

# **Compliance Enforcement in Regional Fisheries Management Organisations to which Australia is a Party**

by

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To my mother, Karen, for her confidence in me; my father, Gordon,  
for his friendship; and to my sister, Emma, for believing in me.

## **Declaration of Originality**

I, Elise Anne Clark, declare that this thesis, which is submitted in fulfillment of the requirements for the award of Master of Laws through the University of Tasmania, contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of the my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.

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## **Abstract**

One of the key problems facing regional fisheries management organisations (RFMOs) in the twenty-first century is a lack of compliance by flag States. Non-compliance by both contracting and non-contracting parties to RFMOs threatens the effectiveness of a regime which relies almost entirely upon cooperation and the interests of individual States to function. The political will of States to effectively address problems caused by non-compliance including, inter alia, illegal, unreported and unregulated (IUU) fishing, has recently been deemed wanting.

This thesis is concerned with the need for better implementation of compliance enforcement mechanisms by RFMOs to which Australia is a party (AusRFMOs). It examines the range of compliance enforcement mechanisms available to RFMOs and evaluates how AusRFMOs are currently tackling the problem of non-compliance. It recognises the difficulties faced by RFMOs in implementing their mandate and demonstrates that policy and diplomatic avenues along with a range of countermeasures may be, and have been, evoked by RFMOs to tackle flag State non-compliance.

This thesis concludes that AusRFMOs could improve their compliance enforcement across the board. It demonstrates that despite the widespread adoption of mechanisms such as IUU vessel lists, there remains a gap between the theoretical mandate of these organisations and their adoption of measures to enable more effective enforcement. The thesis submits that AusRFMOs must better utilise their enforcement capabilities if they are to fulfil the role envisaged for them under the United Nations Convention on the Law of the Sea and other associated international agreements. It concludes that AusRFMOs should take steps to move beyond their role as cooperative entities towards an enforcement capacity if they are to make a real contribution to achieving sustainable global fisheries.

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For my sense of purpose and engagement throughout the course of my Masters studies, I am entirely indebted to my friend and mentor Dr. Gail Lugten. Gail has guided me, consoled me, entertained me and most importantly, has been there beside me as an emotional and intellectual stalwart. For her patience, friendship and for the joy she brings to the mundane, I am grateful. I look forward to our future endeavours together as friends and colleagues.

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## Acronyms

ACAP	Agreement for the Conservation of Albatrosses and Petrels
AusRFMO	Regional Fisheries Management Organisation to which Australia is a Party
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCMs	Participating Territories
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDP	Catch Documentation Programme
CDS	Catch Documentation Scheme
CNP	Cooperating Non-Party
COFI	Committee on Fisheries
CP	Cooperating Party
CWP	Coordinating Working Party on Fishery Statistics
DOCEP	Development of a Compliance Evaluation Procedure
DWFN	Distant Water Fishing Nation
EC	European Community
EEZ	Exclusive Economic Zone
EFP	Experimental Fishing Programme
FAO	Food and Agriculture Organisation of the United Nations
FFA	Forum Fisheries Agency

FIRMS	Fisheries Resources Monitoring System
FOC	Flag of Convenience
FONC	Flag of Non-Compliance
IATTC	Inter-American Tropical Tuna Commission
ILC	International Law Commission
IOTC	Indian Ocean Tuna Commission
IPHC	International Pacific Halibut Commission
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
IUU	Illegal, Unreported and Unregulated Fishing
LOSC	United Nations Convention on the Law of the Sea
MHLC	Multilateral High Level Conference
NCP	Non-Cooperating Party
NGO	Non-Governmental Organisation
PSM	Port State Measures
RFBs	Regional Fisheries Bodies
RFMO	Regional Fisheries Management Organisation
RSN	Regional Fishery Body Secretariats Network
SBT	Southern Bluefin Tuna
SCIC	Standing Committee on Implementation and Compliance

SEAFO	South East Atlantic Fisheries Organisation
SIODFA	South Indian Ocean Deepwater Fishers Association
SOFIA	State of World Fisheries and Aquaculture
SPC	Secretariat of the Pacific Community
SPRFMO	South Pacific Regional Fisheries Management Organisation
TAC	Total Allowable Catch
TIS	Trade Information Scheme
UNFSA	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
VMS	Vessel Monitoring System
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organisation



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## CHAPTER 1 INTRODUCTION

### 1.1 Introduction

The concept of flag State jurisdiction, whereby the activities of fishing vessels are regulated by the State in which they are registered,<sup>1</sup> has survived over centuries to remain the overriding principle of the law of the sea. The contemporary fisheries regime, embodied in the 1982 United Nations Convention on the Law of the Sea (LOSC),<sup>2</sup> adopts the principle of flag State jurisdiction in article 91.<sup>3</sup> While this principle is subject to a number of conditions, including those laid down by the LOSC,<sup>4</sup> such conditions have proven difficult to enforce. Today, as was the case in the era prior to adoption of the LOSC, the regulation of the activities of high seas<sup>5</sup> fishing vessels resides first and foremost with the jurisdiction of the flag State.

The notion of flag State jurisdiction originated with the theories of Hugo Grotius, first espoused in 1608 through his publication *Mare Liberum*.<sup>6</sup> Grotius posited that the world's marine resources were 'vast, limitless and inexhaustible of use'<sup>7</sup> and as such, they could not be owned. He reasoned that if no State could occupy the seas, they could not be possessed and therefore regulation of fish stocks would be highly impractical, if not impossible.<sup>8</sup> As such, the rule of the 'freedom of the seas',<sup>9</sup> whereby global fisheries resources are considered free to all, was born.

The freedom to fish on the high seas is granted to all States whether coastal or landlocked.<sup>10</sup> Upon the registration of a vessel by a certain State, that State gains exclusive jurisdiction over the vessel's activities in international waters.<sup>11</sup> Similarly, once granted the nationality of a flag State, a vessel is at liberty to take from the 'common pool' resources of the high seas.<sup>12</sup> However the application of this freedom has become increasingly dangerous as the exhaustible nature of fish stocks has been realised.<sup>13</sup>

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<sup>1</sup> If a vessel is fishing on the high seas, 'the flag State has the exclusive responsibility for controlling the activities of the vessel.' See Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 110.

<sup>2</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>3</sup> *Ibid* article 91.

<sup>4</sup> *Ibid* articles 91, 94.

<sup>5</sup> Article 86 of the LOSC defines the high seas as '...all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.'

<sup>6</sup> Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1608), Translated by Ralph Van Deman Magoffin, Carnegie Endowment for International Peace (1916) (*Mare Liberum*)

<sup>7</sup> Rosemary Rayfuse, *Non-flag State Enforcement in High Seas Fisheries* (2004) 19.

<sup>8</sup> Gail Lugten, 'Galleons, Greed and Grotius' (2006) *Australia & New Zealand Law & History E-Journal* 1 <[http://www.anzhsejournal.auckland.ac.nz/pdfs\\_2006/Others\\_2\\_Lugten.pdf](http://www.anzhsejournal.auckland.ac.nz/pdfs_2006/Others_2_Lugten.pdf)> at 12 December 2011.

<sup>9</sup> LOSC, above n 2, article 87(1).

<sup>10</sup> *Ibid* articles 87, 90.

<sup>11</sup> *Ibid* article 91.

<sup>12</sup> Justice John Middleton, 'Ship Registration and the Role of the Flag' (Paper presented at the Admiralty Education, 2007). Presentation available on line at < [http://www.fedcourt.gov.au/how/admiralty\\_papersandpublications.html](http://www.fedcourt.gov.au/how/admiralty_papersandpublications.html)>

<sup>13</sup> Lugten, above n 8, 6.

In January 2011, the Twenty-ninth meeting of the United Nations Food and Agriculture Organisation (FAO) Committee on Fisheries (COFI-29)<sup>14</sup> was presented with a report entitled, “The State of World Fisheries and Aquaculture - 2010” (SOFIA-2010).<sup>15</sup> The report indicated that around 50 percent of global marine fish stocks are fully exploited,<sup>16</sup> whereas around 32 per cent of global marine fish stocks are classified as overexploited, depleted or recovering from depletion.<sup>17</sup> As a result, today, only 15 percent of global marine fish stocks are estimated to be underexploited or moderately exploited.<sup>18</sup>

These figures demonstrate that the conception of the high seas as being ‘free to all’ has resulted in global marine fish stocks falling victim to the ‘tragedy of the commons’.<sup>19</sup> It was Garrett Hardin who, in the 1960s, first articulated the phenomenon which occurs when many people have access to, ‘a desired but limited resources that nobody owns or nobody can control’<sup>20</sup>. In a fisheries context, this phenomenon has resulted from individual States or individual fishers acting in their own self interest rather than for the common good. Hardin proposed that in such a situation, all will eventually lose as the resource is depleted.<sup>21</sup>

Arguably then, the very factors that provide the foundation of the contemporary law of the sea regime, including the freedom to fish, flag State jurisdiction and common resource allocation, are the same factors that have contributed to the collapse of global fisheries. As a result, a complex global regulatory framework of organisations, treaties, non-binding international agreements and private arrangements has been created.<sup>22</sup> This system has recently been described as a, ‘decentralised but still relatively coherently co-ordinated system’<sup>23</sup> of production, trade and governance which has become increasingly globalised in recent years.<sup>24</sup>

In this challenging and complex fisheries environment, a particular group of organisations, which provide the subject of this thesis, operate as a mechanism through which States can cooperate

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<sup>14</sup> COFI meets biennially to review issues of an international character and to discuss the program of work of FAO in fisheries and aquaculture. See Food and Agriculture Organisation of the United Nations: Fisheries and Aquaculture Department, *COFI: Committee on Fisheries* (2011) <<http://www.fao.org/fishery/about/cofi/en>> at 15 December 2010.

<sup>15</sup> Food and Agriculture Organisation of the United Nations (FAO), *State of World Fisheries and Aquaculture 2010* (Rome: 2010).

<sup>16</sup> Ibid 8. SOFIA-2010 recognises stocks as ‘fully exploited’ when they are at or close to their maximum sustainable productions.

<sup>17</sup> Ibid. SOFIA-2010 reports that 28 percent of marine fish stocks are estimated to be overexploited, 3 percent depleted and 1 percent recovering from depletion.

<sup>18</sup> FAO, above n 15.

<sup>19</sup> Garret Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1234.

<sup>20</sup> Callum Roberts, *The Unnatural History of the Sea* (2007) 106.

<sup>21</sup> Ibid 107.

<sup>22</sup> Martin Tsamenyi et al, ‘Fairer Fishing? The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries’ (Economic Paper No 86 in the Commonwealth Economic Paper Series, Commonwealth Secretariat, 2009) 6.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 4.

in the interest of conserving and managing marine living resources.<sup>25</sup> These organisations, known as 'regional fisheries management organisations' (RFMOs), operate as key actors in the global framework of coastal states, flag states, fishing states, port states, inspecting states, market states, fishing fleets and companies, intergovernmental organisations and non-governmental organisations (NGOs).<sup>26</sup>

RFMOs have been defined by FAO as, 'intergovernmental fisheries organisations or arrangements...that have the competence to establish fisheries conservation and management measures'.<sup>27</sup> They are established via convention or agreement between States with a common interest in fishing a specific area on the high seas or fishing for a specific species therein. It is their unique ability to develop conservation measures to which States Parties must adhere that sets RFMOs apart from another group of fisheries organisations which operate in respect of high seas fisheries:<sup>28</sup> regional fisheries bodies<sup>29</sup> (RFBs). On an institutional level, RFMOs provide the basis for international cooperation in the global effort to conserve high seas fish stocks and preserve the vital marine ecosystems that exist in these areas.

While many RFMOs operate in a specified area of the high seas,<sup>30</sup> others have a more specific mandate to regulate certain species of fish stocks on the high seas alone (see Table 1).<sup>31</sup> To date, RFMOs have been established to regulate fishing for species ranging from Antarctic krill<sup>32</sup> in the southern ocean, to Atlantic tuna;<sup>33</sup> with global coverage of the world's oceans a priority for the FAO (see Figure 1).<sup>34</sup> To this end, several new RFMOs have been adopted in recent years,

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<sup>25</sup> Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007) 1.

<sup>26</sup> Tsamenyi, above n 22.

<sup>27</sup> United Nations Food and Agriculture Organisation, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted by consensus at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 102th Session of the FAO Council.

<sup>28</sup> Judith Swan, 'Decision-Making in Regional Fishery Bodies or Arrangements: the Evolving Role of RFBs and International Agreement on Decision-Making Processes' (FAO Fisheries Circular - C995, 2004). Available on line at <<http://www.fao.org/docrep/006/Y5357E/y5357e00.HTM>>

<sup>29</sup> For a complete list of regional fisheries bodies in existence see United Nations Division for Ocean Affairs and the Law of the Sea website: <<http://www.un.org/Depts/los/Links/IGO-links-fish.htm>>

<sup>30</sup> RFMOs such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) for instance operate within an Area defined by the agreement. For CCAMLR's boundaries see Commission for the Conservation of Antarctic Marine Living Resources, *Convention Area Map* (2011) <<http://www.ccamlr.org/pu/e/conv/map.htm>> at 12 September 2010.

<sup>31</sup> The Commission for the Conservation of Southern Bluefin Tuna (CCSBT), for instance, was established to address the impact that overfishing was having on a particular species. See Commission for the Conservation of Southern Bluefin Tuna, *About the Commission* (2010) <<http://www.ccsbt.org/docs/about.html>> at 5 September 2010.

<sup>32</sup> The conservation of Antarctic krill, or *Euphausia superba*, was a motivating factor in the establishment of the CAMLR Convention. See Australian Antarctic Division, *Krill: Magicians of the Southern Ocean* (2010) <<http://www.antarctica.gov.au/about-antarctica/fact-files/animals/krill/krill-magicians-of-the-southern-ocean>> at 15 September 2010.

<sup>33</sup> International Convention for the Conservation of Atlantic Tunas, *Introduction* (2010) <<http://www.iccat.int/en/introduction.htm>> at 10 September 2010.

<sup>34</sup> Committee on Fisheries, 'Strengthening Regional Fisheries Management Organisations and their Performance Including the Outcome of the 2007 Tuna RFMOs Meeting' (Paper presented at the Twenty Seventh Session of the Committee on Fisheries, Rome, Italy, 5 - 9 March 2007) 2.



including one to regulate the deep-sea fisheries of the Southern Indian Ocean<sup>35</sup> and another to span the numerous fisheries that exist in the South Pacific Ocean.<sup>36</sup>

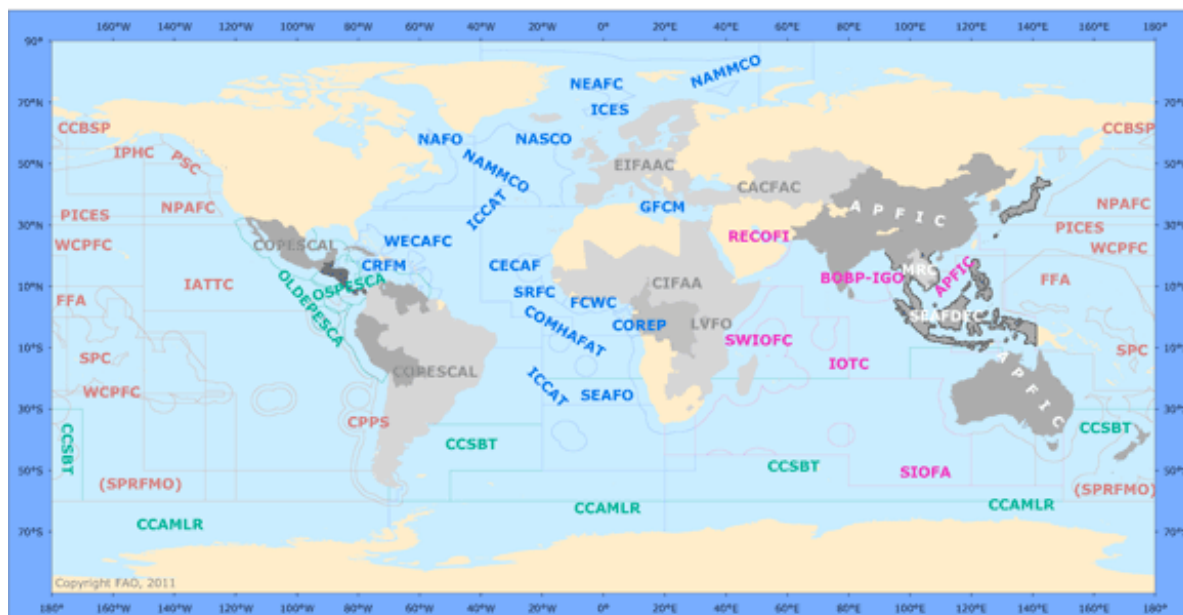


Figure 1. Regional Fisheries Bodies and Regional Fisheries Management Organisations<sup>37</sup>

This thesis is limited to an analysis of the performance of RFMOs to which Australia is a party (AusRFMOs). The AusRFMOs examined in this thesis include:

- the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),
- the Commission for the Conservation of Southern Bluefin Tuna (CCSBT),
- the Indian Ocean Tuna Commission (IOTC), and
- the Western and Central Pacific Fisheries Commission (WCPFC).

For the purposes of this thesis, the term 'AusRFMO' will also include the South Indian Ocean Fisheries Agreement (SIOFA) and the South Pacific Regional Fisheries Management Organisation (SPRFMO).

This decision is justified in that while Australia has not yet ratified the SIOFA, Australia has played crucial role in the negotiation of this instrument and may extend this involvement in the coming years. The SPRFMO is considered as an AusRFMO even though it has not entered into force for the same reasons.

<sup>35</sup> The Southern Indian Ocean Fisheries Agreement entered into force in August 2010. Fish Information and Services, *Southern Indian Ocean Fisheries Agreement Comes into Force* (2010) <<http://fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=37823&ndb=1&df=0>> at 30 August 2010.

<sup>36</sup> The South Pacific Regional Fisheries Management Organisation (SPRFMO) has not yet entered into force but the agreement has been concluded. See South Pacific Regional Fisheries Management Organisation, *Welcome to the South Pacific RFMO* (2010) <<http://www.southpacificrfmo.org/>> at 30 August 2010.

<sup>37</sup> Food and Agriculture Organisation of the United Nations, *Regional Fisheries Bodies* (2011) <<http://www.fao.org/fishery/rfb/en>> at 2 January 2010.

**Table 1. Regional Fisheries Management Organisations Currently in Force<sup>38</sup>**  
**(RFMOs considered in this thesis highlighted in bold)**

<i>Date of Entry Into Force</i>	<i>Regional Fisheries Management Organisation</i>	<i>Acronym</i>
1923	International Pacific Halibut Commission	IPHC
1946	International Whaling Commission	IWC
1950	Inter-American Tropical Tuna Commission	IATTC
1952	General Fisheries Council for the Mediterranean	GFCM
1969	International Convention for the Conservation of Atlantic Tunas	ICCAT
1979	Northwest Atlantic Fisheries Organization	NAFO
<b>1982</b>	<b>Convention on the Conservation of Antarctic Marine Living Resources</b>	<b>CCAMLR</b>
1982	North-East Atlantic Fisheries Commission	NEAFC
1983	North Atlantic Salmon Conservation Organization	NASCO
1985	Pacific Salmon Commission	PSC
1993	North Pacific Anadromous Fish Commission	NPAFC
<b>1994</b>	<b>Commission for the Conservation of Southern Bluefin Tuna</b>	<b>CCSBT</b>
1996	Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea	CCBSP
<b>1996</b>	<b>Indian Ocean Tuna Commission</b>	<b>IOTC</b>
2003	South East Atlantic Fisheries Organization	SEAFO
<b>2004</b>	<b>Western and Central Pacific Fisheries Commission</b>	<b>WCPFC</b>
<b>2009<sup>39</sup></b>	<b>South Pacific Regional Fisheries Management Organisation</b>	<b>SPRFMO</b>
<b>2010</b>	<b>South Indian Ocean Fisheries Agreement</b>	<b>SIOFA</b>

<sup>38</sup> This table is adapted from one contained in a briefing paper published by Michael Lodge. For the purposes of this thesis, the International Baltic Sea Fishery Commission (IBSFC) has not been included as it has been defunct since January 2006 and the Asian Pacific Fishery Commission has not been included as this organisation does not have the competence to establish conservation and management measures. See Michael Lodge, 'Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations' (Briefing Paper 07/01, Energy, Environment and Development Programme, Chatham House, 2007).

<sup>39</sup> 2009 is the date of signature of the SPRFMO. This Agreement has not yet entered into force. See South Pacific Regional Fisheries Management Organisation, *Welcome to the South Pacific RFMO* (2010) <<http://www.southpacificrfmo.org/>> at 30 August 2010.

In a modern fisheries context, reliance on RFMOs to recover species from the brink of extinction and to better regulate fish stocks for which they are responsible continues to grow.<sup>40</sup> However RFMOs must function under international principles established via the LOSC including the basic principle of flag State jurisdiction. In this way, RFMO effectiveness is limited by the individual interests of States Parties and over the years, States have demonstrated a lack of political will to conserve the world's fish stocks. As a result, RFMOs have struggled to meet expectations of their regulatory capacity and their effectiveness has been challenged.

This chapter analyses how the international regime has evolved to impose new expectations on RFMOs. The first section of this chapter explores the evolution of the international fisheries regime to demonstrate how the role of RFMOs has changed with time. It argues that prior to the introduction of the LOSC, the main function of RFMOs was to preserve or improve the fishing rights of individual States but that the advent of the contemporary law of the sea regime created a new role for RFMOs. The second section of the chapter outlines the objective, structure and significance of this thesis.

## **1.2 Fisheries management prior to the introduction of the contemporary law of the sea regime**

The inaccessible nature of global marine resources was significantly reduced with the development of superior fishing technology in the early 1900s.<sup>41</sup> The transition of many vessels from sail to steam power 'changed all the rules of fishing',<sup>42</sup> with steam-powered vessels having no need to wait for wind or tide conditions to be favourable in order to fish.<sup>43</sup> With this introduction, individuals were able to extend their fishing practices well beyond immediate coastal areas and the first early examples of States realising their competing interests in a single fishery arose.

In 1923, the International Pacific Halibut Commission (IPHC) was established by a Convention between the governments of Canada and the United States of America.<sup>44</sup> Originally named the 'International Fisheries Commission' in recognition of the non-existence of other international fisheries bodies,<sup>45</sup> the IPHC sought to manage stocks of Pacific Halibut (*Hippoglossus*

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<sup>40</sup> An example of increasing reliance on RFMOs can be seen in the September 2009 decision of European Union Member States not to implement an international ban on exports of Atlantic bluefin tuna. This decision placed the survival of this depleted species solely within the ambit of the International Commission for the Conservation of Atlantic Tunas (ICCAT). See World Fishing Today, *Commission statement on the decision by member States not to support Monaco's proposal to ban international trade in Atlantic bluefin tuna* (2009) <<http://www.worldfishingtoday.com/news/default.asp?nyId=4079>> at 24 September 2009.

<sup>41</sup> Lodge et al, above n 25, 2.

<sup>42</sup> Roberts, above n 20, 147.

<sup>43</sup> Ibid.

<sup>44</sup> International Pacific Halibut Commission, *About IPHC* (2009) <<http://www.iphc.washington.edu/halcom/about.htm>> at 8 August 2009.

<sup>45</sup> Ibid.

*stenolepis*) harvested by both Canada and the USA. The original mandate of the IPHC was to permit the optimum utilisation of stocks of Pacific Halibut so that the maximum benefit could be derived by both States equally.<sup>46</sup> While the preservation of the species may have been motivated by the economic interest of the parties concerned, the IPHC represents the first example of a RFMO being created to conserve depleted deep sea resources.<sup>47</sup>

With growing realisation of the conflicting fisheries interests of States, the newly created FAO took steps to implement several regional fisheries organisations.<sup>48</sup> In 1952, the International Law Commission (ILC) recommended that an obligation be imposed on States to accept, 'any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area...'<sup>49</sup>

In 1955, the Rome Technical Conference on the Conservation of the Living Resources of the Sea<sup>50</sup> (the Rome Conference) developed the findings of the ILC and concluded that international conservation organisations should be established to assist in the conservation of marine living resources.<sup>51</sup> It was at the Rome Conference that the idea that international cooperation could be achieved through the establishment of regional conventions regulating a specific oceanic area or species of fish was first explored.<sup>52</sup>

The concept of regional regulation was developed at the first United Nations Convention on the Law of the Sea (UNCLOS 1).<sup>53</sup> The Convention on Fishing and Conservation of the Living Resources of the High Seas (the Conservation Convention)<sup>54</sup> was adopted at this meeting and later became the source of articles 116-120 of the 1982 LOSC.<sup>55</sup> Article 4 of the Conservation Convention states that where the nationals of two or more countries are engaged in fishing for the same stocks, they shall enter into negotiations with a view to agreeing upon measures to conserve the living resources affected.<sup>56</sup>

Further to this, article 1(2) of the Conservation Convention provides that all States, 'have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Gail Lugten, 'Cooperation and Regional Fisheries Management' (2000) 30 *Environmental Policy and Law* 251, 4.

<sup>49</sup> Alan E. Boyle and David Freestone, *International Law and Sustainable Development* (1999) 115.

<sup>50</sup> 'Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (1955)' (UN Doc. A/CONF.10/6, 1955).

<sup>51</sup> Lodge et al, above n 41, 2.

<sup>52</sup> Ibid.

<sup>53</sup> Tullio Treves and Laura Pineschi, *The Law of the Sea: the European Union and its Member States* (1997) 41.

<sup>54</sup> *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285, (entered into force 20 March 1966).

<sup>55</sup> Treves and Pineschi, above n 53.

<sup>56</sup> Conservation Convention, above n 54.

nationals as may be necessary for the conservation of the living resources of the high seas.<sup>57</sup> While the specific requirement that States cooperate through regional organisations was not included until the compilation of the LOSC in 1982, these provisions formed the basis for the contemporary fisheries regime.

With the implementation of the 200 nautical mile exclusive economic zone (EEZ) in the mid to late 1970s,<sup>58</sup> the need for States to negotiate fisheries arrangements to preserve the interests of distant water fishing nations (DWFNs) became apparent.<sup>59</sup> EEZs brought 90-95% of the world's fisheries under the national jurisdiction of coastal States and prompted a huge shift in the manner in which fish stocks were regulated.<sup>60</sup> By 1977, most States were exploring their new boundaries and tension between DWFNs and coastal States increased.<sup>61</sup> Despite these tensions, cooperation through the creation of RFMOs in the years leading up to the 1982 LOSC was not widespread.<sup>62</sup>

### 1.3 The evolution of RFMOs under international law

The contemporary conception of RFMOs as being at the heart of international fisheries management<sup>63</sup> is a notion which has evolved with the introduction of significant fisheries agreements following the creation of the LOSC. While the LOSC remains the most significant development in the modern law of the sea, it has become clear in the years following the creation of this agreement that its provisions have been insufficient to prevent the decline of fish stocks, particularly those in existence on the high seas.

This section determines how and why RFMOs evolved to fill the gaps in the international regime by analysing the provisions of the four major hard law<sup>64</sup> fisheries instruments,<sup>65</sup> as well as one

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<sup>57</sup> Ibid article 1(2).

<sup>58</sup> Lodge et al, above n 25, 2.

<sup>59</sup> *High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas. Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, ICUN and the Earth Institute at Colombia University* 40.

<sup>60</sup> Quentin Hanich and Professor Martin Tsamenyi, 'Exclusive Economic Zones, Distant Water Fishing Nations and Pacific Small Island Developing States: Who Really Gets All the Fish?' (Paper presented at the Sharing the Fish Conference, Perth, Western Australia, March 2006).

<sup>61</sup> Lodge et al, above n 25, 3.

<sup>62</sup> Prior to the introduction of the LOSC in 1982, only five RFMOs were in existence: the General Fisheries Commission for the Mediterranean (GFCM, 1952), the Inter-American Tropical Tuna Commission (IATTC, 1950), the International Convention for the Conservation of Atlantic Tunas (ICCAT, 1969), the International Pacific Halibut Commission (IPHC, 1923) and the Northwest Atlantic Fisheries Organisation (NAFO, 1979).

<sup>63</sup> Lodge et al, above n 25, 'Foreword'.

<sup>64</sup> "Hard law" instruments are classified by their legally binding nature. Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, 'Soft Law, Hard Law and Effective Implementation of International Environmental Norms' (2006) 6(3) *Global Environmental Politics* 104.

<sup>65</sup> The four major hard law instruments are identified by Palma, Tsamenyi and Edeson as including the LOSC, FAO Compliance Agreement, UNFSA and the Port State Measures Agreement. Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 57.

important soft law<sup>66</sup> instrument.<sup>67</sup> This section demonstrates that expectations that these organisations would, ‘rescue the bulk of the world’s fisheries from the tragedy of the commons’<sup>68</sup> were perhaps unrealistic in light of their limited mandates and cooperative foundation.

### 1.3.1 The United Nations Convention on the Law of the Sea

The LOSC is the founding agreement of the contemporary international fisheries regime and was formulated in an era of growing concern over the finite nature of marine living resources.<sup>69</sup> It establishes a comprehensive legal regime which requires States to cooperate in the conservation and management of specific stocks<sup>70</sup> and establishes the sovereignty of flag States on the high seas.<sup>71</sup> The LOSC urges all States to take action at sub-regional, regional and global levels to protect and preserve the marine environment.<sup>72</sup> This foundational agreement is today regarded as a ‘framework Convention’ in that it articulates core legal principles but is unable to provide for an effective management regime.<sup>73</sup> As a result, a plethora of hard and soft law instruments have been developed post-LOSC to address difficulties in the enforcement of its provisions.

The freedom to fish is embodied in article 87 of the LOSC.<sup>74</sup> This freedom is granted on the condition that States adhere to other provisions in the LOSC and is subject to customary rules of international law.<sup>75</sup> The freedom must also be exercised, ‘with due regard for the interests of other States’<sup>76</sup> and in accordance with the provisions of Part XI, Section 2 of the LOSC. Section 2 of Part XI contains articles 117 and 118 of the LOSC which provide, *inter alia*, that it is the duty of States to cooperate in the conservation and management of marine living resources on the high seas.

In articles 63 and 64, the LOSC requires States to cooperate via appropriate subregional or regional organisations<sup>77</sup> and appropriate international organisations.<sup>78</sup> In articulating the duty to cooperate, article 118 also provides that States are to cooperate to, ‘establish subregional and

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<sup>66</sup> “Soft law” refers to international norms that are non-legally binding by nature but still have legal relevance. See Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, ‘Soft Law, Hard Law and Effective Implementation of International Environmental Norms’ (2006) 6(3) *Global Environmental Politics* 104.

<sup>67</sup> The IPOA-IUU will also be considered in this section.

<sup>68</sup> Lodge et al, above n 25, ‘Foreword’.

<sup>69</sup> Denzil Miller and Erik Molenaar, ‘The SEAFC Convention: A Comparative Analysis in a Developing Coastal State Perspective’ (2006) 20 *Ocean Yearbook* 305, 361.

<sup>70</sup> LOSC, above n 2, articles 63 and 64.

<sup>71</sup> *Ibid* article 91.

<sup>72</sup> Miller and Molenaar, above n 69, 362.

<sup>73</sup> Gail Lugten, ‘The Role of National Governments in Implementing Criteria and Actions for Flag State Performance’ (Paper presented at the Expert Consultation on Flag State Performance, Rome, Italy, 23 - 26 June 2009) 24.

<sup>74</sup> Article 87.1.(e) establishes the freedom of fishing as being subject to conditions laid down in section 2 of the LOSC.

<sup>75</sup> Rosemary Rayfuse, ‘Countermeasures and High Seas Fisheries Enforcement’ (2004) LI *Netherlands International Law Review* 4153.

<sup>76</sup> LOSC, above n 2, article 87(2).

<sup>77</sup> *Ibid* article 63.

<sup>78</sup> *Ibid* article 64.

regional fisheries organisations' to conserve and manage the living marine resources of the high seas.

Despite outlining the main function of RFMOs, the LOSC fails to explain how RFMOs are to go about allocating the relative fishing rights of States. This lacuna has been the cause of substantial disagreement within RFMOs and has even prevented the acceptance of scientifically sound catch quotas within certain RFMOs.<sup>79</sup> No provision is made for the internal enforcement of RFMO conservation measures and as participation in RFMOs remains voluntary, there is little that individual RFMOs can do to ensure that their measures will have their intended effect.<sup>80</sup>

### 1.3.2 The FAO Compliance Agreement

In the decade following the creation of the LOSC, a vast gap in the regulatory regime emerged. As a result, in 1993, the 'Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas' (FAO Compliance Agreement)<sup>81</sup> was created. A binding agreement, the FAO Compliance Agreement was established to strengthen the requirement that States only register vessels over which they are able to exercise effective control.<sup>82</sup> As such, it was hoped that the FAO Compliance Agreement would solve the problem of 're-flagging' of vessels which is a key mechanism through which illegal, unreported and unregulated (IUU) fishing operations are carried out.

The FAO Compliance Agreement specifies measures that flag States must implement to ensure that their vessels do not undermine the conservation and management measures of RFMOs.<sup>83</sup> It provides that flag States must take such measures as may be necessary to ensure that fishing vessels entitled to fly their flag comply with the regulatory authority of RFMOs.<sup>84</sup> The FAO Compliance Agreement also requires Parties to cooperate in the implementation of the Agreement, particularly with regards to information sharing.

While the FAO Compliance Agreement constitutes a significant step towards clarifying the provisions of the LOSC, this Agreement has suffered a similar fate to that of many other hard and

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<sup>79</sup> In the fishing period spanning 1997 – 2003, the CCSBT was unable to establish quota allocations for its contracting States. Commission for the Conservation of Southern Bluefin Tuna, Part Two, Report of the Independent Expert, September 2008. Available on line at

<[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/PerformanceReview\\_IndependentExpertsReport.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/PerformanceReview_IndependentExpertsReport.pdf)>

<sup>80</sup> Pedro Pintassilgo et al, 'Stability and Success of Regional Fisheries Management Organisations' (Working Paper No 20/2008, Coalition Theory Network Working Papers, 2008).

<sup>81</sup> *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, opened for signature 24 November 1993, 2221 UNTS 39486 (entered into force 24 April 2003).

<sup>82</sup> High Seas Task Force, above n 59, 54.

<sup>83</sup> Peter Flewelling, *Recent Trends in Monitoring Control and Surveillance Systems for Capture Fisheries* (2003) 17.

<sup>84</sup> FAO Compliance Agreement, above n 81, article III(a).

soft international treaties introduced post-LOSC: insufficient ratification by flag States.<sup>85</sup> As a result, the impact of its provisions has been limited.

### 1.3.3 The United Nations Fish Stocks Agreement

Following the creation of the FAO Compliance Agreement, it became clear that the management of straddling and highly migratory fish stocks had still not been adequately addressed in the legal framework and that these stocks had been subjected to heavy overexploitation.<sup>86</sup> In 1995, the 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks'<sup>87</sup> (UNFSA) was formulated to promote the long-term conservation and sustainable use of straddling and highly migratory stocks.<sup>88</sup> The fundamental purpose of the UNFSA is to implement the provisions of the LOSC relating to these specific stocks and to ensure that no area of the high seas remains unregulated.<sup>89</sup>

UNFSA extends the ambit of RFMOs to regulate fisheries within areas of national jurisdiction as well as on the high seas.<sup>90</sup> It lists the matters upon which States are to agree in order to achieve the long term sustainability of fisheries and in doing so, defines the desirable characteristics of RFMOs.<sup>91</sup> To this end, Part III of UNFSA contains detailed provisions about the duty to cooperate and elaborates the manner in which this duty is to be given effect. UNFSA provides that States are required to give effect to their duty to cooperate by becoming members of relevant RFMOs.<sup>92</sup> It goes on to state that where no 'subregional or regional fisheries management organization or arrangement' exists to conserve a straddling or highly migratory fish stock, States shall cooperate to establish such an organisation.<sup>93</sup>

However, UNFSA provides that this duty cannot be discharged by flag States merely through the creation of an RFMO. It requires that States not only become members of RFMOs, but also that

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<sup>85</sup> This low level of ratification can in part be explained by the fact that the European Community's ratification of the Compliance Agreement was counted as one acceptance for its members whereas other international agreements, including the UNFSA, have included the individual ratifications of European Community members.

<sup>86</sup> Ibid.

<sup>87</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001).

<sup>88</sup> Earth Negotiations Bulletin, *Summary of the Eighth Round of Informal Consultations of State Parties to the UN Fish Stocks Agreement* (2009) <<http://www.iisd.ca/vol07/enb0764e.html>> at 24 August 2009.

<sup>89</sup> Ibid.

<sup>90</sup> Michael Lodge, 'Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations' (Briefing Paper 07/01, Energy, Environment and Development Programme, Chatham House, 2007) 3.

<sup>91</sup> Ibid. Lodge articulates a list of items upon which States should agree including: "agreement on conservation and management measures to ensure long-term sustainability; agreement on participatory rights such as allocations of allowable catch or levels of fishing effort; agreement on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner; and agreement on mechanisms for obtaining scientific advice and ensuring compliance with and enforcement of conservation and management measures."

<sup>92</sup> UNFSA, above n 87, article 8(3).

<sup>93</sup> Ibid article 8(5).



they *participate in* and *respect* the conservation measures imposed by the RFMO concerned.<sup>94</sup> This requirement applies to members of RFMOs and non-members alike and establishes that where a State persistently fails to comply with UNFSA, it will be in breach of the duty to cooperate.<sup>95</sup>

UNFSA is regarded as a progressive agreement in that it places RFMOs at the heart of international fisheries management.<sup>96</sup> Unfortunately, many States who are parties to the LOSC have yet to sign on as parties to the UNFSA.<sup>97</sup> This has been attributed to the inclusion of effective enforcement mechanisms coupled with a lack of contemporary political will to seriously address the problem of IUU fishing.<sup>98</sup> As a result, high seas fisheries have continued to decline since the inception of this Agreement.<sup>99</sup>

### 1.3.4 The Port States Agreement

The most recent international agreement of significance to this thesis is the 'Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (PSM Agreement)<sup>100</sup> which was formulated in August 2009 under Article XIV of the FAO Constitution.<sup>101</sup> Prior to the introduction of the PSM Agreement, different States elected to adopt different standards and conditions of entry with regard to their ports.<sup>102</sup> The overall objective of the PSM Agreement is to establish common procedures for inspection and agreed measures against IUU fishing vessels.<sup>103</sup>

The PSM Agreement does this by aiming to prevent IUU catches from being offloaded and entering the market.<sup>104</sup> The PSM Agreement implements a consistent approach to:

Cooperation and exchange of information among national authorities and States, requirements for prior entry into port, use of ports, port inspection procedures, training of inspectors, the role of flag States, requirements of developing States, dispute settlement, dealing with non-parties, and monitoring and review of the implementation of the agreement.<sup>105</sup>

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<sup>94</sup> Ibid, article 8(6).

<sup>95</sup> Ibid, articles 7, 8(4).

<sup>96</sup> Lodge et al, above n 25, "Foreword".

<sup>97</sup> At the time of writing there are 159 State parties to the LOSC and only 75 State parties to UNFSA. Earth Negotiations Bulletin, *Summary of the Eighth Round of Informal Consultations of State Parties to the UN Fish Stocks Agreement* (2009) <<http://www.iisd.ca/vol07/enb0764e.html>> at 24 August 2009.

<sup>98</sup> Denzil Miller, Eugene Sabourenkov and David Ramm, 'Managing Antarctic Marine Living Resources: The CCAMLR Approach' (2004) 19(3) *The International Journal of Marine and Coastal Law* 317.

<sup>99</sup> Lodge et al, above n 25, "Foreword".

<sup>100</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted in November 2009 by the FAO Conference at its Thirty-sixth Session through Resolution No 12/2009, under Article XIV, paragraph 1 of the FAO Constitution.

<sup>101</sup> Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 64.

<sup>102</sup> Ibid 63.

<sup>103</sup> Ibid 64.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

If widely ratified, the PSM Agreement will assist RFMOs in developing procedure and conservation measures to combat IUU fishing.

### **1.3.5 The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

The 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing'<sup>106</sup> (IPOA-IUU) provides an important soft law reinforcement of the cooperative function of RFMOs in the specific context of a global fisheries problem. The IPOA-IUU defines a RFMO as, 'an intergovernmental fisheries organization or arrangement, as appropriate that has the competence to establish fishery conservation and management measures.'<sup>107</sup> It confirms the provisions of UNFSA by providing that States have a duty to cooperate with RFMOs and that this cooperation should occur directly through RFMOs to prevent, deter and eliminate IUU fishing.<sup>108</sup> If States refuse to participate in a RFMO, they should ensure their vessels do not undermine measures adopted by RFMOs.<sup>109</sup>

The role played by RFMOs under international law is reflected in paragraphs 78 – 84 of the IPOA-IUU.<sup>110</sup> These paragraphs recognise that cooperation by all States is vital for the success of measures taken by RFMOs and that States that are not members to RFMOs are not discharged from their obligation to cooperate.<sup>111</sup> The IPOA-IUU also requires States, acting through RFMOs, to strengthen and develop new ways to combat IUU fishing in conformity with international law.<sup>112</sup>

The IPOA-IUU also provides that RFMOs should encourage non-members with a real interest in the fishery concerned to become members or should at least develop ways to facilitate cooperation by non-members in the work of RFMOs.<sup>113</sup> It makes repeated reference to the manner in which the institutional mechanisms of RFMOs might be strengthened<sup>114</sup> to encourage and facilitate participation by non-contracting parties.<sup>115</sup> However, as the IPOA-IUU is voluntary by nature, uncooperative flag States threaten the effectiveness of its provisions. Regardless, the

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<sup>106</sup> IPOA-IUU, above n 27.

<sup>107</sup> Ibid paragraph 6(c).

<sup>108</sup> Ibid paragraph 28.

<sup>109</sup> Ibid paragraph 79.

<sup>110</sup> High Seas Task Force, above n 59, 45.

<sup>111</sup> IPOA-IUU, above n 27, paragraph 79.

<sup>112</sup> Ibid paragraph 80.

<sup>113</sup> FAO Technical Guidelines for Responsible Fisheries, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Food and Agriculture Organisation of the United Nations, Rome, 2002, 55. Available on line <<ftp://ftp.fao.org/docrep/fao/005/y3536e/y3536e00.pdf>>

<sup>114</sup> IPOA-IUU, above n 27, paragraphs 78 – 83.

<sup>115</sup> Ibid paragraph 83.

IPOA-IUU provides an important benchmark for States to meet through their adoption of the conservation measures of RFMOs, flag State measures and port State measures.<sup>116</sup>

#### **1.4 Objective of the thesis**

A lack of political will from flag States to conserve and manage the living resources of the high seas has challenged the effectiveness of RFMOs. Non-compliance by flag States with the regulatory function of these organisations and their obligations under international law continues to prevent the sustainable management of global fisheries. The objective of this thesis is to identify the compliance enforcement mechanisms that are available under the regional fisheries regime to combat acts of non-compliance and to determine how they are being implemented by RFMOs to which Australia is a party.

In order to achieve this objective, the thesis asks whether RFMOs themselves are capable of taking action against non-compliance. A qualitative analysis of AusRFMOs is conducted to identify which compliance enforcement mechanisms are currently in place as well any future compliance initiatives being investigated by these organisations. Using this data, the thesis analyses the degree of implementation of the different mechanisms in the six RFMOs under examination to determine how compliance enforcement in AusRFMOs can be improved.

#### **1.5 Thesis structure**

This introductory chapter has provided a background to the development of RFMOs under international law and has highlighted how non-compliance with the international regime is presented as a significant challenge to the sustainability of global fisheries. It has shown that there exists a heavy weight of expectation on RFMOs to facilitate cooperation from non-contracting parties, to develop strong institutional measures to improve cooperation and to regulate fisheries both within and outside national jurisdictions. It has demonstrated that in the contemporary law of the sea regime, the obligations of States, both members and non-members of RFMOs, have also grown.

*Chapter 2* - This chapter introduces the problem of non-compliance. It does so by conducting a study of one of the key problems arising from flag State non-compliance: the problem of IUU fishing. It begins by exploring the four key causes of IUU fishing including fleet overcapacity, the declaration of EEZs, the weaknesses of the international regime and the “common pool” nature

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<sup>116</sup> Ibid.

of global fish stocks. The chapter goes on to consider the theory behind non-compliance to pinpoint why States choose not to comply.

*Chapter 3* - The third chapter identifies and categorises nine key compliance enforcement mechanisms available to RFMOs in an effort to highlight their range and scope. The list includes: cooperative policies, policies relating to non-contracting parties, policies relating to cooperating parties, vessel lists, requests and negotiations, diplomatic demarches, trade-related measures, graded sanctions and boarding, inspection and arrest. The membership problem is also considered to highlight the different types of membership and differing obligations associated with the level of State membership.

*Chapter 4* - Working from the established list of compliance enforcement mechanisms outlined in Chapter 3, Chapter 4 presents the results of a study into the individual mechanisms adopted by the six AusRFMOs under examination. It begins by providing background information into each AusRFMO and then outlines the compliance enforcement mechanisms the individual RFMO has adopted in their founding text, in conservation measures and future compliance initiatives currently underway.

*Chapter 5* - This chapter constitutes the analytical element of this thesis in its examination of the findings of Chapter 4. Chapter 5 tabulates the findings of Chapter 4 and then analyses the level of implementation by AusRFMOs of each of the compliance enforcement mechanisms under examination through the provision of a second table. The second section of the chapter considers the need for more uniform implementation of mechanisms such as trade-related measures, graded sanctions and policies relating to non-contracting parties in AusRFMOs to adopt a consistent approach to non-compliance.

*Chapter 6* - Chapter 6 considers the problem of a lack of uniformity in AusRFMOs and the difficulties associated with maintaining compliance on a regional level. It proposes that a solution may be found in the provisions of the LOSC and argues that the duty to cooperate, if clarified via international dispute resolution, may strengthen the role of RFMOs. This chapter examines the potential for an advisory opinion to be bought before the International Tribunal for the Law of the Sea (the Tribunal) and considers how a favourable outcome may deter non-compliance by flag States.

*Chapter 7* - The final chapter of this thesis submits some general conclusions on how AusRFMOs might better tackle the problem of non-compliance. It focuses on the need for uniformity in approach across RFMOs, wider adoption of trade-related measures and need for a paradigm shift to occur in relation to the enforcement capacity of RFMOs. It is concluded that a

perceived lack of legitimacy associated with the conservation measures of RFMOs has prevented these organisations from taking significant steps towards enforcing sanctions and taking action against flag State non-compliance.

## **1.6 Significance of the research**

This thesis contributes to the wealth of information currently being collected on the performance of RFMOs. It demonstrates that there is significant inconsistency in the type and degree to which compliance enforcement mechanisms are currently implemented by AusRFMOs. This thesis also provides a creative insight into the range of compliance enforcement mechanisms available to RFMOs and foresees an increase in the use of countermeasures by RFMOs as being essential to the future effectiveness of the regional regime.

It is argued that AusRFMOs should adopt a uniform approach to trade-related measures as an essential element of effective compliance enforcement. The thesis provides a legal argument based on international fisheries agreements in support of RFMOs having the power to implement and enforce sanctions under international law. It argues that if RFMOs continue to be viewed as merely cooperative in function, this undermines the significant developments that have been made via the creation of international instruments such as the UNFSA and the IPOA-IUU. Finally the thesis explores the idea that international dispute resolution may assist RFMOs in strengthening their mandate.

It is submitted that the inability of RFMOs to establish effective compliance enforcement regimes has prevented them from fulfilling the role envisaged for them under international law. This thesis demonstrates that the next stage of RFMO development must be for a paradigm shift to occur to allow RFMOs to act not only as entities which encourage conservation and make regulations regarding this, but to *enforce* their regulations through whatever means appropriate.

## CHAPTER 2

### NON-COMPLIANCE: THE PROBLEM OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING

#### 2.1 Introduction

Flag State compliance with the law of the sea is fundamental to the success of the regional system of fisheries governance. Today, a lack of compliance, or more accurately, a lack of political will to achieve sustainable fisheries has severely limited the ability of regional fisheries management organisations (RFMOs) to fulfil their role under international law.<sup>117</sup> The refusal of certain flag States to participate in RFMOs despite the continued, and often underhand, presence of their vessels in regulated waters has contributed to this problem.<sup>118</sup> Non-compliant flag State practice has often limited the decision-making function of RFMOs;<sup>119</sup> undermining both individual RFMO performance and the performance of the regional fisheries regime as a whole.<sup>120</sup>

One of the most significant problems resulting from non-compliant State practice is the problem of illegal, unreported and unregulated (IUU) fishing. A report<sup>121</sup> commissioned by the United Nations Food and Agriculture Organisation (FAO) and authored by Dr. Gail Lugten in 2010 found that IUU fishing continues to be the number one concern of regional fisheries organisations around the world.<sup>122</sup> However the enforcement of, and compliance with, conservation measures of RFMOs requires voluntary acceptance and many flag States are unable or unwilling to enforce their legal duties in this respect. As a result, the legal regime has had a limited impact on IUU

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<sup>117</sup> Most of the remaining obstacles to effective fisheries management result from a lack of political will to resolve them. See Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007), xi.

<sup>118</sup> For example, at the Twenty-second Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) it was noted that stronger diplomatic actions were required to be taken against States such as Equatorial Guinea and Togo, whose vessels had been sighted conducting IUU fishing operations within the CCAMLR Conservation Area. Neither of these States is a CCAMLR Contracting Party however their vessels continued to fish in this area against CCAMLR conservation measures. Antarctic and Southern Ocean Coalition, 'CCAMLR XXII Meeting Report', 24 October - 7 November 2003, Hobart, Australia, 6. Available on line at

<<http://www.asoc.org/Portals/0/ASOC%20final%20report%20CCAMLR%20XXII,%20Dec%202003.pdf>>

<sup>119</sup> The 2009 performance review of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) noted a lack of compliance with reporting requirements as one of the factors contributing to the inability of State parties to reach agreement on a total allowable catch (TAC) over many years. Commission for the Conservation of Southern Bluefin Tuna, Part Two, Report of the Independent Expert, September 2008. Available on line at

<[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/PerformanceReview\\_IndependentExpertsReport.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/PerformanceReview_IndependentExpertsReport.pdf)>

<sup>120</sup> Denzil Miller, 'Regional Fisheries Management Organisations and Implementation of Flag State Performance Criteria and Actions' (Paper presented at the FAO Expert Consultation on Flag State Performance, 23 - 26 June 2009).

<sup>121</sup> Gail Lugten, *The Role of International Fishery Organisations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources*, FAO Fisheries and Aquaculture Circular. No. 1054, Rome, FAO, 2010. Available on line <<http://www.fao.org/docrep/012/i1493e/i1493e.pdf>>

<sup>122</sup> Ibid 8.

vessels flying the flags of non-compliant States on the high seas.<sup>123</sup>

This chapter examines the challenges posed by IUU fishing as an introduction to the problem of non-compliance. First, the scope of the IUU fishing problem, its causes and the impacts are considered. Secondly, the chapter examines the motivating factors for States not to comply with the regional fisheries regime and the impact that such non-compliance has had on the ability of RFMOs to conserve global fisheries resources.

## 2.2 Defining the IUU problem and its causes

At a meeting convened by the FAO in 2008 entitled 'Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action' (the FAO Expert Workshop),<sup>124</sup> IUU fishing was deemed a crime that, 'undermines the ability to ensure a level playing field for fishing operations'.<sup>125</sup> The global phenomenon of IUU fishing has been of international concern since the early 1990s.<sup>126</sup> The term 'IUU fishing' however, was not used to refer to such activities until a meeting of CCAMLR in 1997 where it evolved from discussions concerning illegal or non CCAMLR-compliant fishing activities.<sup>127</sup>

Previously known as 'unauthorised fishing in zones of national jurisdiction and on the high seas',<sup>128</sup> Australia brought the IUU fishing issue to FAO in 1999 which inevitably led to the development of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).<sup>129</sup> IUU fishing is now commonly defined using the description contained in the IPOA-IUU<sup>130</sup>, however the IPOA-IUU retains the status of a soft law<sup>131</sup> instrument and controversy has arisen in recent times concerning the applicability of this definition for use in hard law<sup>132</sup> international agreements.<sup>133</sup>

The IUU fishing problem manifests itself at many different levels and stages of the fishing operation. It can occur within zones of national jurisdiction, within areas regulated by RFMOs, or

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<sup>123</sup> Matthew Gianni and Walt Simpson. (2005). *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*. Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International, 6.

<sup>124</sup> *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action*, United Nations Food and Agriculture Organisation (FAO) in cooperation with Fisheries and Oceans Canada, 25-28 March 2008, Vancouver, Canada.

<sup>125</sup> Matthew Gianni, 'Track Record of Flag State Performance' (Paper presented at the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, Vancouver, Canada, 25 - 28 March 2008).

<sup>126</sup> David J Douman, 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action' (Document AUS:IUU/2000/4, Expert Consultation on Illegal, Unreported and Unregulated Fishing, Government of Australia in Cooperation with FAO, 2000) iv.

<sup>127</sup> *High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas*. Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, ICUN and the Earth Institute at Colombia University 93.

<sup>128</sup> Douman, above n 126126.

<sup>129</sup> United Nations Food and Agriculture Organisation, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted by consensus at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 102th Session of the FAO Council.

<sup>130</sup> High Seas Task Force, above n 127.

<sup>131</sup> 'Soft law' refers to international norms that are not legally binding by nature but still have legal relevance. See Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, 'Soft Law, Hard Law and Effective Implementation of International Environmental Norms' (2006) 6(3) *Global Environmental Politics* 104.

<sup>132</sup> 'Hard law' instruments are classified by their legally binding nature. Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, 'Soft Law, Hard Law and Effective Implementation of International Environmental Norms' (2006) 6(3) *Global Environmental Politics* 104.

<sup>133</sup> Jane Broweleit, *Port State Measures Agreement* (PhD Thesis, University of Tasmania, 2009) 18.

on the high seas.<sup>134</sup> Importantly, however, IUU fishing is not restricted to the act of fishing itself and if the real causes of this global problem are to be properly addressed, consideration of more than just vessel activities on the world's oceans is necessary.<sup>135</sup>

Davor Vidas<sup>136</sup> asserts that the act of IUU fishing constitutes, 'only one segment of the overall problem'<sup>137</sup> and that included in our understanding of this term should be the sale of IUU catch on the international market and the overall infrastructure of the operation.<sup>138</sup> Under Vidas' definition, the 'infrastructure' of a fishing operation includes consideration of factors such as the registration of vessels to certain flag States and transfer of ownership of a vessel to disguise the real beneficial owner.<sup>139</sup>

The FAO has recently condemned IUU fishing as, 'a crime that is committed by both large and small operators to gain economic advantage at the expense of responsible resource users or operators or at the expense of the health of the resource itself.'<sup>140</sup> While this crime was originally conceived of as being largely opportunistic by nature,<sup>141</sup> IUU fishing today involves a wide range of economic transactions and organised syndicates of ownership to stay below the radar.<sup>142</sup> As a result, the concept of IUU fishing has evolved into something much more complex and difficult to control than was originally thought.<sup>143</sup>

Several important factors can be identified as having 'caused' the proliferation of IUU fishing both on the high seas and within areas of national jurisdiction. These factors include:

- the overcapacity of fishing fleets,<sup>144</sup>
- the declaration of the 200 nm exclusive economic zones (EEZs) of coastal States,<sup>145</sup>
- the inherent weakness of the international regulatory regime,<sup>146</sup>
- the 'common pool' nature of the world's fish stocks.<sup>147</sup>

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<sup>134</sup> Department of Agriculture, Fisheries and Forestry, Australian Government, *Illegal, Unreported and Unregulated Fishing* (2008) <<http://www.daff.gov.au/fisheries/iuu>> at 23 April 2009.

<sup>135</sup> Davor Vidas, 'IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment' in D D Caron and H N Scheiber (eds), *Bringing New Law to Ocean Waters* (2004) 3.

<sup>136</sup> Senior Research Fellow, Director of Marine Affairs and Law of the Sea Programme, Fridtjof Nansen Institute.

<sup>137</sup> Vidas, above n 135.

<sup>138</sup> *Ibid.* 4.

<sup>139</sup> *Ibid.*

<sup>140</sup> Gianni, above n 125.

<sup>141</sup> R Baird, 'Arrests in a Cold Climate (Part 2) - Shaping Hot Pursuit through State Practice' (2009) 13 *Antarctic and Southern Ocean Law and Policy* 1.

<sup>142</sup> High Seas Task Force, above n 127, 16.

<sup>143</sup> Gianni, above n 125.

<sup>144</sup> This overcapacity has proven difficult to combat with older and smaller fishing vessels commonly being replaced by larger and more efficient vessels. FAO developed an International Plan of Action for the Management of Fishing Capacity (IPOA-CAP) in 1999 however this has done little to address the situation. Department of Fisheries and Oceans Canada, *Causes of IUU Fishing* (2009) <<http://www.dfo-mpo.gc.ca/overfishing-surpeche/isu-iuu-drvrs-eng.htm>> at 2 May 2009.

<sup>145</sup> Deniz Miller and Marie Jacobsson, 'Fisheries Management and Good Governance: Global, Regional and National Legislation and Regulation' in J Sundberg (ed), *Fish, Trade and Development* (in press) .

<sup>146</sup> U R Sumaila, J Alder and H Keith, 'The Cost of Being Apprehended Fishing Illegally: Empirical Evidences and Policy Implications' (Paper presented at the OECD Workshop on Illegal, Unreported and Unregulated Fishing, Paris, 19-20 April 2004). Available on line at <<http://www.oecd.org/dataoecd/53/29/30735089.PDF>>



It is important to note that although these factors will be considered separately for the purposes of this chapter, they are by no means independent causes in their own right and their combined effect on the evolution of IUU fishing should be recognised at all times.<sup>148</sup>

### *Overcapacity of fishing fleets*

The term 'overcapacity' refers to the presence of too much fishing activity or excessive fishing capacity of vessels.<sup>149</sup> With the introduction of large scale fishing vessels and advanced fishing technology in the 1970's, FAO estimated that by 1990 the global fishing fleet had doubled.<sup>150</sup> Over the past thirty to forty years there has been a growing recognition that there are too many vessels and too few fish.<sup>151</sup> In 2007, a meeting of COFI considered the need to bring the global fishing capacity in line with a total allowable catch (TAC) and highlighted the relationship between excess capacity and IUU fishing.<sup>152</sup>

Today, the capacity of global fishing fleets harvesting bluefin tuna<sup>153</sup> alone has reached immense proportions, with increases in fleet efficiency over the past decade resulting in rampant overfishing of this species in the Atlantic and Mediterranean Sea.<sup>154</sup> This industry is now facing collapse; spurred on not only by the vast overcapacity of bluefin tuna fleets but also by the underreporting of catches by certain countries, poor management by RFMOs and economic disincentives to remedy the situation.<sup>155</sup>

It is clear that the situation facing fishing operators in a contemporary climate is one of increased competition for fewer resources.<sup>156</sup> In this way, fishing operators hoping to maintain profits in an environment of overcapacity may have increasingly resorted to illegal fishing as a viable alternative to fishing in accordance with regulatory arrangements.<sup>157</sup>

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<sup>147</sup> Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007) 2.

<sup>148</sup> Doulman, above n 126.

<sup>149</sup> Department of Fisheries and Oceans Canada, *Causes of IUU Fishing* (2009) <<http://www.dfo-mpo.gc.ca/overfishing-surpeche/isu-iuu-drvrs-eng.htm>> at 2 May 2009.

<sup>150</sup> Greenpeace, *Overcapacity* (2002) Greenpeace Archive <<http://archive.greenpeace.org/comms/fish/plun03.html>> at 15 April 2009.

<sup>151</sup> Gary Morgan, Derek Staples and Simon Funge-Smith, 'Fishing Capacity Management and IUU Fishing in Asia' (RAP PUBLICATION 2007/16, Regional Office for Asia and the Pacific, 2007)1.

<sup>152</sup> Food and Agriculture Organisation of the United Nations (FAO), *State of World Fisheries and Aquaculture 2008* (Rome: 2008) 9.

<sup>153</sup> There are several variations of the bluefin tuna including the Northern bluefin tuna, the Southern bluefin tuna, and the Pacific bluefin tuna. Southern bluefin tuna caught off the coast of Tasmania can grow to over two metres in length and weigh over 220kg. The majority of bluefin tuna catch is used as sashimi. See generally, Department of Primary Industries and Water, *Southern Bluefin Tuna* (2009) <<http://www.dpiw.tas.gov.au/inter.nsf/WebPages/ALIR-4YA59M?open>> at 20 April 2009.

<sup>154</sup> The vast majority of bluefin tuna caught in the Mediterranean are transported live to cages in which they are fattened and subsequently sold to Japanese fish markets. WWF Mediterranean, 'Race for the Last Bluefin: Capacity of the Purse Seine Fleet Targeting Bluefin Tuna in the Mediterranean Sea and Estimated Capacity Reduction Needs' (2008) ii.

<sup>155</sup> *Ibid* v.

<sup>156</sup> Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence' (2004) 14(5) *Melbourne Journal of International Law* 299.

<sup>157</sup> *Ibid*.

### *The declaration of the 200nm exclusive economic zone (EEZ)*

Fishing on the high seas has dramatically increased since the adoption of EEZs by coastal States in the late 1970s and early 1980s.<sup>158</sup> With the declaration of coastal State rights, a vast number of restrictions were imposed upon the fishing activities of distant water fishing nations (DWFNs) within areas of national jurisdiction.<sup>159</sup> Many States were abruptly denied access to the fishing grounds in which they had previously made their livelihoods. An excess capacity of both domestic and foreign fishing vessels soon emerged and the failure of many States to adequately deal with this oversupply resulted in these vessels being pushed out onto the high seas in search of new fishing opportunities.<sup>160</sup>

In a devastating example of the impact of EEZ declarations on marine resources of the central Bering Sea, vessels that had been displaced from the US EEZ in the mid 1980s began targeting concentrations of pollock in an area surrounded by the EEZs of the US and Russia.<sup>161</sup> The total catches taken from this area, referred to as the 'Donut (or Doughnut) Hole', rose from 181 000 tonnes in 1984 to over 1 million tonnes in 1986.<sup>162</sup> By 1993, the total catch had dropped to 2 000 tonnes due to the impacts of overfishing.<sup>163</sup> As there was no specific regulatory regime in place determining the TAC for pollock on the high seas, the actions of the displaced vessels fishing in this region went unchecked and pollock stocks in the region plummeted.<sup>164</sup>

This pattern of exploitation has been played out in fisheries regimes the world over; with fishing operators shifting their interest from one resource to another depending upon the commercial availability of the stock.<sup>165</sup>

### *The inherent weakness of the international regulatory regime*

As the common property of all States, fish stocks in international waters are owned by no State or individual.<sup>166</sup> Under this regime, short term profit-motivated fishing practices are encouraged and vessel operators have increasingly resorted to illegal fishing.<sup>167</sup> While it was hoped that improved cooperation and agreement between States through RFMOs would rescue global

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<sup>158</sup> Matthew Gianni, *Real and Present Danger: Flag State Failure and Maritime Security and Safety* (2008) 23.

<sup>159</sup> *Ibid.* 4.

<sup>160</sup> Lodge et al, above n 147.

<sup>161</sup> Marine Resources Assessment Group, *IUU Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs* (2005) 46.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Rosemary Rayfuse, *Non-flag State Enforcement in High Seas Fisheries* (2004) 284.

<sup>165</sup> D G Miller, 'Exploitation of Antarctic Marine Living Resources: A Brief History and a Possible Approach to Managing the Krill Fishery' (1991) 10 *South African Journal of Marine Science* 321.

<sup>166</sup> Article 89 of the United Nations Convention on the Law of the Sea provides: '[n]o State may validly purport to subject any part of the high seas to its sovereignty.' *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>167</sup> Baird, above n 156, 299.

fisheries from the tragedy of the commons,<sup>168</sup> stocks continue to decline due to a lack of political will to resolve the problem. In the case of the 'Donut Hole', for instance, the Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea<sup>169</sup> was finally agreed upon by the interested States two years after the collapse of the fishery.<sup>170</sup>

The inherent weaknesses of the international fisheries legal regime are discussed in more detail below; however it is important to note at this point that many of the causes of IUU fishing have arisen as a result of the 'consensual nature of international law.'<sup>171</sup> Indeed, international law can be defined by its consensual characteristics as it exists as a result of agreement between State parties.<sup>172</sup> Yet the premise of sovereign equality and consensual agreement often belie weaknesses within international law as States may choose not to accept obligations undertaken by the majority.<sup>173</sup> In a regional fisheries context this translates to difficulties in decision making within RFMOs, non-compliance with the conservation measures imposed by RFMOs or simply by States choosing not to 'sign up' to the relevant RFMOs.<sup>174</sup>

#### *The 'common pool' nature of the world's fish stocks*

Finally, the root cause of the problem of IUU fishing, and indeed the problem of managing marine capture fisheries as a whole, has long been recognised as the 'common pool' nature of the international fisheries regime.<sup>175</sup> Under this regime, the freedom to fish the high seas is granted to all States equally and as such the individual fisher has every incentive to regard fisheries resources as if they were non-renewable. In effect, any individual fisher acting to conserve and invest in marine resources would be making an unsound and irrational commercial decision.<sup>176</sup> In such a system, the over-exploitation of marine resources will occur unless all States find the political will necessary to exercise control over vessels registered to their flag.<sup>177</sup>

The net of international agreements developed to eliminate the problem of IUU fishing have so far failed to live up to expectations due to a lack of political will to carry the provisions of these agreements into affect.<sup>178</sup> While there are numerous causes which have led to the prevalence of IUU fishing practices, in a regime providing for effective control of the activities of vessels on the

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<sup>168</sup> Lodge et al, above n 147, 'Foreword'.

<sup>169</sup> This Convention is also known as the 'Donut Hole Agreement' and was signed in Washington on June 16 1994. See Marine Resources Assessment Group, *IUU Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs* (2005) 20.

<sup>170</sup> Rayfuse, above n 164, 285.

<sup>171</sup> E. J Molenaar, 'Addressing Regulatory Gaps in High Seas Fisheries' (2005) 20(3-4) *The International Journal of Marine and Coastal Law* 533.

<sup>172</sup> Baird, above n 156, 301.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> Lodge et al, above n 147, 2.

<sup>176</sup> *Ibid.*

<sup>177</sup> Email from Dr. Denzil Miller to Elise Clark, 13 October 2008.

<sup>178</sup> High Seas Task Force, above n 127, 7.

high seas, it is unlikely that these causes would have had the devastating impact on marine living resources that we see today.<sup>179</sup>

### 2.3 The impact of IUU fishing and its operation

Under article 91.1 of the United Nations Convention on the Law of the Sea (LOSC),<sup>180</sup> each State holds the power to ‘fix the conditions for the grant of nationality to ships, for the registration of ships in its territory, and for the right to fly its flag.’ The only limitation on this principle under article 91.1 is that there must exist a ‘genuine link’ between the flag State and the vessel itself.<sup>181</sup> While there is insufficient scope at this stage for an examination of the debate surrounding the ‘genuine link’ requirement, it is important to note that it is now generally accepted that action taken before the International Tribunal on the Law of the Sea (the Tribunal) attempting to enforce this requirement upon non-compliant flag States is no longer likely to succeed.<sup>182</sup>

The problem with the indiscriminate nature of the international registration of vessels is apparent in the practice of certain flag States, commonly referred to as ‘flags of convenience’ (FOCs) or, more accurately, ‘flags of non-compliance’ (FONC),<sup>183</sup> which choose not to regulate the activities of their flagged vessels on the high seas. FONC States either do not have the sufficient capacity or interest in agreeing to comply with or participate in the conservation measures imposed by RFMOs.<sup>184</sup> As a result, vessels registered to these States are under no obligation to fish in compliance with the conservation objectives of RFMOs or in a responsible manner as required under the LOSC.

IUU fishing vessels are often identified as being registered to FONC States and are able to avoid regulation on the high seas through the actions of non-compliant flag States.<sup>185</sup> However the difficulties associated with taking action against the real perpetrators of IUU fishing are exacerbated by a system of hidden beneficial ownership which underlies most IUU fishing operations.<sup>186</sup> This system provides the real beneficiaries of IUU fishing with the elements of

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<sup>179</sup> Molenaar, above n 171.

<sup>180</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>181</sup> *Ibid* article 91.1.

<sup>182</sup> Tullio Treves, ‘Legal Tools for Effective Control’ (Paper presented at the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, Vancouver, Canada, 25 - 28 March 2008).

<sup>183</sup> While the term ‘flag of non-compliance’ has been recognised by FAO as the more appropriate terminology, the term ‘flag of convenience’ is still commonly employed. For the purposes of this thesis, flag States which chose not to regulate the activities of their vessels on the high seas will be referred to as ‘FONCs’. See generally *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, United Nations Food and Agriculture Organisation (FAO) in cooperation with Fisheries and Oceans Canada, 25-28 March 2008, Vancouver, Canada* 8.

<sup>184</sup> Baird, above n 156, 302.

<sup>185</sup> *Ibid*.

<sup>186</sup> Gianni and Simpson, above n 123, 15.

flexibility and anonymity which are essential to the strength of these operations,<sup>187</sup> circumventing the requirement that a State maintain a degree of control over ships registered to their flag.<sup>188</sup>

By registering their vessel to a 'front' company located in a FONC State, this entity becomes the legal owner of the vessel while having no real vested interest in its operation. The 'front' company holds the vessel in name only and the beneficial owner is able to hide behind the registered legal activity.<sup>189</sup> At law, the connection between these two entities is invisible,<sup>190</sup> thereby maintaining an appearance of legitimacy and allowing the major player in the IUU operation to direct the activities of vessels while remaining undetected.

The combination of both FONC registration and hidden beneficial ownership means that the real owners of IUU vessels are able to avoid the regulatory efforts of RFMOs and international agreements.<sup>191</sup> Today, the FONC system and IUU fishing practices have become inextricably linked.<sup>192</sup> In 2005, approximately 2 900 large-scale fishing vessels were flagged to one of 14 open registry States or were listed as 'flag unknown'.<sup>193</sup> While the number of vessels registered to the 14 FONC countries decreased by 20% in 2008, there was an overall increase in the number of vessels listed as 'flag unknown'.<sup>194</sup> As a result, in 2008 the number of large-scale fishing vessels flagged to either a FONC State or listed as 'flag unknown' remained high at 2 760 vessels.<sup>195</sup>

A 2008 report by Gianni<sup>196</sup> considering the failure of flag States to uphold their responsibilities under international law found that Cambodia, Georgia, Mongolia, North Korea, Sierra Leone and Togo had registered a combined total of 318 large-scale fishing vessels.<sup>197</sup> However none of these vessels had been authorised to fish in any of the areas on the high seas regulated by a RFMO.<sup>198</sup> Gianni comments that the consistent failure of certain flag States to meet their

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<sup>187</sup> Vidas, above n 135, 4.

<sup>188</sup> Gail Lugten, *Legal Consultation for the Food and Agriculture Organisation of the United Nations - Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Carriers and Support Vessels*, UN Food and Agriculture Organisation, 865 (2008) [Contract Report] 21.

<sup>189</sup> *Ibid.*

<sup>190</sup> This is because both domestic and international law have retained a strict adherence to entity law that protects the identity of beneficial owners. The case of *Salomon v Salomon & Co Ltd* (1897) AC 22 provides authority for this. Refer Gail Lugten, *Legal Consultation for the Food and Agriculture Organisation of the United Nations - Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Carriers and Support Vessels*, UN Food and Agriculture Organisation, 865 (2008) [Contract Report] 22.

<sup>191</sup> Baird, above n 156, 301.

<sup>192</sup> High Seas Task Force, above n 127, 36.

<sup>193</sup> *Ibid.*

<sup>194</sup><sup>194</sup> Gianni above n 158140, 5.

<sup>195</sup> *Ibid.*

<sup>196</sup> Matthew Gianni is an independent advisor and advocate for ocean conservation based in the Netherlands. He is a co-founder of the Deep Sea Conservation Coalition and is currently the Political and Policy Advisor to the coalition and an advisor to International Union for the Conservation of Nature.

<sup>197</sup> Gianni, above n 158, 'Executive Summary'.

<sup>198</sup> *Ibid.*

obligations under the current regime, 'risks rendering the flag State, or flag State sovereignty, a notional entity or fiction of international law.'<sup>199</sup>

IUU fishing, however, threatens much more than the notion of flag State responsibility. By creating vast uncertainty in terms of quotas for fishing operators and depriving coastal States of food and fishing opportunities,<sup>200</sup> IUU fishing puts the lives and livelihoods of legitimate fishers at risk.<sup>201</sup> Fish caught by both legal fishers and IUU fishers are sold on the same markets and yet legitimate fishers must pay the extra costs of operating within regulatory regimes and in compliance with conservation measures.<sup>202</sup>

Uncertain estimates of IUU fishing have resulted in increased costs, lower employment, lower incomes and lower export revenue for responsible fishing operators.<sup>203</sup> Indeed, Norwegian scientists estimate that without illegal fishing in their waters, the 2007 quota for Northeast Arctic cod would be 85 per cent higher than the actual case<sup>204</sup> demonstrating just how dramatically the profits of legitimate operators have been affected by IUU fishing. Studies conducted into the rate of IUU fishing and the percentage of catches sacrificed to IUU operations are inherently questionable as IUU fishing operates outside any legal regulatory regime.<sup>205</sup>

When this inequity is applied to developing countries, however, the impact of IUU fishing is even more catastrophic.<sup>206</sup> A 2005 report entitled, 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Synthesis Report',<sup>207</sup> considered the direct impact of IUU fishing in 10 developing countries. The report found that in one country alone (Guinea) a probable loss of USD \$27 million in shrimp catch, \$8 million in demersal fish catch and \$49 million in octopus catch was suffered at the hands of IUU operators fishing in coastal waters.<sup>208</sup> Overall, it was estimated that IUU fishing in the 10 countries under examination resulted in a total loss of \$372 million to developing countries.<sup>209</sup> When this loss is considered in terms of the food security and the consumption of fish protein by developing States' coastal populations, the effect of IUU fishing is to effectively deprive already poverty stricken fishing communities of a vital food source and livelihood.

Damage to ecosystems and global marine environments as a result of IUU fishing is, in a contemporary fishing climate, one of the major obstacles to be addressed in the interests of

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<sup>199</sup> Ibid 33.

<sup>200</sup> Doulman, above n 126, vi.

<sup>201</sup> High Seas Task Force, above n 127, 3.

<sup>202</sup> Ibid 20.

<sup>203</sup> Ibid.

<sup>204</sup> Olav Schram Stokke, 'Trade Measures and the Combat of IUU Fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic' (2009) 33 *Marine Policy* 339.

<sup>205</sup> Gianni, above n 158.

<sup>206</sup> Marine Resources Assessment Group, above n 161, 5.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid 6.

<sup>209</sup> Ibid.

achieving sustainable fisheries.<sup>210</sup> Many commercial fishing operators target predatory species such as tuna; in some cases leading to an 80% reduction in tuna populations.<sup>211</sup> The exploitation and targeting of specific species in this way has resulted in the overfishing of prey species as humans adjust their appetites to settle for the less desirable but more commercially available prey species.<sup>212</sup>

Contributing to this, the thriving aquaculture industry today requires a constant supply of prey to be caught and ground into meal to 'grow' fish bred within captivity.<sup>213</sup> Inevitably, it is not fishing practices alone that reduce stocks both on the high seas and within EEZs but also the impact that the removal of such fish has on other species that has furthered the crisis of international fisheries present today. It is important to recognise at this point that the threat of climate change to the world's fisheries imposes another layer of uncertainty to scientific studies into the impact of overfishing on marine ecosystems.<sup>214</sup>

Information remains one of the essential tools in the fight against IUU fishing.<sup>215</sup> By adopting a precautionary approach<sup>216</sup> towards consideration of the significance of research in this area, conservation regulations and catch quotas will hopefully reflect the true state of the world's fisheries allowing sustainable fishing practices to continue. In any case, the 'complex web of relationships in marine ecosystems' makes predictions concerning fish populations and catch quotas very difficult.<sup>217</sup>

## 2.4 Non-compliance

Today there is growing support for the notion that flag State jurisdiction exists as a presumption under international law; one that is rebuttable subject to instances of State non-compliance.<sup>218</sup> This section aims to outline the key motivators behind non-compliance to determine the most effective manner in which RFMOs might address the problem. It is submitted that in many cases, a refusal of States to cooperate has been misconstrued as a perceived lack of action on

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<sup>210</sup> E.J. Molenaar, 'Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Fisheries Law' (2002) 17(4) *The International Journal of Marine and Coastal Law* 561, 563.

<sup>211</sup> Margot L. Stiles et al, *Hungry Oceans: What Happens When The Prey Is Gone?* (2009) 4.

<sup>212</sup> *Ibid* 2.

<sup>213</sup> *Ibid* 1.

<sup>214</sup> The twenty-eighth Session of COFI (2009) considered the likely impacts of climate change for fisheries. See G L Lugten, 'CCAMLR and COFI: Challenges from the Twenty-Eighth Session of the FAO Committee on Fisheries' (2009) *Antarctic and Southern Ocean Law and Policy Occasional Papers* 13, 74.

<sup>215</sup> Vidas, above n 135, 20.

<sup>216</sup> FAO has described the 'precautionary approach' as a management approach involving the exercise of 'prudent foresight to avoid unacceptable or undesirable situations, taking into account that changes in fisheries systems are only slowly reversible, difficult to control, not well understood, and subject to change in the environment and human values.' See Food and Agriculture Organisation of the United Nations, *Latest Publications* (2009) <<http://www.fao.org/fishery/publications/en>> at 10 June 2009.

<sup>217</sup> Molenaar, above n 210, 567

<sup>218</sup> FAO Expert Workshop, above n 124, 10.

the part of RFMOs<sup>219</sup> and that for best practices to be effective, non-compliance must be targeted effectively.

In this thesis, the term 'non-compliance' is defined as including a lack of compliance by both contracting parties (CPs) and non-contracting parties (NCPs) with the conservation objectives of RFMOs and obligations under international law. The application of the term to States extends to instances of non-compliance at all stages of flag State responsibility; including the registration of vessels, the record of fishing vessels, and the authorisation to fish.<sup>220</sup> In regards to non-compliance by nationals, such instances may include taking action or inaction that undermines the effectiveness of international conservation and management measures.

This central question posed in the first part of this section is: What motivates States to ignore regulations and act in a manner inconsistent with international law? The key motivators behind non-compliant State practices are identified through consideration of why IUU fishing continues to occur on the high seas to date. The causes of IUU fishing will be applied to a theoretical framework to explain the behaviour of non-compliant States and individuals.

#### **2.4.1 The theory of non-compliance in an international context**

From a sociological perspective, Tom Tyler<sup>221</sup> argues that there are two basic principles that explain why States adopt and implement international laws: the 'instrumental' approach and the 'normative' approach.<sup>222</sup> The instrumental approach reflects the notion of the 'tragedy of the commons' and recognises that States are primarily driven by self-interest.<sup>223</sup> Compliance is determined by States' expectations that sanctions will flow from a violation of regulations and therefore their behaviour is dictated by external factors.<sup>224</sup> Both nationals and States under this view are seen as 'utility maximising individuals' who compare the costs of non-compliance (both social and economic) to the potential gain to be made from such behaviour.<sup>225</sup> Under this approach, coercive measures, such as the use of force or removal of fishing privileges, represent the only reliable mechanism for ensuring compliance with fisheries regulations.<sup>226</sup>

The inherent weakness of the international fisheries regime has led certain States and individuals to conclude, on a cost/benefit analysis, that there is more to be gained from fishing outside

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<sup>219</sup> Committee on Fisheries, 'Strengthening Regional Fisheries Management Organisations and their Performance Including the Outcome of the 2007 Tuna RFMOs Meeting' (Paper presented at the Twenty Seventh Session of the Committee on Fisheries, Rome, Italy, 5 - 9 March 2007).

<sup>220</sup> Charlotte De Fontaubert, Indrani Lutchman and International Union for Conservation of Nature, *Achieving Sustainable Fisheries: Implementing the New International Legal Regime* (2003) 51.

<sup>221</sup> Tom Tyler is Professor of Psychology, Department of Psychology, New York University, New York.

<sup>222</sup> T. R. Tyler, *Why People Obey the Law* (2006) 165.

<sup>223</sup> Olav Schram Stokke, *Governing High Seas Fisheries: the Interplay of Global and Regional Regimes* (2001) 122.

<sup>224</sup> Jesper Raakjær Nielsen, 'An Analytical Framework for Studying: Compliance and Legitimacy in Fisheries Management' (2003) 27(5) *Marine Policy* 425.

<sup>225</sup> *Ibid* 427.

<sup>226</sup> Stokke, above n 223.



international regulations than within them.<sup>227</sup> The lack of prescription within the LOSC on the nature and scope of flag State obligations has made clear and discernable sanctions almost impossible to identify. With the expectation of being apprehended and fined low, the self-interest of States continues to encourage non-compliance.<sup>228</sup>

This reality is drawn into sharp relief through consideration of the vast overcapacity of fishing vessels in operation both on the high seas and within EEZs. Excess capacity has proven an extremely powerful driver for IUU fishing with the economic benefits to be derived by non-compliance great.<sup>229</sup> Fishers are today operating in an environment of increased competition for fewer resources<sup>230</sup> and without the threat of severe and certain sanctions being imposed for non-compliant behaviour, the 'instrumental' approach has motivated many States and individuals to avoid compliance.

The second theory of compliance, the 'normative' perspective, argues that States (and nationals) will comply with laws that they consider to be fair, appropriate or legitimate.<sup>231</sup> This theory places strong emphasis on the internal incentives of compliant behaviour.<sup>232</sup> In this way, the personal morals and perceptions of the individual fisher or collective State will influence whether they comply with international law.<sup>233</sup> Under this approach, the perceived 'legitimacy' of a law or regulation will be the main factor determining compliance by the State or individual.<sup>234</sup>

Arguably, the major bar to the perceived legitimacy of international fisheries law has been the controversial introduction of EEZs in the late 1970s.<sup>235</sup> This introduction stemmed from the desire of coastal States to regulate proximate fisheries resources, and in many cases, to gain an economic advantage in doing so.<sup>236</sup> In declaring EEZs, jurisdiction over 90% of the world's commercial fisheries was transferred to coastal States.<sup>237</sup> However for those States which were subsequently denied access to these resources, this development was seen as a blatant reversal of the freedom to fish.<sup>238</sup>

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<sup>227</sup> Baird, above n 156.

<sup>228</sup> Carl-Christian Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing' (Paper presented at the Conference on the Governance of High Seas Fisheries and the United Nations Fish Stocks Agreement, St. Johns, Canada, May 1-5 2005).

<sup>229</sup> Ibid.

<sup>230</sup> Baird, above n 156, 227, 301.

<sup>231</sup> Stokke, above n 223, 122.

<sup>232</sup> Nielsen, above n 224, 425.

<sup>233</sup> Ibid.

<sup>234</sup> Stokke, above n 223, 122.

<sup>235</sup> Philippe Cullet, *Differential Treatment in International Environmental Law* (2003) 82.

<sup>236</sup> Ibid.

<sup>237</sup> Quentin Hanich and Martin Tsamenyi, 'Exclusive Economic Zones, Distant Water Fishing Nations and Pacific Small Island Developing States: Who Really Gets All the Fish?' (Paper presented at the Sharing the Fish Conference, Perth, Western Australia, March 2006).

<sup>238</sup> Gordon R. Munro, 'Coastal States and Distant-Water Fishing Nation Relations: an Economist's Perspective' (1989) *Marine Fisheries Review*.

States such as Spain, which retains a reputation for questionable fishing practices,<sup>239</sup> have voiced opposition to coastal State management of these waters resulting in tension between coastal States and DWFNs. As a result, the perceived 'illegitimacy' of the inclusion of EEZs in the LOSC has resulted in non-compliance by many DWFNs, with European Union companies among the top profiteers of IUU fishing.<sup>240</sup> While the 'normative' perspective can be demonstrated to have contributed to non-compliance by flag States, it is argued that the 'instrumental' approach, whereby State compliance is dictated by the severity and certainty of sanctions, is primarily responsible for the level of non-compliance with international regulations that is present to date. It is evident that without political will and commitment by flag States to provide the necessary monitoring and surveillance of vessels, there will be little compliance with the rules and obligations contained in international fisheries law.<sup>241</sup>

#### 2.4.2 The impact of non-compliance on RFMO performance

In 2005/2006, calls for improved performance by RFMOs were made by numerous international organisations. Recognition of the need for better State compliance with the demands of RFMOs became widespread with the publication of the final report of the Ministerially-led Task Force on IUU Fishing on the High Seas (the High Seas Task Force) in 2005.<sup>242</sup> This report, entitled 'Closing the Net: Stopping Illegal Fishing on the High Seas', highlights the need for RFMO reform and for action to be taken by States on this matter.<sup>243</sup> The High Seas Task Force advocates a more systematic approach to the review of RFMO performance<sup>244</sup> and encourages RFMOs to work together through improved 'coordination, cooperation and information sharing'.<sup>245</sup>

The 2006 UNGA Resolution on Sustainable Fisheries<sup>246</sup> also notes the need for all States and RFMOs to improve cooperation, communication and coordination.<sup>247</sup> It urges RFMOs to strengthen and modernise their mandates and conservation measures 'as a matter of priority'.<sup>248</sup> The resolution highlights the need for implementation of the precautionary approach and adoption of an ecosystems based approach<sup>249</sup> by RFMOs to adopt a long term approach to the sustainable use of marine living resources.<sup>250</sup> The Resolution urges States to undertake

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<sup>239</sup> O. P. Dwivedi, *Sustainable Development and Canada: National & International Perspectives* (2001) 208.

<sup>240</sup> Gianni and Simpson, above n 123, 4.

<sup>241</sup> Earl Wiseman and Robert Steinbock, 'Compliance' in Myron H. Nordquist (ed), *Current fisheries issues and the Food and Agriculture Organization of the United Nations* (2000) 387.

<sup>242</sup> High Seas Task Force, above n 127.

<sup>243</sup> *Ibid* 4.

<sup>244</sup> COFI, above n 219, 6.

<sup>245</sup> High Seas Task Force, above n 127, 4.

<sup>246</sup> UNGA Resolution A/RES/61/105. Available on line at

<<http://daccessdds.un.org/doc/UNDOC/GEN/N06/500/73/PDF/N0650073.pdf?OpenElement>>

<sup>247</sup> *Ibid*.

<sup>248</sup> *Ibid* paragraph 70.

<sup>249</sup> An ecosystems-based approach to fisheries acknowledges that fisheries decisions take place in an ecosystem context and ecosystem knowledge can assist in managing fisheries production and identifying effects on ecosystems. See David Fluharty, 'Evolving Ecosystem Approaches to Management of Fisheries in the USA' (2005) 300 *Marine Ecology Progress Series* 248.

<sup>250</sup> UNGA Resolution, above n 246, paragraph 70.

performance reviews which include an element of independent evaluation and are made available to the public upon completion.<sup>251</sup>

In May 2006, a Review Conference<sup>252</sup> mandated under the United Nations Fish Stocks Agreement (UNFSA) Article 36 and UNGA Resolution 59/25 of 2004 was convened to propose means for strengthening the implementation of UNFSA.<sup>253</sup> The Review Conference called for updated RFMO mandates to give effect to modern principles of fisheries management<sup>254</sup> CPs were asked to encourage RFMOs to undergo performance reviews utilising transparent criteria so that a clear assessment of the areas needing improvement could be identified.<sup>255</sup> The Review Conference was instrumental in reaffirming the need for full implementation of the role of RFMOs as envisaged under UNFSA<sup>256</sup> and prompted action from several RFMOs to strengthen their mandates.<sup>257</sup>

At the First Joint Tuna RFMOs Meeting<sup>258</sup> held in Kobe in 2007, repeated calls for RFMOs to conduct transparent and independent performance reviews were addressed.<sup>259</sup> Performance reviews were requested from each RFMO<sup>260</sup> and a set of performance criteria was developed to assist RFMOs in conducting reviews.<sup>261</sup> It was decided that performance reviews should be conducted as soon as practicable by all five RFMOs and that they should be based on the common elements of RFMO mandates, best practices of each RFMO and relevant provisions of international agreements.<sup>262</sup>

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<sup>251</sup> COFI, above n 219, 5.

<sup>252</sup> Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 22 to 26 May 2006).

<sup>253</sup> Participants in the Conference were: Australia, Canada, China, Cook Islands, Federated States of Micronesia, Fiji Islands, France, Indonesia, Japan, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, New Zealand, Niue, Republic of Palau, Independent State of Papua New Guinea, Republic of the Philippines, Republic of Korea, Independent State of Samoa, Solomon Islands, Kingdom of Tonga, Tuvalu, United Kingdom of Great Britain and Northern Ireland in respect of Pitcairn, Henderson, Ducie and Oeno Islands, United States of America and Republic of Vanuatu.

<sup>254</sup> Marjorie L. Mooney-Seus and Andrew A. Rosenberg, 'Best Practices for High Seas Fisheries Management: Lessons Learned' (Briefing Paper 07/03, 2007) 2.

<sup>255</sup> COFI, above n 219, 5.

<sup>256</sup> 2nd Joint Tuna RFMOs Meeting, San Sebastian, 2009, "The UN Fish Stocks Agreement (UNFSA) and Tuna RFMO Members", Submission by the Delegation of Norway. Available on line <<http://www.tuna-org.org/Documents/TRFMO2/19%20ANNEX%205.11%20ENG.pdf>>

<sup>257</sup> In one example of this, the North-East Atlantic Fisheries Commission (NEAFC) and the Northwest Atlantic Fisheries Organization (NAFO) incorporated the outcome of the Review Conference into their work. See Fisheries and Oceans Canada, *11th North Atlantic Fisheries Ministers' Conference* (2006) <[http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/nr\\_nafmc-eng.htm](http://www.dfo-mpo.gc.ca/overfishing-surpeche/media/nr_nafmc-eng.htm)> at 11 August 2009.

<sup>258</sup> *Report of the Joint Meeting of Tuna RFMOs*, January 22 - 26, 2007, Kobe, Japan, TunaRFMOs2007/1. Report available on line <<http://www.tuna-org.org/Documents/other/FinalReport-Appendices.pdf>>

<sup>259</sup> Ibid.

<sup>260</sup> The tuna RFMOs include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC), the Inter-American Tropical Tuna Commission (IATTC), the International Convention for the Conservation of Atlantic Tunas (ICCAT) and the Western and Central Pacific Fisheries Commission (WCPFC). See Tuna-Org, *Report of the Second Joint Meeting of Tuna RFMOs* (2009) <<http://www.tuna-org.org/>> at 10 June 2009.

<sup>261</sup> Commission for the Conservation of Southern Bluefin Tuna, Part Two, Report of the Independent Expert, September 2008. Available on line at

<[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/PerformanceReview\\_IndependentExpertsReport.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/PerformanceReview_IndependentExpertsReport.pdf)>

<sup>262</sup> Inter-American Tropical Tuna Commission, "Performance Reviews of Tuna Regional Fisheries Management Organisations", 80th Meeting, California, USA, 8-12 June, 2009, Doc IATTC-80-13. Available on line <<http://www.iattc.org/PDFFiles2/IATTC-80-13-Performance-review.pdf>>

By the time the Second Joint Tuna RFMOs Meeting<sup>263</sup> was held in June/July 2009, however, only three of the five tuna RFMOs had adopted and implemented the performance criteria and completed performance reviews.<sup>264</sup> The reviews that were undertaken depicted a stark reality for the regulation of fish stocks. A common history of failed catch quotas and low rates of compliance was shared by all three RFMOs under examination and all had also failed in their task to conserve a specific species or geographic area of the high seas.

The self-assessment conducted by the Convention on the Conservation of Southern Bluefin Tuna (CCSBT) in 2008 revealed that the RFMO had struggled to fulfil its original mandate to conserve and optimally utilize southern bluefin tuna (SBT) stocks.<sup>265</sup> The review found that the RFMO had been faced with significant challenges and had overcome these challenges with only limited success. Serious overfishing of SBT and under-reporting of SBT catches in past years was found to have undermined the health of the resource and ability of the CCSBT to take adequate management measures.<sup>266</sup>

This reality was demonstrated in the finding that the CCSBT had failed to reach agreement over many years on 'even the most basic management measures for a single fish stock – a total allowable catch...'<sup>267</sup> The review states that at its core, the CCSBT is a convention for the management of a single fish stock: a scenario that does not reflect a modern scientific understanding of ecosystems management or the precautionary approach.<sup>268</sup>

Also compiled in 2008, the performance review of the International Commission for the Conservation of Atlantic Tunas (ICCAT) found that the RFMO's performance in respect of several of the species under its purview did not meet its conservation objectives.<sup>269</sup> This was thought to be mainly due to a lack of compliance by Contracting Parties (CPs) who had consistently failed to provide accurate data in order for conservation measures to be effectively imposed.<sup>270</sup> The review concluded that the ICCAT Convention needs to be modernised, 'or otherwise supplemented'<sup>271</sup> to reflect current approaches to fisheries management.

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<sup>263</sup> *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, June 29 – July 3, 2009.

<sup>264</sup> The Inter-American Tropical Tuna Commission and the Western and Central Pacific Fisheries Commission both failed to present performance reviews at the Second Joint Meeting of Tuna RFMOs and were unable to report any progress on this matter. Inter-American Tropical Tuna Commission, "Performance Reviews of Tuna Regional Fisheries Management Organisations", 80th Meeting, California, USA, 8-12 June, 2009, Doc IATTC-80-13. Available on line <<http://www.iattc.org/PDFFiles2/IATTC-80-13-Performance-review.pdf>>

<sup>265</sup> Performance Review CCSBT, above n 261.

<sup>266</sup> *Ibid.*, 3-4.

<sup>267</sup> *Ibid.* 4.

<sup>268</sup> *Ibid.*

<sup>269</sup> G Hurry, M Hayashi and J J Maguire, *Report of the Independent Review: International Commission for the Conservation of Atlantic Tunas*, (2008) 1.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

The most recent performance review was conducted by the Indian Ocean Tuna Commission (IOTC) in 2009.<sup>272</sup> It reported high levels of uncertainty within the IOTC in regards to the status of stocks and low levels of compliance by CPs with IOTC conservation measures.<sup>273</sup> In accordance with the findings of the CCSBT performance review, the IOTC review found that the RFMO did not take account of modern principles of fisheries management such as the PA or EBM and it did not sufficiently explain flag State obligations in respect of the Commission.<sup>274</sup>

Gaping holes in the management regime of this organisation resulted in a finding that the RFMO should either be severely amended or replaced by a new instrument altogether.<sup>275</sup> Given the difficulties associated with achieving consensus in decision making, it seems that the latter option, while drastic, appears a more likely or realistic solution to the situation.

## 2.5 Conclusion

This chapter has demonstrated how the complexity of the IUU fishing problem, combined with the weakness of the international fisheries regime, has created a significant disincentive for States to conserve global fish stocks. This disincentive has resulted in many RFMOs struggling to fulfil their mandate to conserve and sustainably manage, with the recent performance review of certain RFMOs highlighting the need for greater State cooperation in this respect.

In the modern fisheries context, regional regulation has struggled to perform in accordance with the expectations of international fisheries agreements. Non-compliance by flag States both parties to and non-parties to RFMOs has contributed to the IUU fishing problem and threatened the effectiveness of these organisations. While international attention has focussed on RFMOs as needing significant reform, this chapter has argued that it is State practice, rather than individual RFMO performance, that should remain the target of reform if sustainable fishing arrangements are to be secured for future generations.

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<sup>272</sup> Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid 1.



## CHAPTER 3

### COMPLIANCE ENFORCEMENT MECHANISMS

#### 3.1 Introduction

The inception of the United Nations Fish Stocks Agreement (UNFSA)<sup>276</sup> in 1995 reflects a commitment on behalf of the international community to strengthen, where needed, regional fisheries management organisations (RFMOs).<sup>277</sup> This agreement envisages a new role for RFMOs by authorising contracting parties (CPs) to take enforcement action against non-compliance and deter vessels from undermining the conservation measures of these organisations.<sup>278</sup> In 2001, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>279</sup> (IPOA-IUU) reinforced UNFSA ideals by providing that States, acting through RFMOs, should take action to prevent, deter and eliminate IUU fishing.<sup>280</sup> The IPOA-IUU also suggests that in taking such action, States should agree to adopt 'appropriate measures, through agreed procedures'<sup>281</sup> which comply with international law.<sup>282</sup>

Three years later, at a meeting of the Organisation for Economic Co-operation and Development (OECD) in 2004, it was decided that: 'fair, transparent and non-discriminatory countermeasures should be adopted, consistent with international law, against countries that do not comply with the conservation and management measures adopted by RFMOs...'<sup>283</sup> These examples highlight increasing awareness and acceptance of the use of compliance enforcement mechanisms in RFMOs.

Over the last decade, the use of compliance enforcement mechanisms has been stressed as both legally legitimate and necessary for the sustainable management of the world's oceans. However, as recently as March 2009, the Twenty-eighth Session of the FAO Committee on Fisheries (COFI) found there was a continuing need for more effective management to fulfil global nutritional, social and economic sector objectives.<sup>284</sup> COFI concluded that an effective approach had not yet been established to enable RFMOs to take the action necessary to

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<sup>276</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001).

<sup>277</sup> Organisation for Economic Cooperation and Development, *Strengthening Regional Fisheries Management Organisations* (2009) 8.

<sup>278</sup> UNFSA, above n 276, articles 20(1), 20(7).

<sup>279</sup> United Nations Food and Agriculture Organisation, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted by consensus at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 102th Session of the FAO Council.

<sup>280</sup> *Ibid* paragraph 84.

<sup>281</sup> *Ibid*.

<sup>282</sup> *Ibid* paragraph 80.

<sup>283</sup> Organisation for Economic Cooperation and Development, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (2004) 14.

<sup>284</sup> "FAO Programme of Work in Fisheries and Aquaculture", Report of the Twenty-eighth Session of the Committee on Fisheries, Rome, Italy, 2 - 6 March 2009, 3.

facilitate enhanced flag State responsibility and enable international obligations to be met.<sup>285</sup> With many States reluctant to delegate jurisdiction over the actions of their vessels on the high seas to a regulatory authority, there is a clear need for a paradigm shift in the way States commit to their regional obligations.<sup>286</sup>

However, the availability and adoption of enforcement mechanisms by RFMOs has increased in the last decade.<sup>287</sup> Options ranging from policy-based approaches designed to encourage cooperation from non-compliant States, to more 'hard-line' trade-related measures have been adopted as a means for improving RFMO performance.<sup>288</sup> To date, many RFMOs have implemented measures to target non-compliance by both CPs and non-contracting parties (NCPs) and all RFMOs have adopted specific measures that place obligations on flag States.<sup>289</sup>

However in 2007, a report issued by Chatham House outlining best practices for RFMOs<sup>290</sup> (the Chatham House Report) found that inconsistencies in compliance enforcement still exist between RFMOs, challenging the effectiveness of this regime.<sup>291</sup> The success of compliance enforcement measures, such as trade-related measures, depends upon the uniform adoption of such regulations by all RFMOs, as well as the cooperation of flag States.<sup>292</sup> Unfortunately, the majority of RFMOs still lack an effective enforcement regime<sup>293</sup> and an integrated approach remains to be seen.<sup>294</sup>

This chapter begins with the proposition that there exists the means, legal standing and need for RFMOs to take action to ensure compliance from flag States. As outlined at the 2008 'Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action' (the FAO Expert Workshop),<sup>295</sup> there is a distinct need for more legal research to be conducted in this area to identify possible actions that can be taken by RFMOs.<sup>296</sup> The chapter responds to the need for increased utilisation and acceptance of compliance enforcement mechanisms. By dividing possible compliance enforcement mechanisms that can be taken by RFMOs into three categories (including policies, diplomacy and countermeasures) this section aims to clarify the

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<sup>285</sup> Ibid 4.

<sup>286</sup> Alistair Graham of the World Wide Fund for Nature (WWF) has commented on a pattern emerging in RFMOs in that States bring very limited agendas with them to meetings. Such action, it is suggested, has the potential to compromise cooperation obligations and prevent conservation objectives from being reached. Alistair Graham, 'Extractive and Non-Extractive Allocation Issues - An Environmental Perspective' (Paper presented at the Sharing the Fish Conference, Perth, Australia, 23 February - 2 March 2006).

<sup>287</sup> TRAFFIC, 'The Use of Trade-Related Measures in the Commission for the Conservation of Southern Bluefin Tuna' (Paper presented at the Meeting of the CCSBT Compliance Committee, Miyazaki, Japan, 8-9 October 2006).

<sup>288</sup> Ibid.

<sup>289</sup> Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007) 44.

<sup>290</sup> Chatham House is the home of the Royal Institute for International Affairs and is based in London, England.

<sup>291</sup> Lodge et al, above n 289, 59.

<sup>292</sup> Ibid 55.

<sup>293</sup> Rosemary Rayfuse, 'Regional Allocation Issues or Zen and the Art of Pie Cutting' (2007) No. 2007-10 *UNSW Law Research Paper*. Available at on line at <<http://www.fishallocation.com/assets/pdf/papers/RosemaryRayfuse>>

<sup>294</sup> Lodge et al, above n 289, 59.

<sup>295</sup> *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action*, United Nations Food and Agriculture Organisation (FAO) in cooperation with Fisheries and Oceans Canada, 25-28 March 2008, Vancouver, Canada.

<sup>296</sup> Ibid.



application and effect of these measures and provide new insights into the different paths RFMOs might take to implement enforcement mechanisms.

### 3.2 Limitations

Compliance enforcement is pivotal to the success of the individual RFMO.<sup>297</sup> This thesis is limited to discussion of enforcement action that can be brought by RFMOs against flag States. Under international law, flag State jurisdiction grants States, not individual vessels, the jurisdiction to fish the high seas.<sup>298</sup> As such, if there is a breach of an obligation that has been accepted by the flag State via their RFMO commitment, it is the flag State and not the vessel that will be liable. As a result of flag State jurisdiction, there is often more to be gained in terms of fisheries management by targeting the actions of the non-compliant flag States rather than targeting the actions of the individual vessel fishing the high seas.<sup>299</sup>

However, that is not to say that the actions of the flag State are separate from those of the vessel it has authorised to fish the high seas. In some cases, in order to effectively penalise the flag State for not controlling the actions of their vessels on the high seas, it is necessary to consider enforcement action that can be taken against an individual vessel.<sup>300</sup> As a result, this chapter considers specific examples of enforcement actions that target vessels for the impact that such action has on compliance by flag States.

### 3.3 The membership problem

In considering compliance with RFMO conservation measures, another difficulty presents itself: the problem of RFMO membership. Today, several categories of RFMO membership exist. These include the CP and NCP and what will be referred to for the purposes of this thesis as a Cooperating Non-Party (CNP). Differing levels of membership imply different responsibilities for the flag State in respect of the relevant RFMO and its conservation measures. Legally, CPs are obliged to adhere to the conservation measures that they accept upon becoming a party to a RFMO.<sup>301</sup> In this way, enforcement action can be brought against a CP in the event of non-compliance. In the case of NCPs, however, RFMOs have no legal standing to enforce their conservation measures against non-compliance.<sup>302</sup>

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<sup>297</sup> Denzil Miller and Marie Jacobsson, 'Fisheries Management and Good Governance: Global, Regional and National Legislation and Regulation' in J Sundberg (ed), *Fish, Trade and Development* (in press) .

<sup>298</sup> Rosemary Rayfuse, *Non-flag State Enforcement in High Seas Fisheries* (2004) 21.

<sup>299</sup> Davor Vidas, 'IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment' in D D Caron and H N Scheiber (eds), *Bringing New Law to Ocean Waters* (2004) 3.

<sup>300</sup> For example, 'non-compliant vessel lists' (formerly referred to as vessel 'black-lists') target individual vessels, however they are also a powerful mechanism for pressuring flag States to comply; particularly RFMO member States.

<sup>301</sup> Miller and Jacobsson, above n 297.

<sup>302</sup> R. Quentin Grafton et al, *Handbook of Marine Fisheries Conservation and Management* (2010)160.

In an attempt to overcome this problem, UNFSA provides that all States, regardless of their membership of the relevant RFMO, have an obligation to ensure their vessels comply with the conservation and management measures adopted by that RFMO.<sup>303</sup> In addition, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the FAO Compliance Agreement) provides that States should take measures to ensure that their vessels do not engage in activity which undermines the effectiveness of RFMO conservation measures.<sup>304</sup> Unfortunately, since its inception, ratification or accession to the FAO Compliance Agreement has been low,<sup>305</sup> a situation which has challenged the application of this agreement. As a general rule, however, the United Nations Convention on the Law of the Sea (the LOSC)<sup>306</sup> also imposes a customary obligation upon all State parties to cooperate in the conservation and management of high seas resources.<sup>307</sup>

The difficulty that arises is that international agreements only apply *inter partes*.<sup>308</sup> This means that only States that agree to the provisions of UNFSA and the FAO Compliance Agreement have an obligation to adhere to the conservation measures of RFMOs even when they are not a CP. Logically, it is unlikely that a State that has failed to become a member of a RFMO would agree to the provisions of either of these agreements. As a result of the voluntary nature of high seas conservation attempts, there is some debate as to the extent to which RFMOs have the jurisdiction to create compliance mechanisms which apply to NCPs.<sup>309</sup> Despite this, certain RFMOs *have* adopted conservation measures which aim to penalise non-compliant NCPs<sup>310</sup> and there are examples of NCPs demonstrating an acceptance of their responsibility to RFMOs by ordering their vessels to comply with these measures.<sup>311</sup>

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<sup>303</sup> UNFSA, above n 276, article 18(1).

<sup>304</sup> *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, opened for signature 24 November 1993, 2221 UNTS 39486 (entered into force 24 April 2003), article 3(1).

<sup>305</sup> Kevern L. Cochrane and David J. Doullman, 'The Rising Tide of Fisheries Instruments and the Struggle to Keep Afloat' (2005) 360(1453) *Philosophical Transactions: Biological Sciences* 77, 80.

<sup>306</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>307</sup> *Ibid* articles 116-118.

<sup>308</sup> The term *inter partes* literally means 'between parties'. In a legal sense it is used to define a relationship that is between specified parties only and does not concern others. Lloyd Duhaime, *Legal Dictionary* <<http://duhaime.org/LegalDictionary/Interpartes.aspx>> at 29 March 2010.

<sup>309</sup> The debate as to whether RFMOs might impose their conservation measures on non-contracting parties arose between States at CCAMLR XXVIII held in Hobart, Tasmania in 2010. See Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-ninth Meeting of the Commission*, CCAMLR-XXIX, Hobart, Australia, 25 October - 5 November 2010, paragraphs 12.95 - 12.100. Available on line <[http://www.ccamlr.org/pu/e/e\\_pubs/cr/10/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cr/10/all.pdf)>

<sup>310</sup> For instance, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) has established a trade-related measure to address IUU fishing by NCPs. Antarctic and Southern Ocean Coalition, 'CCAMLR XXII Meeting Report', 24 October - 7 November 2003, Hobart, Australia, 6. Available on line at <<http://www.asoc.org/Portals/0/ASOC%20final%20report%20CCAMLR%20XXII,%20Dec%202003.pdf>>

<sup>311</sup> Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) LI *Netherlands International Law Review* 41, 62.

Finally, CNPs hold a different status altogether within the RFMO framework. To encourage compliance, many RFMOs have invited NCPs to accept 'cooperating non-member' status.<sup>312</sup> It is up to the individual RFMO to determine matters such as how CNPs will participate in the organisation (including their attendance at annual meetings), procedures for attaining CNP status and which conservation measures will apply to CNPs. There is great variation in the approach that different RFMOs adopt with respect to CNPs, with certain RFMOs only recognising CNPs for their participation in specific conservation measures.<sup>313</sup>

However in a report entitled 'Practice of RFMOs Regarding Non-Members',<sup>314</sup> Daniel Owen<sup>315</sup> states that all RFMOs require CNPs to confirm their commitment to 'respect the Commission's conservation and management measures'.<sup>316</sup> As a general rule, he argues, all the conservation and management measures of the RFMO in question are to be complied with by CNPs.<sup>317</sup>

Where a measure refers only to members, there may be some difficulty determining how it will apply to CNPs but this, Owen suggests, will come down to a matter of wording. Arguably, for the purposes of compliance enforcement, CNPs hold the same status as CPs unless the wording of a conservation measure suggests otherwise. In summary, and for the purposes of practicality, this chapter considers compliance enforcement mechanisms that could theoretically be adopted by an RFMO to combat non-compliance by flag States with varying degrees of RFMO membership.

### 3.4 Tactical measures

This section is based on the diagram of RFMO compliance enforcement contained in Figure 2 (see below). As Figure 2 demonstrates, there are several avenues that RFMOs might pursue to improve rates of compliance by flag States; including policy approaches; diplomatic action; and countermeasures. Under each of these categories, a range of actions can be employed by the RFMO to encourage or require compliance by the flag State. Certain approaches, such as cooperative policies, function by pre-empting instances of non-compliance by flag States while others, such as trade-related measures and graded sanctions, allow a RFMO to respond to a specific or continuing instance of non-compliance. As such, the course of action an RFMO

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<sup>312</sup> FAO Technical Guidelines for Responsible Fisheries, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Food and Agriculture Organisation of the United Nations, Rome, 2002, 55. Available on line <<ftp://ftp.fao.org/docrep/fao/005/y3536e/y3536e00.pdf>>

<sup>313</sup> For example, the only cooperating party status the CCAMLR recognises is that of the 'non-Contracting Party cooperating with CCAMLR by participating in the Catch Documentation Scheme for *Dissostichus* spp.' See Daniel Owen, "Practice of RFMOs Regarding non-Members: A Report to Support the Independent High Level Panel to Develop a Model for Improved Governance by RFMOs", Cambridge, United Kingdom, February 2007, 4.

<sup>314</sup> Daniel Owen, "Practice of RFMOs Regarding non-Members: A Report to Support the Independent High Level Panel to Develop a Model for Improved Governance by RFMOs", Cambridge, United Kingdom, February 2007.

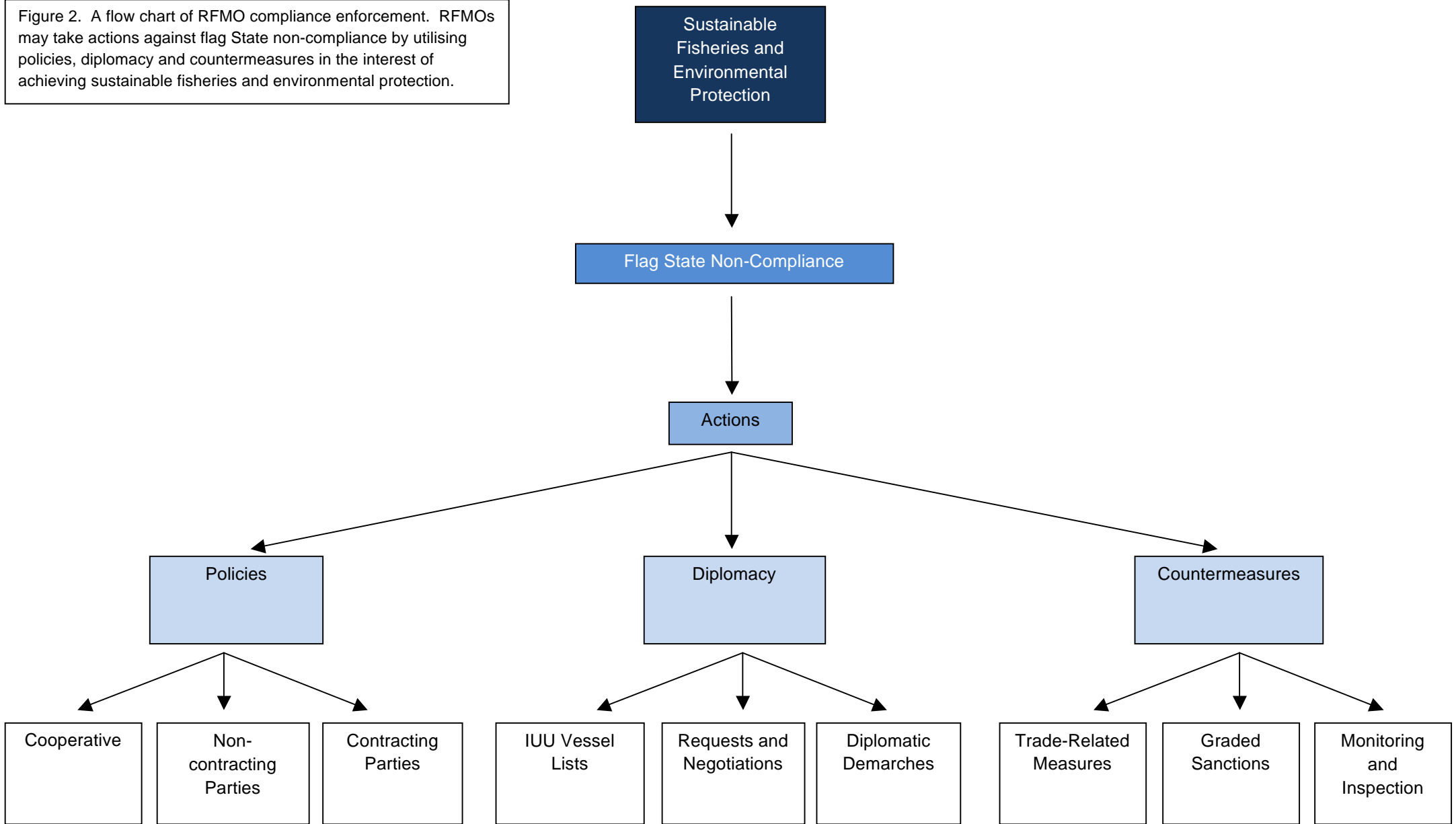
<sup>315</sup> Daniel Owen is a barrister at the bar of England and Wales. He specializes in international, European Community and United Kingdom law regulating the use of the marine environment, and has worked frequently on fisheries matters.

<sup>316</sup> Owen, above n 314, 12.

<sup>317</sup> *Ibid.*

adopts to combat non-compliance will depend upon whether the non-compliance is a perceived threat or an actual occurrence.

Figure 2. A flow chart of RFMO compliance enforcement. RFMOs may take actions against flag State non-compliance by utilising policies, diplomacy and countermeasures in the interest of achieving sustainable fisheries and environmental protection.



\* This figure was formulated in conjunction with Dr. Denzil Miller. The author would like to recognise and thank Dr. Miller for his contribution.

While the list of nine compliance mechanisms examined in this section is not exhaustive, attention is drawn to the need for compliance enforcement in RFMOs to occur across all three categories on a tactical level. Improved flag State control is one of the foundations of responsible fisheries management<sup>318</sup> and by categorising examples of compliance enforcement mechanisms this chapter provides a unique insight into the range of compliance enforcement mechanisms and their differing applications. While it is recognised that it difficult for RFMOs to address failures by specific flag States,<sup>319</sup> and that the problem of political will remains as strong as ever; the fact remains that if regional management is to gain strength, RFMOs must be able to respond quickly and accurately to non-compliant behaviour.<sup>320</sup>

### 3.4.1 Policies and approaches

RFMO policies and their approach towards both CPs and NCPs are essential to the effectiveness of the regional system of fisheries management.<sup>321</sup> Without guidelines to determine how the individual RFMO will deal with CPs and NCPs differently, there can be no common and consistent approach to the manner in which the organisation conducts itself. As such, policies and approaches play a large role in determining how individual RFMOs will tackle the problem of non-compliance by different parties. While RFMO policies and approaches govern a vast array of matters, including transparency and new and exploratory fisheries,<sup>322</sup> this section is specifically concerned with the manner in which an RFMO, by adopting a strict approach, can minimise non-compliance.

#### 3.4.1.1 Cooperative policies

Cooperation is the foundation of regional fisheries management.<sup>323</sup> It is through cooperation that RFMOs seek to enforce their mandate and implement their regime. By encouraging both CPs and NCPs to cooperate with the objectives of an RFMO, the instances of non-compliance will be minimised. In the alternative, a lack of cooperation from flag States reduces the control exercised by a RFMO, particularly when trying to impose restrictions on a flag State that is not a party to the relevant RFMO.

The importance of cooperation arises as a result of the duty to cooperate contained in the LOSC. The LOSC determines that States are 'to cooperate to establish subregional or regional fisheries organisations'<sup>324</sup> in the interests of conservation, and therefore one of the purposes of an RFMO

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<sup>318</sup> FAO Expert Workshop, above n 124.

<sup>319</sup> Denzil Miller, 'Regional Fisheries Management Organisations and Implementation of Flag State Performance Criteria and Actions' (Paper presented at the FAO Expert Consultation on Flag State Performance, 23 - 26 June 2009).

<sup>320</sup> FAO Expert Workshop, above n 124.

<sup>321</sup> Implementation of the IPOA-IUU, above n 312.

<sup>322</sup> A Willock and M Lack, *Follow the Leader: Learning from Experience and Best Practice in Regional Fisheries Management Organisations* (2006) 16.

<sup>323</sup> Lodge et al, above n 289, 1.

<sup>324</sup> LOSC, above n 306, article 118.

is to act as a forum for negotiations between States on conservation matters.<sup>325</sup> As such, many RFMOs have formulated policies directly relating to cooperation between and amongst CPs, NCPs and CNPs.

The manner in which policy can be used to encourage cooperation can be demonstrated by the conservation measures of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). The CCAMLR has sought to overcome the threat posed by NCPs to its effectiveness by adopting a 'Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties'.<sup>326</sup> This policy codifies the duty to cooperate contained in the LOSC and extends awareness of the need for NCPs to accede to the convention. The aim of the Policy is to encourage and build the capacity of NCPs to cooperate and to keep them informed of developments in conservation measures.<sup>327</sup> The Policy requires the Chairman of the CCAMLR to write to NCPs to, *inter alia*, 'invite and encourage non-Contracting Parties to attend as observers at meetings of the Commission'<sup>328</sup> and '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'.<sup>329</sup>

In another example of how cooperative policies can target non-compliance, certain RFMOs have moved to make policies more effective by including provisions that provide positive incentives for cooperation. The framework provisions of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the North-East Atlantic Fisheries Commission (NEAFC) expressly refer to 'cooperation quotas' implying that if States choose to cooperate their catch quotas will be increased.<sup>330</sup>

In other cases, the treaty establishing a RFMO can refer to the benefits to be derived from cooperation. It is the policy of both the Western and Central Pacific Fisheries Commission (WCPFC) and the South East Atlantic Fisheries Organisation (SEAFO) that 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'. In this way, cooperative policies can encourage compliance from NCPs and reduce the incentive for States to operate outside RFMO regimes.

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<sup>325</sup> Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40(1) *Ocean Development & International Law* 80, 87.

<sup>326</sup> The Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties was Adopted at CCAMLR-XVIII and amended at CCAMLR-XXV. Available on line <<http://www.ccamlr.org/Pu/e/cds/policy-to-enhance.pdf>>

<sup>327</sup> Lodge et al, above n 289, 64.

<sup>328</sup> Policy to Enhance Cooperation, above n 326.

<sup>329</sup> *Ibid.*

<sup>330</sup> Henriksen, above n 325.

### 3.4.1.2 Non-contracting parties

One of the primary challenges facing RFMOs and their ability to implement conservation measures effectively is the problem of incomplete membership. Many States continue to operate outside of the relevant fisheries regimes, threatening the conservation and management goals of RFMOs.<sup>331</sup> Significant damage can result from the activities of NCPs, with the conservation measures of the ICCAT, for instance, frequently undermined by ships registered in non-member States.<sup>332</sup> In fact, it is estimated that about 10 percent of the total catch in ICCAT fisheries is undertaken by vessels flagged to non-member States<sup>333</sup> which can thereby diminish incentives to comply with the RFMO.

As such, many RFMOs have designed compliance policies and approaches targeting the activities of NCPs, their nationals and their vessels. For instance, the Indian Ocean Tuna Commission (IOTC) has a scheme to promote compliance by the vessels of NCPs whereby any evidence that such vessels have been fishing contrary to IOTC regulations should be reported to the authorities. Similarly, CCAMLR's Resolution 14/XIX urges all NCPs not participating in the CCAMLR Catch Documentation Scheme (CDS) to implement it fully. By implementing a single approach towards the actions of NCPs, RFMOs are able to achieve consistency and promote a consistent message to non-compliant States, their vessels and nationals.

### 3.4.1.3 Contracting parties

While the control or regulation of NCPs is one of the key objectives of any RFMO, achieving compliance by those parties that *have* agreed to implement RFMO mandates is not a given. Indeed, the performance reviews of certain AusRFMOs recently noted low levels of compliance by contracting parties as one of the major problems facing the effectiveness of the individual RFMO.<sup>334</sup> As such, achieving compliance by those parties that have committed to implementing conservation measures as well as empowering those States to achieve compliance from their nationals is crucial to the functionality of all RFMOs.

In an example of a policy approach directed at CPs, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) recently implemented their 'Resolution on action plans to ensure compliance with Conservation and Management Measures'. This Resolution requires CPs and CNPs to submit an action plan to the Secretariat concerning, *inter alia*, how the State will certify catch data and information on ecologically related species. Further to this the CCAMLR has adopted Conservation Measure 10-08 requiring CPs to take measures to deprive IUU fishing

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<sup>331</sup> Willock and Lack, above n 322, 1.

<sup>332</sup> Elizabeth R. DeSombre, 'Fishing Under Flags of Convenience: Using Market Power to Increase Participation in International Regulation' (2005) 5(4) *Global Environmental Politics* 79.

<sup>333</sup> *Ibid.*

<sup>334</sup> Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*. See also Commission for the Conservation of Southern Bluefin Tuna, Report of the Performance Review Working Group, Canberra, Australia, July 2008. Available on line at <[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/report\\_of\\_PRWG.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/report_of_PRWG.pdf)>



operators of the benefits obtained from their behaviour. This approach requires that the flag State act to achieve compliance by nationals and vessels with the conservation mandate of the RFMO.

### 3.4.2 Diplomatic measures

As outlined in Figure 2, the second tactical measure to be examined for its ability to enable RFMOs to take action against non-compliance, is that of diplomacy. While significant difficulties have arisen as a result of the law of the sea being founded in the notion of the freedom to fish,<sup>335</sup> it is arguable that this situation has also strengthened the ability of diplomatic pressures to control the actions of States. Meetings of RFMOs are replete with examples of States undertaking diplomatic negotiations which continue intersessionally to allow States to reach agreement on conservation measures.<sup>336</sup>

However, the diplomatic ambitions of a State or group of States can also be made apparent through the creation of IUU vessel lists or the issuing of a diplomatic demarche. While such tensions do not always resolve themselves in favour of conservation, diplomacy is certainly an important, if not the most important, tool available to empower RFMOs and CPs to enforce compliance.

#### 3.4.2.1 IUU vessel lists

Today, it is common policy for an RFMO to compile an annual list of vessels they have found to be engaged in IUU fishing in their area of competence and undermining their conservation measures.<sup>337</sup> The CCAMLR was the first RFMO to adopt a scheme for an IUU vessel list at its twenty-second annual meeting in 2003.<sup>338</sup> Since then, numerous other RFMOs<sup>339</sup> have adopted similar schemes.

On a tactical level, the compilation of these lists could be considered to be a policy approach, however for the purposes of this chapter, they are analysed for their effectiveness as a diplomatic measure aimed at naming and shaming those flag States whose vessels appear on lists compiled by the RFMO. If the flag State of a listed vessel is a CP, the pressure imposed upon the non-compliant flag State at both meetings of the RFMO and intersessionally is

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<sup>335</sup> Rayfuse, above n 298, 24.

<sup>336</sup> For example, at CCAMLR XXIX the USA reiterated its commitment to continued intersessional discussions on approaches to manage the krill fishery. Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-ninth Meeting of the Commission*, CCAMLR-XXIX, Hobart, Australia, 25 October - 5 November 2010, paragraph 12.70.

<sup>337</sup> CCAMLR's IUU vessel list is available on line <<http://www.ccamlr.org/put/e/sc/fish-monit/iuu-vess.htm>>

<sup>338</sup> Chatham House, *Monitoring IUU Fishing Vessels in Southern African Ports* (2009) <[http://www.iuufishing.org/index.php?option=com\\_frontpage&Itemid=1](http://www.iuufishing.org/index.php?option=com_frontpage&Itemid=1)> at 15 March 2010.

<sup>339</sup> Including the Inter-American Tropical Tuna Commission (IATTC), the International Convention for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), Northwest Atlantic Fisheries Organization (NAFO), North-East Atlantic Fisheries Commission (NEAFC), South East Atlantic Fisheries Organization (SEAFO) and the Western and Central Pacific Fisheries Commission (WCPFC).

considerable and such pressure can often lead to the State taking action to remove the vessel from their register.<sup>340</sup>

However this does not resolve the problem of IUU vessels that are flagged to NCPs. As a result many RFMOs have compiled separate lists of IUU vessels of CPs and NCPs.<sup>341</sup> There are many kinds of activities that will lead to inclusion on IUU vessel lists. According to the Chatham House Report these can include:

- being sighted engaged in illegal activity,
- fishing with a vessel not registered on a required register,
- landing after being denied port access,
- landing or transshipment pursuant to relevant measures,
- fishing without quota, catch limit or effort allocation,
- failing to report or record catches (or making false reports),
- fishing during closed seasons or in closed areas,
- using prohibited fishing gear, or
- transshipping to vessels on the IUU fishing list.<sup>342</sup>

Generally, these are all activities considered to be 'serious violations' under UNFSA.<sup>343</sup>

The quality of information included in the IUU vessel lists of different RFMOs has been found to vary greatly.<sup>344</sup> However, it appears that there is considerable commonality amongst RFMOs when it comes to determining what actions should be taken against vessels appearing on these lists.<sup>345</sup> In terms of compliance enforcement, it is the effect that IUU vessel lists have on the actions of States that is of the greatest significance. While technical measures such as denying port access and prohibiting chartering of the vessel might occur, the public notoriety associated with listing is sometimes enough to prompt the flag State itself to penalise the non-compliant vessel in question.<sup>346</sup>

Regardless of the penalties that flow from an IUU listing for the vessel, it is clear that the IUU vessel lists represent an important diplomatic tool that can be utilised by RFMOs in order to promote compliance by both CPs and NCPs.

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<sup>340</sup> Lodge et al, above n 289, 68.

<sup>341</sup> CCAMLR, *IUU Vessels* (2009) <<http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-vess.htm>> at 15 March 2010.

<sup>342</sup> Lodge et al, above n 289, 63.

<sup>343</sup> Ibid.

<sup>344</sup> The PEW Environment Group, *Port State Performance* (2009) <<http://www.portstateperformance.org/index.php/content/execsummary>> at 7 March 2010.

<sup>345</sup> Lodge et al, above n 289, 63.

<sup>346</sup> The PEW Environment Group, above n 344.

### 3.4.2.2 Requests and negotiations

Due to the voluntary nature of RFMO membership, these organisations function largely via diplomatic negotiations and the issuing of requests to achieve compliance with conservation measures. By enacting measures to promote membership, an RFMO may encourage NCPs with a real interest in a fishery to join or at least accede to the convention and apply its conservation and management measures.

The IPOA-IUU provides that where the actions of individual States fail to achieve participation, RFMOs themselves should facilitate cooperation through the 'implementation of measures adopted by the relevant organisations.'<sup>347</sup> The ability of an RFMO to achieve comprehensive membership of all States with a potential to influence the fishery in question is a prerequisite for effective management.<sup>348</sup> A specific RFMO might issue a request for cooperation from a vessel or flag State to cease non-compliant behaviour by providing a deadline by which time compliance is to be achieved.<sup>349</sup> Alternatively, it may request a State to recall its vessel to port so that enforcement action might ensue.<sup>350</sup>

However, it is more common for the RFMO itself to engage in requests and negotiations whereby such action will encourage a specific NCP to become a CP. The CCSBT, for instance, used its Japanese contacts to place diplomatic pressure on Korea to become a CP to the commission.<sup>351</sup> Such efforts, however, do not always go rewarded and despite continued pressure, Indonesia remains outside of the CCSBT.<sup>352</sup>

In a positive example of how negotiations can instigate compliance, in 1997, CCAMLR requested Namibia and Mauritius to attend its next meeting as observers following negotiation efforts instigated by France, Australia, New Zealand and South Africa.<sup>353</sup> These negotiations were aimed at encouraging these States to close their ports to illegal trade in Patagonian Toothfish.<sup>354</sup> Three years later, in June 2000, Namibia acceded to the CCAMLR and in 2001 they became a permanent member.<sup>355</sup>

However, achieving this level of success in respect of NCPs as a result of negotiations is not always successful. Both the ICCAT and the CCSBT have undertaken lengthy negotiations with NCPs promising that in becoming CPs, these States will be allocated a certain quota in the

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<sup>347</sup> IPOA-IUU, above n 279, paragraph 83.

<sup>348</sup> Willock and Lack, above n 322, iv.

<sup>349</sup> Organisation for Economic Cooperation and Development, *Review of Fisheries in OECD Countries* (2005), 20.

<sup>350</sup> *Ibid.*

<sup>351</sup> Organisation for Economic Cooperation and Development, *Strengthening Regional Fisheries Management Organisations* (2009) 34.

<sup>352</sup> *Ibid.*

<sup>353</sup> Rachel Baird, 'Coastal State Fisheries Management: A Review of Australian Enforcement Action in the Heard and McDonald Islands Australian Fishing Zones' (2004) 9(1) *Deakin Law Review* 91.

<sup>354</sup> *Ibid.*

<sup>355</sup> 'Report of the CEP Observer to CCAMLR XIX and SC-CCAMLR XIX', 23 October to 3 November, 2000, Information Paper IP-26, Australia. Available on line at <[http://cep.ats.aq/cep/MediaItems/ml\\_376387248032407\\_ip026e.pdf](http://cep.ats.aq/cep/MediaItems/ml_376387248032407_ip026e.pdf)>

fishery in question.<sup>356</sup> Unfortunately, these States have often held off on becoming CPs until they are offered a substantial quota in the fishery or, in choosing not to join, have continued to fish in the region despite their lack of membership.<sup>357</sup>

### 3.4.2.3 Diplomatic demarches

Although similar to diplomatic action instigated through negotiations and requests, diplomatic demarches by definition, involve a formal representation or warning made to a public authority.<sup>358</sup> The formal nature of this exercise distinguishes it from the negotiation process and while diplomatic demarches are traditionally sent by a State or group of States to another State, RFMOs (as a collaboration of States) are also able to issue diplomatic demarches to States that have engaged in non-compliant behaviour.

The use of diplomatic demarches to persuade States to fish responsibly is well established.<sup>359</sup> In 1998, Australia and France sent a joint demarche to Mauritius in regards to a vessel illegally fishing in the CCAMLR conservation area.<sup>360</sup> Australia and France requested that the *Salvora*, an IUU vessel, not be allowed to unload its catch without an investigation into its fishing activities.<sup>361</sup> In this instance, Mauritius agreed to intervene if the *Salvora* offloaded its catch at a specific port and in this case, the demarche achieved its intended outcome.<sup>362</sup> The success of this measure resulted in a ruling in the Mauritius Supreme Court that the *Salvora* had caught Toothfish in the French exclusive economic zone (EEZ) resulting in the vessel being unable to land its catch.<sup>363</sup>

However, there are also cases where RFMOs themselves have issued diplomatic demarches. In the case of the Inter-American Tropical Tuna Commission (IATTC), the Commission encountered problems with non-compliance when, in 2002, it issued a total closure of all purse seine<sup>364</sup> fisheries. While it was understood that CPs complied with the closure, vessels from Bolivia and Colombia (both NCPs) continued to fish using purse seine nets.<sup>365</sup> The IATTC then issued diplomatic demarches to both these States to no avail. A greater level of success, however, was achieved by the IATTC when the vessels of several NCPs were found to be targeting yellowfin

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<sup>356</sup> Willock and Lack, above n 322, 6.

<sup>357</sup> *Ibid.*

<sup>358</sup> A 'demarche' is defined as 'a political step or proceeding'. See McIntosh (ed), *The Concise Oxford Dictionary of Current English* (1964) 323.

<sup>359</sup> Rayfuse, above n 298, 146.

<sup>360</sup> Baird, above n 353.

<sup>361</sup> *Ibid.*

<sup>362</sup> Greenpeace, *The Case of the Salvora* (2000)

<[http://archive.greenpeace.org/oceans/southernoceans/expedition2000/pirate/report\\_salvora.html](http://archive.greenpeace.org/oceans/southernoceans/expedition2000/pirate/report_salvora.html)> at 5 March 2010

<sup>363</sup> *Ibid.*

<sup>364</sup> The Australian Fisheries Management Authority describes purse seine fishing as a technique whereby the top of a net is floated at the ocean's surface and the bottom of the net is held under the water by lead weights. A wire that is threaded through the bottom of the net can be tightened to close the bottom of the net trapping the fish inside. The net is then pulled in toward the boat and the catch is either pumped or lifted out with small nets or the whole net is brought aboard. See Australian Fisheries Management Authority, *Purse Seine* (2005)

<[http://www.afma.gov.au/information/students/methods/purse\\_seine.htm](http://www.afma.gov.au/information/students/methods/purse_seine.htm)> at 5 March 2010

<sup>365</sup> Rayfuse, above n 298, 145.

tuna in its area of competence. In this case, the vessels withdrew from the area as a result of a 'series of diplomatic demarches'<sup>366</sup> which persuaded the flag States to exercise control over their vessels.

### 3.4.3 Countermeasures

International law concerning countermeasures is founded in the concept of flag State responsibility.<sup>367</sup> Where an obligation, owed to the international community as a whole, is breached, State responsibility may be invoked to allow for action to be taken against the offending State. Under normal circumstances, such action would lie in contravention of international law; however, when countermeasures are taken in conformity with certain requirements, coercive action can be justified.<sup>368</sup> However countermeasures are viewed as exceptional measures, the scope of which is limited to 'the cessation of the internationally wrongful act.'<sup>369</sup>

In the context of international fisheries law, countermeasures could allow a flag State to take action against another State which might have failed to comply with its obligation to cooperate with other States in the conservation of marine living resources.<sup>370</sup> However there are certain conditions restricting what types of action may be taken.

In 1997, it was decided by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case that countermeasures must:

- a) be taken in response to an unlawful act;
- b) be preceded by a demand for compliance by the injured State/s;
- c) be proportionate, and;
- d) have the purpose of inducing the 'wrongdoing state to comply with its obligations under international law'.<sup>371</sup>

As one commentator observes, countermeasures must be reversible<sup>372</sup> and they must not involve the threat or use of force.<sup>373</sup> As a result of the above requirements, the State or group of States taking action must be considered 'injured'. This occurs when an obligation is owed to a

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<sup>366</sup> Ibid.

<sup>367</sup> Ibid 49.

<sup>368</sup> Rosemary Rayfuse, 'Possible Actions Against Vessels Flying the Flags of States Not Meeting the Criteria for Flag State Performance' (Paper presented at the Expert Consultation on Flag State Performance, Rome, Italy, 23 - 26 June 2009) 11.

<sup>369</sup> Elena Katselli, 'Countermeasures by Non-Injured States in the Law on State Responsibility' (Paper presented at the Inaugural Conference of the European Society of International Law "International Law in Europe: Between Tradition and Renewal", Florence, Italy, 13 - 15 May 2004) 5.

<sup>370</sup> Rayfuse, above n 368.

<sup>371</sup> International Court of Justice, 'Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)' (1997). Judgment available on line at <<http://www.icj-cij.org/docket/files/92/7375.pdf>>

<sup>372</sup> Rayfuse, above n 368, 50.

<sup>373</sup> Ibid 11.

group of States or to the international community as a whole and a breach of that obligation can radically change the position of all other States.<sup>374</sup>

In the context of RFMO actions, CPs who are acting in compliance with conservation measures may be considered 'injured' by the actions of a non-compliant flag State allowing IUU vessels to fish. Rosemary Rayfuse<sup>375</sup> argues that countermeasures must be owed to all CPs of an RFMO at least and that within RFMOs, calls for compliance are increasingly being voiced at annual meetings.<sup>376</sup>

The potential for an RFMO to take countermeasures against uncooperative flag States was considered as a viable option for RFMOs to achieve compliance at a 2008 United Nations Food and Agriculture (FAO) workshop on flag State responsibilities.<sup>377</sup> In addition, Roberto Cesari<sup>378</sup> of the European Commission argues that the most effective way to gain flag State cooperation is through the adoption of countermeasures such as trade related measures.<sup>379</sup> He contends that such measures, so long as they are transparent, non-discriminatory and compatible with the regulations of the World Trade Organisation (WTO), represent a tool to pressure flag State who are not cooperating, 'to increase their own control on their vessels, and to oblige their operators to comply with the conservation and management measures of the RFMOs in question.'<sup>380</sup>

#### **3.4.3.1 Trade-related measures**

Trade-related measures are probably the largest remaining category of countermeasures available to induce other States to comply with international law.<sup>381</sup> Article 68 of the IPOA-IUU envisages that States should cooperate through RFMOs to adopt, 'appropriate multilaterally agreed trade-related measures consistent with the WTO that may be necessary to prevent, deter and eliminate IUU fishing for specific fish stocks or species.'<sup>382</sup> This agreement defines what types of actions might constitute trade-related measures in an RFMO context as multi-lateral catch documentation and certification requirements and import and export controls or prohibitions.<sup>383</sup> As a result of such clarification, trade-related measures may be said to consist of port State measures which prevent the landing, transshipment or processing of fish unless the

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<sup>374</sup> Rayfuse, above n 311, 45.

<sup>375</sup> LLB Queens, LL.M Cantab, PhD Utrecht, Admitted to practice in England and Wales, Formerly of the Bar of British Columbia, Canada.

<sup>376</sup> Rayfuse, above n 311, 69.

<sup>377</sup> FAO Expert Workshop, above n 124, 11.

<sup>378</sup> Mr. Roberto Cesari is the European Commission's Directorate-General for Maritime Affairs and Fisheries.

<sup>379</sup> Roberto Cesari, EC Directorate-General for Maritime Affairs and Fisheries, <roberto.cesari@ec.europa.eu> "Contact at CCAMLR" (20 November 2009) (personal e mail).

<sup>380</sup> Ibid.

<sup>381</sup> Rayfuse, above n 311.

<sup>382</sup> IPOA-IUU, above n 279, paragraph 68.

<sup>383</sup> Ibid.

vessel has established that they were taken in a manner consistent with conservation and management measures.<sup>384</sup>

As a result of the restriction that trade-related measures impose on the fundamental legal principle of free trade, the rules and articles of the WTO are of integral importance to the legal application of these measures. In an early case that challenged US environmental protection legislation, Mexico and other countries<sup>385</sup> asked for a panel of the WTO to decide whether the US had the right to ban imports of tuna that had been caught in a manner that did not meet US dolphin protection standards.<sup>386</sup> The panel concluded that the US could not prevent the imports of tuna simply because of the way it was produced and that the General Agreement on Tariffs and Trade (GATT)<sup>387</sup> rules did not allow one country to take trade action for the purposes of enforcing its domestic legislation in another country.<sup>388</sup> As this was an early case, however, it was not decided under the present system of WTO dispute settlement and the report of the panel does not have the status of a legal interpretation.

In November 1998, the *Shrimp-Turtle Case*<sup>389</sup> came before the WTO. This case was brought by India, Malaysia, Pakistan and Thailand against a ban imposed by the US on imports of shrimp which had been caught without the use of 'turtle excluder devices'.<sup>390</sup> On an appeal by the US, the four countries succeeded based on a finding of the WTO that in implementing this measure, the US had failed to provide for the non-discriminatory allocation of technical and financial assistance.<sup>391</sup> However this finding fails to reflect the positive outcome of this decision for the protection of the marine environment.

Finally, in December 2000, the European Community (EC) initiated a case against Chile before the WTO for prohibiting the unloading and transit of swordfish cases taken from the high seas bordering Chile's exclusive economic zone (EEZ), when taken in contravention of Chile's conservation rules.<sup>392</sup> This highly controversial case involved not only a challenge to high seas sovereignty but also a challenge to the jurisdiction of the WTO, with Chile asserting that the

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<sup>384</sup> Antarctic and Southern Ocean Coalition, 'CCAMLR XXII Meeting Report', 24 October - 7 November 2003, Hobart, Australia, 6. Available on line at <<http://www.asoc.org/Portals/0/ASOC%20final%20report%20CCAMLR%20XXII,%20Dec%2003.pdf>>

<sup>385</sup> World Trade Organisation, *Mexico etc versus US: 'Tuna-Dolphin'* (1996)  
<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm)> at 7 March 2010

<sup>386</sup> Ibid.

<sup>387</sup> *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948).

<sup>388</sup> Ibid.

<sup>389</sup> World Trade Organisation, United States – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, WT/DS58/AB/R. Full report of the appellate body available on line at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf)>

<sup>390</sup> World Trade Organisation, *India etc vs US: "shrimp-turtle"* (1999)  
<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)> at 7 March 2010

<sup>391</sup> Ibid.

<sup>392</sup> Peter-Tobias Stoll and Silja Voneky, 'The Swordfish Case: Law of the Sea vs Trade' (2002) 62(21) *ZaöRV* Article available on line at <[http://www.zaoerv.de/62\\_2002/62\\_2002\\_1\\_a\\_21\\_36.pdf](http://www.zaoerv.de/62_2002/62_2002_1_a_21_36.pdf)>

appropriate dispute settlement body in this case would be the International Tribunal for the Law of the Sea (the Tribunal).<sup>393</sup>

As a result, both cases before both the Tribunal and the WTO were suspended and the fundamental environmental issues at hand remain undecided. Ultimately, the decision in this case has fallen to the two parties, with a memorandum of understanding finally being implemented in December 2009.<sup>394</sup> This understanding provides for access of EC vessels to Chilean ports in exchange for commitments on cooperation in the management of stocks.<sup>395</sup>

While it is clear that not every breach of a flag State obligation will be serious enough to warrant the imposition of trade-related measures, if a flag State undermines the effectiveness of an RFMO conservation measure it appears that trade action on the part of that RFMO would currently be consistent with international law.<sup>396</sup> The IPOA-IUU specifically calls on States to exercise trade-related measures against non-compliant States and so long as certain conditions are met it increasingly appears that trade-related measures are legitimate under both WTO regulations and other forms of international law. In addition, article 20(7) of UNFSA authorises CPs, individually or in concert, to take action to deter vessels not complying with relevant RFMO measures until such time as appropriate action is taken by the vessel's flag State.<sup>397</sup>

#### **3.4.3.2 Graded sanctions**

One of the primary findings of the Chatham House Report was that a model RFMO should ensure compliance by providing punishments for non-compliant vessels and States.<sup>398</sup> This notion is reiterated in the FAO Compliance Agreement which is a legally binding agreement clarifying the importance of punitive sanctions. It states that sanctions are applicable in respect of vessels which act in contravention of the provisions of the Agreement.

The FAO Compliance Agreement states that such sanctions shall include refusal, suspension or withdrawal of the authorisation to fish the high seas for serious violations. It provides that sanctions are to be 'of sufficient gravity as to be effective in securing compliance...and to deprive offenders of the benefits accruing from their illegal activities.'<sup>399</sup> Excluding the use of trade-related measures, however, other such penalties that might be available to RFMOs to achieve

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<sup>393</sup> Jiaxiang Hu, 'The Role of International Law in the Development of WTO Law' (2004) 7(1) *Journal of International Economic Law* 143.

<sup>394</sup> European Commission Directorate-General for Trade, "General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases Under the Trade Barriers Legislation", Brussels, February 2010.

<sup>395</sup> *Ibid.*

<sup>396</sup> Rayfuse, above n 311, 57.

<sup>397</sup> Miller, above n 319.

<sup>398</sup> Fisheries and Oceans Canada, *Recommended Best Practices for Regional Fisheries Management Organisations: A Model RFMO* (2009) <<http://www.dfo-mpo.gc.ca/overfishing-surpeche/documents/poster-eng.htm>> at 5 March 2010.

<sup>399</sup> FAO Compliance Agreement, above n 304, article 3(8).



compliance include the use of fines, reduced fishing opportunities, vessel confiscations, denying non-compliant States access to national fisheries.<sup>400</sup>

Certain RFMOs continue to resist the use of sanctions or penalties to address non-compliance.<sup>401</sup> At a meeting of the Tuna RFMOs in 2007,<sup>402</sup> one of the key challenges for the five RFMOs was identified as being the application of penalties and sanctions of 'adequate severity' to deter IUU fishing by both CPs and NCPs.<sup>403</sup> In 2009, the 'Second Joint Meeting of Tuna RFMOs' noted the need for tuna RFMOs to establish a comprehensive system of non-discriminatory sanctions to address the actions of States that repeatedly fail to comply with their obligations.<sup>404</sup> It was decided that this system should include incentives to encourage transparent recognition of overfishing and reinforced sanctions for unreported overfishing.<sup>405</sup>

However, certain RFMOs have taken steps towards imposing penalties in instances of non-compliance.<sup>406</sup> The ICCAT, for instance, provides that a CP that is deemed to have seriously undermined conservation measures will be subject to a review process which might impose penalties against the offending State.<sup>407</sup> Given the range and scope of sanctions available to RFMOs, it is submitted that RFMOs should continue to implement policies which provide for such measures to be taken to combat IUU fishing.

### 3.4.3.3 Monitoring and inspection

The final compliance enforcement mechanism examined in this section is the potential for RFMOs to adopt strict monitoring and inspection requirements to address vessels failing to comply with their conservation measures on the high seas. As provided for in paragraph 80.8 of the IPOA-IUU, the inspection and arrest of non-compliant vessels falls within the ambit of RFMO mandates<sup>408</sup> and that this is an area in which many RFMOs require further development.<sup>409</sup>

Rayfuse explains that not all RFMOs have adopted monitoring and inspection schemes and that no RFMOs provide for a positive right of arrest, detention or prosecution in the event of non-compliance.<sup>410</sup> Rayfuse contends, however, that where States violate their obligations to

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<sup>400</sup> Implementation of the IPOA-IUU, above n 312.

<sup>401</sup> Including the Indian Ocean Tuna Commission. See Indian Ocean Tuna Commission, *Welcome to the IOTC Website* <[www.iotc.org](http://www.iotc.org)>

<sup>402</sup> *Report of the Joint Meeting of Tuna RFMOs*, January 22 - 26, 2007, Kobe, Japan, TunaRFMOs2007/1.

<sup>403</sup> Second Joint Meeting of Tuna RFMOs (Kobe 2), "Course of Actions of Kobe Process 2009-2011", July 2, 2009, Doc. No. TRFMO2-008A/2009, 2.

<sup>404</sup> *Ibid.*

<sup>405</sup> *Ibid.*

<sup>406</sup> Joint Meeting of Tuna RFMOs, above n 402, Appendix 10.

<sup>407</sup> *Ibid.*

<sup>408</sup> Implementation of the IPOA-IUU, above n 312.

<sup>409</sup> Joint Meeting of Tuna RFMOs, above n 402.

<sup>410</sup> Rayfuse, above n 311, 43

cooperate with an RFMO by failing to effectively control a vessel, then any CP may be entitled to act by boarding, inspecting or, if necessary, arresting the vessel concerned.<sup>411</sup>

### 3.5 Conclusion

Historically, a lack of enforcement capability has prevented RFMOs from enforcing their conservation measures on both CPs and NCPs. This chapter has argued that a perceived lack of legitimacy surrounds the notion of RFMOs effectively enforcing their mandate. The fundamental international law concepts of State sovereignty and the freedom of the high seas continue to present as a threat to the enforcement capabilities of RFMOs,<sup>412</sup> however RFMOs are slowly coming to accept the need for the use of trade-related and other measures to control the actions of States and vessels on the high seas.

This analysis has been conducted in recognition of the practical difficulties facing RFMOs in the contemporary fisheries regime, but has aimed to draw attention to the fact that RFMOs are not as 'toothless' as they once were and that legally speaking at least, the avenues for compliance enforcement continue to grow. Many RFMOs have already identified possible improvements to existing measures which can assist them in combating IUU fishing and with increasing awareness and recognition of the options analysed above, it is hoped that a 'culture of compliance' will develop amongst RFMOs and States alike.<sup>413</sup>

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<sup>411</sup> Ibid 65.

<sup>412</sup> FAO Expert Workshop, above n 124.

<sup>413</sup> Judith Swan, 'International Action and Responses by Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO Fisheries Circular - C996, 2004). Available on line at <<http://www.fao.org/docrep/006/y5361e/y5361e07.htm>>

## CHAPTER 4

### COMPLIANCE ENFORCEMENT IN AUSRFMOS

#### 4.1 Introduction

Breakdowns in cooperation within and between regional fisheries management organisations (RFMOs) pose a significant threat to the effectiveness of high seas governance. A 2007 joint workshop of the Organisation for Economic Cooperation and Development (OECD) and the Food and Agriculture Organisation of the United Nations (FAO) reported that RFMOs lacking the resilience to cope with uncooperative States are likely to flounder over time.<sup>414</sup> This situation is also documented in recent RFMO performance reviews.<sup>415</sup> The joint OECD-FAO Workshop identified a gap in the effective implementation of conservation measures by RFMOs and found that this situation requires urgent attention by States. The Workshop concluded that there was more scope for effective cooperation between States, particularly in the area of enforcement.<sup>416</sup>

This chapter identifies the measures currently in place in RFMOs to which Australia is a party (AusRFMOs) to promote compliance and ensure the objectives of the Convention or Agreement are being met. This Chapter breaks down its assessment of the compliance enforcement capacity of AusRFMOs into three categories. First, the founding Convention or Agreement is considered. Second, the formal and informal conservation measures or 'regulations'<sup>417</sup> established by the RFMO to improve compliance and give effect to their mandate are listed.<sup>418</sup> Finally, future compliance initiatives being undertaken by the RFMO in the field of compliance enforcement are outlined.

By identifying the mechanisms currently in place and those being developed by each of the AusRFMOs under examination, this Chapter provides a detailed, comprehensive and contemporary account of the compliance enforcement capacity of AusRFMOs. To provide context and insight into the individual challenges faced by each RFMO, each account begins with a summary of the key compliance issues faced by the RFMO as articulated in performance reviews.

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<sup>414</sup> Organisation for Economic Cooperation and Development and Food and Agriculture Organisation of the United Nations, *Globalisation and Fisheries: Proceedings of an OECD-FAO Workshop* (2007) 151.

<sup>415</sup> See, for example, Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*.

<sup>416</sup> OECD-FAO Workshop, above n 414, 152.

<sup>417</sup> While the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Western and Central Pacific Fisheries Commission (WCPFC) both utilise the term 'conservation measure' to describe the legally binding regulations adopted, the Indian Ocean Tuna Commission (IOTC) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) utilise the term 'resolution'. For the purposes of this thesis, all regulations will be referred to as 'conservation measures' unless referring to the actual title of the regulation.

<sup>418</sup> Note that this examination is only possible where the RFMO is in force and has the potential to formulate conservation measures. In the case of the South Pacific Regional Fisheries Management Organisation (SPRFMO) and the Southern Indian Ocean Fisheries Agreement (SIOFA) neither of these organisations has developed any regulations concerning their relevant area of application.

## 4.2 Compliance enforcement

An act of non-compliance can be committed by both Contracting Parties (CPs) and non-Contracting Parties (NCPs) to an RFMO. The term 'compliance enforcement' is used to describe the body of measures RFMOs can adopt to penalise non-compliance or provide incentives to comply with conservation measures.

Compliance enforcement is distinct from another body of regulations developed by RFMOs which will be referred to generally as 'scientific regulations'. Compliance enforcement mechanisms can function by anticipating non-compliance and deterring this activity, or by addressing the breach by imposing punitive or trade-related action after non-compliance has occurred. Examples of compliance enforcement mechanisms are outlined in Chapter 3 (see Chapter 3, Figure 2).

RFMOs utilise both legally binding and non-legally binding measures to regulate the activities of States, vessels and nationals. For the purposes of this thesis, legally binding measures are referred to as 'formal' measures whereas non-legally binding measures are referred to as 'informal' measures. The terminology adopted by RFMOs to distinguish between formal and informal measures varies significantly. For the purposes of consistency and clarity, this chapter considers the formal and informal measures of each AusRFMO separately to highlight the differences in application of each.

## 4.3 Convention for the Conservation of Antarctic Marine Living Resources

### *Background*

The Convention for the Conservation of Antarctic Marine Living Resources (the CAMLR Convention)<sup>419</sup> was established on 7 April 1982 in response to, *inter alia*, fears that the krill fishery would become the next in a line of species to be overfished in the Antarctic.<sup>420</sup> As a key ecological species, scientists were concerned that if stocks of krill were to become depleted, the entire Antarctic marine food chain could be compromised.<sup>421</sup>

At its Twenty-sixth meeting in 2007, CCAMLR decided to undertake a performance review during 2008.<sup>422</sup> The practice of RFMOs submitting to performance reviews was initiated at a meeting of tuna RFMOs in Kobe, Japan in January 2007<sup>423</sup> and in the case of CCAMLR, the review was

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<sup>419</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 48, (entered into force 7 April 1982).

<sup>420</sup> This phenomenon, known as the 'line of exploitation' includes the exploitation of seals, whales and fish such as the Patagonian toothfish. D.G. M. Miller, 'Managing Fishing in the Sub-Antarctic' (2007) 141(1) *Papers and Proceedings of the Royal Society of Tasmania* 121, 124.

<sup>421</sup> E A Clark, 'The Duty of States to Cooperate in International Marine Capture Fisheries Law' (2009) 13 *Antarctic and Southern Oceans Law and Policy Occasional Papers* 46, 57.

<sup>422</sup> CCAMLR, *Report of the CCAMLR Performance Review Panel* (2007) <<http://www.ccamlr.org/pu/E/revpanrep.htm>> at 21 May 2010.

<sup>423</sup> Inter-American Tropical Tuna Commission, "Performance Reviews of Tuna Regional Fisheries Management Organisations", 80th Meeting, California, USA, 8-12 June, 2009, Doc IATTC-80-13. Available on line <<http://www.iattc.org/PDFFiles2/IATTC-80-13-Performance-review.pdf>>

carried out by a panel of nine people appointed by the Commission. The purpose of the review was to evaluate CCAMLR's performance against specific criteria.<sup>424</sup> In general, the review noted that in recent years, there has been a good degree of compliance by CPs and that levels of compliance have actually increased with time.<sup>425</sup> While there continue to be breaches by CPs, many of these appeared to be of a 'technical nature' rather than physical acts of illegal fishing for instance.<sup>426</sup>

The CCAMLR performance review went on to state that despite the combined effect of CCAMLR's provisions relating to illegal, unreported and unregulated (IUU) fishing,<sup>427</sup> this practice continues to be a significant problem, specifically in respect of localised areas in CCAMLR waters.<sup>428</sup> In reality, the report notes, the failure of certain parties to discharge conservation and management obligations indicates a major problem when it comes to cooperative regional fisheries management in CCAMLR.<sup>429</sup> The performance review proposes that CCAMLR should ensure that it continues to improve the efficiency, reach and use of compliance enforcement tools.<sup>430</sup>

#### 4.3.1 CCAMLR objectives

As outlined above, the CAMLR Convention was formulated in 1982. Over the years, CCAMLR has updated or developed many of the original provisions of the CAMLR Convention through the adoption of conservation measures to improve or promote compliance with conservation objectives. The CAMLR Convention provides the organisation with the jurisdiction to adopt conservation measures and states what the effect of these measures will be. Article IX(6) of the CAMLR Convention states that conservation measures, 'shall become binding upon all Members of the Commission' within 180 days unless a CP notifies the Commission that it is unable to accept the measure. While not a compliance enforcement mechanism *per se*, this provision is significant as without its inclusion the obligation for States to comply would not be recognised by the CCAMLR.

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<sup>424</sup> CCAMLR, *Report of the CCAMLR Performance Review Panel* (2007) <<http://www.ccamlr.org/pu/E/revpanrep.htm>> at 21 May 2010 at XII.I

<sup>425</sup> Jorge Berguño et al, 'CCAMLR Performance Review Panel Report' (2008) 63. Report available online at <<http://www.ccamlr.org/pu/E/e-Prfrm%20Review%20Report%20Jun09.pdf>>

<sup>426</sup> *Ibid.*

<sup>427</sup> CCAMLR's provisions relating to IUU fishing include:

- vessel and gear marking
- Flag State licensing
- Port State controls
- vessel monitoring systems
- a catch documentation scheme
- black –listing of both contracting and non-contracting party vessels

<sup>428</sup> Berguño et al, above n 425, 64.

<sup>429</sup> *Ibid.* 65.

<sup>430</sup> *Ibid.* 74.

Under article X of the CAMLR Convention, the Commission is required to draw the attention of a NCP to any activity undertaken by its nationals or vessels which affects the implementation of the objectives of the CCAMLR. Under article X(2), the Commission shall do the same in regards to CPs and draw their attention to any activity which affects the compliance by the CP with its obligations under the Convention. The obligation to make States aware of acts of non-compliance is a common compliance enforcement tactic among RFMOs as often the mere recognition of such behaviour can place political pressure on a State to better control its actions or those of a vessel or national.

Under the CAMLR Convention, CPs are also under a direct obligation to ensure that they take 'appropriate measures'<sup>431</sup> within their competence to ensure compliance with the provisions of the CAMLR Convention and CCAMLR conservation measures under article XXI. The CAMLR Convention foresees the imposition of sanctions by States in response to non-compliance by their flagged vessels or nationals.<sup>432</sup> Article XXI requires States to report on the taking of any such action to the CCAMLR, presumably to ensure that non-compliant activities do not go unrecognised or unreported.

#### **4.3.2 Conservation measures**

Formal measures imposed by CCAMLR are referred to by the Commission as 'Conservation Measures', with each measure allocated a number and a title.<sup>433</sup> Informal measures, however, may be referred to either as 'Regulations' or 'Policies'. For instance, CCAMLR has a Resolution to the effect that States must require, as a condition of granting a vessel a license to fish for Patagonian toothfish,<sup>434</sup> that vessels only land catches in ports that are fully implementing the CCAMLR Catch Documentation Scheme (CDS). While this measure appears to be a strict compliance enforcement mechanism, as a Resolution, this requirement is not binding on CPs or NCPs.

##### **4.3.2.1 Formal measures**

In a measure aimed at promoting compliance by the vessels of NCPs, CCAMLR's Conservation Measure 10-07 provides for the development of an 'IUU vessel list' to name and shame non-compliant vessels and their flag States. As outlined in Chapter 3, IUU vessel lists are a key compliance enforcement mechanism adopted by many RFMOs to tackle the problem of IUU fishing. Conservation Measure 10-07 provides that at each annual meeting, the Commission

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<sup>431</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 48, (entered into force 7 April 1982) article XXI.

<sup>432</sup> *Ibid.*

<sup>433</sup> For instance, the CCAMLR 'Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures' may also be referred to as 'Conservation Measure 10-07'.

<sup>434</sup> CCAMLR Resolution XXII 'Use of ports not implementing the Catch Documentation Scheme'.

identify NCPs whose vessels are engaged in IUU fishing in the Convention Area.<sup>435</sup> On approval of a vessel list, the Executive Secretary of the CCAMLR is required to place the list on the public section of the CCAMLR website and communicate the list to other RFMOs.<sup>436</sup>

Further to the formal CCAMLR IUU vessel list, Conservation Measure 10-02<sup>437</sup> was passed in 2010 to require all CPs to ensure their vessels are licensed to fish in the Convention Area. This measure provides that a CP may only issue a licence to fish if it is satisfied of its ability to exercise its responsibilities under the Convention. Conservation Measure 10-02 specifies the monitoring requirements a flag State must be able to exercise over its vessels.

The taking of action that is consistent with international law to address non-compliance is a common thread among CCAMLR conservation measures. However, a clause is often included to ensure that there is no abuse of the use of sanctions, penalties or other trade-related measures. Conservation Measure 10-07 provides that CPs should not take any trade-related measures or other sanctions against vessels as a result of their inclusion on this list. This provision is without prejudice to the rights of States to take proper action consistent with international law.<sup>438</sup> This provision foresees the potential for States to incorrectly use the IUU Vessel List as an indication of proof of non-compliant activities by those vessels listed.

Under Conservation Measure 10-07, CPs are still able to cooperate to adopt trade-related measures, consistent with their obligations to the World Trade Organisation (WTO), to prevent, deter and eliminate IUU fishing. It states that such measures may be used, to support cooperative efforts to ensure that trade in Patagonian toothfish does not encourage IUU fishing or diminish the effectiveness of CCAMLR's conservation measures.<sup>439</sup> Additionally, Conservation Measure 10-05 states that the Commission is committed to taking steps, consistent with international law, to ensure that fish was caught in a manner consistent with CCAMLR conservation measures.

Conservation Measure 10-08 also recognises the right of flag States to take action in response to acts of non-compliance by CP nationals. It states that CPs shall take measures to effectively deprive any participants in IUU fishing of the benefits obtained from their behaviour. Furthermore, Conservation Measure 10-03 entitled 'Port inspections of vessels carrying toothfish' provides that in the event that a vessel has fished in contravention of CCAMLR conservation measures, the CP will cooperate with the flag State of the vessel to take appropriate action and, if necessary,

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<sup>435</sup> CCAMLR Conservation Measure 10-07, 'Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures' paragraph 2.

<sup>436</sup> Ibid paragraph 23.

<sup>437</sup> CCAMLR Conservation Measure 10-02, 'Licensing and inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area', paragraph 1.

<sup>438</sup> CCAMLR Conservation Measure 10-07, above n 435, paragraph 26.

<sup>439</sup> Ibid.

apply sanctions to the vessel.<sup>440</sup> Finally Conservation Measure 10-04 was adopted in 2010 to require CPs to ensure that their flagged vessels are equipped with automated satellite-linked VMS.<sup>441</sup>

#### 4.3.2.2 Informal measures

The informal measures adopted by CCAMLR are generally aimed at expressing agreement within the Commission on matters of significance. Many of CCAMLR's informal measures, or 'Resolutions', are aimed at urging non-compliant States, vessels or nationals to comply with CCAMLR provisions. For instance, Resolution 14/XIX urges all CCAMLR Acceding States<sup>442</sup> and NCPs not participating in the CDS to implement it as soon as possible. Resolution 15/XXII builds from this to urge all CPs to require that their vessels should land catches in States that are fully implementing the CDS. Resolution 19/XXI contains a more general provision that urges all CPs and NCPs to take measures or cooperate to ensure that their nationals do not engage in or support IUU fishing.

The difference in wording adopted in CCAMLR formal and informal measures is due to the difference in the strength of these provisions. Informal measures can only 'request', 'urge' or 'encourage' States to act in a certain manner, whereas formal measures can require States to comply with their provisions. Resolution 25/XXV,<sup>443</sup> for instance, urges all CPs to pursue diplomatic and other action, in accordance with international law, to encourage NCPs to recognise CCAMLR conservation measures. Such diplomatic action, as explored in Chapter 3, could be achieved via the imposition of diplomatic demarches, requests or entering into negotiations with the flag State/s concerned.<sup>444</sup>

Finally, the 'Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties' (the CCAMLR Policy) is a unique approach adopted by the CCAMLR to improve compliance. Neither a regulation nor a conservation measure, the CCAMLR Policy requests the Executive Secretary to, *inter alia*:

- invite and encourage NCPs to attend as observers at CCAMLR meetings,
- encourage NCPs to accede to the Convention, and
- encourage NCPs to participate in the CCAMLR Catch Documentation Scheme.

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<sup>440</sup> CCAMLR Conservation Measure 10-03, 'Port inspections of vessels carrying toothfish', paragraph 3.

<sup>441</sup> CCAMLR Conservation Measure 10-04, 'Automated satellite-linked Vessel Monitoring Systems'.

<sup>442</sup> The CCAMLR has 9 acceding States including: Bulgaria, Canada, Cook Islands, Finland, Greece, Mauritius, Netherlands, Peru and Vanuatu. Full membership list available on line at <<http://www.ccamlr.org/pe/ms/contacts.htm#States>>

<sup>443</sup> CCAMLR Resolution 25/XXV, 'Combatting illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties'.

<sup>444</sup> Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) LI *Netherlands International Law Review* 41.



### 4.3.3 Future compliance initiatives

The first CCAMLR Workshop for the Development of a Compliance Evaluation Procedure (DOCEP) was held in Norway in July 2009.<sup>445</sup> This meeting was attended by 10 Member Countries and was designed to develop an action plan for possible responses of the CCAMLR to non-compliance.<sup>446</sup> The objective of the meeting was to develop a model for the standard evaluation of performance of vessels with conservation measures in force.<sup>447</sup> In developing this model, DOCEP recognised that flag State compliance was often directly linked to the compliance of vessels with conservation measures.

The main outcome of the meeting was the development of a matrix to assess the impact and frequency of non-compliance activities of CCAMLR vessels.<sup>448</sup> The matrix allows DOCEP to assign a non-compliance status of negligible, minor, major, serious or critical to the conservation measures of CCAMLR in order to determine the urgency of action being taken.<sup>449</sup> DOCEP notes that this process was similar to the listing of IUU vessels by the CCAMLR, however, the information arising from the Workshop had significant potential to assist CCAMLR's decision making processes.<sup>450</sup> The draft matrix developed by DOCEP was discussed and endorsed at CCAMLR XXVII.<sup>451</sup>

In 2010, work on the outcomes of the performance review continued with the Scientific Committee, the Standing Committee on Implementation and Compliance (SCIC) and the Commission forming working groups to report back on progress made under each of the review recommendations.<sup>452</sup> The Commission noted good progress regarding the performance review in relation to flag State duties, port State measures and monitoring, control and surveillance.<sup>453</sup>

Also in 2010, the Commission noted intersessional work conducted by DOCEP and noted that in 2011, DOCEP would continue to work intersessionally via electronic means.<sup>454</sup> A proposal by the European Union concerning the adoption of a trade-related measure was again considered at CCAMLR-XXIX,<sup>455</sup> however the proposal was stalled by several countries.<sup>456</sup>

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<sup>445</sup> Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty Eighth Meeting of the Commission*, Hobart, Australia, 26 October - 6 November 2009, paragraph 8.37. Available on line at <[http://www.ccamlr.org/pu/e/e\\_pubs/cr/09/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cr/09/all.pdf)>

<sup>446</sup> Ibid.

<sup>447</sup> Ibid, Appendix VI.

<sup>448</sup> See for example the DOCEP case study of Conservation Measure 26-01 in Appendix VII of Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty Eighth Meeting of the Commission*, Hobart, Australia, 26 October - 6 November 2009. Available on line at <[http://www.ccamlr.org/pu/e/e\\_pubs/cr/09/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cr/09/all.pdf)>

<sup>449</sup> Ibid paragraph 34.

<sup>450</sup> Ibid paragraph 40.

<sup>451</sup> Ibid paragraph 8.38.

<sup>452</sup> Andrew Wright, Executive Secretary, Commission for the Conservation of Antarctic Marine Living Resources, <Andrew\_Wright@ccamlr.org> "CCAMLR Meet" (27 October 2010) (personal e mail).

<sup>453</sup> Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-ninth Meeting of the Commission*, CCAMLR-XXIX, Hobart, Australia, 25 October - 5 November 2010, 67.

<sup>454</sup> Ibid 26.

<sup>455</sup> Ibid 53.

## 4.4 Indian Ocean Tuna Commission

### *Background*

The Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement)<sup>457</sup> was adopted by the United Nations Food and Agriculture Organisation (FAO) in November 1993. Entering into force in 1996, the Indian Ocean Tuna Commission (IOTC) retains a special relationship to the FAO in that it is legally an article XIV body of the FAO and does not function via an independent secretariat in the traditional RFMO approach. While this relationship is unique, it has been reported to have caused significant problems for the IOTC in a budgetary context and in terms of participation by relevant flag States.<sup>458</sup>

The IOTC is responsible for the Indian Ocean and adjacent seas north of the Antarctic Convergence to the extent that it is necessary for the purpose of conserving and managing migrating tuna stocks.<sup>459</sup> In addition to the range of tuna stocks under the purview of the Commission,<sup>460</sup> the Secretariat also collates data on non-target, associated and dependent species which may be affected by tuna fishing in the Indian Ocean.<sup>461</sup>

The primary objective of the IOTC is to 'promote cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimum utilisation of stocks covered by this Agreement and encouraging sustainable development of fisheries...'<sup>462</sup> However the fulfilment of this objective has proven difficult for the IOTC and its CPs.<sup>463</sup> The IOTC Performance Review recognises the need for improvement in regards to compliance, an issue which affects both CPs and NCPs.<sup>464</sup>

The compliance concerns facing the IOTC are highlighted throughout the Report of the Performance Review Panel.<sup>465</sup> This review demonstrates low levels of compliance with IOTC measures are commonplace and limited action has been taken to remedy the situation.<sup>466</sup> Currently, the IOTC IUU Vessel List applies only to NCPs and there are currently no sanctions or penalties available to address non-compliance.

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<sup>456</sup> Including Argentina, Namibia and South Africa. Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-ninth Meeting of the Commission*, CCAMLR-XXIX, Hobart, Australia, 25 October - 5 November 2010, 54.

<sup>457</sup> *Agreement for the Establishment of the Indian Ocean Tuna Commission*, adopted by the FAO Council 25 November 1993, Rome, Italy.

<sup>458</sup> Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*, 1.

<sup>459</sup> Indian Ocean Tuna Commission, *Welcome to the IOTC Website* <[www.iotc.org](http://www.iotc.org)>

<sup>460</sup> See 'species under IOTC management' available on line at: Indian Ocean Tuna Commission, *About IOTC* (2010) <<http://www.iotc.org/English/info/mission.php>> at 20 November 2010.

<sup>461</sup> Indian Ocean Tuna Commission, *About IOTC* (2010) <<http://www.iotc.org/English/info/mission.php>> at 20 November 2010.

<sup>462</sup> *Ibid.*

<sup>463</sup> The IOTC performance review notes significant deficiencies in the IOTC Agreement including its relationship to the UNFAO. The panel recommended significant amendments or replacing the IOTC with a new instrument. Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*, 1.

<sup>464</sup> Gerard Domingue, Compliance Coordinator, Indian Ocean Tuna Commission, <[gd@iotc.org](mailto:gd@iotc.org)> "Compliance in the IOTC" (27 April 2010) (personal e mail).

<sup>465</sup> Anonymous, above n 458.

<sup>466</sup> *Ibid.*

The IOTC Compliance Committee was established in 2002 and is designed to report to the Commission on the status of compliance by CPs with conservation measures.<sup>467</sup> However, the performance review panel suggests that the ability of the IOTC Compliance Committee to address and monitor non-compliance is limited. The review panel proposed that mechanisms to sanction non-compliance should be developed and the IUU vessel list be amended to allow for the inclusion of vessels flagged to CPs.

#### **4.4.1 IOTC objectives**

The IOTC Agreement includes several references to the need for the IOTC to promote cooperation amongst CPs. Such provisions provide an important basis for promoting productive relationships between CPs which is an essential tool in improving compliance. Article IV of the IOTC Agreement provides that CPs shall cooperate to encourage any State which is entitled to become a CP to accede to the Agreement. Furthermore, article V states that the IOTC shall 'encourage, recommend and coordinate'<sup>468</sup> information sharing activities and recognise the need for equitable participation of all CPs.

The IOTC Agreement also makes reference to the need for CPs to ensure that they take action under national legislation to ensure that penalties are implemented for violations of conservation and management measures.<sup>469</sup> It is specifically stated that such measures are binding upon CPs under paragraph 1 of article IX. Significantly, under article X(3), CPs are also required to cooperate in the establishment of an appropriate system to review the implementation of conservation and management measures and monitor fishing activities.

#### **4.4.2 Conservation measures**

The IOTC adopts the terminology of 'resolutions' rather than 'conservation measures' to describe the measures it adopts to regulate the activities of its CPs.<sup>470</sup> These resolutions are binding on CPs in the same manner that conservation measures are binding on CPs of the CCAMLR, however in the IOTC, CPs are not bound if they make a specific objection to the resolution.<sup>471</sup> The informal measures adopted by the IOTC are referred to as 'recommendations' which, in light of the fact that they are non-binding, rely upon the voluntary actions of States to be upheld.<sup>472</sup>

##### **4.4.2.1 Formal measures**

The IOTC has adopted a series of measures aimed at enhancing cooperation with both CPs and NCPs. Resolution 98/05, for instance, provides that the Chairman of the IOTC should send a

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<sup>467</sup> IOTC Performance Review, above n 458, 36.

<sup>468</sup> IOTC, above n 457, article V.

<sup>469</sup> Ibid article X.

<sup>470</sup> IOTC, above n 461.

<sup>471</sup> Article IX, *Agreement for the Establishment of the Indian Ocean Tuna Commission*, adopted by the FAO Council 25 November 1993, Rome, Italy, 5. However most of the decisions made by the IOTC are arrived at by consensus.

<sup>472</sup> Ibid.

letter to all NCPs known to have vessels fishing in the IOTC Area to urge them to become CPs. Such an approach is important compliance enforcement measure to maintain relationships between the IOTC and interested parties.

Resolution 01/03 is more direct in targeting the vessels of NCPs and refers to the establishment of a scheme to promote compliance. Under this resolution, evidence that NCP vessels are fishing contrary to IOTC regulations should be reported to the authorities and the flag State made aware of the situation. Such vessels are to be inspected and all landings and transshipments by the vessel should be prohibited by all CP ports.

Resolution 07/01 is aimed at promoting compliance by nationals of CPs and cooperating NCPs. It provides that relevant agencies of CPs should cooperate to investigate allegations concerning the engagement of their nationals in IUU fishing and that they should take action in this respect. Finally, Resolution 10/11 on on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing came into effect on 1 March 2011 and makes provision for CPs to report information including a list of designated ports and information about the designated competent authority in each port State.

The IOTC has created several resolutions concerning the need for improved vessel control of IUU fishing vessels. Resolution 99/02 calls for specific action to be taken against the fishing activities of large scale 'flag of convenience' longline vessels. This is to occur via CPs denying such vessels a license to fish and refusing landing and transhipment by such vessels.

Resolution 09/03 provides for the creation of a list of vessels presumed to have carried out IUU fishing in the IOTC Area. IUU vessel lists are noted in Chapter 3 to be a key compliance enforcement mechanism in their ability to 'name and shame' the perpetrating States and vessels. Other associated and supporting resolutions include Resolution 99/03 which provides for a control and inspection scheme to be set up under the IOTC as well as Resolution 06/03 which establishes a vessel monitoring system in the IOTC Area to standardise the systems adopted by CPs.

Significant steps were taken at the meeting of the IOTC in Busan, Korea in 2010 to address non-compliance.<sup>473</sup> At this meeting, the IOTC adopted Resolution 10/10 on trade-related measures which, importantly, provides a legally binding measure to allow the IOTC to take measures against CPs who repeatedly fail to discharge their obligations as *well as* NCPs who fail to discharge their obligations under international law.

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<sup>473</sup> Indian Ocean Tuna Commission, *Report of the Fourteenth Session of the Indian Ocean Tuna Commission*, Busan, Korea, 1-5 March 2010.

This resolution allows the Compliance Committee to propose to the IOTC to adopt non-discriminatory WTO-consistent trade-related measures against non-compliant States. It provides that in the case of CPs, actions such as the reduction of existing quotas or catch limits should be carried out before consideration is given to trade-related measures which should be considered only where other actions have proven unsuccessful or would not be effective.

Resolution 10/09 was also agreed in 2010 to change the manner in which the IOTC Compliance Committee conducts its business. Concerned about the level of flag State compliance, the Commission agreed that amongst other responsibilities, the IOTC Compliance Committee should develop a scheme of sanctions to provide greater direction in dealing with issues of non-compliance. This measure also serves to clarify the obligation of all CPs to ensure the proper implementation of 'IOTC legislation'.<sup>474</sup>

#### **4.4.2.2 Informal measures**

With the upgrading of Recommendation 03/05 to a Resolution, the IOTC has only one informal measure or recommendation. Recommendation 03/04 concerns the enhancement of effectiveness of IOTC measures to eliminate IUU activities in the IOTC Area. This recommendation recognises that the Commission has endorsed the cooperative management frameworks that have been concluded between the Seychelles, Vanuatu and Japan. It further notes that the Commission urges these three States to implement the frameworks properly and to continue to report on an annual basis concerning their progress in this regard.

#### **4.4.3 Future compliance initiatives**

The full implications of Resolution 10/10 on trade-related measures is yet to be seen and parties are keen to note that such measures must only be utilised as a last resort. It is foreseen that in the future, the elements of Resolution 10/10 will be incorporated in the scheme of sanctions that the Compliance Committee will develop under Resolution 10/09. Such an approach has been effective in other RFMOs such as ICCAT and it is hoped that this measure will result in increased compliance with IOTC Resolutions.

At the 2010 meeting of the IOTC, another important conservation measure dealing with compliance was forwarded by the European Community. The proposal was made with regard to the introduction of a Catch Documentation Programme (CDP) to supersede the current IOTC Statistical Document Programme for Bigeye Tuna.<sup>475</sup> This CDP would apply to yellowfin, bigeye and skipjack tunas only. No consensus could be reached on this proposal; with some CPs

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<sup>474</sup> Indian Ocean Tuna Commission and the United Nations Food and Agriculture Organisation, 'Collection of Resolutions and Recommendations by the Indian Ocean Tuna Commission' (2010) 188. Available on line at <[http://www.iotc.org/files/proceedings/misc/ComReportsTexts/resolutions\\_E.pdf](http://www.iotc.org/files/proceedings/misc/ComReportsTexts/resolutions_E.pdf)>

<sup>475</sup> Gerard Domingue, above n 464.

concerned that as the Programme only applied to three specific tropical tuna species, it would create confusion in the CPs exporting fish to the European market.<sup>476</sup>

The report of the 8<sup>th</sup> Session of the Compliance Committee provided an update on the progress made following the 2008 IOTC Performance Review.<sup>477</sup> The update provides that the revised terms of reference for the Compliance Committee should assist in following up on infringements by CPs and that the Compliance Committee will also develop a scheme of incentives and sanctions to encourage compliance by all CPs.<sup>478</sup> The development of a strict system of market related measures is noted as high priority by the Compliance Committee.<sup>479</sup>

#### 4.5 Commission for the Conservation of Southern Bluefin Tuna

##### *Background*

The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) arose out of a voluntary agreement between Australia, New Zealand and Japan which was established in the 1980s.<sup>480</sup> In the early 1990s, the three States decided to formalise this agreement and in 1993 they signed a Convention creating the CCSBT.<sup>481</sup> The CCSBT has its headquarters in Canberra, Australia and today, numerous other States which have been active in the fishery for southern bluefin tuna have joined the Commission.<sup>482</sup>

The CCSBT has also admitted the Philippines, South Africa and the European Community as CNPs, a status which is regarded as a transitional measure to achieving full membership of the Commission. These States have also been admitted to the Extended Commission and Extended Scientific Committee of the CCSBT, which perform the same tasks as the Commission and have the same Secretariat as the Commission.<sup>483</sup>

In July 2008, the CCSBT underwent a self-assessment of its performance.<sup>484</sup> This assessment is now accompanied by the report of an independent expert issued in September of 2008 which was designed to offer recommendations of its own concerning the performance of this

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<sup>476</sup> IOTC, above n 473, 14.

<sup>477</sup> Indian Ocean Tuna Commission, *Report of the Eighth Session of the Compliance Committee*, Colombo, Sri Lanka, 14-16, and 19 March 2011, IOTC-2011-CoC8-R[E] 33. Available on line <[http://www.iotc.org/files/proceedings/2011/s/IOTC-2011-CoC8-R\[E\].pdf](http://www.iotc.org/files/proceedings/2011/s/IOTC-2011-CoC8-R[E].pdf)>

<sup>478</sup> *Ibid* 34.

<sup>479</sup> *Ibid* 35.

<sup>480</sup> Commission for the Conservation of Southern Bluefin Tuna, *About the Commission* <[www.ccsbt.org](http://www.ccsbt.org)> accessed 20 April 2010.

<sup>481</sup> *Convention for the Conservation of Southern Bluefin Tuna*, opened for signature 10 May 1993, 1819 UNTS 359, (entered into force 20 May 1994).

<sup>482</sup> Such States include the Republic of Korea, Indonesia and the Fishing Entity of Taiwan.

<sup>483</sup> Commission on the Conservation of Southern Bluefin Tuna, *Resolution to Establish an Extended Scientific Commission and an Extended Scientific Committee*, adopted at the Seventh Annual Meeting (18 – 21 April 2001) and revised at the Tenth Annual Meeting (7 – 10 October 2003). Available on line at <[http://www.ccsbt.org/docs/pdf/about\\_the\\_commission/the\\_Extended\\_commission.pdf](http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf)>

<sup>484</sup> Commission for the Conservation of Southern Bluefin Tuna, Report of the Performance Review Working Group, Canberra, Australia, July 2008. Available on line at <[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/report\\_of\\_PRWG.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/report_of_PRWG.pdf)>

organisation.<sup>485</sup> The report of the independent expert noted the concerns of the organisation that it had not managed to prevent serious overfishing of southern bluefin tuna (SBT), or to prevent under-reporting of catches.<sup>486</sup>

In addition, the independent expert also noted that the CCSBT had only just begun to seriously tackle compliance and enforcement issues.<sup>487</sup> It highlighted the fact that in 2008, the Commission did not have a suite of measures in place relating to compliance and although most CPs require vessels to use VMS, the CCSBT had not implemented a conservation measure to this effect. It was reported that the Commission needed to work towards adopting a broader set of Port State measures to prevent the landing and transshipment of IUU SBT catch by both CPs and NCPs.<sup>488</sup>

Since the release of the report in 2008, the CCSBT has made progress with regard to the findings of this report and established significant conservation measures pertaining to compliance.

#### **4.5.1 CCSBT objectives**

The primary objective of the CCSBT, as expressed in its founding agreement, is to 'ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.'<sup>489</sup> Under article 5, the Convention provides that Parties shall take all action necessary to ensure enforcement and compliance with binding measures which should be developed at the earliest possible time to monitor all fishing activities relating to SBT.<sup>490</sup>

The Convention of the CCSBT goes into considerable depth on the need to promote membership and compliance by NCPs. To this end, the Commission should invite membership by any State not party to the Convention whose nationals, residents or fishing vessels harvest SBT.<sup>491</sup> Parties must cooperate with each other in this regard under article 13 and should act to encourage accession by States 'where the Commission considers this to be desirable.' Upon signing the Convention, Parties agree to invite the attention of any NCP to any matter which might affect the attainment of the objective of the Convention.<sup>492</sup>

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<sup>485</sup> Commission for the Conservation of Southern Bluefin Tuna, Part Two, Report of the Independent Expert, September 2008. Available on line at

<[http://www.ccsbt.org/docs/pdf/meeting\\_reports/ccsbt\\_15/PerformanceReview\\_IndependentExpertsReport.pdf](http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_15/PerformanceReview_IndependentExpertsReport.pdf)>

<sup>486</sup> Ibid 4.

<sup>487</sup> Ibid 10.

<sup>488</sup> Ibid 11.

<sup>489</sup> CCSBT, above n 481, article 3.

<sup>490</sup> Ibid article 8.

<sup>491</sup> Ibid article 14.

<sup>492</sup> Ibid article 15(1).

Under article 15(3), Parties should take appropriate measures to prevent their registered vessels from transferring registration to avoid compliance with the conservation measures of the CCSBT. Furthermore, article 15(4) provides that Parties should cooperate in taking measures to deter fishing activities for SBT where such action could affect the attainment of the objective of the Convention.

#### **4.5.2 Conservation measures**

The CCSBT has implemented both formal 'Resolutions' and informal 'Recommendations' to give effect to its mandate. The Recommendations of the CCSBT do not currently relate to compliance and as such are not considered in this section.

##### **4.5.2.1 Formal measures**

The CCSBT has implemented a 'Resolution on action plans to ensure compliance with Conservation and Management Measures'<sup>493</sup> requiring CPs and NCPs to submit an action plan on compliance with conservation and management measures by April 1 2010. This plan must include a scheme concerning how the State will systematically verify catch data and information on ecologically related species to the Secretariat.

Following the findings of the 2008 Performance Review, the CCSBT implemented a 'Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels' in recognition of the need to ensure monitoring of such transshipment in areas beyond national jurisdiction. The 'Resolution on establishing the CCSBT Vessel Monitoring System' was also formulated in response to the Performance Review and recognises the need for monitoring, control and surveillance measures to apply to all sectors of the global southern bluefin tuna fishery.

This measure provides that all CPs and CNPs must ensure that no vessels under their registry carry out IUU fishing activities and also must take necessary measures to ensure that the owners of vessels are citizens or legal entities within the flag State itself to allow for punitive action to be taken.<sup>494</sup> Further to this, the Executive Secretary is to maintain a CCSBT Record of fishing vessels registered to fish for SBT and to ensure this information is published publically.<sup>495</sup>

On 1 January 2010, the CCSBT implemented a Catch Documentation Scheme (CDS) to replace the redundant Trade Information Scheme (TIS). The 'Resolution on the Implementation of a CCSBT Catch Documentation Scheme'<sup>496</sup> covers all landings, transshipments, exports, imports

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<sup>493</sup> CCSBT 'Resolution on action plans to ensure compliance with Conservation and Management Measures'.

<sup>494</sup> 'Resolution on establishing the CCSBT Vessel Monitoring System', paragraph 6(f).

<sup>495</sup> Ibid paragraph 5.

<sup>496</sup> CCSBT 'Resolution on the Implementation of a CCSBT Catch Documentation Scheme'.



and re-exports of SBT whereas the TIS only covered international trade in SBT.<sup>497</sup> It requires whole SBT to be tagged at the time of the kill and that the tag remain until the first point of domestic sale<sup>498</sup> and provides that the Compliance Committee must review the resolution no later than its 2011 meeting.

The CCSBT has also adopted a '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 CCSBT15 in 2008'. While this list comprises a record of fishing vessels authorised to fish for southern bluefin tuna, it is not a specific list of unauthorised vessels or vessels considered to be undertaking IUU fishing for southern bluefin tuna.<sup>499</sup>

While the CCSBT has also adopted an Action Plan concerning the obligation of CPs to take action against fishing which could adversely affect the objective of the Convention which allows the Commission to impose trade-related measures on SBT products. However since the introduction of the CCSBT CDS, the Action Plan has essentially become redundant.<sup>500</sup>

#### **4.5.3 Future compliance initiatives**

At the Seventeenth Annual Meeting of the Commission in October 2010, there was support from the Extended Commission for the development of a Compliance Plan to encourage:

- The more effective implementation of the CDS;
- Improvement to the transshipment monitoring program;
- Prevention of southern bluefin tuna being recorded as other species;
- Better reporting of by-catch and discards against national allocations; and
- Better systems to provide information to port States to improve monitoring of southern bluefin tuna activities.<sup>501</sup>

Furthermore, the implementation of five draft compliance policy statements was also raised to be developed for consideration at the next meeting. The RFMO has made significant developments since October 2008 with the introduction of resolutions on CDS and VMS<sup>502</sup> and it is unclear where the compliance enforcement capacity of the RFMO will lead in the future. It is likely that the Action Plans required to be submitted by States will lead to future discussions of the

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<sup>497</sup> Bob Kennedy, Executive Secretary, Commission for the Conservation of Southern Bluefin Tuna, <rkennedy@ccsbt.org> "Compliance in the CCSBT" (25 May 2010) (personal e mail).

<sup>498</sup> Ibid.

<sup>499</sup> CCSBT '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', paragraph 2.

<sup>500</sup> Ibid.

<sup>501</sup> Commission for the Conservation of Southern Bluefin Tuna, *Report of the Seventeenth Annual Meeting of the Commission*, 15 October 2010, Narita, Japan 4.

<sup>502</sup> Ibid.

Commission and that developments will occur as a result of the review by the Compliance Committee of the CDS which must occur no later than the 2011 meeting.

#### 4.6 Western and Central Pacific Fisheries Commission

##### *Background*

The WCPFC seeks to ensure the long term conservation and sustainable use of migratory species that exist in this area of the Pacific including species such as tunas, billfish and marlin.<sup>503</sup> The main object of the Commission is to enhance to provisions of the Agreement amongst CPs by developing conservation measures to that effect.<sup>504</sup> The RFMO was established after lengthy negotiations of the Multilateral High Level Conference (MHLC) which began in 1994 and concluded in Honolulu, Hawaii in 2000.<sup>505</sup> In the course of these negotiations, it was decided that principles of fisheries management including the precautionary approach, that management decisions be based on the best available science and ecosystems based management should provide the basis of the Convention.

Australia signed the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean<sup>506</sup> in October of 2000 and ratified the Agreement in September of 2003. As of December 2009, the Convention has 25 CPs, including the fishing entity of Chinese-Taipei.<sup>507</sup> In a 2010 study designed to quantitatively assess the effectiveness of the world's RFMOs, the WCPFC scored consistently high across the board and received the highest overall score out of all the RFMOs assessed.<sup>508</sup> However the WCPFC continues to face significant challenges. It has openly stated concerns that Western and Central Pacific Ocean fish stocks are fully subscribed and therefore opportunities for new entrants to the RFMO are limited.<sup>509</sup> The WCPFC also has yet to undertake a Performance Review.

A proposal to conduct a Performance Review was initiated in 2007 by Australia in an effort to bring the WCPFC in line with recommendations made at the Kobe meetings.<sup>510</sup> At that time it was agreed that the review should be deferred with Japan suggesting a review not be

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<sup>503</sup> Western and Central Pacific Fisheries Commission, *Frequently Asked Questions* (2010) <<http://www.wcpfc.int/frequently-asked-questions-and-brochures>> at 20 November 2010.

<sup>504</sup> Gail Lugten, *The Role of International Fishery Organisations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources*, FAO Fisheries and Aquaculture Circular. No. 1054, Rome, FAO, 2010, 36.

<sup>505</sup> WCPFC, above n 503.

<sup>506</sup> *Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, 40 ILM 278 (entered into force 19 June 2004).

<sup>507</sup> *Ibid.*

<sup>508</sup> Sarika Cullis-Suzuki and Daniel Pauly, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations' (2010) 34 *Marine Policy*, 4.

<sup>509</sup> Lugten, above n 504, 47.

<sup>510</sup> Western and Central Pacific Fisheries Commission, "Australian proposal for the Commission's implementation of the RFMO performance review", WCPFC Fourth Regular Session, Tumon, Guam, USA, 3-7 December 2007, WCPFC4-2007/DP05. Available on line at <[www.wcpfc.int](http://www.wcpfc.int)>

undertaken until 2009 in light of time considerations.<sup>511</sup> To date it appears that the review has been postponed for future consideration.<sup>512</sup>

In order to overcome the difficulties associated with objections in respect of decision-making, the WCPFC has established a general rule that decisions made by the organisation are to be by consensus. However if all efforts to reach such consensus have been exhausted, decisions can be made by vote. Where a decision involves a question of procedure, a majority vote will prevail however where a decision involves a question of substance a three-fourths majority is required.

#### **4.6.1 WCPFC objectives**

The founding Convention of the WCPFC includes a comprehensive suite of provisions aimed achieving compliance from both CPs and NCPs. The Agreement itself reflects deliberations on principles including ecosystem based management and equality amongst developing and developed States. Amongst these, notable provisions include those relating specifically to the duties and responsibilities of flag States, port State measures and trade-related measures. This section will briefly analyse the content of these provisions.

Article 27 of the Convention provides that port States are under an obligation to promote the effectiveness of subregional, regional and global conservation and management measures. In this regard, a port State may not discriminate against the fishing vessel of any State; however they may adopt regulations to prohibit landings and transshipments where the catch has been taken in a manner which undermines the objectives of the WCPFC.

This notion is reinforced in article 25(11) of the Convention which provides that CPs may take action to deter vessels which have engaged in such activities. To this effect, the Commission is authorised, when necessary, to develop procedures which allow for non-discriminatory trade-related measures to be taken against *any* State, 'whose fishing vessels fish in a manner which undermines the effectiveness of the conservation and management measures adopted by the Commission.' The inclusion of this provision reflects the commitment of CPs to allowing the use of trade-related measures to be adopted and recognises that the taking of such measures by an RFMO is consistent with international law.

While the flag State obligations embodied in the Convention are many and varied, they are largely concerned with the commitment of States to comply and to allow easy exchange of information in the case of a breach of compliance. Part V deals with the duties of flag States and provides that no CP shall allow vessels to be used for fishing the species covered by the

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<sup>511</sup> Western and Central Pacific Fisheries Commission, "Fourth Regular Session", Tumon, Guam, USA, 3-7 December 2007, paragraph 15.2.

<sup>512</sup> Western and Central Pacific Fisheries Commission, "Proposal for the Commission's implementation of the RFMO performance review", Sixth Regular Session, Papeete, Tahiti, French Polynesia 7-11 December 2009, WCPFC6-2009/IP07

Convention in areas beyond national jurisdiction, unless authorised to do so.<sup>513</sup> Furthermore, CPs must take measures to ensure that nationals and fishing vessels comply with the provisions of the Convention.<sup>514</sup>

More specifically, CPs are required to cooperate to establish mechanisms for effective monitoring, control and surveillance; including the use of VMS.<sup>515</sup> Where it has been established that the vessel of a CP has been non-compliant, States must ensure that the vessel ceases fishing activities until sanctions have been complied with.<sup>516</sup> Finally, CPs must establish arrangements for making available information required to allow for the exchange of evidence in respect of alleged violations.<sup>517</sup>

#### **4.6.2 Conservation measures**

In the WCPFC, the formal and binding decisions made by the RFMO are referred to as 'Conservation and Management Measures'. Such decisions are numbered and include the year of adoption. Informal measures are referred to as 'Resolutions' and describe non-binding statements and recommendations addressed to CPs and CNPs. The WCPFC also has a third category of measures referred to as 'Other Decisions of the Commission' and describe all other decisions made by the Commission.

##### **4.6.2.1 Formal measures**

The formal measures the WCPFC has implemented in respect of compliance range from boarding and inspection measures to IUU vessel lists. The Conservation Measure entitled 'Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures' provides that each CP must ensure that vessels accept such procedures and that any evidence obtained should be referred to the authorities of the fishing vessel.

Conservation and Management Measure 2009-11 entitled 'Cooperating Non-Members' provides that any NCP with an interest in the fishery may request the Commission for the status of cooperating non-member.<sup>518</sup> The WCPFC Technical and Compliance Committee (WCPFC-TCC) will then assess whether such status may be granted by taking into account factors such as the State's record of responding to IUU activity.<sup>519</sup>

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<sup>513</sup> WCPFC, above n 506, article 25.

<sup>514</sup> Ibid article 23(5).

<sup>515</sup> Ibid article 10(1)(i).

<sup>516</sup> Ibid article 25(4).

<sup>517</sup> Ibid article 25(5).

<sup>518</sup> 'Cooperating Non-Members', paragraph 1.

<sup>519</sup> Ibid 3(c).

The 'Conservation and Management Measure for Compliance Monitoring Scheme' was adopted in 2010 at the Seventh Regular Session of the WCPFC.<sup>520</sup> This measure implements a scheme to ensure that CPs, CNPs and participating territories (CCMs) implement and comply with the WCPFC Convention. The measure allows the Commission to respond to non-compliance in a manner which takes account of the reasons behind the non-compliance and its degree. Actions may range from cooperative capacity-building initiatives through to penalties and other actions as may be necessary.<sup>521</sup>

The 'Conservation Measure to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Western and Central Pacific Ocean' provides for identification of such vessels at each annual meeting. Under this measure, CPs are obliged to forward to the Secretariat a list of vessels presumed to be carrying out IUU activities in the Convention Area.<sup>522</sup> Once the list has been adopted, CPs must take all necessary measures to eliminate these activities including non-discriminatory trade-related measures or withdrawing the registration of fishing license of the vessels involved.<sup>523</sup>

Lastly the 'Conservation and Management Measure for Vessels Without Nationality' provides that vessels without nationality are presumed to be operating in contravention of the Convention. As such, the measure actively encourages all CPs to take action, including enacting domestic legislation to prevent such vessels from undermining the effectiveness of the Convention.

#### **4.6.3 Future compliance initiatives**

Being a relatively new organisation, work on compliance and management with the objectives of the WCPFC is still in its early stages however procedures are in place to improve monitoring and reporting from within the Secretariat.<sup>524</sup> The WCPFC-TCC is in the process of considering a Control of Nationals Conservation Measure.<sup>525</sup> Further, the issue of a Catch Documentation Scheme (CDS) has been raised by the Forum Fisheries Agency (FFA), the European Community and Japan.

However in the past there has not been consensus between CPs on the matter of a CDS. There is a general feeling that CDSs have become redundant and this matter has not yet been

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<sup>520</sup> Western and Central Pacific Fisheries Commission, Seventh Regular Session, Honolulu, Hawaii, USA, 6-10 December 2010.

<sup>521</sup> 'Conservation and Management Measure for Compliance Monitoring Scheme', paragraph 1(iv).

<sup>522</sup> 'Conservation Measure to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Western and Central Pacific Ocean', paragraph 4.

<sup>523</sup> Ibid paragraph 16.

<sup>524</sup> Peter Flewwelling, Compliance Manager, Western and Central Pacific Fisheries Commission, <Peter.Flewwelling@wcpfc.int> "Compliance in the WCPFC" (22 April 2010) (personal e mail).

<sup>525</sup> Western and Central Pacific Fisheries Commission, Technical and Compliance Committee, "Draft WCPFC Conservation and Management Measures for the Control of Nationals", Fifth Regular Session, 1-6 October 2009, Pohnpei, Federated States of Micronesia, WCPFC-TCC5-2009/DP-10 (Rev.2)

resolved.<sup>526</sup> In regards to the implementation of a Conservation Measure on trade-related measures there has not been any work done within the WCPFC in this regard, however, it has been discussed briefly by the Commission especially with regard to sanctioning acts of non-compliance.<sup>527</sup>

#### 4.7 South Pacific Regional Fisheries Management Organisation

##### *Background*

International consultations on the proposed South Pacific Regional Fisheries Management Organisation (SPRFMO) were initiated in February 2006 by Australia, Chile and New Zealand.<sup>528</sup> In May 2007, voluntary interim measures were adopted by Australia and other participants to manage the fishery whilst negotiations were being concluded.<sup>529</sup> These measures were adopted to regulate both pelagic and demersal fisheries in the South Pacific Ocean in the interests of sustainably managing non-highly migratory fish and vulnerable marine ecosystems.<sup>530</sup> The sixth international consultation on the establishment of the SPRFMO was held in Australia in October 2008.<sup>531</sup>

On 14 November 2009, the Convention on the Conservation and Management of the High Seas Fishery Resources of the South Pacific Ocean<sup>532</sup> was adopted in Auckland, New Zealand solidifying the commitment of States signatories to managing this fishery, however, the agreement itself has yet to enter into force.<sup>533</sup> Until the Convention enters into force, the SPRFMO remains a theoretical Agreement.<sup>534</sup> To become a fully fledged RFMO, the SPRFMO required ratification, accession, acceptance or approval by eight States; of which three must be coastal States and three non-coastal States.<sup>535</sup> If after three years of its adoption the Convention has not entered into force, it will enter into force six months after the deposit of the tenth instrument of ratification, accession, acceptance or approval.<sup>536</sup>

The entry into force of the SPRFMO will close the gap in the international conservation and management of fisheries from the most eastern part of the South Indian Ocean through the Pacific towards the exclusive economic zones (EEZs) of South America.<sup>537</sup> Negotiations for the

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<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.*

<sup>528</sup> Bob Cheek, *Cheeky: Confessions of a Ferret Salesman* (2005) 70.

<sup>529</sup> Australian Government Department of Agriculture Fisheries and Forestry, 'Australian fisheries jurisdiction and Fishery Status Reports' (2006). Available on line <[http://adl.brs.gov.au/data/warehouse/brsShop/data/27\\_fsr06\\_austjurisdiction.pdf](http://adl.brs.gov.au/data/warehouse/brsShop/data/27_fsr06_austjurisdiction.pdf)>

<sup>530</sup> *Ibid.*

<sup>531</sup> United Nations Food and Agriculture Organisation, *Strengthening regional fisheries governance* (2010)

<<http://www.fao.org/fishery/topic/14908/en>>

<sup>532</sup> *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, opened for signature 1 February 2010. Full text of Convention available on line <<http://www.southpacificfmo.org/>>

<sup>533</sup> Lugten, above n 504.

<sup>534</sup> DAFF, above n 529.

<sup>535</sup> Lugten, above n 504.

<sup>536</sup> South Pacific Regional Fisheries Management Organisation, *Background* (2010) <<http://www.southpacificfmo.org/>> at 1 December 2010.

<sup>537</sup> Lugten, above n 504.

SPRFMO aimed to establish an organisation in which the precautionary and ecosystem approaches to fisheries management would be central to the conservation and management measures adopted by the organisation.<sup>538</sup> The emphasis on non-tuna species means that the focus of the organisation is more holistic to ensure the long-term conservation of marine ecosystems.<sup>539</sup>

#### **4.7.1 SPRFMO objectives**

As noted above, the SPRFMO Convention provides a comprehensive outline of the duties of States parties and provides a clear picture of the manner in which compliance is to be achieved within the RFMO. The Convention begins with a statement under article 3(ix) that CPs, the Commission and subsidiary bodies should ensure compliance by implementing sanctions to deprive offenders of the benefits to be gained from their activities. This sends a strong message that this RFMO is willing to take real action in the compliance enforcement measures they adopt.

In this regard, the Convention establishes the obligations of CPs of the Commission as including taking all necessary measures to ensure the effectiveness of conservation measures under article 24. CPs are required to report to the Commission on an annual basis to demonstrate how measures have been implemented and how compliance has been achieved. Each CP must take measures to ensure compliance by nationals or fishing vessels owned by its nationals and immediately investigate any alleged violations against them. In addition, under article 8 of the Convention the Commission itself must:

- develop and establish of effective monitoring, control, surveillance, compliance and enforcement procedures, including non-discriminatory market-related and trade-related measures;
- develop processes in accordance with international law to assess flag State performance with respect to the implementation of their obligations under this Convention and adopt proposals, if appropriate, to promote implementation of such obligations; and
- adopt measures to prevent, deter and eliminate IUU fishing.<sup>540</sup>

Article 11 of the SPRFMO Convention provides for the creation of a Compliance and Technical Committee to 'monitor and review the implementation of, and compliance with, conservation and management measures adopted under this Convention and provide advice and recommendations to the Commission'. The creation of this Committee is essential for the effective operation of the SPRFMO and mimics similar provisions in other AusRFMOs. Where

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<sup>538</sup> SOFIA-2008, above n 528.

<sup>539</sup> *Ibid.*

<sup>540</sup> SPRFMO, above n 532, article 8.

the SPRFMO Convention stands out against other RFMOs is in its recognition of the special requirements of developing States.

Article 19 of the Convention is dedicated to formally recognising the role of developing States within the SPRFMO and provides that CPs must cooperate to enhance the ability of developing States to conserve and manage fishery resources. The Convention articulates that such cooperation should occur via the provision of financial assistance, technical assistance, transfer of technology and through joint venture arrangements which should be directed towards monitoring, control, surveillance, compliance and enforcement. This express use of terminology depicting the manner in which cooperation should occur is designed to assist the Commission in promoting future compliance by removing ambiguities.

The Convention contains separate provisions relating directly to flag State and port State duties. Under article 25, concerning flag State duties, the Convention provides that CPs must take all necessary measures to ensure compliance by fishing vessels flying its flag and do not conduct unauthorised fishing within waters under national jurisdiction adjacent to the Convention Area. This interesting provision extends the ambit of the jurisdiction of the RFMO beyond the high seas to include the territorial waters of coastal States. No similar provision is present in the other AusRFMOs examined in this thesis which is most likely to be explained as a consequence of the strict adherence of the SPRFMO to the provisions of the UNFSA. Article 26 of the Convention provides that port States have a duty to take measures to promote the effectiveness of conservation measures; but that the State should not discriminate in form or fact.

Provisions relating to the implementation of VMS, transshipment, the implementation of market-related measures and IUU vessel lists are contained in article 27 of the Convention relating to monitoring, compliance and enforcement. These procedures are available to the Commission to be applied to any 'state, member of the Commission, or entity' whose vessels engage in activities that diminish the effectiveness of the conservation and management measures adopted by the Commission. In this respect, the reason for non-compliance and degree of non-compliance should be taken into account and where trade-related measures are implemented, they must be consistent with the CP's international obligations.

Finally, the SPRFMO contains provisions for the implementation of an observer programme in article 28 and provisions relating to the deterrence of non-compliance by non-parties are contained in article 32. Article 32 provides that CPs shall take measures consistent with the Convention to deter activities of vessels flying the flags of NCPs. Such incidences should be reported to the Commission in combination with detailed reporting of any actions taken.

#### **4.7.2 Conservation measures**

There are currently no SPRFMO conservation measures in existence.



### 4.7.3 Future compliance initiatives

In another unique move, the SPRFMO contains a provision in its Convention noting the need for regional fisheries management organisations and arrangements to undertake performance reviews. In light of this provision it is likely that with entry into force, the SPRFMO would undertake regular performance assessments to determine the degree to which conservation and management objectives are being met. Furthermore article 30 provides that the Commission will review the effectiveness of conservation and management measures as a priority.<sup>541</sup>

The creation of a Review Panel is another interesting addition to the SPRFMO approach whereby this subsidiary body of the RFMO would be tasked with determining objections relating to discrimination against CPs. It provides that where a CP objects to a conservation measure on the grounds that it is discriminatory, the alternative measures proposed by the objecting CP will be binding upon that party or group of parties as a substitution for the original measure. The Review Panel may then recommend modifications be made to the original measure if a finding of discrimination has been made.

This procedure seeks to overcome to problems caused by objecting party States whereby a CP can elect not to be bound by the decisions of the Commission and can thereby avoid compliance requirements. The integration of a Review Panel in the SPRFMO allows for compliance requirements to be imposed upon objecting CPs in future decisions of the Commission when the Agreement enters into force.

## 4.8 Southern Indian Ocean Fisheries Agreement

### *Background*

The Southern Indian Ocean Fisheries Agreement<sup>542</sup> (SIOFA) seeks to ensure the long-term conservation and sustainable use of fisheries resources other than tunas in areas that fall outside national jurisdictions.<sup>543</sup> This includes the management of demersal fish species including alfonso and orange roughy.<sup>544</sup> The achievement of management objectives in the SIOFA are provided for by the formulation of a 'Meeting of Parties' designed to adopt legally binding

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<sup>541</sup> Ibid, article 30.

<sup>542</sup> *Southern Indian Ocean Fisheries Agreement*, opened for signature 7 July 2006. Full text of the Agreement can be found on line at: <<http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE144077.pdf>>

<sup>543</sup> Article 2 of the Agreement states that its objectives are to ensure the long-term conservation and sustainable use of fishery resources in the Area and to promote the sustainable development of fisheries taking into account the needs of developing States bordering the Area, particularly the least-developed among them and small island developing States.

<sup>544</sup> D.W. Japp, 'Workshop on the Implementation of the FAO Guidelines for the Management of Deep-Sea Fisheries in the High Seas - Implementation of the Guidelines in Areas where no Competent RFMO/A is in Place' (Discussion Paper 3, Food and Agriculture Organisation of the United Nations, 2010) 3.

conservation and management measures which CPs will be required to implement and enforce.<sup>545</sup>

The Agreement was adopted after a raft of negotiations concerning the regulation of the Area. In 2005, following a decision to split the negotiation of the South West Indian Ocean Fisheries Commission (SWIOFC), negotiations for a specific high seas agreement extending to the west coast of Australia began.<sup>546</sup> In 2006, a Conference of the Plenipotentiaries for the Adoption of the Southern Indian Ocean Fisheries Agreement was held at the Headquarters of the Food and Agriculture Organization of the United Nations (FAO) in Rome, Italy.<sup>547</sup> At this meeting, the text of the agreement establishing the Southern Indian Ocean Fisheries Agreement (SIOFA) was adopted and the FAO was named as the Secretariat or depository of the Agreement.<sup>548</sup>

Instead of establishing an RFMO, the SIOFA relies on an Annual 'Meetings of Parties' to carry out its objectives, including through the adoption of legally binding conservation and management measures.<sup>549</sup> In this way, the SIOFA establishes a fisheries 'arrangement' rather than a fully-fledged RFMO. Under article 24, the Agreement is to enter into force ninety days from the date of receipt of the fourth instrument of ratification, acceptance or approval; of which two must be made by a coastal State bordering the Area.<sup>550</sup>

Recognition of the needs of developing states bordering the region and party to the Agreement is one of the key objectives of the SIOFA<sup>551</sup> and with this objective in mind the Government of Mauritius became the fourth State to ratify the SIOFA on 13 August 2010. Joining the Cook Islands, the European Union and the Seychelles in ratifying the SIOFA, Mauritius provided the grounds for the Agreement to enter into force and today, the SIOFA is fully operational.<sup>552</sup>

The creation of a RFMO for the Southern Indian Ocean has been a primary objective of the Southern Indian Ocean Deepsea Fisheries Association (SIODFA) since its formation in 2006.<sup>553</sup> While the SIOFA is yet to adopt any formal conservation measures in this area, the SIODFA is hopeful that the Agreement will establish effective mechanisms to monitor fishing in the region

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<sup>545</sup> Ibid.

<sup>546</sup> E.J. Molenaar, 'New Areas and Gaps: How to Address Them' (Paper presented at the Conference on the Governance of High Seas Fisheries and the UN Fish Agreement, St John's, Newfoundland and Labrador, 1 - 5 May 2005). Available on line at <[http://www.dfo-mpo.gc.ca/fgc-cgp/documents/molenaar\\_e.htm#RFMOs](http://www.dfo-mpo.gc.ca/fgc-cgp/documents/molenaar_e.htm#RFMOs)>

<sup>547</sup> FAO Legal Office Treaties, *Southern Indian Ocean Fisheries Agreement* (2010) <<http://www.fao.org/legal/treaties/035s-e.htm>> at 8 May 2010.

<sup>548</sup> Ibid.

<sup>549</sup> Molenaar, above n 546.

<sup>550</sup> FAO Legal Office, above n 547.

<sup>551</sup> Asia-Pacific Fishery Commission, 'Regional Fisheries Contacts: South Indian Ocean Fishery Agreement' (2010). Available on line <<http://www.apfic.org/modules/addresses/visit.php?cid=2&lid=110>>

<sup>552</sup> Fish Information and Services, *Southern Indian Ocean Fisheries Agreement comes into force* (2010) <<http://fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=37823&ndb=1&df=0>> at 22 May 2010.

<sup>553</sup> Baird Maritime, *Southern Indian Ocean Fisheries Agreement comes into effect* (2010) <[http://www.bairdmaritime.com/index.php?option=com\\_content&view=article&id=7697:southern-indian-ocean-fisheries-agreement-comes-into-effect&catid=75:fisheries&Itemid=68](http://www.bairdmaritime.com/index.php?option=com_content&view=article&id=7697:southern-indian-ocean-fisheries-agreement-comes-into-effect&catid=75:fisheries&Itemid=68)> at 22 April 2010

and provide annual reports on fishing operations.<sup>554</sup> It has noted that the entry into force of the SIOFA should remove any uncertainty and delay over introducing essential fisheries management measures.<sup>555</sup> The strength of these propositions has yet to be seen given that in light of its newness, the SIOFA has yet to establish conservation measures in the area under its purview.

#### **4.8.1 SIOFA objectives**

The Convention of the SIOFA sets out limited compliance measures relating to CP obligations, the control of NCPs, boarding and inspection, transshipment regulations and the creation of a compliance committee. Article 6 of the Agreement sets out the general duties and obligations of the 'Meeting of the Parties'. In particular, article 6(1)(g) provides that the Meeting of Parties should promote cooperation among CPs to ensure that conservation measures are adopted in a manner compatible with the fishery resources.

By placing responsibility for the actions of fishing vessels and nationals on CPs, article 10(3) of the Agreement makes the flag State responsible for any breach of a conservation measure that might occur. This is developed further in article 10(4) which provides that each CP should investigate an 'alleged serious violation' by that flag States' national or fishing vessel and report to all CPs as soon as practical concerning actions taken in response to the alleged breach.

CPs are also required to take all measures to ensure that fishing vessels comply with the provisions of the Agreement and that fishing vessels do not conduct unauthorised fishing in waters under national jurisdiction (article 11[1][a]). The role that CPs have in assisting developing States to the Agreement is expanded in article 13(3)(a) and (b), both of which provide that CPs have a duty to ensure that they enhance the ability of developing States to conserve and manage fisheries resources, as well as assist them in achieving this goal.

The Agreement contains several provisions relevant to NCPs,<sup>556</sup> calling for cooperation, information exchange and the taking of internationally acceptable steps against NCPs in instances of non-compliance. Outlining the role of the Meeting of Parties, article 6.1 proposes that the parties shall 'in accordance with international law and any applicable instruments' draw the attention of NCPs to activities which undermine the objectives of the Agreement. This, as suggested in article 6(3), might including the setting aside of fishing opportunities for NCPs if necessary.

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<sup>554</sup> DAFF, above n 529.

<sup>555</sup> Baird Maritime, above n 553.

<sup>556</sup> Daniel Owen, "Practice of RFMOs Regarding non-Members: A Report to Support the Independent High Level Panel to Develop a Model for Improved Governance by RFMOs", Cambridge, United Kingdom, February 2007, 8.

Article 6(4) provides that the Meeting of Parties can review the 'participation in fishing opportunities of non-contracting Parties' by taking into account their implementation of conservation measures. Interestingly, this article appears to extend the ambit of the Agreement beyond control of CPs, however, the Agreement remains unclear as to what kind of 'review' might be undertaken and how any restrictions might actually impact upon NCPs.

Finally, a cooperation provision is inserted in article 17.4 that requires CPs to 'request' NCPs to cooperate fully in the implementation of conservation measures. It goes on to provide that cooperating NCPs will enjoy benefits from the fishery commensurate to their commitment to comply. In other words, those vessels that cooperate fully might enjoy a certain quota in respect of the relevant stocks.

The Agreement goes into little detail on how a system for boarding and inspection might be installed.<sup>557</sup> While there is scope for conservation measures to be implemented in this respect, it would be beneficial to the Agreement to contain a provision concerning when and how boarding and inspections would be expected to take place. Reference is made in article 6(1) to the provision that the Meeting of Parties shall develop 'rules concerning the boarding and inspection of vessels operating in the Area', however, this is contained in a side note to the more broad provision relating to monitoring, control and surveillance.

As discussed in relation to the duties of CPs, article 11(1) establishes that CPs should take measures to ensure that they develop and implement a 'satellite vessel monitoring system' for fishing vessels flying their flag. The implementation of a vessel monitoring scheme is one of the means through which CPs could act to fulfil their concurrent obligation to develop rules and procedures for effective monitoring, control and surveillance of fishing activities as mentioned in article 6(1).

It is stated in article 7 of the Agreement that the Meeting of Parties shall establish a Compliance Committee to 'verify the implementation of and compliance with such measures'. While the establishment of the Compliance Committee in itself is not a compliance enforcement mechanism, the Agreement does contain a provision to establish a compliance enforcement regime. Article 12(2) of the Agreement states that CPs shall not permit 'landings, transshipment or supply services' to fishing vessels unless satisfied that the fish on board have been caught in a manner consistent with conservation measures. The Agreement does not detail how CPs are to establish whether a catch has been caught in consistency with conservation measures.

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<sup>557</sup> Clark, E. A. 2010. 'Compliance Enforcement and the Southern Indian Ocean Fisheries Agreement' SIODFA Tech. Rep. 01/10, at 7.

#### **4.8.2 Conservation measures**

Having entered into force in August 2010, the SIOFA has yet to establish any conservation or management measures to regulate fisheries in the Southern Indian Ocean.

#### **4.8.3 Future compliance initiatives**

There exists a vast range of areas and directions in which the SIOFA could develop its management plan for bottom dwelling species. For instance, the formulation of an IUU vessel list would be of great benefit to the area and would bring the SIOFA in line with similar regional fisheries organisations that function to regulate high seas fisheries. Furthermore, the treaty itself anticipates that fishing opportunities could be set aside for NCPs under articles 6(3), 6(4) and 13(3). However any discussion on this area can only be speculation as the treaty has only recently entered into force.

#### **4.9 Conclusion**

This review has shed light on the compliance conservation measures in place in AusRFMOs to provide a point from which comparisons can be drawn in Chapter 5. It is clear that there is significant variation in the number of conservation measures implemented and the topic and the detail of these measures. This is, of course, due in large part to the differing ages of the AusRFMOs with more recent agreements including the SIOFA and the SPRFMO having yet to develop conservation measures in line with their Convention objectives.

By considering three levels of compliance enforcement; including the founding agreement upon which individual AusRFMOs have been formed, formal and informal compliance measures and future compliance initiatives, this chapter has provided an in-depth assessment of the methods RFMOs can adopt to encourage compliance. Identifying the mechanisms currently in place and those being developed by each RFMO is an essential basis for the effective evaluation of the status of each of the AusRFMOs undertaken in Chapter 5.



## CHAPTER 5 ANALYSIS OF RESULTS

### 5.1 Introduction

Current shortcomings in the international fisheries regime and a continuing lack of political will by States to preserve ocean resources has increased the need for regional fisheries management organisations (RFMOs) to develop new and innovative enforcement mechanisms.<sup>558</sup> Despite the constant threat posed by non-compliant States, many RFMOs have today developed techniques to enforce conservation and compliance with their mandate. While many of these measures are only binding upon RFMO contracting parties (CPs), some are intended to, and do in fact, promote compliance by non-contracting parties (NCPs).<sup>559</sup> By continuing to strengthen these measures and engaging in an effort to promote consistency across the board, the ability of RFMOs to tackle non-compliance is maximised.<sup>560</sup>

This chapter analyses the extent to which compliance enforcement mechanisms have been implemented in RFMOs to which Australia is a party (AusRFMOs). Chapter 4 undertook a detailed examination of the enforcement capacity of the relevant RFMOs and this chapter tabulates these findings in order to analyse the key areas in which AusRFMOs can better implement compliance enforcement mechanisms.

Table 2 is designed to assist in identifying key areas in which compliance gaps exist as well as to categorise the compliance mechanisms that RFMOs have already implemented. This table allows interested parties to consider how other RFMOs might be addressing gaps that exist in their own regime and to compare tactics which may better address compliance. Table 3 assesses the degree to which each AusRFMO has implemented specific compliance enforcement mechanisms to identify, on a broader scale, the areas in which AusRFMOs as a group require improvement.

While it is not within the scope of this chapter to analyse how effective individual compliance measures might have been, this chapter will assess the extent to which AusRFMOs have utilised those compliance enforcement mechanisms available. This chapter is distinguished from the

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<sup>558</sup> Carl Bruch and Kathryn Mengerink, 'Policy Brief: Ocean Compliance and Enforcement' (Paper presented at the 4th Global Conference on Oceans, Coasts, and Islands: Organization of Working Group on Compliance and Enforcement, Hanoi, Vietnam, April 7-11 2008) <<http://www.globaloceans.org/globaloceans/sites/udel.edu.globaloceans/files/Compliance-and-Enforcement-PB-June18.pdf>>

<sup>559</sup> Rosemary Rayfuse, 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction' (Paper presented at the Fourth J.W.H. Verzijl Memorial Symposium on "The Legal Regime of Areas beyond National Jurisdiction: Current Principles and Frameworks and Future Directions, University of Utrecht, 21 November 2008).

<sup>560</sup> Bruch and Mengerink, above n 558.

performance reviews of individual RFMOs in that it functions to compare the performance of AusRFMOs to identify key gaps and areas for improvement in the regional regime. In drawing comparisons between AusRFMOs, it is important to note that the RFMOs in question are at different stages of implementation, with some of the agreements only recently entering into force.<sup>561</sup>

## **5.2 Analysis of compliance enforcement in AusRFMOs**

Chapter 4 considered the compliance enforcement capacity of AusRFMOs by identifying those measures already in place in convention texts and conservation measures. However it also recognised future compliance initiatives currently underway in the RFMOs in question. Table 2 incorporates the findings from Chapter 4 relating to the convention or agreement text as well as the conservation measures of the actual RFMO. The list of compliance enforcement mechanisms under consideration is based on those outlined in Chapter 3, Figure 2.<sup>562</sup>

Table 3 presents a summary of the level of implementation of compliance enforcement in the six AusRFMOs under examination. The allocated status includes consideration of any future compliance initiatives underway, as well as compliance provisions and conservation measures of the RFMO in question. This section seeks to demonstrate that a lack of consistency in approach across AusRFMOs threatens the effectiveness of individual RFMO compliance enforcement. In this respect, it is proposed that RFMOs should be aware of the work of their counterparts in an effort to understand when, why and how certain approaches towards compliance have been successful.

The analysis following Tables 2 and 3 below considers the need for more uniform implementation of compliance enforcement measures such as trade-related measures and graded sanctions. It reveals significant inconsistency in regard to the level of implementation of graded sanctions and argues that so long as trade-related measures are non-discriminatory in approach, certain AusRFMOs should work towards adopting conservation measures to give effect to this important countermeasure.

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<sup>561</sup> The South Indian Ocean Fisheries Agreement (SIOFA) has only recently entered into force whereas the South Pacific Regional Fisheries Management Organisation (SPRFMO) has yet to enter into force.

<sup>562</sup> While 9 key areas for compliance enforcement to be undertaken are listed in Chapter 3, the area of diplomatic demarches has been left out of this table.



**Table 2. Summary of the key compliance enforcement provisions contained in and implemented by Regional Fisheries Management Organisations to which Australia is a party (AusRFMOs)\***

TOPIC	CCAMLR	IOTC	CCSBT	WCPFC	SPRFMO	SIOFA
<b>Cooperative Policies</b>	<p>Conservation Measure 10-03 provides that where an act of non-compliance has occurred, CPs must cooperate with the flag State of the vessel to take appropriate action. Resolution 19/XXI urges all CPs and NCPs to cooperate to ensure that their nationals do not engage in or support IUU fishing. CCAMLR has a 'Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties' to encourage accession and compliance.</p>	<p>Resolution 98/05 provides that the Chairman of the IOTC should send a letter to all NCPs known to have vessels fishing in the IOTC Area to cooperate and become members to the Commission. Article IV of the IOTC Agreement provides CPs should cooperate to encourage any State to become a member to the Agreement. Article V of the IOTC Agreement provides that the IOTC shall encourage, recommend and coordinate information sharing.</p>	<p>Articles 13 and 14 of the CCSBT Convention provide that CPs must cooperate to invite membership by any State not party to the Convention if their nationals fish for southern bluefin tuna (SBT).</p>	<p>Part V of the WCPFC Convention provides States should cooperate to allow easy exchange of information. Under this section of the Convention CPs are also required to cooperate to establish effective mechanisms for monitoring, control and surveillance.</p>	<p>Article 19 of the SPRFMO Convention provides that members of the Commission must cooperate to enhance the ability of developing States to conserve and manage fishery resources. It provides that such cooperation should occur via the provision of financial assistance, technical assistance and the transfer of technology.</p>	<p>Article 6 of the Agreement provides that the Meeting of Parties should promote cooperation among CPs to ensure conservation measures are adopted in a manner compatible with fishery resources. Article 17(4) requires CPs to request NCPs to cooperate fully in the implementation of conservation measures.</p>
<b>Non-Contracting Parties (NCPs)</b>	<p>Resolution 14/XIX urges CCAMLR acceding States and NCPs to implement the Catch Documentation Scheme (CDS) as soon as possible. Article X of the CAMLR Convention provides that the Commission must draw the attention of a NCP to any activity undertaken by its nationals or vessels which affects the implementation of the objectives of the CCAMLR.</p>	<p>Resolution 01/03 provides that evidence that NCP vessels are fishing contrary to IOTC regulations should be reported and the flag State should be made aware.</p>	<p>Article 15 of the CCSBT Convention provides that States Parties should draw the attention of NCPs to the activities of its nationals, residents or vessels which may affect the attainment of the objectives of the Convention.</p>	<p>The 'Conservation and Management Measure for Vessels Without Nationality' provides that such vessels are presumed to be operating in contravention of the Convention.</p>	<p>Article 32 of the Convention provides that members of the Commission must take measures to deter the detrimental activities of vessels flying the flag of NCPs. Such incidences should be reported to the Commission along with any action taken against NCPs. Article 27 of the Convention stipulates that provisions relating to the implementation of vessel monitoring systems, transshipment, market related</p>	<p>Article 6(4) of the Agreement provides that the Meeting of Parties can review the participation opportunities of NCPs by taking into account their implementation of conservation measures.</p>

					measures and IUU vessel lists apply to any 'state, member of the Commission or entity' whose vessels diminish the effectiveness of the <i>SPRFMO Convention</i> .	
<b>Contracting Parties (CPs)</b>	<p>Conservation Measure 10-08 recognises the right of CPs to take action in response to acts of non-compliance by CP nationals.</p> <p>Resolution 25/XXV urges all CPs to pursue diplomatic and other action to encourage NCPs to recognise <i>CCAMLR</i> conservation measures.</p> <p>Article X of the <i>Convention</i> provides that the Commission shall draw attention of CPs to any activity which affects compliance by CP with obligations.</p> <p>Article XXI of the <i>Convention</i> provides CPs must ensure they take appropriate measures to ensure compliance.</p>	<p>Resolution 07/01 provides relevant agencies of CPs and cooperating non-parties (CNP) should cooperate to investigate allegations concerning the engagement of their nationals in IUU fishing.</p> <p>Article X of the <i>IOTC Agreement</i> references the need for CPs to ensure they take action under national legislation to impose penalties against violations of the <i>Agreement</i>.</p>	<p>The 'Resolution on action plans to ensure compliance the Conservation and Management Measures' requires CPs and CNPs to submit an action plan on compliance.</p> <p>Article 5 of the <i>Convention</i> provides that CPs shall take all necessary action to ensure enforcement and compliance with binding measures.</p>	<p>Article 25 of the <i>Convention</i> provides that no CP shall allow vessels to be used for fishing species covered by the <i>Convention</i> unless authorised to do so.</p> <p>Article 23(5) of the <i>Convention</i> provides all CPs must take measures to ensure their nationals and fishing vessels comply with the provisions of the <i>Convention</i>.</p>	<p>Under Article 24 of the <i>Convention</i>, CPs must take all necessary measures to ensure the effectiveness of conservation measures. CPs must report to the Commission on an annual basis to demonstrate how compliance has been achieved.</p> <p>Under Article 25 of the <i>Convention</i> CPs must take all necessary measures to ensure compliance by vessels flying their flag. This extends to waters under national jurisdiction.</p> <p>Article 26 of the <i>Convention</i> provides that port States have a duty to take measures to promote the effectiveness of conservation measures.</p>	<p>Article 10 of the <i>Agreement</i> provides that flag States are responsible for any breach of a conservation measure that might occur. CPs are also charged with investigating serious violations by their nationals or fishing vessels.</p> <p>Article 11 of the <i>Agreement</i> provides CPs must take all measures to ensure that their fishing vessels comply with the provisions of the <i>Agreement</i>.</p> <p>Article 13 of the <i>Agreement</i> provides that CPs have a duty to enhance the ability of developing States to conserve and manage fishery resources.</p>
<b>IUU Vessel Lists</b>	<p>Conservation Measure 10-07 establishes a NCP IUU Vessel List and provides that such vessels be identified on an annual basis.</p>	<p>Resolution 09/03 provides for the creation of the <i>IOTC</i> IUU Vessel List to target vessels presumed to have</p>	<p>List if vessels authorised to fish for southern bluefin tuna under the, 'Resolution on amendment of the Resolution on 'Illegal,</p>	<p>The <i>WCPFC</i> IUU Vessel List is established via the 'Conservation Measure to Establish a List of Vessels Presumed to</p>	<p>The creation of a <i>SPRFMO</i> IUU Vessel List is contained in Article 27 of the <i>Convention</i>.</p>	

	Conservation Measure 10-02 (2010) requires all CPs to ensure their vessels are licensed to fish in the Convention Area.	carried out IUU fishing in the <i>IOTC</i> Area.	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 CCSBT15 in 2008'.	have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Western and Central Pacific Ocean'.		
<b>Requests and Negotiations</b>	Resolution 14/XIX urges <i>CCAMLR</i> acceding States and NCPs to implement the Catch Documentation Scheme (CDS) as soon as possible. Resolution 15/XXII urges all CPs to require their vessels to land catches in States that are fully implementing the CDS. Resolution 25/XXV urges all CPs to pursue diplomatic and other action to encourage NCPs to recognise <i>CCAMLR</i> conservation measures.	Recommendation 03/04 urges three specific States (the Seychelles, Vanuatu and Japan) to implement cooperative management frameworks effectively and to continue to report to the <i>IOTC</i> in this regard.		WCPFC Conservation and Management Measure 2009-11 provides that any NCP with an interest in the fishery may request the Commission for the status of cooperating non-member.	Under Article 8, the <i>SPRFMO</i> Commission must adopt measures to prevent, deter and eliminate IUU fishing. Article 11 of the <i>SPRFMO Convention</i> provides for the creation of a Compliance and Technical Committee to monitor and review compliance.	Under Article 6 of the <i>Agreement</i> , the Meeting of Parties is charged with drawing the attention of NCPs to activities which undermine the objectives of the <i>Agreement</i> . Article 17(4) of the <i>Agreement</i> requires CPs to request NCPs to cooperate fully in the implementation of conservation measures.
<b>Trade-Related Measures</b>	Conservation Measure 10-07 provides CPs should not take any trade-related measures against vessels as a result of their inclusion on the IUU Vessel List. However CPs may cooperate to adopt trade-related measures to prevent, deter and eliminate IUU fishing. Conservation Measure 10-05 provides that the Commission is committed	Resolution 10/10 on market related measures provides a legally binding measure to take measures against CPs and NCPs who repeatedly fail to discharge their obligations. In the case of CPs, action such as the reduction of existing quotas or catch limits should be first carried out before market related measures are	The 'Resolution on the Implementation of a CCSBT Catch Documentation Scheme' covers all landings, transshipments, exports, imports and re-exports of SBT and requires whole SBT be tagged at the time of the kill. The <i>CCSBT</i> has an Action Plan allowing the Commission to impose trade-restrictive measures however this	Under the 'Conservation Measure to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Western and Central Pacific Ocean' members may take non-discriminatory trade-related measures to eliminate the activities of IUU listed	Article 8 of the <i>Convention</i> provides that the Commission must adopt procedures, including non-discriminatory trade-related measures, to ensure compliance. To this effect the Commission must develop processes in accordance with international law to assess flag State performance.	

	<p>to taking steps to ensure fish is caught consistent with international law. Resolution 14/XIX urges CCAMLR acceding States and NCPs to implement the CDS as soon as possible.</p>	<p>adopted.</p>	<p>plan is now essentially redundant. Article 15 of the <i>Convention</i> provides that Parties should cooperate in taking trade restrictive measures to deter fishing activities for SBT where such action could affect the attainment of the objectives of the <i>Convention</i>.</p>	<p>vessels. Article 27 of the <i>Convention</i> provides port States may adopt regulations to prohibit landings and transshipments where catch has been taken in a manner which undermines the objectives of the <i>WCPFC</i>. Article 25(11) of the <i>Convention</i> authorises the Commission to develop procedures to allow for non-discriminatory trade-related measures to be taken against any State undermining the objectives of the Commission.</p>	<p>Article 27 of the <i>Convention</i> contains further references to the implementation of trade-related measures.</p>	
<p><b>Graded Sanctions</b></p>	<p>Conservation Measure 10-03 provides that where an act of non-compliance has occurred, CPs will take appropriate action and, if necessary, apply sanctions to that vessel. Article XXI of the <i>Convention</i> provides sanctions may be imposed by States in response to non-compliance by their flagged vessels or nationals.</p>	<p>Resolution 99/02 provides that action be taken against the activities of 'flag of convenience' vessels including denying vessels a license to fish and refusing landing and transshipments. Resolution 10/09 provides that the <i>IOTC</i> Compliance Committee should develop a scheme of sanctions to provide greater direction in dealing with non-compliance.</p>	<p>The 'Resolution on establishing the CCSBT Vessel Monitoring System' provides that all CPs and CNPs take measures to ensure the owners of vessels are citizens or legal entities within the flag State to allow punitive action to be taken. Article 15 of the <i>Convention</i> provides that Parties should take appropriate measures to prevent their registered vessels from transferring registration to avoid compliance with the <i>CCSBT</i>.</p>	<p>The 'Conservation and Management Measure for Compliance Monitoring Scheme' provides that penalties and other actions as may be necessary may be implemented in response to non-compliance. Article 25 of the <i>Convention</i> provides that where it has been established that a member vessel has been non-compliant, States must ensure that the vessel ceases fishing activities until sanctions have been</p>	<p>Article 3 of the <i>Convention</i> provides that CPs, the Commission and subsidiary bodies should ensure compliance by implementing sanctions to deprive offenders of the benefits to be gained from their activities.</p>	

				complied with.		
<b>Monitoring and Inspection</b>	Conservation Measure 10-04 requires CPs to ensure that their flagged vessels are equipped with automated satellite-linked vessel monitoring systems (VMS).	Resolution 01/03 provides that vessels fishing contrary to <i>IOTC</i> regulations should be inspected and all landings and transshipments by the vessel should be prohibited by all CP ports. Resolution 99/03 provides for a control and inspection scheme to be set up. Resolution 06/03 establishes a vessel monitoring system in the <i>IOTC</i> Area to standardise the systems adopted by CPs.	The <i>CCSBT</i> 'Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels' recognises the need to ensure monitoring of transshipment in areas beyond national jurisdiction. The 'Resolution on establishing the <i>CCSBT</i> Vessel Monitoring System' provides all CPs and CNPs ensure no vessels carry out IUU fishing activities.	The 'Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures' provide each member must ensure that their vessels comply with its provisions and that any harmful evidence obtained from such inspections be referred to the authorities. Article 10 of the <i>Convention</i> provides that CPs must cooperate to establish mechanisms for effective monitoring, control and surveillance.	Article 24 of the <i>Convention</i> provides CPs must take measures to ensure compliance by nationals or fishing vessels owned by them and investigate any alleged violations. Article 8 of the <i>Convention</i> provides that the Commission must develop and establish effective monitoring, control and surveillance enforcement procedures.	Article 6(1) of the <i>Agreement</i> provides that the Meeting of Parties shall develop rules concerning the boarding and inspection of vessels operating in the Area. Article 11(1) of the <i>Agreement</i> provides that CPs should take measures to ensure that they develop a 'satellite vessel monitoring system' for fishing vessels flying their flag.

\* Table 2 highlights the key provisions relating to compliance enforcement as contained in AusRFMO Conventions and Agreements. It is not intended as an exhaustive list of all the provisions relating to compliance enforcement in each AusRFMO under examination. The judgment made by the author as to how to classify the compliance enforcement mechanisms under review is subjective.

**Table 3. Implementation of compliance enforcement mechanisms by Regional Fisheries Management Organisations to which Australia is a Party (AusRFMOs)\***

<i>TOPIC</i>	<i>CCAMLR</i>	<i>IOTC</i>	<i>CCSBT</i>	<i>WCPFC</i>	<i>SPRFMO</i>	<i>SIOFA</i>
<b>Cooperative Policies</b>						
<b>Non-Contracting Parties</b>						
<b>Contracting Parties</b>						
<b>Vessel Lists</b>						
<b>Requests and Negotiations</b>						
<b>Trade-Related Measures</b>						
<b>Graded Sanctions</b>						
<b>Monitoring and Inspection</b>						

<b>Key for Table 3</b>	
	Implemented or currently implementing
	Some measures implemented
	Provided for, to varying degrees, in the founding text of the RFMO
	Minimal or no measures in place

\* This table analyses whether measures are in place, not how effective those measures are. Assessments are made based Table 1 but also include information relating to future compliance initiatives currently being undertaken by AusRFMOs.

### 5.2.1 Trade-related measures

The justification for the focus on trade-related measures throughout this thesis is that such measures represent one of the few effective, enforceable and legally justifiable mechanisms available to RFMOs in their efforts to conserve the marine environment. In a recent publication<sup>563</sup> considering the application of countermeasures in environmental violations, Hjortur B. Sverrisson notes that the cases that appear the most compatible with the use of trade-related measures against States involve the law of the sea and high seas fisheries.<sup>564</sup> Without a clear and substantive legal obligation to conserve and protect the environment, he suggests that countermeasures, in the form of trade-related measures, appear to have been one of the few options that have provided some relief for RFMOs.<sup>565</sup>

However, countermeasures remain a controversial topic in RFMO circles. This is largely due to differences in opinion concerning the scope of application of RFMOs and their enforcement capabilities. Those who disagree with the use of such measures by RFMOs argue that under international law, RFMOs do not have the competence to sanction States and it would not be fair practice to do so.<sup>566</sup> In relation to the application of trade-related measures to non-contracting parties, it has also been argued that such action would infringe upon the principle of *pacta tertiis nec nocent nec prosunt* whereby a treaty cannot establish rules or obligations with regard to a third State.<sup>567</sup>

This thesis contends that so long as trade-related measures are consistent with international legal principles relating to non-discrimination, there is nothing preventing RFMOs from adopting internationally sound measures in this regard. Certain RFMOs have already adopted measures to this effect, with the IOTC Resolution 10/10 allowing the Commission to take measures against CPs and NCPs who repeatedly fail to discharge their objections. In order to be adopted accordance with the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>568</sup> (IPOA-IUU), it is clear that the adoption of trade-related measures should only occur, 'in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and only after prior consultation with interested States.'<sup>569</sup>

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<sup>563</sup> Hjortur B. Sverrisson, *Countermeasures, the International Legal System and Environmental Violations* (2008).

<sup>564</sup> *Ibid* 337.

<sup>565</sup> *Ibid*.

<sup>566</sup> Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-Eighth Meeting of the Commission*, CCAMLR-XXVIII, Hobart, Australia, 26 October - 6 November 2009, 52.

<sup>567</sup> *Ibid*.

<sup>568</sup> United Nations Food and Agriculture Organisation, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted by consensus at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 102th Session of the FAO Council.

<sup>569</sup> *Ibid* paragraph 66.

As a result of this provision, RFMOs must exercise great caution with respect to trade-related measures and place limitations and restrictions upon their operation to prevent discrimination against developing or developed States.<sup>570</sup> Certain RFMOs have overcome this hurdle by providing that trade-related measures should be carried out in accordance with international law. For instance, Article 8 of the SPRFMO Convention provides that the Commission must adopt procedures, including non-discriminatory trade-related measures, to ensure compliance. To this effect the Commission must develop processes in accordance with international law to assess flag State performance.

Notable academics<sup>571</sup> have suggested that today, trade-related measures are central to RFMO compliance. The importance of achieving sustainable global fisheries has forced certain RFMOs to attempt to overcome international rules relating to third parties, with such approaches gaining support from the provisions of the United Nations Fish Stocks Agreement (UNFSA).<sup>572</sup>

However certain RFMOs, including the CCAMLR, have been slow to accept the implications of a trade-related measure aimed at non-compliance. The main reason behind this hesitance appears to be a contrast in opinions between CCAMLR State Parties on whether the adoption of such a measure would be consistent with international law and the rules of the World Trade Organisation (WTO).<sup>573</sup>

### 5.2.2 Graded sanctions

One of the primary roles of RFMOs is to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing on the high seas, an objective delegated to these organisations primarily via the IPOA-IUU. The IPOA-IUU also provides that RFMOs should develop additional compliance measures, including graded sanctions, to promote compliance by their members.<sup>574</sup> Paragraph 21 of the IPOA-IUU calls on States to ensure that sanctions are 'of sufficient severity...to deprive offenders of the benefits accruing from such fishing.'<sup>575</sup> Indeed, the severity

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<sup>570</sup> Rayfuse, Rosemary, *Regional Allocation Issues or Zen and the Art of Pie Cutting*. 2007. Paper Prepared for Sharing the Fish 2006 Conference. Available on line <<http://www.fishallocation.com/assets/pdf/papers/RosemaryRayfuse.>> at 15 August 2009

<sup>571</sup> Including Dr. Mary Ann Palma, Director of the Australian National Centre for Ocean Resources and Security and Prof. Martin Tsamenyi, Professor of Law and Director of the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong, Australia. See Tsamenyi et al, *The New EC Regulation on Illegal Fishing: Implications for ACP Countries*. Available on line <<http://www.thecommonwealth.org/files/187911/FileName/THT56TheNewECRegulationonIllegalFishing.pdf>>

<sup>572</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001).

<sup>573</sup> CCAMLR XXIX, above n 566.

<sup>574</sup> IPOA-IUU, above n 568.

<sup>575</sup> *Ibid.*



of sanctions imposed for IUU fishing was one of the main issues discussed at a recent meeting of the Western and Central Pacific Fisheries Commission (WCPFC).<sup>576</sup>

A range of graded sanctions may be adopted by RFMOs in response to acts of non-compliance. Such measures may be targeted towards individual vessels, nationals or non-compliant States.<sup>577</sup> Sanctions may include prohibiting the importation of products caught by non-cooperating fishing vessels, refusal to enter into negotiations, denial of port privileges, prohibitions on the import of fish and fish products from a certain vessel or certain State, and the application of other economic sanctions.<sup>578</sup> Sanctions should be transparent and, most importantly, consistent, in order to avoid potential or perceived discrimination.<sup>579</sup>

A recent study entitled 'Closing Loopholes: Getting Illegal Fishing Under Control'<sup>580</sup> found that at a regional level, most RFMOs did not consistently assess compliance by their members or lacked measures to sanction members for failing to meet their obligations.<sup>581</sup> The study concludes that while some RFMOs required denial of port services or entry into port for vessels known to have been engaged in IUU fishing, the absence of consistent sanctions both within and between RFMOs has allowed IUU fishing to continue.<sup>582</sup>

In a 2010 report for the FAO, Dr. Gail Lugten<sup>583</sup> considers the level of cooperation and coordination within and between regional fisheries bodies (RFBs).<sup>584</sup> With regard to the five operational AusRFMOs under examination in this thesis, she reports upon the significant level of variation in response.<sup>585</sup> Both the CCSBT and the SPRFMO noted that they cooperated with other RFMOs at all times.<sup>586</sup> In contrast, CCAMLR listed its cooperation specific organisations including the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the CCSBT and the Regional Fishery Body Secretariats Network (RSN).<sup>587</sup> Furthermore, the IOTC recognised its cooperation with the WCPFC, the Coordinating Working Party on Fishery

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<sup>576</sup> Martin Tsamenyi, Professor of Law and Director of the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong, Australia, <tsamenyi@uow.edu.au> "Compliance at the 2009 WCPFC Meet" (16 December 2009) (personal e mail).

<sup>577</sup> Jackie Alder, Gail Lugten, Robert Kay and Bridget Ferriss, "Compliance with International Fisheries Instruments in the North Atlantic" in Tony Pitcher, Ussif Rashid Sumaila and Daniel Pauly. (eds) Fisheries impacts on North Atlantic ecosystems: Evaluations and Policy Exploration. Fisheries Centre Research Reports 9(5).

<sup>578</sup> Mary Ann Palma, 'Combatting IUU Fishing: International Legal Developments' in Q.Hanich and M. Tsamenyi (eds), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fishery Instruments in the Western and Central Pacific Region* (2009) 71.

<sup>579</sup> FAO, above n 574.

<sup>580</sup> The study was conducted by Stefan Flothmann, Kristín von Kistowski, Emily Dolan, Elsa Lee, Frank Meere, Gunnar Album, a number of whom have affiliations with the PEW Environment Group. See <<http://www.sciencemag.org/content/328/5983/1235.full>>

<sup>581</sup> Stefan Flothmann et al, 'Closing Loopholes: Getting Illegal Fishing Under Control' (2010) 328(5983) *Science* .

<sup>582</sup> Ibid.

<sup>583</sup> Ibid.

<sup>584</sup> Gail Lugten, *The Role of International Fishery Organisations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources*, FAO Fisheries and Aquaculture Circular. No. 1054, Rome, FAO, 2010, 25.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

Statistics (CWP) and Fisheries Resources Monitoring System (FIRMS). The WCPFC noted its Memoranda of understanding with CCAMLR, CCSBT, the Forum Fisheries Agency (FFA), Inter-American Tropical Tuna Commission (IATTC), IOTC and the Secretariat of the Pacific Community (SPC).<sup>588</sup>

It is clear that while certain RFMOs considered cooperation with other RFBs and RFMOs to be openly dealt with on a case-by-case basis, others had specific arrangements for cooperation. In the context of non-compliance however, it is clear that this is not a problem peculiar to a single RFMO and that each can learn from one another's successes or failings. Arguably, if RFMOs are able to adopt a consistent approach towards compliance enforcement, their role as regulators of high seas fisheries will gain clarity and impact.

These findings are consistent with the results of this thesis which has uncovered significant inconsistencies in regard to the level of implementation of both convention and conservation measures relating to the use of graded sanctions. The conventions of certain AusRFMOs specifically grant the organisation the capacity to apply sanctions in the face of non-compliance<sup>589</sup> however half of the RFMOs considered failed to raise the question of sanctions in their convention text.<sup>590</sup> While all three of the more established RFMOs<sup>591</sup> examined had implemented conservation measures considering the adoption of compliance mechanisms, the use of such sanctions was often applied narrowly<sup>592</sup> or did not specify the type of sanctions to be imposed.<sup>593</sup>

Better defining graded sanctions and establishing a unified approach to such measures should now be one of the primary tasks on RFMO agendas. These organisations have been hesitant to impose any sanctions upon non-compliant States due to perceived discrimination or concerns that it is not within the jurisdiction of the RFMO to do so. However, the development of the IPOA-IUU, the new Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>594</sup> (PSM Agreement), as well as the inclusion of access to sanctions provided for in the mandates of RFMOs should be persuasive in encouraging these organisations to enforce their conservation objectives. The imposition of monetary fines,

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<sup>588</sup> Ibid.

<sup>589</sup> Including the CCAMLR, the WCPFC and SPRFMO.

<sup>590</sup> Refer Table 1. The founding texts of the IOTC, CCSBT and SIOFA fail to specifically mention the use of sanctions in appropriate circumstances.

<sup>591</sup> Including CCAMLR, IOTC and CCSBT.

<sup>592</sup> IOTC Resolution 99/02 for instance only allows for penalties to be applied against 'flag of convenience' vessels.

<sup>593</sup> For instance, CCAMLR Conservation Measure 10-03 provides that sanctions should be applied to non-compliant vessels however detail is not provided in this respect.

<sup>594</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted in November 2009 by the FAO Conference at its Thirty-sixth Session through Resolution No 12/2009, under Article XIV, paragraph 1 of the FAO Constitution.

confiscation of fishing vessels and denial of fishing licences<sup>595</sup> should be a common resource relied upon by these organisations.

Enhanced communication and information sharing about sanctions between RFMOs is essential to improving compliance across the board.<sup>596</sup> If it is seen that there is a precedent for the adoption of sanctions against a specific act of non-compliance, the logical conclusion is that other RFMOs should adopt similar measures. With the success of IUU vessel lists in RFMOs, it is apparent that these organisations are good at adopting specific strategies to target non-compliance, but that they have difficulties achieving consistency on a broad area such as sanctions. The key then is for these organisations to break-down their options for sanctioning non-compliance and develop specific responses to specific problems. If consistency in this respect can be achieved within the RFMO, political pressure may be applied to other organisations to follow suit.

### 5.2.3 Provisions relating to non-contracting parties

International agreements have also sought to address the problems posed by NCPs with the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>597</sup> calling on States Parties to RFMOs to prevent landings from vessels flagged to non-members.<sup>598</sup> This provision is repeated in the 2005 FAO Port State Model Scheme<sup>599</sup> by which port States are instructed to deny landing, transshipping or processing of fish caught by vessels flagged to a non-party of an RFMO, 'unless it can be established that the catch was taken in accordance with relevant conservation measures.'<sup>600</sup>

Arguably, in the range of compliance enforcement mechanisms available to RFMOs, the measures taken by RFMOs to discourage the vessels of NCPs from undermining the objectives of the relevant agreement are of particular significance. This is because the activities of NCPs lie at the heart of the IUU fishing problem: a problem which has been repeatedly cited as the key challenge facing RFMOs since its formal recognition at a meeting of the CCAMLR in 1997.<sup>601</sup>

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<sup>595</sup> Diane Erceg, 'Deterring IUU fishing through state control over nationals' (2006) 30(2) *Marine Policy*.

<sup>596</sup> Organisation for Economic Co-operation and Development, "Making Sure Fish Piracy Doesn't Pay", Policy Brief, January 2006, <<http://www.oecd.org/dataoecd/26/37/35985301.pdf>>

<sup>597</sup> United Nations Food and Agriculture Organisation, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted by consensus at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 102th Session of the FAO Council.

<sup>598</sup> *Ibid* paragraph 63.

<sup>599</sup> *Model Scheme on Port State Measure to Combat Illegal, Unreported and Unregulated Fishing*, FAO, Rome, Italy, 2007. Available on line <<ftp://ftp.fao.org/docrep/fao/010/a0985t/a0985t00.pdf>>

<sup>600</sup> Adriana Fabra, 'The Use of Port State Measures to Improve Fisheries Compliance' (Paper presented at the Illegal, Unreported and Unregulated Fishing: 2nd Chatham House Update and Stakeholder Consultation Meeting, 2006) 5.

<sup>601</sup> Australian Institute of Criminology, *Illegal, Unregulated and Unreported Fishing* (2010) <<http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp109/08.aspx>> at 2 January 2011

One of the key mechanisms by which RFMOs can seek to improve compliance by NCPs is by developing cooperative policies and schemes to encourage participation.<sup>602</sup> To this effect, the CCAMLR,<sup>603</sup> IOTC<sup>604</sup> and the CCSBT<sup>605</sup> have all adopted framework provisions or conservation measures to the effect that their respective Commissions will notify a NCP if its nationals or vessels have been acting in a manner which affects the implementation of the objectives of the RFMO. Yet more than mere acknowledgement of such behaviour is required if RFMOs are to effectively address the problems caused by the vessels and nationals of NCPs.

In this respect, the SPRFMO has adopted significant framework provisions which require members of the Commission to take measures to deter the activities of vessels of NCP States.<sup>606</sup> Furthermore, article 27 of the SPRFMO Convention provides that the measures adopted by the RFMO relating to market measures, IUU vessel lists and transshipment will apply equally to CPs and NCPs. CCAMLR Resolution 14/XIX urges NCPs to implement the Catch Documentation Scheme (CDS) and article 6(4) of the SIOFA Convention provides that the opportunity for NCPs to participate in a fishery will be reviewed if they fail to implement the provisions of the agreement.

The ability of RFMOs to address the problems posed by the activities of NCP nationals and vessels is limited in that there remains an open debate as to the extent to which an RFMO can impose upon the sovereignty of non-members. The principle that international agreements can only apply *inter partes* has restricted the breadth and scope of RFMO conservation measures. The SPRFMO has sought to overcome this challenge by implementing the approach forwarded in the United Nations Fish Stocks Agreement. Under the SPRFMO Convention, certain management measures apply to any 'state, member of the Commission or entity' whose vessels diminish the effectiveness of the SPRFMO Convention. Such forward-thinking should be applauded, however, it is yet to be seen whether this approach will delay the ratification of this agreement.

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<sup>602</sup> Fabra, above n 600, 8.

<sup>603</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 48, (entered into force 7 April 1982), article X.

<sup>604</sup> IOTC Resolution 10/03 provides that if a NCP's vessels are fishing in contravention of the Convention the flag State will be made aware.

<sup>605</sup> *Convention for the Conservation of Southern Bluefin Tuna*, opened for signature 10 May 1993, 1819 UNTS 359, (entered into force 20 May 1994), article 15.

<sup>606</sup> *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, opened for signature 1 February 2010, article 32.

### 5.3 Conclusion

The compliance enforcement mechanisms implemented by RFMOs have in many cases provided a significant contribution to improving the regulation of high seas fisheries.<sup>607</sup> It has been demonstrated that AusRFMOs have adopted a wide range of compliance enforcement mechanisms but that more needs to be done particularly in the field of trade-related measures, graded sanctions and provisions relating to NCPs if compliance enforcement is to gain strength.

Tables 2 and 3 reveal significant inconsistencies in terms of the degree and extent to compliance enforcement mechanisms have been implemented in AusRFMOs. While certain RFMOs might have recognised the need for action on a specific compliance problem within their framework agreement, it is often the case that this recognition has not been given effect via the implementation of conservation measures.

This thesis argues that the compliance enforcement techniques of RFMOs alone cannot effectively tackle the challenges posed by non-compliance. A lack of consistency in the implementation of compliance enforcement mechanisms across AusRFMOs demonstrates that the regional regime would benefit from a more uniform approach. However it can also be said that significant steps have been taken by most RFMOs in relation to the implementation of vessel lists and monitoring, control and surveillance.

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<sup>607</sup> For instance, IUU Vessel Lists have been demonstrated to be effective in contributing to combat the mounting pressure of IUU fishing on increasingly vulnerable fish stocks. Kristin Gunnarsdottir von Kistowski, 'Do RFMO IUU Vessel Lists Work? An Assessment of Compliance and Effectiveness' (Paper presented at the 5th International Forum on Illegal, Unreported and Unregulated (IUU) Fishing, London, United Kingdom, 2009).

## CHAPTER 6

### UTILISING INTERNATIONAL DISPUTE RESOLUTION TO STRENGTHEN REGIONAL FISHERIES MANAGEMENT

#### 6.1 Introduction

As outlined in previous chapters, cooperation lies at the heart of regional fisheries management. The requirement that flag States cooperate via regional fisheries management organisations (RFMOs) derives from articles 117<sup>608</sup> and 118<sup>609</sup> of the United Nations Convention on the Law of the Sea (LOSC).<sup>610</sup> Together these articles create the 'duty to cooperate' in taking measures to conserve and manage high seas fish stocks.<sup>611</sup>

This chapter addresses the question of how non-contracting parties (NCPs) *as well as* contracting parties (CPs) to RFMOs might be compelled to better comply with their commitments under the LOSC and cooperate to conserve high seas fish stocks. It tackles this question by examining the relationship between RFMOs and international dispute resolution mechanisms and suggesting an option whereby the duty to cooperate could be tested to determine its scope and application. By considering the hypothetical situation whereby an RFMO might bring a request for an advisory opinion before, for example, the International Tribunal for the Law of the Sea (the Tribunal), this chapter sheds light on the potential for the duty to cooperate to be clarified.

First, international debate concerning the duty to cooperate and the need for clarification of this duty is examined to determine whether there exists international support for action to be taken in this regard. Secondly, the chapter considers the practical jurisdiction and standing requirements that would need to be satisfied if an advisory opinion were to be brought and the final section poses some potential questions that could be addressed. It is proposed that bringing an advisory opinion on the duty to cooperate represents a legitimate and reasonable option to be considered in the global effort to achieve greater cooperation in respect of regional fisheries management.

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<sup>608</sup> Article 117 of the LOSC provides, '[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.'

<sup>609</sup> Article 118 of the LOSC provides, 'States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.'

<sup>610</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>611</sup> Elise A Clark, 'Strengthening Regional Fisheries Management: An Analysis of the Duty to Cooperate' (2011) 8(1) *New Zealand Journal of Public and International Law* (in press).

## 6.2 Strengthening RFMOs via international dispute resolution

Drawing upon the duty to cooperate contained in the United Nations Convention on the Law of the Sea (the LOSC) and numerous other international fisheries agreements, this chapter analyses the relationship between RFMOs, the duty to cooperate and the Tribunal. It builds support for an advisory opinion to be bought by an RFMO by examining the history of cases before the Tribunal, the legal standing of RFMOs and the type of questions that such an advice may consider. It concludes that the Tribunal represents a legitimate option for an advisory opinion to be bought by an RFMO to improve compliance with conservation measures.

### 6.2.1 Support for an advisory opinion

A growing body of literature and cases demonstrate support for the proposition that the duty to cooperate should be tested in the interests of improving flag State responsibility. This chapter proposes that a RFMO should be the entity to challenge the operation of this important duty and that such a challenge could occur via the bringing of a case before the Tribunal. In support of this proposition, Judge Tullio Treves of the Tribunal has noted that, ‘cases against a flag State for non-compliance with its responsibilities are possible and may be useful in clarifying the scope of such responsibilities, as well as the consequences of non-compliance.’<sup>612</sup> The history of cases before the Tribunal can shed some light on the circumstances in which the duty to cooperate might be clarified.

In 2000, Chile bought a case before the Tribunal on the basis of the conservation provisions contained in articles 116 – 119 of the LOSC.<sup>613</sup> Chile’s complaint was in regards to the failure of the then European Commission (EC) to ensure that Spanish vessels were acting in compliance with these conservation provisions.<sup>614</sup> Chile’s concern lay with the activities of these vessels when fishing in the waters near the Chilean EEZ which it argued were not accurately reporting catches to the competent organisation.<sup>615</sup>

Interestingly, this case also had the potential to be the first bought before the World Trade Organisation (WTO) on the intersection between environment and trade rules under a multilateral environmental agreement.<sup>616</sup> However the case did not progress with either the Tribunal or the

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<sup>612</sup> *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action*, United Nations Food and Agriculture Organisation (FAO) in cooperation with Fisheries and Oceans Canada, 25-28 March 2008, Vancouver, Canada 12.

<sup>613</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Union)* [2001] 40 ILM 475.

<sup>614</sup> Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007) 79.

<sup>615</sup> *Ibid.*

<sup>616</sup> World Trade Organisation, *Relationship between the WTO and MEA Rules*, <[http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_neg\\_mea\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm)> at 9 September 2011.

WTO by an order dated 16 December 2009 the Tribunal held that the case should be removed from the Tribunal docket after the interested States committed to negotiating a new agreement for the conservation of swordfish.<sup>617</sup>

In the *Southern Bluefin Tuna Cases*,<sup>618</sup> whereby a request for provisional measures was sought by Australia and New Zealand against Japan, the duty to cooperate to conserve southern bluefin tuna (SBT) stocks was sought before the Tribunal.<sup>619</sup> It was argued by Australia and New Zealand that the 'Experimental Fishing Programme' (EFP) that Japan wanted to undertake would threaten already depleted stocks of SBT.<sup>620</sup> On this basis the applicants argued that the cooperative provisions of the SBT Treaty, which is signed by the interested parties to the dispute,<sup>621</sup> contained a specific duty to cooperate in regards to highly migratory species.

In prescribing provisional measures, the Tribunal held that Japan should not conduct the planned EFP unless with the agreement of the other parties and that all parties should continue negotiations with a view to ensuring the conservation of SBT.<sup>622</sup> However most significantly for the purposes of this chapter, a joint declaration by Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson held, *inter alia*.<sup>623</sup>

In the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the Convention lays down, as stated in the order, a duty to cooperate to that end.

These cases demonstrate that the duty to cooperate can provide a legitimate foundation for a fisheries dispute to be brought before an international adjudicative body. Support for this argument is also found in discussions undertaken at international fora in recent years.

A proposal for an advisory opinion to be brought on the duty to cooperate is considered in 2007 Chatham House report entitled: 'Recommended Best Practices for Regional Fisheries Management Organisations'<sup>624</sup> (the Chatham House Report). The Chatham House Report

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<sup>617</sup> International Tribunal for the Law of the Sea, 'Case on Conservation of Swordfish Stocks between Chile and the European Community in the South-Eastern Pacific Ocean' (Press Release, 21 March 2001). Available on line <[http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)>.

<sup>618</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)* [1993] 38 ILM 1624.

<sup>619</sup> Howard S. Schiffman, 'The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute' (1999) 2(3) *Journal of International Wildlife Law & Policy* 5.

<sup>620</sup> *Ibid.*

<sup>621</sup> The Convention for the Conservation of Southern Bluefin Tuna, which had been signed by the three countries, came into force in May 1993. See Commission for the Conservation of Southern Bluefin Tuna, *About the Commission* (2010) <<http://www.ccsbt.org/docs/about.html>> at 5 September 2010.

<sup>622</sup> *Southern Bluefin Tuna Cases*, above n 618.

<sup>623</sup> Joint Declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson. See *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)* [1993] 38 ILM 1624.

<sup>624</sup> Lodge et al, above n 614.



examined the potential for an advisory opinion to be brought before the Tribunal by a RFMO with sufficient support from its CPs.<sup>625</sup> The question of whether RFMOs would be authorised to request an advisory opinion was also discussed at the sixth regional workshop of the Tribunal in South Africa.<sup>626</sup> Judge Tafsir Malick Ndiaye of the Tribunal noted that this question and other questions relating to the role of RFMOs have reoccurred at different workshops of the Tribunal.<sup>627</sup> He suggested that the protection and preservation of the marine environment and 'liability questions relating thereto' are matters for advisory opinions, in addition to the question of IUU fishing.<sup>628</sup>

The potential for a dispute on the duty to cooperate to be brought before the Tribunal was raised at a meeting convened by the United Nations Food and Agriculture Organisation (UNFAO) in 2008. The meeting, entitled 'Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action'<sup>629</sup> (the FAO Expert Workshop) was convened in Vancouver, Canada. Here it was suggested that a 'model case' could be brought for the purposes of clarifying the legal status of the duty to cooperate and the conditions needed to avoid losing a case on this matter.<sup>630</sup> The notion of a model case was discussed in detail, including the question of which organisation might have standing to bring such action.<sup>631</sup> It was commonly agreed that RFMOs would be well placed to take such action.<sup>632</sup> Participants observed that developing international case law could achieve more, and proceed more quickly, than creating yet another international legal instrument to address the problem of non-compliance.<sup>633</sup>

With growing theoretical support for a case or advisory opinion on the significance of the duty to cooperate, this thesis will now turn to examine the practical requirements which would need to be satisfied for an action to proceed.

## 6.2.2 Jurisdiction and standing

The Tribunal is open to States Parties to the LOSC<sup>634</sup> and to entities other than States Parties in any case expressly provided for in Part XI of the LOSC or pursuant to any other agreement

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<sup>625</sup> Ibid 81.

<sup>626</sup> Tafsir Malick Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea' (2010) 9 *Chinese Journal of International Law* paragraph 67.

<sup>627</sup> Ibid paragraph 71.

<sup>628</sup> Ibid paragraph 89.

<sup>629</sup> FAO Expert Workshop, above n 612.

<sup>630</sup> Ibid.

<sup>631</sup> The general consensus of the FAO Expert Workshop was that a State would have to demonstrate its standing to bring the case, or alternately, a group of States could come together as joint claimants under a declaration of common interest. See *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action*, United Nations Food and Agriculture Organisation (FAO) in cooperation with Fisheries and Oceans Canada, 25-28 March 2008, Vancouver, Canada 74.

<sup>632</sup> FAO Expert Workshop, above n 612, 11.

<sup>633</sup> Ibid.

<sup>634</sup> LOSC, above n 610, article 291(1).

conferring jurisdiction on the Tribunal.<sup>635</sup> In this regard, it is clear that when considering who might have standing to bring a contentious case before the Tribunal, international organisations such as RFMOs might be included. The Tribunal has jurisdiction, 'over any dispute concerning the interpretation or application of this Convention which is submitted to it'<sup>636</sup> and in the event of a dispute as to whether the Tribunal has such jurisdiction, the matter can be settled by a decision of the Tribunal.<sup>637</sup>

The question of the jurisdiction of the Tribunal in regards to an advisory opinion is somewhat more complex. Advisory opinions are non-legally binding<sup>638</sup> and they are generally utilised by States to seek clarification upon a point of law. There remain two key unanswered questions that must be addressed in considering bringing a request for an advisory opinion: 1) Does the full Tribunal have advisory jurisdiction? 2) If the Tribunal does have the sufficient advisory jurisdiction, can a State submit a request for an advisory opinion?

These questions will be addressed in order. First, it would appear on the surface that the advisory function of the Tribunal cannot be exercised by the full chamber under article 191 of the LOSC and article 40 of the Statute of the Tribunal (the 'Statute').<sup>639</sup> The advisory jurisdiction of the full Tribunal is not expressly provided for under either the LOSC or the Statute, however, at the same time, neither the LOSC nor the Statute expressly prohibits the advisory function of the Tribunal.<sup>640</sup> However article 138, which considers the jurisdiction of the Tribunal to provide an advisory opinion of a legal question, was inserted into the Rules of the Tribunal in 1996. This provision reads as follows:

*Article 138*

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

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<sup>635</sup> Ibid article 291(2).

<sup>636</sup> International Tribunal on the Law of the Sea, *Proceedings and Judgments - Competence* (2008) <[http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)> at 12 September 2009.

<sup>637</sup> Ibid.

<sup>638</sup> Ndiaye, above n 626, paragraph 62.

<sup>639</sup> *Statute of the International Tribunal for the Law of the Sea*, Annex VI to the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>640</sup> P Chandrasekhara Rao and P Gautier, *Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006) 393.

This provision suggests that the Tribunal may hear an advisory opinion in certain circumstances and is supported by other provisions of the Statute including article 21.<sup>641</sup> In this regard, it could be argued that an advisory opinion falls under the broad jurisdiction granted to the Tribunal.<sup>642</sup>

Mr. Doo-Young Kim, Deputy Registrar of the Tribunal, has argued that the Tribunal may issue an advisory opinion if certain requirements are met;<sup>643</sup> an attitude in line with a general movement in favour of the advisory jurisdiction of the Tribunal.<sup>644</sup> Indeed, Judge Ndiaye has suggested that in the past, the Tribunal has had the support of many States in asserting this jurisdiction,<sup>645</sup> however, it appears that it will be a matter of waiting until a request is submitted on behalf of a State before this question can truly be tested.

The second question to be considered is what kind of 'body' may submit a request to the Tribunal for an advisory opinion. Article 138 contains certain requirements which must be met prior to an international agreement gaining sufficient standing to submit its request. These may be listed as follows:<sup>646</sup>

- there must be an international agreement;
- the agreement must be related to the purposes of the LOSC;
- there must be provision within the agreement for submitting a request for an advisory opinion to the Tribunal; and
- the request must be of a legal nature.

This provision appears to allow for international organisations such as RFMOs to submit a request for an advisory opinion before the Tribunal if they have fulfilled these requirements. Ideally, all RFMOs should have some standing arrangement for seeking advisory opinions from a suitable judicial body on legal questions arising in the course of its work.<sup>647</sup> It remains unclear, however, whether States may submit requests for an advisory opinion in the same manner via a bilateral agreement for example.<sup>648</sup>

Mr. Kim posits that, in light of the flexible approach adopted under article 138(2) of the Rules, States may seek an advisory opinion from the Tribunal via an international organisation created

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<sup>641</sup> The Statute, above n 639, article 21.

<sup>642</sup> Chandrasekhara Rao and Gautier, above n 640, 394.

<sup>643</sup> Doo-young Kim, 'Advisory Proceedings Before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea' (2010) 4 *Issues in Legal Scholarship: Frontier Issues in Ocean Law* 4.

<sup>644</sup> Ndiaye, above n 626, paragraph 63.

<sup>645</sup> *Ibid* paragraph 65.

<sup>646</sup> *Ibid* paragraphs 77, 78, 79 and 80.

<sup>647</sup> Lodge et al, above n 614, 81.

<sup>648</sup> Kim, above n 643, 1.

by an agreement for the purpose of requesting an advisory opinion before the Tribunal.<sup>649</sup> Other commentators support this view and argue that both agreements between States or between States and international organisations would be considered 'international agreements' for the purposes of article 138 of the Rules.<sup>650</sup>

### 6.2.3 Potential questions for consideration

This section considers some of the potential questions that might arise if an advisory opinion on the duty to cooperate were to be brought before the Tribunal. This discussion is not designed to provide a comprehensive account of the uncertainties surrounding the duty to cooperate and it does not go into detail on the elements outlined. Instead, it is aimed at identifying aspects of the duty that remain uncertain and suggesting areas upon which clarification might be sought in the form of an advisory opinion. It is proposed that if, as Judge Tullio Treves of the Tribunal has himself noted, the general reluctance of States to enter into court disputes with other States is to be overcome, continuing debate on the topic will be critical to the success of any action on the duty to cooperate.<sup>651</sup>

#### 6.2.3.1 What are the legal responsibilities and obligations of States Parties to the LOSC with respect to the cooperative provisions contained in articles 117 and 118?

While broad in scope, this question would request the Tribunal to provide clarification of the specific content of the duty to cooperate.<sup>652</sup> In the first and only advisory opinion heard by the Tribunal before the Seabed Disputes Chamber,<sup>653</sup> the questions presented to the Chamber were phrased in similarly broad terms. The FAO Expert Workshop noted that some specific criteria for determining flag State responsibilities in general might include:

- participation in and compliance with relevant treaty regimes;
- participation in and compliance with the conservation and management measures of RFMOs; and
- the effective adoption and implementation of domestic legislation.<sup>654</sup>

Additionally, the Chatham House Report provided the following broad description of the duty:

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<sup>649</sup> Ibid 4.

<sup>650</sup> Chandrasekhara Rao and Gautier, above n 640, 394.

<sup>651</sup> FAO Expert Workshop, above n, 612.

<sup>652</sup> Ibid 10.

<sup>653</sup> Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, is currently before the Tribunal's Seabed Disputes Chamber.

<sup>654</sup> FAO Expert Workshop, above n, 612.

It has two aspects: positively, to seek to reach agreement with others concerned, and, negatively, to refrain from taking unilateral actions whether or not agreement has been reached. The positive element of seeking to reach agreement was explained by the International Court of Justice in the North Sea Continental Shelf cases: '[the parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it' (ICJ Reports 1969, paragraph 85(b) of the Court's judgment). The negative element has a bearing on the legal situation when a dispute arises between States or when a member of an organization votes against a proposal that nonetheless attracts the necessary support to be adopted as a decision. In both situations, the duty to cooperate described above still applies, and it imposes limits on the nature and scope of any unilateral action that a disputant or an objector may take.<sup>655</sup>

Taken in a fisheries context, this definition may provide some useful guidance on the question of what the legal responsibilities of States might be in regards to the duty to cooperate. The Chatham House Report's consideration of the positive and negative elements of the duty has special application in regards to the work of RFMOs. For instance, it could be the case that States are under a positive duty to seek to reach agreement on the conservation of marine living resources of the high seas via RFMOs. Similarly, an advisory opinion might be open to suggestion that States are under an obligation not to block the passing of conservation measures which have the support of the majority in annual meetings of RFMOs.

### **6.2.3.2 What act or omission on the part of a flag State might constitute a breach of the duty to cooperate in the conservation of the living resources of the high seas under articles 117 and 118 of the LOSC?**

The notion that a systematic or continuing failure to comply should act as an indicator of a breach of flag State responsibilities was raised at the FAO Expert Workshop. Here participants debated the notion that 'systematic patterns of failure'<sup>656</sup> should be an indicator of problems in flag State compliance.<sup>657</sup> Moreover, the Workshop noted that a 'model case' on the duty to cooperate would involve a flag State who had a systematic track record of irresponsibility.<sup>658</sup> Participants here agreed on the need for better definition of effective flag State control so that such patterns of failure could be identified.<sup>659</sup> This idea is also supported by the final report of a second joint

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<sup>655</sup> Ibid.

<sup>656</sup> FAO Expert Workshop, above n 612, 8.

<sup>657</sup> Ibid 8.

<sup>658</sup> Ibid.

<sup>659</sup> Ibid.

meeting of the tuna RFMOs (Kobe 2)<sup>660</sup> in 2009, which noted that sanctions should be brought against flag States that repeatedly fail to comply with their obligations or responsibilities.<sup>661</sup>

As States give effect to their duty to cooperate under international law via participation in RFMOs, a failure to participate in, or to become a member of, a relevant RFMO might constitute a breach of the duty to cooperate. In 2006, the report of the Ministerially-Led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas<sup>662</sup> suggested that a number of criteria should be considered when determining whether a flag State had met its fisheries related obligations.<sup>663</sup> It found that a responsible flag State will be expected to implement the obligation to cooperate by ratifying and participating in RFMOs.<sup>664</sup> Even if such States have not accepted the terms of the LOSC or those of other significant international agreements, the duty to cooperate is still said to exist under customary international law and may be applicable to all States.

### **6.2.3.3 What possible action might be taken against a flag State found to be in breach of the duty to cooperate contained in articles 117 and 118 of the LOSC?**

At Kobe 2, it was recognised that uncooperative flag States should be held liable via the use of non-discriminatory sanctions. These sanctions should be applied to CPs and NCPs alike and could ultimately lead to the suspension of vessel and flag State fishing rights in the convention area of a RFMO. These comments indicate a willingness to accept the notion that flag State jurisdiction does not imply flag State immunity and that fishing rights are conditional. This notion is consistent with contemporary academic comment that where a State fails in its duty to cooperate in conservation and management measures, it forfeits the right for its nationals to participate in the freedom of fishing.<sup>665</sup>

If, as foreshadowed above, RFMOs were to establish their own regulatory authority to decide matters including a breach of the duty to cooperate, it is submitted that trade-related measures represent a realistic and appropriate avenue for redress. Most RFMOs have legal standing to take such measures, or at least to enable governing bodies to take trade related measures, against uncooperative flag States.<sup>666</sup> Indeed, Kobe 2 recognised trade-related measures as a valid tool for addressing uncooperative flag State practices. At this meeting, the IOTC

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<sup>660</sup> *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, June 29 – July 3, 2009.

<sup>661</sup> *Ibid.* 2.

<sup>662</sup> *High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas*. Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, ICUN and the Earth Institute at Colombia University.

<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

<sup>666</sup> Richard Tarasofsky, 'Enhancing the Effectiveness of Regional Fisheries Management Organizations through Trade and Market Measures' (Briefing Paper 07/04 Energy, Environment and Development Program, Chatham House, 2007).

recognised the need to take action by ensuring that trade-related measures could be applied to any entity whose actions were considered to undermine IOTC conservation measures.<sup>667</sup> Such measures were said to include limiting access to port facilities, preventing transshipment of IUU caught fish at sea and restricting imports.<sup>668</sup>

Finally, another option that has been raised as an incentive for flag States to cooperate with RFMOs is that of compensation. The costs associated with fishing responsibly, including those incurred by legal fishing operators such as lost revenue as a result of lower quotas as well as those incurred by responsible flag States through their membership to an RFMO, are great.<sup>669</sup> As such, CPs to an RFMO that act in compliance with conservation measures may be considered 'injured' by the actions of a non-compliant flag State allowing IUU vessels to fish. In such a case, it can be argued that there is a failure by the flag State to meet the duty to cooperate and compensation for the consequences of this failure should be paid.<sup>670</sup>

### 6.3 Conclusion

While the collective strengthening of compliance enforcement mechanisms in RFMOs will arguably assist in deterring the activities of non-compliant States, unless the inherent weaknesses of the international fisheries regime are also addressed, RFMO compliance enforcement can only extend so far. This chapter has submitted that an advisory opinion on the duty to cooperate under the LOSC represents an opportunity to enforce the work of RFMOs by clarifying States' international obligations.

This chapter has examined how the duty to cooperate, and its legal potential, has been discussed at international fora in recent years. The possibility of an RFMO bringing an advisory opinion on the duty has been forwarded and it has been shown that a RFMO could have the requisite legal standing and jurisdiction to bring a case. Finally, by giving weight and enforceability to the conservation measures developed by RFMOs, it has been demonstrated that a favourable decision could have a great impact on the effectiveness of regional fisheries management.

This chapter has argued that if the duty to cooperate were found to require States Parties to the LOSC to actively participate in RFMOs, uphold the conservation measures of RFMOs and their

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<sup>667</sup> Kobe 2, "Progress of the Indian Ocean Tuna Commission Concerning the Course of Action Adopted in the First Meeting of Tuna RFMOs", ITOC Secretariat, June 24 2009, Doc. No. TRFMO2-018/2009 3.

<sup>668</sup> Ibid.

<sup>669</sup> Matthew Gianni and Walt Simpson. (2005). *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*. Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International 61.

<sup>670</sup> Ibid.

objectives, this has significant implications for the strength of the regional regime. The Tribunal has been shown to represent a legitimate option for an advisory opinion to clarify the scope of the duty in an effort to improve compliance with the conservation and management objectives of RFMOs.



## CHAPTER 7

### GENERAL CONCLUSIONS

#### 7.1 Introduction

This thesis has demonstrated that with the introduction of the United Nations Convention of the Law of the Sea (LOSC)<sup>671</sup> in 1982, the ability of regional fisheries management organisations (RFMOs) to deliver results has become more critical than ever. In the last decade, many high-profile critics<sup>672</sup> have stepped up the pressure on RFMOs to have a real impact on global fisheries which has, in turn, led to an obsession with performance-based assessment. There is a clear demand for results from these highly politicised and sensitive organisations that fight a continual battle against themselves to make progress in the field of fisheries conservation and management.

This thesis has contributed to the wealth of information currently being collected on the performance of these organisations by analysing the ability of RFMOs to encourage greater compliance from both contracting and non-contracting parties. It has examined what compliance enforcement mechanisms exist in RFMOs to which Australia is a party (AusRFMOs) by exploring the history of the development of the law of the sea regime and the creation of the role of RFMOs. This thesis demonstrates that the voluntary nature of the law of the sea undermines the effectiveness of the regional regime. The reasons behind non-compliance within RFMOs have also been investigated to better understand how conservation measures can be strengthened to promote future compliance.

This thesis has identified a lack of political will on the part of flag States to implement compliance enforcement as being one of the key threats to the ability of RFMOs to function effectively.<sup>673</sup> It submits that unless or until this situation is overcome, and RFMOs are able to implement effective and enforceable conservation measures, they will be prevented from fulfilling their role under international law. This chapter outlines the key findings of this thesis and proposes some positive steps that RFMOs can take to address the problem of insufficient political will.

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<sup>671</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>672</sup> See, for example: Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007); *High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas*. Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, ICUN and the Earth Institute at Colombia University; Gail Lugten, *The Role of International Fishery Organisations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources*, FAO Fisheries and Aquaculture Circular. No. 1054, Rome, FAO, 2010.

<sup>673</sup> Denzil Miller and Marie Jacobsson, 'Fisheries Management and Good Governance: Global, Regional and National Legislation and Regulation' in J Sundberg (ed), *Fish, Trade and Development* (in press) 12.

The first section of this chapter summarises the key findings of Chapters 1 through 6 to establish a foundation for the general conclusions reached in the second section of this chapter. The latter section outlines some general conclusions which can be drawn from this thesis. It is demonstrated that on a broad level, there is a need for more effective cooperation between members of RFMOs and RFMOs themselves in the area of compliance enforcement.

## **7.2 Thesis Summary**

### *Chapter 1 – Introduction*

This chapter introduced the concept of flag State jurisdiction and the problems posed by the founding concept behind the law of the sea regime: the freedom of the high seas. It provided a list of RFMOs currently in force and demonstrated the different geographical locations and fish species regulated by RFMOs on a global scale. This introductory section highlighted the fact that prior to the conception of the LOSC in 1982, regional treaties were largely aimed at cooperation for the purpose of maximising the profits to be derived from the fishery concerned.

This chapter submitted that the embodiment of the duty to cooperate in the LOSC and other associated agreements is the pivotal factor in the contemporary conservation role of RFMOs. By examining the relevant provisions of the LOSC, the United Nations Fish Stocks Agreement (UNFSA), the FAO Compliance Agreement, the FAO Port State Measures Agreement and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), the chapter submitted that in the contemporary international regime, the role of RFMOs has changed dramatically.

Chapter 1 also functioned to provide an outline of the objectives, structure and significance of this thesis.

### *Chapter 2 – Non-Compliance: The Problem of Illegal, Unreported and Unregulated Fishing*

Chapter 2 considered a key challenge that is common to all RFMOs: illegal, unreported and unregulated (IUU) fishing, in order to introduce the problem of non-compliance. Starting from the proposition that IUU fishing is an issue which encompasses much more than the mere act of fishing itself, Chapter 2 explored the topic by identifying four key causes of IUU fishing including:

- the overcapacity of fishing fleets,
- the declaration of the 200 nm Exclusive Economic Zones (EEZs) of coastal States,
- the inherent weakness of the international regulatory regime,
- the 'common pool' nature of the world's fish stocks.

The problem of 'flags of non-compliance' (FONC) and its relationship to IUU fishing was then examined. The role of 'front' companies in IUU fishing operations was analysed, along with the complex issue of how to penalise the true owners or beneficiaries of such fishing. The environmental impact associated with by-catch from IUU fishing, as well as the impact these activities have on developing State economies, was also explored.

Next, the question of why States do not comply with the conservation measures of RFMOs was examined. Adopting a theory which identifies two basic principles to explain why States choose to implement international laws, it was argued that the perceived illegitimacy of the declaration of EEZs as well as the lack of sanctions for acts such as IUU fishing has contributed to the failure of international fisheries regulation.

Finally, this chapter analysed the impacts on non-compliance on the regional regime. It argued that without sufficient political will on the part of flag states to secure fisheries for future generations, the ability of RFMOs to encourage sustainable fishing practices will be limited.

### *Chapter 3 – Compliance Enforcement Mechanisms*

The third chapter of this thesis outlined the range of compliance enforcement mechanisms available to RFMOs to tackle the problem of non-compliance. It identified three categories of mechanism (including policies, approaches and countermeasures) and outlined nine practical compliance enforcement techniques.

The first category considered in Chapter 3 was that of RFMO policies which can take the form of cooperative policies, as well as policies aimed at contracting parties (CPs) and non-contracting parties (NCPs).

The second category of compliance enforcement mechanism examined was that of diplomatic measures. Diplomacy was shown to represent a key tactic RFMOs could utilise to extend invitations to non-contracting parties as well as alert them to the non-compliant activities of their vessels. The chapter considered the use of vessel lists by RFMOs as a diplomatic avenue in the sense that such lists enable RFMOs to 'name and shame' listed vessels. Other diplomatic approaches considered included requests and negotiations which may be utilised by RFMOs to

make specific representations to non-compliant States. Lastly the potential for diplomatic demarches to be issued to persuade States to fish responsibly was considered.

The final category of compliance enforcement mechanism examined in Chapter 3 was that of countermeasures. It was argued that when taken in conformity with certain requirements, coercive measures may be justified. As a vital tool available to RFMOs in the fight for compliance, trade-related measures were considered to be the largest remaining category of countermeasures available. However, this section also considered the potential for graded sanctions to allow RFMOs to refuse, suspend or withdraw the authorisation of a vessel to fish where there has been a serious violation. Lastly, monitoring and inspection mechanisms were also considered for their potential to be evoked by States where a member State has failed to effectively control their vessel.

The chapter concluded that there exists a range of compliance enforcement mechanisms available to RFMOs which might assist in achieving better levels of compliance but that such measures will only be available if agreement can be reached by member States.

#### *Chapter 4 – Compliance Enforcement in AusRFMOs*

The fourth chapter of this thesis analysed each of the six AusRFMOs under examination to identify the compliance enforcement mechanisms contained in their founding agreements and their conservation measures. The analysis also included consideration of any future compliance enforcement initiatives being undertaken. Comprising the data collection section of this thesis, this chapter paved the way for the analysis undertaken in Chapter 5.

Chapter 4 also functioned to provide an insight into the background of each AusRFMO. It was argued that the historical factors surrounding the creation of AusRFMOs was relevant to an analysis of the ability of these organisations to implement and agree upon effective compliance measures. This background information utilised information available from performance reviews as well as material made available on the web sites of AusRFMOs.

Starting with the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the chapter highlighted key compliance enforcement mechanisms in the form of conservation measures, including trade-related measures, IUU vessel lists and promoting compliance by the vessels of both CPs and NCPs. Importantly, the work of CCAMLR's discussion group on the Development of a Compliance Evaluation Procedure (DOCEP) was also noted as being among the future compliance initiatives of the organisation.

Regarding the Indian Ocean Tuna Commission (IOTC), it was highlighted that the RFMO retains a special relationship to the United Nations Food and Agriculture Organisation (FAO). It was submitted that significant conservation measures relating to compliance have been implemented by the organisation, including resolutions relating to the vessels of NCPs, trade-related measures and the creation of the IOTC IUU vessel list. It was argued that while the full implications of provisions relating to trade-related measures are yet to be seen, the creation of a Catch Documentation Scheme (CDS) might assist in the development of IOTC compliance measures.

Next, the provisions of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) were examined. It was noted that the CCSBT aims to ensure the conservation and optimum utilisation of southern bluefin tuna, however, this RFMO has encountered significant compliance issues in the past. Following the findings of the CCSBT performance review, several new resolutions were implemented relating to transshipment and vessel monitoring. At the Seventeenth Annual Meeting of the CCSBT, the Extended Commission raised the need for, inter alia, improvement of transshipment monitoring and better systems to provide information to port States.

The section relating to the Western and Central Pacific Fisheries Commission (WCPFC) highlighted the political situation in which the RFMO was formed as being a significant factor affecting its compliance enforcement capacity. The organisation has yet to undertake a performance review, however, the text of the agreement includes many important provisions relating to ecosystem-based management and the precautionary approach. The WCPFC has also implemented conservation measures relating to boarding and inspection, IUU vessel lists and control of vessels without nationality.

Finally, two fledgling agreements, the South Pacific Regional Fisheries Management Organisation (SPRFMO) and the Southern Indian Ocean Fisheries Agreement (SIOFA) were considered for their potential compliance enforcement capacity on the basis of the provisions in their founding texts. While the SPRFMO has yet to enter into force, it was noted that progress had been made in the founding text of the Agreement relating to compliance enforcement. The SIOFA entered into force in August 2010 and while is not an RFMO in the traditional sense, it was considered for its ability to provide a foundation from which compliance enforcement mechanisms might be developed.

### *Chapter 5 – Analysis of Results*

The fifth chapter of this thesis has tabulated the findings of Chapter 4 to better articulate areas in which AusRFMOs have made progress. The first section of the chapter divided the compliance

enforcement measures in place in AusRFMOs into eight different categories including: cooperative policies, non-contracting party policies, contracting party policies, vessel lists, requests and negotiations, trade measures, graded sanctions and monitoring and inspection. These eight categories are based on the types of compliance enforcement outlined in Chapter 3.

Table 2 takes account of both compliance enforcement mechanisms in place via conservation measures, as well as compliance measures enshrined in the founding agreements of AusRFMOs. It summarises the key compliance enforcement mechanisms contained in and implemented by AusRFMOs and lists the relevant provisions. Table 3 presents a summary of the level of implementation of compliance enforcement in the six AusRFMOs investigated. The allocated status includes consideration of any future compliance initiatives underway, as well as compliance provisions and conservation measures of the RFMO in question.

This chapter demonstrated that a lack of consistency in approach across AusRFMOs threatens the effectiveness of individual RFMO compliance enforcement. Without a common understanding of the reach of RFMOs and their ability to impose sanctions and enforce their conservation measures, RFMOs will continue to struggle to implement their respective mandates. In this respect, it was proposed that RFMOs should be aware of the work of their counterparts in an effort to understand when, why and how certain approaches towards compliance have been successful.

The analysis following Tables 2 and 3 considered the need for more uniform implementation of certain compliance enforcement measures. It revealed significant inconsistency in regard to the level of implementation of graded sanctions and argued that so long as trade-related measures are non-discriminatory in approach, certain AusRFMOs should work towards adopting conservation measures to give effect to this important countermeasure. This chapter also considered the need for a stricter approach to non-compliance by NCPs.

### *Chapter 6 – Utilising International Dispute Resolution to Strengthen Regional Fisheries Management*

The purpose of Chapter 6 was to consider how clarification of certain provisions of the international regime might be better explored to strengthen RFMOs. Drawing upon the relationship between RFMOs and the duty to cooperate as articulated in previous chapters, the discussion assessed the potential for an RFMO to bring an advisory opinion before the International Tribunal for the Law of the Sea (the Tribunal).

Utilising support from a growing body of literature and cases relating to the duty of States to cooperate to conserve marine living resources, the chapter argued that the duty to cooperate is no longer a 'toothless tiger' and that RFMOs would benefit from greater exploration of its meaning under the LOSC. The chapter also recognised standing and jurisdiction as being relevant issues which would need to be addressed if a RFMO were to bring such a case or advisory opinion before the LOSC. The chapter concluded that if the RFMO has made provision for submitting a request for an advisory opinion to the Tribunal, the requirements for a RFMO to submit a case would be fulfilled.

Finally, the chapter provided a practical insight into the benefits to be derived from such a case or opinion by outlining some potential questions that might be clarified. Clarification of the legal responsibilities of States parties to the LOSC, possible actions against States in breach of specific RFMO provisions as well as what acts or omission might constitute a breach are questions which could all form the basis of an advisory opinion. The chapter concluded that while compliance enforcement mechanisms represent a vital option available to RFMOs to improve compliance rates, without support for the work of these organisations from international law, the effectiveness of these measures will be limited.

### **7.3 General conclusions**

This thesis has shown that the enforcement of compliance with management measures of RFMOs is pivotal to ensuring that these organisations fulfil the role envisaged for them under international law. It has demonstrated that non-compliance, particularly in the form of IUU fishing, is one of the most significant threats facing good fisheries governance and conservation attempts today.<sup>674</sup> In the process of identifying the current compliance enforcement mechanisms in place in AusRFMOs, this thesis has reached numerous conclusions. These include:

- a) The adoption of trade-related measures by AusRFMOs is essential to effective compliance enforcement;
- b) There exists significant inconsistency in the type of and degree to which compliance enforcement mechanisms are currently implemented by AusRFMOs;
- c) A perceived lack of legitimacy associated with the compliance enforcement capacity of AusRFMOs has limited the ability of these organisations to enforce their mandate;
- d) As a result of (c), AusRFMOs are struggling to fulfil the role envisaged for them under international agreements; and

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<sup>674</sup> Ibid 12.

- e) RFMOs may benefit from clarification of the duty to cooperate via recourse to an international adjudicative body such as the Tribunal.

To expand upon these conclusions, it is clear that for RFMOs to reach their full potential as high seas regulators, they must first unite in the fight against non-compliance and ensure consistency is achieved in respect of their approach to and sanctions for non-compliance. A lack of consistency in approach across AusRFMOs threatens the effectiveness of individual RFMO compliance enforcement. In this respect, it is proposed that RFMOs should actively review the work of their counterparts in an effort to understand when, why and how certain approaches towards compliance have achieved success.

This thesis has concluded that the individual compliance enforcement mechanisms of RFMOs, particularly trade-related measures can be a powerful tool to regulate the activities of flag States. However, it has also concluded a perceived lack of legitimacy associated with the compliance enforcement capacity of AusRFMOs has prevented these organisations from fulfilling their true role as envisaged under international agreements. In this respect, it is imperative that States come to recognise these organisations have the power, jurisdiction and standing to penalise States that do not comply with their regime.

This thesis has provided a legal argument in support of RFMOs as having the power to implement sanctions under international law. It has argued that if RFMOs continue to be viewed as merely cooperative in function, this undermines the significant developments that have been made via the creation of international instruments such as the UNFSA and the IPOA-IUU. RFMOs must be able to assume an active enforcement role in a modern fisheries context if they are to have any real impact on non-compliant States.

Those States who are opposed to the adoption of effective compliance enforcement in RFMOs are relying upon an outdated view of the supremacy of State sovereignty in a global climate of increasingly declining fisheries resources. RFMOs are operating in a legal environment, 'that reflects the on-going tension between the state sovereignty and international communitarian models';<sup>675</sup> however this conflict must no longer prevent these organisations from adopting legally sound mechanisms to enforce conservation measures.

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<sup>675</sup> Rosemary Rayfuse, *Regional Allocation Issues or Zen and the Art of Pie Cutting*, 2007. Paper Prepared for Sharing the Fish 2006 Conference. Available on line <<http://www.fishallocation.com/assets/pdf/papers/RosemaryRayfuse.>>



The final conclusion of this thesis is that RFMOs may benefit from clarification of the duty to cooperate via international dispute resolution. This conclusion is founded on the interrelationship between RFMOs and the duty to cooperate as forged under numerous international agreements. It is submitted that in the absence of a clear legal obligation to cooperate, regional fisheries organisations will continue to suffer from a lack of political will to resolve the problems caused by flag State non-compliance.

There are a number of practical steps that RFMOs, and AusRFMOs in particular, can take to address the implications of the conclusions this thesis has reached. First, it is clear that uniformity in approach to compliance enforcement is vital to the overall impact of these organisations. RFMOs must make a concerted effort to, 'cooperate with other RFMOs with similar interests in order to coordinate actions':<sup>676</sup> a process which will benefit greatly from regular review of compliance practices.

It is also submitted that as a matter of urgency, all AusRFMOs should seek to implement a conservation measure sanctioning the use of trade-related measures to address the actions of non-compliant States. It is argued that such measures must apply equally to both CPs and NCPs. In order to overcome the primary barrier to such measures being implemented: a perceived lack of legitimacy associated with the implementation of compliance enforcement by RFMOs, a paradigm shift must occur to allow RFMOs to fulfil their intended role under international law.

Nevertheless, certain RFMOs are taking positive steps to address the current failings of the regional regime. The series of meetings coordinated by the tuna RFMOs<sup>677</sup> represents a vital opportunity for these organisations to discuss differences in approach to compliance enforcement and seek to ensure more uniform practices in future. Further to this, the adoption by almost all AusRFMOs of IUU vessel lists represents the potential for RFMOs to learn from the successes of one another. Finally, both current and future performance reviews undertaken by RFMOs continue to challenge the compliance enforcement capabilities of these organisations.

It is often suggested that RFMOs have failed in their task to prevent the overexploitation of high seas living marine resources,<sup>678</sup> however such claims ignore the reality that RFMOs are essentially a product of State action. As Professor Martin Tsamenyi observes, '[a]t this stage, it is doubtful whether international law has developed sufficiently to hold flag States responsible for

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<sup>676</sup> Adriana Fabra, 'The Use of Port State Measures to Improve Fisheries Compliance' (Paper presented at the Illegal, Unreported and Unregulated Fishing: 2nd Chatham House Update and Stakeholder Consultation Meeting, 2006). Available on line <[www.illegal-fishing.info/uploads/Fabra.ppt](http://www.illegal-fishing.info/uploads/Fabra.ppt)>

<sup>677</sup> For details see: *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, June 29 – July 3, 2009.

<sup>678</sup> Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations*, (2007) ix.

the transgressions of vessels flying their flags.<sup>679</sup> As such, the biggest change that must occur in order to ensure that flag States are held accountable for their actions on the high seas is a perceptual change: a shift in thinking. For RFMOs, this means that States must accept their enforcement capacity and enable them to preserve global fish resources for future generations.

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<sup>679</sup> Martin Tsamenyi, Professor of Law and Director of the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong, Australia, <tsamenyi@uow.edu.au> "Compliance at the 2009 WCPFC Meet" (16 December 2009) (personal e mail).

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