea (Donut Hole) Agreement; and (5) the CCAMLR.

### **PART 3 - ANALYSIS OF REGIONAL AND SUB-REGIONAL ARRANGEMENTS**

Part 3 deals with the identification, analysis and comparison of some existing or proposed **sub-regional and regional agreements** establishing RFOs or other legal instruments covering fisheries reporting (and verification), inspection and boarding schemes, regional registers, observer schemes (for scientific or other purposes), as well as other enforcement provisions/schemes. The study covers the CCAMLR, EC, FFA, ICCAT, IOTC, NEAFC, NAFO, MHLC/WCPOFC, and SEAFO. For more details on these different acronyms, the reader is referred to Table 1. Finally, Part 3 will highlight the respective characteristics of the above-mentioned sub-regional and regional arrangements, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and especially the 1995 Fish Stocks Agreement, which is totally centred around the RFO concept.

The following sub-regional and regional arrangements will be examined:

- I. CCAMLR;
- II. EC;
- III. FFA;
- IV. ICCAT;
- V. IOTC;
- VI. NEAFC;
- VII. NAFO;
- VIII. MHLC/WCPOFC; and
- IX. SEAFO.

#### **I. CCAMLR**

##### **A. Introduction**

**CCAMLR.** The CCAMLR is an intergovernmental organisation established by the Convention on the Conservation of Antarctic Marine Living Resources, which entered into force in 1982.

The Convention on the Conservation of Antarctic Marine Living Resources was established mainly in response to concerns that an increase in krill catches in the Southern Ocean could have a serious effect on populations of krill and other marine life, particularly on birds, seals and fish which mainly depend on krill for food.

The Convention sets up a Commission and a Scientific Committee to manage marine living resources in the Southern Ocean. The Convention does not apply to seals and whales, since these resources are covered by other conventions. Moreover, full cooperation exists with the operating bodies of these other conventions. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and its Scientific Committee were a pioneer in the development of the 'ecosystem approach' to the regulation of fisheries. An ecosystem approach does not concentrate solely on the species fished, but also seeks to avoid situations in which fisheries have a significant adverse effect on 'dependent and related species'.

**Membership.** Any state, which acceded to the Convention, is entitled to become a member of the Commission provided it is actively conducting research or harvesting in the Convention Area. An acceding state desiring to become a member must submit a statement to the Australian Ministry of Foreign Affairs and Trade setting down the basis upon which it is seeking to participate in the work of the Commission. It must also indicate its willingness to accept conservation measures adopted by the Commission and currently in force. Copy of such statement is distributed to all members. Within a two-month period any member is entitled to request a special meeting to discuss the proposal for membership. If no such request is made, the state automatically becomes a member of the Commission after the expiration of the two-month period. The Convention also provides for regional economic integration organisations, subject to certain conditions, to be members of the Commission. Finally, Article XXXI allows a member to withdraw from the Convention.

The following countries are members of the Commission:

<i>No</i>	<i>Countries</i>	<i>Member</i>
1	Argentina	*
2	Australia	*
3	Belgium	*
4	Brazil	*
5	Chile	*
6	European Community	*
7	France	*
8	Germany	*
9	India	*
10	Italy	*
11	Japan	*
12	Republic of Korea	*
13	New Zealand	*
14	Norway	*
15	Poland	*
16	Russian Federation	*
17	South Africa	*
18	Spain	*
19	Sweden	*
20	Ukraine	*
21	United Kingdom	*
22	United States	*
23	Uruguay	*
24	Bulgaria	°
25	Canada	°
26	Finland	°
27	Greece	°
28	Namibia	°
29	Netherlands	°
30	Peru	°

\* States are Members of the Commission

° States that have ratified the Convention, but are not Members of the Commission.

**Source:** Official site of CCAMLR (<[www.CCAMLR.org](http://www.CCAMLR.org)>)

**Area of Application.** The Convention applies to all marine living resources (except seals south of 60°S and whales in general) inside an area whose northern boundary is roughly delineated by the mean position of the so-called Antarctic Convergence and thus follows the physical and biological boundaries of the Antarctic. The Convention Area is naturally divided into three sectors (Atlantic Ocean, Indian Ocean and Pacific Ocean), which for statistical purposes are termed Statistical Areas 48, 58 and 88 respectively. Each statistical area is divided into sub-areas and divisions.

In relation to fishing vessels, the Convention applies to any vessels of Contracting or Non-contracting Parties involved in any harvesting and associated activities in the geographic area to which this Convention applies.

## **B. Reporting and Verification**

**Annual Reports.** According to Article XX of the Convention, reports of members' activities are submitted annually by members in order to keep the Commission and the Scientific Committee informed in a concise format on the scope and variety of activities undertaken annually by each member in support of the Convention objectives and, in particular, on the implementation of decisions taken by the Commission and the Scientific Committee.

Annual reports comprise summary information on the following items:

- (1) Fishery-related activities;
- (2) compliance and enforcement;
- (3) research activities in relation to marine living resources and the CCAMLR Ecosystem Monitoring Program;
- (4) research activities on the assessment and avoidance of incidental mortality of Antarctic marine living resources; and
- (5) other activities in pursuance of the decisions and recommendations of the Commission and Scientific Committee.

In addition, under the system of inspection, each Contracting Party shall provide the Secretariat of the Commission with information relating to (a) names of all vessels intending to conduct fishing (this information should be communicated one month before the commencement of the research cruise in accordance with the conservation measures) and (b) licences or permits issued by its authorities to its flag vessels operating in the convention area. This information includes the names of the vessels, the authorised time periods for fishing, the fishing areas, the species targeted and the gear used.

By 31 August of each year, an annual report must be submitted relating to the implementation measures regarding inspection, investigation and enforcement provisions of Conservation Measure 119/XVII 'Licensing and Inspection Obligations of Contracting Parties with regard to their Flag Vessels Operating in the Convention Area'.

**Notification and Report on Sightings of Fishing Vessels.** In accordance with paragraphs 7.22 and 7.23 of CCAMLR-XV, members are required to inform the Secretariat of name changes, re-flagging and re-registration of their vessels. The summary of sightings of fishing vessels in the Convention Area is also required according to Article XXII of the Convention.

Reporting System. In relation to the reporting system on the presence of fishing vessels and fish catches, the CCAMLR sets up its reporting system through measures applying to all areas and sub-areas such as:

- (1) Monthly catch effort reporting system (measure 40/X);
- (2) five-day catch and effort reporting system (measure 51/XIX);
- (3) ten-day catch and effort reporting system (measure 61/XII);
- (4) monthly fine-scale biological data reporting system for trawl, longline and pot fisheries (measure 121/XIX, applies for all trawl, longline and pot fisheries); and
- (5) monthly fine-scale biological data reporting system for trawl, longline and pot fisheries (measure 122/XIX, applies for all trawl, longline and pot fisheries).

Consequently, a reporting system based on the presence and covering catch-related information is submitted to the Commission indirectly through the members of the Commission.

**Catch Documentation Scheme.** The CCAMLR Commission adopted this scheme as a means to protect the toothfish stocks. To meet this purpose, the Contracting Parties shall accompany all landings, transshipments and imports of toothfish by a completed catch document. This document shall include the following information:

- the name, address, telephone and fax numbers of the issuing authority;
- the name, home port, national registry number, and call sign of the vessel and, if issued, its IMO/Lloyd's registration number;
- the reference number of the licence or permit, whichever is applicable, that is issued to the vessel;
- the weight of each toothfish species landed or transhipped by product type, statistical sub-area or division if caught in the Convention Area and/or by FAO statistical area, sub-area or division if caught outside the Convention Area;
- the dates within which the catch was taken;
- the date and the port at which the catch was landed or the date and the vessel, its flag and national registry number, to which the catch was transhipped; and
- the name, address, telephone and fax numbers of the recipient(s) of the catch and the amount of each species and product type received.

Each Contracting Party shall promptly provide copies to the CCAMLR Secretariat of all export-validated catch documents and, where relevant, validated re-export documents that it issued from and received into its territory and shall report annually to the Secretariat data, drawn from such documents, on the origin and amount of toothfish exported from and imported into its territory.

This Catch Documentation Scheme is open to all flag states irrespective of whether they are members of the CCAMLR or not.

### **C. Inspection and Boarding Schemes**

According to Article XXIV of the Convention, the observation and inspection system shall be elaborated by the Commission based on three basic principles: (1) Observers and inspectors are designated by the Members of the Commission; (2) observation and inspection shall be carried out on board vessels engaged in scientific research or harvesting of marine resources

in the area to which the Convention applies; and (3) observers and inspectors shall remain subject to the jurisdiction of the Contracting Party of which they are nationals. Observers and inspectors report to their own state, which then in turn reports to the Commission.

*a. CCAMLR Scheme of International Scientific Observation (ISO)*

**Qualifications and Other Requirements for Observers (ISO Item A).**

- Activities of scientific observers on board vessels will be specified by the Commission. These activities are laid down in Annex I of ISO and may be modified taking into account advice from the Scientific Committee;
- Scientific observers shall be nationals of the Member who designated them and shall act in compliance with customs and orders existing on board vessels;
- Observers must adequately be trained to carry out the duties of scientific observers. For instance, they must be familiar with harvesting and scientific research;
- Observers shall be able to communicate in the language of the flag state of the vessels on which they carry out their activities; and
- Each observer shall carry a document issued by the Designating Member in a form approved by the Commission identifying him as a CCAMLR scientific observer.

**Rights of Observers on Board a Vessel of Another Member.**

Observers are able to carry out their activities on board a vessel of another member in accordance with a bilateral arrangement, concluded between them. Members of such bilateral arrangement will be referred to as 'Designating Members' and 'Receiving Members'.

Such bilateral arrangement must clarify the status of observer officers when on board vessels. Observers are entitled to have access to data and those operations of the vessel necessary to fulfil the duties of a scientific observer as required by the Commission. In addition, Receiving Members have to take appropriate actions on board their vessels to facilitate the observer's tasks such as: to ensure security and welfare of scientific observers in the performance of their duties; to provide them with medical care and safeguard their freedom and dignity; to ensure right of observers of using the ship's communications equipment and operator. According to ISO, the Item B, paragraph d, such communication cost shall normally be borne by the Designating Member. In practice, it is dependent on the provisions contained in the bilateral arrangement concluded between Designating and Receiving Members.

Besides, Designating Members must ensure that transportation and boarding of scientific observers have to be organised so as to minimise interference with harvesting and research operations. Transportation of scientific observers to and from boarding points are under the responsibility of the Designating Member.



## **Observation Reports.**

Scientific observers must submit to the Commission through their Designating Member, not later than one month after the completion of the observer cruise or after the return of the observer to his/her home country. A report of each observation assignment follows the observation formats approved by the Scientific Committee. A copy is to be sent to the member whose vessel was involved.

In cases of bilateral arrangements the members thereof are required to provide details of observation programs to the Commission at the earliest possible opportunity and no later than upon the conclusion of each bilateral arrangement. For each observer deployed, the following details are to be supplied as provided for in Item C of ISO:

- (a) signing date of the arrangement;
- (b) name and flag of the vessel receiving the observer;
- (c) member designating the observer;
- (d) area of fishing (CCAMLR statistical area, sub-area, division);
- (e) type of data to be collected by the observer and submitted to the Secretariat (*e.g.* by-catch, target species, biological data);
- (f) expected dates of the start and end of the observation program; and
- (g) expected date of returning the observer to his/her home country.

## **Functions and Tasks of Observers.**

The major function of observers on board vessels engaged in scientific research or harvesting of marine living resources is to observe and report on the operation of fishing activities in the Convention Area. In fulfilling this function, the following 12 tasks will be undertaken:

- (i) record details of the vessel's operation (*e.g.* partition of time between searching, fishing, transit, etc., and details of hauls);
- (ii) take samples of catches to determine biological characteristics;
- (iii) record biological data by species caught;
- (iv) record by-catches, their quantity and other biological data;
- (v) record entanglement and incidental mortality of birds and mammals;
- (vi) record the procedure by which declared catch weight is measured and collect data relating to the conversion factor between green weight and final product in the event that catch is recorded on the basis of weight of processed product;
- (vii) prepare reports of their observations using the observation formats approved by the Scientific Committee and submit them to the CCAMLR through their respective authorities;
- (viii) submit copies of reports to captains of vessels;
- (ix) assist, if requested, the captain of the vessel in the catch recording and reporting procedures;
- (x) undertake other tasks as may be decided by mutual agreement of the parties involved;
- (xi) collect and report factual data on sightings of fishing vessels in the Convention Area, including vessel type identification, position and activity; and
- (xii) collect information on fishing gear loss and garbage disposal by fishing vessels at sea.

*b. CCAMLR System of Inspection*

The System of Inspection (SOI) consists of 14 items including inspection pennant figure, fishing gear identification mark and identification document.

**Inspector Qualifications and Other Requirements (Item I).**

- (a) Designated inspectors must be familiar with the fishing and scientific research activities to be inspected in accordance with the provisions of the Convention and measures adopted under it;
- (b) members must certify the qualifications of each inspector they designate;
- (c) inspectors must be able to communicate in the language of the flag state of the vessels on which they carry out their activities;
- (d) an inspector must be accorded the status of ship's officer while on board such vessels;
- (e) the names of inspectors must be communicated to the Secretariat within fourteen days of designation; and
- (f) the Commission maintains a register of certified inspectors designated by Members and the Commission shall communicate, each year, the register of inspectors to each Contracting Party within a month of the last day of the Commission meeting.

**Special Flag or Pennant.**

The Commission approves special flags or pennants indicating that inspectors on board are carrying out inspection duties in accordance with this system (items III/a of the SOI). Schedules for inspection will be arranged between the designating state and Flag State of the vessels.

**Rights of Inspectors.**

- Inspectors are entitled to inspect their own vessels (vessels of designating state) and to inspect vessels of Member States based on their arrangements (arrangement to be concluded between the designating state and the flag state);
- inspectors designated by Members are be entitled to board a fishing or fisheries research vessel in the Convention Area so as to determine whether the vessel is, or has been, engaged in scientific research, or harvesting, of marine living resources. In this case, vessels are obliged to receive inspectors. Indeed, according to paragraph 5 of the SOI, any vessel present in the Convention Area for the purpose of harvesting or conducting scientific research on marine living resources must, when given the appropriate signal in the International Code of Signals by a ship carrying an inspector (as signified by flying the flag or pennant referred to above), stop or take such other actions as may be necessary to facilitate the safe and prompt transfer of the inspector to the vessel, unless the vessel is actively engaged in harvesting operations, in which case it shall do so as soon as practicable. Moreover, the master of the vessel has the duty to permit the inspector, who may be accompanied by appropriate assistants, to board the vessel;
- a special inspection pennant is raised during inspection;
- inspectors are accorded the status of ship's officer when on board such vessels;

- in case a vessel fails to implement its obligation to facilitate the transfer of the inspector or in case the master and crew interfere with authorised activities of an inspector, the inspector involved prepares a detailed report, including a full description of all the circumstances and provide the report to the designating state. This report then will be transmitted, in accordance with the relevant provisions of paragraph IX of the SOI, to the CCAMLR Executive Secretary. The Flag State will be informed of such report and asked for comments. All members will be informed within 15 days by the Executive Secretary following the latter's receipt of the inspection form from the designating states. Indeed, pursuant to paragraph VII of the SOI, interference with an inspector or failure to comply with reasonable requests made by an inspector in the performance of his duties must be treated by the flag state as if the inspector were an inspector of that state. Moreover, the Flag State must report on any further action that has been taken.

**Sanctions and Penalties (Control of Illegal, Unregulated and Unreported (IUU) Fishing).**

Flag states have jurisdiction to impose sanctions and penalties for IUU fishing. Indeed, Item XI reaffirms the primary jurisdiction of flag states by stating that 'if, as a result of inspection activities carried out in accordance with these provisions, there is evidence of violation of measures adopted under the Convention, the flag state shall take steps to prosecute and, if necessary, impose sanctions'.

Moreover, flag states are required to report to the Commission once a year on prosecutions and sanctions imposed as a consequence of inspections conducted on vessels flying their flags. SOI requires flag states to report, in writing, about prosecutions and sanctions imposed, to provide a progress report of prosecutions not yet completed and to explain why any prosecution has been unsuccessful or has not been launched.

Furthermore, SOI requires that sanctions applied by flag states in respect to infringements of CCAMLR provisions must be sufficiently severe as to effectively ensure compliance with CCAMLR conservation measures and to discourage infringements and must seek to deprive offenders of any economic benefit accruing from their illegal activities.

Prosecution of the violations is a primary right of flag states. However, other Contracting Parties can take the case when the Flag State gives rise to them. In case a fishing vessel licenced or permitted by a contracting state to fish in the Convention Area is voluntarily in port of another Contracting Party, the port state undertakes inspection of the vessels. If there is evidence for believing that the vessels has fished in contravention of the CCAMLR conservation measures, the catch will not be landed or transhipped. The port state is required moreover inform the flag state of the vessel, and will cooperate with the flag state in taking such appropriate action as is required to investigate the alleged infringement, and, if necessary, apply appropriate sanctions in accordance with national legislation (Measure 147/XIX). However, this measure will not apply to the waters adjacent to Kerguelen and Crozet Island.

A Non-contracting Party vessel, which has been sighted engaging in fishing activities in the Convention Area, is presumed to be undermining the effectiveness of CCAMLR conservation measures. The Contracting Party which sights the Non-contracting Party vessel shall attempt to inform the vessel that it has been sighted engaging in fishing activities in the Convention Area and is accordingly presumed to be undermining the objective of the Convention and that this information will be distributed to all Contracting Parties to the Convention and to the flag

state of the vessel. When the Non-contracting Party vessel enters a port of any Contracting Party, it has to be inspected by authorised Contracting Party officials knowledgeable of CCAMLR conservation measures and will not be allowed to land or tranship any fish until this inspection has taken place. Such inspections include inspection of the vessel's documents, logbooks, fishing gear, catch on board and any other matter, which may include information from a VMS relating to the vessel's activities in the Convention Area. Information on the results of all inspections of Non-contracting Party vessels conducted in the ports of Contracting Parties, and on any subsequent action, are to be transmitted immediately to the Commission. The Secretariat shall transmit this information immediately to all Contracting Parties and to the relevant Flag State.

#### **D. Regional Register**

- CCAMLR-XVII stated that the issue of a vessel register should be further developed during the next intersessional period. The Secretariat provided a report on the status of the CCAMLR Vessel Database (SCOI-99/5). This database could be conveniently expanded to a comprehensive Vessel Register, when required;
- the Scientific Committee requested members to provide intersessionally to the Secretariat details of their vessel registers. It also agreed that the matter be considered further at the next meeting of SCOI.<sup>27</sup> In this regard, the Secretariat highlighted the conclusion of its paper SCOI-99/5 that when a decision is made on the establishment of a Vessel Register, clear guidelines from the Commission should be provided as to what information should be recorded and how this information is to be collected and/or supplied by members. Guidelines should also be provided for the access and use of information contained in the register. All costs involved in establishing and maintaining the Register should also be agreed upon;
- in the meantime, the Scientific Committee agreed on the merit of maintaining a vessel database of the type developed by the Secretariat; and
- there is also a proposal submitted by members of the Commission. Suggestions are made to have vessels register's information on the CCAMLR web site, and photographic images should be included so that vessels can be identified more easily. The Committee took note of this proposal.

#### **E. Other Enforcement Provisions/Schemes**

**Standing Committee on Observation.** In order to facilitate enforcement of the Convention, the Standing Committee on Observation and Inspection was established by the Commission with directions as follows:

The Committee shall, *inter alia*:

- (i) Provide advice on procedures in accordance with Article XXIV 2(a) and terms and conditions in accordance with Article XXIV 2(b) in relation to observation and inspection activities;

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<sup>27</sup> The Standing Committee on Observation and Inspection.

- (ii) provide advice on the nature of the authority and access referred to in paragraph VI and the reporting formats and procedures referred to in paragraphs VIII and IX of the System of inspection;
- (iii) provide advice on inspection and observation priorities and, if necessary, coordination of inspection and observation activities to ensure representative coverage in the Convention Area of (a) harvesting and research activities aimed at each of the primary target species and any species being caught in significant quantities incidental to fishing operations; and (b) harvesting and research activities in each of the CCAMLR statistical areas particularly those in which fisheries and research activities are concentrated; and
- (iv) review inspection and observation reports, as well as steps taken by members to enforce compliance with measures adopted under the Convention, and, as appropriate, advise the Commission.

**Conservation Measure Scheme.** A conservation measure scheme was set up based on different divided areas, species and periods of enforcement.

**Guideline for Estimating Conversion Factor.** In order to effectively implement the convention, the Guideline for estimating Conversion Factors has also been established. The aim of these guidelines is to obtain an accurate description of catch processing methods and to obtain validated conversion factors for whole fish or krill (fresh whole weight) converted into a processed product. Comments relating to the design and application of these guidelines should be forwarded to the CCAMLR through technical coordinators. Scientific observers and fishing masters are called upon to apply these guidelines to fisheries in the Convention Area.

**Vessel-monitoring System.** Moreover, under the CCAMLR Convention, the Contracting Parties are required to install an Automated Satellite-Linked VMS on their vessels.

**Characteristics of Vessel-monitoring System.** VMS is a system where through the installation of satellite-tracking devices on board of fishing vessels, the Flag State receives automatic transmission of certain information. This information includes the fishing vessel identification, location, date and time, and is collected by the Flag State at least every four hours to enable it to monitor effectively its flag vessels.

It's a system where performance standards provide, as a minimum, that the VMS:

- (a) is tamper proof;
- (b) is fully automatic and operational at all times regardless of environmental conditions;
- (c) provides real time data;
- (d) provides the geographical position of the vessel, with a position error of less than 500 m with a confidence interval of 99 percentage; and
- (e) in addition to regular messages, provides special messages when the vessel enters or leaves the Convention Area and when it moves between one CCAMLR area, sub-area or division within the Convention Area.

**Obligation to Install Vessel-monitoring System.** Each Contracting Party is required to establish an automated VMS to monitor the position of its fishing vessels, which are licenced to harvest marine living resources in the Convention Area, and for which catch limits, fishing

seasons or area restrictions have been set by conservation measures adopted by the Commission.

**Exemption.** The implementation of VMS on vessels while participating only in a krill fishery is currently not required.

**Technical Failures.** In the event the VMS ceases to operate, the Contracting Party has the obligation to advise as soon as possible the Executive Secretary of the name of the vessel, the date, time and the location of the vessel when the VMS failed. The party also informs the Executive Secretary when the VMS becomes operational again. The Executive Secretary makes such information available to Contracting Parties upon request.

In the event of technical failure or other non-function of the VMS, the master or the owner of the fishing vessel must communicate at least once every 24 hours, starting from the time that this event was detected, the required data by telex, by fax, by telephone message or by radio to the flag state. The master has also to take immediate steps to have the device repaired or replaced as soon as possible, and, in any event, within two months. If during that period the vessel returns to port it is not be allowed to commence a further fishing trip without having the defective device repaired or replaced.

Finally, an Observer Scientific Manual was also published.

## **F. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** The specific territorial character of the Antarctica led to various measures applicable to different divided areas and sub-areas. The statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources provides for the application of the conservation measures to the waters adjacent to Kerguelen and Crozet, where France has jurisdiction.

Like other international agreements, the CCAMLR does not impose regulations, but rather attempts to reach agreements on certain issues to be in turn implemented by Members of the Convention.

Unlike other multilateral fisheries conventions, the CCAMLR is concerned not only with the regulation of fishing, but also has a mandate to conserve the ecosystem. This 'ecosystem approach', which considers the whole Southern Ocean to be a suite of inter-linked systems, distinguishes the CCAMLR from other multilateral fisheries conventions.

**Weaknesses.** The right to withdraw from the membership as provided in Article XXXI of the CCAMLR Convention presents a weakness of the system. According to this article, any Contracting Party may withdraw from the Convention on 30 June of any year, by giving written notice not later than 1 January of the same year to the depositary, which, upon receipt of such a notice, shall communicate it forthwith to the other Contracting Parties. Moreover, any other Contracting Party may, within sixty days of the receipt of a copy of such a Notice from the depositary, give written notice of withdrawal to the depositary in which case the Convention shall cease to be in force on 30 June of the same year with respect to the Contracting Party giving such notice. Nevertheless, withdrawal from the Convention by any Member of the Commission shall not affect its financial obligations under the Convention.

In addition, Contracting Parties can declare by writing notification to the Commission accepting or not or no longer accepting the conservation measures adopted by the Commission. See Article IX paragraphs 6 (c and d) of the Convention (so-called opting-out clause).

The decision-making on substance-related matters based on consensus may also constitutes also a constraint to the competence of the Commission.

## **G. Implementation of the 1993 FAO Compliance Agreement**

CCAMLR measure 119/XVII entitled 'Licensing and Inspection Obligation of Contracting Parties with regard to their Flag Vessels Operating in the Convention Area' imposes obligations to flag states to issue permits and control effectively their authorised fishing vessels. Indeed, Article IV (b) of the System of Inspection states that: 'Within 7 days of each permit or licence in accordance with Conservation Measure 119/VII the following information about licences or permits issued by its authorities to its flag vessels authorising them to fish in the Convention Area: Name of the vessel; time periods authorised for fishing (start and end date); area(s) of fishing; species targeted and gear used'. Moreover, matters of 'Flagging and Licensing of Non-Contracting Party Vessels' are also dealt with by Resolution 13/XIX. This Resolution urges all Contracting Parties to avoid registering/flagging Non-contracting Party vessels or licensing such vessels allowing them to fish in water under their fisheries jurisdiction.

Strict and sufficient reporting requirements are imposed upon vessels fishing in the high seas through the application of the CCAMLR reporting system (see the above-mentioned Reporting System).

Flag state's enforcement measures and port-state control in respect of fishing vessels entitled to fly the flag and acting in contravention of the 1993 Agreement and sanctions applicable in this respect are not sufficiently regulated in the CCAMLR. These issues are only dealt with through the system of inspection.

Most conservation and management measures are applicable to vessels fishing in the high seas. Moreover, there are also specific measures applicable to specific areas under jurisdiction of contracting states. Furthermore, the CCAMLR conservation and management measures are very detailed. The applicability of the various measures depends on three criteria: (1) Sea area/sub-areas; (2) species/fisheries; and (3) definite/indefinite period in force.

In respect of records of high sea fishing vessels including detailed information as required by the 1993 FAO Agreement (Article VI), the CCAMLR register system is quite developed.

As regards the international cooperation aspect, as a regional intergovernmental organisation, the CCAMLR has its own mechanism for exchange of information relating to high sea fishing vessels such as a common database for registration, a reporting system from vessels and its flag states to Commission. Moreover, the CCAMLR also has a 'policy to enhance cooperation between CCAMLR and Non-Contracting Parties' (Annex 8 of Convention). See *infra*.

## H. Implementation of the 1995 UN Fish Stocks Agreement

**Precautionary Approach.** The CCAMLR conservation measures apply the precautionary principle to the protection of non-target species in trawl fisheries and to new and exploratory fisheries.

These are two key elements in the CCAMLR approach to management, namely the ecosystem approach and the precautionary approach. In accordance with the latter, the CCAMLR recognises that fisheries should be managed from the outset, and that conservation measures should be adopted which set out requirements for any Member planning to initiate a fishery for any species, or in any area, that has not previously been exploited. At this 'new fishery' stage, the measures require that Members notify the CCAMLR of their intention to start a new fishery and supply information on the nature of the proposed fishery and as much as they can on the biology of target species and the possible effects of the fishery on any dependent and associated species. In such cases, the CCAMLR limits the catch or fishing effort (or both), and also makes scientific observation of the fishery obligatory. The conduct of a new fishery is limited to member(s) who made such notification(s).

A new fishery is designated an 'exploratory fishery' after its first year. The conservation measure that the Commission implements for exploratory fisheries allows for continued regulation of the fishery while the scientific information required for a full assessment of the fishery and stock(s) concerned is being collected. A major component of the exploratory phase is the implementation of a plan to collect the data required for such assessment.

The CCAMLR aims at ensuring that exploratory fisheries are not allowed to expand faster than the information collected regarding the management of the fishery in accordance with the principles of Article II. To ensure adequate information, the Scientific Committee is required to develop (and update annually as appropriate) a Data Collection Plan. This plan identifies the types of data required. Participating members are required to provide a Research and Fishery Operation Plan for review by the Scientific Committee and Commission, as well as to submit annually the data specified by the Data Collection Plan. The Scientific Committee also establishes a precautionary catch limit at a level not substantially above that necessary to obtain the information specified in the Data Collection Plan and to undertake assessments and evaluations.

Therefore, we may conclude that the CCAMLR stands at the forefront in the development of precautionary and ecosystem-based fisheries management.

**Duty of the Flag State.** Flag states have the obligation to initiate prosecution and report to Commission. The SOI requires flag states to ensure that any of their vessels, which have been found to contravene a CCAMLR conservation measure, do not carry out fishing operations within the Convention Area until they have complied with the sanctions imposed. In addition, flag states have to report of their re-flagging or intention to re-flagging vessels fishing under their fishery jurisdiction.

**Non-member Obligations.** The principle obligations applicable to non-members are laid down in Annex 8 of the Convention entitled 'Policy to enhance cooperation between the CCAMLR and Non-Contracting Parties'. This Annex aims at ensuring the effectiveness of CCAMLR conservation measures; enhancing cooperation with Non-contracting Parties, including those implicated in fishing which undermines the effectiveness of those measures,



*i.e.* illegal, unreported and unregulated fishing (hereinafter cited as IUU fishing); and eliminating IUU fishing, including that by Non-contracting Parties.

To this end, Annex 8 defines the following policy:

- The list of Non-contracting Parties implicated in IUU fishing is held by the Executive Secretariat;
- the above-mentioned list is transmitted to the Minister for Foreign Affairs of each Non-contracting Party. Moreover, the list includes an explanation of how such IUU fishing undermines the effectiveness of CCAMLR conservation measures;
- Non-contracting Parties are encouraged to accede to the Convention or at least attend as observers at meetings of the Commission in order to improve their understanding of the work of the Commission and the effects of IUU fishing;
- Non-contracting Parties are encouraged to participate in the CCAMLR Catch Documentation Scheme;
- Non-contracting Parties are requested to prevent their flag vessels from fishing in the Convention Area in a manner that undermines the effectiveness of the measures adopted by the CCAMLR to ensure conservation and manage fisheries in a sustainable manner. In case their vessels are involved in IUU fishing, Non-contracting Parties are requested to provide information to the CCAMLR Secretariat on their vessels' activities, including catch and effort data;
- the CCAMLR seeks the assistance of Non-contracting Parties in investigating the activities of their flag vessels suspected of being involved in IUU fishing, including inspecting such vessels when they next reach port;
- the special format to submit information was regulated in Attachment A 'Submission of information by Non-contracting Parties on landings and transshipments of toothfish (*dissotichus* spp.) in their ports'; and
- Non-contracting Parties can also access to the Catch Documentation System (CDS). Non-contracting Parties shall be given only limited access to data in order to validate individual shipments (both to that country, and from that country). Further access shall not be provided and password-protected access and other precautions shall be taken as appropriate. Non-contracting Parties should advise the Secretariat of their national CDS contact point(s) before any access to CDS information is granted.

Moreover, the CCAMLR also established a 'Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures' (see measure 118/XVII).

However, there is no mechanism for inspecting fishing vessels at sea flying the flag of Non-contracting Parties. Annex 8 only seeks assistance of Non-contracting Parties 'in investigating the activities of their flag vessels suspected of being involved in IUU fishing, including inspecting such vessels when they next reach port'.

As regards Contracting Party vessels, if following boarding and inspection there is clear ground for believing that illegal activities took place, the jurisdiction over such violations belongs to flag state according to inspection system of the CCAMLR, Item XI. Indeed, if, as a result of inspection activities carried out in accordance with the CCAMLR provisions, there is evidence of violation of measures adopted under the Convention, the Flag State shall take steps to prosecute and, if necessary, impose sanctions. The Flag State only has an obligation to inform the Secretary about the prosecution proceedings and the explanation in case prosecution is not completed or successful.

**Port-state Enforcement.** As mentioned above, port-state enforcement in the CCAMLR system is provided under measures 147/XVII and 118/XVII relating to port-state inspection of vessels licenced (or permitted) to fish in the Convention Area by a Contracting Party if voluntary in port and of Non-contracting Party vessels respectively. The former allows port states, when asked by the Flag State. The latter prohibits the landing and transshipment of Non-contracting Party vessels.

**Collection and Sharing of Data and Scientific Information.** The CCAMLR has a 'Scientific Committee'. This organ provides a forum for consultation and cooperation as regards the collection, study and exchange of information with respect to marine living resources. This (Science) Committee is also responsible for the promotion of cooperation in the field of scientific research in order to extend knowledge of marine living resources of the Antarctic marine ecosystem. See Article XV of the Convention.

**Settlement of Disputes.** The CCAMLR encourages its Contracting Parties to settle their disputes by negotiation, consultation, mediation and arbitration. If necessary, Contracting Parties may bring their case before the ICJ (International Court of Justice) or arbitration. However, failure to reach agreement on reference to the ICJ or arbitration shall not absolve parties to the dispute from responsibility of continuing to seek to resolve it by any of the various peaceful means. Finally, Article XXV refers to the constitution of a CCAMLR arbitral tribunal.

## II. EUROPEAN COMMUNITY

### A. Introduction

The legal basis for a common fisheries policy is enshrined in the provisions of the Treaty establishing the European Community Consolidated Version (hereinafter cited as TEC) dealing with agriculture (1997).

Article 3(e) TEC provides that the activities of the Community include 'a common policy in sphere of agriculture and fisheries'. From articles 32-38, the fishery matter is voiced out under the agriculture provisions in Title II of the TEC.

It should be stressed that as regards competence, the discussion that follows is concerned only with legislative competence (or jurisdiction to prescribe). The competence to board and arrest (jurisdiction to enforce) and the jurisdiction for courts to deal with alleged breaches of law in this field (jurisdiction to adjudicate) remain under the exclusive competence of Member States. The EC possesses no powers of arrest nor does the European Court of Justice have jurisdiction to trial alleged breaches of fisheries legislation. However, the EC has exclusive competence in international relations in the domain of fisheries. It is empowered to undertake international commitments towards third countries or international organisations in matters relating to fisheries. The European Commission, on behalf of the Community, negotiates fisheries agreements with third countries and participates in various regional fisheries organisations. The EC has concluded 26 fishing agreements with third countries and is currently a member of nine regional or international fisheries organisations.

The competence of EC to adopt relevant rules and regulations regarding the conservation and management of living marine resource was officially clarified in the EC declaration on the competence of the EC with regard to matters governed by the 1995 UN Fish Stocks Agreement, deposited at the UN. There was also a declaration with regard to the 1993 FAO Compliance Agreement.

**For the purpose of examining fisheries control and surveillance, the following European Council regulations will be examined:**

- Council Regulation No. 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture;
- Council Regulation No. 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, as amended;
- Council Regulation No. 3690/93 of 20 December 1993 establishing a Community system laying down rules for minimum information to be contained in fishing licences;
- Council Regulation No. 1627/94 of 27 June 1994 laying down general provisions concerning special fishing permits;
- Council Regulation No. 1093/94 of 6 May 1994 setting the terms under which fishing vessels of a third country may land directly and market their catches at Community ports;
- Council Regulation No. 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources;
- Council Regulation No. 2027/95 of 15 June 1995 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources;
- Council Regulation No. 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas;
- Commission Regulation (EC) No. 897/94 of 22 April 1994 laying down detailed rules for the application of Council Regulation (EEC) No. 2847/93 as regards pilot projects relating to continuous position monitoring of Community fishing vessels.

**Regulation No. 3760/92.** The Community system for the conservation and management of fishery resources used to be set up by Council Regulation No. 170/83 of 25 January 1983. This system was in need of adaptation, and after nearly a decade of application, a new Community system for fisheries and aquaculture was established by Regulation No. 3760/92 in December 1992. This Regulation repealed and replaced Regulation No. 170/83. The objective of the current system is to provide for rational and responsible exploitation of living aquatic resources and of aquaculture.

The scope of application of Regulation No. 3760/92 is contained in its article 1 which reads as follows: 'The common fisheries policy shall cover exploitation activities involving living aquatic resources, and aquaculture, as well as the processing and marketing of fishery and aquaculture products where practised on territory of Member States or in Community fishing waters or by Community fishing vessels'. In this text, Community fishing waters referred to the waters under the sovereignty or jurisdiction of the Member States. Moreover, for the purpose of the Regulation, Community fishing vessel means a fishing vessel flying the flag of a Member State and registered in the Community. See article 3 of the Regulation No. 3760/92.

Regulation No. 3760/92 sets forth principles laying down rules of access to waters and resources. This constitutes the legal base for the technical measures to be created by the European Commission. Those principles consist of:

- establishing zones in which fishing activities are prohibited or restricted;
- limiting the exploitation rate;
- setting quantitative limits on catches;
- limiting time spent at sea, taking into account, where appropriate, the remoteness of the fishing waters;
- fixing the number and type of fishing vessels authorised to fish;
- laying down technical measures regarding fishing gear and its method of use;
- setting a minimum size or weight of individual species that may be caught; and
- establishing incentives, including those of an economic nature, to promote more selective fishing.

Those principles are considered the legal foundation to set up a complex set of detailed rules regarding special fishing permits and fishing licences of Community vessels and vessels flying the flag of third countries operating in Community fishing waters as provided for in Council Regulation No. 1627/94 of 27 June 1994.

Further, Member States are entitled to take measures for the conservation and management of resources in waters under their sovereignty or jurisdiction provided that (1) the measures involve strictly local stocks which are only of interest to fishers from the Member State concerned or apply sole to the fishers of this Member State; (2) the measures are compatible with Community law; and that (3) the measures are no less stringent than the existing measures adopted by the Community. (See article 10 of Regulation No. 3760) In addition, Member States have the obligation to notify the Commission and other Member States of such measures.

Regulation No. 3760/92 has also established two committees, namely the Scientific, Technical and Economic Committee for Fisheries and the Management Committee for Fisheries and Aquaculture. See articles 16 and 17 of Regulation No. 3760/92.

**Regulation No. 2847/93.** To implement the common fisheries policy, Regulation No. 2847/93 of 12 October 1993 institutes a control system applicable to the common fisheries. This Regulation lays down particular provisions for the technical monitoring of conservation and resource management measures, structural measures and measures concerning the common organisation of the market as well as certain provision relating to sanctions and penalties. In particular, the power to adopt appropriate measures to ensure the effectiveness of the system belongs to Member States as provided for under article 1(2). The Community has adopted various measures aimed at persuading Member States to effectively enforce Community regulations.

**Scope of Application of Regulation No. 2847/93.** This Regulation applies to all fisheries activities carried out within the territory and within the marine waters subject to the sovereignty or jurisdiction of the Member States including those exercised by vessels flying the flag of, or registered in, a third country, without prejudice of the right of innocent passage in the territorial sea and the freedom of navigation in the 200-mile fishing zone. The regulation shall also apply to the activities of Community fishing vessels operating in the waters of non-member countries and on the high seas, without prejudice to the special

provisions contained in fisheries agreements concluded between the Community and third countries or in International Conventions to which the Community is a party. See Article 1(3) of Regulation No. 2847/93.

**Fishing Licences and Special Permits.** The question of fishing licences and special permits is governed by Council Regulation No. 3690/93 of 20 December 1993 and Council Regulation No. 1627/94 of 27 June 1994.

According to Council Regulation No. 1627/94 on special fishing permits, all Community fishing vessels need special fishing permits, in addition to its fishing licence, to carry out fishing activities in Community fishing waters and on the high seas. All fishing vessels flying the flag of a third country and operating in Community fishing waters, pursuant to a fisheries agreement concluded between the Community and that country, need to have fishing licences and special permits. Vessels under ten meters in total length flying a Member State's flag and which fish exclusively in the territorial waters of the flag Member State do not need to have such special fishing permits. The information to be contained in the fishing licences and permits is listed in Annex I and II of the Regulation. The competence to issue special fishing permits to Community fishing vessels and fishing licences and special permits to fishing vessels flying the flag of third countries belongs to flag Member State and the Commission respectively. The fishing permit is only to be issued by flag Member State if the vessel concerned obtained beforehand a valid fishing licence.

**Monitoring of Catches.** Fishing vessels are requested to keep a logbook of their operations, indicating particularly the quantities of each species caught and kept on board, the date and location (ICES statistical rectangle) of such catches and the type of gear used. The above-mentioned species are subject to TACs or quotas. Other information such as the quantities discarded at sea may be recorded for evaluation purposes. This provision will not apply to vessels with an overall length of less than ten meters but, in such cases, the Flag State incurs the obligation to control these vessels.

**Landings and Transshipments.** The master of a Community fishing vessel who wishes to utilise landing locations in a Member State other than the flag Member State must inform the competent authorities in that Member State at least two hours in advance of (1) the landing location(s) and estimated time of arrival there; and (2) the quantities of each species to be landed. If the Community fishing vessel has an overall length equal to, or more than, ten meters, it shall after each trip and within 48 hours of landing submit a declaration to the competent authorities of the Member State where the landing takes place. See article 7 of the consolidated version of Regulation No. 2847/93.

**Fishing Effort Control.** Regulation (EC) No. 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources allows to carry out fishing activities in the fishing areas defined in Annex I by vessels authorised by Member States to carry out fishing activities directed at demersal species, in the area situated south of latitude 56° 30 north, east of longitude 12° west and north of latitude 50° 30 north, (known as the 'Irish Box'). In particular, article 2 of Regulation No. 685/95 requires Member States to submit 'lists of named fishing vessels flying their respective flags which are authorised to carry out their fishing activities in the fisheries defined in Annex I'.

Furthermore, Member States shall assess the fishing effort necessary, on the basis of Community criteria for assessing the fishing efforts as defined in Annex II of Regulation No. 685/95. According to Annex II,

- a) Fishing effort is defined as follows:
  - in the case of a vessel, as the product of its capacity and its activity; and
  - in the case of a fleet or of a group of vessels, as the sum of the fishing effort of each individual vessel.
- b) The capacity of a vessel is expressed as follows:
  - In the case of vessels using towed gear, as the installed power expressed in kilowatts (kW);
  - in the case of vessels using fixed gear, as the installed power expressed in kilowatts (kW) and tonnage. If necessary, on the basis of proposals from the Member States and in consultation with the Member States concerned, the Commission will examine the possibility of setting more sophisticated criteria for assessing fishing effort.
- c) The fishing activity of a fishing vessel is evaluated on the basis of time spent annually in the zone.

Moreover, Annex IV of the said regulation lays down detailed measures concerning the exchange between France and Portugal; Spain and France and Belgium and Spain of certain fishing possibilities and certain authorised catch limits. The maximum annual fishing effort for each Member State and for each fishery is indicated in the Annex enclosed to Regulation No. 2027/9595 of 15 June 1995 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources.

## **B. Reporting and Verification**

**Vessel-monitoring System.** Article 3 of Regulation No. 2847/93, as amended by Regulation No. 686/97 of 19 April 1997, requires Member States to establish a satellite-based VMS, to monitor the position of Community fishing vessels. The detailed rules for the application of the Council regulation as regards satellite-based VMS were laid down in Commission Regulation No. 1489/97 of 29 July 1997. In addition, certain categories of Community vessels are required to use the VMS for continuous communication of their operating position. Data transmitted by or recovered from fishing vessels are also required to be recorded in a computer database form in the Member States whose flag the vessels are flying regardless of the waters in which the fishing vessels are operating. In case fishing vessels are operating in waters under jurisdiction of a Member State, the Flag State has the obligation to communicate the information to such Member State immediately. All recorded data have to remain in a computer-readable form for a period of three years. The Commission shall have access to these computer files on the basis of a specific request.

The VMS had to be installed by 30 June 1998 on all Community fishing vessels exceeding 20 meters between perpendiculars or 24 meters overall length and belonging to any one of the following categories:

- (1) vessels operating on the high seas, except in the Mediterranean Sea;
- (2) vessels operating in the waters of third countries, provided that provisions have been made in Agreements with the relevant third country or countries for the application of a VMS to the vessels of such country or countries operating in the waters of the Community; and
- (3) vessels catching fish for reduction to meal and oil.

The VMS had to be installed by 1 January 2000 on all Community fishing vessels exceeding 20 meters between perpendiculars or 24 meters overall length wherever they operate. In Greece and Italy, however, such a system was not yet fully operational at the time of writing of the present report. However, only in the situation where a third country or countries accepted the obligation to apply a VMS to their vessels operating in the waters of the Community, shall Community fishing vessels operating in the waters of such third country or countries be subject to the application of a VMS.

Furthermore, there are some exceptions to the principle of compulsory VMS. The VMS shall not apply to vessels: (a) Operating exclusively within 12 nautical miles of the baseline of the flag Member State; or (b) which never spend more than 24 hours at sea taken from the time of departure to the return to port.

In order to enhance the application of VMS, the regulation requires each Member State to establish its own fisheries monitoring centre (FMC), which will be responsible for monitoring the fishing vessels flying its flag, regardless of the waters in which they are operating or the port they are in, as well as Community fishing vessels flying the flag of other Member States and fishing vessels of third countries to which a VMS applies operating in the waters under the sovereignty or the jurisdiction of that particular Member State. In addition, a financial supporting policy for VMS installation has been adopted. Member States may undertake joint actions for FMC.

The VMS system will enable fishing vessels to communicate by satellite to the Flag State and the coastal Member State concerned simultaneously, its geographical position and, where applicable, the fishing effort reports. This feature of the VMS had not yet become fully operational by September 2001.

**Catch Reports (Title II of Regulation No. 2847/92).** In case of transshipments of any quantities of catches of a stock or group of stocks subject to a TAC or quota irrespective of the place of transshipment, or in case of direct landing of such quantities outside Community territory, the master of Community fishing vessels shall, at the time of the transshipment or the landing, inform the Member State whose flag his vessel is flying, or in which his vessel is registered, of the species and quantities involved and of the date of transshipment or landing and of the location of catches by reference to the smallest zone, for which a TAC or quota has been fixed. At the latest 24 hours before the beginning and at the end of a transshipment or a series of transshipments, when this takes place in a port or in EC maritime waters, the master of the 'receiving vessel' shall inform the competent authorities of that Member State of the quantities of catches of a stock or group of stocks subject to a TAC or quota on board his vessel.

If the transshipment or landing takes more than 15 days, the flag state or state of register will be informed of relating information. The transporter of fishery products is also required to draw up a transporting document, including information relating to the origin of the consignment (name of vessel and its external identification); (b) the place of destination of the consignment(s) and the identification of the transport vehicle; (c) the quantities of fish (in kilograms processed weight) for each species transported, the names of the consignee and the place and the date of loading.

**Fishing Effort Reports.** Commission Regulation (EC) No. 1449/98 of 7 July 1998 lays down detailed rules implementing Council Regulation (EEC) No. 2847/93 as regards effort reports.

This Regulation lays down detailed rules for the provision of 'effort reports' to be communicated by masters of Community fishing vessels, or their representatives, which intend to fish or have fished in an area, in accordance with articles 19(b) and 19(c) of Regulation (EEC) No. 2847/93.

According to article 2 of Regulation No. 1449/98, an effort report must contain the following information:

- The geographical location of a vessel to be expressed in degrees and minutes of latitude and longitude;
- an area to be an area as defined in Annex I to Council Regulation (EC) No. 685/95 (3) and to be expressed using the codes for effort zones defined in Annex VIa to Commission Regulation (EEC) No. 2807/83 (4) laying down detailed rules for recording information on Member States' catches of fish;
- the time to be expressed as universal time (UTC);
- where the catch retained on board by species is mentioned, the demersal species subject to TAC and quota which have to be recorded in the logbook in accordance with article 6 of Regulation (EEC) No. 2847/93 shall be communicated individually in kilograms live weight; all other species retained on board shall be communicated globally in kilograms live weight; the reported quantities shall be the total quantities of each species retained on board at the time of the communication of the effort report; and
- the species to be communicated and identified by the FAO code which is mentioned in the logbook.

In addition, articles 3, 4 and 5 of Regulation No. 1449/98 distinguish five different types and requested information of effort reports applicable in cases of entry, exit, transzonal and single effort report.

**Report to Commission.** Before the 15th of each month, each Member State shall notify the Commission by computer transmission of the quantities of each stock or group of stocks subject to TACs or quotas landed during the preceding month. Notifications to the Commission shall indicate the location of the catches and the nationality of the fishing vessels concerned.

Each Member State shall inform the Commission of a quota consumption forecast with anticipated date of exhaustion in respect of the species for which the catches made by fishing vessels flying its flag or registered there are deemed to have exhausted 70 percentage of the quota, allocation or share available to that Member State. Member States shall, where catches



of stocks or groups of stocks subject to TACs or quotas may reach TAC or quota levels, provide the Commission, at its request, with more detailed or more frequent information.

By means of Regulation No. 500/2001 a similar requirement was introduced for stocks taken by vessels flying the flag of a Member State operating in waters subject to the sovereignty or jurisdiction of third countries and on the high seas. According to article 1 of this Regulation each Member State shall notify the Commission by computer transmission, before the end of the first month of each quarter, of the quantities of each stock not subject to TACs or quotas taken by fishing vessels flying its flag operating in waters subject to the sovereignty or jurisdiction of third countries and on the high seas and: (1) landed directly in its territory during the previous quarter; (2) landed directly in third countries during the previous quarter; or (3) transhipped to third country vessels during the previous quarter. Moreover each Member State shall notify the Commission by computer transmission, before the end of the first month of each quarter, of the quantities taken by fishing vessels flying the flag of another Member State in waters subject to the sovereignty or jurisdiction of third countries and on the high seas and landed in its territory during the previous quarter.

### **C. Inspection and Boarding Schemes**

**Inspection.** In principle, regulations on boarding, inspection and power of authorised officer fall under the Member States competence. Indeed, according to article 4(1) of Regulation No. 2847/93, inspections shall be carried out by each Member State on its own account by means of a system of inspection decided by the Member State itself. Member States shall inspect fishing vessels and investigate all activities including activities of landing, selling, transporting and storing fish and recording landing and sales. See article 2(2) of Regulation No. 2847/93. Member States shall place sufficient means at the disposal of its competent authorities to enable them to perform their task of inspection and control (see article 1(2) of Regulation No. 2847/93). These monitoring activities also apply to fishing vessels flying the flag of third countries when sailing in maritime waters under sovereignty or jurisdiction of Member States. Fishing vessels of Member States are subject to such monitoring activities even if they operate in the water outside the Community fishery zones.

Regulation No. 2847/93 encourages Member States to coordinate their monitoring activities through setting up a joint-inspection program. In this case, they have the obligation to inform the Commission regularly of such program. Moreover, the inspection must observe the principle of non-discrimination as regards the sector and vessels chosen for inspection.

In order to ensure compliance with the objectives and strategies set out by the Council with respect to the management and monitoring of fishing activities, each Member State must organise regular checks or set up cross-checking information on fleet fishing capacity and activities taken place in its territory or within the maritime waters under its sovereignty or jurisdiction, of all persons concerned by the implementation of the above-mentioned objectives. In particular, Member States will carry out (their) technical control by the following means: (a) Restructuring, renewal and modernisation of the fishing fleet; (b) adaptation of fishing capacity by means of temporary or definitive cessation; (c) restriction of the activity of certain fishing vessels; (d) restriction of the design and number of fishing gear and of the method by which it is used; (e) development of the aquaculture industry and coastal areas. See articles 24 and 25 of Regulation No. 2847/93. If Member States fail to implement

their obligations, the Commission will react, *i.e.* it submits for the Council's approval a proposal for measure(s) to be taken.

In addition, Member States have to carry out the inspections on the implementation of measures concerning the common organisation of the market in fishery products as set forth in Title VI of Regulation No. 2847/93.

**Verification by Commission.** The Commission can verify the application of existing measures by the Member States by means of the examination of documents and by conducting on-the-spot visits. The Commission may decide, if it considers it necessary, to carry out verification without prior notice.

To carry out on-the-spot visits, the Commission has a small unit of 25 inspectors (see Fisheries Monitoring and Surveillance' Commission Press Release dated 27 October 2000). To this end, the Commission issues written instructions to its inspectors indicating their authority and the objectives of their missions. Commission inspectors can be present at control and inspection activities carried out by national control services. In the framework of these missions, the Commission establishes appropriate contacts with Member States to establish a mutually acceptable inspection program. Member States have the obligation to cooperate with Commission inspectors and to facilitate their tasks. However, in the framework of sea or air inspection where the competent national services must carry out other priority tasks relating to, in particular, defence and safety at sea, the authorities of the Member State reserves the right to defer or redirect the inspection operations the Commission intended to conduct.

In certain cases, the Commission inspectors may carry out independent inspections. However, the Commission inspectors may not on their own initiative use the powers of inspection conferred to national agents. The Commission inspectors do not have access to vessels or premises unless accompanied by agents of a Member State and they cannot carry out controls with respect to natural persons (see article 29 of Regulation No. 2847/93). The Commission inspectors may store information in a specified database. If national provisions provide for the confidentiality of investigations, communication of this information is subject to the authorisation of the competent authorities.

**Joint International Inspection.** In 1988 the EC contributed to the establishment and the implementation of NAFO's joint international inspection scheme, by adopting Regulation No. 2868/88. Within this framework, the EC is required to assign Community inspectors to the scheme to be appointed by the Commission or by a Member State.

#### **D. Regional Register**

For purposes of EC cohesion, the Commission issued in August 1989 a document entitled 'A Future for Community Shipping Industry: Measures to Improve the Operating Conditions of Community Shipping'. This document proposed the establishment of a Community ship register and suggested the flying of the Community flag by some sea-going vessels. To this end a draft proposal of Council Regulation concerning the Establishment of a Community Ship Register was issued. See COM (89) 266 final. The proposed system would operate in parallel with the national registries maintained in each Member State, allowing vessels flying the flag of a Member State also to apply for the 'Community Flag'. However, according to the

draft, there was no obligation to register on this EUROS system. Although the draft contained some tax-exemption advantages, the proposal was not welcomed and has not been adopted by the Member States.

### **E. Other Enforcement Provisions/Schemes**

As already pointed out, only Member States have jurisdiction to enforce Community fishery management measures. Therefore, national laws shall apply in case of imposing sanctions and penalties. Aiming at persuading Member States effectively to enforce Community regulations, Regulation No. 2847/93 only provides the different kinds of sanctions to be applied in general.

These sanctions may include depending on the gravity of the offence:

- Fines;
- seizure of prohibited fishing gear and catches;
- sequestration of the vessel;
- temporary immobilisation of the vessel;
- suspension of the licence; and
- withdrawal of the licence.

For the purposes of approximation and transparency, a list of types of behaviour that seriously infringe the rules of the common fisheries policy was laid down in Council Regulation No. 1447/1999 of 24 June 1999.

Member States must without delay and in compliance with their procedures under national law notify the flag Member State or the Member State of registration, of any infringement of the Community rules. These notifying information should indicate the name and the identification marks of the vessel involved, the names of the master and the owner, the circumstances of the infringement, any criminal or administrative proceedings or other measures taken and any definitive ruling relating to such infringement.

In case of violation discovered by Member States of landing or transshipment, they shall take appropriate action against the master of the vessel involved or against any other person responsible for the infringement.

The prosecution of infringements may be transferred from the Member State of landing or transshipment to the competent authorities of the Member State of registration with the agreement of the latter. The Commission has to be notified of any such transfer by the Member State of landing or transshipment.

Member States are required to report to the Commission any laws, regulations or administrative provisions adopted by them in order to prevent and prosecute irregularities; any changes in the minimum and maximum amount of the fines provided for in respect of each type of infringement and the nature of any other sanctions available; as well as the results of inspections or monitoring.

## **F. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** The common fisheries policy granted exclusive legislative competence to the EC. Consequently, the EC enacted a set of rules on fishery control and management. These legislative instruments take mainly the form of regulations that have 'direct applicability' and 'direct effect'.

**Weaknesses.** The Community has exclusive competence in relation to the conservation and management of sea fishing resources, including the competence to adopt regulatory measures and enter into international agreements, but it does not have such competence in relation to matters of enforcement, scientific research, or to development measures. Consequently, it may create difficulties if an international agreement allocates certain rights and duties, which cannot be implemented at the Community level, particularly in respect of enforcement and administrative and judicial measures relating to vessels and their crew. Especially in the enforcement area many defects became apparent over the years, such as the lack of resources for national inspector schemes, of dissuasive penalties, of autonomous powers of the Community Inspectorate, of coordination between national inspection bodies, of political will of the Member States, and of providing an overall approach.

The recent crisis indicates once more that the common fisheries policy has to a large extent failed to prevent the over-exploitation of many stocks and the growth of excess capacity.

## **G. Implementation of the 1993 FAO Compliance Agreement**

The EC deposited its instrument of acceptance of the 1993 FAO Compliance agreement on 6 August 1996. As regards fishing permits and licences to vessels operating in the high seas, Council Regulation No. 2847/93 applies to the high seas. This legislation establishes a permitting and reporting system for Community fishing vessels. In addition, the system of records of fishing vessels, port-state inspection and communication to flag states of vessels committing infringements are also established. The issuing of fishing permits to Community vessels remains within the competence of the Member States. The Community only issues fishing licences and special permits to vessels flying the flag of the third country operating in Community fishing waters. The major EC responsibility under the 1993 FAO Compliance Agreement is the obligation to licence and control all Community-flag fishing vessels operating on the high seas. Obviously, under Council Regulation No. 1627/94 of 27 June 1994 on special fishing permits, all Community fishing vessels need special fishing permits, in addition to its fishing licence, to carry out fishing activities regardless of the waters where fishing vessels are operating.

Recently, Member States became obliged to transfer detailed catch information concerning high seas fisheries directly to the Commission.

Although the agreement requires that the sanctions to be imposed in case of violations shall be of 'sufficient gravity' in order to secure effective compliance with the provisions of the agreement, this does not appear to be the case in the national legislation of the Member States where fines frequently stay below the demands of deterrence.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

The EC signed the 1995 UN Fish Stocks Agreement on 27 June 1996. The EC and the Member States however have not yet deposited the instruments of ratification, as the internal procedures of certain Member States have not yet been completed. The deposition of the instruments should take place simultaneously.

The EC has played an important role in the elaboration of progressive control schemes within the framework of RFOs like the NAFO, the NEAFC and the CCAMLR. It also actively promotes at present the adoption of similar schemes in other RFOs.

Council Regulation No. 2847/43 obliges Member States fishing beyond Community waters to comply with obligations in the field of monitoring, inspection and surveillance, as well as with specific provisions adopted in the framework of RFOs and in fishery agreements concluded by the Community with third states. But a number of Member States have not carried out inspection and surveillance activities on board their vessels on the high seas, unless the latter form part of the convention or regulatory area of the just-mentioned RFOs. In the same vein, port-state control has normally only been applied in practice by Member States if the EC has entered into specific commitments with third states in this respect.

As regards the precautionary approach, the EC Commission proposed a final draft text on 'Application of the precautionary principle and multi-annual arrangements for setting TACs' in its Communication to the Council and the European Parliament of 1 December 2000 (see COM (2000) 803 final). In addition, the European Commission has adopted a proposal aiming to group under the same regulation the various technical measures set up to protect highly migratory species.

Recently, Member States became obliged to transfer detailed catch information concerning high seas fisheries directly to the Commission.

Although the agreement requires that the sanctions to be imposed in case of violations shall be 'adequate in severity' in order to secure effective compliance with the provisions of the agreement, this does not appear to be the case in the national legislation of the Member States where fines frequently stay below the demands of deterrence.

## **III. FFA**

### **A. Introduction**

**FFA Convention.** The Convention on the Establishment of the South Pacific Forum Fisheries Agency (hereinafter cited as FFA Convention) was signed at Honiara, Solomon Islands on 10 July 1979 and entered into force on 9 August 1979. The main intention behind its establishment was the intention of presenting a common front to distant water fishing nations seeking access to the highly migratory species in the EEZ of the member countries.

**Agency.** The FFA Convention established the South Pacific Forum Fisheries Agency (hereinafter cited as FFA of the Agency). The Agency consists of the Forum Fisheries Committee, in which all members are represented, and the Secretariat. The agency has no regulatory functions, but plays an advisory and coordinating role aiming at assisting member

countries in the exercise of their sovereign rights over the living resources of their EEZ. Nevertheless, through the FFA, member countries have cooperated on fisheries management. Indeed, within the Agency several regional agreements have been adopted such as (1) the 1982 Nauru Agreement concerning Cooperation in the Management of Fisheries of Common Interest (hereinafter cited as 1982 Nauru Agreement); (2) the 1987 Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America; and (3) the 1992 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (hereinafter cited as 1992 Niue Treaty).

**Closed Membership.** Membership of the Agency is only open to (a) members of the South Pacific Forum, and (b) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum. Are currently members of the Agency: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

**Territorial Scope.** The FFA area of competence is the South Pacific region. There is no precise definition of the area by lines of latitudes or longitudes. However, it mainly coincides with FAO Statistical Areas 71 and 81. As regards the resources, the FFA covers all living resources and in particular highly migratory species.

## **B. Reporting and Verification**

The FFA Convention does not contain any reporting or verification schemes. However within the South Pacific Forum Fisheries Agency two regional agreements have been adopted which do contain such obligations for the states parties to these agreements.

Firstly, the 1982 Nauru Agreement states, in its Article II, that the parties 'being the Federated States of Micronesia, Kiribati, the Marshall Islands, Nauru, Palau, Papua New Guinea, the Solomon Islands and Tuvalu' shall seek to establish a coordinated approach to the fishing of the common stocks in the national Fisheries Zones by foreign vessels, and in particular shall establish, as a minimum, uniform terms and conditions under which the parties may licence foreign fishing vessels to fish within the national Fisheries Zones regarding (1) the requirement that a standardised form of log book be maintained on a day-to-day basis which shall be produced at the direction of the competent authorities; (2) the timely reporting to the competent authorities of required information concerning the entry, exit and other movement and act of fishing vessels within these Fisheries Zones; and (3) the requirement to supply to the competent authorities complete catch and effort data for each voyage.

Secondly, the 1992 Niue Treaty obliges parties 'being Australia, Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga and Vanuatu' to ensure that foreign vessels licenced to fish under foreign fishing agreements are, as a minimum, required to provide reports in accordance with the standard forms of reporting as set out in the harmonised minimum terms and conditions of fisheries access from time to time. Under the 1992 Niue Treaty, 'foreign fishing agreement' means an agreement or arrangement authorising or permitting foreign fishing vessels to fish in the EEZ or fisheries zone of any Party.

### C. Inspection and Boarding Schemes

States parties to the 1979 FFA Convention have agreed under Article 5 of that Convention that the Forum Fisheries Committee shall promote intra-regional coordination and cooperation in fisheries surveillance and law enforcement. Furthermore, the 1992 Niue Treaty provides that states parties shall cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. To the best of our knowledge, no specific regional inspection or boarding schemes have been adopted yet.

The Agreed Minute on Surveillance and Enforcement Cooperation Between the Parties to the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America of 8 March 1994 acknowledges the plan of the Pacific Island States to establish a regional scheme for fishery surveillance and enforcement. The parties agreed to enhance surveillance and enforcement which, according to the literature, has resulted in significant improvements in the detection of vessels engaged in illegal fishing in the EEZs of these countries.

### D. Regional Register

**Regional Register of Foreign Fishing Vessels.** One of the first developments in the areas of control and surveillance was the establishment of the Regional Register of Foreign Fishing Vessels. This innovative and cost-effective control consisting of registering distant water fishing nations vessels operating in the EEZs of FFA member countries ensures a high degree of compliance by foreign fishing vessels. A foreign vessel must have good standing on the register to be licenced to fish in the EEZs of FFA member countries. Indeed, the 1987 Niue Treaty provides that parties shall ensure that no foreign fishing vessels shall be licenced to fish unless the vessel has good standing on the Regional Register of Foreign Fishing Vessel maintained by the South Pacific Forum Fisheries Agency (see Article IV.2). If good standing is withdrawn, the licensing ban remains with vessels even if sold or renamed.

**Vessel-monitoring System Register for Foreign Fishing Vessels.** Any foreign fishing vessel that wishes to apply for a licence to fish must first be registered on the VMS Register of Foreign Fishing Vessels maintained by the FFA. This is not a licence to fish, but an additional procedure to existing registration and licensing procedures.

### E. Other Enforcement Provisions/Schemes

**Vessel-monitoring System.** The FFA launched a major initiative during 1995 to research, design and implement a satellite-based VMS. This allows the provision of timely and accurate fishing activity information to FFA member countries. The FFA VMS complements the existing monitoring and surveillance program, significantly enhancing each member country's resources for monitoring, surveillance and control of fishing activities within their EEZs. At present, the FFA and its member countries rely on the reports of national fisheries observers, for a small portion of the fleet, and occasional aerial surveillance information for near-real-time fishing vessel position information. Any foreign fishing vessel that wishes to apply for a licence to fish in the EEZs of a FFA member country must first be registered on the VMS Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency. FFA member countries will not licence any vessel to fish until the vessel is registered on the VMS Register. With VMS, fishing vessel positions are monitored using a global satellite

positioning system. This information is then automatically analysed within the FFA. Due to legal constraints, this requirement is not yet applied to the high seas in the Convention area.

**Coordination of Aerial Surveillance Flights.** Another significant aspect of FFA's surveillance activities is the coordination of aerial surveillance flights covering member country EEZs. New Zealand, Australian and French air forces participated in aerial surveillance meetings at the FFA. The New-Zealand, Australian and French air forces, which undertake aerial surveillance flights within the region, as part of their cooperation programmes with the South Pacific countries, recognised the FFA coordinating role in the planning of these aerial surveillance flights. Moreover, the FFA supplies fisheries information to surveillance flights, enhancing that way the effectiveness and usefulness towards the naval and fisheries surveillance vessels of the FFA member countries.

## **F. Observer Schemes**

The development of a regional observer programme for the South Pacific by the FFA is aimed at the collection of data as well as foreign fishing vessel compliance with the terms and conditions of fishing access. A comprehensive observer-training programme has recently been successfully undertaken and dialogue with the Solomon Islands College of Higher Education (SICHE) has been established to develop a curriculum of observer training courses. Guidelines for standard observer operating procedures are also being developed in conjunction with other regional organisations such as South Pacific Commission (SPC).

## **G. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** Subsequent developments and results achieved by the member countries within the Forum Fisheries Agencies enhanced the role of the Agency. Indeed, several international treaties conferred some additional functions to the Agency. These treaties are (1) the 1982 Nauru Agreement; (2) the 1987 Niue Treaty; and (3) the 1987 Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America. Finally, the Agency plays also a central role in the management of the VMS and in the coordination of the aerial surveillance flights.

**Weaknesses.** The Agency presents a structural weakness in the sense that the 1979 FFA Convention did not assign regulatory powers to the Agency. Indeed, the Agency has to be considered as a forum to promote intra-regional coordination and cooperation in the fields such as (1) harmonisation of policies with respect to fisheries management; (2) cooperation in respect of relations with distant water foreign countries; (3) cooperation in surveillance and enforcement; (4) cooperation in respect of onshore fish processing and (5) cooperation in marketing. Consequently, the Agency does not present the characteristics of an integrated regional fisheries organisation. Finally, the closed membership of the Agency is another weakness. Indeed, membership of the Agency shall only be open to (1) members of the South Pacific Forum; and (2) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum. Consequently, distant water fishing nations are therefore clearly excluded from membership.



## H. Implementation of the 1993 FAO Compliance Agreement

Taking into consideration the exact functions of the Agency and the lack of any regulatory powers of the Agency, the 1979 FFA Convention cannot implement *stricto sensu* the 1993 FAO Compliance Agreement. Indeed, the Agency is only a forum for members to discuss and consult together on matters of common concern in the field of fisheries. However, the Agency may facilitate or coordinate the implementation of the 1993 FAO Compliance Agreement.

## I. Implementation of the 1995 UN Fish Stocks Agreement

Taking into consideration the exact functions of the Agency and the lack of any regulatory powers of the Agency, the 1979 FFA Convention seems not to allow for the implementation of the UN Fish Stocks Agreement.

According to Article III of the FFA Convention, the Parties recognise that effective cooperation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for cooperation between all coastal states in the region and all states involved in the harvesting of such resources.

Moreover, the 1982 Niue Treaty provides for cooperation in the implementation of harmonised minimum terms and conditions of access; exchange of information; cooperation in fisheries surveillance and law enforcement; cooperation in prosecutions and cooperation in enforcement of penalties. However, such cooperation only applies to fisheries activities taken place in the fisheries zones of the parties and does not apply to high seas fishing.

## IV. ICCAT

### A. Introduction

**Establishment.** The International Commission for the Conservation of Atlantic Tunas was created by the International Convention for the Conservation of Atlantic Tunas signed on 14 May 1966 in Rio de Janeiro. The Commission covers all waters of the Atlantic Ocean and adjacent seas, including the Mediterranean Sea.

**Structure.** The organisation consists of the Commission itself, which is the main decision-making body, composed of all members, the Council which is responsible for performing intersessional tasks of the Commission, the Secretariat, four Panels specialised on different types of Tuna, the Compliance Committee, the Permanent Working Group (PWG) on ICCAT Statistics and Conservation Measures which reviews compliance by non-Member States, the Standing Committee on Finance and Administration and finally Special Working Groups can be created. At the moment, there is only a Special Working Group on Allocation Criteria.

**Membership.** Angola, Brazil, Cape Verde, Canada, China, Côte d'Ivoire, Croatia, EC, Equatorial Guinea, France (St. Pierre et Miquelon), Gabon, Ghana, Guinea-Conakry, Japan, Korea (Rep. of), Libya, Morocco, Namibia, Panama, Russia, Sao Tome and Principe, South

Africa, Trinidad and Tobago, Tunisia, United Kingdom (Anguilla, Bermuda, St. Helena, Turks and Caicos), United States of America, Uruguay, Venezuela.

**Objectives.** The objective of the IICAT is to cooperate in maintaining the population of tunas and tuna-like species found in the Atlantic Ocean and the adjacent seas at levels that will permit the maximum sustainable catch for food and other purposes.

## **B. Reporting and Verification**

**Required Information.** The ICCAT strives to obtain complete and accurate statistics from all countries, entities and fishing entities operating tuna and tuna-like fisheries in the Atlantic and Mediterranean. While Tunas and tuna-like fish are highly-migratory species, most of which frequently cross national and international waters, all countries, contracting and Non-contracting Parties, which operate tuna and/or shark fisheries in the Atlantic Ocean and adjacent seas are requested to submit their tuna/shark fisheries data. The following information is required:

- Nominal annual catch of tuna and tuna-like fish, by region, gear, flag and species, and, where possible, by EEZ and high seas;
- number of fishing vessels by size classes, gear and flag, and, where possible, by EEZ and high seas;
- monthly catch statistics by area, gear, flag and species; and
- catch statistics on sharks.

**Reports on Transshipments of Foreign Vessels.** The ICCAT Contracting Parties and cooperating Non-contracting Parties shall establish necessary internal measures to monitor foreign vessels that tranship or unload at their ports to the extent practicable in order to provide appropriate documentation, as necessary and appropriate, on the species composition and weight of such landed species, the date of each transshipment or landing, and the geographical area where the vessel fished. This information shall be transmitted to the ICCAT Secretariat, which should then immediately transmit the information to the party whose flag the landing vessel flies.

**Reports on Sighted Illegal Fishing Activities.** The Contracting Parties should collect any information on the sighting of vessels of contracting and Non-contracting Parties, that are engaged in illegal fishing, through their enforcement and surveillance operations in the Convention Area. Such information should be transmitted promptly to the Executive Secretary.

Furthermore, the Contracting Parties should encourage those of their fishers operating in the Convention Area to collect information on vessels engaged in illegal fishing. Any observation by a Contracting Party vessel or aircraft about Contracting Parties' vessels that may be fishing contrary to the ICCAT conservation measures shall be reported immediately to the appropriate authorities of the flag state making the observation. That Contracting Party shall then immediately notify the appropriate authorities of the Flag State of the vessel fishing. Each Contracting Party making the observation and the Contracting Party whose fishing vessels were observed shall provide the pertinent information to the ICCAT Secretariat for review by the Compliance Committee. When a sighted vessel flies the flag of a Contracting Party, the Executive Secretary shall immediately transmit it to the relevant Contracting Party,

which is requested to take immediately appropriate action with respect to the vessel in question. Such Contracting Party shall promptly inform the Commission of the actions taken.

When the sighted vessel flies the flag of a Non-contracting Party, the Executive Secretary shall immediately transmit it to the relevant Non-contracting Party and request that it promptly take appropriate action to ensure that the effectiveness of the ICCAT conservation measures are not undermined and inform the Commission of the results of such action. The Executive Secretary compiles the information and provides it to the Commission.

When the Flag State cannot be identified, the Executive Secretary compiles the information received from the Contracting Parties, which sight such vessels, and provides it to the Commission.

### **C. Inspection and Boarding Schemes**

**Port Inspections.** When a vessel flying the flag of a Non-contracting Party which has been sighted in the ICCAT Convention Area and which is presumed to be undermining the ICCAT conservation measures enters voluntarily a port of any Contracting Party, it is inspected by authorised Contracting Party officials knowledgeable of the ICCAT measures and is allowed to land or tranship any fish until this inspection has taken place. Such inspections include the vessel's documents, logbooks, fishing gear, catch on board and any other matter relating to the vessel's activities in the Convention Area.

Landings and transhipments of all fish from such a vessel are prohibited in all Contracting Party ports if such inspection reveals that the vessel has onboard species subject to the ICCAT conservation measures, unless the vessel establishes that the fish were caught outside the Convention Area or in compliance with the relevant ICCAT conservation measures and requirements under the Convention.

Information on the results of all inspections of vessels of Non-contracting Parties, entities or fishing entities, conducted in the ports of Contracting Parties, and any subsequent action, are to be transmitted immediately to the Commission. The Secretariat in turn transmits this information to all Contracting Parties and to the relevant Flag State.

**Powers and Duties of the Inspectors.** Inspection is carried out by the appropriate authorities of the Contracting Parties, who will monitor compliance with the Commission's conservation measures for all the ICCAT species, at their own ports, without discrimination. It is important to stress that inspectors remain under the control of the authority of the Contracting Parties.

In the case of an apparent violation by a foreign fishing vessel, the inspector draws up a report of the inspection on a form standardised by the Commission, or on a form produced by the national government, which collects the same quality of information. Copies of the form must be sent to the Flag State. In the case of a violation by a domestic vessel, domestic procedures will be followed for documentation, which must also provide the same quality of information as the standard ICCAT form.

An inspector may examine the fish, fishing gear, fish samples, and all relevant documents to verify compliance with the ICCAT measures. The master of the vessel is required to cooperate with the inspector. Inspections must be carried out so that the vessel suffers the

minimum interference and inconvenience and that degradation of the quality of the fish is avoided.

**Exchange of Inspectors.** Parties must consider and act on reports of apparent violations by foreign inspectors on a similar basis as the reports of national inspectors in accordance with their national legislation. Moreover, Contracting Parties are requested to collaborate, in accordance with their legislation, in order to facilitate judicial or other proceedings arising from reports of inspectors acting under these agreements.

Parties whose vessels enter, land, or tranship their catches in ports other than their own, can send their own inspectors to inspect their own vessels with respect to the observance of the Commission's regulations, having previously obtained an invitation from the port state in which the inspection shall be executed.

In addition, parties are encouraged to enter into bilateral agreements that allow for an inspector exchange program designed to promote cooperation, share information, and educate each party's inspectors on strategies and operations that promote compliance with the ICCAT management measures. The countries' national report should include a description of such programs.

**Stateless Vessels.** Any sightings of vessels that appear to be without nationality (stateless) that may be fishing for the ICCAT species ought to be reported immediately to the appropriate authorities of the Contracting Party whose vessel or aircraft made the sighting. Where there are reasonable grounds for suspecting that a fishing vessel targeting ICCAT species on the high seas is stateless, a Contracting Party may board and inspect the vessel<sup>28</sup>.

Where evidence so warrants, the Contracting Party may take such action as may be appropriate in accordance with international law. Any Contracting Party receiving a report of a sighting or conducting an action against a stateless fishing vessel shall immediately notify the ICCAT Secretariat, which, in turn, shall notify all other Contracting Parties.

#### **D. Regional Register**

The ICCAT Contracting Parties should take the necessary measures to maintain a register of all high seas fishing vessels of more than 24 meters in length, authorised to fly their flag in the ICCAT-Area. Contracting parties should provide the ICCAT with the names of vessels entered on this register and annually of any changes thereto.

This list of vessels shall include the following information:

- Name of vessels, register number;
- previous flag (if any);
- international radio call sign (if any);
- type of vessel, length and gross registered tonnage (GRT); and
- name and address of owner(s).

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<sup>28</sup> See Recommendation by ICCAT on Transshipments and Vessel Sightings, which entered into force on 13 June 1998, and Article 110 of the 1982 Convention.

The ICCAT Executive Secretary circulates the lists annually or upon request of a Contracting Party or parties.

The Contracting Parties and cooperating Non-contracting Parties, entities or fishing entities notifies the ICCAT Executive Secretary of any information concerning fishing vessels that are not listed but believed to be fishing for tuna in the Convention Area. The Executive Secretary informs the Flag State to take necessary measures to prevent the vessels(s) from fishing for tuna in the Convention Area.

The ICCAT encourages Non-contracting Parties to provide the same information as requested above.

#### **E. Other Enforcement Provisions/Schemes**

**Vessel-monitoring System.** Each Contracting Party with vessels greater than 24 meters in overall length and fishing for ICCAT species on the high seas outside the fisheries jurisdiction of any coastal state has to install a satellite-based VMS.

The information collected by the VMS has to include the vessel identifier, location, date and time.

Performance standards must at a minimum include a system that:

- Is tamper proof;
- is fully automatic and operational at all times regardless of environmental conditions;
- provides real time data; and
- provides latitude and longitude, with a position accuracy of 500 m.

#### **F. Characteristics: Strengths and Weaknesses of the System**

**Strengths. *Open System.*** Each year, the Executive Secretary of the ICCAT contacts all Non-contracting Parties known to be fishing in the Convention area for species under ICCAT competence to urge each of them to become a Contracting Party to the ICCAT or to attain status as a cooperating party.

***Import Ban.*** Contracting parties shall take appropriate measures to the effect that the import of Atlantic bluefin tuna and its products in any form from Belize, Equatorial Guinea and Honduras be prohibited. The ban that existed on the import of Tuna from Panama was lifted in 2000.

***Vessels without Nationality.*** Vessels that appear to be without nationality that may be fishing for ICCAT species may be boarded and inspected by the Contracting Party whose vessel or aircraft made the sighting. Where evidence so warrants, the Contracting Party may take such action as may be appropriate in accordance with international law.

***International Agreements.*** All Contracting Parties that have not yet done so are encouraged to become a party to the 1995 UN Fish Stocks Agreement as well as to the 1993 FAO Compliance Agreement.

*Port Inspections.* Most the ICCAT recommendations can only be enforced during off-loading, and therefore port inspections are the most fundamental and effective tool for monitoring and inspection. The purpose of the port inspection scheme is to ensure individual vessel compliance as well as to facilitate overall monitoring of each party's fisheries for ICCAT species.

*Compliance Committee.* The functions of the Compliance Committee shall be to provide the Commission with information, advice and recommendations on the implementation of, and compliance with, conservation and management measures.

*The ICCAT presents a developed institutional structure.*

**Weaknesses.** *Effectiveness.* The effectiveness of the Inspections is questionable. There are a lot of vessels still engaged in illegal fishing for tuna in the Atlantic.

*Absence of any dispute settlement mechanism regarding disputes arising out of the ICCAT convention implementation schemes.*

*No 100 Percent Observer Scheme.*

*ICCAT Inspectors.* The ICCAT doesn't have its own inspectors, but has to rely on the inspectors of the Contracting Parties. This may cause limitations

*Objection Procedure.* If any Contracting Party presents to the Commission an objection to a recommendation, the recommendation shall not become effective on that party. Consequently this fact weakens the impact of the recommendations and decisions that already by their very nature are to be qualified as soft law instruments.

## **G. Implementation of the 1993 FAO Compliance Agreement**

**Precautionary Approach.** In 1997, the Standing Committee on Research and Statistics (SCRS) created an ad hoc Working Group to develop a discussion document of what 'precautionary approaches' means in the context of ICCAT stocks.

**Reporting.** High seas fishing vessels have to report their fishing areas, their catches and landings.

**Records of Vessels.** The ICCAT Contracting Parties have to maintain a register of all high seas fishing vessels of more than 24 meters in length.

**Flag-state Responsibility.** When a vessel has been sighted committing an infringement, the Flag State shall be informed. The Flag State shall ensure that vessels flying their flags do not engage in fishing activities that diminish the effectiveness of international conservation and management measures, such as those adopted by the ICCAT.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

**Non-contracting Parties.** Non-contracting Parties shall be encouraged to become a party to the ICCAT Convention.

**Port Inspections.** When a vessel flying the flag of a Non-contracting Party which has been sighted in the ICCAT Convention Area and which is presumed to be undermining the ICCAT conservation measures enters voluntarily a port of any Contracting Party, it shall be inspected by authorised Contracting Party officials knowledgeable of the ICCAT measures and shall not be allowed to land or tranship any fish until this inspection has taken place.

**Flag-state Enforcement Measures.** Parties must consider and act on reports of apparent violations by foreign inspectors on a similar basis as the reports of national inspectors in accordance with their national legislation. Contracting parties shall collaborate, in accordance with their legislation, in order to facilitate judicial or other proceedings arising from reports of inspectors acting under the ICCAT Convention.

## **V. IOTC**

### **A. Introduction**

**IOTC Agreement.** The Agreement for the Establishment of the Indian Ocean Tuna Commission (hereinafter cited as the Agreement) was adopted by the FAO Council at its 105<sup>th</sup> session in Rome on 25 November 1993. As provided for in Article XVIII, the Agreement entered into force on 27 March 1996, date of deposit of the tenth instrument of acceptance. The Financial Regulations were adopted at the First Special Session of the IOTC in Rome on 21-24 March 1997 and the Rules of Procedure were adopted at the Second Session held in Victoria on 22-25 September 1997.

**Parties to the Agreement.** The following states are Parties to the Agreement: Australia, China, Eritrea, the EC, France, India, Japan, Republic of Korea, Madagascar, Malaysia, Mauritius, Oman, Pakistan, Seychelles, Sri Lanka, Sudan, Thailand and the United Kingdom.

**Objective.** The objective of the Agreement is to promote cooperation among its members with a view to ensuring, through appropriate management, the conservation and optimum utilisation of stocks covered by the Agreement and encouraging sustainable development of fisheries based on such stocks.

**IOTC.** The Indian Ocean Tuna Commission (IOTC) (hereinafter cited as the Commission) is an intergovernmental organisation established under Article XIV of the FAO Constitution. The Commission is mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas.

**Geographical Area.** The area of competence of the Commission (hereinafter cited as the Area) shall be the high seas areas of the Indian Ocean (defined for the purpose of the Agreement as being FAO statistical areas 51 and 57) and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out the Indian Ocean.

**Species and Stocks.** The species covered by the Agreement are tuna and tuna-like species as set out in Annex B of the Agreement. The term 'stocks' means the populations of such species, which are located in the Area or migrate into or out of the Area.

## **B. Observer Schemes**

**No Observer Scheme.** The IOTC has not adopted any observer schemes. However, an intersessional meeting has taken place on 27-29 March 2001 in Japan in order to discuss the establishment of a, monitoring, inspection and control scheme. The meeting decided to defer the adoption of such scheme to a later time. There was, however, (political) consensus on the principle that observer programmes constitute a valuable tool for monitoring fisheries even in the absence of any enforcement role. Moreover, it was agreed during this meeting that VMS are a valuable element to be incorporated in later phases of such scheme.

## **C. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** *Extensive Area of Application.* The Commission's area of competence comprehends the extensive high seas areas of the Indian Ocean and adjacent seas, north of the Antarctic Convergence.

*Observer Status.* Any member or associate member of the FAO that is not a member of the Commission may, upon its request, be invited to be represented by an observer at sessions of the Commission. It may submit memoranda and participate without vote in the discussions. Moreover, states which, while not members of the Commission nor members or associate members of the FAO, are members of the United Nations, any of its Specialised Agencies or the IAEA may, upon request and subject to the concurrence of the Commission through its Chairperson and to the provisions relating to the granting of observer status to nations adopted by the Conference of THE FAO, be invited to attend sessions of the Commission as observers. Finally, the Commission may invite intergovernmental or, on request, non-governmental organisations having special competence in the field of activity of the Commission to attend such of its meetings as the Commission may specify.

*Voting Procedure.* The Commission may, by a two-thirds majority of its members present and voting, adopt conservation and management measures binding on members of the Commission. As regards the opting-out procedure, see *infra* Weaknesses.

*Cooperation with Other Organisations.* The Commission cooperates and makes appropriate arrangements therefore with other intergovernmental organisations and institutions, especially those active in the fisheries sector, which might contribute to the work and further the objectives of the Commission in particular with any intergovernmental organisation or institution dealing with tuna in the IOTC Area. To this end, the Commission may enter into agreements with such organisations and institutions. Such agreements must seek to promote complementarity and to avoid duplication in and conflict with the activities of the Commission and such organisations.

**Weaknesses.** *No Inspection and Boarding Scheme.* The IOTC has not yet adopted any inspection, boarding and control schemes. However, an intersessional meeting took place on 27-29 March 2001 in Japan in order to lay the basis for the establishment of a control and



inspection scheme. The meeting decided to defer the adoption of such scheme to a later time. It resulted from this meeting that there was not a wide support to include at-sea inspection in the control and inspection. However, there was general consensus that in-port inspection would be a central element in the control and inspection scheme and that it could be, in particular, an effective tool to deal with IUU fishing by denying authorisation to unload or tranship catches.

*No Observer Scheme. See supra.*

*No Vessel-monitoring System.* No compulsory VMS has been adopted within the IOTC. See *supra*.

*Opting-out Procedure.* Members of the Commission may, within a specified period, object to a conservation and management measure adopted by the Commission. Such member of the Commission, which has objected to a measure, is not bound thereby. Furthermore, if more than one-third of the members of the Commission present an objection to a measure, the other members are also not bound by that measure; but this does not preclude any or all of them from giving effect thereto.

#### **D. Implementation of the 1993 FAO Compliance Agreement**

The Agreement for the Establishment of the Indian Ocean Tuna Commission does partly contribute to the implementation of the 1993 FAO Compliance Agreement.

The Agreement simply states that each member of the Commission has to ensure that such action is taken, under its national legislation, including the imposition of adequate penalties for violations, as may be necessary to implement the conservation and management measures which become binding on it. Unfortunately, the Agreement or the subsequent IOTC resolutions and decisions do, until now, not include specific provisions dealing with high seas fishing authorisations, general high seas records or state control regarding landings or transshipments.

However, Recommendation 98/04 recommends that all Contracting Parties and Non-contracting Parties cooperating with the IOTC with vessels fishing for tropical tunas in the IOTC Area submit by 30 June every year to the Secretary a list of their respective vessels greater than 24 meters that have fished for tropical tunas in the IOTC Area during the previous year and may submit by 30 June every year, on a voluntary basis, a list of their respective vessels of less than 24 meters that have fished for tropical tunas in the IOTC Area during the previous year. These lists must contain the following information for each vessel: (a) Name and registration number; (b) previous flag (if any); (c) international radio call sign; (d) vessel type, length, and gross registered tonnage or gross tonnage; and (e) name and address of owner, and/or charterer, and/or operator.

#### **E. Implementation of the 1995 UN Fish Stocks Agreement**

The Agreement for the Establishment of the Indian Ocean Tuna Commission may need to be amended in order to implement the 1995 UN Fish Stocks Agreement.

The Agreement and Resolutions 98/01 and 00/01 provide for the collection and sharing of data and scientific information.

However, the Agreement or the subsequent IOTC resolutions and decisions do, until now, not contain specific provisions dealing with the application of the precautionary approach to conservation and management measures; the compatibility of conservation and management measures for areas under national jurisdiction and those adopted for the high seas area; regional cooperation on inspection, boarding and other enforcement schemes; port-state enforcement; high seas authorisations.

## **VI. NEAFC**

### **A. Introduction**

**Establishment.** The North East Atlantic Fisheries Commission (hereinafter cited as NEAFC) was created, in its current form, in 1980, by the Convention on Future Multilateral Cooperation in the Northeast Atlantic, signed on 18 November 1980 in London. The latter entered into force on 17 March 1982. The Commission covers the Northeast Atlantic, including dependent seas, and the 200-mile zones with the exception of Baltic Sea and the Belts and the Mediterranean Sea and its dependent seas. This mostly corresponds with FAO Statistical Area 27.

**Structure.** The organisation has a relatively simple structure. There is the Commission itself, which is composed of all members, and a Secretariat. There is no internal scientific body. The Commission is also empowered to set up subsidiary bodies, as it considers 'desirable' for the exercise of its duties and functions.

**Membership.** Denmark (in respect of Faeroe Islands and Greenland), the EC, Iceland, Norway, Poland and Russia.

**Objectives.** The objective of the NEAFC is to perform its functions in the interests of the conservation and optimum utilisation of the fishery resources of the Convention area. The NEAFC is empowered to recommend a wide variety of conservation and management measures. The responsibility for enforcing management measures adopted under the NEAFC rests with the Contracting Parties, which are required to take such action, including the imposition of adequate sanctions for infractions, as may be necessary to implement any recommendations adopted by the Commission. In 1999, however, a Scheme of Joint International Inspection and Surveillance was adopted, closely following the models provided by the UN Fish Stocks Agreement and the NAFO.

### **B. Reporting and Verification**

**Catch Reporting.** Each Contracting Party ensures that all fishing vessels flying its flag and conducting fishing activities keep a bound fishing logbook and, where appropriate, a production logbook or a storage plan. The Contracting Party makes sure that its fishing vessels do communicate catch reports to their competent authorities or the Secretary if the Contracting Party so desires. Furthermore, a Contracting Party is required to report the

quantities on board when entering the Regulatory Area. This report shall be made no more than 12 hours and at least 6 hours in advance of each entry into the Regulatory Area.

Moreover, a report on weekly catches must for the first time be transmitted at the latest at the end of the seventh day after the entry into the Regulatory Area or, when fishing trips take more than 7 days, the master of the fishing vessel has the obligation to transmit by the latest Monday noon the catches taken in the Regulatory Area during the preceding week ending Sunday midnight. This report must include information on the number of fishing days since the commencement of fishing, or since the last catch report.

Further, the Contracting Party is requested to report the quantities on board when exiting the Regulatory Area. This report has to be made no more than eight hours and at least six hours in advance of each exit from the Regulatory Area. It must include, where appropriate, the number of fishing days and the catch taken in the Regulatory Area since the commencement of fishing, or since the last catch report.

Finally, the Contracting Parties have to report the quantities on-loaded and off-loaded for each transshipment of fish during the vessel's stay in the Regulatory Area.

**Inspection Activities Reports.** Each Contracting Party is obliged to report to the Secretary by 1 October of each year for the previous calendar year the number of inspections conducted by it under the Scheme specifying the number of inspections on the vessels of each Contracting Party and, in the case of infringement, the date and position of the inspection of the named vessel and the nature of infringement. The Contracting Parties has the duty to also report the number of air hours flown on NEAFC patrol, the number of sightings and the number of surveillance reports established as well as the follow-up of such reports.

### **C. Inspection and Boarding Schemes**

**NEAFC Inspectors.** Each Contracting Party appoints on a yearly basis inspectors to the NEAFC Inspection and Boarding Scheme (hereinafter cited as the Scheme). Each inspector carries special documentation of identity as a NEAFC inspector issued by the respective Contracting Party and is under the obligation to hold and produce this document of identity when boarding a fishing vessel.

Furthermore, inspectors carry out their duties in accordance with the rules set out in the Scheme, but they remain under the operational control of the authorities of their Contracting Parties and are responsible to them.

**Means of Inspections.** Each Contracting Party notifies the Secretary before 1 January of each year of the names of the inspectors and special inspection vessels as well as the type of aircraft and the details of their identification, which they are assigning to the Scheme for that year. Modifications by Contracting Parties to such notifications must be communicated to the Secretary giving one month's notice. The Secretary in turn circulates to all Contracting Parties the notifications received from any Contracting Party under the Scheme, within 15 days of receipt.

Any vessel assigned to the Scheme and carrying assigned inspectors, as well as the boarding craft deployed by that vessel carries a special flag or pennant to indicate that inspectors on

board may carry out inspection duties in accordance with the Scheme. Aircrafts assigned to the Scheme must have their international radio call sign clearly displayed.

Furthermore, each Contracting Party has the duty to keep a record for their assigned inspection vessels and aircraft of the date and hour of the start and termination of their duties under the Scheme and to notify this information to the NEAFC Secretary. The Secretary promptly informs the other Contracting Parties accordingly.

Where, at any time, more than ten fishing vessels of any one Contracting Party are engaged in fishing activities conducted on regulated resources in the Regulatory Area, the Contracting Party is required, during that time, to have an inspection vessel in the Regulatory Area, or to cooperate with another Contracting Party to jointly operate an inspection vessel.

**General Inspection and Surveillance Principles.** Each Contracting Party ensures that assigned inspectors from another Contracting Party is allowed to carry out inspections on board those of its fishing vessels to which the Scheme applies. Furthermore, it has the duty to adopt measures obliging the masters of the fishing vessels to cooperate with the assigned NEAFC inspectors and to ensure their safety throughout the inspection.

Moreover, each Contracting Party ensures that inspections carried out by that party are carried out in a non-discriminatory manner and in accordance with the Scheme. The number of inspections is based upon fleet size, taking into account the time spent in the Regulatory Area. In its inspections, each Contracting Party *ought* to aim at ensuring equal treatment between all Contracting Parties with fishing vessels operating in the Regulatory Area through an equitable distribution of inspections.

Inspectors have to avoid the use of force except when and to the degree necessary to ensure their safety. When carrying out inspections on board fishing vessels, inspectors cannot carry any firearms. In addition, without limiting the capability of inspectors to carry out their mandates, inspections have to be made so that the fishing vessel, its activities and the catch retained on board do not suffer undue interference and inconvenience.

**Inspection Procedure.** No boarding can be conducted without prior notice by radio being sent to the fishing vessel or without the fishing vessel being given the appropriate signal using the International Code of Signals, including the identity of the inspection platform, whether or not such notice is acknowledged as received.

An inspector has the authority to examine all relevant areas, decks and rooms of the fishing vessels, catch (whether processed or not), nets or other gear, equipment, and any relevant documents which the inspector deems necessary to verify the compliance with the measures established by the NEAFC and to question the master or a person designated by the master.

Moreover, the fishing vessel to be boarded cannot be required to stop or manoeuvre when fishing, shooting or hauling. The inspectors may order the interruption or delay in the hauling of the fishing gear until they have boarded the fishing vessel and in any event no more than 30 minutes after receiving the signal.

Furthermore, the duration of an inspection may not exceed four hours, or until the net is hauled in and the net and catch are inspected, whichever is longer. In the case of an infringement being detected the inspectors may stay on board for the time necessary for the

completion of his inspection. However, in special circumstances relating to the size of a fishing vessel, and the quantities of fish retained on board, the duration of the inspection may exceed the limits stipulated above. In such a situation, the inspecting party shall in no case stay longer on board the fishing vessel than the time required to complete the inspection. The reasons for exceeding the limit stipulated above have to be recorded in the inspection report.

There can be no more than two inspectors in an inspection party from one Contracting Party boarding a fishing vessel of another Contracting Party.

In carrying out their inspection, the inspectors may request of the master any assistance required. Moreover, the report of the inspection may be commented upon by the master and must be signed by the inspectors at the end of the inspection. A copy of the inspection report has to be given to the master of the fishing vessel.

In addition, inspectors ought not to interfere with the master's ability to communicate with the authorities of the Flag State during the boarding and inspection.

Finally, each Contracting Party has to ensure that its inspection platforms manoeuvre at a safe distance from the fishing vessels according to good seamanship.

**Vessel-master Obligations during Inspection Procedures.** The master of a fishing vessel is requested to facilitate prompt and safe boarding *i.e.* to cooperate with and assist in the inspection of the fishing vessel conducted pursuant to these procedures, and not to obstruct, intimidate or interfere with the inspectors in the performance of their duties. Moreover, he has to allow inspectors to communicate with the authorities of the flag Contracting Party and the inspecting Contracting Party; and provide them access to relevant areas, decks and rooms of the fishing vessel, catch (whether processed or not), nets or other gear, equipment, and any relevant documents.

**Infringement Procedures.** If the inspectors find that there are clear grounds for believing that a fishing vessel flying the flag of another Contracting Party has engaged in any activity contrary to NEAFC recommendations, they are required to note the infringement in the inspection report and to take all necessary measures to ensure security and continuity of the evidence for subsequent dockside inspection. An identification mark may be affixed securely to any part of the fishing gear that appears to the inspector to have been in contravention of applicable measures.

Moreover, in order to facilitate Contracting Party action on the infringement, inspectors immediately are obliged to attempt to communicate with an inspector or designated authority of the Contracting Party of the inspected fishing vessel.

In addition, the Contracting Party inspecting a fishing vessel ought to communicate in writing the details of an infringement to the designated authorities of the Contracting Party of the inspected vessel within the working day following the inspection whenever possible. The original of the inspection report, together with any supporting documentation, is to be forwarded promptly to the appropriate authorities of the Contracting Party of the inspected fishing vessel as well as a copy to the Secretary.

**Serious Infringements Procedure.** A serious infringement means:

- (1) Fishing without a valid authorisation issued by the flag Contracting Party;
- (2) fishing without or after attainment of a quota;
- (3) use of prohibited fishing gear;
- (4) serious mis-recording of catches;
- (5) preventing an inspector from carrying out his duties;
- (6) directed fishing for a stock that is subject to a moratorium or for which fishing is prohibited;
- (7) falsifying or concealing the markings, identity or registration of a fishing vessel;
- (8) concealing, tampering with or disposing of evidence relating to an investigation; and
- (9) multiple violations that together constitute a serious disregard of conservation and management measures.

If a NEAFC inspector considers that there are clear grounds for believing that a fishing vessel has committed a serious infringement, he **must** promptly notify the flag Contracting Party of that infringement. The flag Contracting Party is under the obligation to respond to the notification without delay and to ensure that the fishing vessel concerned is inspected within 72 hours by an inspector duly authorised by that flag Contracting Party. In order to preserve the evidence, the inspector is required to take all necessary measures to ensure security and continuity of the evidence whilst minimising interference with and inconvenience to the operation of the vessel. Moreover, the inspector is entitled to remain on board the fishing vessel for the period necessary to provide information to the duly authorised inspector concerning the infringement or until the response of the flag Contracting Party requires the inspector to leave the fishing vessel. The flag Contracting Party, if evidence so warrants, requires the fishing vessel to proceed immediately to a port designated by that Contracting Party for a thorough inspection under its authority and in the presence of a NEAFC inspector from any other Contracting Party that wishes to participate. The flag Contracting Party may authorise the inspecting Contracting Party to bring the fishing vessel without delay to a port designated by the flag Contracting Party. If the fishing vessel is not called to port, the Contracting Party must provide due justification in a timely manner to the Secretary and to the inspecting Contracting Party. The Secretary has to make such justification available on request to any Contracting Party. Where a fishing vessel is required to proceed to port for a thorough inspection, a NEAFC inspector from another Contracting Party may, subject to the consent of the Contracting Party of the fishing vessel, board the fishing vessel as it is proceeding to port, may remain on board the fishing vessel as it proceeds to port and may be present during the inspection of the fishing vessel in port.

The appropriate authorities of a Contracting Party notified of an infringement committed by a fishing vessel of that party are requested to take prompt action to receive and consider the evidence of the infringement and, conduct any further investigation necessary for the follow up to the infringement and, whenever possible, inspect the fishing vessel concerned. Each Contracting Party has to designate the appropriate authorities mandated for receiving evidence of infringement and has to inform the Secretary of the address of those authorities. The Secretary has the duty to inform subsequently all other Contracting Parties.

**Mutual Recognition of Inspectors.** Each Contracting Party are required to consider and act on reports from inspectors of other Contracting Parties under the Scheme on the same basis as reports from its own inspectors. Contracting Parties must cooperate in order to facilitate

judicial or other proceedings arising from a report submitted by an inspector under the Scheme.

#### **D. Regional Register**

**Notification of Fishing Vessels.** Each Contracting Party notifies, in computer readable form, to the Secretary prior to 1 January of each year if possible, or in any case before the vessel's entry into the Regulatory Area, all fishing vessels authorised to fish in the Regulatory Area and notably whether the vessel is authorised to fish one or more regulated resource. Each Contracting Party is requested to notify any modifications to this information without delay.

**Catch and Fishing Effort Reporting.** Each Contracting Party has the duty, within 30 days following the calendar month in which the catches were landed, or transhipped, to report to the Secretary, provisional monthly statistics of catches of fisheries, whether or not that party has quota allocations for the stocks from which catches were obtained. The Secretary, within ten days following the monthly deadlines for receipt of the provisional catch statistics, collates the information received and circulates it to the Contracting Parties. These reporting obligations also apply to regulated resources caught in areas under national fisheries jurisdiction.

#### **E. Other Enforcement Provisions/Schemes**

**Vessel-monitoring System.** Each Contracting Party is requested to implement a VMS for its fishing vessels exceeding 20 metres between perpendiculars or 24 metres overall length which fish, or plan to fish, in the Regulatory Area and require its fishing vessels, fishing in the Regulatory Area, to be equipped with an autonomous system able to automatically transmit messages to a land-based fisheries monitoring centre (hereinafter cited as FMC) allowing a continuous tracking of the position of a fishing vessel by the Contracting Party of that fishing vessel.

To this end, each party ensures that the satellite device enables a fishing vessel to communicate by satellite to the Contracting Party messages relating to the following data:

- The vessel identification;
- the most recent geographical position of the vessel;
- the date and time of the fixing of the said position of the vessel;
- where applicable, data relating to the catch on board; and
- where applicable, data relating to transhipment.

Moreover, each Contracting Party guarantees that the master of fishing vessels flying its flag ensures that the satellite tracking devices are at all times fully operational and that all the information is transmitted. In the event of a technical failure or non-operation of the satellite-tracking device fitted on board a fishing vessel, the device must be repaired or replaced within one month. After this period, the Master of a fishing vessel is not authorised to commence a fishing trip with a defective satellite-tracking device. In case a device stops functioning and a fishing trip lasts more than one month, the repair or the replacement has to take place as soon as the vessel enters a port, the fishing vessel is not authorised to continue or commence a fishing trip without the satellite tracking device having been repaired or replaced. Each

Contracting Party has also to make sure that a fishing vessel with a defective satellite tracking device communicates, at least daily, their reports by other means of communication (radio, fax or telex).

Contracting Parties, for the purpose of this scheme, cooperate with the Secretary in order to establish a database delimiting the Regulatory Area by latitude and longitude coordinates. This occurs without prejudice to each Contracting Party's position concerning the delimitation of sea areas under their sovereignty and jurisdiction.

## **F. Characteristics: Strengths and Weaknesses of the System**

**Strengths. *Membership.*** The Convention lists individual parties eligible to participate in the Convention and the Commission. Importantly, this list includes the EC. Any state not referred to in this list (Member States of the EC excepted) may accede to the Convention, subject to the approval of three-fourths of all the Contracting Parties.

*Scope.* The Commission may also adopt recommendations concerning fisheries conducted within the national jurisdiction of a Contracting Party, but only if the Contracting Party in question specifically requests and approves the recommendation.

*Non-contracting Party Vessels.* A Non-contracting Party vessel, which has been sighted engaging in fishing activities in the Regulatory Area, is presumed to be undermining the effectiveness of recommendations established under the Convention. In the case of any transshipment activities involving a sighted Non-contracting Party vessel inside or outside the Regulatory Area, the presumption of undermining the effectiveness of recommendations established under the Convention applies to any other Non-contracting Party vessel that has engaged in such activities with that vessel. Information regarding such sightings must be transmitted immediately to the Secretary. The Secretary has to transmit this information to all Contracting Parties within one business day of receiving this information, and to the flag state of the sighted vessel as soon as possible. The Contracting Party which sighted the Non-contracting Party vessel has to attempt to inform such a vessel that it has been sighted engaging in fishing activities in the Regulatory Area and is accordingly presumed to be undermining the recommendations established under the Convention and that this information will be distributed to all Contracting Parties and to the flag state of the vessel. In the event that any Non-contracting Party vessel, which has been sighted and reported as engaged in fishing activities in the Regulatory Area, consents to be boarded by NEAFC inspectors, their findings are to be transmitted to the Secretary. The Secretary has the duty to transmit this information to all Contracting Parties within one business day of receiving this information, and to the flag state of the boarded vessel as soon as possible. The Non-contracting Party vessel that is boarded must be provided with a copy of the findings of the NEAFC inspectors.

*Port Inspections.* Contracting Parties shall ensure that their vessels do not receive transshipments of fish from a Non-contracting Party vessel that has been sighted fishing in the NEAFC area. When such a vessel enters a port of any Contracting Party, it shall be inspected by authorised Contracting Party officials knowledgeable of recommendations established under the Convention and shall not be allowed to land or tranship any fish until this inspection has taken place. Such inspections include the vessel's documents, log books, fishing gear, catch on board, and any other matter relating to the vessel's activities in the Regulatory Area.



Landings and transshipments of all fish from a Non-contracting Party vessel which has been inspected shall be prohibited in all Contracting Party ports if such inspection reveals that the vessel has on board species subject to recommendations established under the Convention unless it is established that the fish were caught outside the Regulatory Area or in compliance with all relevant recommendations established under the Convention.

Information on the results of all inspections of Non-contracting Party vessels conducted in the ports of Contracting Parties, and subsequent action, have to be immediately transmitted through the Secretary to all Contracting Parties and as soon as possible to the relevant flag state(s).

Each Contracting Party reports to the Secretary by 1 March of each year for the previous calendar year the number of inspections of Non-contracting Party vessels it conducted under this Scheme in its ports, the names of the vessels inspected and their respective flag state, the dates and ports where the inspection was conducted, and the results of such inspections.

*Vessels without Nationality.* Where there are reasonable grounds for suspecting that a vessel, which has been sighted engaging in fishing activities in the Regulatory Area, is without nationality, a NEAFC Contracting Party may also board and inspect the vessel. Where evidence so warrants, a NEAFC Contracting Party may take such action as may be appropriate in accordance with international law. Contracting Parties are encouraged to examine the appropriateness of domestic measures to exercise jurisdiction over such vessels.

**Weaknesses.** *Objection Procedure.* Any Contracting Party may object to a recommendation within 50 days of the date of notification of that recommendation. In the event of such an objection, any other Contracting Party may similarly object within 40 days after receiving notification of that objection. If any objection is made within this further period of 40 days, other Contracting Parties are allowed a final period of 40 days after receiving notification of that objection in which to lodge objections. A recommendation does not become binding on a Contracting Party, which has objected thereto. If three or more Contracting Parties have objected to a recommendation it shall not become binding on any Contracting Party. Except when a recommendation is not binding on any Contracting Party, a Contracting Party which has objected to a recommendation may at any time withdraw that objection and becomes then bound by the recommendation within 70 days, or as from the date determined by the Commission, whichever is the later. If a recommendation is not binding on any Contracting Party, two or more Contracting Parties may nevertheless at any time agree among themselves to give effect thereto, in which event they immediately notify the Commission accordingly.

*Absence of Dispute Settlement Procedure.*

*NEAFC Inspectors.* The inspectors remain under the operational control of the authorities of their Contracting Parties. However they have the powers of inspection, seizure and search, as defined in the NEAFC Scheme of Joint International Inspection and Surveillance Implementation of the 1993 FAO Compliance Agreement.

*Flag-state Enforcement Measures.* Each Contracting Party ensures that the appropriate measures be taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where NEAFC measures have not been respected. These measures are, in accordance with the relevant provisions of

national law, capable of effectively depriving those responsible of the economic benefit of the infringements or of providing sanctions proportionate to the seriousness of such infringements, thus effectively discouraging future infringements.

*Duty to Report.* High Seas fishing vessels have to report their catches in the NEAFC area. Each entry and exit has to be reported. These reports are inspected by the observers, and by port inspectors.

*Flag-state Responsibility.* When a vessel has been sighted committing an infringement, the Flag State is informed. The appropriate authorities of the Contracting Party are notified of the infringement committed by the fishing vessel and have to take prompt action to receive and consider the evidence of the infringement.

*High Seas Conservation and Management Measures.* The objective of the NEAFC is to perform its functions in the interests of the conservation and optimum utilisation of the fishery resources of the Convention area.

*Records of High Seas Fishing Vessels.* All vessels operating in the NEAFC area have to register with the Secretary.

## **G. Implementation of the 1995 UN Fish Stocks Agreement**

*Joint International Enforcement Scheme.* The Contracting Parties agree to maintain in force and to implement within the Regulatory Area a scheme of joint international enforcement. This scheme includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties and for flag state prosecution and sanctions on the basis of evidence resulting from such boarding and inspection. A report of such prosecutions and sanctions imposed shall be included in an annual statement regarding the actions that were taken during the last year.

*Non-contracting Party Vessels.* The Contracting Parties agree to invite the attention of any non-state party to any matter relating to the fishing activities in the Regulatory Area of the nationals or vessels of that state, which appear to affect adversely the attainment of the objectives of the Convention. The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects. The NEAFC adopted a scheme to promote compliance by Non-contracting Party vessels with the conservation and enforcement measures established by the NEAFC.

*Port-state Enforcement.* When a Non-contracting Party vessel, which has been sighted and reported as engaged in fishing, enters a port of any NEAFC Contracting Party, it shall be inspected by authorised Contracting Party officials.

## VII. NAFO

### A. Introduction

**Establishment.** The Northwest Atlantic Fisheries Organisation was created by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries signed on 24 October 1978 in Ottawa. The objective of the organisation is to promote the conservation and optimum utilisation of fishery resources in the Northwest Atlantic.

**Structure.** The organisation consists of the General Council, the Scientific Council, the Fisheries Commission (hereinafter cited as the Commission), and the Secretariat situated in Canada.

**Membership.** Bulgaria, Canada, Cuba, Denmark (in respect of Faeroe Islands and Greenland), EC, Estonia, France (in respect of St. Pierre and Miquelon), Iceland, Japan, Korea (Rep. of), Latvia, Lithuania, Norway, Poland, Romania, Russia, Ukraine, United States.

**Objectives.** The Contracting Parties agreed to maintain in force and to implement within the Regulatory Area a scheme of joint international enforcement. This scheme includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties and for flag state prosecution and sanctions on the basis of evidence resulting from such boarding and inspection.

### B. Reporting and Verification

**Catch Reporting.** A Contracting Party ensures that each vessel of that party with fish on board, on entering the Regulatory Area, has a record in its fishing logbook of the amount of each species of fish on board. Moreover, as regards fish taken subject to Commission measures, a Contracting Party must guarantee that all vessels of that party fishing in the Regulatory Area record their catches and the estimated cumulative catch on a daily basis. The records must correspond to the smallest geographical area for which a quota has been allocated. They will show the disposition of the catch including any fish off-loaded while the vessel is operating in the Regulatory Area, and be retained aboard the vessel for the duration of the quota period. For all fish taken subject to Commission measures, Contracting Parties are requested to ensure that all vessels of that party fishing in the Regulatory Area either record their cumulative production by species and product form in a production logbook, or stow in the hold all processed catch in such a way that each species is stowed separately. A stowage plan has to be maintained showing the location of the products in the hold. Furthermore, the Contracting Party, within 30 days following the calendar month in which the catches were made, has the duty to report provisional monthly catches by species and stock area to the Executive Secretary, whether or not that party has quota allocations for the stocks from which catches were obtained. The Executive Secretary, within ten days following the monthly deadlines for receipt of the provisional catch statistics, collates the information received and circulates it to Contracting Parties. The Executive Secretary collates the logbook catch summaries from inspection forms and, on a monthly basis, circulates the cumulative year-to-date information to the Contracting Parties.

**Presence Reporting.** Each flag Contracting Party is requested to notify the Executive Secretary of all vessels of more than 50 gross tons engaged in fishing or in processing fish in the Regulatory Area, prior to 1 January of each year, if possible; or in a timely manner following departure of the vessel from its home port; or by message within 30 days of any changes in the terms of notification.

Moreover, the Contracting Party must ensure that their vessels report to their competent authorities or to the NAFO Secretariat:

- (1) Each entry into the Regulatory Area. This report has to be made at least six hours in advance of the vessel's entry and to include the date, the time, geographical position of the vessel and total round weight by species on board;
- (2) each exit from the Regulatory Area. This report has to be made six hours in advance of the vessel's exit from the Regulatory Area and to include the same information as required by entry; and
- (3) each movement from one NAFO division to another NAFO division. This report has to be made prior to the vessel's entry into a NAFO division and to include the date, time and geographical position of the vessel. However, vessels equipped with devices, which enable the automatic transmission of their position, are exempt from these requirements.

**Reporting of Each Offloading for Transshipment of Fish.** When the transshipment of fish takes place while the vessel is operating in the Regulatory Area, a report has to be made at least 24 hours in advance and to include the date, the time, the geographical position of the vessel and total round weight by species to be transhipped in kilograms.

The verification of the reports is a competence of the observers (see *infra*).

### **C. Inspection and Boarding Schemes**

Although a distinction can be made between inspectors and observers, this study will not make one (see *infra* Part 4, Recommendation V).

**Full Observer Coverage.** In order to improve and maintain compliance with the conservation and enforcement measures for their vessels fishing in the Regulatory Area, Contracting Parties agree to a program of 100 percent observer coverage and to require all vessels fishing in the Regulatory Area to be equipped with satellite tracking devices.

Inspection and control in the Regulatory Area apply to the following vessels:

- (1) Fishing vessels that are or have been engaged in fishing operations in the Regulatory Area;
- (2) vessels, equipped for processing fish on board, which are or have been engaged in fish transferring operations in the Regulatory Area; and
- (3) transport vessels actually engaged in fish transferring operations.

**Powers of Observers.** Observers monitor the vessels' compliance with the relevant conservation and enforcement measures. In particular their duties are:

- (1) To record and report upon the fishing activities of the vessel and verify the position of the vessel when engaged in fishing. The observer monitors the functioning of, and report upon any interference with, the satellite system. In order to better distinguish fishing operations from steaming and to contribute to an *a posteriori* calibration of the signals registered by the receiving station, the observer maintains detailed reports on the daily activity of the vessel;
- (2) to observe and estimate catches with a view to identifying catch composition and monitoring discards, by-catches and the taking of undersized fish;
- (3) to record the gear type, mesh size and attachments employed by the master; and
- (4) to verify entries made to the logbooks. With regard to catches, correspondence between the logbook entries for the Regulatory Area and estimates of catches by species on board relating to these entries may be ascertained and differences between recorded catches and the inspector's estimate of the catches on board with percentages is recorded in the inspection report. Inspectors is given access to production logbooks or stowage plans and in the latter case has to be given such assistance as is possible, reasonable and necessary to ascertain that the stowage conforms to the stowage plan, no interference being allowed in the stowage of product or in the technological process on the vessel. Inspectors convert production weight, as recorded in production logbooks, into live weight so that the latter can be verified against the logbook entries that are made in live weight. Inspectors are guided by conversion factors established by the master of the vessel.

The vessel on which an observer is placed has to provide suitable food and lodging during the observer's deployment. Vessel masters have to ensure that all necessary cooperation is extended to observers in order for them to carry out their duties including providing access, as required, to the retained catch, and catch which is intended to be discarded.

**Use of Arms.** The use of arms in relation to the inspections is prohibited and, in particular, the inspectors are requested not to carry arms. The principle of not carrying or using arms shall not be deemed to limit the performance of inspections by a Contracting Party of vessels flying its own flag.

**Two Types of Infringements.** When an apparent infringement of the conservation and enforcement measures is identified by an observer, he must report it within 24 hours to a NAFO inspection vessel, which has to report it to the Executive Secretary.

*Infringements regarding Fisheries.* Where a NAFO inspector finds an apparent infringement of measures prohibiting:

- (1) Fishing in a closed area or with gear prohibited in a specific area;
- (2) fishing for stocks or species after the date on which the Contracting Party for the inspected vessel has notified the Executive Secretary that vessels of that party will cease a directed fishery for those stocks or species; and

- (3) fishing on an 'Others' quota without prior notification to the Executive Secretary, or more than seven working days after the Contracting Party for the inspected vessel has been notified by the Executive Secretary that fishing under an 'Others' quota for that stock or species should cease.

The inspector must immediately attempt to communicate with an inspector of the Contracting Party for the inspected vessel, known to be in the vicinity, or the Executive Secretary. The master of the inspected vessel has the duty to provide the use of the vessel's radio equipment and operator for messages to be sent out and received for this purpose.

At the request of the inspector, a master is obliged to cease all fishing that appears to the inspector to contravene the measures referred to in 1) to 3) above.

The inspector in charge may request that the master remove any part of the fishing gear, which appears to the inspector to contravene the Commission's measures.

Furthermore, an appropriate authority of a Contracting Party notified of an apparent infringement committed by a vessel of that party is required to take prompt action to conduct the investigations necessary to obtain the evidence required and, whenever possible, board the vessel involved. The authority must take immediate judicial or administrative action, as would be the case when dealing with apparent infringements of fisheries regulations in national waters. An appropriate authority of the Contracting Party for the vessel concerned shall cooperate fully with the appropriate authority of the Contracting Party that designated the NAFO inspector to ensure that the evidence of the apparent infringement is prepared and preserved in a form that facilitates judicial action. The appropriate authorities in the Flag State of the vessels concerned ought to ~~take~~ prompt action as necessary to receive and consider the evidence and to conduct any further investigation necessary for disposition of the apparent infringement.

*Infringements regarding Reporting and Gear.* Elements of possible infringements are:

- (1) Misreporting of catches;
- (2) mesh size violations;
- (3) hail system violations;
- (4) interference with the satellite tracking system;
- (5) preventing an inspector or an observer from carrying out his or her duties; and
- (6) directed fishing for a stock, which is subject to a moratorium or for which fishing is prohibited.

If a NAFO inspector cites a vessel for having committed apparently, to a serious extent, an infringement as listed above, the Contracting Party of the vessel has the duty to ensure that the vessel concerned is inspected within 72 hours by an inspector duly authorised by that Contracting Party. In order to preserve the evidence, the NAFO inspector must take all necessary measures to ensure security and continuity of the evidence, and may remain on board the vessel, for the period necessary to provide information to the duly authorised inspector concerning the apparent infringement.

Moreover, where justified, the competent authority of the Contracting Party or the inspector authorised by the competent authority of the Contracting Party of the vessel concerned, where

duly authorised to do so, requires the vessel to proceed immediately to a nearby port, chosen by the Master, which should be either St. John's, Halifax, the home port of the vessel or a port designated by the flag state, for a thorough inspection under the authority of the flag state and in the presence of a NAFO inspector from any other Contracting Party that wishes to participate. If the vessel is not called to port, the Contracting Party must provide due justification in a timely manner to the Executive Secretary who shall make it available on request to any Contracting Party.

Where a vessel is required to proceed to port for a thorough inspection, a NAFO inspector from another Contracting Party may, subject to the consent of the Contracting Party of the vessel, board the vessel as it is proceeding to port, may remain on board the vessel as it proceeds to port and may be present during the inspection of the vessel in port.

If an apparent infringement of the conservation and enforcement measures has been detected which in the view of the duly authorised inspector is sufficiently serious, the inspector ought to take all necessary measures to ensure security and continuity of the evidence including, as appropriate, sealing the vessel's hold for eventual dockside inspection.

Resistance to an inspector or failure to comply with his directions is treated by the Flag State of the vessel as if the inspector were an inspector of that state.

Furthermore, appropriate authorities of a Contracting Party are under the obligation to consider and act on reports from inspectors of other Contracting Parties under the scheme on the same basis as reports from its own inspectors. Contracting Parties are requested to cooperate to follow up apparent infringements using all necessary evidence available from all sources, including evidence from other Contracting Parties as required for effective prosecution or administrative proceedings, subject to the rules governing the admissibility of evidence in domestic courts.

Contracting Parties must every two years, check each of their vessels, to certify the correctness of the vessel's plans for fish rooms and other fish storage places. The master has to ensure that a copy of such verification remains on board to be shown to a NAFO inspector if requested.

**Port Inspections.** When a port call is made in the port of a Contracting Party by a vessel that has been engaged in fishing for stocks subject to conservation measures, the Contracting Party whose port is being used has to ensure that its inspector is present and that, on each occasion when catch is offloaded, an inspection takes place to verify the species and quantities caught. The Contracting Party has also to ensure that the interference in the offloading activity is minimised and that the quality of the catch is not adversely affected.

The quantities landed by species and the quantities retained on board, if any, are to be cross-checked with the quantities recorded in logbooks, catch reports on exit from the regulatory Area, and reports of any inspections carried out under this Scheme.

Inspections have to include verification of mesh size of nets on board and size of fish retained on board.

## **D. Observer Schemes**

Each Contracting Party shall require all its vessels fishing in the Regulatory Area to accept observers on the basis of the following:

- (1) Each Contracting Party has the primary responsibility to obtain, for placement on its vessels, independent and impartial observers;
- (2) in cases where a Contracting Party has not placed an observer on a vessel, any other Contracting Party may, subject to the consent of the Contracting Party of the vessel, place an observer on board until that Contracting Party provides a replacement; and
- (3) no vessel is required to carry more than one observer pursuant to this Program at any time.

Moreover, each Contracting Party has to provide to the Executive Secretary a list of the observers they will be placing on vessels in the Regulatory Area.

## **E. Regional Register**

**Notification of Fishing Vessels.** Each flag Contracting Party has to notify the Executive Secretary of all vessels of more than 50 gross tons engaged in fishing or in processing fish in the Regulatory Area prior to 1 January of each year, if possible; or in a timely manner following departure of the vessel from its home port. Such notification must include for each vessel:

- Name of the vessel in both native and Latin alphabet;
- official numbers;
- home port and nationality;
- owner and charterer, if any;
- certification that its master has been provided with the existing Commission's measures; and
- Principal target species while engaged in fishing in the Regulatory Area.

The Executive Secretary must provide all Contracting Parties with a listing of all vessels fishing in the Regulatory Area.

**Catch Reports.** The NAFO adopted a wide range of measures for the conservation and management of the stocks in the Regulatory Area. These include setting total allowable catches and member nation quota allocations, technical conservation measures, such as minimum fish sizes, minimum mesh sizes and changing gear requirements.

A Contracting Party must, within 30 days following the calendar month in which the catches were made, report provisional monthly catches by species and stock area to the Executive Secretary, whether or not that party has quota allocations for the stocks from which catches were obtained. The Executive Secretary has, within ten days following the monthly deadlines for receipt of the provisional catch statistics, to collate the information received and circulate it to Contracting Parties. He has also the duty to collate the logbook catch summaries from inspection forms and, on a monthly basis, circulate the cumulative year-to-date information to Contracting Parties in the same manner as described above.



**Fishing Days.** Each Contracting Party has to communicate the number of fishing days to the Executive Secretary before 1 November of each year.

**Infringements.** Where a NAFO inspector cites a vessel for having committed an apparent infringement of reporting and gear requirements, the inspector will immediately report this to the Executive Secretary, who in turn immediately has the duty to report, for information purposes, to the other Contracting Parties with an inspection vessel in the Regulatory Area.

**Inspections.** Contracting Parties engaged in surveillance or inspection activities in the Regulatory Area must, where possible, coordinate their efforts through an exchange of information. Inspection vessels have to provide notification to the Executive Secretary and competent authorities/inspection vessels of Contracting Parties with an inspection presence in the Regulatory Area. This notification should be completed as far in advance as is practicable and include the inspection vessel's name, radio call sign, communication capability, and name(s) of NAFO inspectors.

Moreover, inspection vessels operating in the Regulatory Area have to maintain contact, as far as possible on a daily basis, and with due regard to radio security, in order to exchange information on boarding/sightings or other relevant information and to coordinate their activities.

Furthermore, Contracting Parties engaged in inspection or surveillance activities in the Regulatory Area have the duty to prepare reports of inspection activity, based on a calendar year, outlining details of boarding, sightings and apparent infringements.

**Presence of Satellite Devices.** Each Contracting Party whose vessels are equipped with satellite devices notify the Executive Secretary of the names of those vessels. In addition, each Contracting Party transmits, to the NAFO Executive Secretary, on a real time basis, messages indicating movements within the Regulatory Area for its vessels equipped with satellite devices. The Executive Secretary transmits as quickly as possible such information to Contracting Parties with an inspection vessel in the NAFO Regulatory Area. The Executive Secretary draw up lists of such vessels and circulate these to Contracting Parties with an inspection presence in the Regulatory Area.

## **F. Other Enforcement Provisions/Schemes**

**Vessel-monitoring System.** Each Contracting Party has to ensure that each of its vessels operating in the Regulatory Area is equipped with a satellite-tracking device allowing the continuous tracking of its position by the Contracting Party. To this end the satellite tracking device must allow for automatic communication at least once every six hours when operating in the Regulatory Area to a land-based fisheries monitoring centre (hereinafter cited as FMC) of data relating to:

- (1) The vessel identification;
- (2) the most recent geographical position of the vessel (longitude, latitude) with a position error which has to be less than 500 metres, with a confidence interval of 99 percentage; and
- (3) the date and time of the fixing of the said position of the vessel.

Each Contracting Party has to take the necessary measures to ensure that its FMC receives these data.

Moreover, the FMC of each Contracting Party ought to be equipped with computer hardware and software enabling automatic data processing and electronic data transmission. Each Contracting Party is obliged to provide for back-up and recovery procedures in case of system failures.

Each party has the duty to cooperate with other Contracting Parties which have a NAFO inspection vessel or aircraft in the Regulatory Area, in order to exchange information on a real-time basis on the geographical distribution of fishing vessels equipped with satellite devices and, on specific request, information related to the identification of a vessel.

## **G. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** *Open System in Theory.* Participation in the Convention is open to any state subject to notification in writing to the depository. The membership of the Fisheries Commission is limited, however, to parties which either participate in the fishing activities in the Regulatory Area, or which provide evidence that it is going to participate in such fisheries in the near future. However, it is nowadays quite difficult to be admitted as a member of the Fisheries Commission. The membership of the Fisheries Commission is reviewed annually by the General Council.

*Full Observer Vessels Coverage.*

*Satellite Fishing Vessels Tracking.*

*Dockside Inspection.*

*Non-contracting Party Vessels.* A Scheme to Promote Compliance by Non-contracting Party Vessels with the conservation and enforcement measures has been established by the NAFO. Contracting Parties have to report to the NAFO Secretariat all sightings, made by inspectors, of Non-contracting Party fishing vessels engaged in fishing activities in the NAFO Regulatory Area. Such reports must include all information derived from the inspector's observations concerning the Non-contracting Party fishing vessel's activities. The inspector will attempt to inform the Non-contracting Party fishing vessel that it has been sighted engaging in fishing activities, that a surveillance report has been completed, that there may be consequences for the vessel, and that this information will be distributed to all NAFO Contracting Parties and to the flag state of the vessel.

In the event that the Non-contracting Party vessel, which has been sighted and reported as engaged in fishing activities in the NAFO Regulatory Area, is boarded by inspectors, the findings of the inspectors must be transmitted to the Executive Secretary. The Executive Secretary will transmit this information to all Contracting Parties within 72 hours of receiving this information, and to the flag state of the boarded vessel as soon as possible.

In addition, Contracting Parties agree to invite the attention of any state not a party to this Convention to any matter relating to fishing activities in the Regulatory Area undertaken by nationals or vessels of that state, which appear to affect adversely the attainment of the

objectives of this Convention. The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects.

*Traditional Rights.* Proposals adopted by the Commission for the allocation of catches in the Regulatory Area take into account the interests of Commission members whose vessels have traditionally fished within that Area, and, in the allocation of catches from the Grand Bank and Flemish Cap, Commission members must give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which have undertaken extensive efforts to ensure the conservation of such stocks through international action, in particular, by providing surveillance and inspection of international fisheries on these banks under an international joint enforcement scheme.

*NAFO has Developed an Institutional Structure.*

**Weaknesses.** *Objection Procedure in the Convention.* If any Commission member presents to the Executive Secretary an objection to a proposal, within sixty days of the date of transmittal, this proposal will not become a binding measure on that member.

*Absence of Dispute Settlement Procedure.* However, negotiations on this topic are currently being held.

*Absence of Enforcement Powers.* Compared to its Member States, the NAFO has no autonomous powers in case of infringements of reporting and gear requirements. Before any action can be taken, the consent of the Flag State is required.

## **H. Implementation of the 1993 FAO Compliance Agreement**

**Reporting.** High seas fishing vessels have to report their fishing areas, their catches and landings. Their reports are inspected under the 100 percent observer scheme.

**Flag-state Responsibility.** When a fishing vessel has been sighted committing an infringement, the Flag State has to be informed. The Flag State has to react as if the infringement had been committed in waters under his jurisdiction.

**High Seas Conservation and Management Measures.** The NAFO objective is to promote the conservation and optimum utilisation of fishery resources in the Northwest Atlantic.

**Records of High Seas Fishing Vessels.** All vessels operating in the NAFO area have to register with the Executive Secretary.

## **I. Implementation of the 1995 UN Fish Stocks Agreement**

**Consistency between National and Regional Measures.** The Commission seeks to ensure consistency between any proposal that applies to a stock or group of stocks occurring both within the Regulatory Area and within an area under the fisheries jurisdiction of a coastal state, or any proposal that would have an effect through species interrelationships on a stock

or group of stocks occurring in whole or in part within an area under the fisheries jurisdiction of a coastal state.

The Commission also seeks consistency between any measures or decisions taken by the coastal state for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction. The appropriate coastal state and the Commission accordingly promote the coordination of such proposals, measures and decisions.

**Joint International Enforcement Scheme.** The Contracting Parties agree to maintain in force and to implement within the Regulatory Area a scheme of joint international enforcement. This scheme includes provisions for reciprocal rights of boarding and inspection by the Contracting Parties and for flag-state prosecution and sanctions on the basis of evidence resulting from such boarding and inspections. A report of such prosecutions and sanctions imposed is included in an annual statement regarding the actions that were taken during the last year.

**Non-contracting Party Vessels.** The Contracting Parties agree to invite the attention of any state not a party to this Convention to any matter relating to fishing activities in the Regulatory Area undertaken by nationals or vessels of that state that appear to affect adversely the attainment of the objectives of the Convention. The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects.

Furthermore, the NAFO adopted in 1997 a scheme to promote compliance by Non-contracting Party vessels with the conservation and enforcement measures established by the NAFO. In the event that any Non-contracting Party vessel, which has been sighted and reported as engaged in fishing activities in the NAFO Regulatory Area, consents to be boarded by NAFO inspectors, the findings of the NAFO inspectors is transmitted to the NAFO Secretariat. The NAFO Secretariat will transmit this information to all NAFO Contracting Parties within one business day of receiving this information, and to the flag state of the boarded vessel as soon as possible. The Non-contracting Party vessel that is boarded is provided with a copy of the findings of the NAFO inspectors.

**Port-state Enforcement.** When a Non-contracting Party vessel that has been sighted and reported as engaged in fishing enters a port of any NAFO Contracting Party, it is inspected by authorised Contracting Party officials knowledgeable in the NAFO conservation and enforcement measures and this Scheme, and cannot land or tranship any fish until this inspection has taken place. Such inspections include the vessel's documents, log books, fishing gear, catch on board and any other matter relating to the vessel's activities in the NAFO Regulatory Area. The landings and transhipments of all fish from the Non-contracting Party vessel, which has been inspected, are prohibited in all Contracting Party ports, if such inspection reveals that the vessel has engaged in illegal fishing.

## VIII. MHLC/WCPOFC

### A. Introduction

**Honolulu Convention.** The Multilateral High Level Conference (hereinafter cited as MHLC) adopted on 5 September 2000 in Honolulu, United States, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereinafter cited as the Convention). The Convention is not yet in force.

**Participation.** As of 31 January 2001, the following states had signed the Convention: Australia, Cook Islands, Fiji, Federated States of Micronesia, Kiribati, Marshall Islands, Niue, Palau, Papua New Guinea, Samoa, Tuvalu, United States of America and Vanuatu.

**Objective.** The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the 1995 UN Fish Stocks Agreement. In this regard, parties agreed that compatible, effective and binding conservation and management measures can be achieved only through cooperation between coastal states and states fishing in this region. Moreover, effective conservation and management measures require the application of the precautionary principle and the best scientific information available.

**Area of Application.** Broadly speaking, the Convention applies to the western and central Pacific Ocean. A precise definition based on longitudes and latitudes is given in Article 3 of the Convention. However, nothing in the Convention shall constitute recognition of the claims or positions of any of the members of the Commission concerning the legal status and extent of waters and zones claimed by any of such members.

**Structure.** Under the Convention, the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereinafter cited as the Commission or WCPOFC) is to be set up, along two subsidiary bodies -a Scientific Committee and a Technical and Compliance Committee-, and a Secretariat.

### B. Reporting and Verification

Operators of fishing vessels engaged in fishing activities in the Convention Area shall record and report vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with the standards for collection of such data as set out by the Commission. See Article 5 of Annex III. For the purpose of this Annex, 'operator' means any person who is in charge of, directs or controls a fishing vessel, including the owner, master or charterer. To this end, the Commission shall adopt standards for collection, verification and for the timely exchange and reporting of data on fisheries for highly migratory fish stocks in the Convention Area. See Article 10.1 (d) of the Convention.

### C. Inspection and Boarding Schemes

**Inspection and Boarding.** According to Article 10.1(i) of the Convention, the Commission shall establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement, including a VMS. As regards boarding and inspection in

particular, the Commission shall, for the purposes of ensuring compliance with conservation and management measures, establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area. These procedures must provide the following provisions. The master and each member of the crew of the vessel shall immediately comply with every instruction and direction given by an authorised and identified officer of a member of the Commission, including to stop, to move to a safe location, and to facilitate safe boarding and inspection of the vessel, its licence, gear, equipment, records, facilities, fish and fish products. Such boarding and inspection shall be conducted as much as possible in a manner so as not to interfere unduly with the lawful operation of the vessel. Moreover, the operator and each member of the crew shall facilitate and assist in any action by an authorised officer and shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an authorised officer in the performance of his or her duties.

All vessels used for boarding and inspection of fishing vessels on the high seas in the Convention Area shall be clearly marked and identifiable as being on government service and authorised to undertake high seas boarding and inspection in accordance with this Convention. Moreover, each member of the Commission shall ensure that fishing vessels flying its flag accept boarding by duly authorised inspectors in accordance with such procedures. Such duly authorised inspectors shall comply with the procedures for boarding and inspection. See Article 26

Furthermore, if, within two years of the entry into force of this Convention, the Commission is not able to agree on such procedures, or on an alternative mechanism which effectively discharges the obligations of the members of the Commission under the 1995 UN Fish Stocks Agreement and this Convention to ensure compliance with the conservation and management measures established by the Commission, Articles 21 and 22 of the 1995 UN Fish Stocks Agreement shall be applied, as if they were part of this Convention and boarding and inspection of fishing vessels in the Convention Area, as well as any subsequent enforcement

Action, shall be conducted in accordance with the procedures set out therein and such additional practical procedures as the Commission may decide are necessary for the implementation of Articles 21 and 22 of the 1995 UN Fish Stocks Agreement.

**Transhipments.** The operator shall comply with any procedures established by the Commission to verify the quantity and species transhipped, and any additional procedures and measures established by the Commission with respect to transhipment in the Convention Area. Moreover, the operator shall allow and assist any person authorised by the Commission or by the member of the Commission in whose designated port or area a transhipment takes place to have full access to and use of facilities and equipment which such authorised person may determine is necessary to carry out his or her duties, including full access to the bridge, fish on board and areas which may be used to hold, process, weigh and store fish, and full access to the vessel's records, including its log and documentation for the purpose of inspection and photocopying. Furthermore, the operator shall also allow and assist any such authorised person to remove samples and gather any other information required to fully monitor the activity. The operator or any member of the crew shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with any such authorised person in the performance of such person's duties. Every effort should be made to ensure that any disruption to fishing operations is minimised during inspections of transhipments.

## **D. Regional Register**

The Convention requires the Commission to maintain a record containing the following information provided by the members of the Commission relating to their high seas fishing vessels operating in the Convention Area:

- (1) Name of fishing vessel, registration number, previous names (if known), and port of registry;
- (2) name and address of owner or owners;
- (3) name and nationality of master;
- (4) previous flag (if any);
- (5) international Radio Call Sign;
- (6) vessel communication types and numbers (INMARSAT A, B and C numbers and satellite telephone number);
- (7) colour photograph of vessel;
- (8) where and when built;
- (9) type of vessel;
- (10) normal crew complement;
- (11) type of fishing method or methods;
- (12) length;
- (13) moulded depth;
- (14) beam;
- (15) gross register tonnage;
- (16) power of main engine or engines;
- (17) the nature of the authorisation to fish granted by the flag state; and
- (18) carrying capacity, including freezer type, capacity and number and fish hold capacity.

The Commission shall circulate periodically the information contained in the record to all members of the Commission, and, on request, individually to any member.

Moreover, each member of the Commission shall also promptly inform the Commission of:

- (a) Any additions to the record; and
- (b) any deletions from the record by reason of:
  - (i) The voluntary relinquishment or non-renewal of the high seas fishing authorisation by the fishing vessel owner or operator;
  - (ii) the withdrawal of the high seas fishing authorisation;
  - (iii) the fact that the fishing vessel concerned is no longer entitled to fly its flag;
  - (iv) the scrapping, decommissioning or loss of the fishing vessel concerned; and
  - (v) any other reason, specifying which of the reasons listed above is applicable.

## **E. Other Enforcement Provisions/Schemes**

**Vessel-monitoring System.** As regards other enforcement provisions, the Convention imposes the following duty on the flag states. According to Article 24, each member of the Commission shall require its fishing vessels that fish for highly migratory fish stocks on the high seas in the Convention Area to use near real-time satellite position-fixing transmitters while in such areas. The standards, specifications and procedures for the use of such

transmitters shall be established by the Commission, which shall operate a VMS for all vessels that fish for highly migratory fish stocks on the high seas in the Convention Area. In establishing such standards, specifications and procedures, the Commission shall take into account the characteristics of traditional fishing vessels from developing states. The Commission, directly, and simultaneously with the Flag State where the Flag State so requires, or through such other organisation designated by the Commission, shall receive information from the VMS in accordance with the procedures adopted by the Commission. The procedures adopted by the Commission shall include appropriate measures to protect the confidentiality of information received through the VMS. Any member of the Commission may request that waters under its national jurisdiction be included within the area covered by such VMS.

Moreover, each member of the Commission shall require its fishing vessels that fish in the Convention Area in areas under the national jurisdiction of another member to operate near real-time satellite position-fixing transmitters in accordance with the standards, specification and procedures to be determined by the coastal state.

Finally, the members of the Commission shall cooperate to ensure compatibility between national and high seas VMS.

**Enforcement Schemes.** As regards other enforcement schemes, the following provisions can be mentioned.

Each member of the Commission shall enforce the provisions of the Convention and any conservation and management measures issued by the Commission.

Each member of the Commission shall, at the request of any other member, and when provided with the relevant information, investigate fully any alleged violation by fishing vessels flying its flag of the provisions of the Convention or any conservation and management measure adopted by the Commission. A report on the progress of the investigation, including details of any action taken or proposed to be taken in relation to the alleged violation, shall be provided to the member making the request and to the Commission as soon as practicable and in any case within two months of such request and a report on the outcome of the investigation shall be provided when the investigation is completed.

Each member of the Commission shall, if satisfied that sufficient evidence is available in respect of an alleged violation by a fishing vessel flying its flag, refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned.

Each member of the Commission shall ensure that, where it has been established, in accordance with its laws, that a fishing vessel flying its flag has been involved in the commission of a serious violation of the provisions of the Convention or of any conservation and management measures adopted by the Commission, the vessel concerned ceases fishing activities and does not engage in such activities in the Convention Area until such time as all outstanding sanctions imposed by the flag state in respect of the violation have been complied with. Where the vessel concerned has conducted unauthorised fishing within areas under the national jurisdiction of any coastal state party to the Convention, the flag state shall, in accordance with its laws, ensure that the vessel complies promptly with any sanctions which may be imposed by such coastal state in accordance with its national laws and regulations or



shall impose appropriate sanctions. For the purposes of this article, a serious violation shall include any of the violations specified in Article 21, paragraphs 11 (a) to (h) of the 1995 UN Fish Stocks Agreement and such other violations as may be determined by the Commission.

Each member of the Commission shall, to the extent permitted by its national laws and regulations, establish arrangements for making available to prosecuting authorities of other members evidence relating to alleged violations.

Where there are reasonable grounds for believing that a fishing vessel on the high seas has engaged in unauthorised fishing within an area under the national jurisdiction of a member of the Commission, the flag state of that vessel, at the request of the member concerned, shall immediately and fully investigate the matter. The Flag State shall cooperate with the member concerned in taking appropriate enforcement action in such cases and may authorise the relevant authorities of such member to board and inspect the vessel on the high seas. This paragraph is without prejudice to the right of hot pursuit as provided for in Article 111 of the 1982 Convention.

All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions that may permit, *inter alia*, refusal, withdrawal or suspension of authorisations to serve as masters or officers on such vessels.

Each member shall transmit to the Commission an annual statement of compliance measures, including imposition of sanctions for any violations it has taken in accordance with this article.

The above-mentioned provisions are without prejudice to:

- (a) The rights of any of the members of the Commission in accordance with their national laws and regulations relating to fisheries, including the right to impose appropriate sanctions on the vessel concerned in respect of violations occurring within areas under national jurisdiction in accordance with such national laws and regulations; and
- (b) the rights of any of the members of the Commission in relation to any provision relating to compliance and enforcement contained in any relevant bilateral or multilateral fisheries access agreement not inconsistent with the provisions of the Convention, the 1995 UN Fish Stocks Agreement or the 1982 Convention.

Each member of the Commission, where it has reasonable grounds for believing that a fishing vessel flying the flag of another state has engaged in any activity that undermines the effectiveness of conservation and management measures adopted for the Convention Area, shall draw this to the attention of the flag state concerned and may, as appropriate, draw the matter to the attention of the Commission. To the extent permitted by its national laws and regulations it shall provide the flag state with full supporting evidence and may provide the Commission with a summary of such evidence. The Commission shall not circulate such information until such time as the Flag State has had an opportunity to comment, within a reasonable time, on the allegation and evidence submitted, or to object as the case may be.

The members of the Commission may take action in accordance with the 1995 UN Fish Stocks Agreement and international law, including through procedures adopted by the Commission for this purpose, to deter fishing vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures adopted by the Commission from fishing in the Convention Area until such time as appropriate action is taken by the flag state.

The Commission, when necessary, shall develop procedures which allow for non-discriminatory trade measures to be taken, consistent with the international obligations of the members of the Commission, on any species regulated by the Commission, against any state or entity whose fishing vessels fish in a manner which undermines the effectiveness of the conservation and management measures adopted by the Commission.

## **F. Observer Schemes**

**Regional Observer Programme.** The Convention contains a set of provisions relating to the establishment and functioning of a regional observer programme. These provisions contain the following elements.

The Commission shall develop a regional observer programme to collect verified catch data, other scientific data and additional information related to the fishery from the Convention Area and to monitor the implementation of the conservation and management measures adopted by the Commission.

The observer programme shall be coordinated by the Secretariat of the Commission, and shall be organised in a flexible manner, which takes into account the nature of the fishery and other relevant factors. In this regard, the Commission may enter into contracts for the provision of the regional observer programme.

The regional observer programme shall consist of independent and impartial observers authorised by the Secretariat of the Commission. The programme should be coordinated, to the maximum extent possible, with other regional, sub-regional and national observer programme.

Each member of the Commission shall ensure that fishing vessels flying its flag in the Convention Area, except for vessels that operate exclusively within waters under the national jurisdiction of the flag state, are prepared to accept an observer from the regional observer programme, if required by the Commission.

The provisions of paragraph 4 shall apply to vessels fishing exclusively on the high seas in the Convention Area, vessels fishing on the high seas and in waters under the jurisdiction of one or more coastal states, and vessels fishing in waters under the jurisdiction of two or more coastal states. When a vessel is operating on the same fishing trip both in waters under the national jurisdiction of its flag state and in the adjacent high seas, an observer placed under the regional observer programme shall not undertake any of the activities specified in paragraph 6 (e) when the vessel is in waters under the national jurisdiction of its flag state, unless the flag state of the vessel agrees otherwise.

The regional observer programme shall operate in accordance with the following guidelines:

- (a) The programme shall provide a sufficient level of coverage to ensure that the Commission receives appropriate data and information on catch levels and related matters within the Convention Area, taking into account the characteristics of the fisheries;
- (b) each member of the Commission shall be entitled to have its nationals included in the programme as observers;
- (c) observers shall be trained and certified in accordance with uniform procedures to be approved by the Commission;
- (d) observers shall not unduly interfere with the lawful operations of the vessel and, in carrying out their functions, they shall give due consideration to the operational requirements of the vessel and shall communicate regularly with the captain or master for this purpose;
- (e) the activities of observers shall include collecting catch data and other scientific data, monitoring the implementation of conservation and management measures adopted by the Commission and reporting of their findings in accordance with procedures to be developed by the Commission;
- (f) the programme shall be cost effective, shall avoid duplication with existing regional, sub-regional and national observer programmes, and shall, to the extent practicable, seek to minimise disruption to the operations of vessels fishing in the Convention Area; and
- (g) a reasonable period of notice of the placement of an observer shall be given.

Furthermore, the Commission shall develop further procedures and guidelines for the operation of the regional observer programme, including:

- (a) To ensure the security of non-aggregated data and other information which the Commission deems to be of a confidential nature;
- (b) for the dissemination of data and information collected by observers to the members of the Commission; and
- (c) for boarding of observers which clearly define the rights and responsibilities of the captain or master of the vessel and the crew when an observer is on board a vessel, as well as the rights and responsibilities of observers in the performance of their duties.

Finally, the Commission shall determine the manner in which the costs of the observer programme would be defrayed.

**Obligations of the Operator in Respect of Observers.** Article 3 of Annex III of the Convention imposes some obligations upon operators of fishing vessels in respect of observers. As already stated, for the purposes of this Annex, 'operator' means any person who is in charge of, directs or controls a fishing vessel, including the owner, master or charterer. The following obligations have been identified.

The operator and each member of the crew shall allow and assist any person identified as an observer under the regional observer programme to:

- (a) Embark at a place and time agreed to;

- (b) have full access to and use of all facilities and equipment on board which the observer may determine is necessary to carry out his or her duties, including full access to the bridge, fish on board, and areas which may be used to hold, process, weigh and store fish, and full access to the vessel's records including its logs and documentation for the purpose of records inspection and copying, reasonable access to navigational equipment, charts and radios, and reasonable access to other information relating to fishing;
- (c) remove samples;
- (d) disembark at an agreed place and time; and
- (e) carry out all duties safely.

Moreover, the operator or any crewmember shall not assault, obstruct, resist, delay, and refuse boarding to observers. They shall neither intimidate nor interfere with observers in the performance of their duties.

Finally, the operator shall provide the observer, while on board the vessel, at no expense to the observer or the observer's government, with food, accommodation and medical facilities of a reasonable standard equivalent to those normally available to an officer on board the vessel.

#### **G. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** Once the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean will enter into force, the Convention will create one of the most developed and integrated regional organisations, namely the Western and Central Pacific Ocean Fisheries Commission (hereinafter cited as WCPOFC). Other strengths are listed below.

*Extensive Scope.* The Convention applies to the whole western and central Pacific Ocean. A precise definition based on longitudes and latitudes is given in Article 3 of the Convention.

*Extensive Powers of the WCPOFC.* The Convention grants important decisive powers to the Commission. Without prejudice to the sovereign rights of coastal states for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks within areas under national jurisdiction, the functions of the Commission shall be to:

- (a) Determine the total allowable catch or total level of fishing effort within the Convention Area for such highly migratory fish stocks as the Commission may decide and adopt such other conservation and management measures and recommendations as may be necessary to ensure the long-term sustainability of such stocks;
- (b) promote cooperation and coordination between members of the Commission to ensure that conservation and management measures for highly migratory fish stocks in areas under national jurisdiction and measures for the same stocks on the high seas are compatible;
- (c) adopt, where necessary, conservation and management measures and recommendations for non-target species and species dependent on or associated with the target stocks, with a view to maintaining or restoring populations of such

- species above levels at which their reproduction may become seriously threatened;
- (d) adopt standards for collection, verification and for the timely exchange and reporting of data on fisheries for highly migratory fish stocks in the Convention Area in accordance with Annex I of the Agreement, which shall form an integral part of this Convention;
  - (e) compile and disseminate accurate and complete statistical data to ensure that the best scientific information is available, while maintaining confidentiality, where appropriate;
  - (f) obtain and evaluate scientific advice, review the status of stocks, promote the conduct of relevant scientific research and disseminate the results thereof;
  - (g) develop, where necessary, criteria for the allocation of the total allowable catch or the total level of fishing effort for highly migratory fish stocks in the Convention Area;
  - (h) adopt generally recommended international minimum standards for the responsible conduct of fishing operations;
  - (i) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement, including a VMS;
  - (j) obtain and evaluate economic and other fisheries-related data and information relevant to the work of the Commission;
  - (k) agree on means by which the fishing interests of any new member of the Commission may be accommodated;
  - (l) adopt its rules of procedure and financial regulations and such other internal administrative regulations as may be necessary to carry out its functions;
  - (m) consider and approve the proposed budget of the Commission;
  - (n) promote the peaceful settlement of disputes; and
  - (o) discuss any question or matter within the competence of the Commission and adopt any measures or recommendations necessary for achieving the objective of the Convention.

Moreover, when exercising its functions, the Commission may adopt measures relating to, *inter alia*:

- (a) The quantity of any species or stocks that may be caught;
- (b) the level of fishing effort;
- (c) limitations of fishing capacity, including measures relating to fishing vessel numbers, types and sizes;
- (d) the areas and periods in which fishing may occur;
- (e) the size of fish of any species that may be taken;
- (f) the fishing gear and technology which may be used; and
- (g) particular sub-regions or regions.

In developing criteria for allocation of the total allowable catch or the total level of fishing effort the Commission shall take into account, *inter alia*:

- (a) The status of the stocks and the existing level of fishing effort in the fishery;
- (b) the respective interests, past and present fishing patterns and fishing practices of participants in the fishery and the extent of the catch being utilised for domestic consumption;
- (c) the historic catch in an area;

- (d) the needs of small island developing states, and territories and possessions, in the Convention Area whose economies, food supplies and livelihoods are overwhelmingly dependent on the exploitation of marine living resources;
- (e) the respective contributions of participants to conservation and management of the stocks, including the provision by them of accurate data and their contribution to the conduct of scientific research in the Convention Area;
- (f) the record of compliance by the participants with conservation and management measures;
- (g) the needs of coastal communities that are dependent mainly on fishing for the stocks;
- (h) the special circumstances of a state, which is surrounded by the EEZ of other states and has a limited EEZ of its own;
- (i) the geographical situation of a small island developing state which is made up of non-contiguous groups of islands having a distinct economic and cultural identity of their own but which are separated by areas of high seas; and
- (j) the fishing interests and aspirations of coastal states, particularly Small Island developing states, and territories and possessions, in whose areas of national jurisdiction the stocks also occur.

*Voting Procedure.* As a general rule, decision-making in the Commission shall be by consensus. For the purposes of this article, 'consensus' means the absence of any formal objection made at the time the decision was taken.

Except where this Convention expressly provides that a decision shall be made by consensus (*e.g.* decisions relating to the allocation of the total allowable catch or the total level of fishing effort and decisions relating to the exclusion of vessel types), if all efforts to reach a decision by consensus have been exhausted, decisions by voting on questions of procedure shall be taken by a majority of those present and voting. Decisions on questions of substance shall be taken by a three-fourths majority of those present and voting provided that such majority includes a three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting and a three-fourths majority of non-members of the South Pacific Forum Fisheries Agency present and voting and provided further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

Moreover, if it appears to the Chairman that all efforts to reach a decision by consensus have been exhausted, the Chairman shall fix a time during that session of the Commission for taking the decision by a vote. At the request of any representative, the Commission may, by a majority of those present and voting, defer the taking of a decision until such time during the same session as the Commission may decide. At that time, the Commission shall take a vote on the deferred question. This rule may be applied only once to any question.

Where the Convention expressly provides that a decision on a proposal shall be taken by consensus and the Chairman determines that there would be an objection to such proposal, the Commission may appoint a conciliator for the purpose of reconciling the differences in order to achieve consensus on the matter.

A decision adopted by the Commission shall become binding 60 days after the date of its adoption.

However, a member which has voted against a decision or which was absent during the meeting at which the decision was made may, within 30 days of the adoption of the decision by the Commission, seek a review of the decision by a review panel constituted in accordance with the procedures set out in Annex II to the Convention on the grounds that (a) the decision is inconsistent with the provisions of the Convention, the 1995 UN Fish Stocks Agreement or the 1982 Convention; or (b) the decision unjustifiably discriminates in form or in fact against the member concerned.

Pending the findings and recommendations of the review panel and any action required by the Commission, no member of the Commission shall be required to give effect to the decision in question.

If the review panel finds that the decision of the Commission need not be modified, amended or revoked, the decision shall become binding 30 days from the date of communication by the Executive Director of the findings and recommendations of the review panel.

However, if the review panel recommends to the Commission that the decision be modified, amended or revoked, the Commission shall, at its next annual meeting, modify or amend its decision in order to conform with the findings and recommendations of the review panel or it may decide to revoke the decision, provided that, if so requested in writing by a majority of the members, a special meeting of the Commission shall be convened within 60 days of the date of communication of the findings and recommendations of the review panel.

*Interesting Powers of the Technical and Compliance Committee.* Very interesting also are the functions of the Technical and Compliance Committee, a subsidiary organ of the WCPOFC. These functions are to:

- (a) Provide the Commission with information, technical advice and recommendations relating to the implementation of, and compliance with, conservation and management measures;
- (b) monitor and review compliance with conservation and management measures adopted by the Commission and make such recommendations to the Commission as may be necessary; and
- (c) review the implementation of cooperative measures for monitoring, control, surveillance and enforcement adopted by the Commission and make such recommendations to the Commission as may be necessary.

*Transparency.* The Commission shall promote transparency in its decision-making processes and other activities. In this regard, Representatives from intergovernmental organisations and non-governmental organisations concerned with matters relevant to the implementation of this Convention shall be afforded the opportunity to participate in the meetings of the Commission and its subsidiary bodies as observers or otherwise as appropriate. The rules of procedure of the Commission shall provide for such participation. The procedures shall not be unduly restrictive in this respect. Such intergovernmental organisations and non-governmental organisations shall be given timely access to pertinent information subject to the rules and procedures that the Commission may adopt.

*Cooperation with Other Organisations.* According to the Convention, the Commission shall cooperate, as appropriate, with the FAO and with other specialised agencies and bodies of the United Nations on matters of mutual interest.

Moreover, the Commission shall make suitable arrangements for consultation, cooperation and collaboration with other relevant intergovernmental organisations, particularly those which have related objectives and which can contribute to the attainment of the objective of the Convention, such as the CCAMLR, the Commission for the Conservation of Southern Bluefin Tuna, the Indian Ocean Tuna Commission and the Inter-American Tropical Tuna Commission.

Where the Convention Area overlaps with an area under regulation by another fisheries management organisation, the Commission shall cooperate with such other organisation in order to avoid the duplication of measures in respect of species in that area, which are regulated by both organisations.

The Commission shall cooperate with the Inter-American Tropical Tuna Commission to ensure that the objective of effective management and long-term conservation and sustainable use of tropical tuna is reached. To that end, the Commission shall initiate consultation with the Inter-American Tropical Tuna Commission with a view to reaching agreement on a consistent set of conservation and management measures, including measures relating to monitoring, control and surveillance, for fish stocks that occur in the Convention Areas of both organisations.

Furthermore, the Commission may enter into relationship agreements with the above-mentioned organisations and with other organisations as may be appropriate, such as the Pacific Community and the South Pacific Forum Fisheries Agency, with a view to obtaining the best available scientific and other fisheries-related information to further the attainment of the objective of the Convention and to minimise duplication with respect to their work.

Any organisation with which the Commission has entered into an arrangement or agreement may designate representatives to attend meetings of the Commission as observers in accordance with the rules of procedure of the Commission. Procedures shall be established for obtaining the views of such organisations in appropriate cases.

**Weaknesses.** The Convention sets up a restrictive system as regards membership to the Commission. All Contracting Parties are said to be members of the Commission, while a list is provided naming those states able to become party to the founding document. The latter includes coastal states of the region as well as states with fishing interests in that particular area. Later accession of other states or regional economic integration organisations wishing to conduct fishing activities in the Convention Area is only possible upon invitation, by consensus, of the Contracting Parties. See *infra* Part 4, Recommendation III.

## **H. Implementation of the 1993 FAO Compliance Agreement**

**Full implementation of the 1993 FAO Compliance Agreement.** The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean is fully compatible with the 1993 FAO Compliance Agreement.



**Flag-state Duties.** The Convention imposes the following obligations on flag states.

Each member of the Commission shall take such measures as may be necessary to ensure that:

- (a) Fishing vessels flying its flag comply with the provisions of the Convention and the conservation and management measures adopted pursuant hereto and that such vessels do not engage in any activity which undermine the effectiveness of such measures; and
- (b) fishing vessels flying its flag do not conduct unauthorised fishing within areas under the national jurisdiction of any Contracting Party.

No member of the Commission shall allow any fishing vessel entitled to fly its flag to be used for fishing for highly migratory fish stocks in the Convention Area beyond areas of national jurisdiction unless it has been authorised to do so by the appropriate authority or authorities of that member. A member of the Commission shall authorise the use of vessels flying its flag for fishing in the Convention Area beyond areas of national jurisdiction only where it is able to exercise effectively its responsibilities in respect of such vessels under the 1982 Convention, the 1995 UN Fish Stocks Agreement and this Convention.

It shall be a condition of every authorisation issued by a member of the Commission that the fishing vessel in respect of which the authorisation is issued:

- (a) Conducts fishing within areas under the national jurisdiction of other states only where the fishing vessel holds any licence, permit or authorisation that may be required by such other state; and
- (b) is operated on the high seas in the Convention Area in accordance with the requirements of Annex III (see *supra*), the requirements of which shall also be established as a general obligation of all vessels operating pursuant to the Convention.

Each member of the Commission shall, for the purposes of effective implementation of the Convention, maintain a record of fishing vessels entitled to fly its flag and authorised to be used for fishing in the Convention Area beyond its area of national jurisdiction, and shall ensure that all such fishing vessels are entered in that record.

Each member of the Commission shall provide annually to the Commission, in accordance with such procedures as may be agreed by the Commission, all the information to be contained in the regional register (see *supra*) with respect to each fishing vessel entered in the record required to be maintained under paragraph 4 and shall promptly notify the Commission of any modifications to such information.

**Port-state Jurisdiction.** The Convention sets forth the following provisions dealing with measures taken by port states.

A port state has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures. When taking such measures a port state shall not discriminate in form or in fact against the fishing vessels of any state.

Whenever a fishing vessel of a member of the Commission voluntarily enters a port or offshore terminal of another member, the port state may, *inter alia*, inspect documents, fishing gear and catch on board such fishing vessel.

Members of the Commission may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner that undermines the effectiveness of conservation and management measures adopted by the Commission.

**Competence of the Commission.** The Convention assigned to the Commission competence to adopt generally recommended international minimum standards for the responsible conduct of fishing operations. See Article 10.1 (h).

## **I. Implementation of the 1995 UN Fish Stocks Agreement**

**Full implementation of the 1995 UN Fish Stocks Agreement.** The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean is fully compatible with the 1995 UN Fish Stocks Agreement. Pursuant of Article 4 of the Convention, nothing in the Convention shall prejudice the rights, jurisdiction and duties of states under the 1982 Convention and the 1995 UN Fish Stocks Agreement. The Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the 1995 UN Fish Stocks Agreement.

**Non-parties to the Convention.** Each member of the Commission shall take measures consistent with the Convention, the 1995 UN Fish Stocks Agreement and international law to deter the activities of vessels flying the flags of non-parties to the Convention which undermine the effectiveness of conservation and management measures adopted by the Commission.

The members of the Commission shall exchange information on the activities of fishing vessels flying the flags of non-parties to this Convention which are engaged in fishing operations in the Convention Area.

The Commission shall draw the attention of any state, which is not a party to this Convention, to any activity undertaken by its nationals or vessels flying its flag which, in the opinion of the Commission, affects the implementation of the objective of the Convention.

The members of the Commission shall, individually or jointly, request non-parties to the Convention whose vessels fish in the Convention Area to cooperate fully in the implementation of conservation and management measures adopted by the Commission with a view to ensuring that such measures are applied to all fishing activities in the Convention Area. Such cooperating non-parties to the Convention shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with, and their record of compliance with, conservation and management measures in respect of the relevant stocks.

Non-parties to the Convention, may, upon request and subject to the concurrence of the members of the Commission and to the rules of procedure relating to the granting of observer status, be invited to attend meetings of the Commission as observers.

**Flag-state Duties.** See *supra* Implementation of the 1993 FAO Compliance Agreement.

**Port-state Jurisdiction.** See *supra* Implementation of the 1993 FAO Compliance Agreement.

**Dispute Settlement Procedure.** The provisions relating to the settlement of disputes set out in Part VIII of the 1995 UN Fish Stocks Agreement apply, *mutatis mutandis*, to any dispute between members of the Commission, whether or not they are also parties to the 1995 UN Fish Stocks Agreement.

**Compatibility of Conservation and Management Measures.** The Convention assures the compatibility of the conservation and management measures taken at different levels. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of highly migratory fish stocks in their entirety. To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.

In establishing compatible conservation and management measures for highly migratory fish stocks in the Convention Area, the Commission shall:

- (a) Take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;
- (b) take into account (i) the conservation and management measures adopted and applied in accordance with Article 61 -conservation of the living resources in the EEZ- of the 1982 Convention in respect of the same stocks by coastal states within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Convention Area as a whole do not undermine the effectiveness of such measures; and (ii) previously agreed measures established and applied in respect of the same stocks for the high seas which form part of the Convention Area by relevant coastal states and states fishing on the high seas in accordance with the 1982 LOS Convention and the 1995 UN Fish Stocks Agreement;
- (c) take into account previously agreed measures established and applied in accordance with the 1982 Convention and the 1995 UN Fish Stocks Agreement in respect of the same stocks by a sub-regional or regional fisheries management organisation or arrangement;
- (d) take into account the respective dependence of the coastal states and the states fishing on the high seas on the stocks concerned; and
- (e) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

The coastal state shall ensure that the measures adopted and applied by it to highly migratory fish stocks within areas under its national jurisdiction do not undermine the effectiveness of measures adopted by the Commission under the Convention in respect of the same stocks.

Where there are areas of high seas in the Convention Area entirely surrounded by the EEZ of members of the Commission, the Commission shall, in giving effect to this article, pay special attention to ensuring compatibility between conservation and management measures

established for such high seas areas and those established in respect of the same stocks in accordance with Article 61 -- conservation of the living resources in the EEZ -- of the 1982 Convention by the surrounding coastal states in areas under national jurisdiction.

**Application of the Precautionary Approach.** In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission shall, in giving effect to their duty to cooperate in accordance with the 1982 Convention, the 1995 UN Fish Stocks Agreement and the Convention, apply the precautionary approach in accordance with the Convention and all relevant internationally agreed standards and recommended practices and procedures. See Article 5 (c) of the Convention.

In applying the precautionary approach, the members of the Commission shall:

- (a) Apply the guidelines annexed to the Agreement, and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;
- (b) take into account, *inter alia*, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distributions of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and
- (c) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans where necessary to ensure the conservation of such species and to protect habitats of special concern.

Members of the Commission shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

Furthermore, members of the Commission shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event they are exceeded, members of the Commission shall, without delay, take the action determined to restore the stocks.

Where the status of target stocks or non-target or associated or dependent species is of concern, members of the Commission shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.

As regards new or exploratory fisheries, members of the Commission shall adopt as soon as possible cautious conservation and management measures, including, *inter alia*, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.

Finally, if a natural phenomenon has a significant adverse impact on the status of highly migratory fish stocks, members of the Commission shall adopt conservation and management

measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impacts. Members of the Commission shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific information available.

**Collection and Sharing of Data and Scientific Information.** In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission shall, in giving effect to their duty to cooperate in accordance with the 1982 Convention, the 1995 UN Fish Stocks Agreement and the Convention, collect and share, in a timely manner, complete and accurate data concerning fishing activities on, *inter alia*, vessel position, catch of target and non-target species and fishing effort, as well as information from national and international research programmes.

The Commission shall adopt standards for collection, verification and for the timely exchange and reporting of data on fisheries for highly migratory fish stocks in the Convention Area in accordance with Annex I of the 1995 UN Fish Stocks Agreement, which shall form an integral part of this Convention; and compile and disseminate accurate and complete statistical data to ensure that the best scientific information is available, while maintaining confidentiality, where appropriate.

## **IX. SEAFO**

### **A. Introduction**

**SEAFO Convention.** The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (hereinafter cited as SEAFO Convention) has been adopted in November 2000 and was open for signature on 20 April 2001, in Windhoek, Namibia.

**Objective.** The objective of the SEAFO Convention is to ensure the long-term conservation and sustainable use of high seas fishery resources in the Convention Area through the effective implementation of the SEAFO Convention. In this regard, parties agreed that compatible, effective and binding conservation and management measures can be achieved only through cooperation between coastal states and states fishing in this region. Moreover, effective conservation and management measures require the application of the precautionary principle in the management of high seas fishery resources, in line with the principles set out in the 1995 UN Fish Stocks Agreement and with the 1995 FAO Code of Conduct for Responsible Fisheries.

**Area of Application.** The SEAFO Convention applies within the Convention Area, being all waters beyond areas of national jurisdiction in the South East Atlantic Ocean. A precise definition of the Convention Area based on a line joining some points along parallels of latitude and meridians of longitude is provided in Article 4 of the SEAFO Convention.

**Structure.** The SEAFO Convention establishes the South East Atlantic Fisheries Organisation (hereinafter cited as the Organisation). The Organisation comprises the Commission; the Compliance and Scientific Committees, as subsidiary bodies of the

Commission; and the Secretariat. Each Contracting Party shall be a member of the Commission. The headquarters of the Organisation are established in Namibia.

## **B. Reporting and Verification**

**SEAFO and MCS Schemes.** The SEAFO Commission is responsible for the development of rules for the collection, submission, verification of, access to and use of data (see Article 6.3(k)) and for the establishment of appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement (see Article 6.3(h)).

**Interim Arrangements.** In order to strengthen the effective exercise of flag-state responsibility by Contracting Parties, interim arrangements have been annexed to the SEAFO Convention, which forms an integral part of the SEAFO Convention. They will apply upon entry into force of the SEAFO Convention and would remain in force until the establishment of the observation, inspection, compliance and enforcement system (see *infra*) or until the Commission decides otherwise. The interim arrangements contain the following reporting and verification obligations.

Each Contracting Party is required to ensure that all fishing vessels and fishing research vessels flying its flag and authorised to fish in the Convention Area keep a bound fishing logbook with consecutively numbered pages and, where appropriate, a production logbook, storage plan or a scientific plan.

Fishing logbooks must contain the following data:

- (a) Each entry into and exit from the Convention Area;
- (b) the cumulative catches by species (FAO 3 Alfa Code as defined *infra*) by live weight (Kg), the proportion of the catch by live weight (Kg) retained on board; and
- (c) for each haul:
  - i. Catch by species in live weight (Kg), catch retained on board by species in live weight (Kg) and an estimation of the amount of living marine resources discarded (Kg) by species;
  - ii. the type of gear (number of hooks, length of gill nets, etc.);
  - iii. the longitude and latitude coordinates of shooting and hauling; and
  - iv. the date and time of shooting and hauling (UTC).

After each haul report to be submitted, the following details have to be entered in the logbook immediately:

- (a) Date and time (UTC) of transmission of the report; and
- (b) in the case of a radio transmission, the name of the radio station through which the report is transmitted.

Fishing vessels, and if appropriate, fishing research vessels engaged in fishing activities which process and/or freeze their catch must either:

- (a) Record their cumulative production by species (FAO 3 Alfa Code), by live weight (Kg), and product form in a production logbook; or

- (b) stow in the hold all processed catch in such a way that the location of each species can be identified from a stowage plan maintained by the master of the fishing vessel.

The quantities recorded must correspond accurately to the quantities kept on board. The original recordings contained in the fishing logbooks shall be kept on board the fishing vessel and if appropriate, fishing research vessel, for a period of at least 12 months.

**FAO 3 ALFA Code (adapted) reads as follows**

<b>FAO 3 ALFA CODE</b>	<b>SPECIES</b>	<b>LATIN NAME</b>
<b>ALF</b>	Alfonsinos	Family Berycidae
<b>HOM</b>	Horse Mackerel	Trachurus spp.
<b>MAC</b>	Mackerel	Scomber spp.
<b>ORY</b>	Orange Roughy	Hoplostethus spp.
<b>SKA</b>	Skates	Family Rajidae
<b>SKH</b>	Sharks	Order Selachomorpha
	Armourhead	Pseudopentaceros spp.
	Cardinal Fish	Epigonus spp.
	Deepsea Red Crab	Chaceon maritae
	Octopus and Squids	Families Octopodidae and Loliginidae
	Patagonian toothfish	Dissostichus eleginoides
	Hake	Merluccius spp.
<b>WRF</b>	Wreckfish	Polyprion americanus
	Oreodories	Family Oreosomatidae

**Reporting of Catch and Fishing Effort.** Pursuant to the interim arrangements, each Contracting Party has to report to the Secretariat the catch, in metric tonnes per species, taken in the Convention Area on a monthly basis. Such reports must specify the month to which each report refers and be submitted within 30 days following the end of the month in which the fishing occurred.

The Secretariat has the duty to collate the information received and to circulate it to the Contracting Parties, within 15 days following the monthly deadlines for receipt of the provisional catch statistics.

**Communication of Vessel Movements and Catches.** Pursuant to the interim arrangements, each Contracting Party is required to ensure that its fishing vessels and fishing research vessels authorised to fish in the Convention Area and which are engaged in fishing communicate vessel movements and catch reports to its competent authorities and to the Secretariat if the Contracting Party so desires. The timing and content of the reports must include the following:

- (a) Entry report to be made no more than 12 hours and at least six hours in advance of each entry into the Convention Area and to include entering date, time, geographical position of the vessel and the quantity of fish on board by species (FAO 3 Alfa Code) (see *supra*) and by live weight (Kg);
- (b) catch report to be made by species (FAO 3 Alfa Code) and by live weight (Kg) at the end of each calendar month, or more frequently as required by the Contracting Party;
- (c) exit report to be made no more than 12 hours and at least six hours in advance of each exit from the Convention Area. The report has to include exiting date, time, geographical position of the vessel, the number of fishing days and the catch taken by species (FAO 3 Alfa Code) and by live weight (Kg) in the Convention Area since the commencement of fishing in the Convention Area, or since the last catch report; and
- (d) transshipment report to be made no more than 12 hours after each transshipment and to include the date, the time, and species (FAO 3 Alfa Code) and live weight (Kg), transhipped. This report has to include the quantities by species on-loaded and off-loaded for each transshipment of fish during the vessel's stay in the Convention Area.

### **C. Observation, Inspection, Compliance and Enforcement Schemes**

According to the SEAFO Convention, the Contracting Parties, through the Commission, have to establish a system of observation, inspection, compliance and enforcement, (hereinafter cited as the System), to strengthen the effective exercise of flag-state responsibility by Contracting Parties for fishing vessels and fishing research vessels flying their flags in the Convention Area. The major purpose of the System is to ensure that Contracting Parties effectively discharge their obligations under the SEAFO Convention and, where applicable, under the 1995 UN Fish Stocks Agreement, in order to ensure compliance with the conservation and management measures agreed by the Commission.

Furthermore, in establishing the System, the Commission will be guided, *inter alia*, by the following principles:

- (a) Fostering of cooperation among Contracting Parties to ensure effective implementation of the System;
- (b) a System that is impartial and non-discriminatory in nature;
- (c) verification of compliance with conservation and management measures agreed by the Commission; and



- (d) prompt action on reports of infringements in contravention of measures agreed by the Commission.

Moreover, on the basis of these principles the System will, *inter alia*, comprise the following elements:

- (a) Control measures, including the authorisation of vessels to fish, the marking of vessels and fishing gear, the recording of fishing activities, and the near-to-real time reporting of vessel movements and activities by means such as satellite surveillance;
- (b) an inspection programme, both at sea and in port, including procedures for boarding and inspection of vessels, on a reciprocal basis;
- (c) an observer programme based on common standards for the conduct of observation, including, *inter alia*, arrangements for the placing of observers by a Contracting Party on vessels flying the flag of another Contracting Party with the consent of that Party; an appropriate level of coverage for different sizes and types of fishing vessels and fishery research vessels; and measures for reporting by observers of information regarding apparent violations of conservation and management measures, taking into account the need to ensure the safety of observers; and
- (d) procedures for the follow-up on infringements detected under the System, including standards of investigation, reporting procedures, notification of proceedings and sanctions, and other enforcement actions.

The System shall have a multilateral and integrated character.

In order to strengthen the effective exercise of flag-state responsibility by Contracting Parties for fishing vessels and fishery research vessels flying their flags in the Convention Area, the interim arrangements set out in the Annex (see *supra*) will apply upon entry into force of the SEAFO Convention and remain in force until the establishment of the System or until the Commission decides otherwise.

If, within two years of the entry into force of the SEAFO Convention, the Commission has not established the System, the Commission has the duty, at the request of any Contracting Party, to give urgent consideration to adoption of boarding and inspection procedures in order to strengthen the effective discharge by Contracting Parties of their obligations under the SEAFO Convention and where applicable, under the 1995 UN Fish Stocks Agreement. A special meeting of the Commission may be convened for this purpose.

Moreover, the Interim Arrangements (see *supra*) contain vessel requirement provisions dealing with the marking of fishing vessels and the marking of gear. As regards the marking of fishing vessels, each Contracting Party must ensure that its fishing vessels and fishing research vessels authorised to fish in the Convention area are marked in such a way that they can be readily identified with generally accepted standards, such as the FAO Standard Specification for the Marking and Identification of Fishing Vessels. As regards the marking of gears, each Contracting Party must ensure that gear used by its fishing vessels and fishing research vessels authorised to fish in the Convention Area is marked as follows: The ends of nets, lines and gear anchored in the sea shall be fitted with flag or radar reflector buoys by day and light buoys by night sufficient to indicate their position and extent. Such lights must be visible at a distance of at least two nautical miles in good visibility. Moreover, marker buoys

and similar objects floating on the surface and intended to indicate the location of fixed fishing gear must be clearly marked at all times with the letter(s) and/or number(s) of the vessel to which they belong.

Finally, the Interim Arrangements (see *supra*) provide for scientific observation and collection of information to support stock assessment. To the greatest extent possible, each Contracting Party must collect from each fishing vessel and fishing research vessel flying its flag and authorised to fish in the SEAFO Convention Area, the following information to support stock assessment, including:

- (a) Composition of the catch according to length, weight (Kg) and sex, including the establishment of factors to convert production weight to live catch weight;
- (b) other biological information supporting stock assessment, such as information on age, growth, recruitment, distribution and stock identity; and
- (c) other relevant information, as appropriate, including by surveys of abundance, biomass surveys, hydro-acoustic surveys, research on environmental factors affecting stock abundance, and oceanographic and ecological studies.

Each Contracting Party has to require the submission of this information, in respect of each vessel flying its flag, within 30 days of leaving the Convention Area. The Contracting Party shall provide a copy of the information to the Secretariat as soon as possible, taking account of the need to maintain confidentiality of non-aggregated data. The information shall, to the greatest extent possible, be collected and verified by appropriately designated observers from the flag state not later than six months after these interim measures enter into force.

#### **D. Regional Register**

**SEAFO Rules.** The SEAFO Commission is responsible for the development of rules for the collection, submission, verification of, access to and use of data (see Article 6.3(k)). Moreover, each Contracting Party has to take appropriate measures in respect of vessels flying its flag which are in accordance with measures adopted by the Commission and which give effect thereto, and which take account of international practices. These measures include, *inter alia*, the establishment of a national record of fishing vessels authorised to fish in the Convention Area and provision for sharing this information with the Commission on a regular basis. See Article 14.3(c).

Meanwhile, the interim arrangements require each Contracting Party to notify the Secretariat of all fishing research vessels authorised to fish in the Convention Area as soon as possible and thereafter on an annual basis in accordance with Article VI of the 1993 FAO Compliance Agreement, or in a timely manner following the departure of its vessel from its home port and in any case before the vessel's entry into the Convention Area.

This notification must include for each vessel:

- (1) Name of vessel, registration number, previous names (if known), and port of registry;
- (2) previous flag (if any);
- (3) international Radio Call Sign (if any);
- (4) name and address of owner or owners;

- (5) where and when built;
- (6) type of vessel;
- (7) length;
- (8) name and address of operator (manager) or operators (managers) (if any);
- (9) type of fishing method or methods;
- (10) moulded depth;
- (11) beam;
- (12) gross register tonnage; and
- (13) power of main engine or engines.

Finally, each Contracting Party has to notify the Secretariat of any modifications including suspensions, withdrawals and limitations to this information without delay.

#### **E. Other Enforcement Provisions/Schemes**

Pursuant to the SEAFO Convention, each Contracting Party has the duty to take appropriate measures in respect of vessels flying its flag which are in accordance with measures adopted by the Commission and which give effect thereto, and which take account of existing international practices. These measures shall include, *inter alia*:

- (a) Measures to ensure that a flag state investigates immediately and reports fully on actions taken in response to an alleged violation by a vessel flying its flag of measures adopted by the Commission;
- (b) control of such vessels in the Convention Area by means of fishing authorisation;
- (c) establishment of a national record of fishing vessels authorised to fish in the Convention
- (d) area and provision for sharing this information with the Commission on a regular basis;
- (e) requirements for marking of fishing vessels and fishing gear for identification;
- (f) requirements for recording and timely reporting of vessel position, catch of target and non-target species, catch landed, catch transhipped, fishing effort and other relevant fisheries data;
- (g) regulation of transhipment to ensure that the effectiveness of conservation and management measures is not undermined;
- (h) measures to permit access by observers from other Contracting Parties to carry out functions as agreed by the Commission; and
- (i) measures to require the use of a VMS as agreed by the Commission.

#### **F. Characteristics: Strengths and Weaknesses of the System**

**Strengths.** *Extensive Area of Application.* The SEAFO Convention applies to the Area of the South East Atlantic Ocean. A precise definition of this area based on longitudes and latitudes is given in Article 4 of the SEAFO Convention.

*Extensive Powers of the SEAFO Commission.* The SEAFO Convention grants important decisive powers to the Commission. Without prejudice to the sovereign rights of coastal states for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks within areas under national jurisdiction, the functions of the Commission are to:

- (a) Identify conservation and management needs;
- (b) formulate and adopt conservation and management measures;
- (c) determine total allowable catches and/or levels of fishing effort, taking into account total fishing mortality, including of non-target species;
- (d) determine the nature and extent of participation in fishing;
- (e) keep under review the status of stocks and gather, analyse and disseminate relevant information on stocks;
- (f) encourage, promote and, where appropriate by agreement, coordinate scientific research on fishery resources within the Convention Area and in adjacent waters under national jurisdiction;
- (g) manage stocks on the basis of the precautionary approach;
- (h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;
- (i) adopt measures concerning control and enforcement within the Convention Area;
- (j) develop measures for the conduct of fishing for scientific research purposes;
- (k) develop rules for the collection, submission, verification of, access to and use of data;
- (l) compile and disseminate accurate and complete statistical data to ensure that the best scientific advice is available, while maintaining confidentiality, where appropriate;
- (m) direct the Compliance and Scientific Committees, other subsidiary bodies, and the Secretariat;
- (n) approve the budget of the Organisation; and
- (o) carry out such other activities as may be necessary to fulfil its functions.

Moreover, when exercising its functions, the Commission may adopt measures relating to, *inter alia*:

- (a) The quantity of any species that may be caught;
- (b) the areas and periods in which fishing may occur;
- (c) the size and sex of any species that may be taken;
- (d) the fishing gear and technology that may be used;
- (e) the level of fishing effort, including vessel numbers, types and sizes, which may be used;
- (f) the designation of regions and sub-regions;
- (g) other measures regulating fisheries with the objective of protecting any species; and
- (h) other measures the Commission considers necessary to meet the objective of the SEAFO Convention.

Finally, the Commission must draw the attention of all Contracting Parties to any activity, which in the opinion of the Commission, undermines the implementation by a Contracting Party of the objective of the SEAFO Convention, or the compliance of that Contracting Party with its obligations under the SEAFO Convention.

*Interesting Powers of the Compliance Committee.* Very interesting also are the functions of the Compliance Committee, a subsidiary organ of the Commission. The functions of the Compliance Committee are to provide the Commission with information, advice and recommendations on the implementation of, and compliance with, conservation and management measures.

*Transparency.* The SEAFO Convention requires the activities of the Commission to be transparent. To this end the draft contains the following transparency provisions:

- (1) The Commission shall adopt rules of procedure to govern the participation of representatives from non-parties to the SEAFO Convention as observers;
- (2) the Commission shall also adopt rules of procedure to govern the participation of representatives from inter-governmental organisations as observers;
- (3) moreover, representatives from non-governmental organisations concerned with the stocks found in the Convention Area shall be given the opportunity to participate as observers in the meetings of the Organisation, subject to rules adopted by the Commission;
- (4) the Commission shall adopt rules to govern such participation and to provide for transparency in the activities of the Organisation. The rules shall not be unduly restrictive in this respect and shall provide for timely access to records and reports of the Organisation, subject to the procedural rules on access to them. The Commission shall adopt such rules of procedure as soon as possible; and
- (5) meanwhile, the Contracting Parties may decide, by consensus, to invite representatives from non-parties to the SEAFO Convention and from intergovernmental organisations to participate as observers until the rules regarding such participation are adopted by the Commission.

*Cooperation with Other Organisations.* According to the SEAFO Convention, the Organisation shall cooperate, as appropriate, with the FAO and with other specialised agencies and organisations on matters of mutual interest.

The Organisation shall also seek to develop cooperative working relationships with other inter-governmental organisations which can contribute to their work and which have an interest in ensuring the long-term conservation and sustainable use of living marine resources in the Convention Area.

Moreover, the Commission may enter into agreements with such organisations and with other organisations as may be appropriate. The Commission may invite such organisations to send observers to its meetings, or to the meetings of any subsidiary bodies of the Organisation.

Finally, the Organisation shall cooperate with other relevant fisheries management organisations and take account of their conservation and management measures applicable in the region.

*Open Membership.* See Articles 25 and 26 of the SEAFO Convention.

**Weaknesses.** *Voting procedure.* According to the SEAFO Convention, decisions of the Commission on matters of substance shall be taken by consensus of the Contracting Parties present. Since no remedies are included in order to try to avoid a deadlock situation, this could result in a veto power for all members of the Commission.

## G. Implementation of the 1993 FAO Compliance Agreement

The SEAFO Convention on the Conservation and Management of Fishery Resources Stocks in the South East Atlantic Ocean is fully compatible with the 1993 FAO Compliance Agreement.

**Flag-state Duties.** The SEAFO Convention imposes the following obligations on flag states: Each Contracting Party has the duty to take such measures as may be necessary to ensure that vessels flying its flag comply with the conservation and management and control measures adopted by the Commission and that they do not engage in any activities which undermine the effectiveness of such measures.

Furthermore, each Contracting Party has to authorise the use of vessels flying its flag for fishing in the Convention Area only where it is able to exercise effectively its responsibilities in respect of such vessels under the SEAFO Convention.

As already mentioned, each Contracting Party has to take appropriate measures in respect of vessels flying its flag which are in accordance with measures adopted by the Commission and which give effect thereto, and which take account of existing international practices. These measures must include, *inter alia*:

- (a) Measures to ensure that a flag state investigates immediately and reports fully on actions taken in response to an alleged violation by a vessel flying its flag of measures adopted by the Commission;
- (b) control of such vessels in the Convention Area by means of fishing authorisation;
- (c) establishment of a national record of fishing vessels authorised to fish in the Convention Area and provision for sharing this information with the Commission on a regular basis;
- (d) requirements for marking of fishing vessels and fishing gear for identification;
- (e) requirements for recording and timely reporting of vessel position, catch of target and non-target species, catch landed, catch transhipped, fishing effort and other relevant fisheries data;
- (f) regulation of transhipment to ensure that the effectiveness of conservation and management measures is not undermined;
- (g) measures to permit access by observers from other Contracting Parties to carry out functions as agreed by the Commission; and
- (h) measures to require the use of a VMS as agreed by the Commission.

Finally, each Contracting Party is required to ensure that vessels flying its flag do not undermine measures agreed by the Commission through unauthorised fishing within areas adjacent to the Convention Area on stocks occurring in the Convention Area and the adjacent area.

**Port-state Jurisdiction.** The SEAFO Convention sets forth a number of provisions dealing with duties and measures taken by port states. Measures taken by a port state in accordance with the SEAFO Convention are to take full account of the right and the duty of a port state to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures.

Furthermore, each Contracting Party shall, in accordance with measures agreed by the Commission, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

Moreover, each Contracting Party has, in accordance with measures agreed by the Commission, to adopt regulations in accordance with international law to prohibit landings and transshipments by vessels flying the flag of non-parties to the SEAFO Convention where it has been established that the catch of a stock covered by the SEAFO Convention has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission.

In the event that a port state considers that there has been a violation by a Contracting Party vessel of a conservation and management or control measure adopted by the Commission, the port state is required to draw this to the attention of the flag state concerned and, as appropriate, the Commission. The port state has to provide the flag state and the Commission with full documentation of the matter, including any record of inspection. In such cases, the Flag State has the duty to transmit to the Commission details of actions it has taken in respect of the matter.

All measures taken by the port state and the Flag State are to be taken in accordance with international law.

**Regional Register.** See *supra* Regional Register.

## **H. Implementation of the 1995 UN Fish Stocks Agreement**

The SEAFO Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean is fully compatible with the 1995 UN Fish Stocks Agreement.

**Non-parties to the SEAFO Convention.** The SEAFO Convention contains a number of provisions regarding non-parties to the SEAFO Convention. The Contracting Parties have the duty, either directly or through the Commission, to request non-parties to the SEAFO Convention whose vessels fish in the Convention Area to cooperate fully with the Organisation either by becoming party to the SEAFO Convention or by agreeing to apply the conservation and management measures adopted by the Commission with a view to ensuring that such measures are applied to all fishing activities in the Convention Area. Such non-parties to the SEAFO Convention enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the relevant stocks.

Contracting Parties may exchange information between each other or through the Commission on, and shall inform the Commission of activities of, fishing vessels flying the flags of the non-parties to the SEAFO Convention that are engaged in fishing operations in the Convention Area, and of any action taken in response to fishing by non-parties to the SEAFO Convention. The Commission arranges for the sharing of the information on such activities with other appropriate regional or sub-regional organisations and arrangements.

The Contracting Parties may, either directly or through the Commission, take measures, which are consistent with international law, and which they deem necessary and appropriate, to deter fishing activities by fishing vessels of non-parties to this Convention which undermine the effectiveness of conservation and management measures adopted by the Commission.

The Contracting Parties have, individually or jointly, to request fishing entities -- as referred to in Article 1 paragraph 3 of the 1995 UN Fish Stocks Agreement -- which have fishing vessels in the Convention Area to cooperate fully with the organisation in implementing conservation and management measures, with a view to having such measures applied *de facto* as extensively as possible to fishing activities in the Convention Area. Such fishing entities will enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.

The Commission may invite non-parties to the SEAFO Convention to send observers to its meetings, or to the meetings of any subsidiary bodies of the Organisation.

The Contracting Parties call upon states which are not Contracting Parties to the Convention, and which do not otherwise agree to apply the conservation and management measures adopted under the SEAFO Convention, not to authorise vessels flying their flags to engage in fishing for the resources, which are the subject of the SEAFO Convention.

The Commission has to adopt measures, in accordance with international law, to promote compliance by vessels flying the flag of non-parties to the SEAFO Convention with measures agreed by the Commission.

Taking account of Articles 116-119 of the 1982 Convention dealing with the conservation and management of the living resources of the high seas, the Commission may draw the attention of any state or fishing entity which is a non-party to the SEAFO Convention to any activity which in the opinion of the Commission affects implementation of the objective of the SEAFO Convention.

**Flag-state Duties.** See *supra* Implementation of the 1993 FAO Compliance Agreement.

**Port-state Jurisdiction.** See *supra* Implementation of the 1993 FAO Compliance Agreement.

**Dispute Settlement Procedure.** The SEAFO Convention requires Contracting Parties to cooperate in order to prevent disputes.

If any dispute arises between two or more Contracting Parties concerning the interpretation or implementation of the SEAFO Convention, those Contracting Parties have to consult among themselves with a view to resolving the dispute, or to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

In cases where a dispute between two or more Contracting Parties is of a technical nature, and the Contracting Parties are unable to resolve the dispute among themselves, they may refer the dispute to an *ad hoc* expert panel established in accordance with procedures adopted by the Commission at its first meeting. The panel confers with the Contracting Parties concerned



and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.

Where a dispute is not referred for settlement within a reasonable time of the consultations, or where a dispute is not resolved by recourse to other means within a reasonable time, such dispute shall, at the request of any party to the dispute, be submitted for binding decision in accordance with procedures for the settlement of disputes provided in Part XV of the 1982 Convention or, where the dispute concerns one or more straddling stocks, by provisions set out in Part VIII of the 1995 UN Fish Stocks Agreement. The relevant part of the 1982 Convention and the 1995 UN Fish Stocks Agreement shall apply whether or not the parties to the dispute are also parties to these instruments.

A court, tribunal or panel to which any dispute has been submitted shall apply the relevant provisions of the SEAFO Convention, of the 1982 Convention, of the 1995 UN Fish Stocks Agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law, compatible with the 1982 Convention and the 1995 UN Fish Stocks Agreement, with a view to ensuring the conservation of the fish stocks concerned.

**Compatibility of Conservation and Management Measures.** The SEAFO Convention would assure the compatibility of the conservation and management measures taken at different levels. To this end, the SEAFO Convention contains a number of provisions.

The Commission take into account measures established by other organisations that affect living marine resources in the Convention Area, and, without prejudice to the objective of the SEAFO Convention, shall seek to ensure consistency with such measures.

The Contracting Parties recognise the need to ensure compatibility of conservation and management measures adopted for straddling fish stocks on the high seas and in areas under national jurisdiction. To this end, the Contracting Parties have a duty to cooperate for the purposes of achieving compatible measures in respect of such stocks of fisheries resources as occur in the Convention area and in areas under the jurisdiction of any Contracting Party. The appropriate Contracting Party and the Commission accordingly promote the compatibility of such measures. This compatibility has to be ensured in a way that does not undermine measures established in accordance with Articles 61 (conservation of the living resources of the EEZ) and 119 (conservation of the living resources of the high seas) of the 1982 Convention.

For the purpose of ensuring such compatibility, the coastal states and the Commission have to develop and agree on standards for reporting and exchanging data on fisheries for the stocks concerned as well as statistical data on the status of the stocks.

Each Contracting Party keeps the Commission informed of its measures and decisions taken.

**Application of the Precautionary Approach.** Pursuant to the SEAFO Convention, the Commission applies the precautionary approach widely to conservation and management and exploitation of fishery resources in order to protect those resources and preserve the marine environment.

Furthermore, the Commission has to be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

In taking such measures, the Commission takes cognisance of best international practices regarding the application of the precautionary approach, including Annex II of the 1995 UN Fish Stocks Agreement and the 1995 FAO Code of Conduct for Responsible Fisheries.

**Collection and Sharing of Data and Scientific Information.** According to the SEAFO Convention, each Contracting Party has the duty, in respect of its activities within the Convention Area, to:

- (a) Collect and exchange scientific, technical and statistical data with respect to fisheries resources covered by the SEAFO Convention;
- (b) ensure that data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements of the Commission;
- (c) take appropriate measures to verify the accuracy of such data;
- (d) provide annually to the Organisation such statistical, biological and other data and information as the Commission may require;
- (e) provide to the Organisation in the manner and at such intervals as may be required by the Commission, information concerning its fishing activities, including fishing areas and fishing vessels in order to facilitate the compilation of reliable catch and effort statistics; and
- (f) provide to the Commission at such intervals as it may require information on steps taken to implement the conservation and management measures adopted by the Commission.

Furthermore, each coastal state is required, in respect of activities that occur in its area of national jurisdiction relating to straddling stocks of fishery resources, to provide to the Organisation data required in accordance with paragraph 1.

Moreover, each Contracting Party is required to transmit to the Commission an annual statement of implementing and compliance measures it has taken, including imposition of sanctions for any violations.

Without prejudice to the primacy of the responsibility of the flag state, each Contracting Party shall, to the greatest extent possible, take measures, or cooperate, to ensure that its nationals fishing in the Convention Area and its industries comply with the provisions of the SEAFO Convention. Each Contracting Party shall, on a regular basis, inform the Commission of such measures taken.

Further, each coastal state has to regularly inform the Organisation of the measures they have adopted for fishery resources within areas of water under their national jurisdiction adjacent to the Convention Area.

Finally, as seen earlier the Commission is responsible for the development of rules for the collection, submission, verification of, access to and use of data; and for the compilation and dissemination of accurate and complete statistical data to ensure that the best scientific advice is available, while maintaining confidentiality, where appropriate.

## **PART 4 - RECOMMENDATIONS**

The present, and final part of the report, formulates a number of conclusions mainly based on the materials covered by Parts 2 and 3. They take the form of eight recommendations containing concrete suggestions aiming at arriving at a more efficient monitoring, control and surveillance system relating to fishing vessels, as well as a more effective compliance and enforcement mechanism applicable to fisheries regulations in general, whether on the national, sub-regional or regional level.

A first recommendation highlights some specific characteristics of national legislation trying to incorporate relevant provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.

A second recommendation takes a closer look at the most efficient manner in which responsibility for fishery violations can be dealt with from a juridicotechnical perspective. A marked shift is discernible in this particular area on the international level.

A third recommendation analyses the different structural set-ups of the RFOs considered by the present report. Special attention is devoted in this part to the manner in which membership is regulated, how decisions are taken, and whether or not international legal personality has been accorded. This exercise leads to a set of conclusions which start from a number of juxtapositions: Those RFOs which are not yet fully operational, and those that are; those RFOs having only an advisory competence, and those making proper decisions; those RFOs have a closed nature, and those possessing a more open character; those RFOs possessing opting-out clauses, and those rather working on the basis of consensus; and, finally, the question will be answered whether the RFOs in question are to be classified as intergovernmental organisations or rather as so-called autonomous institutional arrangements.

A fourth recommendation tries to suggest solutions for the problem created in contemporary international fisheries law by entities like Taiwan Province of China that have a substantial fishing capacity on the high seas, but are not allowed to participate in the relevant international legal instruments because of their special status.

A fifth recommendation analyses the different 'classic' methods available, such as inspection, boarding and observation, encountered in the previous parts, in order to find out whether a single best method exists, or whether an ideal solution has rather to be found in a correct mixture of some of them, depending on the particular circumstances of each case.

A sixth recommendation addresses its attention to a more novel technique introduced in this area, which the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement already made obligatory for states on an individual basis, namely the regional registers.

A seventh recommendation addresses another recent development in the area, namely the introduction of VMS. Even though some RFOs have already started with the implementation of such a VMS system, others are presently merely considering its introduction.

An eighth, and last recommendation, finally wraps up this Part 4 by providing some over-all concluding remarks.

## RECOMMENDATION I. SALIENT FEATURES OF NATIONAL LEGISLATION

The first recommendation takes the country studies analysed in Part 2 as point of departure. Starting from a horizontal, cross-sectional comparison, an attempt is made to highlight some salient features in the manner in which countries have tried to implement their international commitments through the adaptation of their respective national legislative frameworks.

Taking into account the remarks made in Part 1, which briefly sketched the international legal setting, especially the 1993 FAO Compliance Agreement will serve as point of reference here. As far as the responsibilities of the Flag State are concerned, this agreement contains more detailed provisions than the 1995 UN Fish Stocks Agreement. In a recommendation that looks at the ways and means by which states have managed to incorporate their international commitments into national law, these direct obligations imposed on states to control the activities of fishing vessels flying their own flag on the high seas, certainly form a core element. With the new role attributed to RFOs by the 1995 UN Fish Stocks Agreement in this respect, the latter primarily aims at encouraging changes to be achieved in the structure of existing RFOs, or at providing guiding principles to be taken into account by those RFOs still to be created. One could argue therefore that, certainly as far as monitoring, control and surveillance of fishing vessels as well as compliance and enforcement mechanisms are concerned, on the whole indirect obligations are created with respect to the states when adjusting their national legal frameworks to this new RFO concept. Instead of having to take positive action, such as issuing licences, creating registers, conveying information to the FAO, etc., states foremost have to allow their fishing vessels to become subjected to the new powers attributed to RFOs by the 1995 UN Fish Stocks Agreement, such as the possibility to be boarded and inspected by a third state that is a member of the competent RFO.

For a good understanding of this recommendation, a preliminary remark seems justified with respect to the representative nature of the group of countries included in the list, which served as basis for Part 2. In view of the fact that neither the 1993 FAO Compliance Agreement, nor the 1995 UN Fish Stocks Agreement has yet entered into force, and more specifically that these agreements only require, respectively, 25 and 30 instruments of ratification or acceptance for their entry into force,<sup>29</sup> it can hardly be said that the high number of countries in Part 2 having already deposited such instrument, namely five out of seven for both agreements,<sup>30</sup> reflects the overall picture. Moreover, the legislation of a country like New Zealand, which stands out in this list because it ratified or acceded to neither agreement, is characterised by the fact that, in reality, it already implements many of the key provisions of these international agreements.<sup>31</sup> It is therefore clear that the states were not selected randomly, but that they rather try to represent a group of states that stands at the forefront with respect to the implementation of the novel principles contained in both agreements. As such, it serves as a perfect point of reference to analyse how states, which have a favourable attitude towards both agreements, have so far implemented the principles contained therein in practice.

<sup>29</sup> Representing roughly about 15 percentage of the world community of states.

<sup>30</sup> Amounting to more than 70 percentage of this same community. New Zealand is the only country having accepted or ratified neither agreement. Australia so far only ratified the 1995 UN Fish Stocks Agreement, whereas Spain only acceded to the 1993 FAO Compliance Agreement.

<sup>31</sup> To the extent that New Zealand legislation provides that if national procedures differ from those established by a RFO to which this country is a member, their national authorities must comply with the procedures established by the RFO.

State practice indicates that it is not normally necessary to completely overhaul existing fisheries laws and regulations, by for instance creating a new full-fledged Fish Code. Instead, what states have usually been doing so far is simply to fine-tune the existing framework, mainly by way of amendments, in order to accommodate the new developments taking place at the international level. The example set by Norway in this respect demonstrates that the existing framework has not even to be of a recent date, for this country amended in one instance legislation which dates back to 1917 in order to comply with newly created obligations. The manner in which Canada and Norway have moreover tackled the problem indicates that these amendments can be contained in rather short regulations if one considers the existing framework to be flexible enough to adapt to new circumstances. In one case, even though no specific provisions appear to exist, a country proved even willing to comply with particular international requirements on a free-standing basis. Indeed, Canada does not appear to have a specific provision implementing Article VI of the 1993 FAO Compliance Agreement, which obliges states to communicate certain information to the FAO, but this does not seem to have been an obstacle for this information to reach the FAO anyway. Other countries, mostly the common law countries on the list, entered into more detail when amending their existing legal frameworks.

The following are a few elements normally included in the amendments of existing legislation aiming at the transposition of the obligations of the two relevant international agreements into national law. For convenience, they are grouped together under two separate headings.

#### **A. Establish licensing system for high seas fisheries, maintain records, properly mark high seas fishing vessels, exchange information ...**

Especially the 1993 FAO Compliance Agreement, as mentioned above,<sup>32</sup> provides a detailed list of concrete steps to be undertaken by the states in order to ascertain that the latter are effectively able to control the vessels fishing on the high seas that are flying their flag. Since these requirements are new under international law, it would seem preferable for states to explicitly incorporate these sometimes rather detailed requirements in their national laws and regulations. Most states do so, even though not always with the same detail, as already alluded to above. To take the requirement to communicate certain data to the FAO once again as an example, the national legislation of the United States on the one hand, and that of Canada and Norway on the other hand, treat this issue in a totally different manner: The former in a very explicit and detailed manner, the latter only indirectly or even not at all.

#### **B. Enforcement authority and powers**

A first necessary element to be introduced in the national laws and regulations appears the indication *ad nominem* of the authority receiving the power to deal with these new areas of competence, as well as the specification of the concrete powers and duties this entails for the authority in question.

All the countries involved include relevant provisions in the recently introduced amendments. Because these amendments have to be incorporated in an already existing system, it should not surprise that the competent authorities so designated vary according to the different

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<sup>32</sup> See *supra* Part. 1.

national systems: In Australia that competence is granted to the Australian Fisheries Management Authority; in Canada to the Regional Director-General; in Namibia to the Ministry of Fisheries and Marine Resources; in New Zealand to the Chief Executive; in Norway to the Fisheries Director; in Spain to the General Department for Maritime Fishing; and in the United States to the appropriate Secretary.

A similar remark seems to be justified with respect to the exact formulation of these newly acquired powers. To take only one example of particular relevance here, namely the compliance and enforcement measures to be taken by states with respect to vessels flying their flag that acted in contravention of the provisions to be found at the international level, a certain flexibility appears to exist as to how states interpret sanctions 'of sufficient gravity', notion incorporated in the 1993 FAO Compliance Agreement,<sup>33</sup> or 'adequate in severity', terms used in the 1995 UN Fish Stocks Agreement.<sup>34</sup> While most countries render violators subject to criminal responsibility, one country nevertheless only provides for administrative sanctions in this respect.<sup>35</sup> A majority of countries also seems to require the violations to have been perpetrated on purpose. New Zealand legislation, on the other hand, provides for a general system of strict liability. In this group relegating violations to the criminal sphere, some make a distinction between nationals and foreigners, while others do not. This may concern either the amount of the fine, or the kind of sanctions to be applied, namely imprisonment or not. With respect to the fine-related distinction, the legislation of Australia can be mentioned as example of a country severely punishing the offence of using a foreign boat to fish in the Australian fishing zone,<sup>36</sup> whereas Namibian legislation treats owners and masters of Namibian flag vessels and foreign flag vessels in exactly the same manner. With respect to the punishment-related distinction, namely that some countries do subject foreigners committing fishing violations outside their territorial sea to imprisonment fines, whereas others do not, the United States appears to belong to the first group, whereas countries like New Zealand and Norway explicitly exclude these kinds of sanctions to be applied to foreigners.

### C. Conclusions

States having the intention to comply with the novel provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement, whether or not they formally submitted their instrument of ratification or accession to the agreements in question, have so far done so by explicitly transposing the ideas contained in those latter documents into their national laws and regulations. This appears to be a commendable approach given the rather new character of the rights and obligations involved, as well as the detailed nature of some of these provisions.

That states display a clear tendency of favouring the technique of amending existing legislation over the creation of free-standing new enactments cannot be denied. However, as already argued by the present author elsewhere with respect to marine pollution,<sup>37</sup> the question might be raised whether such a state of affairs is suitable for the proper incorporation

<sup>33</sup> 1993 FAO Compliance Agreement, Article III(8). As already quoted *supra* note 10 and accompanying text.

<sup>34</sup> 1995 UN Fish Stocks Agreement, Article 19 (2). As already quoted *supra* note 24 and accompanying text.

<sup>35</sup> Namely Spain.

<sup>36</sup> The maximum fine is ten times higher than that applicable to other fishing violations.

<sup>37</sup> Franckx, E., 'Vessel-source Pollution and Coastal State Jurisdiction: General Framework', 24 *South African Yearbook of International Law* pp. 1, 30-31 (1999).

of such new, and sometimes detailed concepts. Admittedly the area of marine pollution is much more complex and technical, but states nevertheless seem to have adapted their fisheries legislation a few times already during the last couple of years in order to conform to the rapidly changing international rules on the subject. And as one starts amending amendments, the difficulties seem to have a tendency to increase exponentially, making it very difficult for states, even those with a firm intention of implementing the relevant international provisions conscientiously, to fit these novelties in the existing national legal framework. It is therefore recommended that states, when opting for the amendment technique, very carefully check whether the amended text still forms a logical whole and accurately reflects the different provisions of the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement.<sup>38</sup>

## RECOMMENDATION II. INDIVIDUAL VS. FLAG-STATE RESPONSIBILITY

An important preliminary issue to consider with respect to the implementation of fisheries law appears to be the exact legal basis on which fisheries jurisdiction is claimed at the international level. The fundamental question to be answered is whether the link on which fisheries law is based is one between the state and the fishers having the nationality of that state, or rather between the state and the fishing vessels flying the flag of that particular state? A certain development has to be noted in this respect.

In the past it was rather the first hypothesis that was applied in practice, since it was the notion of 'nationals' that was normally relied upon in fishery matters. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>39</sup> as well as the 1982 Convention, as far as fisheries on the high seas are concerned, rely on the notion of 'nationals' as a matter of principle.<sup>40</sup>

It should nevertheless be noted that the International Law Commission, when commenting on draft Article 49 of what was to become the 1958 Fishing Convention, indicated in 1956 that:

'[T]he term "nationals" denotes fishing boats having the nationality of the states concerned, irrespective of the nationality of the members of their crew'.<sup>41</sup>

This comment later found its way into the text of the 1958 Fishing Convention itself, namely in Article 14, which reads:

'In articles 1, 3, 4, 5, 6, and 8, the term "nationals" means fishing boats or craft of any size having the nationality of the state concerned, according to the law of that state, irrespective of the nationality of the members of their crews'.<sup>42</sup>

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<sup>38</sup> For further literature on the subject matter: Edeson W.; Freestone D.; and Gudmundsdottir E., "Legislating for Sustainable Fisheries; A Guide to Implementing the 1993 Compliance Agreement and 1995 UN Fish Stocks Agreement", The World Bank Law, Justice and Development Series, 2001

<sup>39</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 *UNTS* 285. Hereinafter cited as 1958 Fishing Convention.

<sup>40</sup> 1958 Fishing Convention, *supra* note 39, articles 1, 3-6, 8, 9 and 13 and 1982 Convention, articles 116-118. In the French language-version of these documents, a further distinction has to be made between '*nationaux*', used in the 1958 text, and '*ressortissants*', as used in the 1982 one.

<sup>41</sup> Report of the International Law Commission Covering the Work of its Eighth Session (A/3159), article 49 Commentary, paragraph (2), 2 *Yearbook of the International Law Commission*, pp. 253, 286 (1956).

<sup>42</sup> 1958 Fishing Convention, *supra* note 39, Article 14.

The articles referred to in this clause were in fact all the articles of the 1958 Fishing Convention, which related to fishing by means of vessels. The word 'nationals' was also found in articles 9 and 13, but since these articles related to the dispute settlement provisions and fishing by means of fixed engines, they quite normally were excluded from the assimilation made in Article 14.

It seems noteworthy to stress that the 1982 Convention does not contain a similar provision. Even though the negotiations leading up to this document lasted for almost a decade, the possible insertion of the above-mentioned assimilation was never even raised.<sup>43</sup> This approach reflected the basic attitude that the economic activity of fishing created rights for the fishers, whereas the obligations, as well as the corresponding responsibility of states, were linked to ships in general, and thus not merely fishing vessels, and related mostly to their safety at sea.<sup>44</sup>

This basic approach underwent a fundamental change when the Food and Agriculture Organisation<sup>45</sup> adopted its World Fisheries Strategy in 1984 at the occasion of the World Conference on Fisheries Management and Development.<sup>46</sup> Since then, flag-state responsibility has been included in some inter-state fishery agreements,<sup>47</sup> but it was only with the signature of the 1993 FAO Compliance Agreement that this approach was included in a multilateral convention with global application.<sup>48</sup> The 1995 UN Fish Stocks Agreement further consolidated this novel approach by devoting a special chapter to this topic, entitled 'Duties of the Flag State'.<sup>49</sup>

In this respect it might be instructive to refer to the interpretative declaration to be deposited by the EC<sup>50</sup> and its Member States on ratification of the 1995 UN Fish Stocks Agreement, and which reads as follows:

"The European Community and its Member States understand that the term "States whose nationals fish on the high seas" shall not provide any new grounds for jurisdiction based on the nationality of persons involved in fishing on the high seas rather than on the principle of flag State jurisdiction".<sup>51</sup>

<sup>43</sup> For a detailed account of the *travaux préparatoires*, see Anon, 'Article 116: Right to Fish on the High Seas', in 3 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nandan, S. & Rosenne, S., eds), The Hague, Martinus Nijhoff, pp. 279-289 (1995); Anon, 'Article 117: Duty of States to Adopt with Respect to Their Nationals Measures for the Conservation of the Living Resources of the High Seas', *ibid.*, pp. 290-295; Anon, 'Article 118: Cooperation of States in the Conservation and Management of Living Resources', *ibid.*, pp. 296-303; Anon, 'Article 119: Conservation of the Living Resources of the High Seas', *ibid.*, pp. 304-311.

<sup>44</sup> Lucchini, L. & Vœlckel, M., *Droit de la Mer*, Tome 2, Vol. 2, Paris, Pédone, p. 639 (1996).

<sup>45</sup> Hereinafter cited as FAO.

<sup>46</sup> Moore, G., 'The FAO Compliance Agreement', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), The Hague, Martinus Nijhoff, p. 77, 80 (2000).

<sup>47</sup> Both Moore, G., *supra* note 46, p. 80 note 11, and Lucchini, L. & Vœlckel, M., *supra* note 44, p. 672 note 26, refer to the same agreement in this respect, namely the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, 2 April 1987, as available on Internet: <[www.oceanlaw.net/texts/pacisles.htm](http://www.oceanlaw.net/texts/pacisles.htm)>.

<sup>48</sup> 1993 FAO Compliance Agreement, Article III. This article was entitled 'Flag State responsibility'.

<sup>49</sup> This chapter contains one article, namely Article 18, which has resemblances with Article 12 of the 1993 FAO Compliance Agreement. See *supra* note 48 and accompanying text.

<sup>50</sup> Hereinafter cited as EC.

<sup>51</sup> 98/414/EC: Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, *Official Journal* L 189, 3 July 1998, pp. 14 and 15. See Annex C.



This seems also to be in accordance with the position taken by the International Tribunal on the Law of the Sea in the *Saiga*-case (No. 2),<sup>52</sup> where the judges had to respond to the Guinean objection to the admissibility of the Tribunal based on the fact that certain claims entertained by Saint Vincent and the Grenadines related to non-nationals of that state.<sup>53</sup> The Tribunal was of the opinion that the 1982 Convention was sufficiently clear on the topic to conclude:

'Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag state. The nationalities of these persons are not relevant'.<sup>54</sup>

Even though this passage is based on an interpretation of provisions of the 1982 Convention not directly related to fishing vessels,<sup>55</sup> it must nevertheless be remembered that in the *Saiga*-case (No 1) the Tribunal opted for the hypothesis that Guinea arrested the *Saiga* for fishing violations.<sup>56</sup>

If one analyses the different RFOs here under consideration<sup>57</sup> in this respect, a clear chronological distinction can be made.<sup>58</sup> The founding documents of earlier RFOs often only contain a standard clause saying that the Contracting Parties will take all necessary action to ensure enforcement of the decisions adopted by the RFO. Usually, a further provision concerns the obligation for the Contracting Parties, in order to gather reliable statistical, biological and other scientific information, to obtain this data from national companies and fishers, combined with another provision where the same kind of information is to be obtained from nationals of Non-contracting Parties. Good examples of this practice are the founding documents of the ICCAT,<sup>59</sup> the NAFO,<sup>60</sup> the NEAFC,<sup>61</sup> the CCAMLR,<sup>62</sup> and the

<sup>52</sup> See *Saiga*-case (Saint Vincent and the Grenadines v. Guinea), 1 July 1999, paragraphs 103-109, as available on Internet: <[www.un.org/Depts/los/ITLOS/Judg\\_E.hmt](http://www.un.org/Depts/los/ITLOS/Judg_E.hmt)>.

<sup>53</sup> In fact, the whole crew of the *Saiga* at the time of the incident was composed of non-nationals of that country.

<sup>54</sup> *Saiga*-case, *supra* note 52, para. 106.

<sup>55</sup> Arts 116-118 of the 1982 Convention are not mentioned.

<sup>56</sup> See *Saiga*-case (Saint Vincent and the Grenadines v. Guinea), 4 December 1997, paragraph 72, as available on Internet: <[www.un.org/Depts/los/ITLOS/Judg\\_E.hmt](http://www.un.org/Depts/los/ITLOS/Judg_E.hmt)>.

<sup>57</sup> For a schematic overview, see Table 1.

<sup>58</sup> Since the FFA has only advisory functions, this particular RFO will not be mentioned here.

<sup>59</sup> ICCAT, Articles IX(1) and IX(2)(b). This document contains no provisions with respect to the gathering of information from nationals of non-parties. In December 1992, by means of a resolution entitled 'Resolution by ICCAT to Establish a Permanent Working [Group] for the Improvement of ICCAT Statistics and Conservation Measures and the Terms of Reference of the Working Group (92-2)' (as available on Internet: <[www.iccat.es](http://www.iccat.es)>), of which the main task was exactly to 'obtain, compile and review all available information on the tuna activities of Non-Contracting Parties'. *Ibid.*, *sub* 1. By means of its 1994 'Resolution by ICCAT on Compliance with the ICCAT Conservation and Management Measures (included Addendum) (94-9)' (as available on the same Internet site), Contracting Parties were requested to collect particular information on the sighting of vessels of contracting and Non-contracting Parties (*ibid.*, *sub* 1). In order to do so, Contracting Parties should encourage their fishers to collect the required information (*ibid.*, *sub* 2).

<sup>60</sup> NAFO, Articles XVII, VI(3) and XIX. Article VI(3) does not explicitly mention national fishers or companies.

<sup>61</sup> NEAFC, Articles 15(1) and 16(2). Like the founding document of the ICCAT (see *supra* note 59), this document contains no provision with respect to the gathering of information from nationals of non-parties.

IOTC.<sup>63</sup> The more recently created RFOs, on the contrary, usually make a distinction between the obligations of the Contracting Parties on the one hand, where vessels and individual fishers are placed on the same footing,<sup>64</sup> and the duties of the flag state or compliance and enforcement provisions on the other hand. In the latter case, no reference whatsoever is made to individual fishers.<sup>65</sup> As far as non-parties are concerned, the MHLC and the SEAFO founding documents take a different position. The MHLC instrument, following the example set by the CCAMLR,<sup>66</sup> provides that the Commission draws the attention of the non-parties to any activity undertaken by their nationals or vessels flying their flag, which in the opinion of the Commission undermines the objectives of this RFO. A similar provision is not found in the founding document of the SEAFO Convention. These two documents do have similar provisions nevertheless concerning non-parties, in the sense that the Contracting Parties have the right, either directly or through the Commission, to request non-parties to fully cooperate in the realisation of the established conservation and management measures.<sup>67</sup> These provisions do no longer explicitly mention 'nationals' of non-parties.

One therefore ends up with a system where states make international fishery rules and guarantee to look after their compliance, while the individual fishers are those whose behaviour will determine whether these rules will be observed or not. Government compliance, in other words, is 'being decided by individuals and reflected in the ways and means that governments respond to that behaviour'.<sup>68</sup>

In order to control the behaviour of these individual fishers to the maximum, it is recommended to rely on the active personality principle, *i.e.* a state should prosecute its nationals for offences of its national fishing regulations committed anywhere in the world. A state, member of a RFO and whose nationals are involved in fishing activities, therefore, should accept the obligation to exercise prescriptive<sup>69</sup> and enforcement<sup>70</sup> jurisdiction over

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<sup>62</sup> CCAMLR, Articles XXI(1), XX(1-2) and finally X and XII respectively. Specific about these last two articles, which relate to non-parties, is that they do not concern the mere gathering of information. Instead, they state that the Commission will, with respect to activities by the nationals or vessels of such states which are believed to affect the implementation of the objective of the convention, draw the attention of such state to this fact. Every Contracting Party furthermore undertakes the obligation to exert efforts, consistent with the Charter of the United Nations, 'to the end that *no one* engages in any activity contrary to the objective of this Convention'. We emphasized. As was the case with respect to the NAFO (see *supra* note 60), Article XX(1-2) does not explicitly mention national fishers or companies.

<sup>63</sup> IOTC, Arts X(1), XI(1) and X(4) respectively. As was the case with respect to the NAFO (see *supra* note 60) and CCAMLR (*supra* note 62), Article XI(1) does not explicitly mention national fishers or companies.

<sup>64</sup> MHLC, Article 23 (5) and SEAFO, Article 13 (6).

<sup>65</sup> MHLC, Arts 24-27 and SEAFO, Articles 13-16. The only time nationals are mentioned is concerning the possibility for Contracting Parties to appoint observers.

<sup>66</sup> See *supra* note 62.

<sup>67</sup> MHLC, Article 32 (4) and SEAFO, Article 22(1). If the former tries to achieve this by means of a mere request, the latter also offers the possibility for those third states to become party to the convention.

<sup>68</sup> Joyner, C., 'Compliance with and Enforcement of International Fisheries Law', in *Developments in International Fisheries Law* (Hey, E., ed.), Kluwer, The Hague, p. 327 (1999).

<sup>69</sup> Prescriptive jurisdiction means the power to legislate, *i.e.* to enact fishing laws and regulations binding upon its subjects.

individual fishers (natural persons) and companies (artificial persons) possessing the nationality of that particular state, if these persons undermine by their actions the implementation of the conservation and management regime established by that RFO.<sup>71</sup> If these persons are making use of a fishing vessel flying the flag of the state in question, there is not really a problem because, being the flag state, it has direct control over them.<sup>72</sup> This is however no longer so if the (natural or artificial) persons make use of vessels flying the flag of another state for exercising their fishing activities. In this case the prescriptive jurisdiction remains intact, but the enforcement jurisdiction becomes crippled.<sup>73</sup> It is therefore recommended that states be available to pierce the veil of the flag state: They should try to enter into agreements with relevant flag states in order to facilitate enforcement. Undoubtedly, the vessel should remain the main point of reference when the duties of the Flag State or when compliance and enforcement measures are being dealt with, for it will be mainly through the Flag State that the compliance of international fishery rules will be looked after.

With respect to non-parties, finally, it might be advisable, at least from a policy point of view, to include an explicit reference to their nationals in the provision that the RFO will draw the attention of non-parties to the fact that they are undermining the implementation of the objective of a particular convention. Practically speaking, however, since these states are outside the framework of the RFO anyway, their nationals might have little reason to exercise fishing activities on vessel flying the flag of another state. For this reason, it would appear sufficient to rely to the Flag State in the latter hypothesis.

### RECOMMENDATION III. STRUCTURE OF THE RFOS

Another recommendation concerns the RFO structure that seems to be most inclined to vehicle an efficient mechanism of fisheries control. A most recent study has tried to expand on a new tendency in international law, which consists of elaborating specific institutional

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<sup>70</sup> Enforcement jurisdiction means the power of physical interference by the executive of a particular state. Applied to the context of the active personality principle, it includes the power to arrest persons or to seize property. It should nevertheless be stressed that one should clearly distinguish between having enforcement jurisdiction on paper on the one hand, and effectuating that jurisdiction in practice on the other. As long as the perpetrator is to be found on ones own territory, the state possessing enforcement jurisdiction has no difficulty in effectuating that jurisdiction in practice since every state has complete sovereignty over its own territory. But in the hypothesis that the perpetrator is to be found elsewhere, a state may well have prescriptive and enforcement jurisdiction under international law, but will not be able to effectuate that jurisdiction because that would infringe the territorial sovereignty of the other state on whose territory the perpetrator is to be found. Only two solutions present themselves in that hypothesis: Either the state in question asks for his extradition or it simply waits until the perpetrator enters its territory.

<sup>71</sup> It goes without saying that the more countries start implementing such a strategy, the more effective the system becomes. If only a few countries would punish fishing offences of their national fishers committed while on board foreign ships, fishing companies would simply start recruiting fishers possessing another nationality. See Kaye, S., *International Fisheries Management*, The Hague, Kluwer Law International, p. 483 (2001), who moreover emphasises that states should aim at punishing the corporate structures deciding on the mode of fishing operations, rather than at the single crew member merely implementing these decisions.

<sup>72</sup> With respect to jurisdiction, ships are treated as forming part of the territory of the flag state under international law.

<sup>73</sup> In application of the rules of international law just explained (see *supra* notes 69-72), the state whose nationality the perpetrator possesses will not be able to effectuate its enforcement jurisdiction since the ship on which he operates is considered to form part of the territory of another state.

arrangements that grant the bodies so created innovative powers.<sup>74</sup> It lies in the intention of this recommendation to take the above-mentioned study as starting point to have a closer look at the different RFOs here under consideration.<sup>75</sup> After analysing their intrinsic characteristics, a few concluding remarks will be made in order to ascertain where exactly these RFOs fit in this recent development discerned by the above-mentioned study.

The group of RFOs considered by this study includes different kinds of RFOs.<sup>76</sup> This group appears to provide a good sample of the global picture.<sup>77</sup> The great majority of RFOs do not cover whole oceans;<sup>78</sup> 60 percentage of all RFOs are not limited to one specific species but rather cover all species as a matter of principle;<sup>79</sup> the majority of RFOs are not linked to the FAO;<sup>80</sup> conditions of accession vary widely ranging from totally closed systems to those of a more open nature, mostly requiring prior authorisation of different kinds;<sup>81</sup> and finally, most RFOs do not only possess an advisory function, but also decision-making powers which are usually regulated in a rather detailed manner.<sup>82</sup>

Special attention will be given to the last two elements, namely the membership requirements and the decision making process. Membership has become a crucial issue ever since the

<sup>74</sup> Churchill, R. & Ulfstein, G., 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *American Journal of International Law* pp. 623-659 (2000).

<sup>75</sup> For a schematic overview, see Table 1.

<sup>76</sup> A special note should be attached to the European Union as it appeared in the terms of reference. Even though the Treaty of Maastricht does attribute some competence to the Union which might have an impact on fisheries management and conservation, as for example the coordination with respect to judicial and internal affairs, it did not really change anything fundamental to the Community competence in this domain. See Vignes, D., 'La Communauté européenne dans le domaine du droit general de la mer', in *The Law of the Sea: The European Union and Its Member States* (Treves, T. & Pineschi, L., eds), The Hague, Martinus Nijhoff, pp. 7, 8 and 9 (1997). Immediately rectifying the title of his intervention, see Garzon Clariana, G., 'L'Union européenne et la Convention de 1982 sur le droit de la mer', in *Colloque sur la Belgique et la nouvelle Convention des Nations Unies sur le droit de la mer* (Salmon, J. & Franckx, E., eds), Bruxelles, Bruylant, p. 36, 36 (1995). It appears therefore more correct to refer to the EC when addressing the issue of fisheries conservation and management. Secondly, as the fourth leading fish-catching power worldwide (see Churchill, R., 'The European Community and Its Role in Some Issues of International Fisheries Law', in *Developments in International Fisheries Law*, *supra* note 68, p. 534, 534), the classification of the EC as a RFO may appear somewhat problematic. See Nordmann, C., 'Regional Organisations: The European Community and the Law of the Sea Convention', in *Order for the Oceans at the Turn of the Century* (Vidas, D. & Ostreng, W., eds), The Hague, Kluwer Law International, p. 355, 362 (1999). Being a full-fledged Contracting Party to some of the other RFOs under consideration, such as the CCAMLR, the ICCAT, the IOTC, the NEAFC, and the NAFO, it maybe has more characteristics of a state than of a RFO. But then again, one should immediately qualify such a statement, as done by Churchill, R., 'The EEC's Contribution to "State" practice in the Field of Fisheries', 19 *Law of the Sea Institute Proceedings* p. 557, 557 (1987), where this author writes: '[C]learly the EEC is not a state nor likely to become one in the foreseeable future. Nevertheless, it is contended that for fisheries purposes the EEC may be regarded as a single coastal state'. As the odd man out in this group, the EC will consequently only be treated in a stepmotherly fashion in these recommendations.

<sup>77</sup> For a good overview of the present-day situation, see Casado Raigon, R., 'La pêche en haute mer', in *Le droit international de la pêche maritime* (Vignes, D., Casado Raigon, R. & Cataldi, G., eds), Bruxelles, Bruylant, pp. 119, 181-192 (2000). The figures mentioned in this work are taken as point of reference.

<sup>78</sup> Only the CCAMLR, the ICCAT and the IOTC do. This appears to be slightly above average when compared to the global picture.

<sup>79</sup> Exactly four out the ten RFOs considered by the present study relate in essence only to highly migratory species: The FFA, the ICCAT, the IOTC and the MHLA.

<sup>80</sup> Only the IOTC falls under the category of FAO-linked organisations.

<sup>81</sup> Since membership is an essential element in the proper functioning of RFOs, this particular aspect will be dealt with next.

<sup>82</sup> Only FFA has mainly an advisory function, whereas all the others have decision-making powers.

1995 UN Fish Stocks Agreement attributed a pivotal role to RFOs based on the open and non-discriminatory character of these regional organisations.<sup>83</sup> Notwithstanding the very specific scope of this 1995 UN Fish Stocks Agreement, namely straddling and highly migratory fish species, it should be stressed that most of the species found in the high seas cross the 200-mile limit at some stage of their life cycles, and can therefore be considered, from a biological point of view, as straddling stocks.<sup>84</sup> A good argument can therefore be made that the scope of the 1995 UN Fish Stocks Agreement supersedes the strict framework of those RFOs here under consideration which are only concerned with highly migratory species,<sup>85</sup> since it seems to have a spill-over effect on the multiple species RFOs figuring on that list as well.<sup>86</sup>

Also the decision-making process, and especially whether or not an opting-out clause is provided for in the different RFO-systems, is an element that has a direct impact on the proper assessment of the overall effectiveness of these organisations. Or as stated by Casado Raigon:

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<sup>83</sup> Hayashi, M., 'The Straddling and Highly Migratory Fish Stocks Agreement', in *Developments in International Fisheries Law*, *supra* note 68, p. 56, 67. Also stressing the particular element, see Örebech, P., Sigurjonsson, K. & McDorman, T., 'The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement', 13 *International Journal of Marine and Coastal Law* p. 119, 123 (1998) and Tahindro, A., 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks', 28 *Ocean Development and International Law* pp. 1, 21-22 (1997). At the conference leading up to the 1995 UN Fish Stocks Agreement, considerable anxiety existed that a RFO would exclude other states from membership. See Schram, G. & Tahindro, A., 'Developments in Principles for the Adoption of Fisheries Conservation and Management Measures', in *Developments in International Fisheries Law*, *supra* note 68, p. 251, 282.

<sup>84</sup> See Hayashi, M., 'The Role of the United Nations in Managing the World's Fisheries', in *The Peaceful Management of Transboundary Resources* (Blake, G., Hildesley, W., Pratt, M., Ridley, R. & Schofield, C., eds), London, Graham & Trotman, p. 373, 374 (1995) and by the same author, 'United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Session', 11 *Ocean Yearbook* pp. 20, 21-22 (1994), both referring to a study by the FAO, *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, Rome, FAO Fisheries Circular 868 (1993), preliminary version. Beyond the field of application of the 1995 UN Fish Stocks Agreement, therefore, not many other living resources remain on the high seas. As stressed by Lucchini, L. & Vøelckel, M., *supra* note 44, p. 690, and Momtaz, D., 'L'Accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrants', 41 *Annuaire Français de Droit International* p. 676, 681 (1995).

<sup>85</sup> The 1995 UN Fish Stocks Agreement, for instance, has been called the 'primary impetus' for the FFA to start negotiations with countries fishing for tuna in the area, an initiative which finally resulted in the establishment of the MHLIC. See Aqorau, T., 'The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean', 15 *International Journal of Marine and Coastal Law* p. 111, 111 (2000).

<sup>86</sup> This point is clearly illustrated in the central role which the 1995 UN Fish Stocks Agreement played during the creation process of the SEAFO, a RFO which in order to exclude duplication of efforts excludes highly migratory species. Jackson, A., 'Developments in the Southeast Atlantic, 1997-1999: Meetings of Coastal States and Other Interested Parties on a Fisheries Management Organization for the South East Atlantic (the SEAFO Process)', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), *supra* note 46, p. 55, 60-62. It was already during the second meeting, held at Cape Town on 19-21 May 1998, that this decision was taken. See Final Minute of the Conference on the South East Atlantic Fisheries Organi[s]ation and of the Meetings of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic, 20 April 2001 (text kindly received from the FAO Legal Office on 23 April 2001; on file with the author). Taking position, for instance, that the 1995 UN Fish Stocks Agreement is applicable to the CCAMLR as well, see Rayfuse, R., 'Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources', 13 *International Journal of Marine and Coastal Law* p. 579, 580 note 5 (1998).

'Il est évident que la situation créée en appliquant ce procédé d'objection n'a pas pour effet la meilleure conservation et la meilleure administration des ressources de la zone réglementée'.<sup>87</sup>

This issue can moreover be raised whether such an opting-out clause is compatible with the 1995 UN Fish Stocks Agreement in the first place.<sup>88</sup>

With respect to these two issues, *i.e.* membership and the decision-making process, an attempt to categorise the different RFOs under consideration will be made in the next section. Because the exact structure of the organisation plays an important role in the study, which triggered this recommendation,<sup>89</sup> a third and last part will be devoted to the question whether the RFOs possess international personality.<sup>90</sup>

## A. Membership

First of all mention must be made of FAO RFOs. This group of RFOs is usually characterised by an open membership for members and associate members of the FAO. Only the Agreement establishing the IOTC fits squarely under this heading and provides a good example of this particular characteristic of FAO RFOs.<sup>91</sup> Non-members of the FAO that are members of the United Nations, any specialised organisation or the International Atomic Energy Agency, need to be admitted by a two-thirds majority in the IOTC.<sup>92</sup> The latest in line, for instance, the Agreement for the Establishment of the Regional Commission for Fisheries,<sup>93</sup> which provides for the Regional Commission for Fisheries in the Persian Gulf,<sup>94</sup> even goes one step further by no longer restricting membership to members and associate members of the FAO having either a coastline or fishing interests in the area, but automatically broadens this membership to an even wider group, *i.e.* without a special-vote requirement in the Commission itself.<sup>95</sup>

<sup>87</sup> Casado Raigon, R., *supra* note 77, p. 190.

<sup>88</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 83, pp. 125 and 126, concluding that even though it may be compatible with the letter of the 1995 UN Fish Stocks Agreement, it certainly runs counter to the latter's spirit.

<sup>89</sup> See *supra* note 74 and accompanying text.

<sup>90</sup> An international person has been defined by the International Court of Justice as an entity 'capable of possessing international rights and duties, and [which] has the capacity to maintain its rights by bringing international claims'. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, *ICJ Reports* 170, 179 (1949).

<sup>91</sup> IOTC, Article IV (1) provides: 'Membership in the Commission shall be open to Members and Associate Members of FAO (a) that are: (i) coastal States or Associate Members situated wholly or partly within the Area; (ii) States or Associate Members whose vessels engage in fishing in the Area for stocks covered by this Agreement; or (iii) regional economic integration organizations of which any State referred to in subparagraphs (i), or (ii) above is a member and to which that State has transferred competence over matters within the purview of this Agreement; and (b) that accept this Agreement in accordance with the provisions of paragraph 1 of Article XVII'.

<sup>92</sup> *Ibid.*, Article IV(2).

<sup>93</sup> Multilateral agreement approved by the FAO Council at its Hundred and Seventeenth Session (11 November 1999) by Resolution No. 1/117, as available on Internet: <[www.fao.org/Legal/default.htm](http://www.fao.org/Legal/default.htm)>. This agreement has not yet entered into force.

<sup>94</sup> *Ibid.*, Article 1(1).

<sup>95</sup> *Ibid.*, Article 1 (2) provides: 'Membership in RECOFI shall be open to Members and Associate Members of the Organization and such non-Member States of the Organization as are Members of the United Nations, or any of its Specialized Agencies or the International Atomic Energy Agency that are coastal States or Associate Members whose territories are situated wholly or partly within the Area defined in Article IV, that accept this Agreement in accordance with the provisions of Article XIII'.

Within this group of FAO RFOs, a further subdivision has to be made between those established on the basis of Article VI (1) of the FAO Constitution, which states:

‘The Conference or Council may establish commissions, the membership of which shall be open to all Member Nations and Associate Members, or regional commissions open to all Member Nations and Associate Members whose territories are situated wholly or in part in one or more regions, to *advise* on the formulation and implementation of policy and to coordinate the implementation of policy’,<sup>96</sup>

and those under XIV of that same document, which allows for the Conference of that organisation to approve and submit to its members conventions and agreements concerning areas within its field of competence. The latter conventions then start a life of their own and allow for a much more active role with respect to, for instance, the conservation and management of fishery resources. Once again, the IOTC provides a good example of a RFO established under this second type of arrangement, since it has the power to adopt, by a two-thirds majority, conservation and management measures that will be binding on all Commission members.<sup>97</sup> Moreover, each member of the Commission is obliged to take national legislative action in order to secure the effective implementation of these conservation and management measures thus adopted.<sup>98</sup>

Of all the other RFOs under consideration only the ICCAT and the SEAFO have a direct link with the FAO in the sense that the agreements, which serve as their founding documents, while concluded outside the framework of the FAO, nevertheless rely on the Director-General of that organization for depositary functions.<sup>99</sup> The ICCAT and the FAO, moreover, concluded a formal agreement during the early 1970s in order to enhance cooperation in the field of statistics, stock assessment and the formulation of conservation and management measures.<sup>100</sup> But also on the more practical level, the ICCAT has by means of its resolutions urged its members to cooperate with FAO programs.<sup>101</sup>

Membership of the non-FAO RFOs varies widely. On one side of the spectrum one has RFOs like the ICCAT in which all Contracting Parties to the founding document are represented.<sup>102</sup> The latter is an open agreement since any state, which is a member of the United Nations or of any specialised agency, may become a Contracting Party, or adhere at a later point in time to this legal instrument.<sup>103</sup> Taking into account that this convention was already concluded in 1966, an additional protocol proved necessary to make it also possible for inter-governmental economic integration organisations to become bound by its provisions.<sup>104</sup> A next step down is

<sup>96</sup> FAO Constitution, as available on Internet: <[www.fao.org/Legal/default.htm](http://www.fao.org/Legal/default.htm)>, Article VI(1). We emphasized.

<sup>97</sup> IOTC, Article IX(1-4).

<sup>98</sup> *Ibid.*, Article X(1).

<sup>99</sup> ICCAT, Article XV and SEAFO, Article 34. It might be added that in the framework of the Review Panel established under Annex II of the latter's founding document, the FAO is also referred to through the reference to the special arbitration procedure of Annex VIII of the 1982 Convention.

<sup>100</sup> Agreement between the Food and Agriculture Organization of the United Nations and the International Commission for the Conservation of Atlantic Tunas, adopted by the FAO Conference and approved by the Commission at its Third Regular Meeting (Paris, 1973), as available on Internet: <[www.iccat.es](http://www.iccat.es)>. The agreement has provisions on reciprocal representation, exchange of information, cooperation and consultation, technical cooperation, joint action, and proposals for the inclusion of agenda items.

<sup>101</sup> See for instance the 1995 Resolution by ICCAT on Cooperation with the Food & Agriculture Organization of the United Nations (FAO) With Regard to study on the Status of Stocks and By-Catches of Shark Species (95-2), as available at Internet: <[www.iccat.es](http://www.iccat.es)>.

<sup>102</sup> ICCAT, Article III(2).

<sup>103</sup> *Ibid.*, Article XIV(1).

<sup>104</sup> Multilateral Protocol, 10 July 1984, Article I (modifying ICCAT, Articles XIV-XVI).

those RFOs that restrict membership to those states fishing in the convention or regulatory area. In this group, a further distinction has to be made between RFOs on the basis of whether the latter exercise any control on the truthfulness of the just mentioned requirement. The SEAFO, for instance, which allows each Contracting Party to become a member of the Commission,<sup>105</sup> restricts membership to the agreement on which it is based to coastal states and all other states and regional economic integration organisations whose vessels fish in the convention or regulatory area without providing any system of control.<sup>106</sup> This reflects the will of the founding fathers to create an open organisation.<sup>107</sup> The CCAMLR, on the other hand, is also open to all states engaged in research or harvesting activities in relation to the marine living resources to which this convention applies.<sup>108</sup> A certain control is nevertheless exercised by the members of that body, since these requirements are supposed to be fulfilled if, after having received the application, no other commission member requests a special meeting to consider the matter.<sup>109</sup> Even though any state can become member of the NAFO founding document,<sup>110</sup> membership of the Commission itself is restricted to Contracting Parties either participating in fisheries in the regulatory area, or providing evidence that it expects to participate in such fisheries during the year of the annual meeting or during the following calendar year.<sup>111</sup> In the latter hypothesis, however, the evidence must be judged satisfactory by the General Council, in which all other Contracting Parties are represented and have one vote.<sup>112</sup> But the fact that this General Council reviews and determines the membership of the Commission at each annual meeting<sup>113</sup> seems to indicate that this body exercises some degree of control.<sup>114</sup>

Starting from the other side of the spectrum one finds the EC, which of course resembles more a closed system since no other country can join the Common Fisheries Policy simply based on its fishing interests. In this group one can also classify the RFOs that list *ad nominem* those countries, which can become Contracting Parties to the founding document. Accession is subsequently allowed to other states or entities, but under rather strict control of the Contracting Parties. Also here one finds further gradations. In the NEAFC all Contracting

<sup>105</sup> SEAFO, Article 6(1).

<sup>106</sup> *Ibid.*, Article 26(1). In order to make sure that all states with a fishing interest in the convention or regulatory area were invited to participate in the meetings leading up to the establishment of the SEAFO, assistance was requested from the FAO to identify those states. See Final Minute of the Conference on the South East Atlantic Fisheries Organi[s]ation and of the Meetings of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic, *supra* note 86, sub IV.

<sup>107</sup> Jackson, A., *supra* note 86, p. 58.

<sup>108</sup> CCAMLR, Article VII(2)(b). Also in order to become a Contracting Party, states are required to have an interest in research or harvesting activities in the convention or regulatory area.

<sup>109</sup> *Ibid.*, Article VII(2)(d). This provision was inserted after the Antarctic Treaty (1 December 1959, 420 UNTS 71), where such a provision was missing, ran into troubles when the first country requested membership based on similar requirements adapted to the primary purpose of that agreement (namely 'conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition'. Antarctic Treaty, Article IX(2)). Poland argued it had automatic access once it fulfilled these requirements, but the other Committee members insisted that they first had to approve of this accession. At present, there are seven countries member, parties to the convention, which are not member of the CCAMLR, namely Bulgaria, Canada, Finland, Greece, Namibia, the Netherlands and Peru. See *supra* Part 3 (I)(A).

<sup>110</sup> A mere notification in writing to the Depository suffices in this respect. See NAFO, Article XXII(4).

<sup>111</sup> *Ibid.*, Article XIII(1)(a-b).

<sup>112</sup> *Ibid.*, Article V(2). Decisions in that body are taken by majority vote, provided that two-thirds of the Contracting Parties are present.

<sup>113</sup> *Ibid.*, Article XIII(1).

<sup>114</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 83, p. 122, who straightforwardly state that NAFO membership 'is effectively closed to new entrants'.



Parties to the founding document have a representation,<sup>115</sup> each with one vote.<sup>116</sup> Those countries able to ratify the founding instrument, however, are listed by name and comprise coastal as well as states with fishing interests in the convention or regulatory area.<sup>117</sup> Any other state requesting accession after the treaty entered into force has to meet with the approval of three-fourths of all the Contracting Parties.<sup>118</sup> A similar but somewhat more restrictive system applies to the MHLC: All Contracting Parties are said to be members of the Commission,<sup>119</sup> while a list is provided naming those countries able to become a party to the founding document. The latter includes coastal states of the region as well as states with fishing interests in that particular area.<sup>120</sup> Later accession of other countries or regional economic integration organisations wishing to conduct fishing activities in the convention or regulatory area is only possible upon invitation, by consensus, of the Contracting Parties.<sup>121</sup> Finally, also the FFA can be listed in this group. The convention<sup>122</sup> as well as membership in the FFA itself<sup>123</sup> is in principle only open to members of the South Pacific Forum. Membership in the FFA can only be opened to other states and territories in the region on the recommendation of the Forum Fisheries Committee, which together with the Secretariat form the two constituent parts of the FFA,<sup>124</sup> and with the approval<sup>125</sup> of the Forum.<sup>126</sup>

## B. Decision-making Process

Here three broad categories can be discerned in the group of RFOs under consideration. First of all there are RFOs that appear to work ultimately on the basis of unanimity.<sup>127</sup> A second group consists of the more classic RFOs, where voting is taken by some kind of majority, be it a simple majority or a two-thirds majority in principle, with sometimes the additional

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<sup>115</sup> NEAFC, Article 3(3).

<sup>116</sup> *Ibid.*, Article 3(9).

<sup>117</sup> *Ibid.*, Article 20.

<sup>118</sup> *Ibid.*, Article 20(4).

<sup>119</sup> MHLC, Article 34(4). Even though the agreement uses the term 'members of the Commission' throughout the document, it is only in the final provisions, tucked away in the very back of a provision concerning signature, ratification, acceptance and approval, that the convention determines the membership itself of that body. There is no provision determining the exact way in which these Contracting Parties can be represented in the Commission (*i.e.* how many delegates, how many experts ...) nor how many votes each Contracting Party has in the Commission. It is remarkable to note that with respect to the subsidiary bodies of the Commission, *i.e.* the Scientific Committee, the Technical and Compliance Committee, as well as other committees deemed necessary by the Commission, detailed provisions are to be found. See *ibid.*, Article 11 (2 and 7). It is difficult to understand, therefore, why the second sentence of Article 9 (1), which appeared in a previous draft and which read: 'Each member of the Commission shall have one representative in the Commission, who may be accompanied by alternates and advisers', was deleted in the final version.

<sup>120</sup> *Ibid.*, Article 34(1).

<sup>121</sup> *Ibid.*, Article 35(2).

<sup>122</sup> FFA, Article X(1).

<sup>123</sup> *Ibid.*, Article II(a).

<sup>124</sup> *Ibid.*, Article I(1-2).

<sup>125</sup> As a rule, the normal voting procedure adhered to within this organisation is consensus. See *infra* notes 161-162 and accompanying text.

<sup>126</sup> *Ibid.*, Article II(b). The countries so invited are supposed to become Contracting Parties of the founding document as well. *Ibid.*, Article X(4). Unlike members of the South Pacific Forum, which have the possibility of becoming member, those countries admitted by an Article II(b) procedure 'shall deposit an instrument of accession with the depositary'.

<sup>127</sup> Unanimity requires a positive action of the Contracting Parties, *i.e.* they have to vote in favour.

requirement of quorums or three-fourths majorities in certain specified cases. Finally, there are those RFOs guided by the principle of consensus.<sup>128</sup>

In the first group, it would appear one could classify the EC. The legal basis for the European fisheries policy is to be found in the article extending the common market to agriculture and trade in agricultural products.<sup>129</sup> The normal voting procedure provided by the EC Treaty in this respect is a qualified majority.<sup>130</sup> Nevertheless, without going into the intricacies of EC law, a veto power still appears to exist if very important national interests would be at stake.<sup>131</sup>

The second group is made out of the ICCAT, the IOTC, the NEAFC and the NAFO. Two common features link all these RFOs. First, that the starting point of their voting procedures is always a simply majority requirement and second, that they all provide for an objection procedure. But apart from these common features, many differences exist.

As far as the voting procedures are concerned, the ICCAT, which has a rather complicated structure,<sup>132</sup> adds to the simple majority rule just mentioned, a two-thirds quorum requirement.<sup>133</sup> This basic approach is qualified by the introductory words of the relevant article: 'Except as may otherwise be provided in this Convention'.<sup>134</sup> Because of the complicated structure already referred to,<sup>135</sup> this also leads to similar voting procedures.<sup>136</sup> This basic rule normally also applies to voting in the Council,<sup>137</sup> the panels,<sup>138</sup> and the committees,<sup>139</sup> even though it may be supplemented by additional rules adopted by these respective bodies.<sup>140</sup> For amendments to the founding document, a three-fourth majority is provided for.<sup>141</sup> The IOTC,<sup>142</sup> even though it has only a participation quorum of a simple

<sup>128</sup> Consensus on the other hand avoids a vote, meaning that states can remain passive. In the present context it can be defined as the absence of any objection by a Contracting Party and submitted by this state as constituting an obstacle to the taking of particular decisions. See Parry, C. & Grant, J., *Encyclopaedic Dictionary of International Law*, New York, Oceana, p. 72 (1986). See also *infra* note 175 and accompanying text.

<sup>129</sup> Consolidated Version of the Treaty Establishing the European Community (hereinafter cited as EC Treaty), Article 32, *Official Journal* C 340, 10 November 1997, pp. 173-308.

<sup>130</sup> *Ibid.*, Article 37(2).

<sup>131</sup> Graig, P. & de Burca, G., *EU Law: Text, Cases and Materials*, Oxford, Oxford University Press, pp. 142-143 (1998).

<sup>132</sup> Besides the Commission, which is the main decision-making body, there is the Council (implementing the intersessional tasks of the Commission), the Secretariat (coordination and facilitating the work of the Commission), four panels (reviewing research results and drafting management measures), the Compliance Committee (reviewing compliance by the Contracting Parties), the Permanent Working Group on Statistics and Conservation Measures (reviewing compliance by non-Member States), the Standing Committee on Research and Statistics (coordinating and executing matters relating to monitoring and assessment, while overseeing many further sub-committees), the Standing Committee on Finance and Administration (taking care of financial and administrative matters), and other Special Working Groups.

<sup>133</sup> ICATT, Article III(3) as further worked out by the Rules of Procedure, Rule 9, as available at Internet: <www.icatt.es>.

<sup>134</sup> *Ibid.*

<sup>135</sup> See *supra* note 132 and accompanying text.

<sup>136</sup> See for instance ICATT, Articles VIII(1)(b)(i) and X(2)(c).

<sup>137</sup> Rules of Procedure, *supra* note 133, Rule 11(5).

<sup>138</sup> *Ibid.*, Rule 12(7)

<sup>139</sup> *Ibid.*, Rule 13(4).

<sup>140</sup> *Ibid.*, Rules 11(5), 12(7) and 13(4) respectively.

<sup>141</sup> *Ibid.*, Article XIII(1).

majority attached to the fundamental rule of the simple majority,<sup>143</sup> requires nevertheless a two-thirds majority rule for the adoption of any binding conservation or management measure<sup>144</sup> and consensus as a rule for the adoption of the budget.<sup>145</sup> Like the procedure applicable in the ICCAT,<sup>146</sup> also the NEAFC<sup>147</sup> requires a two-thirds quorum for the simple majority rule to be applied.<sup>148</sup> It also has a similar qualifying statement as under the ICCAT,<sup>149</sup> namely that the convention can provide otherwise. In that case, a two-thirds majority will be necessary with a two-thirds quorum requirement.<sup>150</sup> This procedure is encountered in the articles dealing with recommendations concerning fisheries,<sup>151</sup> concerning measures of control relating to fisheries,<sup>152</sup> or providing for the collection of statistical information.<sup>153</sup> Under the NAFO,<sup>154</sup> finally, a quorum of two-thirds is attached to the simple majority requirement as well with respect to the voting procedure in the General Council<sup>155</sup> as in the Commission.<sup>156</sup> But here too exceptions are provided for with respect to voting procedures in the General Council if it concerns the modification of the boundaries of the scientific and statistical sub-areas, divisions and subdivisions,<sup>157</sup> and the division of the Regulatory Area.<sup>158</sup> Finally, amendments to the NAFO treaty require a three-fourths majority.<sup>159</sup>

The third and last group are the RFOs guided by the principle of consensus. It concerns two organisations from the late 1970s, early 1980s, namely the FFA and the CCAMLR, and two most recent organisations, namely the MHLR and the SEAFO. The Forum Fisheries Committee, which together with the secretariat forms the South Pacific Forum Fisheries Agency,<sup>160</sup> endeavours to take decisions by consensus.<sup>161</sup> Only if this proves to be impossible, the Committee will turn to a vote, requiring a two-thirds majority.<sup>162</sup> The CCAMLR, which together with the Scientific Committee<sup>163</sup> and the Executive Secretary<sup>164</sup> form the main organs of this RFO, on the other hand, makes a distinction between matters of

<sup>142</sup> This is the principal organ, seconded by a number of subsidiary bodies created by it such as the Scientific Committee (IOTC, Article XII(1)), Sub-commissions with limited membership according to the particular species covered, as well as Working Parties (*ibid.*, Article XII(5)).

<sup>143</sup> IOTC, Article VI(2).

<sup>144</sup> *Ibid.*, Article IX(1).

<sup>145</sup> *Ibid.*, Article XIII(2). Nevertheless, if no consensus can be reached, a two-thirds majority will do.

<sup>146</sup> See *supra* note 133 and accompanying text.

<sup>147</sup> This organisation has a rather simple structure consisting of the Commission itself (NEAFC, Article 3(1)) and a Secretariat (*ibid.*, Article 3(7)), which only has become independent since 1998. The Commission is allowed to set up Committees and subsidiary bodies (*ibid.*, Article 3(8)).

<sup>148</sup> *Ibid.*, Article 3(9).

<sup>149</sup> See *supra* note 134 and accompanying text.

<sup>150</sup> NEAFC, Article 3(9).

<sup>151</sup> *Ibid.*, Article 5(1).

<sup>152</sup> *Ibid.*, Article 8(1).

<sup>153</sup> *Ibid.*, Article 9(1).

<sup>154</sup> Contrary to NEAFC (see *supra* note 147), this organisation has a rather complex structure consisting of a General Council, a Scientific Council, a Fisheries Commission, and a Secretariat (NAFO, Article II(2)), which all adopt their own rules of procedure and establish their own subsidiary bodies.

<sup>155</sup> *Ibid.*, Article V(2).

<sup>156</sup> *Ibid.*, Article XIV(2).

<sup>157</sup> *Ibid.*, Article XX(2).

<sup>158</sup> *Ibid.*, Article XX(3).

<sup>159</sup> *Ibid.*, Article XXI(3).

<sup>160</sup> FFA, Article I(1-2).

<sup>161</sup> *Ibid.*, Article IV(1).

<sup>162</sup> *Ibid.*, Article IV(2).

<sup>163</sup> CCAMLR, Article XIV.

<sup>164</sup> *Ibid.*, Article XVII(1).

substance, which are adopted by consensus,<sup>165</sup> and other matters, where a simple majority will be sufficient.<sup>166</sup> The latter system is taken over by the SEAFO, which consists of a Commission as main organ, a Compliance and Scientific Committees and possible other bodies established by the Commission as subsidiary bodies, and a Secretariat.<sup>167</sup> Here too, matters of substance in the Commission are decided by consensus,<sup>168</sup> while other issues merely require a simple majority.<sup>169</sup> The most progressive voting system is to be found in the Commission of the MHLC,<sup>170</sup> where the consensus procedure received an extra dimension.<sup>171</sup> First of all, unlike the CCAMLR and the SEAFO, the general rule is that all decision-making in the Commission shall be by consensus, *i.e.* without making a preliminary distinction between substantial and procedural matters.<sup>172</sup> For some of these decisions or recommendations there is no alternative,<sup>173</sup> but for others, if all efforts to reach a decision by consensus fail, a further distinction has to be made between procedural question, where a simple majority is required, and questions of substance, where a qualified three-fourth majority is required.<sup>174</sup> Secondly, the concept of consensus is clearly defined for the purposes of the conventional article on decision-making as 'the absence of any formal objection made at the time the decision was taken'.<sup>175</sup> In the framework of other regional organisations this notion sometimes boils down to nothing more than a system of mere unanimity voting that grants each member a veto.<sup>176</sup> The latter is something that the MHLC explicitly tries to avoid, and this brings us to a third salient feature of this agreement, namely that in case the chairman

<sup>165</sup> *Ibid.*, Article XII(1), which moreover states: 'The question of whether a matter is one of substance shall be treated as a matter of substance'.

<sup>166</sup> *Ibid.*, Article XII(2). No quorum is provided for.

<sup>167</sup> SEAFO, Article 5(2)(a-c).

<sup>168</sup> *Ibid.*, Article 17(1), also indicating that the question of whether a matter is one of substance must be treated as a matter of substance.

<sup>169</sup> *Ibid.*, Article 17(2). No quorum is provided for.

<sup>170</sup> MHLC, Article 9(1). This Commission has as subsidiary bodies a Scientific Commission and a Technical and Compliance Committee (Article 11). These commissions are serviced by a permanent secretariat (Article 15).

<sup>171</sup> This decision-making procedure has been qualified as 'without doubt the most controversial and innovative provisions' of the founding document. See Lodge, M., 'The Draft Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J., eds), *supra* note 46, p. 19, 25.

<sup>172</sup> *Ibid.*, Article 20(1).

<sup>173</sup> It concerns the adoption of rules of procedure by the Commission (Article 9 (8)), the allocation of the total allowable catch by the Commission (Article 10 (4)), the adoption of reports by the Commission (Article 11 (4)), recommendations of a specially established committee to the Commission on the implementation of conservation and management measures for the area north of the 20° parallel of north latitude (Article 11 (7)), the adoption of financial regulations by the Commission (Article 17 (2)), the adoption of the budget by the Commission (Article 18 (1)), the determination of the level of contributions to be born by each member of the Commission (Article 18 (2)), the invitation addressed by the Contracting Parties to other states or regional integration organisations to accede to the convention (Article 35 (2)), the adoption of amendments (Article 40 (2)), and the revision of amendments (Article 41 (2)).

<sup>174</sup> This majority must include three-fourths of the members of the FFA as well as of the non-FFA members, present and voting, with the understanding that a proposal shall not be considered as defeated by two or fewer votes in each chamber. *Ibid.*, Article 20(2). The latter requirements were not to be found in a previous draft, which had simply required a four-fifths majority in this case. In the event that a member objects to a decision, an independent review by a panel is provided for. Its findings are normally followed by the Commission. *Ibid.*, Article 20(6-9).

<sup>175</sup> *Ibid.*, Article 20(1).

<sup>176</sup> This has been the case during the early years of the CCAMLR. The benefits of the consensus procedure only began to be realised by the late 1980s when instead of strong decisions, unacceptable to the states directly involved, weaker decisions started to be formulated to which nobody had to object. As emphasized by Kaye, S., *supra* note 71, pp. 399-407.

of the Commission determines that an objection could be forthcoming on an issue requiring consensus, the convention explicitly provides the possibility that he may appoint a conciliator in order to try to iron out the differences.<sup>177</sup> The chairman is thus allowed to look for other avenues in order to reach consensus as defined above.<sup>178</sup>

With this classification in mind, it is easily understood that opting-out clauses are not really relevant in the last category comprising the CCAMLR, the FFA, the MHLC and the SEAFO, since the consensus procedure relied upon makes the inclusion of such an option redundant. Even though under the CCAMLR and the SEAFO not all questions are decided by consensus, the problem of having substantial questions being decided against the will of a certain Contracting Party is ruled out by the fact that the issue whether something is of a substantial or procedural nature is itself decided upon as a matter of substance.<sup>179</sup> In the FFA a similar possibility exists, since if consensus proves to be impossible, a two-thirds majority will suffice.<sup>180</sup> Given the advisory nature of the FFA, the absence of an opting out clause is justified. As already mentioned above, the MHLC is the only RFO, which takes as starting position that all decisions are to be taken by consensus.<sup>181</sup> If consensus fails, there is no other voting procedure to circumvent this stalemate as far as a long list of important questions are concerned.<sup>182</sup> The only remedy provided is the competence of the chairman of the Commission to appoint a conciliator in order to try to avoid a formal objection.<sup>183</sup>

All the other RFOs do contain such an opting-out clause in their founding documents. And even though the practical conditions differ to make use of this right,<sup>184</sup> the final result is always that the party making such a reservation does not become bound by the conservation and management rule in question.<sup>185</sup>

### C. International Legal Personality

The crucial question this section tries to determine is whether the different founding documents here under consideration establish a full-fledged intergovernmental organisation, or whether, on the contrary, these new entities should rather be labelled as 'autonomous institutional arrangements', as described by R. Churchill and G. Ulfstein.<sup>186</sup> Sometimes the classification is easy to make, because the founding documents explicitly address this question. In other instances, however, the distinction is much less clear-cut. One of the seemingly constant differences by which one can distinguish between both is the meeting pattern of the organisations concerned: Intergovernmental organisations usually only meet at headquarters, whereas autonomous institutional arrangements invariably meet in different places.<sup>187</sup>

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<sup>177</sup> *Ibid.*, Article 20(4).

<sup>178</sup> See *supra* note 175 and accompanying text.

<sup>179</sup> CCAMLR, Article XII(1) *in fine*, and SEAFO, Article 17(1) *in fine*.

<sup>180</sup> See *supra* note 162 and accompanying text.

<sup>181</sup> See *supra* note 172 and accompanying text.

<sup>182</sup> See *supra* note 173 and accompanying text.

<sup>183</sup> See *supra* note 177 and accompanying text.

<sup>184</sup> Especially the period during which a Contracting Party may make use of this right differs widely.

<sup>185</sup> ICCAT, Article VIII (3)(a-f) and (4-5); IOTC, Article IX(5-7); NEAFC, Article 12(2); and NAFO Article XII.

<sup>186</sup> See *supra* note 74.

<sup>187</sup> Churchill, R. & Ulfstein, G., *supra* note 74, p. 630.

A number of the RFOs here considered can easily be classified in this respect, since they create intergovernmental organisations and explicitly grant them international legal personality, the capacity to contract and privileges and immunities. This is the case with respect to the CCAMLR,<sup>188</sup> the EC,<sup>189</sup> the FFA,<sup>190</sup> the NEAFC,<sup>191</sup> the NAFO,<sup>192</sup> the MHLC,<sup>193</sup> and the SEAFO.<sup>194</sup> All of these RFOs have their fixed headquarters,<sup>195</sup> even though this does not automatically imply that all meetings have necessarily to take place there.<sup>196</sup>

The founding documents of the ICCAT and the IOTC remain totally silent on the issue of legal personality as well as on the location of headquarters or meetings to be held in the framework of these conventions. Nevertheless, as far as the ICCAT is concerned, an agreement was concluded with the government of Spain in 1971 by means of which the latter recognised the juridical personality of that organisation.<sup>197</sup> It furthermore provided for the permanent seat of the ICCAT in Spain.<sup>198</sup> This has been located in Madrid. Also the IOFC has concluded a Headquarters Agreement with the Seychelles,<sup>199</sup> locating the secretariat at Victoria. All meetings scheduled for 2001, for instance, will take place there.<sup>200</sup> Hence all the RFOs just mentioned have a legal personality.

<sup>188</sup> CCAMLR, Article VIII, relating to the Commission for the Conservation of the Antarctic Marine Living Resources.

<sup>189</sup> EC Treaty, *supra* note 129, Article 281.

<sup>190</sup> FFA, Article VIII, relating to the South Pacific Forum Fisheries Agency.

<sup>191</sup> NEAFC, Article 3(2), relating to North-East Atlantic Fisheries Commission. This article does not specifically address the issues of the capacity to contract or privileges and immunities, but simply states that the Commission 'shall enjoy in its relations with other international organizations and in the territories of the Contracting Parties such legal capacity as may be necessary to perform its functions and achieve its ends'.

<sup>192</sup> NAFO, Article II(3), with respect to the Northwest Atlantic Fisheries Organisation. This article has a similar provision as the one just mentioned with respect to the NEAFC (see *supra* note 191), but nevertheless explicitly addresses the issue of privileges and immunities.

<sup>193</sup> MHLC, Article 9(6), with respect to the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. This article follows substantially the respective NAFO provision just mentioned. See *supra* note 192.

<sup>194</sup> SEAFO, Article 5(3) with respect to the South East Atlantic Fisheries Organisation. This article has the same substance as the MHLC (*supra* note 193) and NAFO provisions (*supra* note 192).

<sup>195</sup> CCAMLR, Article XIII(1): Hobart, Tasmania, Australia; EC: Brussels, Belgium (EC Treaty, *supra* note 129, Article 289 as further worked out by Protocol 8); FFA, Article I(3): Honiara, Solomon Islands; NEAFC, Article 3(5): London, United Kingdom; and NAFO, Article II(4): Dartmouth, Nova Scotia, Canada. The seat of the MHLC will be determined by the Contracting Parties (MHLC, Article 9 (7)), that of the SEAFO will be located in Namibia (SEAFO, Article 5(5)).

<sup>196</sup> For instance, NEAFC, Article 3(6), allows exceptions to the rule that the Commission meets in London. A similar exception is to be found in the SEAFO, where Commission meetings can eventually be held elsewhere (SEAFO, Article 8(4)). The most liberal RFO in this respect appears to be the NAFO. First of all the possibility is foreseen to change headquarters (NAFO, Article II(4)). Secondly, the location of the annual meetings of the General Council are decided by that body with as only restriction that 'shall normally be in North America' (*ibid.*, Article IV(4)). If any other meeting is to be convened of the General Council, the Chairman may decide the location himself, apparently without any further restriction (*ibid.*, Article IV(5)). The same applies with respect chairman of the Commission who can convene other meetings than the annual one covered by Article IV at a location of his preference (*ibid.*, Article XIII(5)).

<sup>197</sup> Agreement on Seat between the Spanish State and the International Commission for the Conservation of Atlantic Tunas, 29 March 1971, Article 1, as available on Internet: <www.iccat.es>.

<sup>198</sup> *Ibid.*, Article 2.

<sup>199</sup> Report of the Second Session of the Indian Ocean Tuna Commission, Mahé, Seychelles, 22-25 September 1997 (FIPL/R564(Bi)), paragraphs 12-14, as available on Internet: <www.seychelles.net/iotc/English/Publications/EReports.htm>.

<sup>200</sup> As available on Internet: <www.seychelles.net/iotc/English/CommSC/Ecurrent.htm>.

## D. Conclusions

What conclusions to be made after having analysed the structure of the different RFOs under consideration in view of suggesting concrete recommendations?

### *a. Signature v. Ratification*

First, in order to start with the easy recommendations, it appears obvious that only RFOs whose founding documents have entered into force can be effective. Of the nine RFOs under consideration, two did not fulfil this requirement at the time of writing, namely the MHLC and the SEAFO. The former nevertheless adopted a resolution at the time of the adoption of the convention establishing the MHLC, by means of which a Preparatory Conference was established to ensure that no vacuum would exist in the period between signature and entry into force of that document.<sup>201</sup> Also with respect to the SEAFO, a so-called annex on interim arrangements, which was added to the convention about a year before the founding document was signed,<sup>202</sup> forms at present an integral part of that convention.<sup>203</sup> But since it specifically relates to the system of observation, inspection, compliance and enforcement and will moreover only become operational after the convention itself has entered into force,<sup>204</sup> this interim arrangement does not need to retain our attention under this heading.

Given the novel character of the MHLC and the SEAFO, it is submitted that their early entry into force seems to be essential in order to serve as point of reference for the other RFOs willing to adapt themselves to the new developments in the law of international high seas fisheries.

### *b. Advisory v. Decision-making RFOs*

Second, the new regime created by the 1995 UN Fish Stocks Agreement stands or collapses with the effectiveness of RFOs.<sup>205</sup> A major problem resides in making the existing RFO, which in the past often only had advisory competence, effective decision-making and implementing organisations.<sup>206</sup> It should therefore be clear that the establishment of new Article VI FAO RFOs, which only have an advisory role,<sup>207</sup> should be avoided.<sup>208</sup>

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<sup>201</sup> Resolution Establishing a Preparatory Conference for the Establishment of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, as available on Internet: <[www.ocean-affairs.com/convention.html](http://www.ocean-affairs.com/convention.html)>. This Preparatory Conference may, *inter alia*, recommend conservation and management measures.

<sup>202</sup> Final Minute of the Conference on the South East Atlantic Fisheries Organi[s]ation and of the Meetings of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic, *supra* note 86, *sub* VI.

<sup>203</sup> SEAFO, Article 16(5).

<sup>204</sup> This regime will remain in force until after the Contracting Parties, through the Commission, will have established such a full-fledged system of observation, inspection, compliance and enforcement, as required by SEAFO, Article 1 (1).

<sup>205</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 83, p. 120.

<sup>206</sup> Barston, R., 'The Law of the Sea and Regional Fisheries Organisations', 14 *International Journal of Marine and Coastal Law* p. 333, 341 (1999). A number of existing FAO RFOs, not to be discussed in the present report, recently underwent such a change. See United Nations, *Oceans and the Law of the Sea* (Advance, unedited text), 6 March 2001, p. 51 (para. 280), as available on Internet: <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>207</sup> See *supra* note 96 and accompanying text.

<sup>208</sup> Barston, R., *supra* note 206, pp. 343-344.

*c. Closed v. Open RFOs*

Third, there is the problem of openness of the RFO. According to the 1995 UN Fish Stocks Agreement, states having a real interest in the fisheries concerned may become members of the RFO concerned.<sup>209</sup> The conditions set by the latter with respect to membership must not prevent such states from participating.<sup>210</sup> Because only states that are members of the competent RFO or accept to implement the conservation and management measures enacted by it are allowed to participate in the harvesting of the managed resource,<sup>211</sup> it is easily understood that open membership plays a crucial role in the effectiveness of the system established by the 1995 UN Fish Stocks Agreement.<sup>212</sup> This seems to be a sound principle applying to any RFO wishing to establish an effective system of conservation and management measures, since it clearly enhances the legitimacy of the management body in the eyes of the participants.<sup>213</sup> Even though the argument can be made that in specific cases substantially the same results can be achieved through a network of bilateral agreements with third user states after a core group of states has laid down the conservation and management measures to be applied in a given region,<sup>214</sup> from a policy point of view such a construction would not seem to be commendable since it would lack the necessary legitimacy in the eyes of the third user states.

The above analysis indicates that, at present, one ends up with a mixed bag. Some of the RFOs have an open-membership policy, such as the ICCAT<sup>215</sup> and the IOTC,<sup>216</sup> while others are of a closed-membership type, such as the MHL<sup>217</sup> or the FFA.<sup>218</sup> Accession of later members is governed by the same diversity. Sometimes it is completely open, without any restrictions whatsoever, as with respect to the ICCAT,<sup>219</sup> but often it can become very restrictive, such as is the case in the MHL where consensus is needed.<sup>220</sup> Even in organisations that have a somewhat more liberal regime of accession, such as the NAFO,<sup>221</sup> practice indicates that later accession is rendered highly unlikely by the manner in which the organisation decides to allocate fishing rights to new comers.<sup>222</sup>

Furthermore, among the RFOs here discussed, only the ICCAT system does not limit membership to a particular region, either by requiring the contracting state to be located in a

<sup>209</sup> 1995 UN Fish Stocks Agreement, Article 8(3).

<sup>210</sup> *Ibid.*, where it is stated: 'The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned'.

<sup>211</sup> *Ibid.*, Article 8(4).

<sup>212</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 83, pp. 122 and 123.

<sup>213</sup> On this point, see also *infra* notes 295-409, and accompanying text.

<sup>214</sup> See for instance Stokke, O., 'Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreement', 32 *Ocean Development and International Law* pp. 241, 251-262 (2001), who makes such an argument with respect to the bilateral system set up by Norway and Russia in the Barents Sea.

<sup>215</sup> See *supra* note 103 and accompanying text.

<sup>216</sup> See *supra* note 91 and accompanying text.

<sup>217</sup> See *supra* note 120 and accompanying text.

<sup>218</sup> See *supra* notes 122-123 and accompanying text.

<sup>219</sup> See *supra* note 103 and accompanying text.

<sup>220</sup> See *supra* note 121 and accompanying text.

<sup>221</sup> See *supra* notes 111-114 and accompanying text.

<sup>222</sup> Molenaar, E., 'The Concept of "Real Interest" and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms', 15 *International Journal of Marine and Coastal Law* pp. 475, 514-518 (2000). Even if new members were to obtain membership in the Fisheries Commission, 'such new members should be aware that presently and for the foreseeable future, stocks managed by NAFO are fully allocated, and fishing opportunities for new members are likely to be limited'. *Ibid.*, p. 515.



given region, or to display a fishing activity in such region.<sup>223</sup> This might be a dangerous path to follow, as clearly demonstrated by the developments within the International Whaling Commission,<sup>224</sup> where the organisation shifted from an association protecting the sustainability of the whaling activities, to one where the protection and conservation of the whales became the central issue, because of its completely open membership.<sup>225</sup> This finally even resulted during the early 1990s in the creation of a new RFO that once again aims at the rational management, conservation and optimum utilisation of the living resources of the sea.<sup>226</sup>

In order to avoid break-away organisations, it is therefore recommended that membership should be limited to countries that are either coastal states in the convention or regulatory area or have a fishing interest in that region.<sup>227</sup> But beyond this particular restriction, membership should not be unnecessarily limited. Otherwise a similar tendency towards the creation of a new RFO could emerge, this time with identical competence *ratione loci* and *ratione materiae*, but simply with a different competence *ratione personae*. The example of the FFA springs naturally to mind in this respect,<sup>228</sup> where some have argued in favour of the establishment of a novel organisation if the closed nature of the FFA would not be changed,<sup>229</sup> a point of view very much disputed by others.<sup>230</sup> Present-day practice, however, indicates that this might not always be easy to realise in practice.<sup>231</sup> It is noteworthy in this respect that the RFO that tries to iron out this incompatibility of positions in the South Pacific just mentioned, namely the MHLRC,<sup>232</sup> has been struggling with this issue since its inception.<sup>233</sup>

<sup>223</sup> See *supra* note 103 and accompanying text.

<sup>224</sup> Established on the basis of the International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72.

<sup>225</sup> *Ibid.*, Article X. Because of the open-ended membership, many non-whaling states have been added to the club so that it has become very difficult, if not impossible, for whaling states to press their views with success.

<sup>226</sup> Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, 9 April 1992, Preamble para. 2, as available on Internet: <www.oceanlaw.net/texts/nammco.htm>. Or to use the words of Wheatley, S., 'The Legal Protection of Whales -- Time for a Re-think?', 143 *New Law Journal* p. 855, 856 (1993), who states: 'The North Atlantic Marine Mammal Commission is effectively a breakaway whaling body in direct challenge to the IWC, whose charter emphasises the "utilisation of marine mammal stocks in the North Atlantic"'.

<sup>227</sup> An element clearly introduced by the 1995 UN Fish Stocks Agreement. See *supra* notes 209-210 and accompanying text.

<sup>228</sup> From an historical perspective, it is interesting to note that a previous draft of the FFA, submitted to the ninth South Pacific Forum in 1978, contained a much more liberal membership clause for even independent states from outside the region could have become Contracting Parties according to its terms. This draft, however, was defeated by an overwhelming majority at that time. See Lodge, M., 'Minimum Terms and Conditions of Access: Responsible Fisheries Management Measures in the South Pacific Region', 16 *Marine Policy* pp. 277, 278-279 (1992).

<sup>229</sup> See for instance Van Dyke, J., 'Modifying the 1992 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: The Straddling Stocks Negotiations', 10 *International Journal of Marine and Coastal Law* p. 219, 226 (1995).

<sup>230</sup> Aqorau, T. & Bergin, A., 'The UN Fish Stocks Agreement -- A new Era for International Cooperation to Conserve Tuna in the Central Western Pacific', 29 *Ocean Development & International Law* pp. 21, 26-29 (1998), pleading in favour of the retention of the FFA's unique characteristics.

<sup>231</sup> See Molenaar, E., *supra* note 222, pp. 507-524.

<sup>232</sup> Specifically linking the establishment of the MHLRC to the FFA, see for instance Lodge, M., *supra* note 171, pp. 20-22.

<sup>233</sup> Molenaar, E., *supra* note 222, pp. 509-514.

*d. Opting-out Clause v. Consensus*

Fourth, as far as the opting-out clause is concerned, a tendency exists today to try to move away from the classical system of majority voting in RFOs, tempered by an opting-out clause for those not willing to subscribe a particular conservation or management measure, to a system where consensus decisions are becoming the rule.<sup>234</sup> Taking into account the problems an opting-out system might create from an effective implementation point of view,<sup>235</sup> the consensus system has to be preferred, especially in the form in which it has been incorporated in the MHLC founding document. Not only because of the absence in this document of any alternative voting method if consensus should fail, at least with respect to certain crucial issues,<sup>236</sup> but also because specific methods are created in order to prevent formal objections from being raised.<sup>237</sup>

*e. Intergovernmental Organisations v. Autonomous Institutional Arrangements*

Fifth, even though all the RFOs here under consideration, without exception, are to be disqualified as 'autonomous institutional arrangement' described by R. Churchill and G. Ulfstein,<sup>238</sup> because they were all established as formal intergovernmental organisations,<sup>239</sup> it should nevertheless be noted that they seem to possess many of the advantages explaining the recent ascendancy of the autonomous-institutional -arrangement-type organisation as opposed to the traditional intergovernmental organisation at the global level. One could mention in this respect the open-membership possibility,<sup>240</sup> the flexible manner in which the organisational structure is worked out in the different types of RFOs under consideration,<sup>241</sup> the flexibility as far as meeting places are concerned,<sup>242</sup> making it also possible for developing states to host headquarters,<sup>243</sup> and the flexibility as far as the frequency of meetings is concerned.<sup>244</sup> This probably has to be explained by the difference that exists between intergovernmental organisations established at the global level, and those created at the regional level. As acknowledged by R. Churchill and G. Ulfstein themselves, these regional organisations

<sup>234</sup> This seems to be a general trend in recent developments concerning multilateral environmental agreements. See Churchill, R. & Ulfstein, G., *supra* note 74, pp. 640-641 and 642-643. Even in instances, as under the Montreal Protocol, where adjustments are in theory adopted with a two-thirds majority without an opting-out clause, this has not yet happened in practice since all adjustments have so far been adopted by consensus. See *ibid.*, pp. 638 and 640.

<sup>235</sup> See *supra* notes 87-88 and accompanying text.

<sup>236</sup> See *supra* note 173 and accompanying text.

<sup>237</sup> See *supra* note 177 and accompanying text.

<sup>238</sup> Churchill, R. & Ulfstein, G., *supra* note 74, p. 623.

<sup>239</sup> See *supra* notes 188-200 and accompanying text.

<sup>240</sup> Even if within the limits as described *supra* note 227 and accompanying text.

<sup>241</sup> As discussed *supra* Part 4, Recommendation III (B).

<sup>242</sup> The ICCAT for instance very often makes use of this possibility. It might suffice to have a look at the meeting places for the different gatherings planned for the year 2001 within the framework of this organisation. As available on internet: <www.iccat.es>. Also the IOTC has held commission meetings outside its headquarters, namely in Rome, Italy (1<sup>st</sup> special meeting) and Kyoto (4<sup>th</sup> meeting).

<sup>243</sup> See for instance the IOTC, where three votes were necessary to prefer Seychelles over Sri Lanka. See Report of the First Session of the Indian Ocean Tuna Commission, Rome, Italy, 3-6 December 1996 (FIPL/R551(B)), paragraphs 24-30, as available on Internet: <www.seychelles.net/iotc/English/Publications/EReports.htm>.

<sup>244</sup> Listing all these elements as advantages of autonomous institutional arrangements over intergovernmental organisations, see Churchill, R. & Ulfstein, G., *supra* note 74, p. 630.

'are often much less formal and bureaucratic than their global counterparts, and in fact the distinction between these IGOs and autonomous institutional arrangements is much less clear-cut'.<sup>245</sup>

This helps us to conclude that the RFOs possess a structure, which is apt of securing efficient fisheries control mechanisms. Especially the presence of proper institutions needs to be stressed in this study, since the lack of them would make it very difficult for these RFOs to monitor implementation and take action in case of violation of the conservation and management measures established by them.<sup>246</sup>

Is there one RFO of the list under consideration, which could be proposed as an ideal example to be followed by others? The above analysis demonstrates that this is not the case. All have their positive and negative aspects. To take the two most recent examples as point of reference: The MHLC certainly has the most progressive voting system but is handicapped by its closed character. The SEAFO on the other hand scores extremely well on the membership and accession issue, a little bit less on the voting procedures, but totally insufficient on the issue of so-called fishing entities, a topic which will be addressed by the next recommendation, and where the MHLC, once again, could well serve as example for other RFOs.

#### RECOMMENDATION IV. ENTITIES

Another question relates to the involvement of Taiwan Province of China in the different RFOs. Now that the pace has been set by the 1995 UN Fish Stocks Agreement, which states:

'This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas',<sup>247</sup>

it might be advisable for concerned RFOs to include a similar reference to the notion of 'entity' in their constituent documents in order to be able to take the peculiar position of this country into account.<sup>248</sup> Taiwan Province of China is a very active high seas fishing state,<sup>249</sup>

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<sup>245</sup> *Ibid.*, p. 631.

<sup>246</sup> *Ibid.*, p. 629.

<sup>247</sup> 1995 UN Fish Stocks Agreement, Article 1 (3).

<sup>248</sup> Specifically linking this notion of entity to be found in Article 1 (3) of the 1995 UN Fish Stocks Agreement to Taiwan Province of China, see Juda, L., 'The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique', 28 *Ocean Development and International Law* p. 147, 156 (1997); Barston, R., *supra* note 206, p. 351; and Rayfuse, R., 'The Interrelationship Between the Global Instruments of International Fisheries Law', in *Developments in International Fisheries Law*, *supra* note 68, pp. 107, 153-154. Or as expressed in more diplomatic terminology by Anderson, D., 'The Straddling Stocks Agreement of 1995: An Initial Assessment', 45 *International and Comparative Law Quarterly* p. 463, 468 (1996), who states when discussing the salient features of the definitions to be found in Part I: 'Third, the Agreement is seemingly intended to be applicable in principle to a "fishing entity" whose vessels fish on the high seas: Taiwan may have been in mind'.

but has been unable to become a party to the 1982 Convention, the 1995 UN Fish Stocks Agreement or any other relevant multilateral instrument. Similar problems are encountered with respect of the attitude of this entity concerning vessel-source pollution, a topic regulated in general terms by the 1982 Convention as well as by a number of other agreements containing technical rules and standards, of which many were elaborated under the auspices of the International Maritime Organisation.<sup>250</sup> Taking into account the very important high seas fishing effort of Taiwan Province of China, as well as the main object of the present study, *i.e.* effective implementation of fisheries legislation (national and international), a separate recommendation on this topic appears to be justified.

The 1995 UN Fish Stocks Agreement seems however to have set only a first step, and beyond the shadow of a doubt a very important one, but stopped right there. Indeed, the only other provision found in the rest of the agreement, which uses the term as referred to in Articles 1 (3),<sup>251</sup> is the article dealing with non-members and non-participants. This article requires members of a RFO, individually or jointly, to request such entities to fully cooperate with the implementation of the conservation and management measures decided upon by that RFO.<sup>252</sup> The *quid pro quo* for fishing entities that comply with such a request is that they

'shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks'.<sup>253</sup>

<sup>249</sup> As remarked by Pannatier, S., 'Problèmes actuels de la pêche en haute mer', 101 *Revue Générale de Droit International Public* p. 421, 424 (1997), emphasizing that, together with five other countries, Taiwan Province of China was responsible for the catch of 99 percent of all high seas fisheries during the early 1990s. Government interest in distant water fisheries has moreover been increasing during the last decade when compared with coastal and offshore fisheries, since the latter resources have severely been depleted. Haward, M. & Bergin, A., 'Taiwan's Distant Water Tuna Fisheries', 24 *Marine Policy* p. 33, 34 (2000). In the Western and Central Pacific, to give a concrete example, 90 percent of the catch is taken by Japanese, Korean, US and Taiwanese fishing vessels, representing a value of an estimated USD 1 billion. Aqorau, T., 'Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience', in 15 *International Journal of Marine and Coastal Law* p. 37, 38 (2000).

<sup>250</sup> See Fu, L., 'Case Study of Taiwan', in *Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (Franckx, E., ed.), The Hague, Martinus Nijhoff, pp. 337-344 (2001), who indicates that Taiwan Province of China is often disposed to comply with the different requirements contained in these international legal instruments to which it is not allowed to become a party (*ibid.*, p. 341). Its national legislation often reflects the content of these international documents. Confirming this point of view, see also the statement of Dr. Wang of the Chinese (Taiwan) Branch during the last conference of the International Law Association in which he 'drew attention to the situation of vessels flying the flag of a state or fishing entity that is not a party to the 1982 Convention or the 1995 Fish Stocks Agreement in case these vessels violate a coastal state's laws and regulations. He noted the importance of the question to Taiwan, which was not a party to either agreement due to political obstacles but which had adopted its own laws and regulations that applied within its territorial sea and its EEZ. Accordingly, heavy fines are imposed for any pollution caused by vessels, whether foreign or national'. Working Session of the Committee on Coastal State Jurisdiction relating to Marine Pollution, Thursday, 27 July 2000, 9.30 AM, in *The International Law Association: Report of the Sixty-Ninth Conference (London, 25-29 July 2000)* (Soons, A. & Ward, C., eds), Aberystwyth, Cambrian Printers, pp. 443-500 (2000). Also reprinted in *Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (Franckx, E., ed.), *supra*, p. 133, 142.

<sup>251</sup> Excluded are thus the references to the notion of 'entity' or 'entities' to be found in Parts XII (Review Conference) and XIII (Final Provisions), which may be able to become a party to the 1995 UN Fish Stocks Agreement. Since those referred to in Article 3(1) are not included in the signature and ratification clauses of the agreement (Arts 37-38), the articles making use of these notions to be found in these two Parts can thus safely be put aside for present purposes.

<sup>252</sup> 1995 UN Fish Stocks Agreement, Article 17(3).

<sup>253</sup> *Ibid.*, Article 17(3) *in fine*.

The 1995 UN Fish Stocks Agreement in other words creates obligations for such fishing entities, but is rather reluctant in the granting of any firm rights.<sup>254</sup> Because these entities are barred from becoming a Contracting Party to the 1995 UN Fish Stocks Agreement,<sup>255</sup> the latter situation seems difficult to rime with the basic postulate of international law that treaties do not create obligations for third parties without their consent.<sup>256</sup> A detailed study of the substantially novel compliance and enforcement provisions of the 1995 UN Fish Stocks Agreement<sup>257</sup> undertaken by the present author elsewhere, came to the conclusion that these provisions did not negate the *pacta tertiis* rule.<sup>258</sup> This conclusion is mainly based on the argument that states, by becoming a party to the 1995 UN Fish Stocks Agreement accept in advance the application of a system whereby decisions adopted by RFOs, in which they did not participate and to which they had not expressly consented, nevertheless become binding on them. But this argumentation cannot be applied *in casu* for, as noted above, these entities have not been allowed to become a party to the 1995 UN Fish Stocks Agreement in the first place.<sup>259</sup> Thus, unless fishing entities expressly accept, in writing,<sup>260</sup> the obligation to become bound by decisions taken by RFOs to which they are not a member, it appears difficult to imagine how the 1995 UN Fish Stocks Agreement might attain the same goal in this particular case.

Among the RFOs under consideration, a distinction has to be made between those RFOs trying to solve this problem through their founding documents, and those looking for more pragmatic solutions to the issue.

In a first group of RFOs here under consideration, the term was for the first time used in the agreement establishing the IOTC. It found its way into the implementation provision of that document, in which it was stated that the members of the IOTC must cooperate in the exchange of information regarding the fishing for stocks by nationals of any state or entity, which is not a member of that commission.<sup>261</sup> The IOTC itself, moreover, would endeavour to obtain fishing statistics from the latter group of entities.<sup>262</sup> In other words, such entities are only considered as objects whose activities are to be observed in the framework of this convention.

The other extreme is the founding document of the MHLC for it not only explicitly grants such entities the right to become bound by that agreement, but also to participate in the

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<sup>254</sup> Since the hypothesis envisaged by Article 17 is that the fishing entities are non-member and non-participants to the RFO, it will remain within the discretionary powers of the latter body to determine the exact benefits to be attributed. A second possible alternative, namely that the fishing entities are members and participants to the RFO, is clearly not envisaged by the 1995 UN Fish Stocks Agreement.

<sup>255</sup> See *supra* note 249 and the text following that note.

<sup>256</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 34.

<sup>257</sup> Especially Arts 21 (1) and 23 (1-2) were singled out. Also Article 8 (4) received special attention.

<sup>258</sup> Franckx, E., '*Pacta Tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks', *supra* note 22, pp. 14-20, and by the same author '*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea', *supra* note 22, pp. 64-71.

<sup>259</sup> See *supra* note 249 and the text following that note as well as *supra* note 255 and accompanying text.

<sup>260</sup> As provided by the Vienna Convention on the Law of Treaties, *supra* note 256, Article 35.

<sup>261</sup> IOTC, Article X(4). Regional economic integration organisations are apparently not linked to the concept of entity in the framework of this agreement (see for instance Article IV(1)(a)(iii)).

<sup>262</sup> *Ibid.*, Article XI(1).

decision-making process.<sup>263</sup> From mere objects, in other words, the role of such entities has been upgraded since they are bestowed with a special status<sup>264</sup> under this multilateral instrument, which grants them rights<sup>265</sup> and obligations.<sup>266</sup> This is a remarkable evolution when compared with the 1995 UN Fish Stocks Agreement, where only obligations were apparently bestowed. The MHLC founding document for the first time adds a detailed set of rules how, and under what conditions, such entities may participate in the work of the Commission. Annex I, as could be expected, is a very carefully drafted document which tends to place such entities on equal footing with the other Contracting Parties while at the same time strictly limiting this particular participation effect 'solely for the purposes of this convention'.<sup>267</sup> In order to avoid unnecessary complications, a clause has moreover been included in this Annex that obliges the parties, if a particular dispute cannot be settled by agreement between them, to submit that dispute to final and binding arbitration.<sup>268</sup> This *avant-garde* position finally adopted by the MHLC was apparently not easily arrived at,<sup>269</sup> for a previous draft had rather reflected the provisions of the 1995 UN Fish Stocks Agreement.<sup>270</sup>

The preparations of the founding document of the SEAFO indicate that originally the idea was to take this *avant-garde* position one step further by including in the interpretation section the definition of the term 'Contracting Party':

"Contracting Party" means any state, *entity* and regional economic integration organisation which has consented to be bound by this Convention, and for which the Convention is in force'.<sup>271</sup>

In the adopted version the term Contracting Party does no longer include 'entities'. There is a separate definition of 'Fishing entity', which simply refers back to Article 1 (3) of the 1995 UN Fish Stocks Agreement, as already mentioned above.<sup>272</sup> But since the latter does not really define the term either,<sup>273</sup> it does not shed much light on the issue. Substantive issues relating to fishing entities are dealt with in provisions relating to the functions of the Commission on the one hand, and those concerning non-parties to the convention on the other hand. The Commission is responsible for drawing the attention of 'any state or fishing entity which is a non-party' to the founding document, to activities which run contrary to the objectives stated therein.<sup>274</sup> Secondly, in the article concerning non-parties to the convention, it is stated that fishing entities can be requested to cooperate fully in the implementation of the conservation and management measures adopted by the SEAFO.<sup>275</sup>

The removal of this one word out of the section 'use of terms' of the earlier SEAFO draft totally changes the approach the SEAFO convention takes with respect to this particular

<sup>263</sup> MHLC, Article 9(2).

<sup>264</sup> Their status has been clarified not in the agreement itself, but by means of an annex. The latter nevertheless forms an integral part of the convention. *Ibid.*, Article 41(1).

<sup>265</sup> See *supra* note 263 and accompanying text.

<sup>266</sup> MHLC, Article 25(12) indicating that trade measures can be taken against entities whose fishing vessels undermine the effectiveness of the conservation and management measures adopted by the Commission.

<sup>267</sup> *Ibid.*, Annex I(4).

<sup>268</sup> *Ibid.*, Annex I(3).

<sup>269</sup> Or as stated by Lodge, M., *supra* note 171, p. 30, this was '[p]erhaps the most difficult issue of all that the Conference must address'.

<sup>270</sup> The present Article 9(2) and Annex I were absent, whereas Article 25(12) was already present.

<sup>271</sup> SEAFO (version 12 May 2000), Article 1(e). Emphasis added.

<sup>272</sup> See *supra* note 247 and accompanying text.

<sup>273</sup> It only adds 'whose vessels fish on the high seas' to the notion to be defined.

<sup>274</sup> SEAFO, Article 6(10).

<sup>275</sup> *Ibid.*, Article 2(4).

problem. In the former draft of the SEAFO founding document a progressive position was taken whereby these entities were totally assimilated with other Contracting Parties, namely states and regional economic integration organisations, for the purpose of the implementation of the convention, *i.e.* making it possible for such entities to fully participate in the work of the organisation with the same rights and obligations. The signed text falls back on the situation as envisaged by the 1995 UN Fish Stocks Agreement, where the notion of entity is only relied upon in relation to non-parties to that agreement. The only incentive given to such fishing entities to comply with the requests of the SEAFO to implement the conservation and management measures decided upon by that organisation, is to be found in the provision that these entities 'shall enjoy benefits from participation in the fishery commensurate with their commitment' to comply with these measures.<sup>276</sup> But since these fishing entities remain outside the system itself, it appears that it will become the discretionary power of the SEAFO to determine what the notion 'commensurate' exactly means in this equation. At the time the SEAFO agreement was negotiated, the negotiating parties opted for the approach taken by the 1995 UN Fish Stocks Agreement and, as noted above, this might cause problems from an international law perspective.<sup>277</sup>

Some RFOs, to be distinguished in this respect from those discussed above, try to tackle the issue of fishing entities in a more pragmatic manner. This is for instance the case of the ICCAT, oldest RFO in this group. In 1997 a resolution was adopted, transmitted to the Contracting Parties on 12 December of that year, in which the notion of 'entity' and 'fishing entity' were introduced.<sup>278</sup> In order to encourage all these entities to implement the ICCAT conservation measures, they were allowed to apply for the special status of 'cooperating party'. Salient features of this novel procedure are that the entities have to apply for such status on a yearly basis. In the application which the entity has to address to the Executive Secretary and which is subsequently considered by the annual meeting, the applicant must indicate its firm commitment to respect the conservation and management measures of the organisation and must commit him or herself to transmit all data, which Contracting Parties must provide within the framework of the ICCAT.<sup>279</sup> Entities that do not respond to this invitation will not be considered as cooperating party.<sup>280</sup> This resolution does not provide any special *quid pro quo* besides the right already granted previously to other Non-contracting Parties of attending the ICCAT meetings as observers.<sup>281</sup> The ICCAT Rules of Procedure attach to this right of attendance a possibility of addressing the meeting, with the authorisation

<sup>276</sup> SEAFO, Article 22(4). This wording is identical to the one used by the 1995 UN Fish Stocks Agreement. See *supra* note 253 and accompanying text.

<sup>277</sup> See *supra* note 256 and accompanying text.

<sup>278</sup> Resolution by ICCAT on Becoming a Cooperating Party, Entity or Fishing Entity (97-17), as available on Internet: <www.iccat.es>.

<sup>279</sup> *Ibid.*, sub 2. These requests are reviewed by the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures, body which is also responsible for the annual evaluation in order to determine whether that special status should be continued. *Ibid.*, sub 3.

<sup>280</sup> *Ibid.*, sub 4. Under the heading 'Cooperating Parties/Entities/Fishing entities' Chinese Taipei was for instance allowed as observer during the latest regular meeting of the Commission. See Records of Meetings, 16<sup>th</sup> Regular Meeting of the Commission, Rio de Janeiro, Brazil, 15-22 November 1999, sub 4.1, as available on Internet: <www.iccat.es>. Its scientists also participate in subsidiary bodies. See Report of the Standing Committee on Research and Statistics (SCRS), Madrid, Spain, 16-20 October 2000, sub 4.1, as available on Internet: <www.iccat.es>.

<sup>281</sup> This right was already provided in 1994 by means of the Resolution by ICCAT on Coordination with Non-Contracting Parties (94-6), sub 3, as available on Internet: <www.iccat.es>. The 1997 resolution (97-17) (see *supra* note 278) in a way extended this 1994 resolution from mere Non-contracting Parties, to entities and fishing entities.

of the Chairman, but not a right to vote.<sup>282</sup> Since 1997, therefore, it has become general practice for this organisation to include the standard terminology 'Non-Contracting Party, Entity and Fishing Entity' in its recommendations and resolutions,<sup>283</sup> including those concerning compliance with the ICCAT conservation and management program.<sup>284</sup>

But a common characteristic of this second group of RFOs is apparently that many obligations are imposed on entities but almost no rights are granted. In the ICCAT the rights are reduced to the entity obtaining observer status with a right to attend and address meetings unless the Chairman of the Commission withdraws this right for failure to conform to the rules of procedure,<sup>285</sup> with no right to vote but a duty to pay in order to attend the meetings,<sup>286</sup> and with a right to obtain the same information as the other Contracting Parties unless such information is deemed confidential by the parties.<sup>287</sup> In other words, this boils down to a not very enviable position for these entities. And although Taiwan Province of China has at times been lauded for its efforts displayed,<sup>288</sup> fact is that this entity has not yet fully implemented the conservation and management measures of the ICCAT.<sup>289</sup>

It is therefore recommended that RFOs, in whose convention or regulatory area of application fishing entities, other than states, regional economic integration organisations, or self-governing states or territories envisaged by the final provisions of the 1982 Convention,<sup>290</sup> do operate, should not only bestow obligations but also grant rights to these entities. The only way of reaching the ultimate goal of RFOs, namely the effective implementation of their conservation and management decisions, is to actively involve these entities in the decision-making process, preferably even in the preparatory phase leading up to the adoption of the documents containing these rules<sup>291</sup> as well as in the intermediary phase if a special regime

<sup>282</sup> Rules of Procedure, *supra* note 133, Rule 5. Since 1998, moreover, observers are required to pay a fee for their participation, as determined by the Executive Secretary. See Guidelines and Criteria for Granting Observer Status at ICCAT Meetings, adopted at the 11<sup>th</sup> Special Meeting, 16-23 November 1998. As available on Internet: <www.iccat.es>.

<sup>283</sup> See for instance resolutions 97-2, 97-3, 98-2, 98-3, 98-6, 98-10, 99-2 and 99-7.

<sup>284</sup> See for instance resolutions 97-11, 98-11, 99-9 and 99-12.

<sup>285</sup> See Guidelines and Criteria for Granting Observer Status at ICCAT Meetings, *supra* note 282, *sub* 9.

<sup>286</sup> See *supra* note 282 and accompanying text.

<sup>287</sup> See Guidelines and Criteria for Granting Observer Status at ICCAT Meetings, *supra* note 282, *sub* 8.

<sup>288</sup> See for instance Resolution by ICCAT Calling for Further Actions Against Illegal, Unregulated, and Unreported Fishing Activities by Large-Scale Longline Vessels in the Convention Area and Other Areas (99-11), Preamble, 7<sup>th</sup> paragraph, and Resolution by ICCAT Endorsing the International Plan of Action for the Management of Fishing Capacity (IPOA) (99-13), Preamble, 4<sup>th</sup> paragraph, as both available on Internet: <www.iccat.es>.

<sup>289</sup> See *infra* note 294.

<sup>290</sup> 1982 Convention, Article 305 (1)(c-e).

<sup>291</sup> As stated by the Chairman of the MHLC in February 1999 at the opening of the fourth session: 'Participation in this Conference is based on the fact that the participants are either coastal States or territories in the region or have fishing interests in the region. If we are going to have an effective regime for fisheries conservation and management in the region then it is obvious that all those who belong to the region or fish in the region must be involved'. As quoted by Lodge, M., *supra* note 171, p. 31. In the Final Act of the MHLC, which itself was signed by Taiwan Province of China, the latter is listed as having been a full participant to the different sessions of the conference. Final Act of the Multilateral High-level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, 5 September 2000, paragraph 4, as available on Internet: <www.ocean-affairs.com/convention.html>.



has been foreseen to bridge the gap between signature and ratification.<sup>292</sup> The exact juridical formula to achieve this objective is only of secondary importance, as long as it finds its reflection in the founding document. The IOTC experience learns that trying to solve the issue afterwards becomes a very difficult exercise indeed.<sup>293</sup>

If the full assimilation with the other Contracting Parties, even if strictly limited for the purposes of the fishery conventions in question, appears to be politically impossible, the example set by the MHLC might provide a nice way out. What one should however avoid believing is that obligations will be fulfilled without effective rights being granted.<sup>294</sup> A crucial element to arrive at effective monitoring, control and surveillance systems appears to be legitimacy of the management bodies.<sup>295</sup> This is only to be achieved if these entities are given an opportunity to actively participate in the decision-making process within RFOs. The granting of benefits commensurate with the commitment of these entities to comply with conservation and management measures, as presently incorporated in the 1995 UN Fish Stocks Agreement and envisaged by the SEAFO Convention, is therefore only a second best alternative, because it can hardly stand the test of legitimacy: The measures to be applied are not only decided by a foreign body, but even the benefits to be attributed, in case of compliance, are left to the discretion of that same foreign body.

<sup>292</sup> As already mentioned above the MHLC established such a regime by the adoption of a resolution establishing a Preparatory Conference. See *supra* note 201. Article 1 of that resolution again allowed fishing entities to participate in that newly established body. On the same day, an arrangement was signed between the representative of Taiwan, Province of China and the Chairman of the MHLC of which the operative part reads: 'The Conference **HEREBY INVITES** Chinese Taipei, as a fishing entity, and Chinese Taipei **HEREBY DECLARES** its intent: (a) to participate in the Preparatory Conference established by the resolution attached to the Final Act of the Conference, (b) subject to the fulfilment of its domestic legal requirements, to agree to be bound by the regime established by the Convention in accordance with article 9, paragraph 2, of the Convention, and to participate in the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean in accordance with the Convention'. Arrangement for the participation of Fishing Entities, 5 September 2000, as available on Internet: <[www.ocean-affairs.com/convention.html](http://www.ocean-affairs.com/convention.html)>.

<sup>293</sup> During the fourth session of the IOTC the efforts of the FAO Legal Advisor were mentioned on consultations with China concerning data from Taiwan Province of China as well as the acceptance by the People's Republic of China that this entity would be represented by an NGO. The latter would then be invited to participate in the IOTC meetings. See Report of the Fourth Session of the Indian Ocean Tuna Commission, Kyoto, Japan, 13-16 December 1999 (IOTC/S/04/99/R[E]), paragraph 33, as available on Internet: <[www.seychelles.net/iotc/English/Publications/EReports.htm](http://www.seychelles.net/iotc/English/Publications/EReports.htm)>. This participation would then most probably be based on Rule XIII of the Rules of Procedure, entitled 'Participation by observers', which allows NGO observers to submit memoranda and participate in the discussions, however without a vote. Rules of Procedure of the Indian Ocean Tuna Commission, Rule XIII, as available on Internet: <[www.seychelles.net/iotc/English/BasicInfo/Ebasictext.htm](http://www.seychelles.net/iotc/English/BasicInfo/Ebasictext.htm)>. Not much progress, however, was made on this issue by the fifth session, leaving the report conclude this point with the following words: 'The Commission stressed the importance attached to further work on this issue. The Commission requested the FAO Legal Adviser to continue to explore practical solutions'. Report of the Fifth Session of the Indian Ocean Tuna Commission, Victoria, Seychelles, 11-15 December 2000 (IOTC/S/05/00/R[E]), paragraph 30, as available on Internet: <[www.seychelles.net/iotc/English/Publications/EReports.htm](http://www.seychelles.net/iotc/English/Publications/EReports.htm)>.

<sup>294</sup> The difficult position of Taiwan Province of China within the framework of the ICCAT might be illustrative here. The country has refused to fully contribute to the scientific research programmes and did moreover not accept the Commission's appeal to reduce its catch of bigeye tuna by 25 percent. See Barston, R., *supra* note 206, p. 351. In the South Pacific, Taiwan Province of China has also been singled out, together with Korea, as the 'worst offenders', with an almost 80 percent rate of non-reporting, *i.e.* the percentage of catch from fishing efforts which is not recorded on logsheets. Bergin, A., 'Political and Legal Control over Marine Living Resources – Recent Developments in South Pacific Distant Water Fishing', 9 *International Journal of Marine and Coastal Law* p. 289, 303 (1994).

<sup>295</sup> Høneland, G., 'Compliance in the Barents Sea Fisheries: How Fishermen Account for Conformity with Rules', 24 *Marine Policy* pp. 11-19 (2000).

## RECOMMENDATION V. INSPECTION, BOARDING AND OBSERVATION

Inspection and boarding belong to the category of the more traditional forms of enforcement. Within a report focussed on fisheries enforcement measures, the term inspector seems to deserve more attention than the notion of observer, since observers are not necessarily involved in observing the compliance with the relevant conservation and management measures of a certain RFO, whereas inspectors necessarily are. Nevertheless, observers have been included in the present section for their practical impact on effective compliance with conservation and management measures can be very important.<sup>296</sup> Viewed from an implementation perspective, therefore, both inspectors and observers seem to play an important role and the neat distinction existing between them in theory has a tendency of fading away in this respect.

This point can be illustrated by the manner in which an inspection and observation system was established within the framework of the CCAMLR, an issue first raised by the United Kingdom in 1984.<sup>297</sup> At that time the CCAMLR decided to clearly distinguish between observers on the one hand, which would promote the objectives of the founding document by merely gathering scientific information necessary to properly manage the living resources of the area, and inspectors on the other hand, which would ensure the observance of the conventional provisions. But *en cours de route* this distinction became blurred, with observers more and more reporting illegal, unregulated and unreported fishing, leading one author to conclude that the merging of the two systems would mark a significant improvement of the system.<sup>298</sup> If one considers that the 100 percentage observer scheme recently established by the NAFO was introduced exactly in order to improve and maintain compliance with the conservation and enforcement measures,<sup>299</sup> this statement appears more than reasonable.<sup>300</sup> The only practical difference that remains therefore between inspectors and observers is inherent in the notions themselves and has to do with the time they spend on board the vessel to be inspected or observed. The former activity will normally be punctual and of short duration,<sup>301</sup> whereas the latter will be carried out for longer periods of time on board the vessel to be observed.

<sup>296</sup> Or as recently stated in the IOTC Report of the Intersessional Meeting on an Integrated Control and Inspection Scheme, Yaizu, Japan, 27-29 March 2001 (IOTC/SS/01/R[E]), p. 5 (para. 30), as available on Internet: <[www.seychelles.net/iotc/English/Publications/EReports.htm](http://www.seychelles.net/iotc/English/Publications/EReports.htm)> under the heading 'Other control and inspection measures': 'There was consensus on the principle that observer programmes constitute a valuable tool for monitoring fisheries even in the absence of any enforcement role and, in some cases, the only effective tool available'.

<sup>297</sup> For a good overview of this particular point, see Rayfuse, R., *supra* note 86, pp. 587-588.

<sup>298</sup> *Ibid.*, p. 602.

<sup>299</sup> Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures (NAFO/FC Doc. 00/1), p. 76 (2000), as available on Internet: <[www.nafo.ca](http://www.nafo.ca)>.

<sup>300</sup> See for instance the recent work inside the IOTC trying to establish a control and inspection scheme, where in a proposal submitted by Australia to the intersessional meeting held in Japan, 27-29 March 2001, one can read: 'The IOTC shall develop a regional observer program to collect verified catch data, other scientific data and additional information related to fishing in the IOTC Area of Competence and to monitor the implementation of the IOTC conservation and management measures'. This country therefore proposes to bestow on these observers a dual task encompassing not only data gathering, but also implementation monitoring. Australia, Principles underpinning the establishment and operation of an integrated IOTC control and inspection scheme (IOTC/SS/01/02), as available on Internet: <[www.seychelles.net/iotc/English/CommSC/InspContr.htm](http://www.seychelles.net/iotc/English/CommSC/InspContr.htm)>. See also the observer scheme established by the MHLIC, where besides general inspection tasks also data gathering is included in the list of activities attributed to observers (MHLIC, Article 28 (6)(e)). A similar dual attitude can be found in the Canadian national fisheries legislation. See *supra* Part. 2, II.

<sup>301</sup> Unless an infringement has been discovered and the inspector decides to remain on board.

In view of what has just been said, the system to be preferred in order to arrive at the most effective means of enforcement under this heading is a system of observers, if possible applied to as many fishing ships as possible which are engaged in fishing activities in a particular area. From all the RFOs here under consideration, the recent changes within the NAFO need to be singled out as most promising developments as of now. Since 1 January 2001, a 100 percentage observer scheme has been introduced, meaning that all vessels fishing in the Regulatory Area will have an independent and impartial observer on board. This is a primary responsibility of the flag state, which can however be supplemented by another Contracting Party willing to place an observer on board that vessel, subject to the consent of the flag state.<sup>302</sup> Such an advanced system of observers is however very costly and its introduction by the NAFO is probably not unrelated to the major difficulties which the organisation encountered during the middle of the 1990s when the dispute between Canada and the EC reached its climax.<sup>303</sup>

For other regions, however, these traditional techniques for ensuring compliance are considered to be too costly for they can easily outweigh the benefits received from the licences by means of which vessels of third states are allowed to fish.<sup>304</sup> Here the FFA stands out as a good example.<sup>305</sup> One can therefore expect that observers will not play a leading role as enforcement mechanism in this region. Nevertheless, one of the major achievements developed under the auspices of the FFA are the so-called harmonised minimum terms and conditions of access for foreign fishing vessels. Even though well-documented in the literature,<sup>306</sup> these minimum terms are not readily available.<sup>307</sup> They are said to contain the requirement for foreign fishing vessel operators to carry observers on board.<sup>308</sup> But since it are the individual states, party to the FFA, that will have to implement these minimum terms and conditions, it appears already from a quick analysis of the legislation that the placing on board of observers is but a possible requirement which can be inserted in the licence

<sup>302</sup> Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures: Supplement of FC Doc. 00/1 (NAFO/FC Doc. 01/1), pp. 17-18 (2001), as available on Internet: <www.nafo.ca>.

<sup>303</sup> The placing on board of independent and impartial observers on board of EC vessels since May 1995 is said to have had an immediate positive impact on the level of compliance. See Wiseman, E. & Steinbock, R., 'Compliance', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), *supra* note 46, p. 387, 401.

<sup>304</sup> Moore, G., 'Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Cooperation', 24 *Ocean Development & International Law* pp. 197, 197-198 (1993).

<sup>305</sup> Kuemlangan, B., 'Legal Aspects of Implementing the FFA Vessel Monitoring System', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), *supra* note 46, p. 409, 410.

<sup>306</sup> See for instance Aqorau, T., *supra* note 249, pp. 44-46; Aqorau, T. & Bergin, A., *supra* note 230, p. 23; Bergin, A., *supra* note 294, p. 302; and especially Lodge, M., *supra* note 228, pp. 277-305, who gives a detailed account.

<sup>307</sup> The official website of the FFA as available on Internet: <www.ffa.int>, for instance, does not list them. These harmonised minimum terms and conditions of access of foreign fishing vessels find their basis in the Nauru Agreement concerning Cooperation in the Management of Fisheries of Common Interest, 11 February 1982, Article IX, as available on Internet: <www.oceanlaw.net/texts/nauru.htm>. For the text of two arrangements implementing the just mentioned Nauru agreement by setting forth minimum terms and conditions of access to the fisheries zones of the parties, see Lodge, M., *supra* note 228, pp. 303-305.

<sup>308</sup> This is said to be provided in s. 6 of the minimum terms and conditions. See Aqorau, T., *supra* note 249, p. 46. The Nauru Agreement concerning Cooperation in the Management of Fisheries of Common Interest, *supra* note 307, Article II(b)(ii), listed the placing on board of observers as one of the elements which such minimum uniform terms and conditions should contain.

conditions.<sup>309</sup> It should also be noted that even in the hypothesis that this system should work in a coherent manner, it only concerns water areas over which the coastal state has either sovereignty or sovereign rights with respect to the living resources. It would, in other words, not be applicable to the high seas lying in between.<sup>310</sup>

A general concluding remark to be made in this respect is that the different observer schemes to be found in the RFOs so far are not really of an international character, nor do they provide for direct and independent control by the organs of the RFOs themselves. The system retained is normally that national observers are placed on board vessels of the other Contracting Parties fishing in the convention or regulatory area, which remain under the direct control of their respective national state. Their reports are not directly sent to the competent organ within the RFO, but rather to their competent national administrations. The latter subsequently transmit these reports, or maybe only a number of them, to the RFO, which then contacts, as appropriate, the relevant Flag State with a request to take the necessary implementation measures. Such a system has of course many flaws. As noted by Francioni with respect to the CCAMLR system:

'On voit donc que ce système n'entraîne pas un grand sacrifice en termes de souveraineté pour les Etats membres. L'exécution des activités d'inspection et d'observation ainsi que la possibilité d'imposer des sanctions demeurent fermement sous le contrôle des Etats.'<sup>311</sup>

This has been clearly demonstrated by the early practice displayed within the framework of the CCAMLR system, where only very few violations were reported this way.<sup>312</sup>

Also the recent developments within the EC demonstrate that a supra-national system appears to be the next step in the development to an effective mechanism for enforcement.<sup>313</sup> Even though not stated in exactly the same terms, such a development also seems to be implied in a recent report of the EC Commission on the monitoring of the implementation of the common

<sup>309</sup> See for instance the legislation of the Cook Island, Territorial Sea and Exclusive Economic Zone Act 1977, Article 13 (3)(o), as available on Internet: <[www.ffa.int/cook.pdf](http://www.ffa.int/cook.pdf)>, and Fiji, Marine Space Act 1978, Article 14 (3)(n), as available on Internet: <[www.ffa.int/fiji.pdf](http://www.ffa.int/fiji.pdf)>.

<sup>310</sup> See Bergin, A., *supra* note 294, pp. 300-302. For all the elements listed under the chapter 'No Escape to the High Seas', this author relies on concrete commitments freely undertaken by particular third states.

<sup>311</sup> Francioni, F., 'La conservation et la gestion des ressources de l'Antarctique', 260 *Recueil des Cours* p. 239, 303 (1996). This point is also stressed by Parkes, G., 'Precautionary Fisheries Management: The CCAMLR Approach', 24 *Marine Policy* p. 83, 88 (2000).

<sup>312</sup> Rayfuse, R., *supra* note 86, pp. 590-592, analysing the period 1989-1997.

<sup>313</sup> About the slow, but steady increase of the powers of the Community Fisheries Inspectorate, see Berg, A., *Implementing and Enforcing European Fisheries Law*, The Hague, Kluwer Law International, pp. 72 and 98-101 (1999). By means of Resolution 500/2001 laying down detailed rules for the application of Council Regulation (EEC) No. 2847/93 on the monitoring of catches taken by Community fishing vessels in third country waters and on the high seas, *Official Journal* L 073, 15 March 2001, pp. 8-12, members states recently also became obliged to transmit detailed catch information of high seas fisheries directly to the Commission.

fisheries policy.<sup>314</sup> It is therefore refreshing to read in the MHLC founding document that observers shall be independent and impartial, and will have to be authorised by the Secretariat of the Commission.<sup>315</sup> Even though a full-fledged system has not yet been established by the SEAFO,<sup>316</sup> the principles contained in the agreement remain silent on this point and the interim arrangements rather point the other direction.<sup>317</sup>

Does this mean that patrol vessels and inspectors become superfluous? Most certainly not, but 100 percentage observer coverage has been labelled as 'the single most effective enforcement strategy' which will downgrade the frequency one has to rely on the significantly more expensive patrol vessels and inspectors.<sup>318</sup> And to make the circle round, a carefully designed system can moreover improve data gathering for scientific assessment.<sup>319</sup>

## RECOMMENDATION VI. REGIONAL REGISTERS

The idea to rely on regional registers as a method to ensure implementation of fisheries conservation and management measures, which finds its origins in the FAO Committee on Fisheries during the late 1970s,<sup>320</sup> was for the first time implemented on a regional basis as a major initiative of the FFA.<sup>321</sup> It became operational in the South Pacific region as a compliance mechanism, shifting the burden of compliance onto the Flag State,<sup>322</sup> on 1 September 1983.<sup>323</sup> A vessel wanting to obtain a licence from a FFA member needs to have good standing status on this list first.

One had to wait for about a decade or more before other RFOs followed suit. The ICCAT, which had adopted a resolution in 1994 urging Member States to maintain national registers of high seas fishing vessels in an effort to encourage the acceptance of the FAO

<sup>314</sup> See Report from the Commission, Report on the Monitoring of the Implementation of the Common Fisheries Policy: Synthesis of the Implementation of the Control System Applicable to the Common Fisheries Policy by Member States, 28 September 2001, COM(2001) 256 final. After having stated that a number of problems can be resolved on the national level, this report continues: 'However, not all problems will be solved in this way. If certain Member States would still not achieve a satisfactory level of control in the future, the current Community control framework is insufficiently compelling for the authorities failing to live up to Community standards. Indeed, the Community framework cannot force compliance with the common fisheries policy even where the Community itself is committed to international obligations. Furthermore, the cooperation and coordination between all authorities involved in fisheries monitoring, inspection and surveillance tasks will remain a heavy burden within the Community control system. These dilemmas obviously require to be addressed at Community level.' *Ibid.*, p. 24.

<sup>315</sup> MHLC, Article 28 (3). They shall moreover be trained and certified in accordance with uniform procedures to be approved by the Commission. *Ibid.*, Article 28 (6)(c).

<sup>316</sup> See *supra* notes 202-204 and accompanying text.

<sup>317</sup> SEAFO, Interim Arrangements, Section 2, *sub* 7, simply states that fishing vessels have to report their movements and catches to the competent authorities of the flag state 'and to the Secretariat if the Contracting Party so desires'.

<sup>318</sup> Wiseman, E. & Steinbock, R., *supra* note 303, p. 405.

<sup>319</sup> *Ibid.*

<sup>320</sup> Moore, G., *supra* note 304, p. 199.

<sup>321</sup> Aqorau, T. & Bergin, A., *supra* note 230, p. 23. Or as clearly stated by Lodge, M., *supra* note 228, p. 283: 'The Regional Register is basically an enforcement tool'. For a general analysis of this regional register, see Douman, D. & Terawasi, P., 'The South Pacific Regional Register of Foreign Fishery Vessels', 14 *Marine Policy* pp. 324-332 (1990).

<sup>322</sup> Aqorau, T., *supra* note 249, p. 47. See also Lodge, M., *supra* note 228, p. 283.

<sup>323</sup> Moore, G., *supra* note 304, p. 199.

1993 Compliance Agreement,<sup>324</sup> only endorsed a recommendation a couple of years later whereby members were required once a year to submit a list of all their vessels fishing for bigeye tuna in the convention or regulatory area.<sup>325</sup> This system became operational on 21 June 1999. Within the framework of the IOTC, a similar system was established<sup>326</sup> under the non-binding recommendation provision.<sup>327</sup> The list concerns vessels that have fished for tropical tuna in the IOTC convention or regulatory area the previous year.<sup>328</sup>

The system introduced by the NEAFC is of a different nature in that it forms part of the compulsory scheme of control and enforcement in respect of fishing vessels fishing in areas beyond the limits of national fisheries jurisdiction in the NEAFC convention or regulatory area.<sup>329</sup> This scheme entered into force on 1 July 1999. A second distinguishing factor, when comparing this system with the ICCAT<sup>330</sup> and IOTC<sup>331</sup> schemes, is that relevant information must be conveyed prior to the vessel's entry into the regulatory area and made available to the other members of the organisation.<sup>332</sup> The NAFO has a similar system in operation.<sup>333</sup>

The last operating RFO to have initiated action in this respect is the CCAMLR. The members are at present discussing improvements to the system.<sup>334</sup>

Even though the MHLC is not yet in force, the founding document of this RFO contains already very detailed provisions on the creation of a regional register. It establishes firstly a system whereby the Member States are required to maintain a record of all fishing vessels entitled to fly its flag and which are authorised to fish in the convention or regulatory area beyond areas of national jurisdiction.<sup>335</sup> But next to it, the Commission itself shall also maintain its own records, based on the information received from the Member States, which it shall circulate periodically to all members of the Commission.<sup>336</sup> The SEAFO Convention refers to this issue in an indirect manner.<sup>337</sup> Under the flag-state duties, the Member States are required to take measures such as establishing a national record and adopting provisions

<sup>324</sup> Resolution by ICCAT Regarding the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (94-8), as available on Internet: <www.iccat.es>. As stressed by Applebaum, B. & Donohue, A., 'The Role of Regional Fisheries Management Organizations', in *Developments in International Fisheries Law*, *supra* note 68, p.217, 245, ICCAT recommendations are binding on members that do not make use of the opting-out provision.

<sup>325</sup> Recommendation by ICCAT Concerning Registration and Exchange of Information on Bigeye Tuna Fishing Vessels (98-2), *sub* 1, as available on Internet: <www.iccat.es>.

<sup>326</sup> Resolution 98/04 concerning Registration and Exchange of Information on Vessels, Including Flag of Convenience Vessels, Fishing for Tropical Tunas in the IOTC Area of Competence, *sub* 1, as available on Internet: <www.seychelles.net/iotc/English/CommSC/ EIOTC3Res.htm>.

<sup>327</sup> IOTC, Article IX(8).

<sup>328</sup> Resolution 98/04 concerning Registration and Exchange of Information on Vessels, Including Flag of Convenience Vessels, Fishing for Tropical Tunas in the IOTC Area of Competence, *supra* note 326, *sub* 1.

<sup>329</sup> Recommendation on a Scheme of Control and Enforcement in Respect of Fishing Vessels Fishing in Areas Beyond the Limits of National Fisheries Jurisdiction in the Convention Area ('The Scheme'), adopted at the NAFO's annual meeting on 20 November 1998, Article 4(1), as available on Internet: <www.neafc.org>.

<sup>330</sup> See *supra* note 325 and accompanying text.

<sup>331</sup> See *supra* note 328 and accompanying text.

<sup>332</sup> Recommendation on a Scheme of Control and Enforcement in Respect of Fishing Vessels Fishing in Areas Beyond the Limits of National Fisheries Jurisdiction in the Convention Area ('The Scheme'), *supra* note 329, Article 4 (1-2).

<sup>333</sup> Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures* (NAFO/FC Doc. 00/1), *supra* note 299, pp. 17-18.

<sup>334</sup> See *supra* Part 3 (I)(D).

<sup>335</sup> MHLC, Article 24(4).

<sup>336</sup> *Ibid.*, Article 24(7).

<sup>337</sup> SEAFO, Article 6(3) is of a very general nature.

for sharing this information with the Commission on a regular basis.<sup>338</sup> The Interim Arrangements<sup>339</sup> provide that members, in accordance with the FAO 1993 Compliance Agreement, will notify the Secretariat of all vessels flying its flag that are authorised to fish in the SEAFO Convention area.<sup>340</sup>

This evolution marks a clear tendency away from a system where the information was submitted *ex post facto* to the RFO, to one where the submission of the information forms a *conditio sine qua non* for having access to the regulatory area. If in the past it could well be introduced as a non-binding instrument, today the regional registers have a tendency to become mandatory and the information contained in them is openly distributed between the Member States of a RFO. The fact that the FFA had this latter system applied right from its inception, and moreover did so well before the other RFOs here under consideration started to even raise the issue, can be explained by the fact that the FFA system does not really apply to the high seas, but only to the maritime areas under jurisdiction of the Member States.<sup>341</sup> It nevertheless laid the foundation for the evolution one witnesses today and where the emphasis, just like in the FFA system, is placed on the regional register as prior condition to access the regulatory area beyond areas under national jurisdiction this time. In this movement towards granting the RFO greater competence at the expense of the system provided by the FAO 1993 Compliance Agreement in which the flag state plays the central role, it is not surprising to see that the CCAMLR had to be mentioned last in the list of RFOs in operation.<sup>342</sup> Once more, the MHLC has to be praised for its proactive approach as witnessed by the detailed rules to be found in its founding document. Nevertheless, it seems to take a step back by placing the national register on the same footing as the one of the Commission.<sup>343</sup> Moreover, no mention is made of whether the registers concern vessels having fished, or rather those that are about to fish in the convention or regulatory area. Likewise, the fact that in the SEAFO founding document the substantive provisions concerning the keeping of records are found under the article dealing with flag-state duties<sup>344</sup> rather than under the one dealing with the powers of the Commission,<sup>345</sup> is significant. It is therefore recommended that the MHLC and the SEAFO adjust their system when these basic articles will be worked out in detail once these organisations become operative.

## RECOMMENDATION VII. VESSEL-MONITORING SYSTEM

Of all enforcement measures here discussed, VMS are probably the most recent to have been introduced. One had to wait until the 1995 UN Fish Stock Agreement in order to find a multilateral treaty of a universal character providing ample indications to support its use.<sup>346</sup>

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<sup>338</sup> *Ibid.*, Article 14(3)(c).

<sup>339</sup> See *supra* notes 202-204 and accompanying text.

<sup>340</sup> SEAFO, Interim Arrangements, Section 1, *sub* (b).

<sup>341</sup> See *supra* note 310 and accompanying text.

<sup>342</sup> The central feature characterising the way in which the CCAMLR enforces its conservation measures is that the latter is firmly based on flag-state jurisdiction. Kaye, S., *supra* note 71, pp. 389-397. See also *supra* note 311, and *infra* notes 399-401, and accompanying text.

<sup>343</sup> See *supra* notes 335-336 and accompanying text.

<sup>344</sup> See *supra* note 338 and accompanying text.

<sup>345</sup> See *supra* note 337 and accompanying text.

<sup>346</sup> Kuemlangan, B., *supra* note 305, p. 414.

But it has witnessed an exponential growth lately,<sup>347</sup> a tendency clearly sustained by the recent developments in most RFOs here under consideration.

Three groups will be distinguished in this respect. First of all there are those RFOs that have a system of VMS in operation. Secondly one can mention those that are actively working at developing such a system or are trying to make such a system operational. Finally, a last group will cover those RFOs that have as yet not become operational themselves, but whose founding documents, being of recent nature, have nevertheless already made reference to VMS.

#### A. Operational Systems of Vessel-monitoring System

If the FFA did not score that well with respect to inspection, boarding and observation,<sup>348</sup> it is in the area of VMS that this organisation has played a pioneering role for obvious geographical reasons.<sup>349</sup> The system became operational as of 1 April 1998.<sup>350</sup> When applying for a licence or permit to fish in one of the FFA member countries, the applicant will receive a separate application form for Registration on the VMS Register of Foreign Fishing Vessels, kept by the FFA.<sup>351</sup>

The EC can be mentioned next, for the Council adopted a resolution establishing a satellite-based VMS in 1997.<sup>352</sup> This system became obligatory for all Community fishing vessels operating on the high seas as of 30 June 1998,<sup>353</sup> and wherever they operate as of 1 January 2000.<sup>354</sup> There is no central EC fisheries monitoring centre, but instead the obligation to establish such centres is bestowed upon each Member State individually.<sup>355</sup> The information so communicated by the fishing vessels is transmitted via satellite not only to the Flag State, but simultaneously to the coastal Member State concerned as well.<sup>356</sup>

The next RFO here under discussion to establish a VMS system is the NEAFC. This system became operational on 1 January 2000.<sup>357</sup> Unlike the FFA system,<sup>358</sup> the satellite communications are directed towards a land-based fisheries monitoring centre located on the

<sup>347</sup> Smith, A., 'Vessel Monitoring Systems', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), *supra* note 46, p. 437, 439.

<sup>348</sup> See *supra* notes 304-309 and accompanying text.

<sup>349</sup> As stated by Aqorau, T., *supra* note 249, p. 38, the Pacific Island states, after the establishment of EEZs, gained sovereign rights over a maritime expanse that corresponds almost to the size of the African continent. Since they are all developing countries, it is easily understood that they tried to develop VMS at an early stage.

<sup>350</sup> Kuemlangan, B., *supra* note 305, p. 411.

<sup>351</sup> For more details, see Vessel Monitoring System: Guidelines for Installation and Registration of Automatic Location Communicators (Ver A1.3, 11 February 1999), as available on Internet: <[www.ffa.int/frame\\_index1.html](http://www.ffa.int/frame_index1.html)>.

<sup>352</sup> Council Regulation (EC) No. 686/97 of 14 April 1997 amending Regulation (EEC) No. 2847/93 establishing a control system applicable to the common fisheries policy, *Official Journal* No. L 102, 19 April 1997, pp. 1-3.

<sup>353</sup> *Ibid.*, Article 1 (1). At least for vessels of certain minimum dimensions.

<sup>354</sup> *Ibid.*, Article 1 (2).

<sup>355</sup> *Ibid.*, Article 1 (7).

<sup>356</sup> *Ibid.*, Article 1 (5).

<sup>357</sup> Recommendation on a Scheme of Control and Enforcement in Respect of Fishing Vessels Fishing in Areas Beyond the Limits of National Fisheries Jurisdiction in the Convention Area ('The Scheme'), *supra* note 329, Article 9 (1).

<sup>358</sup> See *supra* note 351 and accompanying text.



territory of the flag state,<sup>359</sup> or if the Contracting Party so desires, the information can be forwarded to the Secretary of the NEAFC.<sup>360</sup> Annex VI concerning VMS furthermore provides that part of the information so received by the fisheries monitoring centre, namely the position of the vessel upon entering into or exiting from the Regulatory Area and at least once every six hours when operating in the Regulatory Area, must in real time be communicated to the Secretary of the organisation.<sup>361</sup>

Next in line from a chronological point of view are the CCAMLR and the NAFO. Within the CCAMLR system, a fully operational VMS became in force as of 1 January 2001.<sup>362</sup> As was the case with respect to the NEAFC,<sup>363</sup> it is the task of the Flag State to monitor the position of its fishing vessels.<sup>364</sup> If contraventions are detected by means of the analysis of the VMS information by the Flag State, the latter has to inform the Secretariat about it once a year.<sup>365</sup> The NAFO system became operational on the same date.<sup>366</sup> The major difference, compared with the CCAMLR system, is that even though the land-based fisheries monitoring centres that collect the information are still located on the territory of the flag state,<sup>367</sup> the latter is required to transmit this information to the Executive Secretary as soon as possible, but not later than 24 hours after receipt of the information.<sup>368</sup> The Executive Secretary forthwith forwards this information to other Contracting Parties with an active inspection presence in the area.<sup>369</sup>

## B. Vessel-monitory System under Construction

Another RFO has already adopted a recommendation on VMS, but only in the form of a pilot-program. The ICCAT did adopt such a recommendation in 1995, which encouraged the Contracting Parties to set up a satellite tracking and catch reporting system under the responsibility of the Flag State.<sup>370</sup> In 1998 this organisation subsequently adopted a flag-state-based pilot program,<sup>371</sup> which each Contracting Party had to start implementing over a three-year period starting on 1 January 1999<sup>372</sup>. The system would subsequently be evaluated

<sup>359</sup> Recommendation on a Scheme of Control and Enforcement in Respect of Fishing Vessels Fishing in Areas Beyond the Limits of National Fisheries Jurisdiction in the Convention Area ('The Scheme'), *supra* note 329, Article 9 (1)(a).

<sup>360</sup> *Ibid.*, Article 10. It concerns quantities on board when entering the Regulatory Area (to be communicated between 12 and 6 hours before entering that zone), the weekly catches, the quantities on board when leaving the Regulatory Area (to be communicated between eight and six hours before exiting that zone), and the quantities transhipped while in the Regulatory Area.

<sup>361</sup> *Ibid.*, Annex VI(4).

<sup>362</sup> CCAMLR, Conservation Measure 148/XVII: Automated Satellite-Linked VMS, *sub* 2, as available on Internet: <[www.ccamlr.org/English/e\\_general\\_intro.htm](http://www.ccamlr.org/English/e_general_intro.htm)>. An exception is provided for ships fishing only for krill (*ibid.*, *sub* 3).

<sup>363</sup> See *supra* note 359 and accompanying text.

<sup>364</sup> CCAMLR, Conservation Measure 148/XVII: Automated Satellite-Linked VMS, *supra* note 362, *sub* 1.

<sup>365</sup> Namely before the start of the annual meeting. *Ibid.*, *sub* 7 (ii).

<sup>366</sup> Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures, *supra* note 299, p. 77.

<sup>367</sup> Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures: Supplement of FC Doc. 00/1, *supra* note 302, p. 18.

<sup>368</sup> *Ibid.*, p. 19.

<sup>369</sup> *Ibid.*

<sup>370</sup> Resolution by ICCAT on Vessel Monitoring (95-3), *sub* 1, as available on Internet: <[www.iccat.es](http://www.iccat.es)>.

<sup>371</sup> Recommendation by ICCAT Concerning a Vessel Monitoring System Pilot Program (97-12), *sub* 1, as available on Internet: <[www.iccat.es](http://www.iccat.es)>.

<sup>372</sup> *Ibid.*, *sub* 2.

in 2002.<sup>373</sup> But in 1999, only about one third of the members had complied with this recommendation.<sup>374</sup>

A second RFO to be mentioned here, namely the IOTC, has only recently started to look into the issue as part of a more general overhaul. By means of a resolution adopted in 1999, the organisation addressed one of its major shortcomings, namely the lack of any control and inspection scheme even though it was recognised that the control and effective implementation of the management measures constitute an essential element for their success.<sup>375</sup> In this resolution a strict time-frame was set forward to elaborate such a scheme, with final adoption planned for the Commission session in 2001.<sup>376</sup> The intersessional meeting that took place in Yaizu, Japan, dealt with this issue. The agenda of this meeting included monitoring as one of the elements to be discussed.<sup>377</sup> A paper submitted by Australia refers under this heading to satellite transmitter systems.<sup>378</sup> The EC proposed a much more detailed VMS scheme, to become operational not later than 1 January 2003,<sup>379</sup> based apparently on a strictly flag-state land-based monitoring centre.<sup>380</sup>

The Yaizu meeting itself reached consensus on the general principles a control and inspection scheme should contain. At the same time it was agreed that VMS is a valuable element to be included in such a scheme. Nevertheless, the concrete inclusion of VMS in such a scheme was deferred until after the details of such a system would have been agreed upon between the Contracting Parties.<sup>381</sup>

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<sup>373</sup> Ibid., sub 8.

<sup>374</sup> Records of Meetings, 16<sup>th</sup> Regular Meeting of the Commission, Rio de Janeiro, Brazil, 15-22 November 1999, *supra* note 280, sub Appendix 4 to Annex 8 (Summary of information from National Reports or reported to the Compliance Committee regarding the 1997 Recommendation Concerning a Vessel Monitoring System Pilot Program), indicating that only eight Contracting Parties complied. Or as concluded by the Canadian delegation: '[W]e need to address the status of adoption of vessel monitoring systems, an obligation that became mandatory on January 1 of this year and, I believe, has not been complied with by most Parties'.

<sup>375</sup> Resolution 99/03 on the Elaboration of a Control and Inspection Scheme for IOTC, as available on Internet: <[www.seychelles.net/iotc/English/CommSC/EIOTC4Res.htm#9903](http://www.seychelles.net/iotc/English/CommSC/EIOTC4Res.htm#9903)>.

<sup>376</sup> Ibid., sub 2.

<sup>377</sup> Intersessional Meeting on the Establishment of [f] a Control and Inspection Scheme, Yaizu, Japan, 27-29 March 2001 (IOTC/SS/01/01), sub 5 (c)(ii), as available on Internet: <[www.seychelles.net/iotc/English/CommSC/EIOTC4Res.htm#9903](http://www.seychelles.net/iotc/English/CommSC/EIOTC4Res.htm#9903)>.

<sup>378</sup> Australia, Principles Underpinning the Establishment and Operation of an Integrated IOTC Control and Inspection Scheme, *supra* note 300, sub 20.

<sup>379</sup> EC, EC Proposal for a Control and Inspection Scheme (IOTC/SS/01/03), sub 7, as available on Internet: <[www.seychelles.net/iotc/English/CommSC/InspContr.htm](http://www.seychelles.net/iotc/English/CommSC/InspContr.htm)>.

<sup>380</sup> Ibid., sub 7 (a)(i). This can also be inferred from the part on communication of vessel movement and catches. Ibid., sub 6. More generally, one could say that this proposal was very much inspired by Council Regulation (EC) No. 686/97, *supra* note 352, which introduced a VMS system in Europe.

<sup>381</sup> See Report of the Intersessional Meeting on an Integrated Control and Inspection Scheme, *supra* note 296, pp. 5-6 (para. 32), where it was stated: 'It was agreed that VMS are also a valuable element to be incorporated in later phases of the implementation of the Control and Inspection Scheme. Discussion on the specifics of implementation, such as a definition of the category of vessels to which it would apply and the procedures to exchange information, was deferred to a later stage. It was agreed that a "hailing" system could provide an interim solution where a State was not yet in a position to implement VMS monitoring. It was also agreed that this type of monitoring (hailing system) might be appropriate for small coastal craft'.

### C. RFOs under Construction

As far as the MHLC and the SEAFO are concerned, whose two founding documents have so far not yet entered into force, it is noteworthy to stress that both instruments specifically address the issue. In the context of the SEAFO only in a cursory way, it is true, as a duty of the Flag State,<sup>382</sup> but with respect to the MHLC considerable attention was devoted to the question. First of all, it is listed as a function of the Commission to establish such a system.<sup>383</sup> Secondly, a detailed paragraph is enclosed under the article on flag-state duties,<sup>384</sup> where it is already clearly stated that the information transmitted from the fishing vessels will be addressed directly to the Commission, and only if the Flag State so requires, also simultaneously to the Flag State. This system is to apply on the high seas, but any Contracting Party can bring the waters under its national jurisdiction under the system on a voluntary basis.<sup>385</sup> If this is not the case, all Contracting Parties accept to submit their vessels to the VMS requirements of other Member States when fishing in their national maritime zones.<sup>386</sup> To bring some order in these different forms of VMS (national v. high seas), the members of the Commission have a duty to cooperate to ensure compatibility.<sup>387</sup>

### D. Conclusions

What recommendations can be made in this respect? A clear shift is to be noted in the authority receiving the information sent by the fishing vessels. The following systems can be discerned:

- A system like that established by the CCAMLR, where the flag state plays the central role and where information to be conveyed to the organisation takes place only once a year and after having been filtered through the flag state;
- a system like that provided for under the NEAFC, where the flag state can opt for the possibility to convey the information directly to the organisation and where the latter automatically receives certain parts of information; and
- a system like the one practised under the NAFO, where the information gathered by the flag state is simultaneously transmitted to the organisation, which in turn transmits it to members having inspection vessels in the area.

A tendency can thus be ascertained where the exclusive competence of the flag state is little by little eroding in favour of the RFO. This shift has found its ultimate exposition so far in the MHLC founding document. Here, for the first time, the primacy of the Flag State is overturned, for the information is to be sent directly to the Commission. The Flag State can still obtain simultaneous information, but has to express its desire to do so.

The example of the FFA VMS is not really relevant in this respect, for it only applies inside the maritime zones of the member countries.<sup>388</sup> This is not the case with the EC, which only

<sup>382</sup> SEAFO, Article 14 (3)(h). Contracting parties agree to apply, as flag states, a VMS as it will be worked out by the Commission.

<sup>383</sup> MHLC, Article 10 (1)(i).

<sup>384</sup> *Ibid.*, Article 24 (8-10).

<sup>385</sup> *Ibid.*, Article 24 (8).

<sup>386</sup> *Ibid.*, Article 24 (9).

<sup>387</sup> *Ibid.*, Article 24 (10).

<sup>388</sup> See *supra* note 310 and accompanying text.

applied the system to European waters in a second phase. But given the special character of the EC,<sup>389</sup> the example set by this organisation can probably not readily serve as an example for RFOs. Moreover, as just stated, the EC system is not at the forefront of developments in this area, for the implementation of the scheme is still foremost, if not exclusively, flag-state oriented.

It is therefore hoped that the negotiations on the details of a future VMS, which are still to be held in the framework of the IOTC, might have a serious look at the rough structure incorporated in the MHLC founding document. Nevertheless, some *caveats* should be kept in mind in order not to elaborate a system *de lege ferenda*, but difficult to apply under contemporary international law. One could refer in this respect to the statement made by South Africa at the occasion of the latest regular meeting of the ICCAT, where this country complained about the increased illegal fishing activities in its waters by vessels which later use South African ports for bunkering or discharging their catches, and put on record:

'South Africa ... believes that it [i]s the responsibility of fishing vessels to prove where catches have been made. The easiest and most reliable way for this to be done is the implementation of VMS such as that envisaged in the 1997 ICCAT Recommendation on vessel monitoring. South Africa is therefore now considering options for making the carrying of a transmitting VMS a mandatory requirement for all high seas fishing vessels entering our ports.'<sup>390</sup>

Whether such an approach is in full conformity with present-day international law is however not that certain. This issue rather deserves careful attention by RFOs before endorsing such initiatives and requiring for instance foreign vessels without a fishing licence to install automatic location devices on board which have to be switched on when merely making use of the right of navigation through the waters of a coastal state to arrive at one of its ports.<sup>391</sup>

## RECOMMENDATION VIII. FINAL REMARKS

This study has confirmed that the inquiry into the most effective implementation of conservation and management measures established by RFOs is not to be answered by suggesting one or the other single method.<sup>392</sup> Instead it is rather a question of finding the right mix, adapted to the special circumstances surrounding a particular RFO. The special nature of the FFA, for instance, and its considerable contribution to the development of the ways and means by which cost-effective implementation can be assured,<sup>393</sup> has certainly been influenced not only by geographical factors,<sup>394</sup> but also by the specific nature of the resource itself. Fishing in the region for tuna, which would be restricted to the high seas water areas, would hardly be rewarding from an economic point of view.<sup>395</sup> These circumstances resulted

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<sup>389</sup> See *supra* note 76.

<sup>390</sup> Records of Meetings, 16<sup>th</sup> Regular Meeting of the Commission, Rio de Janeiro, Brazil, 15-22 November 1999, *supra* note 280, *sub* Appendix 5 to Annex 8 (Statement by South Africa to the Compliance Committee Regarding the Increased Use of Vessel Monitoring Systems).

<sup>391</sup> Molenaar, E. & Tsamenyi, M., 'Satellite-Based Vessel Monitoring Systems for Fisheries Management: International Legal Aspects', 15 *International Journal of Marine and Coastal Law* pp. 65, 98-101 and 108 (2000).

<sup>392</sup> Many indications in the literature are to be found testifying the correctness of this approach. See for instance Molenaar, E. & Tsamenyi, M., *supra* note 391, pp. 74 and 75; and Rayfuse, R., *supra* note 86, pp. 580 and 581.

<sup>393</sup> See in general Moore, G., *supra* note 304, pp. 197-204.

<sup>394</sup> See *supra* note 349 and accompanying text.

<sup>395</sup> Bergin, A., *supra* note 294, p. 300.

in the creation of a RFO that was self-centred<sup>396</sup> and at the forefront of developing new techniques in compliance control for foreign fishing operations, such as the creation of regional registers<sup>397</sup> or the introduction of compulsory VMS.<sup>398</sup> The special setting in which the CCAMLR was created, based as it is on the so-called 'state paradigm' surrounding the Antarctic continent,<sup>399</sup> made the creation of a regional implementation regime based on an independent control organ much more difficult.<sup>400</sup> Also the creation of a regional register needed much more time in such a setting.<sup>401</sup> A similar remark, but then based on different grounds, can be made with respect to the EC system of implementation.<sup>402</sup>

There is not one single method of implementation that would seem to fit all RFOs under consideration by this study. A system of 100 percentage observers might be the preferred method in the framework of the NAFO,<sup>403</sup> but would most certainly create insurmountable financial obstacles within the framework of other RFOs. On the other hand, a catch documentation scheme following the fishing resource from catch, through the point of landing, to its final destination might work well with respect to important resources in the CAMMLR area, but seems hardly a realistic approach for most multiple species RFOs. Coastal states have received quite extensive powers of enforcement in maritime zones over which they exercise sovereignty or functional jurisdiction with respect to fisheries, but even there many of them lack the effective means for its exercise.<sup>404</sup> To propose therefore that inspection at sea would be the *ultimum remedium* does not appear to be very realistic either in the framework of many RFOs. As remarked by one commentator, boarding on the high seas of foreign vessels on a regular basis, as provided by 1995 UN Fish Stocks Agreement, is something that few states besides the United States might have the resources or even the desire to ascertain.<sup>405</sup> Joint inspection might be a workable implementation mechanism in the framework of the NAFO, but when applied to highly migratory species where vessels move over long distances following the migratory patterns of the fish, this method probably becomes less attractive.<sup>406</sup>

This study has therefore, under the different headings, recommended particular directions that seem worthy of further consideration in order to try to resolve the basic dilemma that there are simply too many fishing vessels for too few fish. There simply seems no other alternative to

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<sup>396</sup> See *supra* note 229 and accompanying text.

<sup>397</sup> See *supra* note 323 and accompanying text.

<sup>398</sup> See *supra* note 349 and accompanying text.

<sup>399</sup> Francioni, F., *supra* note 311, p. 304.

<sup>400</sup> As indicated *supra* notes 311-312 and accompanying text.

<sup>401</sup> See *supra* note 334 and accompanying text.

<sup>402</sup> See *supra* note 313 and accompanying text.

<sup>403</sup> See *supra* note 303 and accompanying text.

<sup>404</sup> Burke, W., *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, Oxford, Clarendon Press, p. 303 (1996).

<sup>405</sup> Balton, D., 'Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks', 27 *Ocean Development & International Law* p. 125, 141 (1996).

<sup>406</sup> Nomura, I., 'Distant Water State Perspective', in *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Nordquist, M. & Moore, J.N., eds), *supra* note 46, p. 183, 193. During the latest intersessional meeting of the IOTC on an integrated control and inspection scheme, most Contracting Parties were of the opinion that 'at-sea inspection has not proven to be a cost effective tool, in particular for tuna resources'. See Report of the Intersessional Meeting on an Integrated Control and Inspection Scheme, *supra* note 296, p. 5 (para. 25).

stop the long list of fishing wars fought so far<sup>407</sup> or the illegal, unregulated and unreported fishing on the high seas,<sup>408</sup> than the establishment of democratic and cost-effective RFOs, possessing legitimate management bodies<sup>409</sup> which are bestowed with an effective implementation and dispute settlement mechanism.<sup>410</sup> The only remaining task, or course, is to try to convince the members of the international community that such development is to their own advantage.<sup>411</sup>

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<sup>407</sup> Dion, M., 'L'internationalisation: source des nouveaux conflits des pêches maritimes et du nouveau droit des pêches', 16 *Annuaire de Droit Maritime et Aero-Spatial* pp. 277, 277 (1998), starting his contribution with the following list: '« Guerre » de la morue en Islande. « Guerre » de la langouste au Brésil. « Guerre » des Malouines. « Guerre » du golfe de Gascogne. « Guerre » du flétan au Canada. « Guerre » de la légine aux Kerguelén'.

<sup>408</sup> See FAO Press Release 01/11: New International Plan of Action Targets Illegal, Unregulated and Unreported Fishing, 2 March 2001. In this scheme RFOs seem to play an important role.

<sup>409</sup> An important element here seems to involve the directly involved actors as much as possible in the decision process. See Høneland, G., *supra* note 295, pp. 12 and 17-18 and Nielsen, J. & Vedsmand, T., 'User Participation and Institutional Change in Fisheries Management: A Viable Alternative to the Failures of "Top-Down" Driven Control?', 42 *Ocean & Coastal Management* p. 19, 20 (1999). Also within the framework of the EC, the Commission has encouraged Member States to give organisations of fishers more responsibility in order to enhance the application of the quota rules. See Berg, A., *supra* note 313, p. 73. Finally, it could be mentioned that the decision to grant observer status to NGOs in 1988 has granted the CCAMLR a legitimacy which is generally lacking with respect to other comparable RFOs. See Kaye, S., *supra* note 71, p. 403.

<sup>410</sup> As stated by Joyner, C., *supra* note 68, p. 336, the absence of the latter element would 'encourage governments to interpret fishery regulations more broadly'.

<sup>411</sup> Whether this will be an easy task, is a question not readily answered. See United Nations, *Oceans and the Law of the Sea*, *supra* note 206, p. 51 (paragraph 284). The final evaluation of the author of a recent book on international fisheries management is rather gloomy in this respect: 'Progress, in the absence of monetary incentives for wider participation, is likely to be incremental at best'. See Kaye, S., *supra* note 71, p. 500.