

Recommended Best Practices for

Regional Fisheries Management Organizations: Technical Study No. 2

Practice of RFMOs Regarding
Non-members

Daniel Owen
Fenners Chambers



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Practice of RFMOs Regarding Non-members

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**Recommended Best Practices for Regional Fisheries
Management Organizations**

Technical Study No. 2

**Practice of RFMOs Regarding
Non-members**

**A report to support the
independent high-level panel to develop a model for
improved governance by RFMOs**

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About the author

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Note on abbreviations

This report uses many abbreviations. Most are explained in the course of the report. For the sake of clarity, some of the others are explained here: ‘**EC**’ means European Community; ‘**FAO**’ means the Food and Agriculture Organization of the United Nations; ‘**IUU**’ means illegal, unreported and unregulated; ‘**REIO**’ means regional economic integration organization; and ‘**RFMO**’ means regional fisheries management organization.

Introduction

The terms of reference (**ToR**) of this report are as follows:

1. Brief analysis of, and references to, decisions or resolutions of RFMOs relating to cooperating non-members. Note will be made when the decision or resolution in question makes express reference to any provision of the RFMO's establishing treaty that deals with admission of new members.
2. Whether any examples exist of positive measures applied to cooperating non-members (e.g. catch allocations).
3. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by RFMOs against non-members (whether cooperating non-members or non-cooperating non-members).
4. In addition to (3), a brief illustrative survey, with examples, of any measures taken by individual States as members of RFMOs in implementation of the measures described in (3). [This survey is likely to be limited to addressing the practice of just two RFMO members.]

For the purposes of ToR 1–3, the following 11 RFMOs have been addressed:

CCSBT	Commission for the Conservation of Southern Bluefin Tuna
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
WCPFC	Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Western and Central Pacific Fisheries Commission)
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
GFCM	General Fisheries Commission for the Mediterranean
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
SEAFO	South East Atlantic Fisheries Organisation
SIOFA MoP	Southern Indian Ocean Fisheries Agreement Meeting of the Parties

In addition to addressing ToR 1–3, the report also considers relevant provisions of each RFMO's underlying treaty. Regarding ToR 3, the term 'measures ... against non-members' has been interpreted as including, *inter alia*, measures that can disadvantage vessels flagged to non-members.

For the purposes of ToR 4, the **EC** and the **USA** have been considered. Because of time restrictions, consideration of the practice of the EC and the USA is restricted to their respective implementation of three measures adopted by the ICCAT.

2 Practice of RFMOs Regarding Non-Members

The report is structured as indicated in the table of contents above. Thus a comparison of practice across the 11 RFMOs is followed by a description of the practice of each RFMO in question. The comparison is based on the descriptions of the individual RFMOs. The report ends with consideration of the practice of the EC and the USA.

New practice is constantly being generated by RFMOs. In the light of that, the author adopted the following policy: (a) if the annual meeting of the RFMO in question took place before the end of 2006, and its report and/or decisions from that meeting were in the public domain on or before 26 January 2007, the report and/or decisions were taken into account; and (b) if any meeting of the RFMO in question or its subsidiary bodies took place on or after 1 January 2007, the results of that meeting were not taken into account. The final report was submitted in February 2007.

It should be added that, because of time restrictions, it was not possible systematically to look through annual reports of the RFMOs in question other than the most recent annual report available. That means that decisions reported exclusively in the annual reports, other than in the most recent report, will not have been noted.

Comparison of RFMO practice

A. Scope of this part

This part of the report is intended to provide a comparison between the 11 RFMOs in question, in terms of their approach to non-members. For that purpose, it draws on the practice described in the other parts of this report. Its purpose is to identify broad similarities and differences between the RFMOs, and it is therefore not intended to replace or render redundant the detail in the parts on individual RFMOs. This part of the report is also not intended to be an analysis of the extent to which RFMOs have met the standards imposed by the UN Fish Stocks Agreement regarding non-members.

B. States, REIOs and entities currently with cooperating status

The States, REIOs and entities currently with cooperating status with the RFMOs in question are as follows:

RFMO	States, REIOs or entities with cooperating status
CCSBT	EC, Philippines, South Africa [cooperating with Extended Commission]
IATTC	Belize, Canada, China, Cook Islands, EC, Honduras, Chinese Taipei
ICCAT	Guyana, Chinese Taipei
IOTC	Belize, Indonesia, Senegal, South Africa
WCPFC	Indonesia, USA
CCAMLR	Seychelles, Singapore [cooperating with CDS]
GFCM	NONE
NAFO	NONE
NEAFC	Belize, Canada, Japan, New Zealand
SEAFO	NONE
SIOFA MoP	NONE [but treaty not yet in force]

C. Scope of framework provisions on cooperation

Eight of the RFMOs have adopted framework provisions on cooperation. The title given to cooperating status, as well as the States, REIOs or entities on which such status can, in principle, be conferred is as follows:

RFMO	Cooperating status title	Primary criterion	Secondary criterion
CCSBT	<i>co-operating non-member</i> [of Extended Commission]	'non-member States and entities'	'whose fishing vessels harvest SBT [i.e. southern bluefin tuna] or through whose exclusive economic or fishery zone SBT migrates'
IATTC	<i>co-operating Non-Party or Co-operating Fishing Entity</i>	'non-parties and fishing entities'	'with vessels known to be fishing for species covered by the IATTC Convention'

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ICCAT	<i>cooperating non-Contracting Party, Entity or Fishing Entity</i>	‘non-Contracting Parties, Entities, or Fishing Entities’	‘known to fishing in the Convention Area for species under ICCAT competence’
IOTC	<i>co-operating non-Contracting Party</i>	‘non-Contracting Parties’	‘known to be fishing in the IOTC Area for species under IOTC competence’
WCPFC	<i>cooperating non-member</i>	‘non-members’	‘whose vessels fish [or ‘intend to fish’] in the Convention Area for species under the Commission’s competence’
CCAMLR	<i>non-Contracting Party cooperating with CCAMLR by participating in the Catch Documentation Scheme for Dissostichus spp.</i>	‘non-Contracting Parties’	‘which are known to be involved in the trade with <i>Dissostichus</i> spp.’
GFCM	<i>co-operating non-Contracting Party</i>	‘non-Contracting Parties’	‘known to be fishing in the GFCM Area for species under GFCM competence’
NEAFC	<i>co-operating non-Contracting Party</i>	‘non-Contracting Party’	[not stated]

Despite the variability between the RFMOs in the title given to cooperating status, for the purposes of this part of the report the generic term ‘cooperating non-member’ (‘CNM’) will be used to refer to non-members with cooperating status.

It can be seen that the terminology and the primary and secondary criteria vary between RFMOs. The NAFO, SEAFO and SIOFA MoP have no framework provisions on cooperation. However, the treaties underlying the SEAFO and SIOFA MoP both anticipate cooperation. The SEAFO Convention anticipates cooperation with: (a) ‘non-parties to this Convention whose vessels fish in the Convention Area’; and (b) ‘fishing entities which have fishing vessels in the Convention Area’. The SIOFA anticipates cooperation with ‘non-Contracting Parties to this Agreement whose vessels fish in the Area’.

The RFMOs’ approach to cooperation by fishing entities is variable. The approaches are summarized in the table below:

RFMO	References in framework provisions on cooperation to fishing entities
CCSBT	– refers only to ‘non-member States and entities’ – but fishing entities may become members of Extended Commission, and Chinese Taipei is a member of Extended Commission
IATTC	– refers, <i>inter alia</i> , to ‘fishing entities’, and Chinese Taipei is currently a Co-operating Fishing Entity – also Antigua Convention (not yet in force) provides for a fishing entity to express its firm commitment to abide by the treaty
ICCAT	refers, <i>inter alia</i> , to ‘Fishing Entities’, and Chinese Taipei is currently a Cooperating Fishing Entity
IOTC	– refers only to ‘non-Contracting Parties’ – but request made in Resolution 05/01 to Chinese Taipei to limit its catch to a certain level

WCPFC	– refers only to ‘non-members’ – but WCPFC Convention also provides for a fishing entity to agree to be bound by the treaty, and Chinese Taipei has agreed to be so bound and now participates as a member of the Commission
CCAMLR	refers only to ‘non-Contracting Parties’
GFCM	refers only to ‘non-Contracting Parties’
NAFO	no framework provisions in place
NEAFC	refers only to ‘non-Contracting Party’
SEAFO	– no framework provisions in place – but SEAFO Convention expressly anticipates cooperation by fishing entities
SIOFA MoP	– no framework provisions in place (treaty not yet in force) – but SIOFA provides for a fishing entity to express its firm commitment to be bound by the treaty

As can be seen, Chinese Taipei currently has cooperating status with the IATTC and ICCAT. In relation to the CCSBT, it is a member of the Extended Commission (therefore not needing cooperating status in addition). The WCPFC Convention and the SIOFA, as well as IATTC’s Antigua Convention, expressly provide for fishing entities, such as Chinese Taipei, to agree to be bound by the terms of the treaty. Chinese Taipei has agreed to be bound in that respect in the case of the WCPFC. As noted above, the SEAFO Convention expressly envisages cooperation by fishing entities. The IOTC has recently requested Chinese Taipei to limit its catch to a certain level.

D. Content of framework provisions on cooperation

There is much similarity between the framework provisions of the ICCAT, IOTC and GFCM. Common elements include, *inter alia*: (a) an invitation from the Commission to non-members conducting relevant fishing to apply for cooperating status; (b) an annual deadline for the application, whether in response to the invitation or otherwise; (c) a statement of the information and commitments to be provided by the applicant; (d) an advisory role for the RFMO’s compliance body and a statement of the factors to be taken into account in decision-making; and (e) failure to state any substantive benefit of cooperation. (See below regarding provisions on renewal and procedural benefits.)

The framework provisions of the CCSBT, IATTC, WCPFC and NEAFC are likewise based on a similar model but contain some differences that set them apart, as follows:

- The CCSBT only permits CNMs of the Extended Commission (rather than of the Commission itself). It appears that non-members may only apply on receipt of an invitation, rather than of their own initiative. The applicant is required to make a more extensive list of commitments; it could be implied that those, *inter alia*, are the commitments to be met if cooperating status is granted. The procedure involves an Exchange of Letters. There is express reference to the possibility of cooperation quota.
- The IATTC, like the CCSBT, requires the applicant to make a more extensive list of commitments. Again, it could be implied that those, *inter alia*, are the commitments to be met if cooperating status is granted.
- The WCPFC’s provisions list some extra factors to be taken into account in deciding whether cooperating status should be granted. There is a clear statement about the duties

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of CNMs. CNMs are invited to make financial contributions commensurate with the benefits they enjoy from participation in the fishery, implying access to cooperation quota. There is an express duty on the Commission to monitor activities of nationals and fishing vessels of CNMs.

- The NEAFC’s provisions do not refer to any invitation from the RFMO. They do refer to the possibility of cooperation quota, and establish duties relating to the use of any such quota. They also identify various duties in the revised Scheme of Control and Enforcement that are applicable to cooperating non-contracting parties.

The CCAMLR has a different approach to cooperation. Although it has a Cooperation Policy of a general nature, that policy establishes no procedure for granting cooperating status. Instead, currently, non-contracting parties may only obtain the title of ‘non-Contracting Party cooperating with CCAMLR by participating in the Catch Documentation Scheme for *Dissostichus* spp.’ (‘CDS’) (although that title does bring some scope for cooperation beyond the CDS). The framework provisions for CDS cooperation have similar elements to those on more general cooperation adopted by other RFMOs, albeit tailored to the CDS.

Renewal of cooperating status provides some interesting points for comparison. In all cases where it is mentioned, renewal is on a yearly basis. The framework provisions of the ICCAT, IOTC and GFCM refer to status being ‘renewed unless revoked ... due to non-compliance ...’, suggesting a presumption of renewal. Other RFMOs (CCSBT, IATTC, WCPFC, CCAMLR and NEAFC) use wording that suggests a less presumptive approach. The CCSBT requires a reaffirmation of the relevant commitments upon renewal.

The matter of procedural benefits also highlights some interesting differences between RFMOs. The IATTC’s framework provisions imply that participation at relevant meetings will be an obligation of cooperating status. The provisions of the CCSBT and WCPFC state that cooperating status brings a right to participate at relevant meetings. The NEAFC’s provisions state that such status will bring an invitation to participate at relevant meetings. In all those cases, the participation is as an observer. The ICCAT, IOTC, CCAMLR and GFCM, in their framework provisions, are all silent on procedural benefits (although their Rules of Procedure contain general rules on observer status – see below).

E. Measures addressed to States, REIOs or entities with cooperating status

There is great variability between RFMOs on the number of measures expressly addressed to States, REIOs or entities with cooperating status. The RFMOs with the highest number of such measures are (in descending order) the ICCAT, IOTC, IATTC and WCPFC. The ICCAT, IOTC and IATTC all have the custom of using the abbreviation ‘CPC’, which means (put briefly) members and CNMs together. Thus a provision, when applicable equally to members and CNMs, will frequently start ‘CPCs shall ...’. The WCPFC uses the term ‘CCM’ in a similar way.

The RFMOs with the lowest numbers of measures expressly addressed to States, REIOs or entities with cooperating status are the CCAMLR, GFCM and NEAFC (and perhaps the CCSBT, although no unified list of all CCSBT decisions is available). In the case of the GFCM, the low number can perhaps be attributed to the fact that the framework provisions on cooperation were only adopted in 2006. In the case of the CCAMLR, the low number can be attributed to the limited scope of cooperation (i.e. participation in the CDS, plus just a few additional areas).

Where the measure refers to ‘CPCs’ or ‘CCMs’, or to CNMs by means of some other wording, the obligation of the CNM is relatively clear. However, all of the RFMOs’ framework provisions on cooperation require the candidate to ‘confirm its commitment to respect the Commission’s conservation and management measures’ (or similar formulations). That implies that all the conservation and management measures of the RFMO in question are to be complied with by CNMs. However, where the measure in question refers only to members, it is not always clear whether, or how, it is to apply to CNMs.

One way of comparing RFMO practice is to select one relatively common category of measure, adopted by almost all RFMOs, and then consider how CNMs are dealt with by each RFMO. The example that will be chosen here is the category of measure providing for so-called positive lists of vessels. The analysis will consider whether such a list may include vessels flagged to CNMs, or just vessels flagged to members. That is relevant because vessels not on such lists are treated less favourably than those on the lists. The following table sets out whether certain positive lists may include vessels flagged to CNMs:

CCSBT	Record of fishing vessels authorized to fish for SBT: may include vessels flagged to ‘[e]ach Member of the Extended Commission . . . , and Co-operating Non-member’
IATTC	Regional Vessel Register: may include vessels flagged to ‘[e]ach Party’ and ‘non-member governments with vessels fishing in the EPO under their jurisdiction’ [cf. LSTLFV [i.e. large-scale tuna longline fishing vessel] List , which may include vessels flagged to ‘Parties, cooperating non-Parties, entities, fishing entities or regional economic integration organizations’]
ICCAT	LSFV [i.e. large scale fishing vessel] record: may include vessels flagged to ‘[e]ach Contracting Party, Cooperating non-Contracting Party, Entity or Fishing Entity’
IOTC	Record of fishing vessels: may include vessels flagged to ‘[e]ach Contracting Party, and Non-Contracting Party co-operating with IOTC’
WCPFC	Record of Fishing Vessels: may include vessels flagged to members, but not entirely clear whether it may include vessels flagged to CNMs because measure states: ‘The obligations and responsibilities set forth in these provisions for members shall apply equally to any cooperating non-member designated by the Commission’
CCAMLR	list of licensed vessels: may include vessels flagged to ‘each Contracting Party’
GFCM	Record of fishing vessels: may include vessels flagged to ‘[e]ach Contracting Party’
NAFO	[no framework provisions on cooperation in place]
SEAFO	[no framework provisions on cooperation in place]
SIOFA MoP	[no framework provisions on cooperation in place]

Thus the lists of the CCSBT, ICCAT and IOTC expressly provide for the inclusion of vessels flagged to CNMs. The IATTC’s Regional Vessel Register applies to ‘non-member governments with vessels fishing in the Eastern Pacific Ocean (EPO) under their jurisdiction’, rather than to CNMs specifically, whereas the IATTC’s LSTLFV list applies to, *inter alia*, CNMs. It is not entirely clear whether the WCPFC’s list may include vessels of CNMs, because of the way the measure is worded. The GFCM’s list impliedly does not include vessels of CNMs. The same applies in the case of the CCAMLR, although that may be attributable to the limited scope of formal cooperation under CCAMLR.

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Even where a RFMO has not yet adopted any framework provisions on cooperation, it is may nonetheless be possible to identify scope for informal cooperation by a non-member (in addition to that non-member simply opting to follow duties applied to members). For example, such scope exists regarding several measures adopted by the NAFO and SEAFO. However, in the absence of a formal framework for cooperation, such cooperation may not be attractive to the non-member States, REIOs or entities in question (unless it serves to avoid the imposition of sanctions).

F. Other provisions relevant to cooperation

The Rules of Procedure and the Financial Regulations of RFMOs commonly contain provisions relevant to cooperation. Regarding Rules of Procedure, rules on observer status are particularly relevant, especially where the framework provisions on cooperation are silent about the procedural rights of States, REIOs and entities with cooperating status, as is the case with the ICCAT, IOTC, CCAMLR and GFCM (see section D above). In all cases, except in respect of the Extended Commission of the CCSBT, the Rules of Procedure of the RFMOs in question make no reference to cooperating status.

The ICCAT's Rules of Procedure state that the Commission may invite 'any Government which is a Member of the United Nations or of any Specialized Agency of the United Nations and which is not a member of the Commission, to send observers to its meetings'. That provision does not accommodate Chinese Taipei. However, another ICCAT measure requires the Executive Secretary to invite, *inter alia*, 'those non-contracting parties, entities or fishing entities identified as harvesting tunas or tuna-like species in the Convention Area', which does cover Chinese Taipei. Under the CCAMLR's Rules of Procedure, there is provision to invite any State to be an observer but there is no provision to invite Chinese Taipei as an observer.

The Rules of Procedure of the IOTC and GFCM are similar regarding the potential categories of observers. In short, there is provision for any State to be invited to attend as an observer so long as it is a member or associate member of the FAO or a member of the UN or a member of any of the UN's specialized agencies or the International Atomic Energy Agency. However, the rules do not accommodate Chinese Taipei, which does not fall into any of those categories. The report of IOTC 10 shows that, in practice, 'the Commission admitted ... invited experts from Taiwan, Province of China' (the contact details for such delegates being listed separately from those of observers).

In cases where the RFMO's framework provisions on cooperation are not silent on observer status, it is potentially important that those provisions are compatible with the Rules of Procedure. An example of a potential incompatibility, depending on how the term 'nationals' is interpreted, is provided by the IATTC: its Rules of Procedure provide for invitations for observer status to be sent to '[a]ll non-member states ... whose *nationals* participate in the fisheries covered by this Convention' whereas Co-operating Non-Parties or Co-operating Fishing Entities are those 'with *vessels* known to be fishing for species covered by the IATTC Convention' (emphasis added).

In almost all cases, the Financial Regulations and/or the treaty establishing the RFMO in question provides for voluntary contributions. The WCPFC's framework provisions on cooperation encourages contributions from those with cooperating status. Furthermore, the report of IOTC 10 notes that: 'The Commission strongly encouraged Cooperating non-Contracting Parties to contribute financially to the Commission ...'.

G. Positive measures applied to cooperating non-members

Most framework provisions on cooperation do not refer to any substantive benefits for the cooperating State, REIO or entity. That is the case with the framework provisions of the IATTC, ICCAT, IOTC, CCAMLR and GFCM. In contrast, the framework provisions of the CCSBT and NEAFC expressly foresee the possibility of cooperation quota. The WCPFC's framework provisions imply participation in the fishery.

In some cases, the treaty establishing the RFMO refers to benefits from cooperation. Thus both the WCPFC Convention and the SEAFO Convention state that cooperating non-parties 'shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with ... conservation and management measures in respect of the relevant stocks'. The WCPFC Convention adds that the benefits must also be commensurate with the cooperating non-parties' 'record of compliance' with the conservation and management measures.

In practice, the CCSBT, IATTC, ICCAT, IOTC, WCPFC and NEAFC have established quota, or at least imply fishing opportunities, for one or more cooperating States, REIOs or entities. In three of those cases (IATTC, ICCAT, IOTC), the framework provisions on cooperation are, in contrast, silent on substantive benefits. The CCSBT is notable in that it also provides a relatively large catch allocation to Indonesia, which merely has observer status rather than CNM status.

Benefits need not only arise in the form of fishing opportunities. CNMs may be given some advantages over other non-members in the application of measures generating sanctions. That is the case with certain framework provisions on trade restrictive measures (IATTC, ICCAT, IOTC) and on the establishment of IUU vessel lists (IOTC, GFCM). In both those cases, CNMs enjoy the same advantages as members. Advantages for CNMs may also be created by measures establishing prohibitions (e.g. see the measures established by the ICCAT and NEAFC mentioned below).

Regarding the CCAMLR, trade benefits may well arise from participating in the CDS, but formal cooperation status is not required for that. Formal cooperation status may also be useful for: (a) accessing funding from the CDS Fund; and (b) getting included in the list of 'States that are fully implementing the CDS' (and hence being more likely to receive landings from contracting party vessels). More generally, benefits may arise in the form of technical cooperation pursuant to the CCAMLR Cooperation Enhancement Program.

It is very hard to make judgments from the above, and from the parts of the report on individual RFMOs, about whether fishing opportunities are starting to arise as an incentive for cooperation. That is partly because the examples that have been used above are in most cases just a snapshot from the last year or so of practice by RFMOs. In addition, a variety of other factors may complicate the picture.

What can be said is that the use of fishing opportunities is far more prevalent in the tuna RFMOs than in the non-tuna RFMOs. The NEAFC is the only non-tuna RFMO to have introduced catch quota for CNMs, and even there the quota is currently limited to 123 tonnes of redfish.

It is also important to point out that for some States, REIOs or fishing entities, the benefit of cooperating status may potentially arise less from an allocation of fishing opportunities and more from an opportunity to participate elsewhere in the supply chain (e.g. as a flag State to vessels

involved in transshipment or resupply, or as a State exporting or re-exporting fish).

For example, a measure adopted by the ICCAT requires its contracting parties to ‘ensure that fishing vessels and mother vessels flying their flag only transfer or receive at-sea transshipment of ICCAT species from Contracting Parties and Cooperating ... Parties, Entities, or Fishing Entities ...’. A similar measure has been adopted by the NEAFC. Furthermore, so-called positive lists of vessels, if those lists may include vessels flagged to CNMs, may create similar effects. In the face of such measures, a non-contracting party flag State with a fleet of relevant carrier vessels may, in principle, benefit from obtaining cooperating status.

H. Measures applied by RFMOs against non-members (whether cooperating non-members or non-cooperating non-members)

The CCSBT, IATTC, ICCAT and IOTC have each adopted framework provisions enabling trade restrictive measures against individual States. Only those of the CCSBT apply exclusively to non-members. In practice, the only RFMO ever to have adopted trade restrictive measures against an individual State is the ICCAT. That RFMO currently has import bans in place against two States, namely Bolivia and Georgia. Neither of those is a member of ICCAT. It should be added that a CCAMLR instrument also enables trade restrictive measures against individual States, but in respect of toothfish specifically. To date, the CCAMLR has not adopted any such measures.

All the RFMOs, except the CCSBT and SIOFA MoP, have also adopted framework provisions on the establishment of an IUU vessel list. In all cases, the provisions are similar in structure. The list proceeds through one, two or three precursors to a confirmed list. At that point, members (and sometimes CNMs) are required to impose a variety of sanctions against the listed vessels. However, there is variation in practice between RFMOs at almost every stage of the process.

For example, at one end of the spectrum, there is variation regarding the role of CNMs in developing the IUU list and in taking actions against the listed vessels. In the case of the IATTC, ICCAT, IOTC, WCPFC and GFCM, CNMs have such roles. In the case of the CCAMLR and NEAFC, they do not, although a CCAMLR Resolution aims at getting non-contracting parties to cooperate in taking sanctions. (The NAFO and SEAFO do not provide a role for CNMs either, but those RFMOs do not have framework provisions on cooperation.)

There is also variation in whether or not the vessels of CNMs can be included on the IUU list. In the case of the IATTC, ICCAT (by means of some circuitous wording), WCPFC, CCAMLR, NAFO and NEAFC they can be included. In the case of the IOTC and GFCM, they cannot be included (at least for the time being).

At the other end of the spectrum, there is subtle variation in the types of activities that can lead to a vessel being placed on the precursor IUU list or in the types of action to be taken by members (and by CNMs, depending on the RFMO) against listed vessels. For example, one of the activities that can lead to inclusion on the precursor list is (broadly speaking) interacting with vessels already on the IUU list. The precise type of interaction referred to varies between RFMOs. Thus the WCPFC, CCAMLR and SEAFO refer to transshipment, joint fishing operations, support and resupply with such vessels. The IATTC and GFCM refer to just transshipment. The ICCAT and IOTC refer to transshipment and joint operations such as resupply or refuelling.

One particular innovation, so far adopted only by the NEAFC and NAFO, is for vessels added to or deleted from the IUU list of one RFMO to be added to or deleted from the IUU list of the other RFMO. In the case of the NEAFC and NAFO, the NAFO measures provide for that to occur ‘unless any Contracting Party objects [on specified grounds]’, whereas the NEAFC measures are silent about the effect of any party objecting.

As well as framework provisions on trade restrictive measures and on the establishment of IUU lists, the RFMOs have adopted a wide range of other measures that could affect non-contracting parties by affecting the operation of their vessels. These include measures relating to, *inter alia*, port inspections, regulation of transshipment, regulation of chartering, regulation of nationals and establishment of so-called positive lists (whether of vessels or, on one occasion, farming facilities). To date, only one of the RFMOs (CCAMLR) has fully implemented a catch documentation scheme. However, the rudiments of a catch documentation scheme have recently been adopted by the CCSBT, and a scheme has been proposed by some members of the WCPFC.

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[Unless otherwise stated, all the documents referred to in this part of the report can be found on the CCSBT website. The CCSBT website does not contain a unified list of decisions adopted to date. Instead, decisions are scattered around the website (e.g. in a list of *CCSBT Operational Resolutions and other Important Documents*) and in the reports of CCSBT meetings. Regarding decisions in the reports of CCSBT meetings, only those in the report of CCSBT 13 will be considered here.]

Full name of RFMO	Commission for the Conservation of Southern Bluefin Tuna
Most recent meeting of RFMO	CCSBT 13 – October 2006 [report, including decisions, available]
Treaty establishing RFMO	Convention for the Conservation of Southern Bluefin Tuna
Year of adoption of treaty	1993
Year of entry into force of treaty	1994

A. Provisions of treaty relating to non-contracting parties

The provisions of the CCSBT Convention referring expressly to non-contracting parties (other than Articles 17 and 18 on signature, ratification, acceptance, approval and accession) are Article 15 (see below) and the following:

Article	Text of relevant provision (emphasis added)
Article 5	4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of <i>any State or entity not party to this Convention</i> .
Article 14	1. The Commission may invite <i>any State or entity not party to this Convention</i> , whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, to send observers to meetings of the Commission and of the Scientific Committee.

Article 15, with a focus on non-contracting parties, reads as follows (emphasis added):

1. The Parties agree to invite the attention of *any State or entity not party to this Convention* to any matter relating to the fishing activities of its nationals, residents or vessels which could affect the attainment of the objective of this Convention.
2. Each Party shall encourage its nationals not to associate with the southern bluefin tuna fishery of *any State or entity not party to this Convention*, where such association could affect adversely the attainment of the objective of this Convention.
3. Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention or measures adopted pursuant to it.

4. The Parties shall cooperate in taking appropriate action, consistent with international law and their respective domestic laws, to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of *any State or entity not party to this Convention* where such activity could affect adversely the attainment of the objective of this Convention.

One provision, Article 13, hints at the concept of cooperation with non-contracting parties by stating that: ‘With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable’. Indeed, Article 13 is the stated legal basis for a 2003 Resolution regarding cooperation (see further section B below). Provisions of the CCSBT Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article	Text of relevant provision
Article 5	<p>1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.</p> <p>2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.</p>
Article 8	<p>1. The Commission shall collect and accumulate information described below: (a) scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species; ...</p> <p>2. The Commission shall consider matters described below: ... (b) regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna; ... (f) other activities necessary to carry out the provisions of this Convention.</p> <p>3. For the conservation, management and optimum utilisation of southern bluefin tuna: (a) the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures ...; and (b) the Commission may, if necessary, decide upon other additional measures.</p> <p>4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider: ... (b) the need for orderly and sustainable development of southern bluefin tuna fisheries; (c) the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates; (d) the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development; (e) the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna; (f) any other factors which the Commission deems appropriate.</p> <p>5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.</p> <p>9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.</p>
Article 10	<p>3. The Secretariat functions shall be prescribed by the Commission, ...</p>

B. Brief analysis of, and references to, decisions or resolutions of the CCSBT relating to cooperating non-members

Principal framework provisions

The **EC**, the **Philippines** and **South Africa** currently enjoy cooperating status under the CCSBT Convention.¹ Technically, they are all ‘co-operating non-members of the Extended Commission’ (**CNMs**). The basis for that status is set out below. In addition, it should be noted that **Indonesia** is an observer at meetings of the Commission and the Extended Commission.

The CCSBT Convention establishes the Commission for the Conservation of Southern Bluefin Tuna. That Commission comprises the parties to the CCSBT Convention, which are currently Australia, Japan, Korea and New Zealand. Southern bluefin tuna will be abbreviated in this report to **‘SBT’**.

In order to accommodate the fishing entity Chinese Taipei, an Extended Commission (**‘ExComm’**) was created in 2001.² The Resolution establishing the ExComm (**‘the 2001 Resolution’**) states that the body ‘shall be comprised of the Parties to the Convention and any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, that is admitted to membership by the Extended Commission pursuant to this Resolution’.³ The Resolution also specifies that:⁴

The Extended Commission ... shall perform the same tasks as the Commission ... including, but not limited to, deciding upon a total allowable catch and its allocation among the Members. All Members shall have equal voting rights. The provisions of the [CCSBT] Convention relating to the Commission ... [Articles 6 to 8, except for 6(9) and (10)] ... shall apply *mutatis mutandis* with regard to the Extended Commission ...

Under paragraph 4 of the 2001 Resolution, decisions of the ExComm reported to the Commission ‘shall become decisions of the Commission at the end of the session of the meeting to which they were reported, unless the Commission decides to the contrary’.⁵ In other words, in practice, the main decision-making body under the CCSBT Convention has now become the ExComm, although the Commission itself still has a power to override the ExComm’s decisions (and to make decisions of its own).

At its outset, the ExComm comprised only the parties to the CCSBT Convention. Chinese Taipei then became a member of the ExComm in 2002. For that purpose, Chinese Taipei was required to ‘give the Commission its firm commitment to respect the terms of the Convention and comply with such decisions of the Extended Commission as become decisions of the Commission pursuant to paragraph 4’.⁶ A quota of SBT for fishing entity members of the ExComm is expressly foreseen by the 2001 Resolution.⁷ Chinese Taipei, because of its status as an actual member of the ExComm, will not be considered further here.

¹ CCSBT 13, report, paragraphs 82–94 and attachments 5 and 6–1.

² Resolution to establish an Extended Commission and an Extended Scientific Committee (adopted at CCSBT 7 in 2001 and revised at CCSBT 10 in 2003). The Extended Scientific Committee will not be considered further in this report.

³ Paragraph 1.

⁴ Paragraph 2.

⁵ Paragraph 4.

⁶ Paragraph 6.

⁷ Paragraph 7.

In 2003, the ExComm adopted a Resolution in order to establish the status of ‘co-operating non-member’ of the ExComm (**‘the 2003 Resolution’**).⁸ The 2003 Resolution is based on Article 13 of the CCSBT Convention (see section A above).⁹ It starts by stating that: ‘The Extended Commission hereby establishes the status of ‘co-operating non-member’ of the Extended Commission ...’.¹⁰

The 2003 Resolution requires the Executive Secretary of the ExComm to contact annually ‘all non-member States and entities whose fishing vessels harvest SBT or through whose exclusive economic or fishery zone SBT migrates’ to invite them ‘to co-operate with the Commission by acceding to the Convention or, as the case requires, by becoming a member of the Extended Commission or applying to the Extended Commission for the status of a co-operating non-member’.¹¹

It is noteworthy that the 2003 Resolution refers to ‘non-member *States* and entities’ (emphasis added). No mention is made of REIOs (e.g. the EC). However, the EC does have CNM status so presumably the wording of the Resolution has not proved to be a barrier in that respect. It also appears that the term ‘co-operating non-member’, because of the reference in the 2003 Resolution to ‘States and entities’, is intended to embrace not only States (and REIOs), but also ‘entities’.

The 2003 Resolution sets out the procedure to be followed, and commitments to be provided, by any State or entity that receives the invitation from the Executive Secretary and then applies for cooperating status.¹² The applicant must ‘give a formal written statement to the Extended Commission of its commitment to’:¹³

-
- (a) carry out the objective of the Convention;

 - (b) abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention;

 - (c) take appropriate action to ensure that its fishing activities do not diminish the effectiveness of conservation and management measures and all other decisions adopted in accordance with the Convention;

 - (d) transmit to the Extended Commission the review of its SBT fisheries and all other data that the members of the Extended Commission are required to submit to the Extended Commission;

 - (e) facilitate scientific research and studies of SBT;

 - (f) ensure that SBT statistical documents are completed in accordance with requirements of the Commission’s Trade Information Scheme; and

 - (g) negotiate with the members of the Extended Commission to develop any other criteria for its admission in the capacity of a Cooperating Non-Member specific to its situation.

The actual admittance of a State or entity to the capacity of CNM requires an Exchange of Letters between the applicant and the ExComm. The basis of that Exchange are to be the commitments

⁸ Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Commission (adopted at CCSBT 10 in 2003).

⁹ Preamble, 3rd recital.

¹⁰ Paragraph 1.

¹¹ Paragraph 2.

¹² Paragraphs 2 and 3. Note that a time-limit established by the 2003 Resolution was waived in the case of the EC (see CCSBT 13, report, paragraphs 91–93).

¹³ Paragraph 4.

‘(a)’ to ‘(f)’ in the table above ‘and any specific criteria determined by the Extended Commission in negotiation with the applicant in accordance with [commitment ‘(g)’ in the table above].’¹⁴

Regarding benefits of CNM status, the 2003 Resolution expressly foresees the possibility of cooperation quota. Thus it states that: ‘In deciding upon a total allowable catch and its allocation the Extended Commission may negotiate catch limits for Cooperating Non-Members’. CNMs are to ‘abide by any negotiated limit’.¹⁵ (See further section C below.)

The Resolution also sets out the procedural rights of CNMs at ExComm meetings. The term ‘observer’ is not used. Instead, it is stated that a CNM ‘will have the right to participate actively in [ExComm] meetings ... including, but not limited to, the right to make proposals and the right to speak, but not to vote’.¹⁶ The Resolution revises the ExComm’s Rules of Procedure accordingly.¹⁷

The ExComm, at each annual meeting, is to decide whether a given CNM may retain its status.¹⁸ The CNM’s performance against its commitments set out in its Exchange of Letters will be evaluated by the ExComm.¹⁹ If successful, the CNM will be required to reaffirm the commitments contained in the Exchange of Letters.²⁰ If the ExComm determines that a given CNM has not fulfilled its commitments, it ‘may proceed in accordance with the 2000 Action Plan, or take other appropriate steps’ (see further section D below).

Measures addressed to CNMs

A **2004 Resolution**, on amendment of the Resolution on ‘Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna’ adopted at the CCSBT¹⁰ in 2003, starts by requiring ‘[t]he Contracting Parties, Member of the Extended Commission and Cooperating Non-Members’ to take general actions to prevent, deter and eliminate IUU fishing.²¹ The Resolution then establishes a CCSBT Record of fishing vessels authorized to fish for SBT.²² That record may include certain vessels flagged to ExComm members and to CNMs,²³ to which various duties in turn apply. (See further sections C and D below.)

The **CCSBT Scientific Observer Program Standards** state that: ‘The CCSBT Scientific Observer Program will cover the fishing activity of CCSBT members *and cooperating non-members* wherever southern bluefin tuna are targeted or are a significant bycatch’ (emphasis added).²⁴ The report of CCSBT 13 notes that the ExComm adopted **three (preliminary) Resolutions on compliance, regarding a catch documentation scheme, a vessel monitoring system and regulation of transshipments**.²⁵ All of those resolutions apply to both members and CNMs.

¹⁴ Paragraph 6.

¹⁵ Paragraph 5.

¹⁶ Paragraph 7.

¹⁷ Paragraph 11.

¹⁸ Paragraph 8.

¹⁹ Paragraph 8.

²⁰ Paragraph 6.

²¹ Paragraph 1.

²² Paragraph 2.

²³ Paragraph 3.

²⁴ Paragraph 4.

²⁵ Paragraph 37. See also Attachments 9, 10 and 11.

The report of CCSBT 13 also contains the result of some **decisions of the ExComm related to, *inter alia*, CNMs**. Of those, the decisions on cooperation quota are mentioned in section C below. Another decision in the report states that (emphasis added):²⁶

The Extended Commission further agreed, in order to improve transparency of and confidence in management measures, that all Members *and Cooperating Non-Members* shall provide to the CCSBT Secretariat in a timely manner information relating to:

- a) the yearly quota and catch allocation arrangements for this fishery either by company, quota holder or vessel; and
- b) the final catch against quota by company, quota holder or vessel at the completion of a vessel's fishing period or fishing year.

In the case where Members *and Cooperating Non-Members* manage through an 'Olympic' system members shall only be required to report details in (b).

Other provisions relevant to cooperation

First, as noted above, the 2003 Resolution requires an applicant for cooperating status to 'abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention'. Thus, in principle, all of the **CCSBT's conservation and management measures and other decisions and resolutions** are to be complied with by CNMs. In practice, CNMs are mentioned expressly in some CCSBT measures (see 'Measures addressed to CNMs' above).

In remaining cases, where express reference is not made to CNMs, it is sometimes less clear how the measure is to be complied with by CNMs. For example, a document entitled *CCSBT Southern Bluefin Tuna Statistical Document Program* states that: 'For importation into the territory of a Member, all southern bluefin tuna shall be accompanied by a CCSBT Southern Bluefin Tuna Statistical Document. There is no waiver of this requirement'.²⁷

It is unclear whether importing CNMs are also bound by that obligation. The Executive Secretary is to 'request non-Members which are major importing countries/fishing entities of southern bluefin tuna to cooperate with implementation of the Program and to provide to the Commission data obtained from such implementation'.²⁸ But that is not necessarily equivalent to CNMs being bound by the obligation referred to in the preceding paragraph.

Secondly, the **Commission's Rules of Procedure** contain provisions that are potentially applicable to CNMs. Rule 3, reflecting Article 14(1) of the CCSBT Convention (see section A above), provides that the Executive Secretary may, with the approval of all the members, invite, *inter alia*, 'any State or entity not party to the Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates'.²⁹ That wording is broader than that used in the 2003 Resolution for defining prospective CNMs, because it refers to nationals and residents rather than just vessels (see above). Although it makes no distinction between CNMs and other non-members, the scope of Rule 3 is clearly broad enough to include CNMs. However, the

²⁶ Paragraphs 39 and 40.

²⁷ Paragraph 1.

²⁸ Paragraph 5.6.

²⁹ Rule 3(1)(a).

Commission ‘may decide to restrict the proceedings of any meeting to Members’.³⁰

The **ExComm’s Rules of Procedure** apply Rule 3 of the Commission’s Rules of Procedure *mutatis mutandis* to the ExComm.³¹ The procedural rights of CNMs at ExComm meetings have already been mentioned above.

Thirdly, the **Commission’s Financial Regulations** state that: ‘Voluntary contributions offered by non-Members may be accepted, subject to agreement by the Commission that the purposes of the contribution are consistent with the policies, aims and activities of the Commission’.³² That provision would presumably be relevant if a CNM were to wish to make a donation to the running costs of fisheries management by the CCSBT. However, the 2003 Resolution is silent on whether or not CNMs should make any financial contribution to the CCSBT or otherwise.

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, the 2003 Resolution expressly foresees the possibility of cooperation quota. Thus it states that: ‘In deciding upon a total allowable catch and its allocation the Extended Commission may negotiate catch limits for Cooperating Non-Members’. CNMs are to ‘abide by any negotiated limit’.³³

The most recent decisions of the ExComm regarding quota are set out in the report of CCSBT 13. The report states that ‘[t]he Chair requested each delegation to express its initial views on total allowable catch and allocation’.³⁴ The report notes the responses of the four members of the ExComm and proceeds to the responses of the Philippines and the EC (two of the three CNMs).

The Philippines ‘noted that it only had a 50t allocation and would be sorry if that was reduced’.³⁵ The EC noted that ‘it was not targeting SBT ... and ... it had no intention of targeting SBT’. It added that ‘[i]t only had a very small bycatch associated with exploratory swordfish fishing surveys ... [and] ... it was confident its bycatch would not exceed the modest quota allocated to it’.³⁶

The report states that ‘[t]he Extended Commission agreed on interim catch allocations for Cooperating Non Members and observers for 2007, as follows’ and then sets out the following table:³⁷

	Allocated catch (tonnes)
Indonesia	750
The Philippines	45
South Africa	40
European Community	10

³⁰ Rule 11(3).

³¹ Rule 2.

³² Regulation 7.2. See also Regulations 7.3 and 6.2.

³³ Paragraph 5.

³⁴ CCSBT 13, report, paragraph 57.

³⁵ Paragraph 57.

³⁶ Paragraphs 57 and 58.

³⁷ Paragraph 64.

Thus the three CNMs, between them, are allocated 95 tonnes. Indonesia, which is an observer rather than a CNM, is allocated 750 tonnes. A much larger total allocation is made to the five members of the ExComm.³⁸

Regarding Indonesia, the report states that: ‘The Members agreed to continue the program to monitor the catch landings of SBT in Indonesia with a view to determining both a temporary allocation and a permanent allocation to Indonesia. A condition of this permanent allocation will be full Membership and cooperation with the goals and principles of the CCSBT’.³⁹ (Indonesia is addressed further in section D below.)

In at least one case, CNMs may be given some advantages over other non-members in the application of a measure generating restrictions. Thus the **2004 Resolution**, *on amendment of the Resolution on ‘Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna’ adopted at the CCSBT10 in 2003*, provides for certain fishing vessels flagged to members of the ExComm and CNMs to be included in the CCSBT record of vessels established by that measure. That means that those vessels, if included, are not subject to certain restrictions applicable to vessels not included on the record (including, potentially, all vessels of non-members without CNM status – see further section D below).

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the CCSBT against non-members (whether cooperating non-members or non-cooperating non-members)

The CCSBT Convention (see section A above) itself contains some provisions relevant to non-contracting parties. Those include, in particular: (a) Article 15(2) (on nationals of contracting parties); Article 15(3) (on transfers of registration); and (c) Article 15(4) (on deterring IUU fishing activities more generally). However, this section will focus on measures adopted by the Commission and/or the ExComm.

Principal framework provisions

The CCSBT has one principal set of provisions on measures against non-contracting parties, in the form of the **Action Plan** adopted in 2000 pursuant to Article 15(4) of the CCSBT Convention (see section A above).⁴⁰ That measure provides, in the first instance, for identification by the Commission, at each annual meeting, of ‘those non-Members whose vessels have been catching SBT in a manner which diminishes the effectiveness of the conservation and management measures, based on the catch data compiled by the Commission, trade information and other relevant information obtained in ports and on fishing grounds’.⁴¹

The identified non-Members are to be requested by the Chair of the Commission ‘to rectify their fishing activities so as not to diminish the effectiveness of the conservation and management

³⁸ Paragraph 60.

³⁹ Paragraph 72. See also, *inter alia*, paragraphs 57 (last bullet point), 81 and 97-99, and Attachment 6-2.

⁴⁰ Action Plan, preamble, 5th recital.

⁴¹ Paragraph 2.

measures and to advise the Commission of their actions taken in that regard'.⁴² Furthermore, Members of the Commission are to 'jointly and/or individually request non-Members catching SBT to cooperate fully with the Commission in implementing the conservation and management measures'.⁴³

If it is decided at subsequent annual meetings that the non-Members receiving requests under the preceding paragraph 'have not rectified their fishing activities', they are to be identified again by the Commission.⁴⁴ From that point, '[t]he Commission may decide to impose trade-restrictive measures consistent with Members' international obligations on SBT products, in any form' in respect of those non-Members.⁴⁵

In practice, no trade restrictive measures have been imposed to date on any non-Member pursuant to the Action Plan. However, some non-Members have been identified (as a prelude to trade-restrictive measures). Those non-Members are **Belize, Cambodia, Equatorial Guinea, Honduras and Indonesia**.

The first four of those States have received the second level of identification (in 2001 or 2002, depending on the State).⁴⁶ The possibility of trade restrictive measures against Belize, Cambodia, Equatorial Guinea and Honduras was considered at CCSBT 9 in 2002. The report of that meeting notes that:⁴⁷

Members of the Extended Commission considered taking further measures in relation to Belize, Honduras, Cambodia, and Equatorial Guinea in accordance with the Action Plan. Some concerns were expressed regarding the appropriateness of taking measures at this stage against these countries, including: issues of WTO consistency; consistency of approach to other countries than these four countries; possible difficulty of taking action when no national quotas have been agreed by CCSBT; whether or not lack of response to communication represented an unwillingness to cooperate; and the discontinuation of SBT exports to members of the Extended Commission as reflected in the TIS [i.e. Trade Information Scheme] data.

For these reasons, some Members of the Extended Commission were not prepared to implement trade restrictive measures at this stage, although Japan proposed to prepare a measure for the time when imports from these four nations re-commenced in the future. This issue will be further reviewed at CCSBT 10. ...

At CCSBT 10 in 2003, 'Members agreed that no further action needed to be taken against Belize, Cambodia, Equatorial Guinea and Honduras at the present time due to the current lack of catches (as deduced from the Trade Information Scheme and Japanese import statistics) from these countries'.⁴⁸

Indonesia, in contrast, has only received the first level of identification (in 2001).⁴⁹ As well as being asked 'to rectify its fishing activities so as not to diminish the effectiveness of conservation

⁴² Paragraph 3.

⁴³ Paragraph 4.

⁴⁴ Paragraph 5.

⁴⁵ Paragraph 6.

⁴⁶ *Decision regarding Cambodia, Honduras and Equatorial Guinea pursuant to the 2000 Action Plan (2001); Decisions regarding Belize pursuant to the 2000 Action Plan (2001 and 2002).*

⁴⁷ CCSBT 9, report, paragraphs 28 and 29.

⁴⁸ CCSBT 10, report, paragraph 27.

⁴⁹ *Decision regarding Indonesia pursuant to the 2000 Action Plan (2001).*

and management measures for SBT', Indonesia was also asked 'to take measures to prevent fishing activities in waters that contain important parts of the SBT spawning grounds and to take appropriate measures to ensure that SBT Statistical Documents are completed in accordance with the requirements of the Trade Information Scheme adopted by the Commission in November 1999 that came into operation on 1 June 2000'. At CCSBT 10 in 2003, it was decided that no further action was required against Indonesia because it had undertaken to cooperate with the CCSBT.⁵⁰

Other provisions affecting non-contracting parties

Some other CCSBT measures could also negatively affect non-parties. The principal measures in that regard are set out below. It should be added that the CCSBT has adopted a *Southern Bluefin Tuna Statistical Document Program* (otherwise known as the *Trade Information Scheme*) which could affect non-contracting parties by: (a) any implications drawn from trade data gathered by that programme; and (b) requirements for certain trade movements of SBT to be accompanied by an appropriate statistical document or re-export certificate (including requirements on validation of such documents). (It is not yet clear how the statistical document programme will be affected by the forthcoming catch documentation scheme – see below.)

The **2004 Resolution**, *on amendment of the Resolution on 'Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna' adopted at the CCSBT10 in 2003*, provides for the establishment of a record of fishing vessels. That record is to comprise certain vessels flagged to members of the ExComm and CNMs,⁵¹ and the measure provides for certain actions to be taken in respect of vessels not included on the record.⁵² It is not clear whether such actions are to apply to vessels not on the record merely by virtue of being flagged to non-contracting parties (other than CNMs); if so, the measure will potentially negatively affect such vessels irrespective of whether those vessels are conducting IUU fishing.

The CCSBT has adopted two (preliminary) Resolutions that could potentially negatively affect non-parties. One is the **2006 Resolution** *on Establishing a Program for Transshipment by Large-Scale Fishing Vessels*,⁵³ which, *inter alia*: (a) establishes the CCSBT Record of Carrier Vessels authorized to receive SBT at sea from large-scale tuna longline fishing vessels; (b) establishes conditions for transshipment at sea; and (c) establishes conditions for landings or imports of transhipped fish.

The other is the **2006 Resolution** *on the implementation of a Catch Documentation Scheme to record all catches of Southern Bluefin Tuna regardless of whether the Southern Bluefin Tuna were traded*.⁵⁴ The CCSBT is to 'develop and implement a Catch Documentation Scheme to record all SBT caught by Members and Cooperating Non-Members regardless of whether the [SBT] was traded'.⁵⁵ That Scheme is to 'apply to the catch, landing and trade in all [SBT] by all Members and Cooperating Non-Members, including during transshipment, import, export, re-export, and landings of

⁵⁰ CCSBT 10, report, paragraph 29.

⁵¹ Paragraph 3.

⁵² See, *inter alia*, paragraphs 6(e), 8(a), 9, 10(b) and 12.

⁵³ CCSBT 13, report, paragraph 37 and Attachment 11.

⁵⁴ CCSBT 13, report, paragraph 37 and Attachment 9.

⁵⁵ Paragraph 1.

domestic production'.⁵⁶ The latter statement is broader than the former, and implies that the Scheme will cover, *inter alia*, SBT in trade originating from vessels flagged to non-Members or non-CNMs.

The Catch Documentation Scheme is to include, *inter alia*, the following elements: (a) 'Each shipment of [SBT] imported, exported, re-exported or domestically landed shall be accompanied by a catch document that has been signed and stamped by a person officially approved by the Member or Cooperating Non-Member as being complete and valid';⁵⁷ and (b) '[SBT] catch without completed and validated catch documents shall be considered as catch taken in contravention of the CCSBT conservation and management measures and shall not be permitted to be imported, exported, re-exported or landed on the domestic market'.⁵⁸

In addition, the *terms of reference for the Compliance Committee* (adopted in 1997) include, *inter alia*: 'To exchange information on activities for taking SBT by nationals, residents or vessels of any State or entity not party to this Convention'.⁵⁹

Furthermore, the **2003 Resolution** requires the Executive Secretary 'to inform any non-member State or entity whose fishing vessels harvest southern bluefin tuna in a manner that undermines the conservation and management measures adopted in accordance with the Convention, or that fails to ensure that SBT statistical documents are completed in accordance with the requirements of the Trade Information Scheme, and that does not seek full membership of the Convention, membership of the Extended Commission or cooperating non-member status, that continuing to allow such activities to take place, undermines the objective of the Convention'.⁶⁰

⁵⁶ Paragraph 3.

⁵⁷ Paragraph 4(iii).

⁵⁸ Paragraph 4(v).

⁵⁹ Paragraph 7.

⁶⁰ Paragraph 10.

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[Unless otherwise stated, all the documents referred to in this part of the report can be found on the IATTC website. The only Resolutions considered here are those included in the list of *Active IATTC ... Resolutions* on the IATTC website. This part of the report does not cover any practice relating to the Agreement on the International Dolphin Conservation Program.]

Full name of RFMO	Inter-American Tropical Tuna Commission
Most recent meeting of RFMO	IATTC 74 – June 2006 [report and adopted Resolutions available]
Treaty establishing RFMO	Convention for the Establishment of an Inter-American Tropical Tuna Commission
Year of adoption of treaty	1949
Year of entry into force of treaty	1950

A. Provisions of treaty relating to non-contracting parties

A new treaty (the so-called Antigua Convention, adopted in 2003) is set to replace the 1949 IATTC Convention once the former enters into force for all parties to the latter (although provisional application is a possibility).⁶¹ According to the report of IATTC 74: ‘The Chairman invited each delegation to describe its situation with respect to the status of the ratification of the Antigua Convention. Almost every delegation whose government had not yet ratified the Convention stated that its internal domestic process to do so was well underway’.⁶² The provisions of the Antigua Convention, rather than the 1949 Convention, will be considered in this section. However, it is important to bear in mind that all practice discussed in sections B, C and D below is under the original 1949 Convention.

The only provision of the Antigua Convention referring expressly to non-contracting parties (other than Article XXVIII on fishing entities (see below) and Articles XXVII, XXIX and XXX on signature, ratification, acceptance, approval and accession) is Article XXVI, entitled *Non-Members*, which reads as follows (emphasis added):

1. The Commission and its members shall encourage all States and regional economic integration organizations referred to in Article XXVII of this Convention and, as appropriate, fishing entities referred to in Article XXVIII of this Convention that are *not members of the Commission* to become members or to adopt laws and regulations consistent with this Convention.
2. The members of the Commission shall exchange information among themselves, either directly or through the Commission, with respect to activities of vessels of *non-members* that undermine the effectiveness of this Convention.

⁶¹ Antigua Convention, Articles XXXI(6) and XXXII.

⁶² IATTC 74, report, page 3.

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3. The Commission and its members shall cooperate, consistent with this Convention and international law, to jointly deter vessels of *non-members* from carrying out activities that undermine the effectiveness of this Convention. To this end, the members shall, *inter alia*, call to the attention of *non-members* such activities by their vessels.

The Antigua Convention also contains provisions on involvement by fishing entities, whereby: 'Any fishing entity whose vessels have fished for fish stocks covered by this Convention at any time during the four years preceding the adoption of this Convention may express its firm commitment to abide by the terms of this Convention and comply with any conservation and management measures adopted pursuant thereto ...'.⁶³ Any fishing entity that so expresses its commitment is considered as a member of the Commission.⁶⁴ Such entities are bound by, *inter alia*, Article XVIII on *Implementation, Compliance and Enforcement by Parties*, Article XX on *Duties of Flag States* and Annex 1 on *Guidelines and Criteria for the Establishment of Records of Vessels*.⁶⁵

Provisions of the Antigua Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article and title	Text of relevant provision
Article VII Functions of the Commission	1. The Commission shall perform the following functions, giving priority to tunas and tuna-like species: ... (b) adopt standards for collection, verification, and timely exchange and reporting of data concerning the fisheries for fish stocks covered by this Convention; (c) adopt measures that are based on the best scientific evidence available to ensure the long-term conservation and sustainable use of the fish stocks covered by this Convention and to maintain or restore the populations of harvested species at levels of abundance which can produce the maximum sustainable yield, <i>inter alia</i> , through the setting of the total allowable catch of such fish stocks as the Commission may decide and/or the total allowable level of fishing capacity and/or level of fishing effort for the Convention Area as a whole; (d) determine whether, according to the best scientific information available, a specific fish stock covered by this Convention is fully fished or overfished and, on this basis, whether an increase in fishing capacity and/or the level of fishing effort would threaten the conservation of that stock; (e) in relation to the stocks referred to in subparagraph (d) of this paragraph, determine, on the basis of criteria that the Commission may adopt or apply, the extent to which the fishing interests of new members of the Commission might be accommodated, taking into account relevant international standards and practices; (f) adopt, as necessary, conservation and management measures and recommendations for species belonging to the same ecosystem and that are affected by fishing for, or dependent on or associated with, the fish stocks covered by this Convention, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened; (g) adopt appropriate measures to avoid, reduce and minimize waste, discards, catch by lost or discarded gear, catch of non-target species (both fish and non-fish species) and impacts on associated or dependent species, in particular endangered species; (h) adopt appropriate measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of the fish stocks covered by this Convention; (i) establish a comprehensive program for data collection and monitoring which shall include such elements as the Commission

⁶³ Article XXVIII(1).

⁶⁴ Article I(7).

⁶⁵ Articles XIX, Article XXI and Annex 1 (paragraph 5).

determines necessary....; ... **(l)** where necessary, develop criteria for, and make decisions relating to, the allocation of total allowable catch, or total allowable fishing capacity, including carrying capacity, or the level of fishing effort, taking into account all relevant factors; ... **(n)** promote the application of any relevant provision of the Code of Conduct and of other relevant international instruments including, *inter alia*, the International Plans of Action adopted by FAO in the framework of the Code of Conduct; ... **(v)** adopt any other measure or recommendation, based on relevant information, including the best scientific information available, as may be necessary to achieve the objective of this Convention, including non-discriminatory and transparent measures consistent with international law, to prevent, deter and eliminate activities that undermine the effectiveness of the conservation and management measures adopted by the Commission.

Article X Committee for the Review of Implementation of Measures Adopted by the Commission	1. The Commission shall establish a Committee for the Review of Implementation of Measures Adopted by the Commission, which shall be composed of those representatives designated for this purpose by each member of the Commission, who may be accompanied by such experts and advisers as that member may deem advisable.
	2. The functions of the Committee shall be those established in Annex 3 of this Convention.
Article XII Administration	2. The functions of the Director shall be: ... (k) ensuring the maintenance of a record, based, <i>inter alia</i> , on the information provided to the Commission pursuant to Annex 1 of this Convention, of vessels fishing in the Convention Area, ... ; ... (m) performing such other functions as are necessary to ensure the efficient and effective operation of the Commission and others that may be assigned to him by the Commission.
Article XV Contributions	3. The Commission shall establish a fund to receive voluntary contributions for research on and conservation of the fish stocks covered by this Convention and, as appropriate, associated or dependent species, and for the conservation of the marine environment.
Article XVI Transparency	2. Representatives of non-Parties ... shall be afforded the opportunity to take part in the meetings of the Commission and of its subsidiary organs, as observers or otherwise, as appropriate, in accordance with the principles and criteria established in Annex 2 of this Convention as well as others that the Commission may adopt. Such participants shall have timely access to relevant information, subject to the rules of procedure and of confidentiality on access to such information that the Commission may adopt.
Article XVIII Implementation, Compliance and Enforcement by Parties	1. Each Party shall take the measures necessary to ensure the implementation of and compliance with this Convention and any conservation and management measures adopted pursuant thereto, including the adoption of the necessary laws and regulations.
	2. Each Party shall provide to the Commission all the information that may be required for the fulfillment of the objective of this Convention, including statistical and biological information and information concerning its fishing activities in the Convention Area, ...
	5. Each Party shall take measures to ensure that vessels operating in waters under its national jurisdiction comply with this Convention and the measures adopted pursuant thereto.

6. Each Party, where it has reasonable grounds to believe that a 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. The Party in question 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 for its consideration, or to object, as the case may be.

9. The Parties whose coasts border the Convention Area or whose vessels fish for fish stocks covered by this Convention or in whose territory the catch is landed and processed shall cooperate with a view to ensuring compliance with this Convention and with a view to ensuring the application of the conservation and management measures adopted by the Commission, including through the adoption of cooperative measures and schemes, as appropriate.

10. If the Commission determines that vessels fishing in the Convention Area have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures adopted by the Commission, the Parties may take action, following the recommendations adopted by the Commission and in accordance with this Convention and international law, to deter such vessels from such activities until such time as appropriate action is taken by the flag State to ensure that such vessels do not continue those activities.

Article XX
Duties of Flag
States

1. Each Party shall, in accordance with international law, take such measures as may be necessary to ensure that vessels flying its flag comply with the provisions of this Convention and the conservation and management measures adopted pursuant thereto, and that such vessels do not engage in any activity which undermines the effectiveness of such measures.

B. Brief analysis of, and references to, decisions or resolutions of the IATTC relating to cooperating non-members

Principal framework provisions

The cooperating non-parties, cooperating fishing entities and cooperating REIOs within the IATTC are currently **Belize, Canada, China, the Cook Islands, the EC, Honduras and Chinese Taipei**.⁶⁶ The custom within the IATTC is to use the abbreviation ‘CPC’ to refer collectively to IATTC parties, cooperating non-parties, cooperating fishing entities and cooperating REIOs. That abbreviation will be used sometimes in this report.

The principal framework provisions on cooperation are contained in **Resolution C-04-02 on criteria for attaining the status of cooperating non-party or fishing entity in IATTC**. That Resolution requires the Director to contact annually ‘all non-parties and fishing entities with vessels known to be fishing for species covered by the IATTC Convention, to urge them to become a Party to the IATTC or to attain the status of a Co-operating Non-Party or Co-operating Fishing Entity to IATTC (Cooperating Status)’.⁶⁷

⁶⁶ <www.iattc.org/HomeENG.htm>.

⁶⁷ Paragraph 1.

In view of that wording, and in view of the current cooperating status of the EC, it would appear that the term ‘Cooperating Non-Party’, for the purposes of Resolution C-04-02, includes not only States, but also REIOs. That in turn contrasts with the IATTC’s habitual definition of the abbreviation ‘CPC’ (see above), which refers to cooperating REIOs separately from cooperating non-parties. For the purposes of this report, the term ‘Cooperating Non-Party’ will be interpreted as meaning both cooperating States and cooperating REIOs and will be abbreviated to ‘CNP’. The term cooperating fishing entity will be abbreviated to ‘CFE’.

Resolution C-04-02 sets out the procedure to be followed, and information, compliance and participation requirements to be met, by a non-party or fishing entity seeking cooperating status.⁶⁸ The information, compliance and participation requirements are as follows:

(a)	Information requirements:
(i)	Communicate full data on its historical fisheries in the IATTC area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas;
(ii)	Communicate annually catch and effort data and size-frequency distribution of the catches (when possible) in due time and appropriate format for scientific evaluation of the stocks;
(iii)	Communicate details on current fishing presence in the area, number of vessels and vessel characteristics;
(iv)	Communicate research programs it has conducted in the IATTC area and share the information and the results with the IATTC.
(b)	Compliance requirements:
(i)	Respect all conservation measures in force in IATTC;
(ii)	Respect the capacity limits already in force in IATTC for tuna vessels;
(iii)	Inform the IATTC of all the management and conservation measures it takes to ensure compliance by its vessels, including <i>inter alia</i> and as appropriate, observer programs, inspection at sea and in port, and Vessel Monitoring Systems (VMS);
(iv)	Respond to alleged violations of IATTC measures by its vessels, as determined by the appropriate bodies, and communicate to IATTC the actions taken against the vessels.
(c)	Participation:
	Participation at plenary and relevant subsidiary and scientific meetings, as an observer.

The applicant must also: (a) ‘confirm its commitment to respect the Commission’s conservation and management measures’; and (b) ‘inform the Commission of the measures it takes to ensure compliance by its vessels with the conservation and management measures of the IATTC’.⁶⁹ Cooperating status is to be decided by the Commission, following a recommendation of the Joint Working Group on Fishing by non-Parties. In the decision-making process, ‘caution shall be used to avoid excess fishing capacity or illegal, unreported and unregulated (IUU) fishing activities in the Convention area’.⁷⁰

The Resolution is not clear about the ongoing commitments of non-parties or fishing entities once they have received cooperating status, but it could be implied that they are to continue to meet the various information, compliance and participation requirements imposed during the

⁶⁸ Paragraphs 2 and 3.

⁶⁹ Paragraph 4.

⁷⁰ Paragraph 5.

application stage (see table above). The Resolution does not refer expressly to any substantive benefits of cooperating status (but see further section C below).

Cooperating status is to be reviewed annually by the Commission, and may be revoked ‘if the Cooperating Non-Party or Cooperating Fishing Entity has not complied with the criteria for attaining such status established by this resolution’.⁷¹

Measures addressed to CNPs and CFEs

From 2003 onwards (i.e. from the year of the adoption of Resolution C-03-II - the predecessor to Resolution C-04-02), many IATTC Resolutions apply some or all of their provisions equally to parties, CNPs and CFEs jointly, by using the abbreviation ‘CPC’ (see above) in the provision in question. In particular, such Resolutions frequently state that ‘CPCs shall ... [undertake the task in question]’. Resolutions that apply some or all of their provisions equally to parties, CNPs and CFEs are as follows:

Resolution	Summary of subject matter
C-03-07	participation of own-flag vessels in LSTLFV list; control of own-flag fishing vessels; participation in statistical document programme; reporting of LSTLFVs (cf. Resolution C-00-06 – see below) [see also section D below]
C-04-03	reporting ‘any sightings of vessels that may be fishing contrary to the conservation and management measures of the IATTC’ [see also section D below]
C-04-05	participation in measures regarding by-catch of non-target species and juvenile tunas
C-04-06	provision of progress report on vessel monitoring system
C-04-07	Sea turtles
C-04-09	conservation and management of tuna [see also section C below]
C-05-01	seabirds
C-05-02	effort limitation [see also section C below]
C-05-03	sharks
C-05-07	participation in development of, and response to, IUU list (and possibility for own-flag vessels to be included on IUU list) [see also section D below]
C-06-02	conservation and management of tuna [see also section C below]
C-06-04	control of certain own-flag vessels undertaking transshipment; participation of own-flag vessels in IATTC Record of Carrier Vessels; participation in statistical document programme [see also section D below]
C-06-05	collection and examination of import and landing data (and possible imposition of non-discriminatory trade restrictive measures) [see also sections C and D below]

⁷¹ Paragraph 6.

Overall, the table above indicates that a broad array of cooperation is expected of CNPs and CFEs. Other Resolutions take a variety of approaches to involving non-parties, and eight examples are provided here. **Resolution C-03-01**, on *IATTC bigeye tuna statistical document program*, states that: ‘The Commission shall request cooperating non-contracting parties to take the measures described in the above paragraphs’.⁷² Thus, in contrast to the measures in the table above, that Resolution: (a) applies its provisions to CNPs by means of a cross-reference rather than addressing individual measures to CPCs; and (b) by referring to CNPs only, does not seek to apply its provisions to CFEs.

Resolution C-02-03, on *the capacity of the tuna fleet operating in the Eastern Pacific Ocean (revised)*, directs its provisions at ‘*participants*’ (emphasis added), which is defined, albeit ‘without setting any precedent’, as ‘Parties to the IATTC, and States and regional economic integration organizations ..., and fishing entities that have applied for membership of the Commission or that cooperate with the management and conservation measures adopted by the Commission’.⁷³ The term ‘that cooperate’ appears to provide scope for including non-parties other than those with CNP status, since the list of purse-seine vessels established pursuant to Resolution C-02-03 includes vessels flagged to Colombia and Bolivia,⁷⁴ neither of which is a party nor a CNP.

The remaining six examples seek to involve non-parties but do not make any express reference to ‘cooperation’. They therefore apply to non-parties irrespective of whether they have cooperating status. Only the last of them refers expressly to fishing entities. Two of them post-date Resolution C-03-II, the predecessor to Resolution C-04-02. **Resolution C-99-07**, on *fish-aggregating devices*, directs its provisions at ‘*the Parties and non-parties under whose jurisdiction vessels operate in the EPO*’ (emphasis added).

Resolution C-00-06, on *a Regional Vessel Register*, recommends to the High Contracting Parties that ‘[t]hey request *non-member governments with vessels fishing in the EPO under their jurisdiction* to provide to the Director the information detailed in paragraph 2 and to otherwise follow the terms of this Resolution’ (emphasis added),⁷⁵ implying that vessels flagged to ‘non-member governments’ may potentially be placed on the Regional Vessel Register, irrespective of whether those governments have cooperating status. That is indeed the case: Bolivia and Colombia have vessels on the Regional Vessel Register, even though neither is a party or a CNP.⁷⁶

(In contrast to the Regional Vessel Register established under Resolution C-00-06 and the list of purse-seine vessels established pursuant to Resolution C-02-03, the list of longline fishing vessels over 24 metres authorized to operate in the Eastern Pacific Ocean, established under Resolution C-03-07, is restricted to vessels flagged to CPCs. The current list does indeed only contain vessels flagged to CPCs, including three CNPs and Chinese Taipei (the only CFE).⁷⁷)

Resolution C-04-06, on *the Establishment of a Vessel Monitoring System (VMS)*, states that: ‘The Commission strongly encourages *governments not party to the Commission whose flag vessels fish in the EPO* to participate in the VMS program established by this resolution’.⁷⁸ **Resolution C-03-05**, on *Data Provision*, recommends to the High Contracting Parties that: ‘The Director communicate

⁷² Paragraph 8; see also paragraphs II and 9.

⁷³ Paragraph 2.

⁷⁴ <www.iattc.org/VesselRegister/VesselList.aspx?List=AcPS&Lang=ENG>.

⁷⁵ Paragraph 6.

⁷⁶ <www.iattc.org/VesselRegister/VesselList.aspx?List=RegVessels&Lang=ENG>.

⁷⁷ <www.iattc.org/VesselRegister/VesselList.aspx?List=Longline&Lang=ENG>.

⁷⁸ Paragraph 4.

with the *governments of states not party [sic] the Commission whose flag vessels may be fishing in the region, to comply with the terms of this resolution (emphasis added)*.⁷⁹

Resolution C-06-01, on *financing*, states that: ‘That *States not presently members of the IATTC and fishing entities which have vessels fishing for fish covered by the Convention* should make, and request their flag vessels to make, voluntary contributions to the Commission, preferably on the same basis as the contributions of existing members’.⁸⁰ **Resolution C-99-01**, on *the establishment of a Permanent Working Group on Compliance*, states that: ‘*Non-parties* shall be requested and encouraged to comply with the requirements and commitments established in paragraphs 7 and 8 above [i.e. regarding provision of certain information to the Working Group] (emphasis added)’.⁸¹

Other provisions relevant to cooperation

In addition to the Resolutions mentioned above, other IATTC instruments also contain provisions of relevance to CNPs and CFEs. First, as noted above, Resolution C-04-02 requires an applicant for cooperating status to ‘confirm its commitment to respect the Commission’s conservation and management measures’. Thus, in principle, all of the **IATTC’s conservation and management measures** are to be complied with by CNPs and CFEs. Those measures that apply expressly to CNPs and CFEs are indicated above. In remaining cases, where reference is made only to parties, it may be less clear how the measure is to apply to CNPs and CFEs.

Secondly, the **IATTC’s Rules of Procedure** contain provisions that are potentially applicable to CNPs and CFEs. Thus Rule XIII(1) states that invitations for observer status will be sent to, *inter alia*, ‘[a]ll non-member states with coastlines bordering the Convention area or whose nationals participate in the fisheries covered by this Convention’. Of note, that Rule refer only to ‘states’ rather than fishing entities, and to ‘nationals’ rather than ‘vessels’. It also makes no distinction between CNPs and other non-parties. Thirdly, the **IATTC’s Plan for Regional Management of Fishing Capacity** applies to CPCs, although it also frequently applies to ‘participants’ in the fisheries as well (i.e. ‘CPCs and all participants ...’).

Fourthly, the **terms of reference of the Joint Working Group on Fishing by non-Parties** identify five functions specific to ‘cooperating non-party, entity or fishing entity’ status, namely to: (a) ‘propose the requirements for non-parties to obtain [such status]’;⁸² (b) ‘when reviewing and monitoring the compliance of a non-party and determining whether it has fulfilled the requirements to obtain [such status], ... take into account the activities of these non-parties as co-operating non-parties or non-parties in other oceans which have regional fisheries organizations that regulate the conservation and management of highly migratory fish stocks under their competence’;⁸³ (c) to ‘analyze the mechanism by which [such status] shall be requested and granted’;⁸⁴ (d) to ‘propose the procedures for evaluating [such status] and define the reasons for revoking such a status’;⁸⁵ and (e) to ‘recommend to the IATTC ... such actions as may be required to obtain, request, grant and maintain [such status] ...’.⁸⁶

⁷⁹ Paragraph 6.

⁸⁰ Paragraph 8.

⁸¹ Paragraph 11.

⁸² Paragraph 2(c).

⁸³ Paragraph 2(e).

⁸⁴ Paragraph 2(f).

⁸⁵ Paragraph 2(g).

⁸⁶ Paragraph 2(h).

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, Resolution C-04-02 does not mention any substantive benefits of cooperating status. However, a 2006 Resolution indicates that cooperation (catch) quota has, in effect, recently been allocated to Chinese Taipei (a CFE), China (a CNP) and other CNPs. Thus **Resolution C-06-02**, for a program on the conservation of tuna in the Eastern Pacific Ocean for 2007, states that:⁸⁷

China, Japan, Korea, and Chinese Taipei, shall take the measures necessary to ensure that their total annual longline catch of bigeye tuna in the EPO during 2007 will not exceed the following catch levels.

China	2,639 metric tons
Japan	34,076 metric tons
Korea	12,576 metric tons
Chinese Taipei	7,953 metric tons

Other CPCs shall take the measures necessary to ensure that their total annual longline catch of bigeye tuna in the EPO during 2007 will not exceed 500 metric tons or their respective 2001 catch levels, whichever is higher. CPCs whose annual catches have exceeded 500 metric tons shall provide monthly catch reports to the Director.

A 2005 Resolution, **Resolution C-05-02**, on northern albacore tuna, freezes fishing effort for northern albacore tuna for CPCs at ‘current levels’. That resolution could therefore be seen as impliedly creating some cooperation (effort) quota for, *inter alia*, CNPs and CFEs, or at least endorsing their existing fishing activities.

It should also be noted that vessels flagged to Belize, Canada, China, the Cook Islands and Chinese Taipei are present on the Regional Vessel Register established pursuant to **Resolution C-00-06**, on a *Regional Vessel Register*. Entry on that Register amounts to allocation of a fishing opportunity in respect of the purse-seine fishery (by virtue of **Resolution C-02-03**, on the capacity of the tuna fleet operating in the Eastern Pacific Ocean (revised)).

In some cases, CNPs and CFEs may be given some advantages over other non-parties in the application of measures generating restrictions or sanctions. For example, **Resolution C-03-07**, on the establishment of a list of longline fishing vessels over 24 meters (LSTLFVs) authorized to operate in the Eastern Pacific Ocean, provides for certain fishing vessels flagged to CPCs to be included in the IATTC record of vessels established by that measure. That means that those vessels, if included, are not subject to certain restrictions applicable to vessels not included on the record (including, potentially, all vessels of non-parties without cooperating status – see further section D below).

Another example is provided by **Resolution C-06-05**, on adoption of trade measures to promote compliance. As noted in section D below, that measure gives CNPs and CFEs an advantage over other non-parties in that, for CNPs and CFEs (and IATTC parties), ‘trade measures should be considered only when any such actions as the Commission may take to promote compliance either have proven unsuccessful or would not be effective’.

⁸⁷ Paragraph 8. Resolution C-04-09, for a multi-annual program on the conservation of tuna in the Eastern Pacific Ocean for 2004, 2005 and 2006, establishes identical limits for an earlier period (see paragraph 8).

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the IATTC against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

The IATTC has adopted two principal sets of provisions on measures against non-contracting parties. The first is **Resolution C-06-05** on *adoption of trade measures to promote compliance*. That measure provides for identification, by means of import and landing data or ‘any other relevant information’, of: (a) CPCs ‘that have failed to fulfil their obligations under the IATTC Convention in respect of IATTC conservation and management measures ...’; and/or (b) non-parties ‘that have failed to discharge their obligations under international law to co-operate with IATTC in the conservation and management of species covered by the IATTC Convention ...’.⁸⁸

The CPC or non-party in question is to be notified of its identification and given an opportunity to respond.⁸⁹ Failure to provide a satisfactory response may lead to the Commission deciding on ‘non-discriminatory trade restrictive measures’ to be applied to the relevant CPC or non-party.⁹⁰ In that instance, the Commission ‘should recommend to the Parties ... to take specific non-discriminatory trade restrictive measures, consistent with their international obligations’.⁹¹

However, in the case of CPCs, ‘trade measures should be considered only when any such actions as the Commission may take to promote compliance either have proven unsuccessful or would not be effective’.⁹² Thus, in that sense, CNPs and CFEs enjoy an advantage over other non-parties. The measure provides for any non-parties subject to trade restrictive measures to be labelled ‘non-cooperating non-parties to the IATTC’.⁹³ It also provides for the Commission to: (a) recommend the lifting of trade restrictive measures if certain improvements are demonstrated;⁹⁴ and (b) recommend the reinstatement of such measures if need be.⁹⁵

In practice, no trade restrictive measures have been imposed to date on any CPC or non-party pursuant to Resolution C-06-05. The effectiveness of the measure is due to be reviewed in 2008, ‘when its application shall terminate, at which time it may be renewed with the adjustments that the Parties may decide’.⁹⁶

The second principal set of provisions is **Resolution C-05-07** to *establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the Eastern Pacific Ocean*. The measure states that: ‘This resolution shall apply to any fishing vessel greater than 24 meters overall length’.⁹⁷ In relation to that length limit, the report of IATTC 74 states that:⁹⁸

⁸⁸ Paragraphs 1 and 2.

⁸⁹ Paragraphs 3, 4 and 5.

⁹⁰ Paragraph 6.

⁹¹ Paragraph 7.

⁹² Paragraph 6.

⁹³ Paragraph 11.

⁹⁴ Paragraph 9.

⁹⁵ Paragraph 10.

⁹⁶ Paragraph 13.

⁹⁷ Paragraph 11.

⁹⁸ IATTC 74, report, page 5.

Regarding the size limit of 24 meters overall length for vessels to be eligible for inclusion in the IATTC IUU Vessel List, the [Joint] Working Group [on Fishing by non-Parties] considered that the limit was too high, and recommended to the Commission an amendment to Resolution C-05-07 which combined a length limit, to be decided by the Commission, with the criterion that all vessels with a history of fishing in waters outside the jurisdiction of their flag states be eligible for inclusion in the IUU List. The Commission did not agree to this proposal, but decided to consider it again at its next meeting [i.e. IATTC 75, due in June 2007].

Resolution C-05-07 starts by setting out a non-exhaustive list of activities or circumstances, to be supported by evidence from a CPC, whereby ‘vessels fishing for species covered by the IATTC Convention are presumed to have carried out IUU fishing activities in the EPO [i.e. Eastern Pacific Ocean]’.⁹⁹ Thus the measure in principle relates to vessels irrespective of their flag. After including various specific activities, the list adds the broad category of vessels engaging ‘in fishing activities contrary to any other IATTC conservation and management measures’.¹⁰⁰ The list ends with vessels being ‘under the control of the owner of any vessel on the IATTC IUU Vessel List’.¹⁰¹

CPCs are to transmit annually ‘a list of any vessels presumed to have carried out IUU fishing activities in the EPO during the current and previous years, accompanied by the evidence supporting the presumption of IUU fishing activity’.¹⁰² That is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the IATTC of a (finalized) IUU Vessel List.

The next step in the process is for the Director, on the basis of the information received from the CPCs and ‘from any other relevant sources’, to draw up a draft IATTC IUU Vessel List.¹⁰³ That list, together with the supporting evidence, is to be transmitted to non-parties with vessels on the list and to all CPCs. They may transmit comments on the draft list, ‘including evidence showing that the vessels neither have fished in contravention of IATTC conservation and management measures nor had the possibility of fishing for species covered by the IATTC Convention in the EPO’.¹⁰⁴

On the basis of the comments received pursuant to the preceding paragraph, the Director is to draw up a provisional IATTC IUU Vessel List and then transmit that list, ‘together with all the evidence provided’, to the non-parties concerned and to the CPCs.¹⁰⁵ CPCs ‘may ... submit ... any additional information which might be relevant for the establishment of the IATTC IUU Vessel List’, and that information, ‘together with all the evidence provided’, is to be circulated by the Director to the CPCs and to the non-parties concerned.¹⁰⁶

Next, the Joint Working Group on Fishing by Non-Parties is to examine the provisional IATTC IUU Vessel List (and to refer its results to the Permanent Working Group on Compliance, if necessary) and then submit the list to the IATTC for approval, having first removed any vessel

⁹⁹ Paragraph 1.

¹⁰⁰ Paragraph 1(h).

¹⁰¹ Paragraph 1(i).

¹⁰² Paragraph 2.

¹⁰³ Paragraphs 3 and 2.

¹⁰⁴ Paragraph 3.

¹⁰⁵ Paragraph 4.

¹⁰⁶ Paragraph 5.

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from the list if its flag State demonstrates specified facts or improvements.¹⁰⁷ It is noteworthy that the subsidiary body with the primary role here is the Joint Working Group on Fishing by *Non-Parties* (emphasis added), even though the list should in principle address vessels irrespective of their flag.

The IATTC then adopts the provisional IATTC IUU Vessel List. At that point, the IATTC is to request non-parties (but, notably, only non-parties) with vessels on the list to, *inter alia*, take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.¹⁰⁸ Furthermore, CPCs are to ‘take all necessary measures, under their applicable legislation and pursuant to paragraphs 56 and 66 of the [FAO] IPOA-IUU’ to:¹⁰⁹

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- (a) ensure that vessels flying their flag do not transship with vessels on the IATTC IUU Vessel List;

 - (b) ensure that vessels on the IATTC IUU Vessel List that enter ports voluntarily are not authorized to land or transship therein;

 - (c) prohibit the chartering of a vessel on the IATTC IUU Vessel List;

 - (d) refuse to grant their flag to vessels on the IATTC IUU Vessel List, unless the vessel has changed owner, and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel or, having taken into account all relevant facts, the flag CPC determines that granting the vessel its flag will not result in IUU fishing;

 - (e) prohibit commercial transactions, imports, landings and/or transshipment of species covered by the IATTC Convention from vessels on the IATTC IUU Vessel List;

 - (f) encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the IATTC Convention caught by vessels on the IATTC IUU Vessel List;

 - (g) collect, and exchange with other CPCs, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the IATTC Convention from vessels on the IATTC IUU Vessel List.
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CPCs ‘shall not take any unilateral trade measures or other sanctions’ against vessels (a) ‘on the draft or provisional IATTC IUU Vessel Lists’ or (b) that have been removed from the IATTC IUU Vessel List, on the grounds that such vessels are involved in IUU fishing activities, albeit ‘[w]ithout prejudice to the rights of CPCs and coastal states to take proper action, consistent with international law’.¹¹⁰

The wording of Resolution C-05-07 indicates that the measures in response to a vessel being placed on the IATTC IUU Vessel List are to be taken by individual CPCs. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the draft, provisional or (finalized) IATTC IUU Vessel Lists is an action to be taken at the RFMO level.

Resolution C-05-07 was adopted in 2005. IATTC 74 adopted an IATTC IUU Vessel List on the basis of that Resolution. That list is available in the report of IATTC 74.¹¹¹ That list includes 33

¹⁰⁷ Paragraphs 6 and 7.

¹⁰⁸ Paragraph 8.

¹⁰⁹ Paragraph 9.

¹¹⁰ Paragraph 12.

¹¹¹ IATTC 74, report, Appendix 3.

vessels: one is flagged to **Cambodia**, one is flagged to **Colombia**, seven are flagged to **Georgia**, 11 are flagged to **Indonesia** and the remainder are of unknown flag. None of those named States are current IATTC parties or CNPs.

Regarding vessels flagged to two IATTC parties (Nicaragua and Venezuela), the report of IATTC 74 states that:¹¹²

Not included in this list [i.e. the provisional IATTC IUU Vessel List forwarded by the Joint Working Group on Fishing by Non-Parties to the Commission for consideration] were the vessels *Atlantis IV* (Nicaragua) and *Athena F* (Venezuela), which have fished in the eastern Pacific Ocean but are not on the IATTC Regional Vessel Register. These cases stimulated considerable discussion regarding the inclusion of the vessels in the IUU List, but there was no unanimous agreement that they should be included.

Regarding vessels flagged to a CNP (Belize – granted cooperating status at IATTC 74), the report of IATTC 74 states that:¹¹³

The [Joint] Working Group [on Fishing by non-Parties] could not agree on how to handle the Belize-flag vessels, and referred this situation to the Commission, which agreed to remove these vessels from the IUU List. Belize made a statement on this matter . . . , noting that Belize vessels have been removed from the IUU list and that Belize has been granted Cooperating Status, and describing certain restrictions that Belize will adhere to relative to fishing by its flag vessels in the EPO.

Other provisions affecting non-contracting parties

Some other IATTC Resolutions could also negatively affect non-parties. The principal measures in that regard are listed below. It should be added that the IATTC has adopted a statistical document programme for bigeye tuna (with some exceptions) which could affect non-contracting parties by: (a) any implications drawn from trade data gathered by that programme; and (b) requirements for certain trade movements of bigeye tuna to be accompanied by an appropriate statistical document or re-export certificate (including requirements on validation of such documents).

Resolution C-03-07, *on the establishment of a list of longline fishing vessels over 24 meters (LSTLFVs) authorized to operate in the Eastern Pacific Ocean*, provides for the establishment of a record of fishing vessels. That record is to comprise certain vessels flagged to CPCs,¹¹⁴ and the measure provides for certain actions to be taken in respect of vessels not included on the record.¹¹⁵ It is not clear whether such actions are to apply to vessels not on the record merely by virtue of being flagged to non-CPCs; if so, the measure will potentially negatively affect such vessels irrespective of whether those vessels are conducting IUU fishing.

Resolution C-06-04, *on establishing a program for transshipments by large-scale fishing vessels*, establishes the IATTC Record of Carrier Vessels. With some exceptions, it also: (a) requires all transshipments of tuna and tuna-like species in IATTC Convention Area to take place in port, unless special conditions for transshipment at sea are complied with; and (b) establishes conditions for transshipment in ports and for landings or imports of transhipped fish.

Under **Resolution C-06-02**, *for a program on the conservation of tuna in the Eastern Pacific Ocean for 2007*, the IATTC: (a) resolves to ‘prohibit landings, transshipments and commercial transactions

¹¹² IATTC 74, report, page 5.

¹¹³ IATTC 74, report, page 5.

¹¹⁴ Paragraph 2.

¹¹⁵ See, *inter alia*, paragraphs 4(e), 6(a), 7 and 8(b).

in tuna or tuna products that have been positively identified as originating from fishing activities that contravene this resolution'; and (b) is required to 'develop transparent and non-discriminatory criteria and procedures to adopt trade restrictive measures consistent with international law and the provisions of the World Trade Organization to promote compliance in the EPO'.¹¹⁶

Other Resolutions that could negatively affect non-parties are summarized as follows:

Resolution	Summary of relevant provisions
C-04-03	<i>on a system of notification of sighting and identification of vessels operating in the Convention Area:</i> (a) regarding 'vessels that may be fishing contrary to the conservation and management measures of the IATTC' [i.e. irrespective of flag State], vessels flagged to CPCs encouraged to report sightings of such vessels informally to the Director, 'if possible in real time' and to their flag States using a proforma; and (b) Director, having 'verified, to the extent possible, that the [reported] vessel ... was likely to have been fishing contrary to the conservation and management measures of the IATTC', to then request flag State of the vessel 'to rectify the vessel's activities' and to report back on measures taken.
C-99-01	<i>on the establishment of a Permanent Working Group on Compliance:</i> (a) establishes said Working Group; and (b) states one of its functions as being 'to recommend to the IATTC appropriate measures for addressing matters related to compliance with fisheries management measures' [i.e. irrespective of flag State]. [Also provides for representatives of, <i>inter alia</i> , non-parties to be observers at meetings.]

In addition, the *terms of reference for the Joint Working Group on Fishing by Non-Parties* include to: '(a) identify non-parties with vessels fishing in the region, and to identify the individual vessels of non-parties; (b) review and monitor compliance by non-parties with the conservation and management measures of ... the IATTC ...; ... (d) examine any information provided by the Parties ... and the administration of the IATTC on vessels of non-Parties, entities or fishing entities fishing in the region; ... (i) develop and recommend measures to be adopted by the IATTC ... to eliminate IUU fishing activities in the region, in line with the FAO Plan of Action; (j) develop a system of notification of sighting and identification of non-Party vessels operating in the region; and (k) propose criteria for and develop a list of vessels identified as being engaged in IUU fishing activities in the region to complement the list of vessels authorized to fish in the region as identified in the IATTC Regional Vessel Register'.¹¹⁷ The terms of reference also provide for '[a]ny government ... accredited as an observer to ... the IATTC ...' to be an observer at meetings of the Joint Working Group.¹¹⁸

Furthermore, the *Plan for Regional Management of Fishing Capacity* states that: 'The IATTC should identify CPCs and all participants in these fisheries whose vessels fish for species covered by the Convention that do not exercise effective jurisdiction and control over their vessels, or whose vessels do not comply with the EPO Plan. The Commission should take measures to encourage such CPCs and participants in these fisheries to implement the EPO Plan'.¹¹⁹

¹¹⁶ Resolution C-04-09, for a multi-annual program on the conservation of tuna in the Eastern Pacific Ocean for 2004, 2005 and 2006, contains similar provisions for an earlier period.

¹¹⁷ Paragraph 2.

¹¹⁸ Paragraph 3(b).

¹¹⁹ Paragraph 27.

ICCAT

<http://www.iccat.es/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the ICCAT website. In particular, the various Recommendations and Resolutions referred to can all be found in the *Compendium [of] Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-like Species*, with the exception of those adopted in 2006 (which are available elsewhere on the ICCAT website).]

Full name of RFMO	International Commission for the Conservation of Atlantic Tunas
Most recent meeting of RFMO	IATTC [special] 15 – November 2006 [report not yet available; adopted Recommendations and Resolutions available]
Treaty establishing RFMO	International Convention for the Conservation of Atlantic Tunas
Year of adoption of treaty	1966 [amendments adopted in 1984 and 1992]
Year of entry into force of treaty	1969 [amendments in force in 1997 and 2005]

A. Provisions of treaty relating to non-contracting parties

The ICCAT Convention does not contain any provisions expressly on non-contracting parties (other than Article XIV on signature, ratification, approval and adherence). Provisions of the ICCAT Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article	Text of relevant provision
Article IV	2. The carrying out of the provisions in paragraph 1 of this Article shall include: (a) collecting and analysing statistical information relating to the current conditions and trends of the tuna fishery resources of the Convention area; ...
Article VIII	1. (a) The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch. These recommendations shall be applicable to the Contracting Parties under the conditions laid down in paragraphs 2 and 3 of this Article. ...
Article IX	1. The Contracting Parties agree to take all action necessary to ensure the enforcement of this Convention. Each Contracting Party shall transmit to the Commission, biennially or at such other times as may be required by the Commission, a statement of the action taken by it for these purposes. 2. The Contracting Parties agree: (a) to furnish, on the request of the Commission, any available statistical, biological and other scientific information the Commission may need for the purposes of this Convention; (b) when their official agencies are unable to obtain and furnish the said information, to allow the Commission, through the Contracting Parties, to obtain it on a voluntary basis direct from companies and individual fishermen.

3. The Contracting Parties undertake to collaborate with each other with a view to the adoption of suitable effective measures to ensure the application of the provisions of this Convention and in particular to set up a system of international enforcement to be applied to the Convention area except the territorial sea and other waters, if any, in which a state is entitled under international law to exercise jurisdiction over fisheries.

Article X II. The Commission may accept contributions, other than provided for in paragraph 2 of this Article, for the prosecution of its work.

Article XI 3. The Commission may invite any appropriate international organization and any Government which is a member of the United Nations or of any Specialized Agency of the United Nations and which is not a member of the Commission, to send observers to meetings of the Commission and its subsidiary bodies.

B. Brief analysis of, and references to, decisions or resolutions of the ICCAT relating to cooperating non-members

Principal framework provisions

Guyana and **Chinese Taipei** currently have cooperating status within the ICCAT. The custom within the ICCAT is to use the abbreviation ‘**CPC**’ to refer collectively to ICCAT contracting parties, cooperating non-contracting parties, cooperating entities and cooperating fishing entities. That abbreviation will be used sometimes in this part of the report.

The principal framework provisions on cooperation are contained in Resolution 94-06 *on coordination with non-Contracting Parties* and Recommendation 03-20 *on criteria for attaining the status of Cooperating non-Contracting Party, Entity or Fishing Entity*. According to the *Compendium [of] Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-like Species* (‘**the Compendium**’ – see above); both of those measures are still in operation.

Resolution 94-06 requires the Executive Secretary to contact ‘all non-Contracting Parties known to be fishing in the Convention area for species under the competence of the Convention to urge them to become Contracting Parties or “Cooperating Parties”’.¹²⁰ The Resolution states that: ‘A Cooperating Party shall be defined as a non-Contracting Party that does not hold membership in ICCAT as a Contracting Party but voluntarily fishes in conformity with the conservation decisions of ICCAT’.¹²¹

Cooperating Parties ‘may attend the meetings of ICCAT as observers’.¹²² However, the Resolution does not set out any substantive benefits of cooperating status (but see further section C below). The Resolution adds that: ‘Non-Contracting Parties that continue to fish for bluefin tuna and that do not become Cooperating Parties shall be advised that their continued fishing outside ICCAT’s conservation measures will diminish the effectiveness of those measures’.¹²³

Recommendation 03-20, adopted subsequently, requires the Executive Secretary to contact annually ‘all non-Contracting Parties, Entities, or Fishing Entities known to be fishing in the

¹²⁰ Paragraph 1.

¹²¹ Paragraph 1.

¹²² Paragraph 3.

¹²³ Paragraph 2.

Convention Area for species under ICCAT competence to urge them to become a Contracting Party to ICCAT or to attain the status of a *Cooperating non-Contracting Party, Entity or Fishing Entity*' (emphasis added).¹²⁴

Recommendation 03-20 sets out the procedure to be followed, and information to be provided, by a non-contracting party, entity or fishing entity seeking cooperating status.¹²⁵ The information to be provided is as follows:

- (a) where available, data on its historical fisheries in the Convention area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas;
- (b) all the data that Contracting Parties have to submit to ICCAT based on the Recommendations adopted by ICCAT;
- (c) details on current fishing presence in the Convention area, number of vessels and vessel characteristics and; [sic]
- (d) information on any research programs it may have conducted in the Convention area and the information and the results of this research.

The applicant must also: (a) 'confirm its commitment to respect the Commission's conservation and management measures'; and (b) 'inform ICCAT of the measures it takes to ensure compliance by its vessels with ICCAT conservation and management measures'.¹²⁶

Cooperating status is to be decided by the Commission, following a recommendation by the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures. The Permanent Working Group is to consider '[the] data submission of the applicant', as well as information on the applicant available from other RFMOs. During the decision-making process, '[c]autious shall be used so as not to introduce into the Convention area the excessive fishing capacity of other regions or IUU fishing activities in granting Cooperating Status to the applicant'.¹²⁷

The Recommendation does not refer expressly to any benefits of cooperating status (but see further section C below). Cooperating status is to be reviewed annually and is to be renewed 'unless revoked by the Commission due to non-compliance with ICCAT conservation and management measures'.¹²⁸ In view of the content of Recommendation 03-20, it is not clear why Resolution 94-06 has not since been repealed (apart from the fact that only the latter grants observership rights at ICCAT meetings). In this part of the report, the abbreviation 'CPEF' with be used to refer to a cooperating non-contracting party, entity or fishing entity.

Measures addressed to CPEFs

Many ICCAT Recommendations and Resolutions apply some or all of their provisions equally to parties and CPEFs jointly, by using the abbreviation 'CPC' (see above) in the provision in question. In particular, such Recommendations and Resolutions frequently state that 'CPCs shall ... [undertake the task in question]'. Some of the many ICCAT Recommendations and

¹²⁴ Paragraph 1.

¹²⁵ Paragraphs 2 and 3.

¹²⁶ Paragraph 4.

¹²⁷ Paragraph 5.

¹²⁸ Paragraph 6.

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Resolutions that apply some or all of their provisions equally to parties and CPEFs are as follows:

Measure	Summary of subject matter
Rec = Recommendation Res = Resolution	C&M = conservation and management SDP = statistical document programme
Rec: 98-03, 02-01, 03-01, 04-01	bigeye tuna C&M
Rec: 03-04 Res: 01-04	swordfish C&M
Rec: 04-04	albacore tuna C&M
Rec: 02-08, 02-09, 04-07, 06-05, 06-07, 06-08	bluefin tuna C&M (including farming)
Rec: 04-10, 05-05 Res: 01-11, 03-10	sharks
Res: 02-14	seabirds
Res: 03-11	sea turtles
Res: 99-11	control of own-flag vessels; urging various business sectors and public to refrain from supporting IUU fishing
Res: 01-18	instructing various business sectors and public to refrain from supporting IUU fishing
Res: 01-19	collecting information on history and economic background of own-flag LSTLVs; implementing SDP; instructing residents to refrain from supporting IUU fishing; monitoring transshipment
Res: 01-20	meeting ICCAT management standard
Rec: 02-21	regulation of chartering
Rec: 02-22	participation of own-flag vessels in LSFV list; control of own-flag fishing vessels; participation in SDP; reporting of LSTVs
Rec: 06-12	participation in development of, and response to, IUU list (and possibility for own-flag vessels to be included on IUU list)
Res: 02-25	regulation of transshipment
Res: 02-26	urging and potentially instructing residents to refrain from supporting IUU fishing
Rec: 03-12	control of own-flag vessels
Rec: 03-13	control of own-flag vessels (data recording system)
Rec: 03-14	control of own-flag vessels (vessel monitoring system)
Rec: 06-13	collection and examination of import and landing data (and possible imposition of non-discriminatory trade restrictive measures)
Rec: 03-16	prohibiting certain activities involving tuna and tuna-like species caught by IUU fishing activities
Rec: 04-12	regulation of sport and recreational fishing
Rec: 06-11	control of certain own-flag vessels undertaking transshipment; participation of own-flag vessels in ICCAT Record of Carrier Vessels; participation in SDP

Res: 05-08	research on use of circle hooks
Rec: 02-17; 02-20; 03-18; 04-13	imposition or lifting of import bans against certain States; assistance to certain States
Rec: 00-22, 06-15, 06-16 Res: 01-23	implementation of (or preparation for implementation of) SDP
Res: 02-29	participation in a Working Group to consider the development of a <i>Compendium of ICCAT recommendations and resolutions</i>
Res: 96-13	monitoring foreign vessels transshipping or unloading at ports [but does not expressly apply to cooperating entities or cooperating fishing entities]
Res: 99-07	provision of data on recreational fisheries
Rec: 05-09	explaining deficiencies in data reporting

Overall, the table above indicates that a broad array of cooperation is expected of CPEFs. The ICCAT has also adopted several Recommendations or Resolutions that refer to ‘non-contracting parties’ generally, rather than CPEFs (or CPCs), even though the theme in question is cooperation. Five examples will be provided here.

(1) **Recommendation 94-05**, concerning the effective implementation of the ICCAT bluefin tuna statistical document program, states that: ‘The Commission shall request the non-Contracting Parties which are major importing countries of bluefin tuna to cooperate with implementation of the Program and to provide to the Commission data obtained from such implementation’ (emphasis added).¹²⁹

(2) **Recommendation 93-04**, on supplemental regulatory measures for the management of Atlantic yellowfin tuna, recommends that ‘there be no increase in the level of effective fishing effort exerted on Atlantic yellowfin tuna, over the level observed in 1992’, but also recommends that ‘all countries whose vessels currently exploit Atlantic yellowfin tuna, or may do so in the future, irrespective of whether or not such vessels fly a flag of the Contracting Parties to the ICCAT Convention, implement the measure indicated ... above’ (emphasis added).

(3) **Recommendation 06-02**, to amend the rebuilding program for north Atlantic swordfish, recommends that: ‘In order to protect small swordfish, Contracting Parties, non-Contracting Parties, Entities or Fishing Entities shall take the necessary measures to prohibit the taking of and landing of swordfish in the entire Atlantic Ocean weighing less than 25 kg live weight, or in alternative, 125 cm lower jaw fork length (LJFL) ...’ (emphasis added).¹³⁰

(4) **Resolution 05-II**, on pelagic *Sargassum*, resolves that ‘Contracting Parties, non-Contracting Parties, Entities and Fishing Entities, where appropriate, undertake to provide to the SCRS information and data on activities that impact pelagic *Sargassum* in the Convention area on the high seas, directly or indirectly, with particular emphasis in the Sargasso Sea’ (emphasis added).¹³¹

(5) **Recommendation 02-21**, on vessel chartering, states that: ‘Fishing vessels to be chartered shall be registered to responsible Contracting Parties, Cooperating non-Contracting Parties, Entities or Fishing Entities or by other responsible non-Contracting Parties, Entities or Fishing Entities,

¹²⁹ Paragraph (d).

¹³⁰ Paragraph 11; see also paragraphs 1, 9, 12 and 13. See also, for example, **Recommendation 06-09**, to further strengthen the plan to rebuild blue marlin and white marlin populations and **Recommendation 06-06** concerning the western Atlantic bluefin tuna rebuilding program.

¹³¹ Paragraph 1.

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which explicitly agree to apply ICCAT conservation and management measures and enforce them on their vessels'.¹³² Thus it refers to: (a) contracting parties; (b) CPEFs; and (c) 'other responsible non-Contracting Parties, Entities or Fishing Entities, which explicitly agree to apply ICCAT conservation and management measures and enforce them on their vessels'. That implies that the ICCAT is prepared, for certain purposes, to accept a secondary category of 'friendly' parties, entities or fishing entities.

Recommendation 06-01, *regarding Chinese Taipei*, is noteworthy because it focuses exclusively on Chinese Taipei – the ICCAT's cooperating fishing entity. It addresses Chinese Taipei's bigeye tuna fishery,¹³³ and replaces Recommendation 05-02, *regarding control of Chinese Taipei's Atlantic bigeye tuna fishery*. The preamble to the latter reveals that Recommendation 05-02 had been adopted in view of concerns about Chinese Taipei's fishing activities. That preamble states, *inter alia*, that:¹³⁴

CALLING ATTENTION to the 2004 decision by the Commission, based on data and associated information submitted by [CPCs], to identify Chinese Taipei pursuant to the *Resolution by ICCAT Concerning Trade Measures* [Res. 03-15] because of its excessive catches and laundering activities in bigeye tuna fisheries and that the Commission duly notified Chinese Taipei of the identification and requested that it rectify the situation;

CAREFULLY REVIEWING the information regarding efforts by the Commission to obtain the cooperation of Chinese Taipei since the 2004 meeting, including information that Chinese Taipei has taken insufficient action to rectify the situation and continues to operate in a manner that diminishes the effectiveness of ICCAT conservation and management measures by, *inter alia*, the continuation of excessive catch and laundering activities in bigeye fisheries, failing to control effectively the large-scale longline vessels registered to Chinese Taipei and continuous involvement of Chinese Taipei fishing vessels in [IUU] fishing;

The preamble to Recommendation 06-01 recognizes some improvements by Chinese Taipei since 2005, stating that: '*ACKNOWLEDGING* with satisfaction that Chinese Taipei has met the conditions set out in Recommendation 05-02 to cooperate with ICCAT in the conservation and management of tuna and tuna-like species by carrying out such measures as extensive reduction in the number of its vessels and has made significant progress in rectifying the situation that Recommendation 05-02 was designed to address'. The operative provisions of Recommendation 06-01 read as follows:

1. Notwithstanding the provisions of [Recommendation 04-01], Chinese Taipei shall limit the number of vessels under its registry authorized to conduct a directed fishery for bigeye tuna in the Convention area to no more than 64 in 2007, and 60 in 2008 and thereafter. In general, Chinese Taipei shall ensure that the number of vessels of any size registered to Chinese Taipei and authorized to fish for ICCAT species in the ICCAT Convention area is commensurate with the available fishing opportunities agreed by ICCAT.
2. For 2007, Chinese Taipei shall subject fishing vessels under its registry and authorized to conduct a directed fishery for bigeye tuna in the Convention Area to the following monitoring and enforcement measures:
 - The vessels shall submit daily catch reports to Chinese Taipei authorities, by VMS or radio;
 - These vessels shall only conduct fishing operations for bigeye tuna if they are in possession of available individual vessel quota.

¹³² Paragraph 3.

¹³³ Recommendation 06-01 replaces Recommendation 05-02, *regarding control of Chinese Taipei's Atlantic bigeye tuna fishery*.

¹³⁴ 5th and 6th recitals.

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- Chinese Taipei authorities will send a preliminary catch report to ICCAT on a semi-annual basis;
 - Chinese Taipei shall ensure 10% observer coverage by vessel in the entire fishery.
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3. Until the observer program established under [Recommendation 06-11], is implemented, no at-sea transshipment is permitted for the vessels in paragraph 2, and their catch must be transhipped or landed at two designated ports (Cape Town or Las Palmas).
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4. For 2007, Chinese Taipei shall conduct an appropriate port inspection and sampling program to verify compliance by its fleet fishing for ICCAT species in the Convention area with quotas and other rules, as well as to sample catches, and report the findings of this program to ICCAT.
-
5. In order to control IUU fishing by vessels of any size that fish for ICCAT species in the ICCAT Convention area, Chinese Taipei shall, in cooperation with other CPCs continue to take effective steps to eliminate IUU fishing activities by Chinese Taipei residents and business entities and by vessels registered to Chinese Taipei, including implementing meaningful regulatory and enforcement measures to, at a minimum:
 - Cut beneficial and financial relations with IUU operators;
 - Identify, investigate, and take effective measures to eliminate IUU fishing operations for ICCAT species in the Convention area, in particular by vessels less than 24 meters LOA owned by Chinese Taipei residents or business entities, including cooperation with flag States to control foreign-flagged vessels; and
 - Work with the respective flag States, to the extent practicable, to stop foreign flagged vessels owned by Chinese Taipei business interests from exporting under the name of Chinese Taipei.
 - Work with the respective flag State to ensure that foreign-flagged vessels owned by Chinese Taipei business interests comply with ICCAT conservation and management measures.
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6. Chinese Taipei shall further investigate the past and current IUU fishing activities involving Chinese Taipei residents including illegal harvest of ICCAT species and submit a report on its findings to the 2007 annual meeting of the Commission.
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7. Chinese Taipei shall submit to ICCAT an interim report by 1 July 2007 and a final report 30 days before the 2007 annual meeting of the Commission describing the steps it has taken to comply with all terms of this recommendation. ICCAT shall review these reports and any other available information at its 2007 annual meeting.
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Other provisions relevant to cooperation

In addition to Recommendations and Resolutions, other ICCAT instruments also contain provisions of relevance to CPEFs. First, as noted above, Recommendation 03-20 requires an applicant for cooperating status to ‘confirm its commitment to respect the Commission’s conservation and management measures’. Thus, in principle, all of the **ICCAT’s conservation and management measures** are to be complied with by CPEFs. Some of those measures that apply expressly to CPEFs are indicated above. In remaining cases, where reference is made only to contracting parties, it may be less clear how the measure is to apply to CPEFs.

Secondly, the **ICCAT’s Rules of Procedure** contain provisions that are potentially applicable to CPEFs. Thus, reflecting Article XI(3) of the ICCAT Convention (see section A above), Rule 5 states that: ‘The Commission may invite ... any Government which is a Member of the United Nations or of any Specialized Agency of the United Nations and which is not a member of the Commission, to send observers to its meetings. Observers may, with the authorization of the Chairman, address the meeting to which they are invited and otherwise participate in its work, but without the right to vote’.

Thirdly, **document 05-12, on guidelines and criteria for granting observer status at ICCAT meetings**, states that the Executive Secretary shall invite, *inter alia*: ‘Non-Contracting countries with

coastlines bordering the Convention Area as defined in Article I of the Convention, or those non-contracting parties, entities or fishing entities identified as harvesting tunas or tuna-like species in the Convention Area'. That is more expansive than Rule 5 (and indeed Article XI(3) of the ICCAT Convention), but it enables the ICCAT to invite, *inter alia*, Chinese Taipei to be an observer at meetings.¹³⁵ Neither Rule 5 nor document 05-12 makes any distinction between CPEFs and other non-contracting parties.

Fourthly, the **ICCAT's Financial Regulations** also contain potentially applicable provisions. Reflecting Article X(II) of the ICCAT Convention (see section A above), Regulation 8 states that: 'The Executive Secretary may accept on behalf of the Commission voluntary contributions whether or not in cash from members of the Commission *or from other sources*, provided that the purposes for which such voluntary contributions have been made are consistent with the policies, aims and activities of the Commission' (emphasis added).¹³⁶ That provision would presumably be relevant if a CPEF were to make a donation to the running costs of fisheries management by the ICCAT (although such donations are not foreseen by Resolution 94-06 or by Recommendation 03-20).

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, neither Resolution 94-06 nor Recommendation 03-20 mentions any substantive benefits of cooperating status. However, **document 01-25, on ICCAT criteria for the allocation of fishing possibilities**, states that (emphasis added):

Participants will qualify to receive possible quota allocations within the framework of ICCAT in accordance with the following criteria:

- 1 Be a Contracting or Cooperating non-Contracting Party, Entity or Fishing Entity.
- 2 Have the ability to apply the conservation and management measures of ICCAT, to collect and to provide accurate data for the relevant resources and, taking into account their respective capacities, to conduct scientific research on those resources.

Thus it is clearly envisaged that a CPEF will have the possibility to receive a quota allocation. What is more, the criteria in the document 'should apply to *all stocks* when allocated by ICCAT' (emphasis added).¹³⁷ Document 01-25 sets out additional criteria for allocation of fishing opportunities, which make no express distinction between CPEFs and contracting parties (although some criteria refer to events in the past, such as historical catches and past contributions to conservation and data provision). One provision states that: 'The allocation criteria should be applied in a manner that encourages cooperating non-Contracting parties, Entities and Fishing Entities to become Contracting Parties, where they are eligible to do so'.¹³⁸

In practice, the ICCAT has adopted several Recommendations providing fishing opportunities to CPEFs, or, more specifically, to Chinese Taipei. That can be illustrated by reference to some Recommendations adopted in 2006.

¹³⁵ See, for example, ICCAT Report for biennial period, 2004-05, Part II (2005) – Vol.1, page 77.

¹³⁶ See also Regulation 4(6).

¹³⁷ Paragraph 3.

¹³⁸ Paragraph 25.

Recommendation 06-01 focuses on Chinese Taipei's bigeye tuna fishery. As noted in section B above, paragraph 1 states that: 'Notwithstanding the provisions of [Recommendation 04-01], Chinese Taipei shall limit the number of vessels under its registry authorized to conduct a directed fishery for bigeye tuna in the Convention area to no more than 64 in 2007, and 60 in 2008 and thereafter ...'.

Resolution 06-02 to amend the rebuilding program for north Atlantic swordfish starts by stating that: 'The Contracting Parties, and non-Contracting Parties, Entities or Fishing Entities whose vessels have been actively fishing for swordfish in the North Atlantic shall implement a 10-year rebuilding program, starting in 2000 and continuing through 2009, with the goal of achieving BMSY, with greater than 50% probability'.¹³⁹ It then proceeds to set catch limits for named States and, in the 'Others' category, for Chinese Taipei. Likewise, Chinese Taipei receives quota under **Resolution 06-03**, on south Atlantic swordfish catch limits.

Recommendation 06-04, to amend the Recommendation by ICCAT on north Atlantic albacore catch limits for the period 2004-2006, extends the terms of Recommendation 03-06 to 2007. Recommendation 03-06 had stated, *inter alia*, that: 'For the non-Contracting Parties, Entities or Fishing Entities, the catch limit for 2004, 2005 and 2006 shall be 4,459 t',¹⁴⁰ with a footnote stating that: 'This total includes a special allocation for Chinese Taipei of 4,453 t, as it has Cooperating Status'. Thus that allocation for Chinese Taipei is now carried forward into 2007. In principle, 6 tonnes (i.e. 4,459 tonnes minus 4,453 tonnes) is available to other 'non-Contracting Parties, Entities or Fishing Entities'.

In some cases, CPEFs may be given some advantages over other non-contracting parties in the application of measures generating sanctions or restrictions. For example, **Recommendation 02-22**, concerning the establishment of an ICCAT record of fishing vessels over 24 metres authorized to operate in the Convention Area, provides for vessels flagged to CPEFs to be included in the ICCAT record of vessels established by that measure. That means that those vessels, if included, are not subject to restrictions which apply to vessels not included on the record (including, potentially, all vessels of non-contracting parties other than CPEFs – see further section D below).

Another example is provided by **Recommendation 06-13**, concerning trade measures. As noted in section D below, that measure gives CPEFs an advantage over other non-contracting parties in that, for CPEFs (and contracting parties), 'actions such as the reduction of existing quotas or catch limits should be implemented to the extent possible before consideration is given to the application of trade restrictive measures'.

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the ICCAT against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

There are two principal sets of provisions on measures against non-contracting parties. The first is **Recommendation 06-13** concerning trade measures. That Recommendation provides for identification, by means of import and landing data or 'any other relevant information', of: (a)

¹³⁹ Paragraph 1.

¹⁴⁰ Paragraph 5.

CPCs ‘that have failed to discharge their obligations under the ICCAT Convention in respect of ICCAT conservation and management measures ...’; and/or (b) non-contracting parties ‘that have failed to discharge their obligations under international law to co-operate with ICCAT in the conservation and management of tuna and tuna-like species ...’.¹⁴¹

The CPC or non-contracting party in question is to be notified of its identification and given an opportunity to respond.¹⁴² Failure to provide a satisfactory response may lead to the Commission deciding upon ‘the adoption of non-discriminatory trade restrictive measures’ to be applied to the relevant CPC or non-contracting party.¹⁴³ In that instance, the Commission ‘should recommend to the Contracting Parties ... to take non-discriminatory trade restrictive measures, consistent with their international obligations’.¹⁴⁴

However, in the case of CPCs, ‘actions such as the reduction of existing quotas or catch limits should be implemented to the extent possible before consideration is given to the application of trade restrictive measures’.¹⁴⁵ Thus, in that sense, CPEFs enjoy an advantage over other non-parties. The measure provides for any non-parties subject to trade restrictive measures to be labelled ‘non-Cooperating non-Contracting Parties to ICCAT’.¹⁴⁶ It also provides for the Commission to: (a) recommend the lifting of trade restrictive measures if certain improvements are demonstrated;¹⁴⁷ and (b) decide on the re-instatement of such measures if need be.¹⁴⁸

In practice, trade restrictive measures have indeed been imposed by the ICCAT against several named States. At the current time, the States subject to such measures are **Bolivia** and **Georgia**;¹⁴⁹ in both cases, the CPCs are to prohibit ‘the import of Atlantic bigeye tuna and its products in any form’ from those States.¹⁵⁰ Both Bolivia and Georgia are non-contracting parties, and neither having cooperating status.

Those measures were imposed under Resolution 98-18 *concerning the unreported and unregulated catches of tunas by large-scale longline vessels in the Convention Area*. That Resolution was in turn repealed and replaced by Resolution 03-15 *concerning trade measures*, which stated that: ‘... CPCs and NCPs [non-Contracting Parties, Entities or Fishing Entities] that are under sanction pursuant to [*inter alia*, Resolution 98-18] are deemed to be sanctioned under the present Resolution, provided that this will not result in any greater level of sanction that already imposed’.¹⁵¹ Resolution 03-15 was in turn repealed and replaced by Recommendation 06-13, which (likewise) stated that: ‘... CPCs and NCPs that are under sanction pursuant to Resolution 03-15 are deemed to be sanctioned under the present Resolution [sic], provided that this will not result in any greater level of sanction than that already imposed’.¹⁵²

¹⁴¹ Paragraphs 1 and 2.

¹⁴² Paragraphs 3, 4 and 5.

¹⁴³ Paragraph 6.

¹⁴⁴ Paragraph 7.

¹⁴⁵ Paragraph 6.

¹⁴⁶ Paragraph 11.

¹⁴⁷ Paragraph 9.

¹⁴⁸ Paragraph 10.

¹⁴⁹ Recommendation 02-17 *regarding Bolivia pursuant to the 1998 Resolution concerning the unreported and unregulated catches of tuna by large-scale longline vessels in the Convention Area*; and Recommendation 03-18 *for bigeye tuna trade restrictive measures on Georgia*.

¹⁵⁰ Recommendation 02-17, paragraph 1; Recommendation 03-18, paragraph 1.

¹⁵¹ Paragraph 12.

¹⁵² Paragraph 12.

The second principal set of provisions is **Recommendation 06-12 amending the Recommendation by ICCAT to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the ICCAT Convention Area**. The Recommendation defines its scope by stating that it: (a) ‘shall apply *mutatis mutandis* to large-scale fishing vessels flying the flag of Contracting Parties and Co-operating non-Contracting Parties, Entities or Fishing Entities’, i.e. CPCs;¹⁵³ and (b) ‘shall apply initially to large-scale fishing vessels [though] [t]he Commission shall, at its annual meeting in 2007, review and, as appropriate, revise this recommendation with a view to its extension to other types of IUU fishing activities’.¹⁵⁴

Recommendation 06-12 starts by setting out a non-exhaustive list of activities or circumstances, to be supported by evidence from a CPC, whereby ‘the fishing vessels flying the flag of a non-Contracting Party, or a Cooperating non-Contracting Party, Entity or Fishing Entity, or a Contracting Party are presumed to have carried out [IUU] fishing activities in the ICCAT Convention Area’.¹⁵⁵ After including various specific activities, the list adds the broad category of vessels engaging ‘in fishing activities contrary to any other ICCAT conservation and management measures’.¹⁵⁶

CPCs are to transmit annually ‘the list of vessels flying the flag of a non-Contracting Party presumed to be carrying out IUU fishing activities in the Convention Area during the current and previous year’ to the Executive Secretary, accompanied by the evidence supporting the presumption of IUU fishing activity.¹⁵⁷ At first reading, that would appear to be the vessels to which the presumption had been applied by virtue of the preceding paragraph. However, the measure goes on to state that: ‘This list shall be based on the information collected by [CPCs], *inter alia*, under [six named ICCAT Recommendations and Resolutions]’.¹⁵⁸

As can be seen, the Recommendation refers to ‘the list of vessels flying the flag of a *non-Contracting Party* ...’ (emphasis added). However, as noted above, the Recommendation also states that it is to apply ‘*mutatis mutandis* to large-scale fishing vessels flying the flag of [CPCs]’. That presumably means that the list to be transmitted by the CPCs is also to contain vessels flagged to CPCs.

The annual transmission of the list of vessels by the CPCs is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the ICCAT of a (finalized) IUU Vessels List. The next step in the process is for the Executive Secretary, on the basis of the information received from the CPCs, to draw up a Draft IUU List (including the vessel-related information listed in Annex I).¹⁵⁹ That List, together with the supporting evidence, is to be transmitted to non-contracting parties with vessels on the list and to CPCs. They are to transmit comments on the draft list, ‘including evidence showing that the listed vessels have neither fished in contravention to ICCAT conservation and management measures nor had the possibility of fishing tuna and tuna-like species in the Convention Area’.¹⁶⁰

¹⁵³ Paragraph 21.

¹⁵⁴ Paragraph II.

¹⁵⁵ Paragraph I.

¹⁵⁶ Paragraph 1(j).

¹⁵⁷ Paragraph 2.

¹⁵⁸ Paragraph 3.

¹⁵⁹ Paragraph 3.

¹⁶⁰ Paragraph 3.

On the basis of, *inter alia*, the comments received from non-contracting parties and CPCs referred to in the preceding paragraph, the Executive Secretary is to draw up a Provisional List (including, again, the vessel-related information listed in Annex I).¹⁶¹ That List, together with the supporting evidence, is to be transmitted to the non-contracting parties concerned and to CPCs.¹⁶² CPCs 'may ... submit ... any additional information, which might be relevant for the establishment of the IUU list'.¹⁶³ That information is to be circulated to all CPCs and to the non-Contracting Parties concerned.¹⁶⁴

Next, the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures ('**PWG**') is to examine the Provisional List (and to refer its results to the Conservation and Management Measures Compliance Committee, if necessary).¹⁶⁵ It is then to 'adopt' a Provisional IUU Vessel List (i.e. presumably in contrast to the Executive Secretary having merely drawn it up) and then submit it to the ICCAT for approval, having first removed any vessel from the list if its flag State demonstrates specified facts or improvements.¹⁶⁶ The PWG is also to recommend to the ICCAT which vessels, if any, should be removed from the IUU Vessels List adopted at the previous ICCAT annual meeting.¹⁶⁷

The ICCAT then adopts the (confirmed) IUU Vessel List. At that point, the Commission is to request non-contracting parties with vessels on the list to, *inter alia*, take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.¹⁶⁸ That request is presumably to be made likewise to any CPCs with vessels on the list, by virtue of the Recommendation applying '*mutatis mutandis* to large-scale fishing vessels flying the flag of [CPCs]' (see above). Furthermore, CPCs are to 'take all necessary measures, under their applicable legislation'.¹⁶⁹

-
- (a) So that the fishing vessels, support vessels, refuelling vessels, the mother-ships and the cargo vessels flying their flag do not assist in any way, engage in fishing processing operations or participate in any transshipment or joint fishing operations with vessels included on the IUU Vessels List;

 - (b) So that IUU vessels are not authorized to land, tranship re-fuel, re-supply, or engage in other commercial transactions;

 - (c) To prohibit the entry into their ports of vessels included on the IUU list, except in case of *force majeure*;

 - (d) To prohibit the chartering of a vessel included on the IUU vessels list;

 - (e) To refuse to grant their flag to vessels included in the IUU list, except if the vessel has changed owner and the new owner has provided sufficient evidence demonstrating the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel, or having taken into account all relevant facts, the flag Contracting Party or Cooperating non-Contracting Party, Entity or Fishing Entity determines that granting the vessel its flag will not result in IUU fishing;

 - (f) To prohibit the imports, or landing and/or transshipment, of tuna and tuna-like species from vessels included in the IUU list;

¹⁶¹ Paragraph 4.

¹⁶² Paragraph 4.

¹⁶³ Paragraph 5.

¹⁶⁴ Paragraph 5.

¹⁶⁵ Paragraph 6.

¹⁶⁶ Paragraphs 6 and 7(i).

¹⁶⁷ Paragraph 7(ii).

¹⁶⁸ Paragraph 8.

¹⁶⁹ Paragraph 9.

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- (g) To encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of tuna and tuna-like species caught by vessels included in the IUU list;
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- (h) To collect and exchange with other Contracting Parties or Cooperating non-Contracting Parties, Entities or Fishing Entities any appropriate information with the aim of searching for, controlling and preventing false import/export certificates regarding tunas and tuna-like species from vessels included in the IUU list.
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CPCs ‘shall not take any unilateral trade measures or other sanctions’ against vessels (a) ‘provisionally included in the Draft IUU List’ or (b) that have already been removed from the Provisional IUU List, on the grounds that such vessels are involved in IUU fishing activities, albeit ‘[w]ithout prejudice to the rights of flag States and coastal States to take proper action consistent with international law’.¹⁷⁰ A procedure is established for removal of a vessel from the (confirmed) IUU Vessels List,¹⁷¹ triggered by the request of the flag State.

The wording of Recommendation 06-12 indicates that the measures in response to a vessel being placed on the IUU Vessels List are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the draft, provisional or confirmed IUU Lists is an action to be taken at the RFMO level.

Recommendation 06-12 was only adopted at the most recent meeting of the ICCAT; consequently no IUU Vessels List adopted under that Recommendation is yet available. However, Recommendation 06-12 replaced an earlier Recommendation (02-23), which applied only to vessels flagged to non-contracting parties. An IUU Vessel List adopted by the ICCAT under Recommendation 02-23 is available on the ICCAT website.¹⁷² That list includes 17 vessels: under the heading ‘Current Flag’, two vessels are stated as being flagged to **Sierra Leone**, while for the remaining 15 vessels the flag is stated to be ‘Unknown’.

Other provisions affecting non-contracting parties

Some other ICCAT Recommendations and Resolutions could also negatively affect non-contracting parties. The principal measures are set out below. It should be added that the ICCAT has adopted statistical document programmes for several tuna and tuna-like species that could affect non-contracting parties by: (a) any implications drawn from trade data gathered by those programmes; and (b) (with some exceptions) requirements for certain trade movements of products of tuna or tuna-like species to be accompanied by an appropriate statistical document or re-export certificate (including requirements on validation of that document).

Recommendation 02-22, concerning the establishment of an ICCAT record of fishing vessels over 24 metres authorized to operate in the Convention Area, provides for the establishment of an ICCAT record of large-scale fishing vessels (‘LSFVs’). That record is to comprise certain vessels flagged to CPCs,¹⁷³ and the measure provides for certain actions to be taken in respect of vessels not included on the record.¹⁷⁴ It is not clear whether such actions are to apply to vessels not on

¹⁷⁰ Paragraph 12.

¹⁷¹ Paragraphs 13-19.

¹⁷² <www.iccat.es/IUU.htm>.

¹⁷³ Paragraph 2.

¹⁷⁴ See, *inter alia*, paragraphs 5(e), 7(a), 8 and 9(b).

the record merely by virtue of being flagged to non-CPCs; if so, the measure will potentially negatively affect such vessels, irrespective of whether those vessels are conducting IUU fishing.

Recommendation 98-II, *concerning the ban on landings and transshipments of vessels from non-contracting parties identifies [sic] as having committed a serious infringement*, relates to port State control. A vessel flying the flag of a non-contracting party, entity or fishing entity, which has been sighted in the ICCAT Convention Area, in conformity with the conditions of [ICCAT Recommendation 97-II, paragraph 4], ‘is presumed to be undermining ICCAT conservation measures’.¹⁷⁵

When such a vessel enters voluntarily a port of any contracting party, it shall not be allowed to land or tranship any fish until it has been inspected.¹⁷⁶ If that inspection reveals that the vessel has onboard species subject to ICCAT conservation measures, landings and transshipments of all fish from that vessel ‘shall be prohibited in all Contracting Party ports ... 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’.¹⁷⁷ (See also **Recommendation 97-10** for a revised ICCAT port inspection scheme.)

Recommendation 06-II, *establishing a programme for transshipment*, relates to transshipments at sea and in port. With a time-limited exception for four specific vessels, it requires all transshipments of tuna and tuna-like species in the ICCAT Convention area to take place in port, unless special conditions for transshipment at sea are complied with. The measure establishes conditions for transshipment in ports and for landings or imports of transhipped fish. It also establishes the ICCAT Record of Carrier Vessels authorized to receive tuna and tuna-like species in the Convention area from large-scale tuna longline fishing vessels.

Recommendation 06-14, *to promote compliance by nationals of Contracting Parties, Cooperating non-Contracting Parties, Entities or Fishing Entities with ICCAT conservation and management measures* (applicable from 1 July 2008, or earlier on a voluntary basis), also has the potential to affect non-contracting parties negatively. That is because the measure aims at reducing the participation of CPC nationals in the activities listed in paragraph 1 of ICCAT Recommendation 06-12 (see above). Any such reduction could impair the efficacy of the operations of vessels conducting IUU fishing (including those flagged to non-contracting parties) that otherwise rely on those nationals.

Recommendation 97-II, *on transshipments and vessel sightings*, establishes a system for reporting of, *inter alia*, ‘non-contracting party, entity or fishing entity vessels that may be fishing contrary to ICCAT conservation measures’.¹⁷⁸ It also requires contracting parties to ‘ensure that fishing vessels and mother vessels flying their flag only transfer or receive at-sea transshipment of ICCAT species from [CPCs]’.¹⁷⁹

(See also, *inter alia*, **Recommendation 02-21**, *on vessel chartering*; **Recommendation 06-07**, *on bluefin tuna farming*; and **Recommendation 06-05**, *to establish a multi-annual recovery plan for bluefin tuna in the eastern Atlantic Ocean and Mediterranean*; **measure 95-15**, *on mandate and terms of*

¹⁷⁵ Paragraph 1.

¹⁷⁶ Paragraph 2.

¹⁷⁷ Paragraph 3.

¹⁷⁸ Paragraph 4.

¹⁷⁹ Paragraph 1.

*reference adopted by the Commission for the ICCAT Conservation and Management Measures Compliance Committee; and **Recommendation 02-28**, to change the terms of reference of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures.)*

IOTC

<http://www.iotc.org/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the IOTC website. The *Collection of Resolutions and Decisions by the Indian Ocean Tuna Commission*, available on the IOTC website, includes Resolutions adopted at IOTC 10.]

Full name of RFMO	Indian Ocean Tuna Commission
Most recent meeting of RFMO	IOTC 10 – May 2006 [report and adopted Recommendations and Resolutions available]
Treaty establishing RFMO [under FAO Constitution, Article XIV]	Agreement for the Establishment of the Indian Ocean Tuna Commission
Year of adoption of treaty	1993
Year of entry into force of treaty	1996

A. Provisions of treaty relating to non-contracting parties

The provisions of the IOTC Agreement referring expressly to non-contracting parties (apart from Article IV on membership and Article XVII on acceptance) are as follows:

Article and title	Text of relevant provision (emphasis added)
Article VII Observers	<p>1. <i>Any Member or Associate Member of FAO that is not a Member of the Commission</i> 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.</p> <p>2. <i>States which, while not Members of the Commission nor Members or Associate Members of FAO, are Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency</i> 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 FAO, be invited to attend sessions of the Commission as observers.</p>
Article X Implementation	4. The Members of the Commission shall cooperate in the exchange of information regarding any fishing for stocks covered by this Agreement by nationals of <i>any State or entity which is not a Member of the Commission</i> .
Article XI Information	1. ... The Commission shall ... endeavour to obtain fishing statistics from <i>fishing States or entities which are not Members of the Commission</i> .

One provision, Article IV(3), hints at the concept of cooperation with non-contracting parties by stating that: ‘With a view to furthering the objectives of this Agreement, the Members of the Commission shall cooperate with each other to encourage any State or regional economic integration organization which is entitled to become, but is not yet, a Member of the Commission, to accede to this Agreement’. Provisions of the IOTC Agreement potentially relating to non-contracting parties include, *inter alia*, the following:

Article and title	Text of relevant provision
Article V Objectives, functions and responsibilities of the Commission	<p>1. The Commission shall promote cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and encouraging sustainable development of fisheries based on such stocks.</p> <p>2. In order to achieve these objectives, the Commission shall have the following functions and responsibilities, in accordance with the principles expressed in the relevant provisions of the United Nations Convention on the Law of the Sea: (a) ... to gather, analyse and disseminate scientific information, catch and effort statistics and other data relevant to the conservation and management of the stocks and to fisheries based on the stocks covered by this Agreement; ... (c) to adopt, in accordance with Article IX and on the basis of scientific evidence, conservation and management measures, to ensure the conservation of the stocks covered by this Agreement and to promote the objective of their optimum utilization throughout the Area; ... (h) to carry out such other activities as may be necessary to fulfil its objectives as set out above.</p>
	<p>3. The Commission may adopt decisions and recommendations, as required, with a view to furthering the objectives of this Agreement.</p>
Article VIII Administration	<p>2. The Secretary shall be responsible for implementing the policies and activities of the Commission and shall report thereon to the Commission. ...</p>
Article X Implementation	<p>1. Each Member of the Commission shall ensure that such action is taken, under its national legislation, including the imposition of adequate penalties for violations, as may be necessary to make effective the provisions of this Agreement and to implement conservation and management measures which become binding on it under paragraph 1 of Article IX.</p> <p>3. The Members of the Commission shall cooperate, through the Commission, in the establishment of an appropriate system to keep under review the implementation of conservation and management measures adopted under paragraph 1 of Article IX, taking into account appropriate and effective tools and techniques to monitor the fishing activities and to gather the scientific information required for the purposes of this Agreement.</p>
Article XI Information	<p>1. The Members of the Commission shall, on the request of the Commission, provide such available and accessible statistical and other data and information as the Commission may require for the purposes of this Agreement. The Commission shall decide the scope and form of such statistics and the intervals at which they shall be provided. ...</p>
Article XIII Finances	<p>6. The Commission may ... accept donations and other forms of assistance from organizations, individuals and other sources for purposes connected with the fulfilment of any of its functions.</p> <p>7. Contributions and donations and other forms of assistance received shall be placed in a Trust Fund administered by the Director-General in conformity with the Financial Regulations of FAO.</p>

B. Brief analysis of, and references to, decisions or resolutions of the IOTC relating to cooperating non-members

Principal framework provisions

The IOTC has adopted Resolution 98/05 on *Cooperation with non-Contracting Parties* and Resolution 03/02 on *Criteria for attaining the status of Co-operating non-Contracting Party*. The cooperating non-contracting parties ('C.NCPs') are currently **Belize, Indonesia, Senegal and South Africa**.¹⁸⁰

By **Resolution 98/05**, the Commission instructs the Chairman to send a standard letter 'to all non-Contracting Parties known to have vessels fishing in the Area for species covered by the Agreement to urge them to become Contracting Parties'. Despite that reference to becoming contracting parties, the text of the standard letter, appended to the Resolution, indicates that (mere) cooperation is acceptable in the absence of becoming a contracting party. Thus the letter states, *inter alia*, that (emphasis added):

The Indian Ocean Tuna Commission (IOTC) is a regional fisheries organization, created in 1996, which to date includes 16 States and one Organization for regional economic integration.

The principal objective of the IOTC is to promote the conservation and management of the migratory species covered by the Agreement establishing the IOTC (hereinafter referred to as 'the Agreement').

The contracting parties of the IOTC have decided to cooperate among themselves to implement this objective.

In order to achieve this goal, the IOTC has, *inter alia*, the responsibility of constantly monitoring the status of and changes in the stocks covered by the Agreement and to collect, analyse and disseminate scientific information, statistics of catches and fishing effort and other data useful for the conservation and management of these stocks.

This function can be implemented only if non-Contracting Parties of the IOTC *cooperate with the Commission and exchange information on fishing activities relating to the stocks covered by the Agreement*.

The Chairman of the IOTC draws the attention of the Authorities of [...] whose vessels exploit the stocks covered by the Agreement in its area of competence, to *the need to cooperate for the purposes of conservation and management of these stocks*.

With this need in mind, the Chairman of the Commission invites the Authorities of [...] to become party to the Agreement establishing the IOTC by sending to the Director-General of FAO an instrument of acceptance, *or at least to cooperate with the Commission, through the exchange of information and statistical data on fishing activities on the stocks falling within the remit of the Commission*.

Resolution 03/02, adopted subsequently, states that its legal basis is Article IX(1) of the IOTC Agreement (on the procedure for adopting conservation and management measures binding on members of the Commission),¹⁸¹ which is a broad and general provision. The Resolution makes no reference to Article IV(3) of the IOTC Agreement (see section A above).

The measure requires the Secretary to contact annually 'all non-Contracting Parties known to be fishing in the IOTC Area for species under IOTC competence to urge them to become Contracting Party to IOTC or attain the status of a Co-operating non-Contracting Party'.¹⁸²

¹⁸⁰ IOTC 10, report, paragraphs 17 and 18.

¹⁸¹ Preamble, 6th recital.

¹⁸² Paragraph 1.

The Recommendation sets out the procedure to be followed, and information to be provided, by a non-contracting party seeking C.NCP status.¹⁸³ The information to be provided is as follows:

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- (a) where available, data on its historical fisheries in the IOTC Area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas;
-
- (b) all the data that Contracting Parties have to submit to IOTC based on the resolutions adopted by IOTC;
-
- (c) details on current fishing presence in the IOTC Area, number of vessels and vessel characteristics and; [sic]
-
- (d) information on any research programmes it may have conducted in the IOTC Area and the information and the results of this research.
-

It also requires the applicant to: (a) ‘confirm its commitment to respect the Commission’s conservation and management measures’; and (b) ‘inform IOTC of the measures it takes to ensure compliance by its vessels of IOTC conservation and management measures’.¹⁸⁴

Resolution 03/02 also explains that C.NCP status is to be decided by the IOTC, on the recommendation of the Compliance Committee. The Compliance Committee may consider ‘[the] data submission of the applicant’ as well as information on the applicant available from other RFMOs. In the decision-making process, ‘[c]aution shall be used so as not to introduce into the IOTC Area the excessive fishing capacity of other regions or IUU fishing activities by granting cooperating status to the applicant’.¹⁸⁵

The cooperating status is to be reviewed annually ‘and renewed unless revoked by the Commission due to non-compliance with IOTC conservation and management measures’.¹⁸⁶ Neither Resolution 03/02 nor Resolution 98/05 mentions any benefits of C.NCP status (but see further section C below).

Measures addressed to cooperating non-contracting parties

Following the adoption of Resolution 98/05, and then Resolution 03/02, many measures adopted subsequently by the IOTC apply some or all of their provisions equally to contracting parties and C.NCPs, by using the phrase ‘The Contracting Parties and non-Contracting Parties Cooperating with the IOTC shall [or ‘are encouraged to’] ...’ (or similar formulations) as a prefix to the activity in question. Those measures, and their relevant subject matter, are as follows:

Measure	Summary of subject matter
Res 99/01	‘transmission of the list of vessels fishing for tropical tunas’
Res 99/02	control of own-flag fishing vessels and specified actions against ‘FOC’ vessels [see also section D below]
Res 00/01	compliance ‘with the Resolution 98/01, “Mandatory Statistical Requirements for IOTC Members”’
Res 00/02	participation in survey of predation of longline-caught fish

¹⁸³ Paragraphs 2 and 3.

¹⁸⁴ Paragraph 4.

¹⁸⁵ Paragraph 5.

¹⁸⁶ Paragraph 6.

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Res 01/01	presentation of national observer programmes prior to annual meeting in 2002
Res 01/02	control of own-flag fishing vessels
Res 01/05	provision of data on FADs
Res 02/02	adoption of pilot programme for satellite-based VMS [now superseded by Res 06/03]
Rec 02/07	control of certain own-flag vessels undertaking transshipment; participation in statistical document programme
Res 03/01	capacity limitation [see also section C below]
Rec 03/05	collection and examination of import and landing data (and possible imposition of non-discriminatory trade restrictive measures) [see also sections C and D below]
Rec 03/06	participation in development of terms of reference for a particular subsidiary body
Res 05/01	catch limitation [see also section C below]
Res 05/02	participation of own-flag vessels in IOTC Record of fishing vessels; control of own-flag fishing vessels; participation in statistical document programme
Res 05/03	participation in port State control
Res 05/04	submission of data on own-flag vessels, and potentially other vessels, to secretariat [see also section D below]
Res 05/05	sharks
Rec 05/07	control of own-flag fishing vessels
Rec 05/08	sea turtles
Rec 05/09	seabirds
Res 06/01	participation in development of, and response to, IUU list (though, temporarily at least, no scope for inclusion of own-flag vessels on IUU list) [see also sections C and D below]
Res 06/02	control of certain own-flag vessels undertaking transshipment; participation of own-flag vessels in IOTC Record of (Carrier) Vessels; participation in statistical document programme [see also section D below]
Res 06/03	adoption of programme for satellite-based VMS
Res 06/04	seabirds
Res 06/05	capacity limitation [see also section C below]

Resolution 01/06, concerning the IOTC bigeye tuna statistical document programme, takes a different approach to applying its provisions to C.NCPs. A paragraph towards the end of the measure states simply that: ‘The Commission shall request Cooperating Non-Contracting Parties to take the measures described in the above paragraphs’.¹⁸⁷

Overall, the table above (and Resolution 01/06) indicates that a broad array of cooperation is expected of C.NCPs.

¹⁸⁷ Paragraph 8.

Other provisions relevant to cooperation

In addition to the Recommendations and Resolutions mentioned above, other IOTC instruments also contain provisions of relevance to C.NCPs. First, as noted above, Resolution 03/02 requires a candidate C.NCP to ‘confirm its commitment to respect the Commission’s conservation and management measures’. Thus, in principle, all of the **IOTC’s conservation and management measures** are to be complied with by C.NCPs. Those measures that expressly apply to C.NCPs are indicated above. However, it is not clear whether any (admitted relatively few) measures that do not mention their express application to C.NCPs are intended to apply to such parties.

Secondly, reflecting Article VII of the IOTC Agreement (see section A above), the **IOTC’s Rules of Procedure** contain provisions that are potentially applicable to C.NCPs. Thus Rule XIII establishes procedures for granting observer status to, *inter alia*: (a) ‘Members and Associate Members of the [FAO] that are not Members of the Commission’;¹⁸⁸ and (b) ‘States which are not Members of the Commission, nor Members of the [FAO], but that are Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency’.¹⁸⁹

Rule XIII does not accommodate Chinese Taipei, which does not fall into either of the categories in the preceding paragraph. However, the report of IOTC 10 shows that, in practice, ‘the Commission admitted ... invited experts from Taiwan, Province of China’ (the contact details for such delegates being listed separately from those of observers).¹⁹⁰ Of note, Rule XIII makes no distinction between C.NCPs and other non-contracting parties (and, as noted above, neither Resolution 03/02 nor Resolution 98/05 establishes any rights for C.NCPs regarding observer status).

Thirdly, the **IOTC’s Financial Regulations** are potentially relevant. Reflecting Article XIII(6) of the IOTC Agreement (see section A above), Regulation IV(2) states that: ‘*In cases of emergency, the Commission is authorized to accept additional contributions from a Member or Members of the Commission or grants from other sources and incur expenditure against them for emergency action for which the said contributions or grants were specifically provided. ...*’ (emphasis added). Reflecting Article XIII(7) of the IOTC Agreement (see section A above), Regulation VI(1) states that: ‘All contributions, donations and other forms of assistance received shall be placed in a Trust Fund administered by the Director-General [of the FAO] in conformity with the Financial Regulations of FAO’.

Those provisions of the Financial Regulations, coupled with Article XIII(6) of the IOTC Agreement (which has a broader scope than just cases of emergency), would presumably be relevant if a C.NCP were to make a donation to the running costs of fisheries management by the IOTC. Such donations are not foreseen by Resolution 98/05 or Resolution 03/02, but the report of IOTC 10 notes that: ‘The Commission strongly encouraged Cooperating non-Contracting Parties to contribute financially to the Commission ...’.¹⁹¹

¹⁸⁸ Rule XII(2).

¹⁸⁹ Rule XII(3).

¹⁹⁰ IOTC 10, report, pages 6 and 26.

¹⁹¹ IOTC 10, report, paragraph 20.

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, neither Resolution 03/02 nor Resolution 98/05 mentions any benefits of C.NCP status.

However, as noted in section D below, **Resolution 06/01** does not currently apply to vessels flagged to C.NCPs. That could lead to preferential treatment for the latter on the basis that such vessels cannot currently be placed on the draft, provisional or confirmed IUU lists. Furthermore, as noted in section D below, **Recommendation 03/05** gives C.NCPs an advantage over other non-contracting parties in that, for C.NCPs (and contracting parties), ‘actions such as the reduction of existing quotas or catch limits should be implemented to the extent possible before consideration is given to the application of trade restrictive measures’.

Several of the measures listed in the table in section B above imply fishing opportunities for C.NCPs. As indicated in the preceding paragraph, **Recommendation 03/05** envisages that C.NCPs may have quotas or catch limits. **Resolution 06/05** *on the limitation of fishing capacity, in terms of number of vessels, of IOTC Contracting Parties and Co-operating non Contracting Parties* and **Resolution 03/01** *on the limitation of fishing capacity of Contracting Parties and Co-operating non-Contracting Parties* establish capacity limitations for C.NCPs (and contracting parties), by reference to numbers of vessels recently notified to the IOTC.¹⁹²

Resolution 05/01, *on conservation and management measures for bigeye tuna*, establishes bigeye tuna catch limits for C.NCPs (as well as for contracting parties), that limit being ‘their recent levels of catch reported by the Scientific Committee’.¹⁹³ During a three-year period from IOTC 10, during which interim catch levels will apply, the Commission is to ‘develop a mechanism to allocate, for specific time periods, bigeye tuna quotas for all [contracting parties and C.NCPs]’.¹⁹⁴ Furthermore, ‘[f]uture access to the tuna and tuna-like resources found within the area of competence of the IOTC will, in part, be determined on the level of responsibility shown by [contracting parties and C.NCPs] in relation to this measure’.¹⁹⁵

(Of note, Resolution 05/01 also states that: ‘The Commission shall request Taiwan Province of China to limit their annual bigeye catch in the IOTC area to 35,000 tonnes’.¹⁹⁶ That provision is notable because Taiwan Province of China does not have any formal status under the IOTC Agreement.)

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the IOTC against non-members (whether cooperating non-members or non-cooperating non-members)

This section will use the abbreviation ‘**CPC**’ to mean contracting parties and cooperating non-contracting parties (as is the convention within IOTC).

¹⁹² Resolution 06/05, paragraph 1 (see also, *inter alia*, paragraphs 4 and 8); Resolution 03/01, paragraph 1 (see also, *inter alia*, paragraph 4).

¹⁹³ Paragraph 1.

¹⁹⁴ Paragraph 5.

¹⁹⁵ Paragraph 6.

¹⁹⁶ Paragraph 2.

Principal framework provisions

The IOTC has adopted two principal sets of provisions on measures against non-contracting parties. The first is **Recommendation 03/05 concerning trade measures**, which provides for the identification, by means of import and landing data and ‘any other relevant information’, of: (a) CPCs ‘who have failed to discharge their obligations under the IOTC Agreement in respect of IOTC conservation and management measures ...’; and (b) non-contracting parties ‘who have failed to discharge their obligations under international law to co-operate with IOTC in the conservation and management of tuna and tuna-like species ...’.¹⁹⁷

The CPC or non-contracting party in question is to be notified of its identification and given an opportunity to respond.¹⁹⁸ Failure to provide a satisfactory response may lead to the Compliance Committee proposing to the Commission to decide upon ‘the adoption of non-discriminatory trade restrictive measures’.¹⁹⁹ If the Commission decides upon the adoption of such measures, it ‘should adopt ... to take [sic] non-discriminatory trade restrictive measures, consistent with their [sic] international obligations’.²⁰⁰

However, in the case of CPCs, ‘actions such as the reduction of existing quotas or catch limits should be implemented to the extent possible before consideration is given to the application of trade restrictive measures’.²⁰¹ Thus, in that sense, C.NCPs enjoy an advantage over other non-contracting parties.

The measure provides for a new label for non-contracting parties (as opposed to CPCs) that are subject to trade restrictive measures under the Resolution: they are to be considered as ‘Non Co-operating Non Contracting Parties to IOTC’.²⁰² It also provides for the Commission: (a) ‘to adopt the lifting of trade restrictive measures’ if certain improvements are demonstrated;²⁰³ and (b) to decide on the re-instatement of such measures if need be.²⁰⁴ In practice, no trade restrictive measures have been imposed to date on any CPC or non-contracting party pursuant to Recommendation 03/05.

The second principal set of provisions is **Resolution 06/01 on establishing a list of vessels presumed to have carried out illegal, unregulated and unreported fishing activities in the IOTC area**. The measure states that: ‘This Resolution shall apply initially to large-scale fishing vessels flying the flag of non-Contracting Parties. The Commission shall, at its annual meeting in 2007, review and, as appropriate, revise this resolution with a view to its extension to other types of IUU fishing activities of non-Contracting Party vessels and, to CPC vessels’.²⁰⁵

That implies that the Resolution’s stated application to vessels flagged to non-contracting parties does not currently include vessels flagged to C.NCPs (although, as stated, that situation may change at the annual meeting due to take place in May 2007). Thus, unless otherwise stated,

¹⁹⁷ Paragraphs 1 and 2.

¹⁹⁸ Paragraphs 3, 4 and 5.

¹⁹⁹ Paragraph 6.

²⁰⁰ Paragraph 7.

²⁰¹ Paragraph 6.

²⁰² Paragraph 11.

²⁰³ Paragraph 9.

²⁰⁴ Paragraph 10.

²⁰⁵ Paragraph 15.

references below to ‘non-contracting parties’ should be interpreted as ‘non-contracting parties other than C.NCPs’.

Resolution 06/01 starts by setting out a non-exhaustive list of activities or circumstances, to be supported by evidence from a contracting party or C.NCP, whereby ‘the fishing vessels flying the flag of a non-Contracting Party are presumed to have carried out [IUU] fishing activities in the IOTC Area’.²⁰⁶ After including various specific activities, the list ends with the broad category of engaging ‘in fishing activities contrary to any other IOTC conservation and management measures’.²⁰⁷

CPCs are to transmit annually ‘the list of vessels flying the flag of a non-Contracting party presumed to be carrying out IUU fishing activities in the IOTC Area ..., accompanied by the supporting evidence concerning the presumption of IUU fishing activity’.²⁰⁸ At first reading, that would appear to be the vessels to which the presumption had been applied by virtue of the preceding paragraph. However, the measure goes on to state that: ‘This list shall be based on the information collected by CPC’s, *inter alia*, under [seven named IOTC Resolutions]’.²⁰⁹

That is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the IOTC of a (finalized) IUU Vessels List. On the basis of the information received from the CPCs, the Secretary is to draw up a Draft IUU Vessels List (including the vessel-related information listed in Annex I).²¹⁰ That List, together with the supporting evidence, is to be transmitted to non-contracting parties with vessels on the list and to CPCs. They may transmit comments on the draft list, ‘including evidence showing that the listed vessels have neither fished in contravention to IOTC conservation and management measures nor had the possibility of fishing tuna and tuna-like species in the IOTC Area’.²¹¹

On the basis (it appears) of the same information that led to the drawing up of the Draft IUU Vessels List, the Executive Secretary is to draw up a Provisional IUU Vessels List (including, again, the vessel-related information listed in Annex I).²¹² That List, together with the supporting evidence, is to be transmitted to the non-contracting parties concerned and to CPCs.²¹³ CPCs ‘may ... submit ... any additional information, which might be relevant for the establishment of the IUU Vessels List’.²¹⁴ That information is to be circulated to all CPCs and to the non-contracting parties concerned.²¹⁵

Next, the Compliance Committee is to ‘adopt’ a Provisional IUU Vessels List (i.e. presumably in contrast to the Secretary having merely drawn it up) and then submit it to the IOTC for approval, having first removed any vessel from the list if its flag State demonstrates specified facts or improvements.²¹⁶ The Compliance Committee is also to recommend to the IOTC which

²⁰⁶ Paragraph 1.

²⁰⁷ Paragraph 1(j).

²⁰⁸ Paragraph 2.

²⁰⁹ Paragraph 3.

²¹⁰ Paragraph 4.

²¹¹ Paragraph 4.

²¹² Paragraph 7.

²¹³ Paragraph 7.

²¹⁴ Paragraph 5.

²¹⁵ Paragraph 5.

²¹⁶ Paragraphs 9, 10 and 11(a).

vessels, if any, should be removed from the IUU Vessels List adopted at the previous IOTC annual meeting.²¹⁷

The IOTC then adopts the (finalized) IUU Vessels List. At that point, the Commission is to request non-contracting parties with vessels on the list to, *inter alia*, take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.²¹⁸ Furthermore, CPCs are to ‘take all necessary measures, under their applicable legislation’:²¹⁹

-
- (a) So that the fishing vessels, the mother-ships and the cargo vessels flying their flag do not participate in any transshipment with vessels on the IUU Vessels list;

 - (b) So that IUU vessels that enter ports voluntarily are not authorized to land, tranship, re-fuel, re-supply, or engage in other commercial transactions;

 - (c) To prohibit the chartering of a vessel included on the IUU Vessels List;

 - (d) To refuse to grant their flag to vessels included in the IUU Vessels List, except if the vessel has changed owner and the new owner has provided sufficient evidence demonstrating the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel; or having taken into account all relevant facts, the Flag State determines that granting the vessel its flag will not result in IUU fishing;

 - (e) To prohibit the imports, landing or transshipment, of tuna and tuna-like species from vessels included in the IUU Vessels List;

 - (f) To encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of tuna and tuna-like species caught by vessels included in the IUU Vessels List;

 - (g) To collect and exchange with other Contracting Parties or Co-operating non-Contracting Parties any appropriate information with the aim of detecting, controlling and preventing false import/export certificates for tunas and tuna-like species from vessels included in the IUU Vessels List.

CPCs ‘should not’ (i.e. exhortatory rather than mandatory) take ‘any unilateral trade measures or other sanctions’ against vessels (a) ‘provisionally included in the Draft IUU Vessels List’ or (b) that have been already removed from the IUU Vessels List, on the grounds that such vessels are involved in IUU fishing activities, albeit ‘[w]ithout prejudice to the rights of Flag States and coastal states to take proper action consistent with international law’.²²⁰ That leaves some uncertainty about the extent to which parties may adopt sanctions against vessels on the Provisional IUU Vessels List. A procedure is established for removal of a vessel from the (finalized) IUU Vessels List,²²¹ triggered by the request of the flag State.

The wording of Resolution 06/01 indicates that the measures in response to a vessel being placed on the IUU Vessels List are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the draft, provisional or finalized IUU Vessel Lists is an action to be taken at the RFMO level.

²¹⁷ Paragraph 11(b).

²¹⁸ Paragraph 12(b).

²¹⁹ Paragraph 13.

²²⁰ Paragraph 16.

²²¹ Paragraphs 17–23.

Resolution 06/01 was only adopted at the most recent meeting of the IOTC; consequently no IUU Vessels List adopted under that Resolution is yet available. However, Resolution 06/01 superseded an earlier Resolution 02/04 entitled *On establishing a list of vessels presumed to have carried out illegal, unregulated and unreported fishing in the IOTC Area*. An IUU Vessels List adopted by the IOTC under Resolution 02/04 is available in the report of IOTC 10.²²² That list includes six vessels: two have apparently been scrapped; one has no current flag State stated; and the remaining three are stated as currently being flagged to **Papua New Guinea**.

Other provisions affecting non-contracting parties

Some other IOTC Resolutions could also affect non-parties negatively. The principal measures in that regard are listed below. It should be added that the IOTC has adopted a statistical document programme for bigeye tuna which could affect non-contracting parties by: (a) any implications drawn from trade data gathered by that programme; and (b) requirements for certain trade movements of bigeye tuna to be accompanied by an appropriate statistical document or re-export certificate (including requirements on validation of such documents).

Measure	Summary of relevant provisions
Res 06/02	<i>on establishing a programme for transshipment by large-scale fishing vessels:</i> (a) establishes IOTC Record of (Carrier) Vessels authorized to receive tuna and tuna-like species at sea in the IOTC Area from LSTLVs; (b) requires all transshipment of tuna and tuna-like species in the IOTC Area to take place in port, unless special conditions for transshipment at sea are complied with; and (c) establishes conditions for transshipment in ports and for landings and imports of transhipped fish. [see also Recommendation 02/07, concerning measures to prevent the laundering of catches by IUU large-scale tuna longline fishing vessels]
Res 05/03	<i>relating to the establishment of an IOTC programme of inspection in port:</i> (a) provides for port inspections by a CPC of 'fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals'; (b) states that 'priority should be given to inspection of vessels from Non-Contracting Parties' (though includes recognition that port inspections 'should be carried out in a non-discriminatory basis'); (c) requires CPCs, in accordance with Resolution 01/03 [see below], to adopt regulations to prohibit landings and transshipments by non-contracting party vessels (exclusively) 'where it has been established that the catch of the species covered by the [IOTC] Agreement ... has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission'.
Res 01/03	<i>establishing a scheme to promote compliance by non-contracting party vessels with Resolutions established by IOTC:</i> (a) a vessel flying the flag of a non-contracting party, entity or fishing entity, sighted by a contracting party vessel or aircraft, where there are grounds for believing that the vessel is fishing contrary to IOTC conservation or management measures, is presumed to be undermining IOTC conservation and management measures; (b) such a vessel, when entering a port of any contracting party voluntarily, is to be inspected and not allowed to land or tranship any fish until the inspection has taken place; and (c) if the inspection reveals vessel has onboard species subject to IOTC conservation and management measures, landings and transshipments of all fish from that vessel are to be prohibited in all contracting party ports unless vessel establishes that the fish were caught outside the IOTC Area or in compliance with the relevant IOTC conservation measures and requirements under the Agreement.

²²² IOTC 10, report: see paragraph 21 and Appendix VI.

Other Resolutions, and one Recommendation, that could affect non-contracting parties negatively are summarized as follows:

Measure	Summary of relevant provisions
Res 05/04	<i>concerning registration and exchange of information on vessels, including flag of convenience vessels, fishing for tropical tunas and swordfish in the IOTC area of competence: (a) CPCs to notify Secretary of any information concerning fishing vessels, other than their own-flag vessels and foreign-flag vessels already required to be notified to the Secretary, 'known or presumed to be fishing for tropical tunas and swordfish in the Area'; and (b) Secretary to request flag State to 'take the measures necessary to prevent the vessel from fishing for tropical tuna and swordfish in the Area' [i.e. irrespective of whether it is engaged in IUU fishing activities].</i>
Res 05/02	<i>concerning the establishment of an IOTC Record of vessels authorised to operate in the IOTC Area: [effect on non-contracting parties unclear because meaning of term 'AFV' (authorised fishing vessel) in Resolution not entirely clear]</i>
Res 02/03	<i>terms of reference for the IOTC Compliance Committee: establishes IOTC Compliance Committee, and states one of the Committee's functions as being to: 'Monitor, review and analyze information pertaining to the activities of Non-Contracting Parties and their vessels which undermine the objectives of the [IOTC] Agreement including, in particular, IUU fishing, and recommend actions to be taken by the Commission to discourage such activities'.</i>
Res 01/04	<i>on limitation of fishing effort of non members of IOTC whose vessels fish bigeye tuna: non-Members of IOTC requested by Commission to reduce fishing effort in 2002 by a specified amount and to report back to Commission on measures taken.</i>
Res 99/02	<i>calling for actions against fishing activities by large scale flag of convenience longline vessels: (a) CPCs to ensure that own-flag large-scale tuna longline vessels do not engage in IUU fishing activities; (b) CPCs to 'refuse landing and transshipment by FOC vessels which are engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC'; (c) CPCs to 'take every possible action, consistent with their relevant laws' to urge business sectors and public to refrain from supporting FOC fishing activities; (d) Commission urges all non- contracting parties (other than C.NCPs), entities or fishing entities to 'act in conformity' with (a), (b) and (c) above; (e) Commission urges 'States and fishing entities whose FOC fishing vessels are engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC, to repatriate or scrap such vessels'; and (f) Commission instructs Secretariat to prepare possible measures including trade restrictive measures to prevent or eliminate FOC fishing activities.</i>

WCPFC

<http://www.wcpfc.int/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the WCPFC website. With the exception of CMM-2006-09, the only Conservation and Management Measures and Resolutions considered here are those included in the list of *Decisions of the Commission* on the WCPFC website.]

Full name of RFMO	Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Western and Central Pacific Fisheries Commission)
Most recent meeting of RFMO	WCPFC 3 – December 2006 [report and adopted Conservation and Management Measures and Resolutions not yet available, with exception of CMM-2006-09]
Treaty establishing RFMO	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
Year of adoption of treaty	2000
Year of entry into force of treaty	2004

A. Provisions of treaty relating to non-contracting parties

The only provision of the WCPFC Convention referring expressly to non-contracting parties (other than Articles 34 and 35 on signature, ratification, acceptance, approval and accession) is Article 32, entitled *Non-parties to this Convention*, which reads as follows (emphasis added):

1. Each member of the Commission shall take measures consistent with this Convention, the Agreement and international law to deter the activities of vessels flying the flags of *non-parties* to this Convention which undermine the effectiveness of conservation and management measures adopted by the Commission.
2. 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.
3. 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 this Convention.
4. The members of the Commission shall, individually or jointly, request *non-parties* to this 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 this 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.
5. *Non-parties* to this 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.

However, the Convention also contains provisions on involvement by fishing entities and territories of contracting parties. Regarding fishing entities, Article 9(2) states that: ‘A fishing entity referred to in the [UN Fish Stocks] Agreement, which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex I, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this article and Annex I’.

Regarding territories, Article 43(1) states that ‘[t]he Commission and its subsidiary bodies shall be open to participation, with the appropriate authorization of the Contracting Party having responsibility for its international affairs, to each of the following’ and then lists American Samoa, French Polynesia, Guam, New Caledonia, Northern Mariana Islands, Tokelau as well as Wallis and Futuna. Article 43(3) adds that: ‘... all such participants shall be entitled to participate fully in the work of the Commission, including the right to be present and to speak at the meetings of the Commission and its subsidiary bodies. In the performance of its functions, and in taking decisions, the Commission shall take into account the interests of all participants’.

Provisions of the WCPFC Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article and title	Text of relevant provision
Article 5 Principles and measures for conservation and management	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 Agreement and this Convention: (a) adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area ...; ... (e) adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species, both fish and non-fish species, ... and impacts on associated or dependent species ...; (f) protect biodiversity in the marine environment; (g) take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources; ... (i) collect and share, in a timely manner, complete and accurate data concerning fishing activities ...; and (j) implement and enforce conservation and management measures through effective monitoring, control and surveillance.
Article 6 Application of the precautionary approach	5. For new or exploratory fisheries, members of the Commission shall adopt as soon as possible cautious conservation and management measures, including, <i>inter alia</i> , 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 longterm 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.
Article 10 Functions of the Commission	1. 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; ... (c) adopt, where necessary, conservation and management measures and recommendations for non-target species and species dependent on or associated

	<p>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; ... (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 vessel monitoring system; (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; ... (o) discuss any question or matter within the competence of the Commission and adopt any measures or recommendations necessary for achieving the objective of this Convention.</p>
	<p>2. In giving effect to paragraph 1, the Commission may adopt measures relating to, <i>inter alia</i>: (a) the quantity of any species or stocks which may be caught; (b) the level of fishing effort; (c) limitations of fishing capacity, including measures relating to fishing vessel numbers, types and sizes; ...</p>
	<p>3. In developing criteria for allocation of the total allowable catch or the total level of fishing effort the Commission shall take into account, <i>inter alia</i>: ... (b) the respective interests, past and present fishing patterns and fishing practices of participants in the fishery and the extent of the catch being utilized for domestic consumption; (c) the historic catch in an area; ... (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;</p>
	<p>4. The Commission may adopt decisions relating to the allocation of the total allowable catch or the total level of fishing effort. Such decisions, including decisions relating to the exclusion of vessel types, shall be taken by consensus.</p>
Article 14 Functions of the Technical and Compliance Committee	<p>1. The functions of the Technical and Compliance Committee shall be 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.</p>
	<p>2. In carrying out its functions, the Committee shall: ... (h) make recommendations to the Commission on matters relating to monitoring, control, surveillance and enforcement.</p>
Article 15 The Secretariat	<p>4. The Secretariat functions shall include the following: ... (f) treasury, personnel and other administrative functions.</p>
Article 17 Funds of the Commission	<p>1. The funds of the Commission shall include: (a) assessed contributions in accordance with article 18, paragraph 2; (b) voluntary contributions; (c) the fund referred to in article 30, paragraph 3; and (d) any other funds which the Commission may receive.</p>
Article 23 Obligations of members of the Commission	<p>1. Each member of the Commission shall promptly implement the provisions of this Convention and any conservation, management and other measures or matters which may be agreed pursuant to this Convention from time to time and shall cooperate in furthering the objective of this Convention.</p>

	<p>2. Each member of the Commission shall: (a) provide annually to the Commission statistical, biological and other data and information in accordance with Annex I of the Agreement and, in addition, such data and information as the Commission may require; ...</p>
	<p>5. Each member of the Commission shall, to the greatest extent possible, take measures to ensure that its nationals, and fishing vessels owned or controlled by its nationals fishing in the Convention Area, comply with the provisions of this Convention. To this end, members of the Commission may enter into agreements with States whose flags such vessels are flying to facilitate such enforcement. Each member of the Commission shall, to the greatest extent possible, at the request of any other member, and when provided with the relevant information, investigate any alleged violation by its nationals, or fishing vessels owned or controlled by its nationals, of the provisions of this Convention or any conservation and management measure adopted by the Commission. ...</p>
Article 24 Flag State duties	<p>I. 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 this 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;</p>
	<p>3. It shall be a condition of every authorization issued by a member of the Commission that the fishing vessel in respect of which the authorization is issued: ... (b) is operated on the high seas in the Convention Area in accordance with the requirements of Annex III, the requirements of which shall also be established as a general obligation of all vessels operating pursuant to this Convention.</p>
Article 25 Compliance and enforcement	<p>I. Each member of the Commission shall enforce the provisions of this Convention and any conservation and management measures issued by the Commission.</p>
	<p>10. 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.</p>
	<p>11. The members of the Commission may take action in accordance with the 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.</p>
	<p>12. 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.</p>

Article 26 Boarding and inspection	1. For the purposes of ensuring compliance with conservation and management measures, the Commission shall establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area. 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 authorized to undertake high seas boarding and inspection in accordance with this Convention.
Article 27 Measures taken by a port State	3. 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 which undermines the effectiveness of conservation and management measures adopted by the Commission.
Article 29 Transshipment	1. In order to support efforts to ensure accurate reporting of catches, the members of the Commission shall encourage their fishing vessels, to the extent practicable, to conduct transshipment in port. A member may designate one or more of its ports as transshipment ports for the purposes of this Convention, and the Commission shall circulate periodically to all members a list of such designated ports. 4. Transshipment at sea in the Convention Area beyond areas under national jurisdiction shall take place only in accordance with the terms and conditions set out in article 4 of Annex III to this Convention, and any procedures established by the Commission pursuant to paragraph 3 of this article. Such procedures shall take into account the characteristics of the fishery concerned. 5. Notwithstanding paragraph 4 above, and subject to specific exemptions which the Commission adopts in order to reflect existing operations, transshipment at sea by purse-seine vessels operating within the Convention Area shall be prohibited.
Article 30 Recognition of the special requirements of developing States	3. The Commission shall establish a fund to facilitate the effective participation of developing States Parties, particularly small island developing States, and, where appropriate, territories and possessions, in the work of the Commission, including its meetings and those of its subsidiary bodies. The financial regulations of the Commission shall include guidelines for the administration of the fund and criteria for eligibility for assistance. 4. Cooperation with developing States, and territories and possessions, for the purposes set out in this article may include the provision of financial assistance, assistance relating to human resources development, technical assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services. ...
Article 33 Good faith and abuse of rights	The obligations assumed under this Convention shall be fulfilled in good faith and the rights recognized in this Convention shall be exercised in a manner which would not constitute an abuse of right.

B. Brief analysis of, and references to, decisions or resolutions of the WCPFC relating to cooperating non-members

Introduction

The WCPFC Convention clearly anticipates the existence of cooperating non-contracting parties (see Articles 32(4), in section A above). Currently, there are two ‘cooperating non-members’ (‘CNMs’), namely **Indonesia** and the **USA**.²²³ Indonesia and the USA were originally given that

²²³ Secretariat, pers. comm.

status in view of their having participated in the Multilateral High-Level Conference and the Preparatory Conference.²²⁴

There is also provision for fishing entities to be agreed to be bound by the Convention's regime (see Article 9(2), in section A above); to date, **Chinese Taipei** has agreed to be so bound and now participates as a member of the Commission. The Convention also provides for seven named territories of contracting parties to participate (see Article 43, in section A above); so far, **Tokelau, French Polynesia, New Caledonia** as well as **Wallis and Futuna** are participants. Fishing entities and territories will be considered in passing in this section, but not in detail.

Principal framework provisions

The WCPFC has adopted framework provisions on CNMs in **Conservation and Management Measure-2004-02**, entitled *Cooperating Non-Members*. The stated legal basis for the measure is Article 32 of the WCPFC Convention (see section A above). CMM-2004-02 requires the Executive Director to contact annually 'all non-members *whose vessels fish* in the Convention Area for species under the Commission's competence to urge them to become a member of the Commission or to apply for the status of Cooperating non-member' (emphasis added).²²⁵ It adds that a 'non-member of the Commission, *whose vessels intend to fish* in the Convention Area, may request the Commission for the status of a "Cooperating non-member"' (emphasis added).²²⁶

The measure sets out the procedure to be followed, and information and commitments to be provided, by a non-member seeking CNM status.²²⁷ The information and commitments to be provided are as follows:

-
- (a) an indication of its views on ratification of or accession to the Convention;

 - (b) a commitment to cooperate fully in the implementation of conservation and management measures adopted by the Commission and to ensure that fishing vessels flying its flag and fishing in the Convention Area and, to the greatest extent possible, its nationals, comply with the provisions of the Convention and conservation and management measures adopted under it;

 - (c) full data on its historical fisheries in the Convention Area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas;

 - (d) all the data members of the Commission are required to submit, in accordance with the recommendations adopted by the Commission;

 - (e) details on its current fishing presence in the Convention Area, including the number of its vessels and their characteristics;

 - (f) results from research programmes it has conducted in the Convention Area; and

 - (g) any further relevant information as determined by the Commission.

CNM status is to be decided by the Commission, having regard to, *inter alia*: (a) 'the views of the non-member applicant on ratification of or accession to the Convention'; (b) 'the status of the stocks and the existing level of fishing effort in the fishery'; (c) 'its record of compliance with the provisions of the Convention and the conservation and management measures developed by

²²⁴ WCPFC 1, report, paragraph 21.

²²⁵ Paragraph 12.

²²⁶ Paragraph 1.

²²⁷ Paragraph 2.

the Commission and other Regional Fisheries Management Organizations ...'; (d) information available from other RFMOs; and (e) data submitted by the candidate.²²⁸ In the decision-making process, '[c]aution shall be used so as not to introduce into the Convention Area the excessive fishing capacity of other regions or IUU fishing activities in granting Cooperating non-member status to such non-members'.²²⁹

Non-members with CNM status must:²³⁰

-
- (a) Comply with all conservation and management measures in force in the Convention Area;
-
- (b) Provide all the data members of the Commission are required to submit, in accordance with the recommendations adopted by the Commission;
-
- (c) Inform the Commission annually of the measures it takes to ensure compliance by its vessels with the Commission's conservation and management measures;
-
- (d) Respond in a timely manner to alleged violations of conservation and management measures by its vessels, as requested by a member of the Commission or determined by the appropriate subsidiary bodies of the Commission and communicate to the member making the request and to the Commission, the actions it has taken against the vessels in accordance with the provisions of Article 25 of the Convention.
-

CNMs are 'entitled to participate at the meetings of the Commission and its subsidiary bodies as Observers'.²³¹ However, each CNM is also 'invited to make a financial contribution commensurate with the benefits it enjoys *from participation in the fishery*' (emphasis added).²³² The latter implies that cooperating status may bring cooperation quota or at least an endorsement of existing fishing activities (and see further section C below).

The Commission is to monitor the activities of nationals and fishing vessels of CNMs, 'including their record of compliance with the provisions of the Convention and conservation and management measures adopted under it and the willingness of such [CNMs] to voluntarily contribute to the work of the Commission'.²³³ CNM status is to be revoked if the nationals or fishing vessels of the CNM in question 'have undermined the effectiveness of conservation and management measures adopted pursuant to the Commission'.²³⁴

The status is to be conferred on an annual basis, and may be renewed 'subject to a review of the [CNM's] compliance with the Convention's objectives and requirements'.²³⁵ A CNM seeking to renew its status 'shall comply with any reasonable requirements the Commission may prescribe to ensure compliance with Commission conservation and management measures'.²³⁶

Measures addressed to cooperating non-members

Following the adoption of CMM-2004-02, several measures adopted subsequently apply some or all of their provisions equally to members and CNMs (and to participating territories, pursuant

²²⁸ Paragraphs 5 and 9.

²²⁹ Paragraph 9.

²³⁰ Paragraph 3.

²³¹ Paragraph 6.

²³² Paragraph 7.

²³³ Paragraph 10.

²³⁴ Paragraph 11.

²³⁵ Paragraph 4.

²³⁶ Paragraph 8.

to Article 43 – section A above), by using the phrase ‘[t]he Members, Cooperating Non-Members and participating Territories ... shall ...’ (or similar formulations) as a prefix to the duty in question. Those measures, and their subject matter, are as follows:

Measure	Subject matter
CMM-2005-01	bigeye and yellowfin tuna – conservation and management
CMM-2005-02	South Pacific albacore tuna – conservation and management
CMM-2005-03	North Pacific albacore tuna – conservation and management
Res-2005-01	seabirds
Res-2005-02	reduction of overcapacity
Res-2005-03	non-target fish species
Res-2005-04	sea turtles

CMM-2004-01, on *Record of Fishing Vessels and Authorization to Fish*, takes a different approach to applying its provisions to CNMs. A paragraph towards the end of the measure states simply that: ‘The obligations and responsibilities set forth in these provisions for members shall apply equally to any cooperating non-member designated by the Commission’.²³⁷ However, that approach is unsatisfactory in that it leaves unclear whether vessels flagged to CNMs may be included in the WCPFC Record of Fishing Vessels.

If such vessels are not to be included in the Record, some contracting party duties regarding vessels not on the record will potentially affect CNM flag vessels negatively, irrespective of whether those vessels are conducting IUU fishing or not.²³⁸ Furthermore, CMM-2006-09 (see section D below) includes the following on its list of activities that can trigger a presumption of IUU fishing: ‘Harvest species covered by the WCPFC Convention in the Convention Area *and are not ... on the WCPFC Record of authorized vessels ...*’ (emphasis added).²³⁹ That provision makes it particularly important to know whether or not vessels flagged to CNMs can be included in the Record.

CMM-2004-01 also states that: ‘Each member of the Commission shall: ... take necessary measures to ensure that fishing for highly migratory fish stocks in the Convention Area is conducted only by vessels flying the flag of a member of the Commission ...’.²⁴⁰ As noted above, CMM-2004-01 also states that: ‘The obligations and responsibilities set forth in these provisions for members shall apply equally to any [CNM]’. The combination of two those statements leaves it unclear whether vessels flagged to CNMs may fish for highly migratory fish stocks in the Convention Area. That point is addressed further in section C below.

Other provisions relevant to cooperation

In addition to the CMMs mentioned above, other WCPFC instruments also contain provisions of relevance to CNMs. First, as noted above, CMM-2004-02 requires CNMs to, *inter alia*, ‘[c]omply with all conservation and management measures in force in the Convention Area’. Thus, in principle,

²³⁷ Paragraph 18.

²³⁸ See, *inter alia*, paragraphs 12, 13 and 14.

²³⁹ Paragraph 3(a).

²⁴⁰ Paragraph 1(c).

all of the **WCPFC's conservation and management measures** are to be complied with by CNMs. Those CMMs that expressly apply to CNMs are indicated above, i.e. CMM-2005-01, CMM-2005-02, CMM-2005-03 and CMM-2004-01. However, CMM-2004-03 on *Specifications for the Marking and Identification of Fishing Vessels* applies duties just to Commission members. Because some CMMs apply expressly to CNMs, whereas CMM-2004-03 does not, it is not clear whether CMM-2004-03 is intended to apply to CNMs.

Secondly, reflecting Article 32(5) of the WCPFC Convention (see section A above), the **WCPFC's Rules of Procedure** contain provisions that are potentially applicable to CNMs. Thus Rule 36 establishes procedures for granting observer status to, *inter alia*: (a) 'States, entities and fishing entities that participated in the Multilateral High Level Conference on the Conservation and Management of the Highly Migratory Fish Stocks, which are not members of the Commission';²⁴¹ (b) '[a]ny entity referred to in [Article 305(1)(c)(d) and (e) LOSC] which is situated in the Convention Area, which is not a member of the Commission';²⁴² (c) '[a]ny regional economic integration organization whose nationals and fishing vessels conduct or wish to conduct fishing for highly migratory fish stocks in the Convention Area';²⁴³ and (d) '[o]ther States and fishing entities with an interest in the work of the Commission, *invited by the Commission*, which are not members of the Commission' (emphasis added).²⁴⁴

Thus, under Rule 36, any non-member State not covered by categories '(a)' or '(b)' will fall into category '(d)' and will thus require an invitation in order to attend meetings as an observer. Regarding category '(d)', the rule itself makes no distinction between CNMs and other non-members. However, as noted above, CMM-2004-02 states that CNMs are 'entitled to participate at the meetings of the Commission and its subsidiary bodies as Observers'. Presumably, CMM-2004-02 and Rule 36 may therefore be reconciled by assuming that CMM-2004-02 creates a standing invitation to CNMs for the purposes of Rule 36.

Thirdly, reflecting Article 17(1)(b) of the WCPFC Convention (see section A above) and consistent with the invitation to CNMs to make financial contributions under CMM-2004-02 (see above), Regulation 8 of the **Financial Regulations** states that: 'Voluntary contributions offered by non-members may be accepted, subject to agreement by the Commission that the purposes of the contribution are consistent with the policies, aims and activities of the Commission'.²⁴⁵ That provision would presumably be relevant if a CNM were to make a donation to the running costs of fisheries management by the WCPFC (as envisaged by CMM-2004-02 – see above).

Pursuant to Article 30 of the WCPFC Convention (see section A above), Regulation 7 of the Financial Regulations establishes a Special Requirements Fund for the purpose of, *inter alia*, 'building capacity for activities in key areas such as effective exercise of flag State responsibilities, monitoring, control and surveillance, data collection and scientific research relevant to highly migratory fish stocks on a national and/or regional level'.²⁴⁶ The Convention stipulates that the Fund is to facilitate effective participation of 'developing States *Parties*, particularly small island developing States, and, where appropriate, territories and possessions' (emphasis added). Despite

²⁴¹ Paragraph (a).

²⁴² Paragraph (b).

²⁴³ Paragraph (c).

²⁴⁴ Paragraph (d).

²⁴⁵ Paragraph 8.2. See also paragraph 8.3.

²⁴⁶ Paragraph 7.1(c).

the somewhat looser wording in Regulation 7, the wording of the Convention implies that the Fund would not be available for use by CNMs, since CNMs are not parties to the Convention.

Of note, Resolution 2005-04, *to mitigate the impact of fishing for highly migratory fish species on sea turtles*, refers to the Special Requirements Fund. As noted above, Resolution 2005-04 is generally applied equally to members and CNMs. However, reflecting the Convention, the Fund is to be used to assist ‘developing State *Members* and territories’ (emphasis added), even though CNMs are encouraged to contribute to it.²⁴⁷

C. Examples of positive measures applied to cooperating non-members

The WCPFC Convention states that CNMs ‘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’ (Article 32(4) – see section A above). (See also Article 10(3), on factors to be taken into account by the WCPFC in developing criteria for the allocation of total allowable catch or total fishing effort, which refers to ‘participants’, rather than more specifically to ‘members’, on several occasions.)

Furthermore, as noted in section B above, CMM-2004-02 invites each CNM ‘to make a financial contribution commensurate with the benefits it enjoys *from participation in the fishery*’ (emphasis added),²⁴⁸ implying that cooperating status may bring cooperation quota or at least an endorsement of existing fishing activities. In contrast to the positive signs from the WCPFC Convention and from CMM-2004-02, the wording of CMM-2004-01 (as noted in section B above) leaves it unclear whether vessels flagged to CNMs may fish for highly migratory fish stocks in the Convention Area.

However, in practice, the WCPFC appears to have, impliedly or expressly, provided fishing opportunities for CNMs. That is evidenced by four recent examples. First, the report of WCPFC 2 states that (emphasis added):²⁴⁹

In relation to the measures on North Pacific albacore and South Pacific albacore, it was agreed that the Commission would review these decisions at the Third Regular Session in 2006. The Commission instructed the Scientific Committee to give priority to developing a stock assessment for South Pacific albacore for consideration in this review. Pending the results of this review, and any additional advice provided by the Scientific Committee, Members, *Cooperating Non-members* and participating territories ... were urged to exercise restraint with respect to increased fishing for this stock in the Convention Area.

Secondly, **CMM-2005-01**, entitled *conservation and management measures for bigeye and yellowfin tuna in the western and central Pacific Ocean*, contains several relevant provisions. For example, it states that ‘[t]he catch of bigeye for each [Member, *Cooperating Non-Member* and participating Territory] for the next 3 years shall not exceed the average annual bigeye catch for the years 2001–2004 or the year 2004’ and adds that the previous provision ‘does not apply to [Members, *Cooperating Non-Members* and participating Territories] that caught less than 2,000 tonnes in 2004’ who shall instead ‘ensure that their catch does not exceed 2,000 tonnes in each of the next 3 years’ (emphasis added).²⁵⁰

²⁴⁷ Paragraphs 9 and 10.

²⁴⁸ Paragraph 7.

²⁴⁹ WCPFC 2, report, paragraph 33.

²⁵⁰ Paragraphs 17 and 18.

Thirdly, **CMM-2005-02**, entitled *conservation and management measure for South Pacific albacore*, states that: ‘Commission Members, *Cooperating Non-Members*, and participating Territories ... shall not increase the number of their fishing vessels actively fishing for South Pacific albacore in the Convention Area south of 20°S above current (2005) levels or recent historical (2000–2004) levels’ (emphasis added).²⁵¹

Fourthly, **CMM-2005-03**, entitled *conservation and management measure for North Pacific albacore*, states that ‘Members, *Cooperating Non-Members* and participating Territories ... shall take necessary measures to ensure that the level of fishing effort by their vessels fishing for North Pacific albacore in the WCPFC Convention Area is not increased beyond current levels’ (emphasis added).²⁵²

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the WCPFC against non-members (whether cooperating non-members or non-cooperating non-members)

The WCPFC Convention (see section A above) itself contains several provisions relevant to non-contracting parties. Those include, *inter alia*: (a) Article 32(1) (on non-parties); (b) Article 23(5) (on nationals); (c) Article 24(1) and (3) (on own-flag vessels); (d) Article 25(11) and (12) (on deterring IUU fishing activities); (e) Article 27(3) (on port State measures); and (f) Article 29(1), (4) and (5) (on transshipment). In addition, Article 14 of the Convention provides for the Technical and Compliance Committee (“TCC”), which is to, *inter alia*, ‘make recommendations to the Commission on matters relating to monitoring, control, surveillance and enforcement’. However, this section will focus on measures adopted by the WCPFC.

Principal framework provisions

The principal framework provisions on measures against non-contracting parties are set out in **CMM-2006-09** to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the Western and Central Pacific Ocean (which is ‘subject to review and, as appropriate, revision’ by the TCC in 2007²⁵³). The description of CMM-2006-09 that follows will use the abbreviation ‘CCM’ to mean Commission members, CNMs and participating territories (as is the convention within the WCPFC).

CMM-2006-09 sets out a non-exhaustive list of activities or circumstances, to be supported by evidence from a CCM, whereby ‘vessels fishing for species covered by the WCPFC Convention are presumed to have carried out IUU fishing activities, as defined in the [FAO] IPOA on IUU fishing, in the Convention Area’.²⁵⁴ Thus the measure in principle relates to vessels irrespective of their flag. After including various specific activities, the list adds the broad category of vessels engaging ‘in fishing activities contrary to any other WCPFC Conservation Measures’.²⁵⁵ The list ends with vessels being ‘under the control of the owner of any vessel on the WCPFC IUU Vessel List’.²⁵⁶

²⁵¹ Paragraph 1.

²⁵² Paragraph 2.

²⁵³ Paragraph 26.

²⁵⁴ Paragraph 3.

²⁵⁵ Paragraph 3(i).

²⁵⁶ Paragraph 3(j).

CCMs are to transmit annually ‘a list of vessels presumed to be carrying out IUU fishing activities in the Convention Area during the current and previous years’, accompanied by the evidence supporting the presumption of IUU fishing activity.²⁵⁷ The identification of such vessels is to be ‘documented, *inter alia*, on reports from [CCMs] relating to WCPFC Conservation Measures in force, trade information obtained on the basis of relevant trade statistics such as [FAO] data, Statistical documents and other national or international verifiable statistics, as well as any other information obtained from Port States and/or gathered from the fishing grounds which is suitably documented’.²⁵⁸

That is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the WCPFC of a (finalized) IUU Vessel List. The next step in the process is for the Executive Director, on the basis of the information received from the CCMs and ‘any other information at his disposal’, to draw up a draft WCPFC IUU Vessel List (including the vessel-related information listed in paragraph 15).²⁵⁹ That list, together with the supporting evidence, is to be transmitted to non-CCMs with vessels on the list and to all CCMs.²⁶⁰ They ‘should’ transmit comments on the draft list, ‘including verifiable evidence ... showing that the vessels neither have fished in contravention of WCPFC Conservation Measures nor had the possibility of fishing for species covered by the WCPFC Convention’.²⁶¹

On the basis of the comments received pursuant to the preceding paragraph, the Executive Director is to draw up a provisional WCPFC IUU Vessel List (including, again, the vessel-related information listed in paragraph 15) and then transmit that list, ‘together with all the evidence provided’, to the non-CCMs concerned and to the CCMs.²⁶² CCMs ‘may ... submit ... any additional information which might be relevant for the establishment of the IUU Vessel List’, and that information, ‘together with all the evidence provided’, is to be circulated by the Executive Director to the CCMs and to the non-CCMs concerned.²⁶³

Next, the TCC is to ‘adopt’ a Provisional IUU Vessels List (i.e. presumably in contrast to the Executive Director having merely drawn it up) and then submit it to the WCPFC for consideration and approval, having first removed any vessel from the list if its flag State demonstrates specified facts or improvements.²⁶⁴ The TCC is also to recommend to the WCPFC which vessels, if any, should be removed from the current IUU Vessel List.²⁶⁵

The WCPFC then adopts the (finalized) IUU Vessel List (including, again, the vessel-related information listed in paragraph 15). At that point, the Commission is to request CCMs and non-CCMs with vessels on the list to, *inter alia*, take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.²⁶⁶ Furthermore, CCMs are to ‘take all necessary non-discriminatory measures under their

²⁵⁷ Paragraph 4.

²⁵⁸ Paragraph 2.

²⁵⁹ Paragraph 5.

²⁶⁰ Paragraph 5.

²⁶¹ Paragraph 6.

²⁶² Paragraph 9. Paragraph 9 actually refers to the Executive Director drawing up a ‘draft’ IUU Vessel List, but presumably that is a drafting error.

²⁶³ Paragraph 10.

²⁶⁴ Paragraphs 11(i), 12, 13 and 14.

²⁶⁵ Paragraph 11(ii).

²⁶⁶ Paragraph 16.

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applicable legislation, international law and each CCMs [sic] international obligations, and pursuant to paragraphs 56 and 66 of the [FAO] IPOA-IUU' to:²⁶⁷

- (a) ensure that fishing vessels, support vessels, mother ships or cargo vessels flying their flag do not participate in any transshipment or joint fishing operations with, support or re-supply vessels on the IUU Vessel List;
- (b) ensure that vessels on the IUU Vessel List that enter ports voluntarily are not authorized to land, transship, refuel or re-supply therein but are inspected upon entry;
- (c) prohibit the chartering of a vessel on the IUU Vessel List;
- (d) refuse to grant their flag to vessels on the IUU Vessel List in accordance with paragraph 1 f) of Section A in Conservation and Management Measure 2004-01;
- (e) prohibit commercial transactions, imports, landings and/or transshipment of species covered by the WCPFC Convention from vessels on the IUU Vessel List;
- (f) encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the WCPFC Convention caught by vessels on the IUU Vessel List;
- (g) collect, and exchange with other CCMs, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the WCPFC Convention from vessels on the IUU Vessel List.

CCMs 'shall not take any unilateral trade measures or other sanctions' against vessels (a) 'on the draft or provisional IUU Vessel Lists' or (b) that have been removed from the IUU Vessel List, on the grounds that such vessels are involved in IUU fishing activities, albeit '[w]ithout prejudice to the rights of CCMs and coastal states to take proper action, consistent with international law'.²⁶⁸ A procedure is established for removal of a vessel from the (finalized) IUU Vessel List,²⁶⁹ triggered by the request of the flag State.

The wording of CMM-2006-09 indicates that the measures in response to a vessel being placed on the IUU Vessel List are to be taken by individual CCMs. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the draft, provisional or (confirmed) IUU Vessel Lists is an action to be taken at the RFMO level. CMM-2006-09 was only adopted at the most recent meeting of the WCPFC; consequently no IUU Vessel List adopted under that CMM is yet available.

Other provisions affecting non-contracting parties

Some other CMMs adopted by the WCPFC could also affect non-contracting parties. As noted in section B above, **CMM-2004-01**, entitled *Record of Fishing Vessels and Authorization to Fish*, is unclear about whether vessels flagged to CNMs may be included in the WCPFC Record of Fishing Vessels. However, it does at least appear clear that vessels flagged to non-parties other than CNMs may not be included in the Record. That has the result that: (a) some contracting party duties regarding vessels not on the Record will negatively affect vessels flagged to such non-parties;²⁷⁰ and (b) vessels flagged to such non-parties will automatically be included in the draft IUU Vessel List.²⁷¹

²⁶⁷ Paragraph 17.

²⁶⁸ Paragraph 19.

²⁶⁹ Paragraphs 20-25.

²⁷⁰ See, *inter alia*, paragraphs 12, 13, 14 and 16.

²⁷¹ CMM-2006-09, paragraphs 3(a), 4 and 5.

CMM-2004-01, as well as establishing a Record of Fishing Vessels, also sets out members' duties regarding the issuing of authorizations to fish. Members must, *inter alia*, 'take measures to ensure that fishing for highly migratory fish stocks in the Convention Area is conducted *only by vessels flying the flag of a member of the Commission*' (emphasis added).²⁷² The term 'fishing' is defined broadly in the WCPFC Convention to include, *inter alia*, 'any operations at sea directly in support of, or in preparation for, any activity described in subparagraphs (i) to (iv), including transshipment'.²⁷³

An information paper to WCPFC 3 prepared by the secretariat states that:²⁷⁴ 'Implementation of [CMM-2004-01] means that carrier and bunker vessels that are flagged to countries that are not Commission Members, Cooperating Non-Members and Participating Territories (CCMs) cannot be licensed by CCMs'. It adds that: 'In June 2006 ... the Commission Chair wrote to CCMs proposing a temporary waiver of this requirement until [WCPFC 3]'.

Because the report of WCPFC 3 is not yet available, it is not known whether a waiver was adopted. However, the fact that a waiver has been proposed suggests that some CCMs are, at least currently, reliant on carrier and bunker vessels flagged to non-CCMs. That in turn suggests that certain non-CCMs (as well as the reliant CCMs) would be negatively affected by the said restriction in CMM-2004-01, subject to any temporary waiver that is granted. A list of 81 carrier and bunker vessels flagged to non-CCMs, notified by two CCMs using such vessels, is appended to the secretariat's information paper. The non-CCM flag States concerned are the **Bahamas, Cambodia, the Netherlands Antilles, Panama, Russia, St Vincent and the Grenadines and Singapore**.

CMM-2004-02, on *Cooperating Non-Members*, requires an applicant for cooperating status to make a commitment to, *inter alia*, 'ensure ... to the greatest extent possible ... *its nationals* ... comply with the provisions of the Convention and conservation and management measures adopted under it' (emphasis added). Compliance by such nationals could reduce the efficacy of the operations of vessels conducting IUU fishing (including those flagged to non-contracting parties) that otherwise rely on those nationals.

In addition, members of the Commission have proposed a variety of CMMs regarding compliance which have not yet been adopted. Those include proposals for, *inter alia*, a statistical document programme,²⁷⁵ a catch documentation scheme,²⁷⁶ a chartering scheme²⁷⁷ and a transshipment scheme.²⁷⁸ The report of WCPFC 3, when available, may contain more information on progress made by those proposals.

²⁷² Paragraph 1(c).

²⁷³ Article 1(d)(v).

²⁷⁴ WCPFC 3 – 2006/IP 04 Rev. 1; see also WCPFC/TCC2/2006/08.

²⁷⁵ WCPFC 3 – 2006 – DP13 (submitted by Japan).

²⁷⁶ WCPFC 3 – 2006 – DP07 Rev.1 (prepared by Forum Fisheries Agency Members); see also WCPFC 3 – 2006 – DP17 (prepared by Japan).

²⁷⁷ WCPFC 3 – 2006 – DP06 Rev.1 (submitted by Forum Fisheries Agency Members).

²⁷⁸ WCPFC 2 – 2005 (prepared by Australia and Philippines).

CCAMLR

<http://www.ccamlr.org/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the CCAMLR website. In particular, the various Conservation Measures and Resolutions referred to can all be found in the *Schedule of Conservation Measures in force 2006/07 season.*]

Full name of RFMO	Commission for the Conservation of Antarctic Marine Living Resources
Most recent meeting of RFMO	CCAMLR 25 – October/November 2006 [adopted Conservation Measures and Resolutions available, but report not yet available]
Treaty establishing RFMO	Convention on the Conservation of Antarctic Marine Living Resources
Year of adoption of treaty	1980
Year of entry into force of treaty	1982

Preliminary note: Under the CCAMLR Convention, it is possible for a State to be a contracting party to the treaty without necessarily being a member of the Commission.²⁷⁹ There are currently 34 contracting parties to the treaty, of which only 24 are members of the Commission. The ten contracting parties that are not members of the Commission are Bulgaria, Canada, China, the Cook Islands, Finland, Greece, Mauritius, the Netherlands, Peru and Vanuatu. Under Article XXI of the Convention, each contracting party is bound by the Commission's conservation measures (unless, in the case of a Commission member, it opted out of that measure). For that reason, contracting parties to the Convention that are not Commission members will not be regarded as 'cooperating' for the purposes of this report, since they are anyway required by the terms of the Convention to comply with all Conservation Measures.

A. Provisions of treaty relating to non-contracting parties

The only provision of the CCAMLR Convention referring expressly to non-contracting parties (other than Articles XXVI, XXVII and XXIX on signature, ratification, acceptance, approval and accession) is Article X(1), which states that: '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 which, in the opinion of the Commission, affects the implementation of the objective of this Convention' (emphasis added).

Provisions of the CCAMLR Convention potentially relating to non-contracting parties include, *inter alia*, the following:

²⁷⁹ Article VII(2).

Article Text of relevant provision

- II 3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation: (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment; (b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above; and (c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.
-
- IX 1. The function of the Commission shall be to give effect to the objective and principles set out in Article II of this Convention. To this end, it shall: ... (f) formulate, adopt and revise conservation measures ...; (g) implement the system of observation and inspection established under Article XXIV of this Convention; (h) carry out such other activities as are necessary to fulfil the objective of this Convention.
-
2. The conservation measures referred to in paragraph 1(f) above include the following: (a) the designation of the quantity of any species which may be harvested in the area to which this Convention applies; ... (c) the designation of the quantity which may be harvested from the populations of regions and sub-regions; ...; (h) regulation of the effort employed and methods of harvesting, including fishing gear, with a view, *inter alia*, to avoiding undue concentration of harvesting in any region or sub-region; (i) the taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.
-
- XVII 3. The Executive Secretary and Secretariat shall perform the functions entrusted to them by the Commission.
-
- XX 1. The Members of the Commission shall, to the greatest extent possible, provide annually to the Commission and to the Scientific Committee such statistical, biological and other data and information as the Commission and Scientific Committee may require in the exercise of their functions.
-
- XXI 1. Each Contracting Party shall take appropriate measures within its competence to ensure compliance with the provisions of this Convention and with conservation measures adopted by the Commission to which the Party is bound in accordance with Article IX of this Convention.
-
- XXII 1. Each Contracting Party undertakes to exert appropriate 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.
-
2. Each Contracting Party shall notify the Commission of any such activity which comes to its attention.
-
- XXIV 1. In order to promote the objective and ensure observance of the provisions of this Convention, the Contracting Parties agree that a system of observation and inspection shall be established.
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B. Brief analysis of, and references to, decisions or resolutions of the CCAMLR relating to cooperating non-members

Introduction

Non-contracting parties ('NCPs') currently listed as cooperating with the CCAMLR by participating in the Catch Documentation Scheme for toothfish ('CDS') are the **Seychelles** and **Singapore**.²⁸⁰ In passing, it is noteworthy that only three of the ten non-Commission contracting parties are currently listed as implementing the CDS; those are **China, Mauritius** and **Peru**.²⁸¹ (However, **Bulgaria, Finland, Greece** and the **Netherlands** – a further four of the ten – are EC Member States, and the EC is listed as implementing the CDS.)

General policy on cooperation

The framework provisions on cooperation in general by non-contracting parties are set out in the *Policy to enhance cooperation between CCAMLR and non-Contracting Parties* ('**the Cooperation Policy**').²⁸² That policy was adopted at CCAMLR 18 (in 1999) and amended at CCAMLR 25 (in 2006).²⁸³ The policy requires the Chairman to write to 'non-Contracting Parties implicated in IUU fishing and or [sic] trade either after the adoption of this policy or during the three years prior, which has undermined the effectiveness of CCAMLR conservation measures' and to, as appropriate:²⁸⁴

-
- (a) invite and encourage non-Contracting Parties to 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;

 - (b) encourage non-Contracting Parties to accede to the Convention;

 - (c) inform non-Contracting Parties of the development and implementation of the CCAMLR Catch Documentation Scheme for *Dissostichus* spp. and provide them with a copy of the conservation measure and the explanatory memorandum;

 - (d) encourage non-Contracting Parties to participate in the CCAMLR Catch Documentation Scheme and draw their attention to the consequences for them of not participating;

 - (e) request non-Contracting Parties to prevent their flag vessels from fishing in the Convention Area in a manner which undermines the effectiveness of measures adopted by CCAMLR to ensure conservation and sustainably managed fisheries;

 - (f) if their flag vessels are involved in IUU fishing, request non-Contracting Parties to provide information to the CCAMLR Secretariat on their vessels' activities, including catch and effort data;

 - (g) seek 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;

 - (h) request non-Contracting Parties to report to the CCAMLR Secretariat on landings and transshipments in their ports in accordance with the format specified in Attachment A; and

²⁸⁰ See <www.ccamlr.org/pu/e/gen-intro.htm>, click on 'Catch Documentation Scheme' button, click on '(see attached)' link, click on 'List of parties implementing the Catch Documentation Scheme'.

²⁸¹ Bulgaria, Finland, Greece and the Netherlands are EC Member States, and the EC is listed as implementing the CDS.

²⁸² Available in the *Schedule of Conservation Measures in Force 2006/07 season*, at pages 169–175.

²⁸³ See *Schedule of Conservation Measures in Force 2006/07 season*, page 169.

²⁸⁴ Paragraphs I and II.

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- (i) request non-Contracting Parties to deny landing or transshipments in their ports for fish harvested in CCAMLR waters not taken in compliance with CCAMLR conservation measures and requirements under the Convention.
-

As can be seen, items ‘(d)’ to ‘(i)’ in the list above relate to substantive cooperation by non-contracting parties. In addition, contracting parties are to ‘individually and collectively take all appropriate efforts to implement or assist in the implementation of this policy’, including ‘taking concerted action on joint demarches on non-Contracting Parties to complement correspondence from the Chairman’.²⁸⁵

The main body of the Cooperation Policy does not describe any benefits that may arise from cooperation. However, Attachment B to the policy relates to the so-called *CCAMLR Cooperation Enhancement Program*. Neither Attachment B nor the Program is mentioned in the main body of the Cooperation Policy, so its status is not entirely clear. The Program’s aim is stated to be ‘to encourage and build the capacity of *non-Contracting Parties* to cooperate with CCAMLR’ (emphasis added). It appears to provide for technical cooperation to non-contracting parties in return for cooperation from them. The Commission is to ‘agree a priority list of countries that may benefit from technical cooperation ...’, and the document sets out criteria for inclusion of States on that list.

Cooperation with Catch Documentation Scheme

Despite the relatively broad array of cooperation opportunities identified in the Cooperation Policy, most (but not all) of the cooperation provided for to date under CCAMLR Conservation Measures relates to the CDS specifically. The Conservation Measure providing for such cooperation is **CM 10-05 (2006)** entitled *Catch Documentation Scheme for Dissostichus spp.*, although that measure is supplemented by some Resolutions also addressing cooperation regarding the CDS.²⁸⁶ CM 10-05 sets how the CDS is implemented and the role for those non-contracting parties that are cooperating with the CCAMLR by participating in the CDS.²⁸⁷

The procedure for gaining cooperating status in the first place under CM 10-05 is set out in Annex C to that measure. The Executive Secretary is required to contact annually ‘all non-Contracting Parties which are known to be involved in the trade with *Dissostichus spp.* to urge them to become a Contracting Party to CCAMLR or to attain the status of a non-Contracting Party cooperating with CCAMLR by participating in the Catch Documentation Scheme for *Dissostichus spp.* (CDS) in accordance with the provisions of Conservation Measure 10-05’.²⁸⁸

Annex C sets out the procedure to be followed by a non-contracting party seeking cooperating status, together with information and compliance requirements.²⁸⁹ The information and compliance requirements are as follows:

²⁸⁵ Paragraph III.

²⁸⁶ See: (a) **Resolution 21/XXIII** on *Electronic Catch Documentation Scheme for Dissostichus spp.* (paragraph 1); (b) **Resolution 17/XX** on *Use of VMS and other measures for the verification of CDS catch data for areas outside the Convention Area, in particular, in FAO Statistical Area 51* (paragraphs 1 and 2); (c) **Resolution 16/XIX** on *Application of VMS in the Catch Documentation Scheme*; and (d) **Resolution 14/XIX** on *Catch Documentation Scheme: implementation by Acceding States and non-Contracting Parties* (paragraphs 1, 2, 3 and 4).

²⁸⁷ See, *inter alia*, paragraphs 6,7, 15 and 16.

²⁸⁸ Paragraph C1.

²⁸⁹ Paragraphs C2 and C3.

(i) Information requirements:

- (a) communicate the data required under the CDS.

(ii) Compliance requirements:

- (a) implement all the provisions of Conservation Measure 10-05;
- (b) inform CCAMLR of all the measures taken to ensure compliance by its vessels used for the transshipments of *Dissostichus* spp. and its operators, including *inter alia*, and as appropriate, inspection at sea and in port, CDS implementation;
- (c) respond to alleged violations of CCAMLR measures by its vessels transshipping *Dissostichus* spp. and its operators, as determined by the appropriate bodies, and communicate to CCAMLR the actions taken against operators.

It also requires the applicant to: (a) ‘confirm its commitment to implement Conservation Measure 10-05’; and (b) ‘inform the Commission of the measures it takes to ensure compliance by its operators with Conservation Measure 10-05’.²⁹⁰ The Annex also explains that decisions on the granting of cooperating status are to be made by the Commission, on the recommendation of the Standing Committee for Implementation and Compliance (‘SCIC’).²⁹¹ The status is to be reviewed annually and may be revoked by the Commission ‘if the Non-Contracting Party concerned has not complied with the criteria for attaining such status established by this measure’.²⁹²

CM 10-05 also contains an Annex B entitled *The use of the CDS Fund*. That Fund is created by the Commission and is funded at least in part by proceeds from the sale by contracting parties of seized or confiscated toothfish.²⁹³ The purpose of the Fund is ‘to enhance the capacity of the Commission in improving the effectiveness of the CDS and by this, and other means, to prevent, deter and eliminate IUU fishing in the Convention Area’.²⁹⁴ The Fund may be used, *inter alia*, ‘to assist Acceding States and non-Contracting Parties that wish to cooperate with CCAMLR and participate in the CDS [with some restrictions] ...’, and acceding States and non-Contracting Parties ‘may submit proposals if the proposals are sponsored by, or in cooperation with, a Member’.²⁹⁵

Resolution 15/XXII, on *Use of ports not implementing the Catch Documentation Scheme for Dissostichus spp.*, recognizes the cooperation of non-contracting parties with the CDS. It does so by urging contracting parties, ‘[w]hen licensing a vessel to fish for *Dissostichus* spp. either inside the Convention Area under Conservation Measure 10-02, or on the high seas, to require, as a condition of that licence, that the vessel should land catches only in States that are fully implementing the CDS; and to attach to the licence a list of all Acceding States and non-Contracting Parties that are fully implementing the Catch Documentation Scheme’.

Other forms of cooperation

Although most of the cooperation provided for to date under CCAMLR Conservation Measures relates to the CDS, some cooperation is broader than that. That is exemplified by: **CM**

²⁹⁰ Paragraph C4.

²⁹¹ Paragraph C5.

²⁹² Paragraph C6.

²⁹³ Paragraph 19.

²⁹⁴ Paragraph B1.

²⁹⁵ Paragraph B2(vi).

10-03 (2005) on *Port inspections of vessels carrying toothfish*; **CM 10-06 (2006)** on *Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures*; **CM 10-07 (2006)** on *Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures*; and **CM 10-08 (2006)** on *Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures*.

All four of those measures provide for cooperating non-contracting parties to receive and/or provide certain information regarding compliance (beyond the scope of the CDS).²⁹⁶ Two of the measures also request the cooperating non-contracting parties to take substantive actions regarding vessels flying their flags.²⁹⁷ Despite the fact that the cooperation sought is beyond the scope of the CDS, the cooperating non-contracting parties in question are still referred to as ‘non-Contracting Parties cooperating with CCAMLR by participating in the Catch Documentation Scheme for *Dissostichus* spp. (CDS)’ (or similar formulations). That may reflect the fact that CM 10-05 on the CDS, rather than the more general Cooperation Policy, is so far the only measure to create a procedure for assigning cooperating status.

Some Resolutions adopted by the CCAMLR call for cooperation beyond the scope of the CDS. Thus **Resolution 19/XXI**, on *Flags of non-compliance*, urges ‘all Contracting Parties and non-Contracting Parties cooperating with CCAMLR’ to: (a) try to ensure that their nationals do not support or engage in IUU fishing; (b) ‘[e]nsure the full cooperation of their relevant national agencies and industries in implementing the measures adopted by CCAMLR’; (c) ‘[d]evelop ways to ensure that the export or transfer of fishing vessels from their State to a FONC State is prohibited’; and (d) ‘[p]rohibit the landings and transshipments of fish and fish products from FONC vessels’.

Likewise, **Resolution 25/XXV**, on *Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties*, urges contracting parties to, *inter alia*, pursue diplomatic action with non-contracting party flag States, seeking that the latter, *inter alia*: (a) ‘investigate the activities of vessels fishing under their flag in the Convention Area, in accordance with Article 94 of UNCLOS, and report findings of such investigations to the Commission’; (b) ‘accede to the Convention and cooperate with the Commission and, until such time as they do, direct their flag vessels not to fish in the Convention Area and take legal and other action against those vessels that disobey this directive’; and (c) ‘grant permission for boarding and inspection by designated CCAMLR inspectors of their flag vessels suspected of, or found to be, fishing in an IUU manner in the Convention Area’.

Resolution 25/XXV also urges contracting parties to ‘[s]eek the cooperation of non-Contracting Party Port States when IUU fishing vessels seek to use the ports of non-Contracting Parties, urging them to take the steps in accordance with Conservation Measure 10-07’ (entitled *Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures*).

Other provisions relevant to cooperation

CCAMLR instruments other than Conservation Measures, Resolutions and the Cooperation Policy also contain provisions of relevance to cooperating non-parties. First, under Rule 30 of

²⁹⁶ CM 10-03, paragraph 4; CM 10-06, paragraphs 3, 8, 8(ii), and 18(xi); CM 10-07, paragraphs 7, 12, 12(ii), 22(x) and 24; and CM 10-08, paragraph 2.

²⁹⁷ CM 10-06 (2006), paragraphs 8(i) and 20; and CM 10-07 (2006), paragraph 12(i) and 24.

the **CCAMLR's Rules of Procedure**, the Commission may extend an invitation to, *inter alia*, the following to participate as observers at meetings of the Commission: (a) 'any signatory of the Convention'; (b) 'any State party to the Convention which is not a Member of the Commission'; and (c) 'any other state ... unless a Member of the Commission objects'.²⁹⁸ Thus non-contracting parties are covered by '(c)' and potentially '(a)'.

Secondly, Regulation 7.2 of the **Financial Regulations** states, *inter alia*, that: 'Voluntary contributions [to the budget of the CCAMLR] offered by non-Members may be accepted, subject to agreement by the Commission that the purposes of the contribution are consistent with the policies, aims and activities of the Commission'.²⁹⁹ That provision would presumably be relevant if a non-contracting party wished to make a contribution to the running costs of fisheries management by the CCAMLR (although such contributions are not foreseen by, *inter alia*, the Cooperation Policy or CM 10-05).

Thirdly, the **terms of reference of the SCIC** provide for that Committee to, *inter alia*, 'review and assess, as appropriate, the implementation of, and compliance with, conservation and management measures by those non-Contracting Parties which have agreed to apply such measures'.³⁰⁰ One specific role for the SCIC in relation to cooperating non-contracting parties, under CM 10-05, has already been noted above; however, the terms of reference imply that the SCIC also has a broader role in relation to such parties.

C. Examples of positive measures applied to cooperating non-members

In respect of trade in toothfish, benefits may well arise for a non-contracting party from fulfilling the provisions of CM 10-05 (2006) that relate to the issue of *Dissostichus* Catch Documents ('DCDs'), validation of DCDs for export and validation of re-export documents (see further section D below). However, the ability to issue a DCD, validate a DCD for export or validate a re-export document is not dependent on the non-contracting party in question having been granted cooperating status under Annex C to CM 10-05 (2006).

Benefits may also arise in the form of technical cooperation pursuant to the CCAMLR Cooperation Enhancement Program. In the case of a non-contracting party cooperating with CCAMLR by participating in the CDS, other benefits may arise from: (a) access to funding from the CDS Fund (see section B above); and (b) inclusion in the list of 'States that are fully implementing the CDS' for purposes of Resolution 15/XXII (see section B above).

Regarding '(a)' above, as noted in section B above, the Fund is available to, *inter alia*, 'assist Acceding States and non-Contracting Parties *that wish* to cooperate with CCAMLR and participate in the CDS' (emphasis added). Thus the actual granting of cooperating status under Annex C to CM 10-05 (2006) does not appear to be a requirement for access to the Fund. Regarding '(b)' above, it is not clear whether the granting of cooperating status under Annex C is the only way for a non-contracting party to be regarded as 'fully implementing the CDS'.

²⁹⁸ See also, *inter alia*, Rules 31–35.

²⁹⁹ See also, *inter alia*, Regulations 7.3 and 6.2.

³⁰⁰ Paragraph 2(ii).

Regarding the allocation of fishing opportunities to cooperating non-contracting parties, the report of CCAMLR 24 states that (emphasis added):

Some Parties considered . . . that it might be useful to adopt guidelines for non-Contracting Parties who wish to cooperate with CCAMLR with a view to giving guidance to those who might wish to join the CAMLR Commission. Reference was made with respect to guidelines already adopted in various RFMOs and to Article 8 of the UN Straddling Fish Stocks Agreement. Consensus was not reached as other Parties did not consider this necessary given the success of cooperation with non-Contracting Parties so far and that *it was not appropriate, in their view, for States who are not Parties to the Convention, to fish in the Convention Area*. In addition, it was recalled in this context that there are Parties to the Convention as well as other States who are not Party to the UN Straddling Fish Stocks Agreement. The Commission also noted comments from the Cook Islands in respect of its present situation.³⁰¹

Thus some contracting parties considered that it ‘was not appropriate, in their view, for States who are not Parties to the Convention, to fish in the Convention Area’. That implies that the same contracting parties would not be willing to provide fishing opportunities as a benefit arising from cooperation by non-contracting parties.³⁰²

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the CCAMLR against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

The principal framework provisions on measures against non-contracting parties are set out in **CM 10-07 (2006)**, entitled *Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures*. In short, this measure provides for the establishment of a Final NCP-IUU Vessel List (via three precursor lists) and provides for sanctions against the vessels and potentially against the flag States in question. On the way, it provides for certain sanctions in port against vessels presumed to have undermined the effectiveness of CCAMLR Conservation Measures. (Of note, CM 10-06 (2006) provides for the establishment of an IUU Vessel List for contracting party vessels and for associated sanctions.)

Regarding sanctions in port, CM 10-07 first establishes how a presumption of IUU fishing can arise and then prescribes the sanctions triggered by such a presumption. A presumption of undermining the effectiveness of CCAMLR Conservation Measures arises from a non-contracting party vessel having been: (a) sighted engaging in fishing activities in the Convention Area; (b) denied port access, landing or transshipment pursuant to CM 10-03; or (c) engaged in transshipment activities, inside or outside the Convention Area, with any vessel covered by ‘(a)’.³⁰³ Any vessel to which such a presumption applies is to be inspected by the port State in accordance with CM 10-03 and is to be prohibited from landing or transshipping any fish species subject to CCAMLR Conservation Measures, ‘unless the vessel establishes that the fish were caught in compliance with all relevant CCAMLR conservation measures and requirements under this Convention’.³⁰⁴

³⁰¹ CCAMLR 24, report, paragraph 17.2.

³⁰² The Cook Islands, referred to in the extract, is now a contracting party to the CCAMLR Convention, but is not a member of the Commission.

³⁰³ Paragraph 4.

³⁰⁴ Paragraph 5.

Information regarding (a) any sightings of non-contracting party vessels engaging in fishing activities in the Convention Area and (b) any denials of landings or transshipments in port, as well as the results of any port inspections, is to be transmitted to the Commission.³⁰⁵ The Executive Secretary is to transmit the information to, *inter alia*, the flag State of the vessel concerned and request the flag State to take certain measures against the vessel and to report back.³⁰⁶

The measure specifies that '[i]n order for a non-Contracting Party's vessel to be included in the NCP-IUU Vessel List', there must be evidence that the vessel has undertaken one or more listed activities.³⁰⁷ The list ends with a broad provision under which the vessel becomes a candidate for listing if it has 'engaged in fishing activities contrary to any other CCAMLR conservation measures in a manner that undermines the attainment of the objectives of the Convention according to Article XXII of the Convention'.³⁰⁸

The evidence in question may be: (a) information obtained by a contracting party that a non-contracting party vessel has engaged in any of the listed activities;³⁰⁹ and (b) vessel identifications 'documented, *inter alia*, on reports relating to the application of [CM] 10-03 [on port inspections], trade information obtained on the basis of the implementation of [CM] 10-05 [on the CDS] and relevant trade statistics such as [FAO] and other national or international verifiable statistics, as well as any other information obtained from Port States and/or gathered from the fishing grounds which is suitably documented'.³¹⁰ (The precise relationship between '(a)' and '(b)' is not very clear from the text of the measure.)

The measure sets out what a contracting party must do with the information it has obtained about a non-contracting party vessel. It must, *inter alia*, transmit the information to the Executive Secretary. The Executive Secretary is to transmit the information to, *inter alia*, the flag State of the vessel concerned and request the flag State to take certain measures against the vessel and to report back.³¹¹

The Executive Secretary is to draw up a Draft NCP-IUU Vessel List of vessels that 'might be presumed to have engaged in any of the [listed] activities' in a given period, based on the supporting evidence referred to above and any other relevant information that the Executive Secretary might have obtained.³¹² That list is to be distributed to, *inter alia*, the non-contracting parties concerned with an invitation to provide comments, including information showing that the vessels in question have not engaged in the listed activities.³¹³ From the Draft NCP-IUU Vessel List, a Provisional NCP-IUU Vessel List (including any information received from the non-contracting parties) is created by the Executive Secretary.³¹⁴

Non-contracting parties cooperating with the Commission by participating in the CDS are to be requested 'to the extent possible in accordance with their applicable laws and regulations' not

³⁰⁵ Paragraph 7.

³⁰⁶ Paragraph 7.

³⁰⁷ Paragraph 9.

³⁰⁸ Paragraph 9(vi).

³⁰⁹ Paragraph 8 (and paragraph 9).

³¹⁰ Paragraph 3 (and paragraph 9).

³¹¹ Paragraph 8.

³¹² Paragraph 10.

³¹³ Paragraphs 10 and 11.

³¹⁴ Paragraph 12.

to register or de-register vessels that have been placed on the provisional list ‘until such time as the Commission has had the opportunity to consider the List and has made its determination’.³¹⁵ Provisions on registration and de-registration also apply to contracting parties.³¹⁶ The provisional list is to be transmitted to non-contracting parties (other than cooperating ones) with vessels on the list.³¹⁷

From the Provisional NCP-IUU Vessel List, a Proposed NCP-IUU Vessel List (taking into account, *inter alia*, any additional information submitted by contracting parties as well as non-contracting parties cooperating with the Commission by participating in the CDS) is to be adopted by the SCIC and submitted to the Commission for approval.³¹⁸ Once approved, the Commission is to request non-contracting parties with vessels on the list to take certain measures and to report back.³¹⁹ Furthermore, contracting parties are to ‘take all necessary measures, subject to and in accordance with their applicable laws and regulations and international law’ in order that:³²⁰

-
- (a) the issuance of a licence to vessels on the NCP-IUU Vessel List to fish in waters under their fisheries jurisdiction is prohibited;
-
- (b) fishing vessels, support vessels, refuel vessels, mother-ships and cargo vessels flying their flag do not in any way assist vessels on the NCP-IUU Vessel List by participating in any transshipment or joint fishing operations, supporting or resupplying such vessels;
-
- (c) vessels on the NCP-IUU Vessel List should be denied access to ports unless for the purpose of enforcement action or for reasons of force majeure or for rendering assistance to vessels, or persons on those vessels, in danger or distress. Vessels allowed entry to port are to be inspected in accordance with relevant conservation measures;
-
- (d) where port access is granted to such vessels:
- (a) documentation and other information, including DCDs where relevant are examined, with a view to verifying the area in which the catch was taken; and where the origin cannot be adequately verified, the catch is detained or any landing or transshipment of the catch is refused; and
- (b) where possible
- i. in the event catch is found to be taken in contravention of CCAMLR conservation measures, catch is confiscated;
- ii. all support to such vessels, including non-emergency refuelling, resupplying and repairs is prohibited.
-
- (e) the chartering of vessels on the NCP-IUU Vessel List is prohibited;
-
- (f) granting of their flag to vessels on the NCP-IUU Vessel List is refused;
-
- (g) imports, exports and re-exports of *Dissostichus* spp. from vessels on the NCP-IUU Vessel List are prohibited;
-
- (h) ‘Export or Re-export Government Authority Validation’ is not certified when the shipment (of *Dissostichus* spp.) is declared to have been caught by any vessel on the NCP-IUU Vessel List;
-
- (i) importers, transporters and other sectors concerned are encouraged to refrain from dealing with and from transshipping of fish caught by vessels on the NCP-IUU Vessel List;
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³¹⁵ Paragraph 12(i).

³¹⁶ Paragraph 13.

³¹⁷ Paragraph 12(iii).

³¹⁸ Paragraphs 15 and 16(i).

³¹⁹ Paragraph 21.

³²⁰ Paragraph 22.

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- (j) any appropriate information which is suitably documented is collected and submitted to the Executive Secretary, to be forwarded to Contracting Parties and non-Contracting Parties, entities or fishing entities cooperating with the Commission by participating in the CDS, with the aim of detecting, controlling and preventing the importation or exportation of, and other trade-related activities relating to, catches from vessels on the NCP-IUU Vessel List intended to circumvent this conservation measure.
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Non-contracting parties cooperating with the Commission by participating in the CDS are to be requested 'to the extent possible in accordance with their applicable laws and regulations' not to register vessels that have been placed on the Final NCP-IUU Vessel List unless they are removed from that list by the Commission.³²¹

Contracting parties 'should not' (i.e. exhortatory rather than mandatory) 'take any trade measures or other sanctions which are inconsistent with their international obligations against vessels using as the basis for the action the fact that the vessel or vessels have been included in the Draft NCP-IUU Vessel List', albeit '[w]ithout prejudice to their rights to take proper action consistent with international law'.³²² That implies that contracting parties may adopt said sanctions against vessels on the Provisional and Proposed NCP-IUU Vessel Lists. The measure establishes a procedure for removal of a vessel from the Final IUU Vessel List.³²³

With regard to toothfish, specifically, '[t]he Commission shall decide appropriate measures to be taken ... so as to address these issue with those identified non-Contracting Parties'. In that respect, 'Contracting Parties may cooperate to adopt appropriately multilaterally agreed trade-related measures, consistent with their obligations as members of the World Trade Organization, that may be necessary to prevent, deter and eliminate the IUU activities identified by the Commission'. The measure adds that: 'Multilateral trade-related measures may be used to support cooperative efforts to ensure that trade in *Dissostichus* spp. and its products does not in any way encourage IUU fishing or otherwise diminish the effectiveness of CCAMLR's conservation measures which are consistent with the United Nations Convention on the Law of the Sea 1982'.³²⁴

It can be seen that the principal sanction under CM 10-07 lies in individual contracting parties taking certain measures against vessels on the NCP-IUU Vessel List. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs.

In contrast, for toothfish specifically, it is foreseen that the Commission could chose to adopt trade-related measures against named flag States. Furthermore, placing of vessels on the NCP-IUU Vessel List is an action to be taken at the RFMO level. In those respects, the CCAMLR has not to date adopted any trade-related measures against a non-contracting party. However, it has placed vessels on the NCP-IUU Vessel List. The NCP-IUU Vessel List for the period 2003 to 2006 is available on the CCAMLR website.³²⁵ The current flag States of the 17 vessels on the List are stated as being **Cambodia, Equatorial Guinea, Honduras, North Korea, Panama and Togo**.

³²¹ Paragraph 24.

³²² Paragraph 26.

³²³ Paragraphs 16(ii) and 18.

³²⁴ Paragraph 30.

³²⁵ <www.ccamlr.org/put/E/sc/fish-monit/iuu-list-06.pdf>.

Other provisions affecting non-contracting parties

Some provisions of other CCAMLR measures could also affect non-contracting parties. **Resolution 25/XXV** (see section B above) urges contracting parties to '[s]eek the cooperation of non-Contracting Party Port States when IUU fishing vessels seek to use the ports of non-Contracting Parties, urging them to take the steps in accordance with Conservation Measure 10-07'. Thus Resolution 25/XXV seeks to extend the reach of CM 10-07 beyond contracting parties and beyond the ways in which it already engages those non-contracting parties cooperating with the Commission by participating in the CDS.

CM 10-05 (2006), on *Catch documentation scheme for Dissostichus spp.*, obliges each contracting party to require that: (a) each landing of toothfish at its ports and each transshipment of toothfish to its vessels be accompanied by a completed *Dissostichus* catch document ('DCD');³²⁶ and (b) each shipment of toothfish imported into or exported from its territory be accompanied by 'the export-validated DCD(s) and, where appropriate, validated re-export document(s) that account for all the *Dissostichus* spp. contained in the shipment'.³²⁷ (Non-contracting parties cooperating under Annex C to CM 10-05 also, impliedly, commit themselves to fulfilling those duties.³²⁸)

In principle, subject to the requirements set out in CM 10-05 (2006) being met, any non-contracting party, whether granted cooperating status under Annex C to CM 10-05 or not, may: (a) issue a DCD for completion by its vessel(s); (b) validate a DCD for export; and (c) validate a re-export document. Likewise, the master of a vessel flagged to a non-contracting party, or exporters or re-exporters in a non-contracting party, may fulfil the requirements set out in CM 10-05. Thus non-contracting parties are not excluded from participating in the scheme.

However, there is a duty on contracting parties to refuse import, export or re-export if any DCD or re-export document, as appropriate, is found to be invalid.³²⁹ (Non-contracting parties cooperating under Annex C to CM 10-05 also, impliedly, commit themselves to fulfilling that duty.³³⁰) In that respect, with some exceptions, a contracting party or cooperating non-contracting party is entitled to obtain verification from the flag State, on the basis of VMS data, of the stated location of the catch if claimed to have been taken on the high seas outside the Convention Area.³³¹

Furthermore, the details included in the DCD may be used: (a) by inspectors in ports of contracting parties, pursuant to CM 10-03 (2005) (see next paragraph), to help determine whether the toothfish in question was caught in accordance with CCAMLR Conservation Measures; and (b) by the Commission to help determine if a particular flag State, whether a contracting party or a non-contracting party, is undermining the effectiveness of CCAMLR Conservation Measures.

CM 10-03 (2005), on *Port inspections of vessels carrying toothfish*, requires, with some exceptions, contracting parties to undertake inspections of all fishing vessels, irrespective of flag, carrying toothfish which enter their ports. The purposes of the inspection are to determine if: (a) any harvesting activities in the Convention Area were carried out in accordance with CCAMLR

³²⁶ Paragraph 4.

³²⁷ Paragraph 10.

³²⁸ Paragraphs C3(ii)(a) and C4(i).

³²⁹ Paragraphs 12, 13, 16 and 17.

³³⁰ Paragraphs C3(ii)(a) and C4(i).

³³¹ Paragraph 16.

Conservation Measures; and (b) any toothfish to be unloaded or transhipped is accompanied by a DCD required by CM 10-05 (2006) and agrees with the information recorded in the DCD.³³²

Contracting parties must ‘require vessels to provide advance notice of their entry into port and to convey a written declaration that they have not engaged in or supported [IUU] fishing in the Convention Area’; and ‘[v]essels which either declare that they have been involved in IUU fishing or fail to make a declaration shall be denied port access, other than for emergency purposes’.³³³ The catch is not to be landed or transhipped ‘[i]n the event that there is evidence that the vessel has fished in contravention of CCAMLR Conservation Measures’.³³⁴

CM 10-05 is also complemented by two Resolutions. **Resolution 14/XIX**, on *Catch Documentation Scheme: implementation by Acceding States and non-Contracting Parties*, reminds Commission members of ‘their obligation under the [CDS] to prevent trade in [toothfish] in their territory, or by their flag vessels, with [*inter alia*] non-Contracting Parties when it is not carried out in compliance with the [CDS]’.³³⁵ **Resolution 15/XXII** (see section B above) urges contracting parties to licence their toothfish vessels such that the licence requires landing of catch only in States that are fully implementing the CDS.

CM 10-08 (2006), on *Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures* (applicable from 1 July 2008, or earlier on a voluntary basis), also has the potential to affect non-contracting parties. That is because the measure aims at reducing the participation of contracting party nationals in, *inter alia*, transshipment, transport and trade of IUU catches as well as engagement on and management of IUU vessels. Any such reduction could reduce the efficacy of the operations of vessels conducting IUU fishing (including those flagged to non-contracting parties) that otherwise rely on those nationals. CM 10-08 is complemented by a provision of **Resolution 19/XXI** on nationals (see below).

Several Resolutions make overtures to non-contracting parties to take action against IUU fishing, or request contracting parties to make such overtures. **Resolution 14/XIX** (see section B above) urges all non-contracting parties not participating in the CDS which fish for, or trade in, toothfish to implement the CDS as soon as possible and recommends that Commission members ‘make appropriate representations concerning this resolution to ... non-Contracting Parties’.³³⁶ **Resolution 25/XXV** (see section B above) urges contracting parties to, *inter alia*, pursue diplomatic action with non-contracting party flag States to persuade them to address IUU fishing by their vessels in specified ways.

More generally, **Resolution 19/XXI** (see section B above) could affect those non-contracting parties that are so-called Flags of Non-Compliance (‘FONC’), by virtue of its invitation to contracting parties and cooperating non-contracting parties to: (a) try to ensure that their nationals are not engaged on FONC vessels; (b) ‘[d]evelop ways to ensure that the export or transfer of fishing vessels from their State to a FONC State is prohibited’; and (c) ‘[p]rohibit the landings and transshipments of fish and fish products from FONC vessels’.

³³² Paragraph 1.

³³³ Paragraph 2.

³³⁴ Paragraph 3.

³³⁵ Paragraph 4.

³³⁶ Paragraphs 1 and 3.

The **terms of reference of the SCIC** are also relevant. They provide for that Committee to, *inter alia*, 'review and analyse information pertaining to activities of Contracting Parties and non-Contracting Parties which undermine the objectives of the Convention, including in particular illegal, unregulated and unreported (IUU) fishing, and recommend actions to be taken by the Commission to prevent, deter and eliminate such activities'.³³⁷ One specific role for the SCIC in relation to non-contracting parties, under CM 10-07, has already been noted above; however, the terms of reference imply that the SCIC also has a broader role in relation to such parties.

³³⁷ Paragraph 2(iv).

GFCM

http://www.fao.org/fi/body/rfb/GFCM/gfcm_home.htm/

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the GFCM website. In particular, the various Recommendations and Resolutions referred to can all be found in the *Compendium of GFCM Recommendations and Resolutions*.³³⁸ This part of the report does not take into account any developments arising at GFCM 31 (9–13 January 2007).]

Full name of RFMO	General Fisheries Commission for the Mediterranean
Most recent meeting of RFMO	GFCM 31 – January 2007
Treaty establishing RFMO [under FAO Constitution, Article XIV]	Agreement for the Establishment of the General Fisheries Commission for the Mediterranean [as amended]
Year of adoption of treaty	1949 [most recent amendment in 1997]
Year of entry into force of treaty	1952 [most recent amendment in 2004]

A. Provisions of treaty relating to non-contracting parties

The GFCM Agreement does not contain any provisions expressly on non-contracting parties (other than Article I(2) on members and Article XIII on acceptance). Provisions of the GFCM Agreement potentially relating to non-contracting parties include, *inter alia*, the following:

Article and title	Text of relevant provision
Article III Functions	1. The purpose of the Commission shall be to promote the development, conservation, rational management and best utilization of living marine resources, as well as the sustainable development of aquaculture in the Region, and to these ends it shall have the following functions and responsibilities: ... (b) to formulate and recommend ... appropriate measures: (i) for the conservation and rational management of living marine resources, including measures: ... regulating the amount of total catch and fishing effort and their allocation among Members; (ii) for the implementation of these recommendations; ... (h) to carry out such other activities as may be necessary for the Commission to achieve its purpose as defined above.
Article V Recommendations on Management Measures	2. Subject to the provisions of this Article, the Members of the Commission undertake to give effect to any recommendations made by the Commission under Article III, paragraph 1(b), from the date determined by the Commission ...
Article IX Finances	6. The Commission may ... accept donations and other forms of assistance from organizations, individuals and other sources for purposes connected with the fulfilment of any of its functions.

³³⁸ Document GFCM-COC:I/2007/Inf.4, tabled for consideration at the January 2007 meeting of the Compliance Committee.

	7. Contributions and donations and other forms of assistance received shall be placed in a Trust Fund administered by the Director-General in conformity with the Financial Regulations of the Organization [i.e. the FAO].
Article X Expenses	6. The Commission may accept voluntary contributions generally or in connection with specific projects or activities of the Commission. Such contributions shall be paid into a trust fund to be established by the Organization. The acceptance of such voluntary contributions and the administration of the trust fund shall be in accordance with the Financial Regulations and Rules of the Organization.
Article XI Administration	2. The Secretary [of the Commission] shall be responsible for implementing the policies and activities of the Commission and shall report thereon to the Commission. ...

B. Brief analysis of, and references to, decisions or resolutions of the GFCM relating to cooperating non-members

Principal framework provisions

The GFCM has recently adopted **Recommendation 2006/5**, entitled *Criteria for obtaining the status of Cooperating non-Contracting Party in GFCM Area*, although there are as yet no cooperating non-contracting parties ('C.NCPs') pursuant to that Recommendation. The stated legal basis for the Recommendation is Article III(1)(h) (see section A above) and Article V (on the procedure for adopting Recommendations pursuant to Article III(1)(b));³³⁹ both of those are broad and general provisions.

The Recommendation requires the Secretary to contact annually 'all non-Contracting Parties known to be fishing in the GFCM Area for species under GFCM competence to urge them to become a Contracting Party to GFCM ... or attain the status of a Co-operating non-Contracting Party'.³⁴⁰ The Recommendation sets out the procedure to be followed, and information to be provided, by a non-contracting party seeking C.NCP status.³⁴¹ The information to be provided is as follows:

- | | |
|-----|---|
| (a) | where available, data on its historical fisheries in the GFCM Area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas; |
| (b) | all the data that Contracting Parties have to submit to GFCM based on the recommendations and resolutions adopted by GFCM; |
| (c) | details on current fishing presence in the GFCM Area, number of vessels and vessel characteristics; and |
| (d) | information on any research programmes it may have conducted in the GFCM Area and the information and the results of this research. |

The applicant is also required to: (a) 'confirm its commitment to respect the Commission's conservation and management measures'; and (b) 'inform GFCM of the measures it takes to ensure compliance by its vessels of GFCM conservation and management measures'.³⁴²

³³⁹ Preamble, 3rd recital.

³⁴⁰ Paragraph 1.

³⁴¹ Paragraphs 2 and 3.

³⁴² Paragraph 4.

Recommendation 2006/5 also explains that C.NCP status is to be decided by the GFCM, on the recommendation of the Compliance Committee. The Compliance Committee is to consider '[the] data submission of the applicant' as well as information on the applicant available from other RFMOs. In the decision-making process, '[c]autious shall be used so as not to introduce into the GFCM Area the excessive fishing capacity of other regions or IUU fishing activities by granting cooperating status to the applicant'.³⁴³

The cooperating status is to be reviewed annually 'and renewed unless revoked by the Commission due to non-compliance with GFCM conservation and management measures'.³⁴⁴ The Recommendation does not mention any benefits of C.NCP status (but see further section C below).

Measures addressed to cooperating parties

In the light of Recommendation 2006/5, two other Recommendations adopted in 2006 apply obligations equally to contracting parties and C.NCPs, by using the phrase 'Contracting Parties and Cooperating non-Contracting Parties shall ...' (or similar formulations) as a prefix to the duty in question. Those are Recommendations 2006/4 and 2006/7. **Recommendation 2006/4** is explained in section D below, and some benefits for C.NCPs arising from it are mentioned in section C below. **Recommendation 2006/7**, on *data confidentiality policy and procedures*, relates to security and confidentiality for 'all data, reports and messages (electronic and of other nature) transmitted and received pursuant to GFCM recommendations'.³⁴⁵ Every provision of Recommendation 2006/7 that applies to contracting parties is also applied to C.NCPs.

In 2005, prior to the adoption of Recommendation 2006/5, the GFCM adopted **Recommendation 2005/2 concerning the establishment of a GFCM record of vessels over 15 metres authorized to operate in the GFCM Area**. The record of vessels impliedly comprises only vessels flagged to contracting parties.³⁴⁶ Therefore some contracting party duties regarding vessels not on the record³⁴⁷ will potentially affect vessels flagged to C.NCPs negatively, irrespective of whether those vessels are conducting IUU fishing or not.

Other provisions relevant to cooperation

Although Recommendation 2006/5 is clearly the current framework for C.NCPs within the GFCM, the notion of cooperation within the GFCM is not new. Thus **Resolution 1997/2**, on *activities of non-Contracting Parties*, 'calls upon States which are not members of GFCM, but whose vessels engage in fishing activities in the region, to become members of GFCM or otherwise cooperate in the implementation of the recommendations adopted by the Council'.³⁴⁸ **Resolution 1969/5** proposes specified cooperation in the field of marine pollution from States that are not members of the GFCM. There are also several Resolutions which appear to restate or rephrase Recommendations of the ICCAT that are potentially relevant to States cooperating with the GFCM.³⁴⁹

³⁴³ Paragraph 5.

³⁴⁴ Paragraph 6.

³⁴⁵ Paragraph 1.

³⁴⁶ Paragraph 2.

³⁴⁷ See, *inter alia*, paragraphs 5(e), 7, 8 and 9(b).

³⁴⁸ 1st operative paragraph.

³⁴⁹ Resolutions 2000/1 (paragraph 6), 2000/3 (paragraph 1) and 1995/1 (section 1, paragraph 3).

Other GFCM instruments also contain provisions of relevance to C.NCPs. First, as noted above, Recommendation 2006/5 calls for each non-contracting party seeking C.NCP status to ‘confirm its commitment to respect the Commission’s conservation and management measures’. Thus the **GFCM’s various conservation and management measures** are potentially to be complied with by C.NCPs. Some measures pre-dating 2006, by not referring expressly to C.NCPs, may leave scope for doubt as to how they apply to such parties. However, new measures adopted from 2007 have the potential to refer expressly to C.NCPs (e.g. as has been done with Recommendation 2006/7 and Recommendation 2004/4 (see above)).

Secondly, the **GFCM’s Rules of Procedure** contain provisions that are potentially applicable to C.NCPs. Thus Rule XII establishes procedures for granting observer status, *inter alia*, to: (a) ‘Members and Associate Members of the [FAO] that are not members of the Commission’;³⁵⁰ and (b) ‘States that are not Members of the Commission, nor Members or Associate Members of the [FAO], but are Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency’.³⁵¹

Rule XII does not accommodate Chinese Taipei, which does not fall into either of the categories in the preceding paragraph. Also, Rule XII makes no distinction between C.NCPs and other non-contracting parties (and, as noted above, Recommendation 2006/5 does not establish any rights for C.NCPs regarding observer status).

Furthermore, Rule XIII of the Rules of Procedure provides that: ‘In the furtherance of cooperative projects provided for in Article III, 1e) of the [GFCM] Agreement, and of studies undertaken outside the region referred to in the Preamble of the Agreement, arrangements may be made [by the FAO’s Director General] with *governments that are not members* of the Commission’ (emphasis added). The cooperative projects provided for by Article III(1)(e) are those ‘in the areas of fisheries and the protection of living marine resources’. The region referred to in the preamble is ‘the Mediterranean and the Black Sea and connecting waters’.³⁵²

Thirdly, reflecting Article IX(6) and (7) of the GFCM Agreement (see section A above), Regulation VI of the **Financial Regulations** states, *inter alia*, that: ‘All contributions, donations and other forms of assistance received shall be placed in a Trust Fund administered by the Director-General [of the FAO] in conformity with the Financial Regulations of FAO’.³⁵³ That provision would presumably be relevant if a C.NCP were to make a donation to the running costs of fisheries management by the GFCM (although such donations are not foreseen by Recommendation 2006/5).

Fourthly, a document tabled for consideration at the January 2007 meeting of the Compliance Committee, entitled **General Guidelines for a GFCM Control and Enforcement Scheme: Needs and Principles**,³⁵⁴ contains some points relevant to C.NCPs. In particular, the document states that the obligations of each contracting party and C.NCP, for the purposes of a control and enforcement scheme, should include: (a) ‘Provision to GFCM, in the manner and at such regular intervals as may be required by GFCM, of compliance reports and information concerning its

³⁵⁰ Rule XII(2).

³⁵¹ Rule XII(3).

³⁵² Preamble, 4th recital.

³⁵³ Regulation VI(1).

³⁵⁴ Document COC1/2007/Inf.3, tabled for consideration at the January 2007 meeting of the Compliance Committee.

fishing activities, including fishing area and fishing vessels, in order to facilitate the compilation of reliable fishing statistics on GFCM regulated species (catch, effort, size samples, etc.), and the effective implementation of GFCM compliance program'; and (b) 'Compliance with all GFCM conservation and management measures'.³⁵⁵

C. Examples of positive measures applied to cooperating non-members

There are no current examples of positive measures applied to particular C.NCPs. As noted in section B above, Recommendation 2006/5 does not mention any benefits of C.NCP status. However, as noted in section D below, Recommendation 2006/4 does not currently apply to vessels flagged to C.NCPs. That could lead to preferential treatment for the latter on the basis that such vessels cannot currently be placed on the draft, provisional or confirmed IUU lists. However, the latter still does not solve the potential problem identified in section B above regarding Recommendation 2005/2.

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the GFCM against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

The principal framework provisions on measures against non-contracting parties are set out in **Recommendation 2006/4** on *establishment of a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the GFCM Area*. The measure states that:

This recommendation shall apply initially to large-scale fishing vessels over 24 metres LOA, flying the flag of non-Contracting Parties. The Commission shall, in future annual meetings, review and, as appropriate, revise this recommendation with a view to its extension to other types of IUU fishing activities of non-Contracting Party vessels and, to Contracting Party, Cooperating non-Contracting Party [sic].³⁵⁶

That implies that the Recommendation's stated application to vessels flagged to non-contracting parties does not currently include vessels flagged to C.NCPs. Thus, unless otherwise stated, references below to 'non-contracting parties' should be interpreted as 'non-contracting parties other than C.NCPs'.

The measure starts by setting out a non-exhaustive list of activities or circumstances, to be supported by evidence from a contracting party or C.NCP, whereby 'fishing vessels flying the flag of a non-Contracting Party are presumed to have carried out [IUU] fishing activities in the GFCM Convention Area'.³⁵⁷ Notwithstanding the existence of the ICCAT, the list includes harvesting tuna or tuna-like species in the Convention Area where the 'flag State is without quotas, catch limit or effort allocation under relevant GFCM conservation and management measures'.³⁵⁸ After including various specific activities, the list ends with the broad category of engaging 'in fishing activities contrary to any other GFCM conservation and management measures'.³⁵⁹

³⁵⁵ Section 2.

³⁵⁶ Paragraph 11.

³⁵⁷ Paragraph 1.

³⁵⁸ Paragraph 1(b).

³⁵⁹ Paragraph 1(j).

Contracting parties and C.NCPs are to transmit annually ‘the list of vessels flying the flag of a non-Contracting Party presumed to be carrying out IUU fishing activities in the GFCM Area during the current and previous years, accompanied by the supporting evidence concerning the presumption of IUU fishing activity’.³⁶⁰ That is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the GFCM of a (finalized) IUU vessels list.

The next step in the process is for the Executive Secretary, on the basis of the information received from the contracting parties and C.NCPs, to draw up a draft IUU list.³⁶¹ That list, together with the supporting evidence, is to be transmitted to non-contracting parties with vessels on the list and to all contracting parties and C.NCPs. Contracting and C.NCPs (but not, apparently, non-contracting parties other than C.NCPs) are to transmit comments on the draft list, ‘including evidence showing that the listed vessels neither have fished in contravention to GFCM conservation and management measures nor had the possibility of fishing species in the GFCM Area’.³⁶²

On the basis of comments received from contracting parties and C.NCPs, the Executive Secretary is to draw up a provisional IUU list.³⁶³ Contracting parties and C.NCPs ‘may ... submit ... any additional information, which might be relevant for the establishment of the IUU list’.³⁶⁴ That information is to be circulated to all contracting parties and C.NCPs and to ‘the non-Contracting Parties concerned’.³⁶⁵ As with the draft IUU list, non-contracting parties with vessels on the provisional list are not expressly given an opportunity to comment.

Next, the GFCM Compliance Committee is to submit the provisional list to the GFCM for approval, having first removed any vessel from the list if its flag State demonstrates specified facts or improvements.³⁶⁶ The provisional list is then adopted by the Commission as the (finalized) IUU list. At that point, the Commission is to request non-contracting parties with vessels on the list to take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.³⁶⁷

Furthermore, contracting parties and C.NCPs are to ‘take all necessary measures, under their applicable legislation’:³⁶⁸

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- (a) So that the fishing vessels, the mother ships and the cargo vessels flying their flag do not participate in any transshipment with vessels registered on the IUU list;

 - (b) So that IUU vessels that enter ports voluntarily are not authorized to land or tranship therein;

 - (c) To prohibit the chartering of a vessel included on the IUU list;

³⁶⁰ Paragraph 2.

³⁶¹ Paragraph 3.

³⁶² Paragraph 3.

³⁶³ Paragraph 4.

³⁶⁴ Paragraph 5.

³⁶⁵ Paragraph 5.

³⁶⁶ Paragraphs 6 and 7.

³⁶⁷ Paragraph 8.

³⁶⁸ Paragraph 9.

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- (d) To refuse to grant their flag to vessels included in the IUU list, except if the vessel has changed owner; and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel, or having taken into account all relevant facts, the flag Contracting Party or Cooperating non-Contracting Party, determines that granting the vessel its flag will not result in IUU fishing;
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- (e) To prohibit the imports, or landing and/or transshipment, of any species from vessels included in the IUU list;
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- (f) To encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of any species caught by vessels included in the IUU list;
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It is noteworthy that some of the measures listed above are not restricted to species covered by the GFCM. In that regard, the report of GFCM 30, held in January 2006, states that: ‘In relation with the reference to trade restrictive measures contained in Recommendation GFCM/2006/4, the delegate from Japan noted that, in conformity with international law, such measures should be adopted only to stocks which are subject to management measures. ...’³⁶⁹

Contracting parties and C.NCPs ‘shall not take any unilateral trade measures or other sanctions’ against vessels (a) ‘provisionally included in the draft IUU list’ or (b) that have already been removed from the provisional list, on the grounds that such vessels are involved in IUU fishing activities, albeit ‘[w]ithout prejudice to the rights of flag Contracting Parties or Cooperating non-Contracting Parties, and coastal states to take proper action consistent with international law’.³⁷⁰ That leaves some uncertainty about the extent to which parties may adopt sanctions against vessels on the provisional list other than the already removed vessels. A procedure is established for removal of a vessel from the (confirmed) IUU list,³⁷¹ triggered by the request of the flag State.

The wording of Recommendation 2006/4 indicates that the measures in response to a vessel being placed on the IUU list are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the draft, provisional and finalized IUU lists is an action to be taken at the RFMO level. Recommendation 2006/4 was only adopted at the most recent meeting of the GFCM; consequently no IUU list is yet available.

Other provisions affecting non-contracting parties

Some provisions of other GFCM instruments could also affect non-contracting parties. As noted in section B above, **Recommendation 2005/2** provides for a record of vessels that impliedly comprises only vessels flagged to contracting parties, and for contracting parties to take certain actions against vessels not on the record.³⁷² It is not clear whether such actions are to apply to vessels not on the list merely by virtue of being flagged to non-contracting parties; if so, the measure will potentially affect non-contracting party vessels negatively, irrespective of whether those vessels are conducting IUU fishing or not.

³⁶⁹ GFCM 30, report, paragraph 29.

³⁷⁰ Paragraph 12.

³⁷¹ Paragraphs 13–19.

³⁷² See, *inter alia*, paragraphs 5(e), 7, 8 and 9(b).

Resolution 1997/2 (see section B above) calls upon members of the GFCM ‘to report to the Council on any fishing activities by vessels flying the flag of non-members which undermine the effectiveness of GFCM recommendations, as well as on the activities of flagless vessels,’³⁷³ (although that provision is largely superseded by Recommendation 2006/4).

Recommendation 2006/6 establishes the GFCM Compliance Committee, and states one of the Committee functions as being to ‘[m]onitor, review and analyze information pertaining to the activities of Non-Contracting Parties and their vessels which undermine the objectives of the Agreement including, in particular, IUU fishing, and recommend actions to be taken by the Commission to discourage such activities’.³⁷⁴

The *General Guidelines for a GFCM Control and Enforcement Scheme: Needs and Principles* (see section B above) contain some points relevant to non-contracting parties. The document states that an effective control and enforcement scheme should include, *inter alia*, ‘[p]rovisions for ensuring compliance by both Contracting and non-Contracting Parties vessels ...’.³⁷⁵ Also, under the heading *A programme to promote compliance by vessels of non-Contracting Parties*,³⁷⁶ the document states that:

Further to existing measures, GFCM should examine measures consistent with international law to deter activities of such vessels which undermine the effectiveness of GFCM conservation and management measures, such as.

- Implementation of all the relevant elements of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.
- Prohibition of landings and transshipments of GFCM species by vessels of non-Contracting Parties, sighted in the GFCM Area, that do not comply with the relevant GFCM conservation and management measures.

³⁷³ 2nd operative paragraph.

³⁷⁴ Paragraph (d).

³⁷⁵ Introduction.

³⁷⁶ Section 4.

NAFO

<http://www.nafo.int/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the NAFO website. The *Conservation and Enforcement Measures* provide a unified source of measures adopted by the NAFO relating to, *inter alia*, compliance. This part of the report does not include coverage of NAFO Resolutions.]

Full name of RFMO	Northwest Atlantic Fisheries Organization
Most recent meeting of RFMO	NAFO 28 – September 2006 [reports and adopted amendments to <i>Conservation and Enforcement Measures</i> available]
Treaty establishing RFMO	Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries [as amended]
Year of adoption of treaty	1978
Year of entry into force of treaty	1979

A. Provisions of treaty relating to non-contracting parties

The only provision of the NAFO Convention referring expressly to non-contracting parties (other than Article XXII on signature, ratification, acceptance, approval and accession) is Article XIX, which states that:

The Contracting Parties agree to invite the attention of any State not a Party to this Convention 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 this Convention. The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects.

Provisions of the NAFO Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article	Text of relevant provision
III	The functions of the General Council shall be: ... (c) to review and determine the membership of the Fisheries Commission pursuant to Article XIII; ...
XI	2. The Commission may adopt proposals for joint action by the Contracting Parties designed to achieve the optimum utilization of the fishery resources of the Regulatory Area. ... 4. Proposals adopted by the Commission for the allocation of catches in the Regulatory Area shall 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 shall give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which has under taken 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 scheme of joint enforcement.

	5. The Commission may also adopt proposals for international measures of control and enforcement within the Regulatory Area for the purpose of ensuring within that Area the application of this Convention and the measures in force thereunder.
XI	9. The Commission may invite the attention of any or all Commission members to any matters which relate to the objectives and purposes of this Convention within the Regulatory Area.
XIII	1. The membership of the Commission shall be reviewed and determined by the General Council at its annual meeting and shall consist of: (a) each Contracting Party which participates in the fisheries of the Regulatory Area; and (b) any Contracting Party which has provided evidence satisfactory to the General Council that it expects to participate in the fisheries of the Regulatory Area during the year of that annual meeting or during the following calendar year.
XV	4. The Executive Secretary shall, subject to the general supervision of the General Council, have full power and authority over staff of the Secretariat and shall perform such other functions as the General Council shall prescribe.
XVII	The Contracting Parties agree to take such action, including the imposition of adequate sanctions for violations, as may be necessary to make effective the provisions of the Convention and to implement any measures which become binding under paragraph 7 of Article XI and any measures which are in force under Article XXIII. ...
XVIII	The Contracting Parties agree to maintain in force and to implement within the Regulatory Area a scheme of joint international enforcement as applicable pursuant to Article XXIII or as modified by measures referred to in paragraph 5 of Article XI. This scheme shall include provision 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 boardings and inspections. A report of such prosecutions and sanctions imposed shall be included in the annual statement referred to in Article XVII.

B. Brief analysis of, and references to, decisions or resolutions of the NAFO relating to cooperating non-members

Scope for cooperation

To date, the NAFO has not adopted any framework provisions on cooperating non-contracting parties, and there are currently no States, REIOs or fishing entities with cooperating status. However, the NAFO *Conservation and Enforcement Measures* ('**C&E Measures**') do contain some provisions that imply scope for cooperation by non-contracting parties (in addition to such parties simply opting to follow duties applied expressly to contracting parties). The relevant provisions are summarized in this section, although further details are provided in section D below.

Article 45 of the C&E Measures envisages that a non-contracting party vessel may consent to being boarded and inspected at sea by NAFO inspectors.³⁷⁷ **Article 47** provides for landing and transhipment by a non-contracting party vessel to which a presumption of IUU fishing applies to be permitted in port if, *inter alia*, '[t]he vessel establishes that it has applied all relevant Conservation and Enforcement Measures'.³⁷⁸

Article 48 explains that the Executive Secretary shall 'advise relevant non-Contracting Parties of the vessels flying their flag that have been included in the Provisional List' and shall, *inter alia*, request the State in question to 'take measures in accordance with its applicable legislation

³⁷⁷ Article 45(1).

³⁷⁸ Article 47(1) and (2).

to ensure that the vessel or vessels in question desist from any activities that undermine the effectiveness of Conservation and Enforcement Measures' and to 'report back to NAFO within 30 days from the date the letter is sent on the results of enquiries and/or measures it has taken in respect of the vessel or vessels concerned'.³⁷⁹ Article 48 also envisages that a non-Contracting Party may agree to a listing, in which case 'the vessel concerned shall be transferred from the Provisional List to the IUU List'.³⁸⁰

Article 49 provides for the Standing Committee on International Control ('STACTIC') to recommend the removal of any vessel from the Provisional List or the IUU List if its flag State provides satisfactory information to establish that, *inter alia*, 'it has taken effective action in response to the IUU fishing in question, including prosecution and imposition of sanctions of adequate severity' or 'it has taken measures to ensure the granting of the right to the vessel to fly its flag will not result in IUU fishing'.³⁸¹

Article 50 envisages that a contracting party may collect and exchange any appropriate information regarding vessels appearing on the IUU List with, *inter alia*, non-Contracting Parties 'with the aim of detecting, controlling and preventing false import/export certificates regarding fish from such vessels'.³⁸² **Article 51** requires contracting parties to 'jointly and/or individually request non-Contracting Parties whose vessels appear on the IUU List to co-operate fully with the Organization in order to avoid undermining the effectiveness of the Conservation and Enforcement Measures adopted pursuant to the Convention'.³⁸³

Thus Articles 45, 47, 48, 49, 50 and 51 of the C&E Measures all provide scope for cooperation by non-contracting parties. But it is important to emphasise that the C&E Measures provide no indication of whether, or to what extent, cooperation under those provisions could assist with obtaining any degree of formal recognition as a cooperating non-contracting party, let alone any benefits that might flow from that status.

Other provisions relevant to cooperation

The Rules of Procedure of the General Council and of the Fisheries Commission contain provisions that are potentially applicable to cooperating non-contracting parties. Thus, under Rule 9.1 of the **General Council's Rules of Procedure** and under Rule 10.1 of the **Fisheries Commission's Rules of Procedure**, '[t]he Executive Secretary shall invite ... non-Contracting Parties identified as harvesting fishery resources in the Regulatory Area' to be observers.³⁸⁴

³⁷⁹ Article 48(3).

³⁸⁰ Article 48(6).

³⁸¹ Article 49(3).

³⁸² Article 50(k).

³⁸³ Article 51(1).

³⁸⁴ See also, *inter alia*, Rules 2.1, 9.6, 9.8 and 9.9 of the General Council's Rules of Procedure and Rules 2.1, 10.6, 10.8 and 10.9 of the Fisheries Commission's Rules of Procedure.

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, there are currently no States, REIOs or entities with cooperating status. Thus there are no examples of positive measures corresponding to such status. The NAFO C&E Measures do contain references to a category of catch allocation referred to as 'Others'.³⁸⁵ However, based on the wording of the C&E Measures, that category seems to be associated with contracting parties.³⁸⁶

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the NAFO against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

The principal framework provisions on measures against non-contracting parties are set out in Articles 43–51 of the NAFO C&E Measures, comprising Chapter VI entitled *Scheme to promote compliance by non-contracting party vessels with recommendations established by NAFO*. Article 2 of the C&E Measures defines the term 'non-Contracting Party vessel' as 'any vessel not flagged to a Contracting Party, including vessels for which there are reasonable grounds for suspecting them to be without nationality'.³⁸⁷ This section will outline the effects of Articles 43–51; the key articles providing for sanctions are Articles 47 and 50.

Under **Article 44**, entitled *Sightings and Identifications of non Contracting Party vessels / Presumption of NCP* [i.e. non-contracting party] *vessels undermining NAFO Conservation and Enforcement Measures*, a non-contracting party vessel sighted or by other means identified by a contracting party as engaging in fishing activities in the Regulatory Area is presumed to be undermining the effectiveness of the C&E Measures. That presumption also applies to any other non-contracting party vessel that has been identified as having engaged in transshipment activities with the vessel in question. Any presumption that arises pursuant to Article 44 has implications for subsequent activities by that vessel (see Article 46 below).

Under **Article 45**, entitled *Inspections at Sea*, NAFO inspectors shall, if appropriate, request permission to board non-contracting party vessels sighted engaging in fishing activities in the Regulatory Area.³⁸⁸ However, no presumption arises from any failure by that vessel to consent to boarding (presumably because such a presumption would represent duplication of the presumption arising under Article 44). A contracting party, '[w]here evidence so warrants ... may take such action as may be appropriate in accordance with international law'.³⁸⁹

Article 46, entitled *Inspections in Port*, requires port States to inspect any non-contracting party vessel upon its entry into port if that vessel is one 'referred to in Article 44(1)'. Presumably that means that the inspection must take place if the vessel has a presumption against it by virtue

³⁸⁵ See, *inter alia*, Articles 3, 7, 8, 9, 21 and 33.

³⁸⁶ See, *inter alia*, Articles 3(1), 3(3), 3(4), 7(10), 8(3), 21(3) and 33(1)(a), as well as footnote 7 on page 30 and footnote 2 on page 32.

³⁸⁷ Article 2(6).

³⁸⁸ Article 45(1).

³⁸⁹ Article 45(2).

of Article 44. The vessel is to be prohibited from landing or transshipping any fish until that inspection has taken place.

Article 47, entitled *Fishing Activities*, sets out contracting party duties in relation to vessels ‘referred to in Article 44(1)’. Presumably, as with Article 46, that means vessels with presumptions against them by virtue of Article 44. All landings and transshipments of all fish from such a vessel are to be prohibited in the ports of all contracting parties unless ‘[t]he vessel establishes that the fish subject to the NAFO convention were caught outside the Regulatory Area’ or ‘[t]he vessel establishes that it has applied all relevant Conservation and Enforcement Measures’.³⁹⁰ Furthermore, contracting parties are to ensure that their vessels do not receive or deliver transshipments of fish to or from such a vessel or engage in joint fishing operations with such a vessel.³⁹¹

Article 48, entitled *Notification of presumed IUU Activities and Establishment of a Provisional List*, provides for the establishment of a ‘Provisional List’ of non-contracting party vessels engaged in IUU fishing. The trigger for a non-contracting party vessel to be placed on the Provisional List is that it is the subject of ‘information [received by the Secretariat] from Contracting Parties pursuant to Articles 44 to 47’.³⁹² However, contracting parties ‘may at any time submit ... any further information, which might be relevant for the identification of non-Contracting Party vessels that might be carrying out IUU fishing in the Regulatory Area’.³⁹³

The Executive Secretary is to request the flag State of any vessels placed on the Provisional List to ‘take measures in accordance with its applicable legislation to ensure that the vessel or vessels in question desist from any activities that undermine the effectiveness of Conservation and Enforcement Measures’ and to ‘report back to NAFO within 30 days from the date the letter is sent on the results of enquiries and/or measures it has taken in respect of the vessel or vessels concerned’.³⁹⁴

The Executive Secretary is also to inform the flag State of the reasons for placing the vessel on the Provisional List and to provide an invitation to attend the meetings of the NAFO bodies at which the composition of the IUU lists will be considered.³⁹⁵ Article 48 also envisages that a non-Contracting Party may agree to a listing, in which case ‘the vessel concerned shall be transferred from the Provisional List to the IUU List’.³⁹⁶

Article 49, entitled *Establishment of the IUU list*, provides for the establishment of an ‘IUU List’. The STACTIC may make recommendations regarding vessel listings on the Provisional List or on the current IUU List. However, it may only recommend removal of a vessel from one or the other list if the flag State satisfies the STACTIC that, *inter alia*, it has taken certain actions or that the vessel did not take part in IUU fishing.³⁹⁷ The finalized IUU List is to be adopted by the General Council of the NAFO.³⁹⁸

³⁹⁰ Article 47(2).

³⁹¹ Article 47(1).

³⁹² Article 48(1).

³⁹³ Article 48(2).

³⁹⁴ Article 48(3)(c) and (d).

³⁹⁵ Article 48(3)(a) and (e).

³⁹⁶ Article 48(6).

³⁹⁷ Article 49(1) and (3).

³⁹⁸ Article 49(4).

Under Article 44(2), a non-contracting party that has been placed on the NEAFC IUU list is presumed to be engaging in fishing activities in the NAFO Regulatory Area and thereby undermining the effectiveness of the C&E Measures. That presumption is reflected in Article 49, in that ‘vessels that have been added to or deleted from the NEAFC IUU List that are flagged to non-Contracting parties shall be incorporated into or deleted from the NAFO IUU List as appropriate, unless any Contracting Party objects [on specified grounds]’. In the event of such an objection, ‘such vessel shall be placed on the Provisional List’, and Article 48 is not to apply to such vessels.³⁹⁹

Article 50, entitled *Follow-up Action*, sets out the implications of being placed on the IUU List. Thus contracting parties are to ‘take all necessary measures to the extent possible in accordance with their applicable legislation with regard to vessels on the IUU List’ including:

-
- (a) prohibiting fishing vessels, support vessels, refueling vessels, the mother-ships and cargo vessels flying their flag to assist vessels on the IUU List in any way, engage in fish processing operations or participate in any transshipment or joint fishing operations with vessels on the IUU List;

 - (b) prohibiting the supply of provisions, fuel or other services to vessels on the IUU List.

 - (c) prohibiting the entry into their ports of such vessels, except in case of force majeure;

 - (d) prohibiting the change of crew, except as required in relation to force majeure;

 - (e) refusing authorization of such vessels to fish in waters under their national jurisdiction;

 - (f) prohibiting the chartering of such vessels;

 - (g) refusing to entitle such vessels to fly their flag;

 - (h) prohibiting where traceable the imports of fish coming from such vessels;

 - (i) prohibiting the landing of fish coming from such vessels;

 - (j) encouraging importers, transporters and other sectors concerned, to refrain from negotiating and from transshipping of fish caught by such vessels;

 - (k) collecting and exchanging any appropriate information regarding vessels appearing on the IUU List with other Contracting Parties, non-Contracting Parties and other Regional Fisheries Management Organizations with the aim of detecting, controlling and preventing false import/export certificates regarding fish from such vessels.

Article 51, entitled *Action vis-à-vis Flag States*, requires the contracting parties to ‘jointly and/or individually request non-Contracting Parties whose vessels appear on the IUU List to co-operate full with the [NAFO] in order to avoid undermining the effectiveness of the [C&E Measures]’.⁴⁰⁰ Under paragraph 2, the General Council is to review, at subsequent annual meetings as appropriate, actions taken by such non-contracting parties and identify those that have not rectified their fishing activities. Contracting parties ‘should – to the extent possible, consistent with their international obligations and in accordance with applicable legislation – restrict the export and transfer of their formerly licensed fishing vessels to non-Contracting Parties identified in paragraph 2’.⁴⁰¹

Article 43(3) notes that: ‘This Scheme shall be interpreted in a manner consistent with international law, including the rights of port access in case of force majeure or distress in accordance with the

³⁹⁹ Article 49, last paragraph.

⁴⁰⁰ Article 51(1).

⁴⁰¹ Article 51(3).

United Nations Law of the Sea, and the principles, rights and obligations in WTO agreements, and be implemented in a fair and transparent manner'. Article 43(2) adds that: 'Nothing in this Scheme shall affect the sovereign rights of Contracting Parties to impose additional measures to promote compliance by NCP [i.e. non-contracting party] vessels, in accordance with international law'.

The wording of Articles 47 and 50 indicates that the measures under those provisions are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the Provisional and IUU Lists is an action to be taken at the RFMO level.

The current IUU List, as of September 2006, is available on the NAFO website.⁴⁰² The current flag State of the five vessels on the list is, in all cases, stated as being **Georgia**. A copy of a letter from the Executive Secretary to the government of Georgia, and the response, is available at Annex 8 to the report of the September 2006 meeting of STACFAC (as was), and a proposed draft of a letter from the President of the NAFO to the government of Georgia is available at Annex 6 to the same report.

Other provisions affecting non-contracting parties

Some other provisions of the C&E Measures could also affect non-contracting parties. **Article 7**, entitled *Greenland halibut in Subarea 2 and Divisions 3KLMNO*, states, *inter alia*, that: 'Contracting Parties shall prohibit landings from non-Contracting Party vessels that have engaged in fishing activities in the Regulatory Area'.⁴⁰³ **Article 15**, entitled *Chartering Arrangements*, potentially affects non-contracting parties because it only envisages chartering of vessels flagged to contracting parties. Of note, it also prohibits '[c]hartering arrangements involving vessels identified as having been involved in IUU fishing activities pursuant to Chapter VI',⁴⁰⁴ but fails to identify the circumstances in which such vessels may be regarded as having shed their IUU status (in contrast to Article 50(f) (see above), where the prohibition on chartering only exists for as long as the vessel is on the IUU List).

⁴⁰² <<http://www.nafo.int/about/frames/about.html>>, click on 'IUU List' button.

⁴⁰³ Article 7(9).

⁴⁰⁴ Article 15(4).

NEAFC

<http://www.neafc.org/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the NEAFC website.]

Full name of RFMO	North East Atlantic Fisheries Commission
Most recent meeting of RFMO	NEAFC 25 – November 2006 [adopted revised <i>Scheme of Control and Enforcement</i> available; adopted stock- and site-specific Recommendations available; report not yet available]
Treaty establishing RFMO	Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries
Year of adoption of treaty	1980
Year of entry into force of treaty	1982

A. Provisions of treaty relating to non-contracting parties

At NEAFC 24, the NEAFC ‘agreed on amendments’ to the NEAFC Convention, but formal adoption of those amendments did not take place (pending two contracting parties needing to finalize their internal procedures).⁴⁰⁵ The provisions of the amended Convention will be considered in this section. However, it is important to bear in mind that all practice discussed in sections B, C and D below is under the unamended Convention.

The amended Convention does not contain any provisions expressly on non-contracting parties (except for Article 20, on signature, ratification, acceptance, approval and accession). Provisions of the amended Convention potentially relating to non-contracting parties include, *inter alia*, the following:

Article	Text of relevant provision
2	The objective of this Convention is to ensure the long-term conservation and optimum utilisation of the fishery resources in the Convention Area, providing sustainable economic, environmental and social benefits.
4	<p>1. The Commission shall perform its functions in order to fulfil the objective set out in Article 2.</p> <p>2. When making recommendations in accordance with Article 5 or 6 of this Convention the Commission shall in particular: ... (c) take due account of the impact of fisheries on other species and marine ecosystems, and in doing so adopt, where necessary, conservation and management measures that address the need to minimise harmful impacts on living marine resources and marine ecosystems; and (d) take due account of the need to conserve marine biological diversity.</p>

⁴⁰⁵ NEAFC Press release, Details, paragraph 5 (available at NEAFC 24, report, Annex N).

5	I. The Commission shall, as appropriate, make recommendations concerning fisheries conducted beyond the areas under jurisdiction of Contracting Parties. Such recommendations shall be adopted by a qualified majority.
7	In the exercise of its functions, as set out in Articles 5 and 6, the Commission may consider <i>inter alia</i> measures for: ... (e) the establishment of total allowable catches and their allocation to Contracting Parties, (f) the regulation of the amount of fishing effort and its allocation to Contracting Parties.
8	I. The Commission may by a qualified majority make recommendations concerning measures of control relating to fisheries conducted beyond areas under the jurisdiction of Contracting Parties for the purpose of ensuring the application of this Convention and any recommendations adopted thereunder.
9	I. The Commission may by a qualified majority make recommendations providing for the collection of statistical information relating to fisheries conducted beyond areas under the jurisdiction of Contracting Parties.
15	I. Without prejudice to the rights of Contracting Parties in regard to waters under their jurisdiction, the Contracting Parties shall take such action, including the imposition of adequate sanctions for infractions, as may be necessary to make effective the provisions of this Convention and to implement any recommendation which becomes binding under Article 12.

B. Brief analysis of, and references to, decisions or resolutions of the NEAFC relating to cooperating non-members

Current cooperating non-contracting parties are **Belize**,⁴⁰⁶ **Canada**, **Japan** and **New Zealand**. The Performance Review Panel notes that: ‘Rules for obtaining cooperating non-Contracting Party status were laid out in the amendments to the Scheme in 2004. Before that, Japan, Canada and New Zealand had been granted non-Contracting Party status without any definite procedure’.⁴⁰⁷

Principal framework provisions

The framework provisions on cooperating non-contracting parties (‘**C.NCPs**’) are set out in the revised *Scheme of Control and Enforcement* adopted at NEAFC 25. That revised Scheme is due to enter into force in May 2007 and will then replace and combine the existing *Scheme of Control and Enforcement* (adopted by the NEAFC in 1998 and amended subsequently) and the existing *Non-Contracting Party Scheme* (adopted by the NEAFC in 2003 and amended subsequently). Unless otherwise stated, this part of the report will address the revised *Scheme of Control and Enforcement* (‘**the revised Scheme**’) rather than the provisions on C.NCPs in the existing *Non-Contracting Party Scheme*.

The principal provisions of the revised Scheme dealing with C.NCPs are Articles 34, 35 and 36 (although other provisions of the revised Scheme refer to C.NCPs as well – see below). With respect to the provisions of the existing *Non-Contracting Party Scheme* regarding C.NCPs, the Performance Review Panel considered that ‘NEAFC has transparent and appropriate rules with regards to becoming a cooperating non-Contracting Party and has applied them accordingly’.⁴⁰⁸

⁴⁰⁶ Secretariat, pers. comm.

⁴⁰⁷ Performance Review Panel – Report of the North East Atlantic Fisheries Commission, Volume I, 2006, page 48.

⁴⁰⁸ Ibid.

Article 34 of the revised Scheme, entitled *Co-operating non-Contracting Party status*, sets out the procedure to be followed, and information to be provided, by a non-contracting party seeking status as a C.NCP. The information to be provided is as follows:⁴⁰⁹

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- (a) Full data on its historical fisheries in the NEAFC area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas;
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- (b) Details on current fishing presence in the area, number of vessels and vessels characteristics;
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- (c) Details of research programmes it has conducted in the NEAFC area, the results of which it shall share with NEAFC.
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It also requires the applicant to: (a): ‘Undertake to respect the provisions of this Scheme and all other Recommendations established under the Convention’; (b) ‘Inform NEAFC of the measures it takes to ensure compliance by its vessels, including *inter alia*, observer programmes, inspection at sea and in port, and VMS’; and (c) ‘Communicate annually catch and effort data and size frequency distribution of the catches (when possible) in due time and appropriate format for scientific evaluation of the stocks’.⁴¹⁰

Article 34 explains that C.NCP status is to be decided by the NEAFC, on the recommendation of the Permanent Committee on Control and Enforcement (‘PECCOE’), on a year-to-year basis.⁴¹¹ The PECCOE is to consider the applicant’s request as well as ‘any other relevant information’.⁴¹² Article 34 adds that a C.NCP will be ‘invited to participate at plenary and scientific meetings, as an observer’.⁴¹³ However, Article 34 itself does not mention that C.NCPs may have access to cooperation quota or any other substantive benefits; the concept of cooperation quota is instead introduced by Article 36 (see next paragraph).

Article 35, on *Communications by co-operating non-Contracting Parties*, sets out the duties of C.NCPs with regard to the communication of various reports and messages referred to in other provisions of the Scheme.

Article 36, entitled *Monitoring of fisheries by co-operating non-Contracting Parties*, relates to notifications and commitments required from C.NCPs before their vessels may fish for regulated species.⁴¹⁴ It introduces the concept of ‘cooperation quota’,⁴¹⁵ i.e. a catch quota that is available for C.NCPs. It also sets conditions for the closure by the C.NCP of its fishery as the cooperation quota in question nears exhaustion.⁴¹⁶ Recommendation III of NEAFC 25 (see further section C below) is an example of a recommendation establishing a cooperation quota.

In addition to Articles 34, 35 and 36, as noted above, several other provisions of the revised Scheme refer to C.NCPs (or to cooperation quota or to cooperation by non-contracting parties). Those provisions are set out in the following table:

⁴⁰⁹ Article 34(1).

⁴¹⁰ Article 34(1).

⁴¹¹ Article 34(2).

⁴¹² Article 34(2).

⁴¹³ Article 34(2).

⁴¹⁴ Article 36(1).

⁴¹⁵ Article 36(2).

⁴¹⁶ Article 36(3).

Article	Text of relevant provision (emphasis added)
Article 4 Authorisation to fish	2. A master of a fishing vessel shall not engage in transshipment or joint fishing operations with vessels of non-Contracting Parties <i>which have not been granted the status of cooperating non-Contracting Parties</i> in accordance with Article 34.
Article 29 Serious infringements	The following infringements shall be considered to be serious: ... (n) engaging in transshipment or joint fishing operations with vessels of a non-Contracting Party <i>which has not been accorded the status of a co-operating non-Contracting Party</i> in accordance with Article 34;
Article 37 Sightings and identifications of non-Contracting Party vessels	2. The Contracting Party which sighted the non-Contracting Party vessel shall attempt to inform such a vessel without delay that it has been sighted or by other means identified as engaging in fishing activities in the Convention Area and <i>unless its flag state has been accorded the status of cooperating non-Contracting Party</i> provided for under Article 34, is consequently presumed to be undermining the Recommendations established under the Convention.
Article 44 IUU vessel lists	<p>1. <i>Unless their flag State has been accorded the status of co-operating non-Contracting Party</i> provided for under Article 34, vessels which have been sighted or by other means identified according to information received pursuant to Articles 37, 38 and 40 as engaging in fishing activities in the Convention Area are presumed to be undermining the effectiveness of Recommendations established under the Convention. The Secretary shall place such vessels on a provisional list of IUU vessels ('A' list).</p> <p>2. <i>A vessel of a co-operating non-Contracting Party</i> shall immediately be added to the 'A' list by the Secretary if it is revealed that it has failed to establish that the fish were caught in compliance with all relevant Recommendations established under the Convention and, in the case of a vessel fishing within the framework of a co-operation quota: (a) it is sighted engaging in fishing activities in the Regulatory Area after the fishery has been closed, or (b) it is sighted engaging in fishing activities in the Regulatory Area without being notified in accordance with Article 36(1), or (c) it fails to comply with the provisions of Article 35.</p> <p>4. [Each year] PECCOE shall undertake a review of the 'B' list and as appropriate recommend to the Commission that vessels are added or removed. PECCOE shall only recommend that the Commission remove a vessel from either the 'A' or 'B' list if the flag state of the vessel concerned satisfies the Commission that: ... (f) <i>the vessel was fishing on a co-operation quota</i> and fulfilled all relevant obligations as set out in Article 34.</p>
Article 45 Follow-up action	2. Further to the measures under paragraph 1 Contracting Parties shall take the following additional measures, under their applicable legislation, with regard to vessels on the 'B' list: ... (g) collect and exchange any appropriate information with other Contracting Parties <i>or cooperating non-Contracting Parties</i> with the aim of detecting, controlling and preventing false import/export certificates regarding fish from such vessels.
Article 46 Action vis-à-vis Flag States	1. Contracting Parties shall jointly and/or individually request non-Contracting Parties whose vessels appear on the IUU lists <i>to co-operate fully</i> with the Commission in order to avoid undermining the effectiveness of the Recommendations that it has adopted.

Other provisions relevant to cooperation

Other NEAFC instruments also contain provisions of relevance to C.NCPs. First, there are **other provisions of the revised Scheme**, as well as **other NEAFC Recommendations**. In that regard, as noted above, Article 34 of the revised Scheme requires C.NCPs to '[u]ndertake

to respect the provisions of this Scheme and all other Recommendations established under the [NEAFC] Convention'. A similar general requirement is found in Article 44(2) of the revised Scheme (see table above), whereby a vessel of a C.NCP 'shall immediately be added to the 'A' list ... if it is revealed that it has failed to establish that the fish were caught in compliance with all relevant Recommendations established under the Convention ...'.

Thus Article 34 refers to 'the provisions of this Scheme and all other [NEAFC] Recommendations' and Article 44(2) refers to 'all relevant [NEAFC] Recommendations'. That wording leaves some scope for doubt about precisely which provisions are to be complied with. With regard to the revised Scheme itself, the extent to which some of the articles apply to C.NCPs is quite clear (i.e. several of the examples provided above); however, it is less clear whether C.NCPs are to follow the requirements in the revised Scheme on, say, marking of gear (Article 7).

Regarding Recommendations, the current set of conservation Recommendations is provided on the NEAFC website.⁴⁷⁷ There are eight Recommendations listed. Only one of those refers expressly to C.NCPs (on which see section C below). The rest are silent regarding C.NCPs. For example, the Recommendation establishing closed areas in order to protect deep-water corals⁴⁷⁸ states that: '... the Contracting Parties ... have agreed that bottom trawling and fishing with static gear shall be prohibited in the following areas ...'. Presumably, by virtue of the undertaking to be given pursuant to the revised Scheme, C.NCPs are expected to adhere to that prohibition. However, that is not clear from the wording of the Recommendation itself.

Secondly, the **NEAFC's Rules of Procedure** contain provisions that are potentially applicable to C.NCPs. Thus, under Rule 33(b), the Secretary 'shall invite ... non-Contracting Parties identified as harvesting fishery resources in the area beyond waters under the fisheries jurisdiction of Contracting Parties (the Regulatory Area)' to be observers.⁴⁷⁹ That rule would capture C.NCPs (as well as, potentially, other non-contracting parties), although C.NCPs enjoy invitations to participate as observers at plenary and scientific meetings anyway by virtue of Article 34 of the revised Scheme (see above).

Thirdly, the **terms of reference of the PECCOE** provide for that Committee to, *inter alia*, 'monitor and review the operation of the Scheme to Promote Compliance by non-Contracting Party Vessels with Recommendations established by NEAFC'.⁴⁸⁰ As noted above, that Scheme has now been incorporated into the revised Scheme. Two specific roles for the PECCOE in relation to C.NCPs, pursuant to Articles 34 and 44 of the revised Scheme, have already been noted above; however, the terms of reference imply that the PECCOE also has a broader role in relation to C.NCPs.

Fourthly, the *Guidelines for the expectation of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area* (adopted at NEAFC 22 in 2003) refer to C.NCPs, but those Guidelines will be described more fully in section C below.

⁴⁷⁷ <www.neafc.org/measures/recs-2007/index.htm>.

⁴⁷⁸ Recommendation IX.

⁴⁷⁹ See also, *inter alia*, Rules 3, 12, 38, 40 and 41.

⁴⁸⁰ Paragraph 2(c).

C. Examples of positive measures applied to cooperating non-members

As noted in section B above, Article 36 of the revised Scheme introduces the concept of ‘cooperation quota’, i.e. a catch quota that is available for C.NCPs. Of the current set of conservation Recommendations listed on the NEAFC website, only one of those refers expressly to C.NCPs. That Recommendation⁴²¹ relates to ‘the pelagic redfish fishery in the Irminger Sea and adjacent waters in 2007’. With regard to C.NCPs, it establishes a cooperation quota (of 123 tonnes)⁴²² and then states that: ‘Only vessels entitled to fly the flag of a NEAFC Contracting Party or of a *Cooperating non-Contracting Party*, having been authorised by its flag State to fish for redfish in the NEAFC Convention Area, may take part in the fishery’ (emphasis added).⁴²³ Regarding other species, the Performance Review Panel notes that ‘[t]here was a cooperative quota for mackerel in previous years’.⁴²⁴

Thus it is clear that the NEAFC, in principle and in practice, provides positive measures, in the form of cooperation quota, for C.NCPs. However, the NEAFC has also sought to manage the expectations of States, whether C.NCPs or not, that may wish to join the organization in order to obtain fishing opportunities in the Regulatory Area. It has done so by means of adopting *Guidelines for the expectation of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area* (see section B above). The operative paragraphs of those Guidelines state that:

Non Contracting Parties of NEAFC should be aware that presently and for the foreseeable future, stocks regulated by NEAFC are fully allocated, and fishing opportunities for new members likely to be limited to new fisheries (stocks not currently allocated),

New Contracting Parties will participate, on the same basis as existing Contracting Parties, in future allocations of stocks which are unregulated at the time when the application is made,

New Contracting Parties who were previously Cooperating Non Contracting Parties may request an allocation of a part of the relevant Co-operative quota. Such allocations will be done on a case by case basis.

Thus the Guidelines indicate, *inter alia*, that a portion of the cooperation quota for any particular stock may be made available for ‘New Contracting Parties who were previously Cooperating Non Contracting Parties’. Regarding the way in which the NEAFC determines participatory rights of new members, the Performance Review Panel states that: ‘The Panel acknowledges the difficulties that NEAFC faces when determining participatory rights of new comers in fisheries already fully or over-exploited and considers the processes established and followed to be appropriate’.⁴²⁵

Benefits may also arise (in comparison with those non-contracting parties that are not C.NCPs) by virtue of Article 37(2) of the revised Scheme (see section B above). Benefits may also arise by virtue of **Article 4** (and **Article 29**) of the revised Scheme: a master of a fishing vessel may engage in transshipment or joint fishing operations with vessels of C.NCPs, but may not do so with vessels of other non-contracting parties (see section D below). Likewise, C.NCPs arguably receive a better deal under **Article 44**, establishing IUU vessel lists, in that the triggers for

⁴²¹ Recommendation III.

⁴²² Footnote 1.

⁴²³ Paragraph 4.

⁴²⁴ Performance Review Panel – Report of the North East Atlantic Fisheries Commission, Volume I, 2006, page 48.

⁴²⁵ *Ibid.*

a C.NCP vessel to be placed on the 'A' list are less extensive than those for vessels of other non-contracting parties (see section D below).

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the NEAFC against non-members (whether cooperating non-members or non-cooperating non-members)

Principal framework provisions

The framework provisions on measures against non-contracting parties are set out in the revised Scheme (introduced in section B above). Unless otherwise stated, this section will address the revised Scheme. Article 1 of the revised Scheme defines the term 'non-Contracting Party vessel' as 'any fishing vessel not flagged in a Contracting Party of NEAFC, including vessels for which there are reasonable grounds for suspecting them to be without nationality'.⁴²⁶ Articles 34–46, comprising a chapter entitled *Measures to promote compliance by non-Contracting Party fishing vessels*, focus on non-contracting parties, although the first three of those articles are about C.NCPs specifically and are described in section B above. This section will outline the effects of Articles 37–46; the key articles providing for sanctions are Articles 41, 45 and 46.

Under **Article 37**, on *Sightings and identifications of non-Contracting Party vessels*, a non-contracting party vessel sighted or by other means identified as engaging in fishing activities in the Convention Area is presumed to be undermining NEAFC Recommendations, unless its flag state has been accorded C.NCP status.⁴²⁷ That presumption also applies to any other non-contracting party vessel that has been identified as having engaged in transshipment activities with the vessel in question.⁴²⁸ Any presumption that arises pursuant to Article 37 has implications for subsequent activities by that vessel (see below).

Under **Article 38**, on *Inspections at sea*, a non-contracting party vessel sighted or by other means identified by a contracting party as engaging in fishing activities in the Convention Area, which does not consent to being boarded and inspected by a NEAFC inspector (or does not meet some of the requirements under Article 19 regarding boarding and inspection procedures), is presumed to have engaged in IUU activities.⁴²⁹ Although there is some difference in wording between Article 37 (presumption of 'undermining [NEAFC] Recommendations') and Article 38 (presumption of having 'engaged in IUU activities'), this may make little difference in practice.

The effect of Article 37 and Article 38 differs depending on whether or not the flag State of the non-contracting party vessel in question has C.NCP status. The presumption arising pursuant to Article 37 does not arise in cases where the flag State is a C.NCP, except possibly in relation to transshipment. In contrast, the presumption arising pursuant to Article 38 arises irrespective of whether the flag State has C.NCP status. As with Article 37, any presumption that arises pursuant to Article 38 has implications for subsequent activities by that vessel (see below).

Under **Article 39**, on *Entry into port*, a port State is to prohibit the entry into its ports of non-contracting party vessels that have not provided prior notice of landing or certain information

⁴²⁶ Paragraph 1(g).

⁴²⁷ Article 37(2) and (1).

⁴²⁸ Article 37(3).

⁴²⁹ Article 38(2) and (1).

required by that article.⁴³⁰ **Article 40**, on *Inspections in port*, requires port States to inspect any non-contracting party vessel upon its entry into port; the vessel is to be prohibited from landing or transshipping any fish until that inspection has taken place.⁴³¹ Articles 39 and 40 apply irrespective of whether or not (a) the flag State has C.NCP status and (b) a presumption has arisen pursuant to Articles 37 or 38.

Under Article 40, the vessel that is the subject of the inspection will be presumed to have engaged in IUU activities if it does not meet the requirements under Article 19 regarding boarding and inspection procedures.⁴³² As with Articles 37 and 38, any presumption that arises pursuant to Article 40 has implications for subsequent activities by that vessel (see below).

Article 41, entitled *Landings, transshipments and joint fishing operations*, deals with follow-up to the inspection by the port State. If that inspection reveals that the vessel has species onboard which are subject to NEAFC Recommendations, landings and transshipments of all fish from that vessel are to be prohibited in the ports and waters of all contracting parties ‘unless the vessel establishes to the satisfaction of the competent authorities that the fish were caught outside the Regulatory Area or in compliance with all relevant [NEAFC] Recommendations’. Furthermore, ‘[t]he vessel shall not be authorised to land or engage in transshipment operation if the flag State of the vessel, or the flag State or States of donor vessels where the vessel has engaged in transshipment operations, does not provide the confirmation in accordance with the provisions of Article 23’ (entitled *Authorisation to land or tranship*). Landings and transshipments are also prohibited if the vessel has failed to meet the requirements in Article 19 regarding boarding and inspection procedures.

Article 42, on *Notification of presumed IUU activities*, sets out the procedure to be followed by the Secretary in transmitting ‘all information received pursuant to Articles 37, 38 and 40’, including to the flag State of the vessel in question.⁴³³ The Secretary is also to request the flag State to ‘take measures ... to ensure that the vessel ... in question desist from any activities that undermine the effectiveness of NEAFC Recommendations ...’.⁴³⁴ The President is to request the flag State to report back to the NEAFC on its enquiries and any measures taken and is to advise the flag State of the dates when the PECCOE will be considering the composition of the IUU lists.⁴³⁵

Article 43, entitled *Reports on IUU activities*, deals with reporting by the contracting parties of information regarding surveillance, inspections and post-inspection landings or transshipments,⁴³⁶ as well as any further information ‘which might be relevant for the identification of non-Contracting Party vessels that might be carrying out IUU fishing activities in the Convention area’.⁴³⁷

Article 44, entitled *IUU vessel lists*, provides for the establishment of two lists of IUU vessels: a provisional list known as the ‘A’ list and a confirmed list called the ‘B’ list. The trigger for a vessel of a non-contracting party other than a C.NCP to be placed by the Secretary on the ‘A’ list is that it is ‘presumed to be undermining the effectiveness of [NEAFC] Recommendations’ by virtue of

⁴³⁰ Article 39(2) and (1).

⁴³¹ Article 40(1).

⁴³² Article 40(2).

⁴³³ Article 42(1).

⁴³⁴ Article 42(2).

⁴³⁵ Article 42(3).

⁴³⁶ Article 43(1).

⁴³⁷ Article 43(2).

having ‘been sighted or by other means identified according to information received pursuant to Articles 37, 38 and 40 as engaging in fishing activities in the Convention Area’.⁴³⁸

The triggers for a vessel of a C.NCP to be placed by the Secretary on the ‘A’ list is that: (a) ‘it is revealed that it has failed to establish that the fish were caught in compliance with all relevant [NEAFC] Recommendations’; or (b) if fishing under a cooperation quota ‘it is sighted engaging in fishing activities in the Regulatory Area after the fishery has been closed’ or ‘it is sighted engaging in fishing activities in the Regulatory Area without being notified in accordance with Article 36(1)’ or ‘it fails to comply with the provisions of Article 35’.⁴³⁹

The triggers established by Article 44 are confusing in that they are not entirely consistent with the presumptions arising pursuant to Articles 37, 38 and 40. For example, the presumption arising under Article 40 (for failure to meet the requirements under Article 19) applies to, *inter alia*, C.NCP vessels and yet is not referred to in Article 44 (see preceding paragraph).

On a yearly basis, the PECCOE may recommend that certain vessels are transferred from the ‘A’ list to the ‘B’ list by the NEAFC.⁴⁴⁰ If the flag State of the vessel concerned satisfies the NEAFC of specified facts or improvements, the PECCOE may recommend that a vessel is removed from the ‘A’ or ‘B’ lists.⁴⁴¹ Vessels that have been placed on the IUU list established by NAFO are to be placed on the NEAFC ‘B’ list.⁴⁴² (The above roles for the PECCOE are a reflection of its general role, established in its term of reference, to, *inter alia*, ‘monitor and review the operation of the Scheme to Promote Compliance by non-Contracting Party Vessels [as was] with Recommendations established by NEAFC’.⁴⁴³)

Article 45, entitled *Follow-up action*, sets out the implications of being placed on the ‘A’ or ‘B’ lists. With regard to vessels on the ‘A’ list, specifically, contracting parties are to ‘take all necessary measures, under their applicable legislation, in order that’ such vessels that enter ports ‘are not authorised to land or tranship therein but are inspected in accordance with the provisions of Article 40’.⁴⁴⁴ It is not clear whether that requirement is merely a re-statement of Article 40.

With regard to vessels on the ‘B’ list, specifically, contracting parties are to take the following additional measures ‘under their applicable legislation’:⁴⁴⁵

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- (a) prohibit the entry into their ports of such vessels;

 - (b) prohibit the authorisation of such vessels to fish in waters under their national jurisdiction;

 - (c) prohibit the chartering of such vessels;

 - (d) refuse the granting of their flag to such vessels;

 - (e) prohibit the imports of fish coming from such vessels;

 - (f) encourage importers, transporters and other sectors concerned, to refrain from negotiating and from transhipping of fish caught by such vessels;

⁴³⁸ Article 44(1).

⁴³⁹ Article 44(2).

⁴⁴⁰ Article 44(3).

⁴⁴¹ Article 44(4).

⁴⁴² Article 44(6).

⁴⁴³ PECCOE terms of reference, paragraph 2(c).

⁴⁴⁴ Article 45(1)(a).

⁴⁴⁵ Article 45(2).

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- (g) collect and exchange any appropriate information with other Contracting Parties or cooperating non-Contracting Parties with the aim of detecting, controlling and preventing false import/export certificates regarding fish from such vessels.
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With regard to vessels on the 'IUU lists' (presumably meaning either the 'A' list or the 'B' list), contracting parties are to 'take all necessary measures, under their applicable legislation, in order that': (a) fishing vessels, support vessels, refuel vessels, the mother-ships and cargo vessels flying their flag do not in any way assist such vessels or participate in any transshipment or joint fishing operations with such vessels; and (b) the supply of provisions, fuel or other services to such vessels is prohibited.⁴⁴⁶

Article 46, on *Action vis-à-vis Flag States*, requires that contracting parties 'jointly and/or individually request non-Contracting Parties whose vessels appear on the IUU lists to co-operate fully with the Commission in order to avoid undermining the effectiveness of the Recommendations that it has adopted' (paragraph 1). The Commission is to 'review, at subsequent annual meetings as appropriate, actions taken by such non-Contracting Parties and identify those which have not rectified their fishing activities'.⁴⁴⁷ Furthermore, the Commission is to 'decide appropriate measures to be taken in respect of non-Contracting Parties identified under paragraph 1'. In that respect, 'Contracting parties may co-operate to adopt appropriate multilaterally agreed non-discriminatory trade related measures, consistent with the [WTO], that may be necessary to prevent, deter, and eliminate the IUU fishing activities identified by the Commission'.⁴⁴⁸

The wording of Articles 41 and 45 indicates that the measures under those provisions are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. However, the Performance Review Panel notes that: 'The tightening of measures against vessels on the NEAFC IUU lists has had a distinct effect. There are numerous examples of vessels being detained in the ports of NEAFC's Contracting Parties'.⁴⁴⁹ Earlier it provides some constructive criticism of the port State control provisions of the existing *Non-Contracting Party Scheme* (although some of that criticism may have been addressed subsequently by the revised Scheme).⁴⁵⁰ The report of the Panel also includes two case studies of IUU activities and the contracting parties' responses.⁴⁵¹

In contrast to Articles 41 and 45, Article 46 implies that trade-related measures are to be taken at the level of the RFMO. To date the NEAFC has not adopted any trade-related measure of the type envisaged by Article 46 against a non-contracting party. Furthermore, the placing of vessels on IUU lists is an action to be taken at the RFMO level. The NEAFC has placed vessels on the 'A' and 'B' lists, albeit pursuant to the existing *Non-Contracting Party Scheme* (rather than the revised Scheme, which does not enter into force until May 2007).

The current 'A' and 'B' lists are available on the NEAFC website.⁴⁵² The flag States of vessels on

⁴⁴⁶ Article 45(1)(b) and (c).

⁴⁴⁷ Article 46(2).

⁴⁴⁸ Article 46(3).

⁴⁴⁹ Performance Review Panel – Report of the North East Atlantic Fisheries Commission, Volume I, 2006, page 49.

⁴⁵⁰ *Ibid.*, pp. 41–2.

⁴⁵¹ *Ibid.*, Appendix VIII.

⁴⁵² <www.neafc.org/measures/iuu-a-list.htm> and <www.neafc.org/measures/iuu-b.htm>.

the 'A' list (totalling two vessels) are the **Cook Islands** and **Georgia**. The flag States of vessels on the 'B' list (totalling 20 vessels) are the **Bahamas, Belize, Cambodia, Georgia, Guinea Conakry, Honduras, Panama, Russia** and **Togo**. (Russia is a contracting party, despite the IUU lists being intended for vessels of non-contracting parties.)

Other provisions affecting non-contracting parties

Some other provisions of the revised Scheme could also affect non-contracting parties. **Article 4** states that: 'A master of a fishing vessel shall not engage in transshipment or joint fishing operations with vessels of non-Contracting Parties which have not been granted the status of cooperating non-Contracting Parties in accordance with Article 34'.⁴⁵³ That provision should have the effect of reducing opportunities for fishing vessels or reefers flagged to non-contracting parties other than C.NCPs.

Article 29 treats, *inter alia*, the following two acts as 'serious infringements': (a) engaging in transshipment or joint fishing operations with vessels of a non-contracting party which has not been accorded C.NCP status (thus implementing Article 4 – see previous paragraph);⁴⁵⁴ and (b) supplying any provisions, fuel or other services to vessels that have been placed on the IUU lists established by the NEAFC pursuant to Article 44 (see above).⁴⁵⁵ The commitment of a 'serious infringement' can have significant repercussions for the vessel carrying out the infringement.

⁴⁵³ Article 4(2).

⁴⁵⁴ Article 29(n).

⁴⁵⁵ Article 29(o).

SEAFO

<http://www.seafo.org/>

[Unless otherwise stated, all the documents referred to in this part of the report can be found on the SEAFO website. The only Conservation Measures and Resolutions considered here are those accessible via the *Cons. & Mngt. Measures* button on the SEAFO website.]

Full name of RFMO	South East Atlantic Fisheries Organisation
Most recent meeting of RFMO	SEAFO 3 – October 2006 [report and adopted Conservation Measures and Resolutions available]
Treaty establishing RFMO	Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean
Year of adoption of treaty	2001
Year of entry into force of treaty	2003

A. Provisions of treaty relating to non-contracting parties

The provisions of the SEAFO Convention referring expressly to non-contracting parties (other than Articles 25 and 26 on signature, ratification, acceptance, approval and accession) are Article 22 (see below) and the following:

Article and title	Text of relevant provision (emphasis added)
Article 6 The Commission	<p>5. The Commission shall adopt measures, in accordance with international law, to promote compliance by vessels flying the flag of <i>non-parties</i> to this Convention with measures agreed by the Commission.</p> <p>10. Taking account of articles 116 to 119 of the 1982 Convention, the Commission may draw the attention of any State or fishing entity which is a <i>non-party</i> to this Convention to any activity which in the opinion of the Commission affects implementation of the objective of this Convention.</p>
Article 8 Meetings of the Commission	<p>6. The Commission shall adopt Rules of Procedure to govern the participation of representatives from <i>non-Parties</i> to this Convention as observers.</p> <p>10. The Contracting Parties may decide, by consensus, to invite representatives from <i>non-parties</i> to this Convention and from intergovernmental organisations to participate as observers until the rules regarding such participation are adopted by the Commission.</p>
Article 15 Port State duties and measures taken by a port State	<p>3. Each Contracting Party shall, in accordance with measures agreed by the Commission, adopt regulations in accordance with international law to prohibit landings and transshipments by vessels flying the flag of <i>non-parties</i> to this Convention where it has been established that the catch of a stock covered by this Convention has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission.</p>
Article 20 Fishing opportunities	<p>2. In applying the provisions of paragraph 1 [regarding participatory rights in fishing opportunities], the Commission may, <i>inter alia</i>: ... (c) set aside fishing opportunities for <i>non-parties</i> to this Convention, if necessary.</p>

Article 22, entitled *Non-Parties to this Convention*, reads as follows (emphasis added):

1. The Contracting Parties shall, either directly or through the Commission, request *non-parties* to this Convention whose vessels fish in the Convention Area to cooperate fully with the Organisation either by becoming party to the 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 this Convention shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the relevant stocks.
2. 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 this Convention which are engaged in fishing operations in the Convention Area, and of any action taken in response to fishing by *non-parties* to this Convention. The Commission shall share information on such activities with other appropriate regional or subregional organisations and arrangements.
3. 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.
4. The Contracting Parties shall, individually or jointly, request *fishing entities* 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* shall 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 this Convention to send observers to its meetings, or to the meetings of any subsidiary bodies of the Organisation.

Provisions of the SEAFO Convention potentially relating to non-contracting parties (whether States, REIOs or fishing entities) include, *inter alia*, the following:

Article and title	Text of relevant provision
Article 3 General principles	In giving effect to the objective of this Convention, the Contracting Parties, where appropriate through the Organisation, shall, in particular: (a) adopt measures ... to ensure the long-term conservation and sustainable use of the fishery resources to which this Convention applies; ... (c) apply the provisions of this Convention relating to fishery resources, taking due account of the impact of fishing operations on ecologically related species such as seabirds, cetaceans, seals and marine turtles; (d) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem as, or associated with or dependent upon, the harvested fishery resources; (e) ensure that fishery practices and management measures take due account of the need to minimise harmful impacts on living marine resources as a whole, and (f) protect biodiversity in the marine environment.
Article 6 The Commission	3. The functions of the Commission shall be to: ... (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; ... (h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement; (i) adopt measures concerning control and enforcement within the Convention area; ... (k) develop rules for the collection, submission, verification of, access to and use of data; ... (m) direct the Compliance and Scientific Committees, other subsidiary bodies, and the Secretariat; ... and (o) carry out such other activities as may be necessary to fulfil its functions.

	6. The Commission shall take full account of the recommendations and advice from the Scientific and Compliance Committees in formulating its decisions.
	8. The measures referred to in paragraph 3 may include the following: (a) the quantity of any species which may be caught; ... (e) the level of fishing effort, including vessel numbers, types and sizes, which may be used; ...
	9. Conservation and management and control measures adopted by the Commission in accordance with this Convention shall become effective in accordance with Article 23.
Article 9 The Compliance Committee	2. Unless otherwise decided by the Commission, 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.
	3. In performing its functions, the Compliance Committee shall conduct activities as the Commission may direct and shall: (a) coordinate compliance activities undertaken by or on behalf of the Organisation; ...
Article 11 The Secretariat	4. The Executive Secretary and the Secretariat shall perform the functions delegated to them by the Commission.
Article 12 Finance and budget	5. The Commission may request and accept financial contributions and other forms of assistance from organisations, individuals and other sources for purposes connected with the fulfilment of its functions.
Article 13 Contracting Party obligations	1. Each Contracting Party shall, in respect of its activities within the Convention area: (a) collect and exchange scientific, technical and statistical data with respect to fisheries resources covered by this Convention; ... (d) provide annually to the Organisation such statistical, biological and other data and information as the Commission may require; ...
	3. Each Contracting Party shall promptly implement this Convention and any conservation, management and other measures or matters which may be agreed by the Commission.
	4. Each Contracting Party shall take appropriate measures, in accordance with the measures adopted by the Commission and international law, in order to ensure the effectiveness of the measures adopted by the Commission.
	6. (a) 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 this Convention. ... (b) Fishing opportunities granted to the Contracting Parties by the Commission shall be exercised exclusively by vessels flying the flag of Contracting Parties.
	8. Each Contracting Party shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights recognised in this Convention in a manner which would not constitute an abuse of rights.
Article 14 Flag State duties	1. Each Contracting Party shall 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.

	<p>3. Each Contracting Party shall 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, <i>inter alia</i>: ... (f) regulation of transhipment to ensure that the effectiveness of conservation and management measures is not undermined; ...</p>
Article 15 Port State duties and measures taken by a port State	<p>6. All measures taken under this article shall be taken in accordance with international law.</p>
Article 20 Fishing opportunities	<p>1. In determining the nature and extent of participatory rights in fishing opportunities, the Commission shall take into account, <i>inter alia</i>: ... (b) respective interests, past and present fishing patterns, including catches, and practices in the Convention area; (c) the stage of development of a fishery; ... (e) contributions to conservation and management of fishery resources in the Convention area, including the provision of information, the conduct of research and steps taken to establish cooperative mechanisms for effective monitoring, control, surveillance and enforcement; ...</p>
Article 21 Recognition of the special requirements of developing States in the region	<p>3. The Contracting Parties shall cooperate through the Commission and other subregional or regional organisations involved in the management of fishery resources: ... (b) to assist developing States in the region which may fish for fishery resources, to enable them to participate in fisheries for such resources, including facilitating access in accordance with this Convention.</p>

B. Brief analysis of, and references to, decisions or resolutions of the SEAFO relating to cooperating non-members

Introduction

The SEAFO Convention clearly anticipates the existence of cooperating non-contracting parties (see, *inter alia*, Article 22(1) and (4), in section A above). However, to date, no framework provisions regarding cooperating status have been adopted, and there are currently no States, REIOs or fishing entities with cooperating status.

South Africa, in its statement to SEAFO 3, stated that: ‘As a Coastal State with straddling fish stocks in our Exclusive Economic Zone as well as the Convention Area, we would like to assure all Parties present that South Africa *will fully cooperate and support all the SEAFO measures*’ (emphasis added), pending deposit of its instrument of ratification.⁴⁵⁶

The report of SEAFO 2 reveals that Japan sought in 2005 to be ‘accorded a status of co-operating non-Party’. The report states that (emphasis added):

The Commission acknowledged the receipt of the Japanese data relating to its 2005 crab fishery. In response to the Japanese request to be accorded a status of co-operating non-Party, *the Commission directed the Executive Secretary to inform Japan that it did not envisage the introduction of such a mechanism*. All Parties strongly urged Japan to ratify the Convention and become a SEAFO Party, considering that it had actively participated in the creation of the organisations and could contribute in a positive way to the further development of the

⁴⁵⁶ SEAFO 3, report, page 23.

organisation through its long involvement and experience in multilateral fisheries co-operation.⁴⁵⁷

Thus, in 2005, the Commission ‘did not envisage’ the introduction of a mechanism to accord cooperating status, despite the intention expressed in Article 22(1) and (4) of the SEAFO Convention. The preference of the parties was for Japan to become a party to the SEAFO Convention. In response, the observer from Japan ‘explained that Japan will cooperate with the [SEAFO] by implementing conservation and management measures adopted by the Commission’.⁴⁵⁸

The report of SEAFO 3 does not reveal any change in the stance of the Commission. It notes that Japan would be requested to comply with certain SEAFO Conservation Measures and should be encouraged to participate fully as a party in the work of the SEAFO in view of the fact that it ‘is actively fishing SEAFO managed species and benefits from those resources’.⁴⁵⁹ A statement from the EC, referring to Japan, stated that ‘[a]s this state is benefiting from the resources of the region it should also make the contributions that are required of the Parties’, and added that Japan should be asked to join the SEAFO.⁴⁶⁰

Scope for cooperation

Some of the SEAFO Commission’s Conservation Measures contain provisions that imply scope for cooperation by non-contracting parties (in addition to such parties simply opting to follow duties applied expressly to contracting parties).

Thus **Conservation Measure 02/05**, on *interim port State measures*, states that ‘[t]he port inspector(s) should ... verify that the official documentation onboard is valid, if necessary, through appropriate contacts with the flag State ...’.⁴⁶¹ It adds that: ‘If the port inspector(s) has reasonable grounds to believe that a vessel has engaged in, or supported IUU fishing, the port inspector(s) should as soon as possible contact the flag State authorities to verify whether the fish and fishery products have been harvested or collected in the areas as recorded in the relevant documents’.⁴⁶² Those provisions create opportunities for a non-contracting party flag State to cooperate.

Other opportunities for cooperation arise under **Conservation Measure 08/06** *establishing a List Of Vessels Presumed To Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the [SEAFO] Convention Area*, which provides for three tiers of IUU list: a ‘draft IUU Vessel List’, a ‘provisional IUU Vessel List’ and lastly a (finalized) ‘IUU Vessel List’.

Regarding the draft IUU Vessel List, the Executive Secretary is to notify non-contracting parties with vessels on that list,⁴⁶³ whereupon such parties ‘shall transmit, at least 30 days before the Annual Meeting of the Commission, their comments to the Executive Secretary, as appropriate, including verifiable evidence and other supporting information, showing that the vessels neither have fished in contravention of SEAFO Conservation Measures nor had the possibility of fishing for species covered by the SEAFO Convention’.⁴⁶⁴

Regarding the provisional IUU Vessel List, the Commission is to remove a vessel from that List

⁴⁵⁷ SEAFO 2, report, paragraph 10.5.

⁴⁵⁸ SEAFO 2, report, paragraph 10.6.

⁴⁵⁹ SEAFO 3, report, paragraphs 5.2 and 9.2.

⁴⁶⁰ SEAFO 3, report, page 20.

⁴⁶¹ Annex A, paragraph 1(a).

⁴⁶² Annex A, paragraph 5(d).

⁴⁶³ Paragraph 5.

⁴⁶⁴ Paragraph 6.

if the vessel's flag State demonstrates that '[t]he vessel did not engage in any of the IUU fishing activities described in paragraph 1' or '[e]ffective action has been taken in response to the IUU fishing activities in question ...'.⁴⁶⁵

Regarding the (finalized) IUU Vessel List, the Commission is to request non-parties with vessels on that list to, *inter alia*, 'take all the necessary measures to eliminate these IUU fishing activities ... and to inform the Commission of the measures taken in this respect'.⁴⁶⁶ A non-contracting party may request the removal of its vessel(s) from the IUU Vessel List by providing information demonstrating that, *inter alia*: (a) '[i]t has adopted measures that will ensure that the vessel complies with all SEAFO measures'; (b) 'it will be able to assume effectively its responsibilities as regards the monitoring and control of the vessel's fishing activities in the Convention Area'; or (c) 'it has taken effective action in response to the IUU fishing activities that resulted in the vessel's inclusion in the IUU Vessel List ...'.⁴⁶⁷ Thus the provisions on each of the three lists provide significant opportunities for non-contracting party 'flag States' to cooperate with the Commission.

Other provisions relevant to cooperation

Reflecting Articles 8(6) and 22 of the SEAFO Convention (see section A above), Rule 33(b) of the **Rules of Procedure of the SEAFO Commission** allow the Commission to 'invite as appropriate, any non-Contracting Party to attend, in accordance with Rules 36, 37 and 38 below, as observers in the meetings of the Commission'.⁴⁶⁸

Furthermore, pursuant to Article 12(5) of the SEAFO Convention (see section A above), Regulation 30 of the **Financial Regulations** provides for, *inter alia*, '[v]oluntary contributions offered by non-Members' to be accepted, 'subject to agreement by the Commission that the purposes of the contribution are consistent with the policies, aims and activities of the Commission'. That provision would presumably be relevant if a cooperating non-contracting party were to make a donation to the running costs of fisheries management by the Commission.

C. Examples of positive measures applied to cooperating non-members

The SEAFO Convention clearly anticipates the provision to cooperating non-contracting parties of 'benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the relevant stocks' (see Article 22(1) and (4) in section A above). More specifically, the Convention anticipates that fishing opportunities may be set aside for non-contracting parties if necessary (see Article 20(2)(c) in section A above). (See also Article 21(3)(b) and 20(1).)

However, as noted in section B above, no States, REIOs or entities have yet been accorded cooperating status. Thus there are no examples of positive measures corresponding to such status. (See also section B above, regarding the Commission's stance in relation to Japan.)

⁴⁶⁵ Paragraph 13.

⁴⁶⁶ Paragraph 16(b).

⁴⁶⁷ Paragraph 20.

⁴⁶⁸ See also, *inter alia*, Rules 34–38.

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the SEAFO against non-members (whether cooperating non-members or non-cooperating non-members)

The SEAFO Convention (see section A above) itself contains several provisions relevant to non-contracting parties. Those include, *inter alia*: Articles 6(5) and 22(3) (on non-parties in general); Article 15(3) (on landings and transshipments by non-parties); Article 13(6)(a) (on nationals); and Article 14(1) and (3) (on own-flag vessels, including transshipment). In addition, Article 9 of the Convention provides for the Compliance Committee, which is to, *inter alia*, ‘coordinate compliance activities undertaken by or on behalf of the [SEAFO]’. However, this section will focus on measures adopted by the Commission.

Principal framework provisions

Framework provisions on measures against non-contracting parties are set out in four SEAFO Conservation Measures: **CM 02/05** on *interim port State measures*; **CM 03/06** on *an Interim Prohibition of Transshipments-at-Sea in the SEAFO Convention Area and to Regulate Transshipments in Port*; **CM 07/06** relating to *Interim Measures to amend the Interim Arrangement of the SEAFO Convention*; and **CM 08/06** establishing a *List Of Vessels Presumed To Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the [SEAFO] Convention Area*. This section will outline the effects of those four Conservation Measures.

CM 02/05 requires each port State to ‘maintain an effective system of port State control for fishing vessels’ of non-contracting parties (and contracting parties) calling at its ports.⁴⁶⁹ The measure sets out the inspection procedures to be followed, including contact with the flag State as described in section B above.⁴⁷⁰ The measure does not specify any factors triggering an inspection or any quotas for the number of vessels to be inspected. Instead, as noted, the desired result is simply that the system be ‘effective’. The measure does not specify how the port State should react to the inspection findings (in contrast to Article 15(3) of the SEAFO Convention – see section A above). No distinction is made between cooperating non-contracting parties and other non-contracting parties.

CM 03/06, reflecting Article 14(3)(f) of the SEAFO Convention (see section A above), requires each contracting party to ‘prohibit transshipments at sea by vessels flying their flag in the Convention Area fishing for species covered by the SEAFO Convention’.⁴⁷¹ That implies that such vessels may not tranship at sea to, *inter alia*, vessels flagged to non-contracting parties. The measure also contains a requirement whereby fishing vessels which catch species covered by the Convention in the Convention Area may only tranship in a port of a contracting party if they have prior authorisation from that port State (and the flag State).⁴⁷² That requirement presumably applies to, *inter alia*, fishing vessels flagged to non-contracting parties, although it fails to reflect the duty specified in Article 15(3) of the SEAFO Convention (see section A above).

⁴⁶⁹ Paragraph 1.

⁴⁷⁰ Paragraph 2.

⁴⁷¹ Paragraph 1.

⁴⁷² Paragraph 2.

CM 03/06 also includes an obligation for contracting parties to ensure that their ‘duly licensed’ fishing vessels obtain flag State authorization for in-port transshipments.⁴⁷³ That obligation presumably applies, *inter alia*, to ports of non-contracting parties. There are also procedures on information to be notified regarding any in-port transshipments to the flag State of both the discharging vessel and the receiving vessel and to the relevant port States.⁴⁷⁴ Transshipment to a vessel flagged to a ‘non-member country’ is expressly anticipated.⁴⁷⁵

CM 07/06 provides for the establishment of a SEAFO record of fishing vessels authorized to fish for species covered by the Convention. The record impliedly comprises only vessels flagged to contracting parties.⁴⁷⁶ Therefore some contracting party duties regarding vessels not on the record⁴⁷⁷ will potentially affect vessels flagged to non-contracting parties negatively, irrespective of whether those vessels are conducting IUU fishing or not.

The measure also requires fishing vessels flagged to contracting parties to report to their flag State specified ‘information on any possible fishing activity by vessels flying the flag of a non-Contracting Party in the Convention Area’.⁴⁷⁸ That information is to be passed on the Executive Secretary for dissemination to the other contracting parties and for consideration at the next SEAFO annual meeting.⁴⁷⁹

CM 08/06, as noted in section B above, provides for three tiers of IUU list: a ‘draft IUU Vessel List’, a ‘provisional IUU Vessel List’ and lastly a (finalized) ‘IUU Vessel List’.

The measure sets out a non-exhaustive list of activities or circumstances, to be supported by evidence from a contracting party, whereby ‘vessels fishing for species covered by the SEAFO Convention are presumed to have carried out IUU fishing activities in the Convention Area’.⁴⁸⁰ Thus the measure in principle relates to vessels irrespective of their flag. After including various specific activities, the list adds the broad category of vessels engaging ‘in fishing activities contrary to any other SEAFO Conservation Measures’.⁴⁸¹ The list ends with vessels being ‘under the control of the owner of any vessel on the SEAFO IUU Vessel List’.⁴⁸²

Contracting parties are to transmit annually ‘a list of vessels presumed to be carrying out IUU activities in the Convention Area during the current and previous year, accompanied by the supporting evidence ... concerning the presumption of this IUU activity’.⁴⁸³ The identification of such vessels is to be ‘documented, *inter alia*, on reports from a Contracting Party relating to SEAFO Conservation Measures in force, trade information obtained on the basis of relevant trade statistics such as [FAO] data, Statistical documents and other national or international verifiable statistics, as well as any other information obtained from port States and/or gathered from the fishing grounds which is suitably documented’.⁴⁸⁴

⁴⁷³ Paragraph 3.

⁴⁷⁴ Paragraph 4.

⁴⁷⁵ Annex, paragraph 5(b).

⁴⁷⁶ Paragraph 3.

⁴⁷⁷ See, *inter alia*, paragraphs 6(e), 8 and 9.

⁴⁷⁸ Paragraph 25.

⁴⁷⁹ Paragraph 26.

⁴⁸⁰ Paragraph 3.

⁴⁸¹ Paragraph 3(i).

⁴⁸² Paragraph 3(j).

⁴⁸³ Paragraph 4.

⁴⁸⁴ Paragraph 2.

That is the start of a process, summarized below, that leads, over the course of any given year, to the adoption by the SEAFO of a (finalized) IUU Vessel List. The next step in the process is for the Executive Secretary, on the basis of the information received from the contracting parties and ‘any other information at his disposal’, to draw up a draft SEAFO IUU Vessel List (including the vessel-related information listed in paragraph 15).⁴⁸⁵ That list, together with the supporting evidence, is to be transmitted to non-contracting parties with vessels on the list and to all contracting parties.⁴⁸⁶ They are to transmit comments on the draft list, ‘including verifiable evidence ... showing that the vessels neither have fished in contravention of SEAFO Conservation Measures nor had the possibility of fishing for species covered by the SEAFO Convention’.⁴⁸⁷

On the basis of the comments received pursuant to the preceding paragraph, the Executive Secretary is to draw up a provisional SEAFO IUU Vessel List (including, again, the vessel-related information listed in paragraph 15) and then transmit that list, ‘together with all the evidence provided’, to the non-contracting parties concerned and to the contracting parties.⁴⁸⁸ Contracting parties ‘may ... submit ... any additional information which might be relevant for the establishment of the IUU Vessel List’, and that information, ‘together with all the evidence provided’, is to be circulated by the Executive Director to the contracting parties and to the non-contracting parties concerned.⁴⁸⁹

Next, at its annual meeting, the Commission is to ‘adopt’ a Provisional IUU Vessel List (i.e. presumably in contrast to the Executive Secretary having merely drawn it up) and then, apparently, submit it to itself for approval, having first removed any vessel from the provisional list if its flag State demonstrates specified facts or improvements.⁴⁹⁰ The Commission is also to recommend (apparently to itself) which vessels, if any, should be removed from the current IUU Vessel List.⁴⁹¹ The Commission then approves the provisional IUU Vessel List,⁴⁹² presumably as a finalized IUU Vessel List (including, again, the vessel-related information listed in paragraph 15).

At that point, the Commission is to request non-contracting parties with vessels on the list to, *inter alia*, take all the necessary measures to eliminate the IUU fishing activities in question and to report back to the Commission regarding the measures taken.⁴⁹³ Of note, the measure contains no equivalent provision in respect of contracting parties with vessels on the IUU list. Furthermore, contracting parties are to ‘take all necessary measures under their applicable legislation and pursuant to paragraphs 56 and 66 of the [FAO] IPOA–IUU’ to:⁴⁹⁴

⁴⁸⁵ Paragraph 5.

⁴⁸⁶ Paragraph 5.

⁴⁸⁷ Paragraph 6.

⁴⁸⁸ Paragraph 9.

⁴⁸⁹ Paragraph 10.

⁴⁹⁰ Paragraphs 11(i), 12 and 13.

⁴⁹¹ Paragraph 11(ii).

⁴⁹² Paragraph 14.

⁴⁹³ Paragraph 16.

⁴⁹⁴ Paragraph 17.

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- (a) ensure that fishing vessels, support vessels, mother ships or cargo vessels flying their flag do not participate in any transshipment or joint fishing operations with, support or re-supply vessels on the IUU Vessel List;

 - (b) ensure that vessels on the IUU Vessel List that enter ports voluntarily are not authorized to land, transship, refuel or re-supply therein but are inspected upon entry;

 - (c) prohibit the chartering of a vessel on the IUU Vessel List;

 - (d) refuse to grant their flag to vessels on the IUU Vessel List;

 - (e) prohibit commercial transactions, imports, landings and/or transshipment of species covered by the SEAFO Convention from vessels on the IUU Vessel List;

 - (f) encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the SEAFO Convention caught by vessels on the IUU Vessel List;

 - (g) collect, and exchange with other Contracting Parties, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the SEAFO Convention from vessels on the IUU Vessel List.

Vessels may be removed from the IUU Vessel List if certain conditions are met.⁴⁹⁵ Contracting parties ‘shall not take any unilateral trade measures or other sanctions’ against vessels (a) ‘on the draft or provisional IUU Vessel Lists’ or (b) ‘that have been removed from the IUU Vessel List’, on the grounds that such vessels are involved in IUU fishing activities, albeit ‘[w]ithout prejudice to the rights of Contracting Parties and coastal states to take proper action, consistent with international law’.⁴⁹⁶

Of potential relevance to some of the items ‘(a)’ to ‘(g)’ listed above, the preamble to CM 08/06 notes that ‘... the situation must be addressed in the light of all relevant international fisheries instruments *and in accordance with the relevant rights and obligations established in the World Trade Organization (WTO) Agreement*’ (emphasis added).⁴⁹⁷

The wording of CM 08/06 indicates that the measures in response to a vessel being placed on the (finalized) IUU Vessel List are to be taken by individual contracting parties. Such measures are therefore outside the scope of this part of the report, which addresses measures applied by RFMOs. In contrast, the placing of vessels on the provisional IUU Vessel List and on the (finalized) IUU Vessel List is an action to be taken at the RFMO level. CM 08/06 was only adopted at the most recent meeting of the SEAFO; consequently no IUU Vessel List is yet available.

⁴⁹⁵ Paragraph 20.

⁴⁹⁶ Paragraph 19.

⁴⁹⁷ 7th recital.

SIOFA MoP

No website yet, but see:

(1) <http://www.fao.org/newsroom/en/news/2006/1000360/index.html>

(2) <http://www.fao.org/Legal/treaties/035t-e.htm>

[Unless otherwise stated, all the documents referred to in this part of the report can be found at website (2) above.]

Full name of RFMO	Meeting of the Parties to the SIOFA
Most recent meeting of RFMO	TREATY NOT YET IN FORCE
Treaty establishing RFMO	Southern Indian Ocean Fisheries Agreement
Year of adoption of treaty	2006
Year of entry into force of treaty	TREATY NOT YET IN FORCE

A. Provisions of treaty relating to non-contracting parties

The provisions of the SIOFA referring expressly to non-contracting parties (other than Articles 22 and 23 on signature, ratification, acceptance, approval and accession) are Article 17 (see below) and the following:

Article and title	Text of relevant provision (emphasis added)
Article 6 Functions of the Meeting of the Parties	1. The Meeting of the Parties shall: ... (j) in accordance with international law and any applicable instruments, draw the attention of any <i>non-Contracting Parties</i> to any activities which undermine the attainment of the objectives of this Agreement;
	3. In applying the provisions of paragraph 2 [regarding determining criteria for participation in fishing], the Contracting Parties may, <i>inter alia</i> : ... (c) set aside fishing opportunities for <i>non-Contracting Parties</i> to this Agreement, if necessary.
	4. The Meeting of Parties shall, subject to agreed rules, review quota allocations and fishing effort limitations of Contracting Parties and participation in fishing opportunities of <i>non-Contracting Parties</i> taking into account, <i>inter alia</i> , information on the implementation by Contracting and <i>non-Contracting Parties</i> of the conservation and management measures adopted by the Meeting of the Parties.
Article 14 Transparency	2. Coastal States with waters under national jurisdiction adjacent to the Area that are <i>not Contracting Parties</i> to this Agreement shall be entitled to participate as observers in the Meeting of the Parties and meetings of its subsidiary bodies.
	3. <i>Non-Contracting Parties</i> to this Agreement shall be entitled to participate as observers in the Meeting of the Parties and meetings of its subsidiary bodies.

Article 17, entitled *Non-Contracting Parties*, reads as follows (emphasis added):

1. Contracting Parties shall take measures consistent with this Agreement, the 1995 Agreement and international law to deter the activities of vessels flying the flags of *non-Contracting Parties* to this Agreement which undermine the effectiveness of conservation and management measures adopted by the Meeting of

the Parties or the attainment of the objectives of this Agreement.

2. Contracting Parties shall exchange information on the activities of fishing vessels flying the flags of *non-Contracting Parties* to this Agreement which are engaged in fishing operations in the Area.

3. Contracting Parties shall draw the attention of any *non-Contracting Party* to this Agreement to any activity undertaken by its nationals or vessels flying its flag which, in the opinion of the Contracting Party, undermines the effectiveness of conservation and management measures adopted by the Meeting of the Parties or the attainment of the objectives of this Agreement.

4. Contracting Parties shall, individually or jointly, request *non-Contracting Parties* to this Agreement whose vessels fish in the Area to cooperate fully in the implementation of conservation and management measures adopted by the Meeting of the Parties with a view to ensuring that such measures are applied to all fishing activities in the Area. Such cooperating *non-Contracting Parties* to this Agreement 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 of fishery resources.

However, the Convention also contains provisions on involvement by fishing entities. Thus Article 15(2) states that: 'A fishing entity which has expressed its commitment to be bound by the terms of this Agreement may participate in the Meeting of the Parties and its subsidiary bodies, and partake in decision making, in accordance with the Rules of Procedure adopted by the Meeting of the Parties. Articles 1 to 18 and 20.2 apply, *mutatis mutandis*, to such a fishing entity'.⁴⁹⁸

Provisions of the SIOFA potentially relating to non-contracting parties include, *inter alia*, the following:

Article and title	Text of relevant provision
Article 4 General principles	In giving effect to the duty to cooperate in accordance with the 1982 Convention and international law, the Contracting Parties shall apply, in particular, the following principles: ... (b) measures shall be taken to ensure that the level of fishing activity is commensurate with the sustainable use of the fishery resources; ... (d) the fishery resources shall be managed so that they are maintained at levels that are capable of producing the maximum sustainable yield, and depleted stocks of fishery resources are rebuilt to the said levels; (e) fishing practices and management measures shall take due account of the need to minimize the harmful impact that fishing activities may have on the marine environment; (f) biodiversity in the marine environment shall be protected; and (g) the special requirements of developing States bordering the Area that are Contracting Parties to this Agreement, and in particular the least-developed among them and small island developing States, shall be given full recognition.
Article 5 Meeting of the Parties	I. The Contracting Parties shall meet periodically to consider matters pertaining to the implementation of this Agreement and to make all decisions relevant thereto.
Article 6 Functions of the Meeting of the Parties	I. The Meeting of the Parties shall: ... (d) formulate and adopt conservation and management measures necessary for ensuring the long-term sustainability of the fishery resources taking into account the need to protect marine biodiversity, ...; (e) adopt generally recommended international minimum standards for the responsible conduct of fishing operations; (f) develop rules for the collection and verification of scientific and statistical data, as well as for the submission, publication, dissemination and use of such data; ... (h) develop rules and procedures for the monitoring, control and surveillance of fishing activities in order to ensure compliance with conservation and management measures adopted by the Meeting of the Parties ...; (i) develop and monitor measures to prevent, deter and eliminate [IUU] fishing; ... (k) establish the criteria for and rules governing participation in fishing; and (l) carry out any other tasks and functions necessary to achieve the objectives of this Agreement.

⁴⁹⁸ See also Articles 15(1) and 20(2).

	<p>2. In determining criteria for participation in fishing, including allocation of total allowable catch or total level of fishing effort, the Contracting Parties shall take into account, <i>inter alia</i>, international principles such as those contained in the 1995 Agreement.</p>
	<p>3. In applying the provisions of paragraph 2, the Contracting Parties may, <i>inter alia</i>: (a) designate annual quota allocations or fishing effort limitations for Contracting Parties; (b) allocate catch quantities for exploration and scientific research; ...</p>
Article 7 Subsidiary bodies	<p>2. Once the measures referred to in Article 6 [on functions of the meetings of the parties] are taken, the Meeting of the Parties shall establish a Compliance Committee, to verify the implementation of and compliance with such measures. The Compliance Committee ... shall report, advise and make recommendations to the Meeting of the Parties.</p>
Article 9 Secretariat	<p>The Meeting of the Parties shall decide on arrangements for the carrying out of secretariat services, or the establishment of a Secretariat, to perform the following functions: ... (c) any other function that the Meeting of the Parties may decide.</p>
Article 10 Contracting Party duties	<p>1. Each Contracting Party shall, in respect of its activities within the Area: (a) promptly implement this Agreement and any conservation, management and other measures or matters which may be agreed by the Meeting of the Parties; (b) take appropriate measures in order to ensure the effectiveness of the measures adopted by the Meeting of the Parties; (c) collect and exchange scientific, technical and statistical data with respect to the fishery resources and ensure that: ... (iii) such statistical, biological and other data and information as the Meeting of the Parties may decide is provided annually; ...</p>
	<p>3. 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 and fishing vessels owned or operated by its nationals fishing in the Area comply with the provisions of this Agreement and with the conservation and management measures adopted by the Meeting of the Parties.</p>
	<p>4. Each Contracting Party shall, to the greatest extent possible, at the request of any other Contracting Party, and when provided with the relevant information, investigate any alleged serious violation within the meaning of the 1995 Agreement by its nationals, or fishing vessels owned or operated by its nationals, of the provisions of this Agreement or any conservation and management measure adopted by the Meeting of the Parties. ...</p>
Article 11 Flag State duties	<p>1. Each Contracting Party shall take such measures as may be necessary to ensure that: (a) fishing vessels flying its flag operating in the Area comply with the provisions of this Agreement and the conservation and management measures adopted by the Meeting of the Parties and that such vessels do not engage in any activity which undermines the effectiveness of such measures; ...</p>
Article 12 Port State duties	<p>1. Measures taken by a port State Contracting Party in accordance with this Agreement shall 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 subregional, regional and global conservation and management measures. When taking such measures, a port State Contracting Party shall not discriminate in form or in fact against the fishing vessels of any State.</p>

	2. Each port State Contracting Party shall: (a) in accordance with the conservation and management measures adopted by the Meeting of the Parties, <i>inter alia</i> , inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals; (b) not permit landings, transshipment, or supply services in relation to fishing vessels unless they are satisfied that fish on board the vessel have been caught in a manner consistent with the conservation and management measures adopted by the Meeting of the Parties; ...
Article 13 Special requirements of developing States	3. Cooperation by the Contracting Parties under the provisions of this Agreement and through other subregional or regional organizations involved in the management of marine living resources should include action for the purposes of: ... (b) assisting developing States bordering the Area, in particular the least-developed among them and small island developing States, to enable them to participate in fisheries for such resources, including facilitating access in accordance with this Agreement.
Article 14 Transparency	6. Observers shall be given timely access to pertinent information subject to the Rules of Procedure, including those concerning confidentiality requirements, which the Meeting of the Parties may adopt.
Article 18 Good faith and abuse of right	Each Contracting Party shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of right.

B. Brief analysis of, and references to, decisions or resolutions of the SIOFA MoP relating to cooperating non-members

The SIOFA clearly anticipates the existence of cooperating non-contracting parties (see Articles 17(4), 6(3) and 6(4) in section A above). However, the treaty is not yet in force and so the Meeting of the Parties has not yet adopted any decisions relating to cooperating non-contracting parties.

Nevertheless, the conference that adopted the SIOFA in July 2006 also adopted a resolution, entitled *Resolution on interim arrangements concerning the high seas in the southern Indian Ocean*,⁴⁹⁹ which called upon ‘all States, regional economic integration organizations and fishing entities that have participated in the Inter-Governmental Consultations or that have carried out or carry out fishing activities in the high seas in the Southern Indian Ocean’ to implement the data collection measures set out in an earlier 2004 resolution (see next paragraph) and to undertake various other tasks relevant to the management of fisheries covered by the SIOFA.

The 2004 resolution, entitled *Resolution on data collection concerning the high seas in the southern Indian Ocean*,⁵⁰⁰ had been adopted by delegations participating in consultations on what became the SIOFA and called upon ‘all States, regional economic integration organizations and fishing entities that have participated in the Inter-Governmental Consultations or that have carried out or carry out fishing activities in the high seas in the Southern Indian Ocean’ and ‘States, regional economic integration organizations and fishing entities whose ports are used to land or tranship non-tuna fishery resources caught in the Area’ to undertake various actions regarding collection and/or provision of data.

⁴⁹⁹ Final Act, Appendix 2.

⁵⁰⁰ Final Act, Appendix 3.

C. Examples of positive measures applied to cooperating non-members

The SIOFA clearly anticipates the provision to cooperating non-contracting parties of ‘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 of fishery resources’ (see Article 17(4) in section A above). More specifically, the treaty anticipates that fishing opportunities may be set aside for non-contracting parties if necessary (see Article 6(3) in section A above). (See also Articles 6(4) and 13(3).) However, because the treaty has not yet entered into force, there are currently no examples of positive measures applied to cooperating non-contracting parties.

D. Review of measures (including trade and market measures, sanctions, port access restrictions) applied by the SIOFA MoP against non-members (whether cooperating non-members or non-cooperating non-members)

Because the treaty has not yet entered into force, there are currently no examples of measures, or frameworks for such measures, adopted by the Meeting of the Parties against non-contracting parties.

However, the SIOFA (see section A above) itself contains several provisions relevant to non-contracting parties. Those include, *inter alia*: Article 17(1) (on non-parties); Article 6(1) (on various relevant functions of the Commission); Article 10(3) (on nationals); Article 11(1) (on own-flag vessels); and Article 12(2) (on port State control). In addition, Article 7 of the Convention provides for a Compliance Committee.

European Community

A. Introduction

This part of the report will focus on the EC's implementation of ICCAT Recommendations, and in particular its implementation of: (a) ICCAT Recommendation 02-17 (requiring an import ban against Bolivia in respect of Atlantic bigeye tuna); (b) ICCAT Recommendation 03-18 (requiring an import ban against Georgia in respect of Atlantic bigeye tuna); and (c) ICCAT Recommendation 02-23 (providing for the establishment of an IUU vessel list and resulting sanctions).⁵⁰¹

B. ICCAT Recommendations 02-17 and 03-18

The current import bans in respect of Bolivia and Georgia are implemented by Council Regulation 827/2004⁵⁰² as amended by Council Regulation 919/2005.⁵⁰³ Both Regulations refer to Article 133 of the Treaty establishing the European Community as their legal basis. That means that the Regulations are based on the common commercial policy of the EC, rather than on the common fisheries policy.

Regulation 827/2004

With regard to Bolivia and Georgia, the preamble of Regulation 827/2004 states that (emphasis added):

(8) ICCAT's attempts to encourage *Bolivia*, Cambodia, Equatorial Guinea, *Georgia* and Sierra Leone to comply with measures for the conservation and management of Atlantic bigeye tuna have been to no avail.

(9) ICCAT has recommended its contracting parties to take appropriate steps to prohibit imports of Atlantic bigeye tuna products in any form from *Bolivia*, *Georgia* and Sierra Leone and to continue prohibiting such imports from Cambodia and Equatorial Guinea. These measures will be lifted as soon as it is established that the countries in question have brought their fishing practices into line with ICCAT's measures. These measures should therefore be implemented by the Community, which has sole competence in this matter. However, in view of the notification periods required by ICCAT, the ban on imports from *Georgia* should not enter into force until 1 July 2004.

Article 1 of Regulation 827/2004 defines the term 'importation' as 'the customs procedures referred to in Article 4(15)(a), 15(b) and 16(a) to 16(f) of Council Regulation (EEC) No 2913/92

⁵⁰¹ ICCAT Recommendation 02-23 has now been replaced by ICCAT Recommendation 06-12.

⁵⁰² Council Regulation (EC) No 827/2004 of 26 April 2004 prohibiting imports of Atlantic bigeye tuna (*Thunnus obesus*) originating in Bolivia, Cambodia, Equatorial Guinea, Georgia and Sierra Leone and repealing Regulation (EC) No 1036/2001, OJ L 127/21, 29.4.2004.

⁵⁰³ Council Regulation (EC) No 919/2005 of 13 June 2005 amending Regulation (EC) No 827/2004 as regards the prohibition of imports of Atlantic bigeye tuna from Cambodia, Equatorial Guinea and Sierra Leone, and repealing Regulation (EC) No 826/2004 prohibiting imports of blue-fin tuna from Equatorial Guinea and Sierra Leone and Regulation (EC) No 828/2004 prohibiting imports of swordfish from Sierra Leone, OJ L 156/1, 18.6.2005.

of 12 October 1992 establishing the Community Customs Code'. Article 2 then sets out various import bans: the products for which bans are established are defined by reference to country of origin and various CN (Combined Nomenclature) codes as follows (emphasis added):

1. The importation into the Community of Atlantic bigeye tuna ...originating in *Bolivia*, Cambodia, Equatorial Guinea and Sierra Leone and falling within CN codes ex 0301 99 90, 0302 34 00, ex 0302 70 00, 0303 44 00, ex 0303 80 00, ex 0304 10 38, ex 0304 10 98, ex 0304 20 45, ex 0304 90 97ex 0305 10 00, ex 0305 20 00, ex 0305 30 90, ex 0305 49 80, ex 0305 59 80 and ex 0305 69 80 is prohibited.
2. The importation of any processed product derived from the Atlantic bigeye tuna referred to in paragraph 1 and falling within codes ex 1604 14 11, ex 1604 14 16 and ex 1604 14 18 and ex 1604 20 70 is prohibited.
3. The importation into the Community of Atlantic bigeye tuna ... originating in *Georgia* and falling within CN codes ex 0301 99 90, 0302 34 00, 0303 44 00, ex 0304 10 38, ex 0304 10 98, ex 0304 20 45, ex 0304 90 97, ex 0305 20 00, ex 0305 30 90, ex 0305 49 80, ex 0305 59 80 and ex 0305 69 80 is prohibited.
4. The importation of any processed product derived from the Atlantic bigeye tuna referred to in paragraph 3 and falling within codes ex 1604 14 11, ex 1604 14 16 and ex 1604 14 18 and ex 1604 20 70 is prohibited.

Regulation 827/2004 entered into force on a date in May 2004. However, paragraphs 3 and 4 of Article 2 were not to apply until 1 July 2004.⁵⁰⁴ Those dates may be compared with date of application of the US regulations implementing the import bans against Bolivia and Georgia. The latter regulations became effective on 5 January 2005 (see part of report on the *United States of America*, section B), i.e. more than six months later than the latest effective date established by Regulation 827/2004.

Article 3 of the Regulation creates a transitional provision, whereby: 'This Regulation shall not apply to quantities of the products referred to in Article 2 and originating in Bolivia, Georgia and Sierra Leone which can be shown to the satisfaction of the competent national authorities to have been under way to Community territory on the date of its entry into force and which are released for free circulation no later than 14 days after that date'.⁵⁰⁵

Regulation 919/2005

The purpose of Regulation 919/2005 is to lift various import bans against Cambodia, Equatorial Guinea and Sierra Leone, including those established by Regulation 827/2004, having noted in its preamble that: 'At its 14th Special Meeting in 2004, ICCAT acknowledged the efforts made by Cambodia, Equatorial Guinea and Sierra Leone to address its concerns and adopted recommendations for the lifting of trade restrictive measures against those three countries'.⁵⁰⁶

However, Regulation 919/2005 cannot fulfil its purpose simply by repealing Regulation 827/2004, since to do so would similarly lift the import bans established by Regulation 827/2004 against Bolivia and Georgia. Therefore, Article 1(1) states that: 'In Article 2(1) [of Regulation 827/2004] "Cambodia, Equatorial Guinea and Sierra Leone" shall be deleted'. (The reference to Sierra Leone in Article 3 of Regulation 827/2004 is also removed.) Thus Regulation 919/2005 leaves the import bans in respect of Bolivia and Georgia in place.

⁵⁰⁴ Article 5.

⁵⁰⁵ Article 3.

⁵⁰⁶ Recital (10).

C. ICCAT Recommendation 02-23

ICCAT Recommendation 02-23 is implemented by Council Regulation 869/2004,⁵⁰⁷ which came into force on a date in May 2004.⁵⁰⁸ Regulation 869/2004 works by amending Regulation 1936/2001.⁵⁰⁹ Regulation 869/2004 refers to Article 37 of the Treaty establishing the European Community as its legal basis, which means that it (like Regulation 1936/2001) is based on the common fisheries policy of the EC.

The preamble of Regulation 869/2004 notes, *inter alia*, that: ‘ICCAT at its 17th meeting in 2001 and its 13th special meeting in 2002 ... recommended new control measures for certain stocks of highly migratory species. These recommendations ... are binding on the Community and should therefore be implemented. ... Regulation (EC) No 1936/2001 should therefore be amended accordingly’.⁵¹⁰

Regulation 869/2004 implements ICCAT Recommendation 02-23 by inserting two new Articles, i.e. Articles 19b and 19c, into Regulation 1936/2001.⁵¹¹ Article 19b(1) specifies the activities of ‘a vessel flying the flag of a non-contracting party’ that, if ‘shown by the competent authority of a Member State’, generate the presumption of the vessel having carried out IUU fishing. Those activities, with some small variations in wording, are the same as those listed in paragraph 1 of ICCAT Recommendation 02-23 (although whereas Recommendation 02-23 refers to ‘fishing vessels’ of non-contracting parties, Article 19(b)(1) refers more broadly to a ‘vessel’ of a non-contracting party).

Article 19(b)(2)-(4) establishes a procedure, including a timetable, for Member States and the European Commission to interact in order to assist the ICCAT in establishing the IUU list (although that procedure is not as detailed as the one established by Recommendation 02-23; for example, it fails to mention the provisional IUU list). Article 19(b)(5) states that: ‘The [European] Commission shall each year, on receiving from ICCAT the list of vessels identified as carrying out IUU fishing (hereinafter referred to as “the IUU list”), send it to the Member States’.

Article 19(c) sets out the actions that Member States are to take with regard to vessels on the IUU list. Article 19(c) may be contrasted with paragraph 9 of Recommendation 02-23 by means of the following table:

Article 19(c) of Regulation 1936/2001 [inserted into Regulation 1936/2001 by Regulation 869/2004]	Paragraph 9 of ICCAT Recommendation 02-23 [items (a) to (g) have been re-ordered to be opposite equivalent terms in Article 19(c)]
I. Member States shall take the necessary measures, in line with their national legislation and Community law, to ensure that:	Contracting Parties and Cooperating non-Contracting Parties, Entities or Fishing Entities shall take all necessary measures, under their applicable legislation:

⁵⁰⁷ Council Regulation (EC) No 869/2004 of 26 April 2004 amending Regulation (EC) No 1936/2001 laying down control measures applicable to fishing for certain stocks of highly migratory fish, OJ L 162/8, 30.4.2004.

⁵⁰⁸ Article 2.

⁵⁰⁹ Council Regulation (EC) No 1936/2001 laying down control measures applicable to fishing for certain stocks of highly migratory fish, OJ L 263/1, 3.10.2001.

⁵¹⁰ Recitals (2) and (3).

⁵¹¹ Article 1.

<p>(a) vessels entered on the IUU list that voluntarily enter a port are not authorised to land or tranship there;</p>	<p>(b) So that IUU vessels that enter ports voluntarily are not authorized to land or transship therein;</p>
<p>(b) their flag is not granted to vessels on the IUU list unless the vessel has changed ownership and a new owner can convincingly show that the previous owner or operator neither has any continuing legal, financial or other real interest in the vessel nor exercises any control over it, or unless, having taken all relevant facts into account, the flag State considers that granting the flag to a vessel will not lead to IUU fishing;</p>	<p>(d) To refuse to grant their flag to vessels included in the IUU list, except if the vessel has changed owner; and the new owner has provided sufficient evidence demonstrating the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel, or having taken into account all relevant facts, the flag Contracting Party or Cooperating non-Contracting Party, Entity or Fishing Entity determines that granting the vessel its flag will not result in IUU fishing;</p>
<p>(c) importers, transporters and other operators are encouraged not to deal in or tranship tunas and tuna-like fish taken by vessels on the IUU list;</p>	<p>(f) To encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of tuna and tuna-like species caught by vessels included in the IUU list;</p>
<p>(d) all relevant information is obtained and exchanged with other contracting parties and cooperating noncontracting parties, entities and fishing entities for the purpose of detecting and preventing the use of false import/export licences for tunas and tuna-like fish from vessels on the IUU list.</p>	<p>(g) To collect and exchange with other Contracting Parties or Cooperating non-Contracting Parties, Entities or Fishing Entities any appropriate information with the aim of searching, controlling and preventing false import/export certificates regarding tunas and tuna-like species from vessels included in the IUU list.</p>
<p>2. The following shall be prohibited:</p>	
<p>(a) transhipment between fishing vessels, mother vessels or transport vessels flying the flag of a Member State and registered in the Community and vessels on the IUU list;</p>	<p>(a) So that the fishing vessels, the mother ships and the cargo vessels flying their flag do not participate in any transshipment with vessels registered on the IUU list;</p>
<p>(b) chartering of a vessel on the IUU list;</p>	<p>(c) To prohibit the chartering of a vessel included on the IUU list;</p>
<p>(c) importing, landing or transshipping tunas or tuna-like fish from vessels on the IUU list;</p>	<p>(e) To prohibit the imports, or landing and/or transshipment, of tuna and tuna-like species from vessels included in the IUU list;</p>

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IMPORTANT NOTE: The author emphasizes that this part of the report is intended to be merely a brief illustrative survey and is *not* to be relied upon as a source of advice or definitive information in relation to any legislation or regulations of the USA. In particular, this part of the report does not take into account any case law arising from US federal or state courts, and it cannot be stated with certainty that the extracts from US legislation and regulations quoted here are the most recent versions.

A. Introduction

This part of the report will focus on the USA's implementation of ICCAT Recommendations, and in particular its implementation of: (a) ICCAT Recommendation 02-17 (requiring an import ban against Bolivia in respect of Atlantic bigeye tuna); (b) ICCAT Recommendation 03-18 (requiring an import ban against Georgia in respect of Atlantic bigeye tuna); and (c) part of ICCAT Recommendation 02-23 (providing for the establishment of an IUU vessel list and resulting sanctions).⁵¹²

B. Atlantic Tunas Convention Act

Introduction

The Atlantic Tunas Convention Act 1975 ('**ATCA**', 16 U.S.C. §§ 971 et seq.)⁵¹³ is the domestic legislation used to implement the ICCAT Convention. Among other things, it gives the executive (in practice, the National Marine Fisheries Service) broad authority to implement ICCAT Recommendations by way of the so-called rulemaking process.

However, other legislation does, or may potentially, also apply to the executive when making rules under the ATCA, including, *inter alia*, the Magnuson-Stevens Fishery Conservation and Management Act (see below), the Endangered Species Act and the Administrative Procedure Act. Initial references below to sections of the ATCA are in bold type to help the reader follow cross-references made in the text.

Rulemaking under the ATCA

§971d(c) of the ATCA is entitled *Regulations and other measures to carry out Commission recommendations*.

⁵¹² ICCAT Recommendation 02-23 has now been replaced by ICCAT Recommendation 06-12.

⁵¹³ See: <www4.law.cornell.edu/uscode/html/uscode16/usc_sup_01_16_10_16A.html>.

§ 971d (c)(1)(A) states that: ‘Upon favorable action by the Secretary of State under section 971c (a) of this title on any recommendation of the Commission made pursuant to article VIII of the Convention, *the Secretary shall promulgate, pursuant to this subsection, such regulations as may be necessary and appropriate to carry out such recommendation*’ (emphasis added). Procedures to afford ‘interested persons’ an opportunity to participate in the rulemaking are established (§ 971d (c)(2)); those procedures supplement the ones established by the Administrative Procedure Act (see above).

Under the mandate provided by § 971d (c)(1)(A), the executive is permitted to make regulations on several listed matters relating to conservation, monitoring and compliance (§ 971d (c)(3) (A)-(J)) as well as, more generally, regulations which ‘impose such other requirements and provide for such other measures as the Secretary may determine necessary to implement any recommendation of the Convention or to obtain scientific data necessary to accomplish the purpose of the Convention’ (§ 971d (c)(3)(K)).

Upon the making of any such regulations, the executive is also required to make regulations ‘which prohibit ... the entry into the United States’: (a) of fish (in any form) of species subject to ICCAT Recommendations ‘which were taken from the Convention area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission’ (§ 971d (c)(4)(A)); and (b) from any flag State whose vessels ‘are being used in the conduct of fishing operations in the Convention area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission’, of fish (in any form) of species subject to ICCAT Recommendations and taken from the Convention area (§ 971d (c)(4)(B)).

Of the two functions mentioned in the preceding paragraph, the first would appear to be a basis for implementing part of ICCAT Recommendation 02-23 (notably paragraph 9(e) of that Recommendation, which requires, *inter alia*, contracting parties to prohibit ‘the imports ... of tuna and tuna-like species from vessels included in the IUU list’).

The second function is clearly a mandate to establish import bans against named flag States. A further provision expands the scope for such bans by allowing the executive ‘in the case of repeated and flagrant fishing operations in the Convention area by the vessels of any country which seriously threaten the achievement of the objectives of the Commission’s recommendations’, to make regulations prohibiting ‘the entry in any form from such country of *other species* covered by the Convention as may be under investigation by the Commission and which were taken in the Convention area’ (emphasis added) (§ 971d (c)(5)).

Rulemaking to implement ICCAT Recommendations 02-17, 03-18 and 02-23

The executive’s broad authority under the ATCA is used routinely. For example, it has recently been used to implement, *inter alia*, ICCAT Recommendations 02-17 and 03-18 and part of ICCAT Recommendation 02-23 (see section A above).

Extracts of the *Federal Register* regarding the rulemaking process for those three examples are available online.⁵¹⁴ The *Proposed rule, request for comments, notice of public hearing* is at 69 FR 25357 et seq. The *Final rule* is at 69 FR 70396 et seq. The proposed rule was published on 6 May 2004 and

⁵¹⁴ <www.gpoaccess.gov/fr/retrieve.html>.

the final rule was published on 6 December 2004 (becoming effective on 5 January 2005). That example illustrates that rulemaking may take several months. In that respect, the Acting Deputy Assistant Administrator of the National Marine Fisheries Service stated in February 2006:

... ATCA stipulates procedures to promulgate regulations. In the specific case of trade restrictive measures adopted by the Commission, the process is lengthy and may result in the U.S. being out of synchronization with other ICCAT contracting parties. The multilateral process of identification and consultation adopted by ICCAT as a prelude to recommending trade restrictive measures provides ample opportunity for the Secretary of Commerce to engage the affected parties regarding import restrictions and we recommend expedited rulemaking.⁵¹⁵

The language used in the final rule to establish import prohibitions from named States is straightforward. For example, with regard to imports of Atlantic bigeye tuna from Bolivia and Georgia, the rule uses a dual approach. First, 50 CFR § 635.45(c) states that: 'All shipments of Atlantic bigeye tuna, or its products, in any form, harvested by a vessel under the jurisdiction of Bolivia ... or Georgia will be denied entry into the United States'. Secondly, 50 CFR § 635.71 includes in the list of prohibitions: '(b)(30) Import a bigeye tuna or bigeye tuna product into the United States from Bolivia ... or Georgia as specified in § 635.45'. Those provisions are presumably based on § 971d (c)(4)(B) of the ATCA (see above).

A dual approach is also used to implement part of ICCAT Recommendation 02-23. First, 50 CFR § 633.45(e) states that: 'All shipments of tuna or tuna-like species, or their products, in any form, harvested in the ICCAT convention area by a fishing vessel listed on the ICCAT record as engaged in illegal, unreported, and unregulated fishing will be denied entry into the United States'. Secondly, 50 CFR § 635.71 includes in the list of prohibitions: '(a)(46) Import or attempt to import tuna or tuna-like species harvested by a fishing vessel on the ICCAT illegal, unreported, and unregulated fishing list as specified in § 635.45(e)'. Those provisions are presumably based on § 971d (c)(4)(A) of the ATCA (see above).

It is noteworthy that 50 CFR §§ 633.45(e) and 635.71 appear to implement only part of ICCAT Recommendation 02-23, since they address only the entry of products into the country, whereas paragraph 9 of the Recommendation contains a wider array of measures to be taken (e.g. prohibitions on transshipment, in paragraph 9(a)). The remainder of paragraph 9 does not appear to be implemented by any other provisions of the final rule. It is not clear why that is the case. It may be that other mandatory provisions of paragraph 9 have been implemented through regulations made under legislation other than the ATCA (e.g. legislation relating to maritime transport; see also Nicholson Act below).

Magnuson-Stevens Fishery Conservation and Management Act

As noted above, the Magnuson-Stevens Fishery Conservation and Management Act ('MSA'; 16 U.S.C. §§ 1801 et seq.) potentially applies to the executive when making rules under the ATCA. That is because Atlantic tuna and tuna-like species (as 'highly migratory species') are subject to domestic management under fishery management plans prepared pursuant to the MSA. The ATCA provides that any regulations issued to implement an ICCAT Recommendation 'shall, to the extent practicable, be consistent with fishery management plans prepared and implemented under the [MSA]'.⁵¹⁶

⁵¹⁵ See: <www.ogc.doc.gov/ogc/legreg/testimon/109s/balsigero216.htm>.

⁵¹⁶ § 971d(c)(1)(C).

C. Nicholson Act

§ 251(a) of the Nicholson Act (46 App. U.S.C. §§ 251 et seq.)⁵¹⁷ states that:

Except as otherwise provided by treaty or convention to which the United States is a party, no foreign-flag vessel shall, whether documented as a cargo vessel or otherwise, land in a port of the United States its catch of fish taken on board such vessels on the high seas or fish products processed therefrom, or any fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products. The Secretary of Commerce may issue any regulations that the Secretary considers necessary to obtain information on the transportation of fish products by vessels of the United States for foreign fish processing vessels to points in the United States.⁵¹⁸

The effect of § 251(a) is that certain fish or products cannot be landed in US ports, irrespective of whether the vessel in question is on the IUU list established pursuant to ICCAT Recommendation 02-23. As can be seen, the effect of § 251(a) is subject to any ‘treaty or convention to which the United States is a party’.

⁵¹⁷ See: <www4.law.cornell.edu/uscode/html/uscode46a/usc_sec_46a_00000251----000-.html>.

⁵¹⁸ § 251(b) creates an exception to § 251(a) regarding certain fish landed in the US Virgin Islands.