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Private-Sector Engagement in Regional Fisheries Management Organisations to which Australia is a Party

by

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This thesis is dedicated to the late Prof. Denzil Miller, who always believed in me.

It is for my friend and mentor Dr. Gail Lugten, who gives me strength.

It is for my husband, Don, who is my soul mate, and my sons, Ted and Charlie, who are my joy.

It is for my mother, Karen, my father, Gordon, and my sister, Emma, who are my backbone.

From the depths of my heart, I thank you all.

Declaration of Originality

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10 July 2020

Abstract

Regional fisheries management organisations (RFMOs) are the entities responsible under international law for creating the conservation and management measures that apply to high seas fisheries. States must implement the conservation and management measures of RFMOs to which they are a party in their domestic legislation. One of the key challenges facing RFMOs globally is a lack of compliance by both contracting and non-contracting Parties.

The current status of wild-capture global fisheries appears grim; with more than 80 per cent of global fisheries either fully exploited, or overexploited. The ability of RFMOs to enforce compliance with the conservation measures they administer is a critical factor in addressing the decline of high seas fish stocks. To date, the performance of RFMOs in this regard has been poor; with discontinuity between the compliance approaches of individual RFMOs cited as one of the key contributing factors to the challenges facing regional fisheries management.

This thesis aims to make recommendations for reform to assist a specific group of RFMOs: RFMOs to which Australia is party (AusRFMOs). It investigates how AusRFMOs can become more adaptive and resilient to the challenges posed by non-compliance. It achieves this by testing the hypothesis that there are inconsistencies amongst AusRFMOs in their adoption of compliance measures.

This thesis argues that private-sector engagement, where the entities being regulated by AusRFMOs become a part of the solution, represents a viable and practical solution to the problem of non-compliance. It is suggested that rather than continuing to focus on how legislative reform can strengthen regional fisheries management, private-sector engagement in the work of AusRFMOs represents an important alternative to the problems currently facing global fisheries.

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CHAPTER 1

Introduction

1.1. Introduction

The ability of Regional Fisheries Management Organisations (RFMOs) to enforce compliance with the conservation measures they administer is a critical factor in addressing the decline of high seas fish stocks.¹ However the performance of RFMOs in this regard has been poor;² with discontinuity between the compliance approaches of individual RFMOs cited as one of the key contributing factors to the challenges facing regional fisheries management.³

The question of how to improve compliance in RFMOs has been widely addressed in literature to date,⁴ but almost exclusively from the perspective of how *flag State* compliance can be strengthened to improve the compliance of the RFMO overall.⁵ While it is indeed the flag State who is responsible for upholding compliance with the conservation measures of RFMOs,⁶ this thesis suggests that limiting discussion of regional fisheries compliance to consideration of flag State compliance alone is insufficient.

The author's thesis submitted in fulfilment of the requirements for the Degree of Master of Laws (Thesis)⁷ found that in 2011, a perceived lack of legitimacy associated with the compliance enforcement capacity of AusRFMOs had likely limited the ability of those organisation to enforce their mandate.⁸ This assessment was made following the collation of data regarding what compliance enforcement measures had been implemented by which AusRFMOs. The data demonstrated that there was little consistency when it came to the type of compliance measures each of the AusRFMOs had adopted.

¹ Denzil G. M. Miller & Elise Clark, 'Promoting responsible harvesting by mitigating IUU fishing: a three-block and OODA construct?' (2016) *Australian Journal of Maritime & Ocean Affairs*, DOI: 10.1080/18366503.2016.1169625

² FAO Fisheries and Aquaculture Circular No. 1072, 'Performance Reviews by Regional Fishery Bodies: Introduction, Summarise, Synthesis and Best Practices', (2012) available online at <<http://www.fao.org/docrep/015/i2637e/i2637e00.pdf>> at 56.

³ Miller and Clark, above, n 1.

⁴ Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) *LI Netherlands International Law Review* 41.

⁵ The principle of flag State jurisdiction is embodied in article 91 of 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).

⁶ Articles 63 and 64 of the *United Nations Convention on the Law of the Sea* require States to cooperate via regional and subregional organisations for the purposes of conserving and managing the marine living resources of the high seas.

⁷ Elise Clark, 'Compliance enforcement in regional fisheries management organisations to which Australia is a party', 2011, thesis available online at: <https://eprints.utas.edu.au>

⁸ *Ibid*, page 113.

This thesis, submitted in fulfilment of the requirements of a Doctor of Philosophy (Law), investigates whether, almost a decade later, this same group of organisations has been able to achieve a greater sense of unity across their collective compliance enforcement approaches. However the aim of this thesis is quite different. Where the findings demonstrate that there remain areas for improvement, it is suggested that an alternative vision of compliance enforcement; where the resource-user shares responsibility with the regulator to achieve compliance with conservation measures, holds significant promise in a modern regional fisheries climate.

Recommendations are made for reforms which would assist AusRFMOs in improving industry perceptions of regulatory legitimacy and to assist AusRFMOs in how they may adapt their regime to encourage greater engagement by the resource-user in their compliance enforcement mandate. This approach allows for the problem of RFMO compliance to be viewed as a challenge to both the flag State, and the resource user, under the principle of 'shared responsibility'.⁹ It is suggested that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance, to leverage compliance mechanisms which engage the resource-user and harness the opportunities they represent.

It is well recognised that regulatory authorities should constantly be concerned with maintaining the involvement of participants in the regime they administer.¹⁰ As cooperative action between non-State actors and RFMOs increases, so does the strength of the argument that responsibility for regional fisheries failures is shared by both the State (often via the RFMO convention) and the resource-user.

The term 'shared responsibility' has, to date, been rarely used in legal literature¹¹ and the concept is one relatively new to the academic discourse.¹² It is a term that refers to the underexplored problem of allocation of responsibilities amongst multiple states and other actors, and has particular relevance in international environmental law.¹³ The example of high seas fish stocks management is often cited as demonstrative of the principle of shared responsibility in that it poses challenging questions relating to who is responsible for the over-exploitation of high seas fish stocks.¹⁴

⁹ Andre Nolkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* at 365.

¹⁰ *Ibid.*, 27.

¹¹ *Ibid.*, 362.

¹² Andrew Nolkaemper and Ilias Plakokefalos, 'Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art' (Universiteit van Amsterdam, 2014) 27.

¹³ *Ibid.*

¹⁴ Nolkaemper and Jacobs, above n 9, 362.

The principle of shared responsibility provides the conceptual framework for the research methodology adopted in this thesis. The premise of the thesis is that fishing industry associations, and other relevant organisations and individuals can and have assumed responsibility for regional fisheries failures. In doing so, they have also assumed a significant compliance responsibility.

This thesis applies the principle of shared responsibility to suggest that AusRFMOs will benefit from increased engagement by the resource user in the regulatory compliance sphere. As the frequency and variety of cooperative action between States and non-State actors increases, there is a need for new perspectives that help to address how RFMOs might develop approaches that better serve the interests of injured parties under regional fisheries regimes.¹⁵

While it is indeed the flag State who is responsible for upholding compliance with the conservation measures of RFMOs,¹⁶ this thesis suggests that for the most part, attempts to enforce flag State responsibility have had less than the desired practical impact. At law, flag States signatory to the LOSC may exercise their discretion to determine how, when and if they will regulate the activities of their vessels in the interests of environmental sustainability.

This thesis is written in the context of an emerging trend of the resource-user adopting the role of the resource-regulator in the compliance sphere and in doing so, provides insight into industry interplay with the mechanisms of RFMOs. It is suggested that where compliance tactics work in harmony, the RFMO will be best placed to target non-compliance. With many species of wild-capture fisheries not fished within biologically sustainable levels,¹⁷ this thesis is a timely examination of how the cross-roads between international relations and international law may strengthen regional fisheries management.

This opening chapter will introduce the key issues relevant to the research undertaken in this thesis. This begins by undertaking a brief explanation of the legal context in which RFMOs operate. While by no means a comprehensive analysis of the legal intricacies at play, it does make mention and explore the key agreements which include the United Nations Convention on the Law of the Sea¹⁸ (the LOSC), the 'Agreement to Promote Compliance with International

¹⁵ Nollkaemper and Jacobs, above n 9, 362.

¹⁶ LOSC Arts 63 and 64.

¹⁷ *The State of World Fisheries and Aquaculture: Opportunities and Challenges*, Food and Agriculture Organisation of the United Nations, Rome, 2014 at 37.

¹⁸ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

Conservation and Management Measures by Fishing Vessels on the High Seas' (FAO Compliance Agreement)¹⁹ and the United Nations Fish Stocks Agreement²⁰ (UNFSA).

The chapter then goes on to discuss in more detail the challenges posed by flag state jurisdiction including, and of specific relevance to this thesis, the difficulties that arise from efforts to enforce the regimes of RFMOs. Associated calls for reform to the legal regime are then discussed and it is suggested that instead of more reforms to our legal regime via official instruments, a greater focus on the responsibilities of the resource-user would have greater practical effect.

Finally, a chapter outline is provided emphasising the three key sections into which the chapters are divided: Context (in Chapters 1, 2, 3 and 4), Data, Analysis and Recommendations (in Chapters 5 and 6) and finally, Conclusions (in Chapter 7).

1.2. The Legal Context

The role of RFMOs has evolved over time to the point that they are now the key forums through which States fulfil their legal duty to cooperate to conserve the living resources of the high seas.²¹ This duty is embodied in articles 63, 64 and 118 of the LOSC which requires States to establish and cooperate via regional organisations to conserve and manage the living resources of the high seas. While this duty is viewed by some as a condition for States to engage in fishing on the high seas, the fact is that membership of, and compliance with, the conservation measures of RFMOs does not reflect this perspective.²²

To provide insight into why it is vital that bottom-up compliance mechanisms within RFMOs have attained such an important status in regional fisheries management, this chapter commences by undertaking an examination of the current status of fisheries governance on the high seas. It first outlines the key concepts of high seas governance outlined under the LOSC and the challenges they pose for securing compliance with the conservation measures of RFMOs. It then briefly considers examples of international treaty law which have been established following the creation of the LOSC in an effort to encourage compliance with the regime. However it is shown that these agreements have, to date, largely failed due to a failure of States to both join and implement them appropriately.

¹⁹ *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).

²⁰ *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).

²¹ Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organisations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organisations*, (2007), ix. Available online at: <http://www.oecd.org/sd-roundtable/papersandpublications/39374762.pdf>

²² Ibid.

This section emphasises that the principles underlying international fisheries law place the flag State at the centre of resource management and as a result, international agreements are created for the purposes of securing flag State compliance with responsible resource management. It is demonstrated that the resource-user has no technical responsibility under international fisheries law to achieve compliance with the objectives of RFMOs which does not reflect the practical reality of regional fisheries governance today. As such, we must establish a way in which compliance can be spoken of in terms of both the compliance capabilities of both the resource-user and the flag State of any relevant RFMO.

1.2.1. The LOSC

The contemporary international fisheries regime was created by the LOSC which was formulated (*inter alia*) to address growing concerns over the finite nature of marine living resources.²³ Where previously the high seas had appeared boundless in scope,²⁴ globalisation of fishing fleets and over-fishing of certain species in the 1970s created new concerns for the health of fisheries worldwide. On 10 December 1982, prompted by concerns including 'the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea...for the maintenance of peace, justice and progress for all peoples of the world',²⁵ States parties to the LOSC agreed to measures for the negotiation of matters including, *inter alia*, jurisdictional limitations, merchant shipping, conservation of marine living resources and the high seas.²⁶

Importantly, the LOSC establishes a system for maritime zoning. This includes defining:

- a 12 nautical mile (nm) territorial sea for coastal States in which they exercise sovereignty,
- a 200 nm exclusive economic zone (EEZ) for coastal States whereby they have sovereign rights with respect to natural resources, certain economic activities and whereby they exercise jurisdiction over marine science research and environmental protection; and
- a system for determining the outer boundaries of the continental shelf of coastal States whereby the coastal State has sovereign rights with respect to exploration and exploitation.²⁷

²³ Denzil Miller and Erik Molenaar, 'The SEAFWC Convention: A Comparative Analysis in a Developing Coastal State Perspective' (2006) 20 *Ocean Yearbook* 305, 361.

²⁴ Hugo Grotius, *The Freedom of the Seas* (Latin and English version, Magoffin trans.) [1608]

²⁵ Preamble, *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

²⁶ *Ibid.*

²⁷ *Ibid.*

In addition the LOSC provides that where there are disputes between States relating to matters covered by the LOSC, they may be submitted to the International Tribunal for the Law of the Sea. The Tribunal also has exclusive jurisdiction over deep seabed mining disputes.

The LOSC also addresses sub-regional, regional and global fisheries issues and establishes a legal regime which establishes the sovereignty of flag States on the high seas. The founding principle of the freedom to fish is embodied in article 87 of the LOSC and is granted on the condition that States adhere to other provisions within the LOSC. This freedom must be exercised 'with due regard for the interests of other States' and is subject to customary international law.

The LOSC urges States to protect and preserve the marine environment via cooperation, however it does not provide a management regime to implement such preservation efforts. Hard and soft law instruments alike have been developed to implement the framework provisions of the LOSC but unfortunately, ratification levels of these subsidiary agreement have never reached the same levels as that of the LOSC. At the time of writing, the LOSC had been ratified by 168 parties.²⁸ Consequently the LOSC is often referred to as a 'framework' convention, establishing the rules of play but leaving regulatory issues unanswered and difficult to enforce.

Gaining cooperation from States to conserve and manage high seas fish stocks, and their associated environments and ecosystems, has proven problematic. The LOSC establishes a legal regime requiring States to 'cooperate' while at the same time, this regime is founded on one key international law principle: the freedom of the high seas. Under this principle, the high seas are open to all States, whether coastal or landlocked, and no high seas areas are the subject of national jurisdiction. As such, it falls to States to regulate the fishing activities of the vessels they flag and the political will to regulate the activities of such vessels is low.

In fact many critics have argued that the effect of the freedom to fish the high seas has resulted in global marine fish stocks falling victim to the 'tragedy of the commons'²⁹. In 1960, Garrett Hardin first articulated the negative outcomes of providing unlimited access to a limited resource that nobody owns or nobody can control.³⁰ The theory states that in resource-rich areas that are open to all, resource-users will tend to maximise their own personal gains. Unfortunately, the

²⁸ United Nations: Division for Ocean Affairs and Law of the Sea, 'United Nations Convention on the Law of the Sea 1982 - Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements'. List available online at: <https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>.

²⁹ Garrett Hardin, 'The Tragedy of the Commons', *Science*, 13 Dec 1968, Vol. 162, Issue 3859, pp. 1243-1248.

³⁰ Ibid, 1244.

decision to exploit a fisheries resource to its full extent usually prevails in such circumstances, or at least until all agree that the resource needs conservation.

In open-access fisheries, this phenomenon has seen States and resource-users taking as much as possible, while still possible. Today, it is difficult to deny that the impact of the tragedy of the commons has been realised with respect to global fish stocks. On the high seas, the harvesting capacity of the global fishing fleet well exceeds the capacity of global fisheries.

The LOSC and RFMOs

The LOSC urges all States to take action at sub-regional, regional and global levels to protect and preserve the marine environment.³¹ Under articles 63 and 64, the LOSC requires States to cooperate via appropriate subregional or regional organisations³² and appropriate international organisations.³³ In articulating the duty to cooperate, Article 118 also provides that States are to cooperate to, 'establish subregional and regional fisheries organisations' to conserve and manage the living marine resources of the high seas.

These fisheries arrangements take the form of RFMOs; a group of organisations which has received substantial scrutiny and critique throughout their varying lifetimes.³⁴ These organisations are defined as, 'intergovernmental fisheries organisations or arrangements...that have the competence to establish fisheries conservation and management measures'.³⁵ 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.

Despite outlining the main function of RFMOs, the LOSC does not 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 occurring within certain RFMOs.³⁶ 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.

³¹ LOSC arts 63 and 64.

³² LOSC art 63.

³³ LOSC art 64.

³⁴ In recent years many regional fishery bodies have taken steps to undergo 'performance reviews'. 'Performance Reviews by Regional Fishery Bodies', FAO Fisheries and Aquaculture Circular No. 1072, FIPI/C1072 (En).

³⁵ 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.

³⁶ This has occurred, for example, recently in the Commission for the Conservation of Southern Bluefin Tuna.

In a modern fisheries context, reliance on RFMOs to recover species from the brink of extinction and to better regulate those fish stocks for which they are responsible, continues to grow. However RFMO effectiveness has been limited by the individual interests of the signatory States Parties over the years. As a result, RFMOs have struggled to meet expectations of their regulatory capacity and both 'sustainability and responsibility to protect the marine environment are still not effectively at the centre of global ocean governance.'³⁷

1.2.2. 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) 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.³⁸ It was hoped that the FAO Compliance Agreement would solve the problem of 'reflagging' 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.³⁹ 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.⁴⁰ 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 soft international treaties introduced post-LOSC: insufficient ratification by flag States.⁴¹ As a result, the impact of its provisions has been limited.

1.2.3. The United Nations Fish Stocks Agreement

³⁷ Editorial, 'Introduction: Advancing governance of areas beyond national jurisdiction' (2014) 49 *Marine Policy* at 81. .

³⁸ *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, IUCN and the Earth Institute at Columbia University at 54.

³⁹ Peter Flewwelling, *Recent Trends in Monitoring Control and Surveillance Systems for Capture Fisheries* (2003) 17.

⁴⁰ FAO Compliance Agreement, article III(a).

⁴¹ Despite being adopted by the FAO Conference in 1993, the FAO Compliance Agreement did not officially enter into force until 24 April 2003 when it obtained 25 instruments of acceptance. At the time of writing, the UNFSA had 59 signatories and 90 states parties. Current treaty information available online at:

https://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm

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.⁴² 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' (UNFSA) was formulated to promote the long-term conservation and sustainable use of straddling and highly migratory stocks.⁴³ 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.⁴⁴

UNFSA extends the ambit of RFMOs to regulate fisheries within areas of national jurisdiction as well as on the high seas.⁴⁵ It lists the matters upon which States are to agree to achieve the long term sustainability of fisheries and in doing so, defines the desirable characteristics of RFMOs.⁴⁶ 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.⁴⁷ It goes on to provide 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.⁴⁸

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 they participate in and respect the conservation measures imposed by the RFMO concerned.⁴⁹ This requirement applies to members of RFMOs and non-members alike and establishes that where a State persistently fails to comply with the UNFSA, it will be in breach of the duty to cooperate.⁵⁰

⁴² Ibid.

⁴³ 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.

⁴⁴ Ibid.

⁴⁵ 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.

⁴⁶ 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.'

⁴⁷ UNFSA, art 8(3).

⁴⁸ UNFSA, art 8(5).

⁴⁹ UNFSA, art 8(6).

⁵⁰ UNFSA, arts 7, 8(4).

UNFSA is regarded as a progressive agreement in that it places RFMOs at the heart of international fisheries management.⁵¹ Unfortunately, many States who are parties to the LOSC have yet to sign on as parties to the UNFSA. 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.⁵² As a result, high seas fisheries have continued to decline since the inception of this Agreement.⁵³

1.2.4. The Agreement on Port State Measures

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 FAO Port State Measures Agreement” (PSM Agreement)⁵⁴ which was formulated in August 2009 under Article XIV of the FAO Constitution.⁵⁵ The PSM Agreement entered into force in June 2016.⁵⁶

Prior to the introduction of the PSM Agreement, different States elected to adopt different standards and conditions of entry with regard to their ports.⁵⁷ The overall objective of the PSM Agreement is to establish common procedures for inspection and agreed measures against IUU fishing vessels.⁵⁸

The PSM Agreement is the first binding international agreement to specifically target the problem of IUU fishing. It does this by preventing vessels engaging in IUU fishing from using ports and offloading their catch.⁵⁹ This means that IUU catch is blocked from entering the market which reduces the incentive to undertake IUU fishing.⁶⁰ At June 2019, there were 60 parties to the PSM Agreement.⁶¹

⁵¹ ‘Global Progress Toward Implementing the United Nations Fish Stocks Agreement’, PEW Report May 23 2016, available online at: <http://pewtrusts.org/en/>

⁵² 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.

⁵³ Ibid.

⁵⁴ 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.

⁵⁵ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 64.

⁵⁶ PSM Agreement, above n 54.

⁵⁷ Palma, Tsamenyi and Edeson, above n 55 at 63.

⁵⁸ Palma, Tsamenyi and Edeson, above n 55 at 64.

⁵⁹ Food and Agriculture Organisation of the United Nations, ‘Agreement on Port State Measures: Background’, 2019, available online at: <<http://www.fao.org/port-state-measures/en/>>.

⁶⁰ Ibid.

⁶¹ Ibid.

The PSM Agreement implements a consistent approach to:⁶²

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.

The Food and Agriculture Organisation of the United Nations is undertaking ongoing work to build capacity of developing countries to implement the provisions of the PSM Agreement.⁶³ This work is being undertaken via the establishment of Technical Cooperation Programmes, Global Capacity Development Programmes and a Port State Measures Assistance Fund as provided for in the PSM Agreement itself.⁶⁴

1.3. The Challenge of Flag State Jurisdiction

The concept of flag State jurisdiction, whereby the activities of fishing vessels are regulated by the State in which they are registered,⁶⁵ has survived over centuries. It remains an overriding principle of the international law of the sea regime. The contemporary fisheries regime, embodied in the LOSC, adopts the principle of flag State jurisdiction in article 91.⁶⁶ While this principle is subject to various conditions, including those laid down by the LOSC,⁶⁷ such conditions have often proven difficult to enforce.⁶⁸ Today, as was the case prior to the adoption of the LOSC, the regulation of high seas fishing vessels resides first and foremost with the flag State.

However not all flag States regulate their vessels to the same standards. In making this observation it is worth first describing the nature of the vessels and companies which operate on the high seas today. As demonstrated by an extensive report into how high seas fishing is constantly evolving, the oceans are currently being exploited on a large-scale by fishing vessels with extensive capacity.⁶⁹ Such is the value of certain species, including for example tuna and

⁶² Ibid.

⁶³ Food and Agriculture Organisation of the United Nations, 'Agreement on Port State Measures: Capacity Building', available online at: <<http://www.fao.org/port-state-measures/capacity-development/ongoing-capacity-building-efforts/en/>>.

⁶⁴ Ibid.

⁶⁵ 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) at 110.

⁶⁶ LOSC, art 91.

⁶⁷ LOSC, art 91 and 94.

⁶⁸ Stuart Kaye, 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement' (2007) 8(1) *Melbourne Journal of International Law*.

⁶⁹ Gianni, M. and Simpson, W. (2005). The Changing Nature of High Seas Fishing: how flags of convenience provide cover for illegal, unreported and unregulated fishing. Australian Government Department of Agriculture, Fisheries and Forestry.

certain deep-sea species,⁷⁰ which occur in high seas areas. These operations are run by multinational companies⁷¹ and many high seas vessels are now equipped to never have to return to port in order to maximise at-sea time as well as profits.

Under the standing afforded via flag State jurisdiction, companies seeking to avoid the rigours of international obligations and stringent regulatory processes can register their vessel/s in certain States which are unwilling or unable to exercise that jurisdiction and operate on the high seas under that flag. As the flag State in question often does not have the capacity or the will to exercise any controls over the vessel, the activities of the vessel go unchecked, allowing illegal, unreported and unregulated⁷² (IUU) fishing to occur on the high seas. This practice, known as operating under a 'flag of convenience'⁷³ (FOC) or 'flag of non-compliance'⁷⁴ (FONC), has been widely condemned by international fora seeking to regulate international fisheries.⁷⁵ However it still prevails, demonstrating a key failing of flag State jurisdiction.⁷⁶

It is worth noting that the corporate aspect of FONC fishing operations is that the vessels concerned have often been found to operate as 'a truly globalised fishing fleet'⁷⁷, where such vessels work in a cooperative and integrated way to disguise/mask their IUU activity.⁷⁸

⁷⁰ The prime example in the Southern Ocean being patagonian toothfish (*Dissostichus eleginoides*) which has been subjected to extensive IUU fishing in waters surrounding the Antarctic. Australian Antarctic Division, *A History of the Patagonian Toothfish Fishery* (2001) <<http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-2-spring-2001/international/a-history-of-the-patagonian-toothfish-fishery>>.

⁷¹ Gianni and Simpson, above n 69 at 52.

⁷² This thesis adopts the definition of IUU fishing contained in the 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 ('the IPOA-IUU'). Its definition reads as follows:

Illegal fishing refers to activities -

- a) conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
 - b) conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
 - c) in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
- Unreported fishing refers to fishing activities -
- a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
 - b) undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
- Unregulated fishing refers to fishing activities-
- a) in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
 - b) in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

⁷³ Gianni and Simpson, above n 69.

⁷⁴ This term is preferred by regional organisations in their terminology as demonstrated by CCAMLR Resolution 19/XXI 'Flags of Non-Compliance' available online at: <http://archive.ccamlr.org/pu/E/e_pubs/cm/11-12/r19-XXI.pdf>.

⁷⁵ Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence' (2004) 5 *Melbourne Journal of International Law* 14.

⁷⁶ Ibid.

⁷⁷ Gianni and Simpson, above n 69.

⁷⁸ 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.

Therefore, FONCs operators often disguise their fishing operations to ensure that the company reaping the true economic benefits from the IUU fishing being undertaken, operate behind a 'corporate veil'⁷⁹.

Consequently, IUU fishing by FONCs continues to highlight the challenges that this activity poses for high seas areas as well as to ensuring the ongoing sustainability of many fish stocks. As a global phenomenon, IUU fishing can compromise the 'ecological health' of the oceans in which it takes place.⁸⁰

This chapter will now turn to consider an advisory opinion, delivered by the International Tribunal for the Law of the Sea (ITLOS) on 2 April 2015, which tackled the question of what the obligations of flag States are with respect to the activities of their flagged vessels engaging in IUU fishing. The opinion focussed on the obligations of flag States when their vessels are fishing within EEZ waters rather than on the high seas. However it provides an important addition to the body of soft and hard law surrounding the regulation of IUU fishing and sheds further light on how regulation of global fisheries have now become one of the greatest governance challenges for the international community.⁸¹

1.4. Case Study on the Implications of Flag State Jurisdiction: Advisory Opinion of the Seabed Disputes Chamber on Flag State Jurisdiction

As discussed above in respect of FONCs and IUU fishing, global fish stocks today continue to feel the effects of non-compliance by flag States failing to appropriately regulate their vessels on the high seas. However flag State jurisdiction and the associated problems arising from lax flag State regulations and enforcement also creates difficulties within the EEZs of coastal States. In such areas, IUU fishing and FONCs pose challenges for the effective implementation of not only international agreements, but also compliance with the legislation of the coastal State. Where developing States are concerned, the effective monitoring and enforcement compliance of domestic legislation poses significant challenges for the coastal State even prior to considering the impacts of IUU fishing in coastal waters by vessels flagged to FONCs.

In the case of one West African fisheries organisation, the Sub-regional Fisheries Commission (SRFC), the impacts of FONC vessels fishing within the EEZs of its coastal States led to members bringing a request before the Seabed Disputes Chamber of the ITLOS: the 'Request

⁷⁹ Lynden Griggs and Gail Lugten, 'Veil over the nets (unravelling corporate liability for IUU fishing offences)' (2007) 31(2) *Marine Policy*.

⁸⁰ David Agnew et al, 'Estimating the Worldwide Extent of Illegal Fishing', (2009) 4(2) PLoS ONE: e4570.doi:10.1371/journal.pone.0004570.

⁸¹ Pauley et al, 'Towards Sustainability in World Fisheries', *Nature*, 2002 August.

for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC)'.⁸² The request, submitted on 28 March 2013, was made as a result of a resolution of the Conference of Ministers of the SRFC.⁸³

The context for the request was that the SRFC had become concerned by their inability to prevent IUU fishing within their coastal waters. They were seeking clarification of what the obligations of the flag State were in cases where IUU fishing activities were being undertaken by their vessels in EEZs of coastal states, including the extent to which the flag State was liable for the activities of these vessels.⁸⁴ In addition, they sought the opinion of the ITLOS on whether vessels which are licenced to fish by an international agency and which commit IUU fishing offences in the EEZ of a coastal State, incur the liability of the international agency.⁸⁵ Finally they sought clarification of the rights and obligations of the coastal State in ensuring the sustainable management of shared fish stocks within the EEZs of coastal States.

On 2 April 2015, the ITLOS delivered its opinion on the questions posed by the SRFC. Under article 138 of its Rules, the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention makes a specific request to that effect.⁸⁶ While such an opinion constitutes the advice of the ITLOS rather than a binding decision, it will be persuasive in shaping the actions of States and may form the basis of future cases. In addition, the ITLOS also clarified that its advice was limited to the specific case of the SRFC as it was in that context that the advice was sought.

The ITLOS, in passing down its opinion, advised that if flag States do not undertake necessary 'due diligence' to ensure that vessels they flag are complying with the protection and preservation measures of coastal States and are properly marked and properly authorised to fish by the coastal State then they may be liable.⁸⁷ In addition, the flag State must have in place enforcement mechanisms to monitor and enforce compliance, such as sanctions sufficient to deter violations by vessels, and procedures to investigate reports of suspected IUU fishing by flagged vessels.⁸⁸

⁸² *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, International Tribunal for the Law of the Sea, available online at: <https://www.itlos.org/en/cases>

⁸³ ITLOS/Press 190: 'The Tribunal receives a request for an advisory opinion from the Sub-Regional Fisheries Commission', 2013. Available online at: https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_190_E.pdf

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ ITLOS/Press 227: 'Tribunal delivers its Advisory Opinion regarding illegal, unreported and unregulated fishing activities'.

Available online at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf

⁸⁸ Ibid.

Such advice has significant ramifications for FONCs, which will very rarely have exercised the above due diligence in flagging vessels. As a result, where a FONC cannot demonstrate that they have appropriately ensured that flagged vessels will be subject to regulation including monitoring and enforcement, sanctions and investigations, then they may be brought before the ITLOS for breach of the LOSC. Where the vessel itself is non-compliant, the flag State may also be liable for the offences of the vessel if they cannot demonstrate that they took measures to enforce the obligations of the vessel.

There is, however, some ambiguity in the opinion of the ITLOS with respect to the effort flag States must go to in order to discharge their commitments in this regard. The opinion provides that flag States must deploy adequate means, and exercise best possible efforts to do the utmost to obtain favourable results. In addition, it is unclear from the decision whether IUU fishing itself must have occurred for liability to arise. Flag States have a duty to cooperate and ensure conservation of straddling stocks which occur across EEZs, however, the enforceability of this duty remains an unanswered question at law.⁸⁹

Regional and international agreements which have arisen out of the LOSC seek to interpret, implement or regulate the open-ended and often unclear provisions of the LOSC. This section demonstrates that today, a complex global framework of treaties and non-binding international agreements comprise the international regime for fisheries management⁹⁰ and yet many issues relating to compliance enforcement are yet to be addressed.

1.5. Calls for Reform

It would appear that today, the current high seas fisheries framework has resulted in a global marine crisis of environmental, ecological and social proportions. While the LOSC sets out 'conditions' which limit application of the freedom of the high seas, it is widely considered that this instrument sets out a framework for oceans governance only.

The LOSC and associated agreements provide for the creation of new organisations, and have sought to strengthen the role of those organisations in regulating fisheries which fall under the regime of the law of the sea. However the current status of international fisheries governance is far from static. This section demonstrates that while calls for reform to the legal frameworks for governing high seas fisheries are necessary and significant, current proposals fail to

⁸⁹ Clark, E. A. 'Strengthening Regional Fisheries Management: An Analysis of the Duty to Cooperate' (2011) *New Zealand Journal of Public and International Law* 9(2), at 223.

⁹⁰ 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.

appropriately contemplate the role that the sector itself has to play in improving governance mechanisms.

Proposals to amend the existing legal regime for international fisheries governance range from revolutionary ideas to amend founding principles of the law of the sea,⁹¹ to proposals which work with those arrangements already in place but encourage more adaptive approaches. In an example of a more revolutionary proposal, Stan Crothers and Lindie Nelson of the New Zealand Ministry of Fisheries suggest that the 'high seas freedom to fish be transformed to a right to share in the net wealth generated from sustainable harvest of high seas fisheries...'⁹² They suggest that rather than relying on cooperation of States via regional fisheries organisations, instead a management organisation in which States are beneficial owners should be established.⁹³

While primarily a discussion paper, this proposal represents a forward-thinking approach to considering how alternative governance frameworks to that which currently exists might promote accountability of States for the activities of their vessels on the high seas. However today, not just critics but States, both individually and through their activities in international and regional institutions, are gradually mobilising to consider alternative approaches to the current LOSC regime. At the forefront of such alternatives is the notion of biodiversity beyond national jurisdiction (BBNJ).⁹⁴

In an approach requiring the negotiation of an entirely new agreement which would sit under the LOSC, certain critics argue that an implementing agreement to the LOSC on BBNJ is the best option to address the regulatory gaps that exist under the current regime. They contend that at present, the LOSC's creation of one regime for high seas areas and another regime for activities occurring on the seabed and subsoil thereof has resulted in sectoral management which creates difficulties with regard to the effective regulation of activities including deep-sea mining and geoengineering.⁹⁵ Proponents argue that where impacts of ocean activities span the two regimes, biodiversity considerations are not appropriately taken into account.⁹⁶

⁹¹ G T Crothers and L Nelson, 'High Seas Fisheries Governance: A Framework for the Future?' Paper presented at *Sharing the Fish Conference*, 2016, available online at: <http://www.fishallocation.com/papers/pdf/papers/StanCrothers.pdf>

⁹² Ibid.

⁹³ Ibid.

⁹⁴ High Seas Alliance, 'We are at a critical juncture of the BBNJ negotiations', March 22, 2019. Article available online at: <http://www.highseasalliance.org/content/we-are-critical-juncture-bbnj-negotiations>.

⁹⁵ Elizabeth Druel et al, 'Getting to Yes? Discussions Towards an Implementing Agreement to UNCLOS on Biodiversity in ABNJ' Policy Brief, 13 October 2013 available online at http://www.iddri.org/Publications/Collections/Syntheses/PB1013_ABNJ%20IA_drue%20bille%20rochette.pdf.

⁹⁶ Ibid.

As a result, discussions towards the instigation of negotiations for such an agreement have commenced via an 'Ad-hoc open-ended informal working group to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction' (the Working Group).⁹⁷ The Working Group was formed in 2004 under the auspices of the United Nations General Assembly (UNGA), however it was not until recently that States discussed their positions with respect to the merit of proceeding towards the negotiation of such an agreement.⁹⁸

To many critics, the prospect of re-negotiating principles under the LOSC or indeed creating new regimes under the LOSC seem intractable as a way to improve the impacts of fishing in high seas areas.⁹⁹ Instead, they promote the need to improve the implementation of existing instruments to achieve effective conservation and sustainable management.¹⁰⁰ Certain proposals under this approach promote multi-sector mechanisms spanning institutions,¹⁰¹ encouraging regional organisations to extend their mandate via the adoption of Marine Protected Areas (MPAs) in high seas areas, as well as more political solutions such as adopting a UN Statement of Principles on marine governance.¹⁰²

Formal treaty negotiations towards the creation of an agreement on BBNJ were held in March 2019 via an Intergovernmental Committee at UN Headquarters in New York.¹⁰³ These discussions were centred around the 'President's Aid to Negotiations': an options-based draft treaty text. With work by interested States parties now progressing towards the mid-point of negotiations, it is looking likely that an implementing agreement to the LOSC on BBNJ will proceed.

The UNGA has also encouraged action in this field via the adoption of resolutions for action on sustainable high seas fisheries. In 2006, Resolution 61/105 of the UNGA called for specific actions to be taken by States and regional fisheries management organisations with regards to bottom fishing in high seas areas.¹⁰⁴ It required States authorising their vessels to engage in bottom fishing to conduct assessments of the impacts of those activities on vulnerable marine ecosystems and to implement appropriate measures in response.¹⁰⁵

⁹⁷ Ibid.

⁹⁸ Editorial, Introduction: 'Advancing governance of areas beyond national jurisdiction' (2014) 49 *Marine Policy* at 81.

⁹⁹ The FAO Code of Conduct specifies that 'the right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources.'

¹⁰⁰ Editorial, above n 98.

¹⁰¹ Druel et al, above n 95. .

¹⁰² Editorial, above n 98 at 40.

¹⁰³ High Seas Alliance, above n 94.

¹⁰⁴ UNGA Res 61/105.

¹⁰⁵ UNGA Res 61/105.

In 2009, the UNGA found that resolution 61/105 had not been implemented effectively and adopted resolution 64/72. This resolution reaffirmed 61/105 and called on States and regional fisheries management organisations to prevent vessels from engaging in bottom fishing in such areas until assessments had been carried out. Resolution 64/72 calls for long term sustainability measures for fish stocks and non-target species.¹⁰⁶ A 2013 report into the implementation of resolution 61/105 and 64/71 found that these recommendations had been implemented to a degree but not sufficiently and made recommendations for improving their implementation.¹⁰⁷

This thesis argues that for the most part, neither political reforms nor treaty-based reforms have fully taken into account the need to empower the resource-user to contribute to, and adopt their own solutions to, the problems of fisheries governance. Commentary on reform to fisheries governance all too often considers 'scientific, legal and institutional efforts to advance governance',¹⁰⁸ without recognising the importance of engaging the sector itself. It would appear that traditional governance is attempting to fight fire with fire; developing layers of unilateral agreements aimed at addressing problems arising from associated agreements. This thesis suggests that the solution lies not in developing new agreements, but in changing our understanding of 'governance' and our expectations of what the State is capable of delivering under international agreements.

1.5.1. The Roles and Responsibilities of the Resource-User: Time for Review?

According to Andrew T Guzman, compliance is one of the most central questions in international law.¹⁰⁹ This is exceptionally true of international fisheries law. Compliance, under international fisheries law, is achieved via the resource user being controlled by the state which is in turn governed by the decisions of the RFMO. However because RFMO membership is voluntary, there exists significant opportunity for non-compliance to occur unchecked. Even where RFMO membership exists, rates of non-compliance within the regime are high.

With the entry into force of the UN Fish Stocks Agreement in 1995, the role of RFMOs was clarified as being a conjugate for cooperation amongst flag States, including in respect of fisheries compliance.¹¹⁰ This role prompted the development of compliance-related conservation measures within RFMOs, such as port state measures, illegal vessel lists and catch

¹⁰⁶ Rogers, A.D., Gianni, M. (2010) *The Implementation of UNGA Resolutions 61/105 and 64/72 in the Management of Deep-Sea Fisheries on the High Seas*. Report prepared for the Deep-Sea Conservation Coalition. International Programme on the State of the Ocean, London, United Kingdom, 97pp, at 3.

¹⁰⁷ Ibid.

¹⁰⁸ Editorial, above n 98 at 81.

¹⁰⁹ Andrew T. Guzman, 'A Compliance Based Theory of International Law' (2002) 90 *California Law Review* 1826.

¹¹⁰ OECD, *Strengthening Regional Fisheries Organisations* (OECD Publishing, 2009), Executive Summary.

documentation schemes.¹¹¹ These conservation measures must be legally implemented by the flag State domestically and compliance with those measures monitored and reported by the flag State. However their impact is felt by the vessels that the flag State regulates.

In areas whereby the resource is the property of the 'commons',¹¹² such as international fisheries, it has been demonstrated that compliance is easier to achieve when resource users support effective monitoring and rule enforcement.¹¹³ In fact in a fisheries context, numerous studies have reinforced the success of co-management regimes, or regimes which engage the resource user throughout different stages of governance.¹¹⁴ While co-management may not be possible under an international regime which is founded on the principle of flag State compliance, industry initiatives have nevertheless been occurring and have been successful in respect of achieving compliance with the objectives of RFMOs.¹¹⁵ Documentation of such efforts, however, is minimal.¹¹⁶

To date there has been little academic commentary on attempts by the resource-user to improve compliance at fisheries law and their contribution to sustainable fisheries in a legal context.¹¹⁷ This thesis undertakes a holistic approach towards documenting this trend in a compliance capability. It captures the various forms and approaches that such initiatives take and emphasises the role that such efforts play in breaking-down sectoral regulation.

This thesis recommends that effective regional fisheries governance will benefit from a synergy between public and private regulation. By examining both top-down compliance tactics in an RFMO, and their interaction with bottom-up compliance tactics, this thesis provides a holistic view of compliance enforcement tactics in operation. This allows for the problem of RFMO compliance to be viewed as a challenge to both the flag State, *and* the resource user, under the principle of shared responsibility.¹¹⁸

The thesis posits that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance, to leverage industry compliance mechanisms and engage with the opportunities they provide. With wild-capture fisheries facing overexploitation,

¹¹¹ Ibid.

¹¹² Garret Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1234.

¹¹³ Thomas Dietz et al, 'The Struggle to Govern the Commons' (2003) 302 *Science* 1907.

¹¹⁴ Robert S Pomeroy et al, 'Conditions affecting the success of fisheries co-management: Lessons from Asia' (2001) 25 *Marine Policy*, 197.

¹¹⁵ For example, in 2003 the Coalition of Legal Toothfish Operators was formed by industry members to eliminate illegal, unreported and unregulated catch of Patagonian toothfish and to improve the sustainability of the stock.

¹¹⁶ Elinor Ostrom, 'Reformulating the Commons' (2011) 6 *Swiss Political Science Review* 29.

¹¹⁷ R. Quentin Grafton et al, 'Incentive-based approaches to sustainable fisheries' on *NRC Research Press* (15 February 2006) <https://crawford.anu.edu.au/pdf/staff/quentin_grafton/CJFAS_06.pdf>.

¹¹⁸ Nollkaemper and Jacobs, above n 9 at 365.

this thesis asserts that RFMO best-practice in a compliance sphere can and should encompass bottom-up compliance tactics.

1.6. Thesis Structure

Chapter 1 - Introduction

The purpose of Chapter 1 is to highlight the challenges posed by a regime founded in the concept of flag State jurisdiction and the need for increased recognition of the roles and responsibilities of the resource-user in an effective fisheries management regime. The chapter explains that the thesis will present an up-to-date assessment of the compliance enforcement regimes of those RFMOs to which Australia is a party. As part of the solution, it is suggested that there is a need to recognise the capability and capacity of the resource-user to better engage in the regulatory regime to improve high seas fisheries governance.

In addition, Chapter 1 provides a contextual overview of the problem of unsustainable fishing in high seas areas. It is suggested that a collaborative approach to governance of high seas fisheries is now required; whereby the resource-user is increasingly engaged in decision-making processes at a regional and international level. It contends that if sustainable fisheries are the objective, increased active interaction between the government and the governed must occur. To support this assertion, a brief case study of a recent advisory opinion issued by the ITLOS is undertaken to highlight the complexities of reliance on flag State responsibility alone in a compliance context.

Lastly Chapter 1 outlines the structure of the thesis, and how the chapters are organised into three key segments to assess whether the hypothesis can be supported. Chapters 1-4 are devoted to analysing the context of the argument, establishing the founding principles upon which the key thesis argument is made and undertaking a review of literature relevant to the field of study. Chapters 5 and 6 comprise the empirical element of the thesis; presenting and analysing data collected regarding the AusRFMOs under examination as well as making recommendations for reform.

Chapter 7 concludes the thesis; undertaking an assessment of how the evidence presented in previous chapters supports, or negates, the hypothesis. This chapter also provides insight into how these findings sit within the context of existing literature in the field of study. The conclusions demonstrate the positive and practical outcomes of this research and suggest what these findings may mean for the future of regional fisheries compliance enforcement.

Chapter 2 – Governance Theory and Research Methodology

This chapter justifies the approach adopted in this study by explaining the theoretical framework within which the study is being undertaken. It begins by examining the objectives of fisheries governance at a regional level to provide insight into the current approach adopted by AusRFMOs. The concepts of sustainable management and ecosystem-based management are outlined to demonstrate that the resource-user plays a vital role in achieving the objectives of regional fisheries governance. In addition, the notion of 'sustainability' is explored to highlight how the theory of corporate social responsibility applies to this thesis examination.

This chapter explains that both rationalist and normative models of compliance have been taken into consideration in this thesis. For example, rationalist models might focus on deterrence and enforcement as a means to prevent and punish non-compliance by changing the resource-user's calculation of benefits and costs.¹¹⁹ An example of this approach is found in illegal vessel lists which seek to 'name and shame' both flag States and the vessels involved. Normative approaches focus on cooperation and compliance assistance as a means to prevent non-compliance.¹²⁰ An example of this approach embodied in a conservation measure is via port State measures which call on States to cooperate.

Finally this chapter explains the methodology adopted in this thesis. It will test the hypothesis that there are significant inconsistencies between and amongst AusRFMOs in their adoption of conservation measures to support their compliance and enforcement regime. This will be achieved by collecting data on the current conservation measures of six AusRFMOs and undertaking a comparison of how complete and comprehensive their suite of compliance enforcement mechanisms are. An assessment of where the main gaps are between and among AusRFMOs can then be undertaken, assisted by insight from the performance reviews published by each AusRFMO.

As a group of organisations whose collective decisions impact on the strength of the wider compliance enforcement capacity of a region, it is critical that AusRFMOs work together if they are to achieve any real impact on the health of global fish stocks. Where the findings from this thesis demonstrate that there remain areas for improvement, it is suggested that an alternative vision of compliance enforcement, where the resource-user shares responsibility with the

¹¹⁹ Durwood Zaeke, Donald Kanjaru, and Eva Kružíková (eds), 'Making Law Work: Environmental Compliance and Sustainable Development' (Cameron May Ltd., International Law Publishers, 2005).

¹²⁰ Ibid.

regulator to achieve compliance with conservation measures, holds significant promise to strengthen connections and compliance enforcement across AusRFMOs.

Chapter 3 – The Mandate and Performance of AusRFMOs

The purpose of this chapter is to explore each of the six AusRFMOs under examination in this thesis in detail to clarify their mandate, geographic application, and in particular, their performance to date. The chapter examines how calls by the United Nations Fish Stocks Agreement Review Conference in 2006 to qualitatively assess the performance of RFMOs led to the development of common criteria for the delivery of ongoing review and assessment. Since this time, the practice of undertaking performance reviews and monitoring the implementation of associated finding has become common across all RFMOs.

However this chapter is of course primarily concerned with the specific AusRFMOs under examination in this thesis. All AusRFMOs have published at least one performance review which will be analysed to gain a current perspective on the key compliance issues impacting the AusRFMOs in question. In addition, the basics of RFMO management are explained including the operation of conservation measures in RFMOs, their legal force other key basics behind how RFMOs regulate.

The chapter concludes that while the process of undertaking performance reviews is far from perfect, if these reports are independent and objective in their approach they represent a valuable tool in understanding both specific and common areas for improvement in the RFMO regime.

Chapter 4 – Compliance Evaluation in the CCAMLR

This chapter largely comprises an article co-authored with the late Prof. Denzil Miller and entitled, 'Trust But Verify: Fisheries Compliance Evaluation and Sustainable Antarctic Marine Living Resource Management'.¹²¹ The author recognises the significant contribution made by Prof. Miller to this thesis with regards to his conceptual insights as well as his material contribution with regards to Chapter 4. This thesis is dedicated to the memory of Prof. Miller.

This chapter documents the rise of the 'compliance evaluation procedure' (CEP) in AusRFMOs and how this process is one of the many compliance-related conservation measures being

¹²¹ Denzil G M Miller and Elise Murray, 'Trust but Verify: Fisheries Compliance Evaluation and Sustainable Antarctic Marine Living Resource Management', Conference Paper, Polar Law Symposium 2019, Hobart Tasmania.

assessed throughout the thesis. The popularity of processes to evaluate compliance in AusRFMOs is demonstrative of the focus AusRFMOs and RFMOs in general currently have on compliance. The CCAMLR CEP was one of the first of its kind and constitutes a strong example of how the process can function to effectively address instances of non-compliance in a regional context.

The Chapter focuses on efforts by the CCAMLR to improve Antarctic marine governance and conservation through the recently-developed CCAMLR compliance evaluation procedure (CCEP). The CCEP's achievements and shortcomings are contrasted with trends in fisheries compliance globally within the context of future uncertainty and risk. It is viewed as a model for other polar and high seas areas, and is suggested that adoption of a CEP by AusRFMOs can fundamentally alter the performance of the RFMO.

Chapter 5 – Compliance-Related Conservation Measures in AusRFMOs

This chapter begins by identifying and categorising the compliance enforcement mechanisms specifically under examination in this thesis. These include: 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 and inspection and arrest. Figure 1 provides a graphic representation of how these methods can be categorised for the purposes of this thesis.

Having discussed the different measures, this thesis proceeds to investigate *which* AusRFMOs have adopted *which* of these measures. A desktop study is undertaken to compile a comprehensive list of the specific compliance-related conservation measures currently in force in each of the AusRFMOs being assessed.

This data collected is used in Chapter 6 to allocate each AusRFMO a compliance ranking of basic, developing or established. These findings highlight the limitations of AusRFMOs when it comes to implementing effective compliance regimes and it is emphasised that compliance must now be viewed as a challenge to both the flag State, and industry, if progress is to be made.

Chapter 6 – Analysis and Recommendations

This chapter comprises the analytical basis of the thesis and is designed to compare the compliance capacity of AusRFMO with their overall performance as determined by their most recent performance reviews. The introductory section of this chapter establishes the context in which this analysis is undertaken with a discussion of incentive-based approaches to compliance

and how such approaches interact with the principle of shared responsibility. The legal status of the resource-user in RFMOs is also examined to demonstrate the difficulties faced by the private-sector seeking to engage directly via the forum provided by the RFMO.

Following this introduction, the chapter undertakes an analysis of the data presented in Chapter 5 and Table 1. Table 3 comprises a summary of the compliance-related conservation measures of each AusRFMO contained in Chapter 5. This table provides a quick reference guide and also demonstrates the respective strengths and weaknesses of each AusRFMO.

Based on this information, the analysis is undertaken by allocating each AusRFMO a status of 'basic', 'satisfactory' or 'established' with regard to its compliance capacity. This finding is then considered in light of the performance of the RFMO as determined by their most recent performance review outcome and other factors. Areas for improvement are identified and discussed to highlight the key compliance concerns of each AusRFMO as determined by this thesis.

In light of the above finding, this chapter examines the ways in which the private-sector can contribute to the compliance capacity of AusRFMOs. Figure 2 is introduced to highlight how avenues for private-sector engagement can be categorised into cooperative measures, benchmarking measures, and political measures to assist in understanding their operation and desired effect.

Finally this chapter highlights that private-sector engagement represents a viable alternative to regulatory reform with regards to the compliance capacity of AusRFMOs. To demonstrate this point, specific and practical recommendations for how both AusRFMOs and the private-sector can improve their respective engagement with one another to a positive effect are made. The chapter concludes there is significant work to be done to rebuild perceptions of the legitimacy of compliance conservation measures in AusRFMOs and that private-sector engagement can assist in addressing this challenge.

Chapter 7 – Conclusions

The concluding chapter begins by reviewing the content and findings of previous chapters. It is shown that when read as a whole, this thesis contains evidence to suggest that AusRFMOs can and should increase their engagement with the private-sector in the interests of achieving improved compliance outcomes for their respective fisheries. Additionally, the private-sector should be encouraged to demonstrate sustainable leadership and assume shared responsibility for the resource, if they wish to see an impact on the sustainability of global fish stocks.

The next section of this chapter outlines a series of conclusions that are primarily based on the data and analysis contained in Chapters 5 and 6 of this thesis. Chapter 6 has shown that there are commonalities in the type of compliance challenges facing AusRFMOs, but that this also means that there are commonalities when it comes to identifying how AusRFMOs may improve their compliance capacity.

The thesis concludes that efforts to improve the governance regime for high seas fisheries via amendment to international agreements or development of new agreements may be limited in effect. It highlights that so long as the impacts of depletion of fish stocks continue to be felt by the 'whole', rather than the individual, significant governance challenges will remain in achieving sustainable fisheries.

1.7. Conclusion

This thesis asserts that it is time to address the current imbalance between our expectations of the resource-user as opposed to the State if we are to achieve actual progress towards sustainable global fisheries. We live in a dramatically altered climate from that in which the LOSC was negotiated and today, international fishing companies are seeking to strengthen their 'social licence' to operate.¹²² To do this, they are distinguishing themselves from competitors by evoking their corporate social responsibility.¹²³ If we continue to look to the RFMOs and legal solutions to address the global fisheries crisis, we fail to recognise integrative solutions whereby governance institutions, industry, civil society and researchers¹²⁴ are all seen as equally vital components in the effort to improve governance of internationalised fisheries.

If, as many commentators continue to assert, a holistic and multi-sectoral and collaborative solution represents the best option for achieving effective reform to fisheries governance, we must adapt our understanding of what governance looks like. The notion of 'reforming' international treaty law, *per se*, becomes redundant if, as this thesis argues, the governance regime recognises both flag State responsibility and the responsibility of the resource-user as equal. It is argued that this approach can be largely achieved by altering our attitude towards the resource-user and what the governance regime for regional fisheries comprises.

¹²² Osterblom H and Bodin O, 'Global Cooperation Among Diverse Organisations to Reduce Illegal Fishing in the Southern Ocean', *Conservation Biology*, 2012.

¹²³ *Ibid.*

¹²⁴ Druel et al, above n 95.

The need to enforce both engagement in and compliance with the conservation measures of RFMOs remains a critical factor to be resolved if we are to stem the decline of high seas fish stocks.¹²⁵ To date, the performance of RFMOs in this regard has been poor;¹²⁶ with discontinuity between the compliance approaches of individual RFMOs cited as one of the key contributing factors to the challenges facing regional fisheries management.¹²⁷ The question of how to improve compliance in RFMOs has been widely addressed in academic literature, but almost exclusively from the perspective of how flag State compliance can be strengthened to improve the compliance of the RFMO overall.¹²⁸

This thesis analyses the legal regime surrounding this issue to recommend a quasi-legal solution at the cross-roads between international law and international relations: RFMOs compliance will function best when there is a synergy between the regulator and the regulated. This fresh perspective is both timely and necessary for the positive future of global fisheries.

¹²⁵ Lodge et al, above n 21.

¹²⁶ FAO Fisheries and Aquaculture Circular No. 1072, 'Performance Reviews by Regional Fishery Bodies: Introduction, Summarise, Synthesis and Best Practices', (2012) available online at <<http://www.fao.org/docrep/015/i2637e/i2637e00.pdf>> at 56.

¹²⁷ Ibid.

¹²⁸ The principle of flag State jurisdiction is embodied in article 91 of 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).

CHAPTER 2

Governance Theory and Research Methodology

2.1. Introduction

The question of why flag States, organisations and individuals choose to comply with international law is at the heart of understanding how to best direct compliance effort to secure sustainable global fisheries.

¹ It is essential that regulators promote an 'enabling environment'² for the sector while effectively managing the risks that this approach may bring. This chapter examines the theories which may underpin efforts by the private-sector to comply with the conservation measures of AusRFMOs.

To date, few studies examining the need to reform the regional fisheries regime have contemplated the role that certain influential corporations play in determining the effectiveness of the regional fisheries regime.³ Fisheries regulators and States parties to RFMOs alike are today recognising the growing role that the private-sector can and should play in the effective regulation of the fishery.⁴ From a legal perspective, fisheries reform efforts have largely focussed on the mandates and conservation measures of RFMOs and how to improve decision-making within the political minefield of State-based interactions. However, some academics have started to approach the problem from a social science perspective, examining the interplay between ecosystems and influential corporations.⁵

This thesis argues that it is beneficial to consider the findings of these social science studies⁶ alongside or in tandem with legal efforts to improve the ability of RFMOs to achieve compliance with their conservation measures. This proposal is supported by recent insights into the actual extent of the role and influence of a limited number of large companies on the high seas.⁷ With certain companies having an influence that is arguably larger than most nations in terms of

¹ Lori Ridgeway, 'Chair's Summary Report', *Workshop on the Challenges and Opportunities of Fisheries Globalisation*, April 2007. Report available online at: <<http://www.oecd.org/greengrowth/fisheries/39997562.pdf>>.

² Ibid.

³ Orjan Bodin and Henrik Osterblom, 'International fisheries regime effectiveness—Activities and resources of key actors in the Southern Ocean', *Global Environmental Change*, 23 (2013) 948–956 at 948.

⁴ For example, in the Commission for the Conservation of Antarctic Living Resources (CCAMLR), the Association for Responsible Krill harvesting companies functions to support the compliance activities of the organisation.

⁵ Bodin and Osterblom, above n 3.

⁶ Bodin and Osterblom, above n 3.

⁷ 'A handful of corporations could hold the answer to the crisis in the seafood industry', *The Guardian*, May 2015. Available online at <<http://www.theguardian.com/sustainable-business/2015/may/28/seafood-industry-overfishing-corporations-control-potential-solution>>

achieving sustainable fisheries,⁸ it is argued that the assumption that flag States alone control international fisheries can no longer be said to be correct.

Despite this influence, many of these large and powerful fishing corporations have yet to assume responsibility for the fisheries they influence.⁹ However, others are engaging in a positive way with regulatory organisations such as RFMOs to achieve compliance outcomes for the fishery concerned. There is growing evidence that engagement in policy-making and research efforts by influential corporations is increasing in RFMOs and that this trend can be beneficial to the work of the RFMO.¹⁰ While the motivations of the corporation must always be questioned, it is also true that the motivations of States in decision-making in RFMOs should be equally challenged.

The purpose of this chapter is to justify the approach adopted in this thesis by explaining the practical and theoretical framework within which the study is being undertaken. To do this, certain terminology adopted for the purposes of the thesis is first explained in a 'vocabulary and definitions' section. The notion of sustainability is defined as it applies to this thesis and terms including 'keystone actors', 'sustainable leadership', and 'private-sector compliance measures' are introduced. This section also clarifies that the thesis is adopting a broad definition of compliance as any effort by a party to pursue the objectives of an RFMO by utilising either rationalist or normative means.

Next the chapter considers the theoretical framework, or 'governance theories', which form the basis of the thesis hypothesis and approach adopted to this research. Here the theory which underpins why States, organisations and individuals choose to comply with international fisheries law is examined. Corporate Social Responsibility (CSR) and the theories which underpin this approach are also shown to be an important contributing factor to the compliance discussion. So too is the international legal principle of shared responsibility, which suggests that both the private-sector and the relevant governmental body share responsibility for the maintenance of the resource.

Finally this chapter explains the methodology adopted in this thesis. It will test the hypothesis that there are significant inconsistencies between and amongst AusRFMOs in their adoption of conservation measures to support their compliance and enforcement regimes. This will be achieved by collecting data on the current conservation measures of six AusRFMOs and

⁸ Österblom H, Jouffray J-B, Folke C, Crona B, Troell M, Merrie A, et al. (2015) Transnational Corporations as 'Keystone Actors' in Marine Ecosystems. PLoS ONE 10(5): e0127533. Available online at <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0127533>>

⁹ Ibid.

¹⁰ H Österblom and O Bodin, 'Global Cooperation among Diverse Organizations to Reduce Illegal Fishing in the Southern Ocean', *Conservation Biology*, V 26 issue 4, 2012, pages 638-648 at 638.

undertaking a comparison of how complete and comprehensive their suite of compliance enforcement mechanisms are. This will form an assessment as to where the main gaps are between and amongst AusRFMOs, assisted by insight from performance reviews of the AusRFMOs themselves.

2.2. Thesis Vocabulary and Definitions

As a group of organisations whose collective decisions impact on the strength of the wider compliance enforcement capacity of a region, it is critical that AusRFMOs work together if they are to achieve any real impact on the health of global fish stocks. Despite this there remains significant inconsistencies often even in the terminology used to discuss a particular approach or particular conservation measure. This section aims to clarify the meaning and intent behind the recommendations made in this thesis and ensure that any level of uncertainty around the conclusions is minimised.

2.2.1. Sustainability

In 1987, just five years after the adoption of the LOSC, a report of the United Nations World Commission on Environment and Development entitled 'Our Common Future' (otherwise known as the 'Brundtland Report')¹¹ defined ecologically sustainable development (ESD) as development that 'seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.'¹² In this way, sustainable development may be seen to be an organisational principle for human life on a finite planet, whereby living conditions and resource-use meet human needs without undermining natural systems. Many critics now recognise sustainable development as essential for the longevity of the human race. The Brundtland Report found that a 'transition to sustainable development'¹³ must occur in governance approaches, if we are to retain a healthy planet and population into the future.

To understand the conservation objectives of AusRFMOs, it is important to examine the concept of sustainability and its evolution alongside the associated concept of ecosystem-based management (EBM). Such concepts are fundamental to the direction that marine governance efforts have taken in recent decades. The limitations of traditional governance methods, ie. single-sector management and population-driven approaches, have been demonstrated as lacking with respect to their ability to comprehend the impacts of the activity on its associated

¹¹ Brundtland G, 'Report of the World Commission on Environment and Development: Our Common Future', 1987, United Nations General Assembly document A/42/427. Available online at: <<http://www.sciepub.com/reference/92946>>

¹² Ibid.

¹³ Ibid.

ecosystem and environment. Indeed the calls for reform to fisheries governance examined below have been motivated by the requirement that governance contemplate ecosystems, environments and the need for sustainability.

The interconnectedness of species which occur in the same ecosystem is no longer escaping the minds of governing bodies in the fisheries sphere. While certain governance bodies do remain limited by the scope of their mandate, others are adapting to incorporate measures which seek to conserve species affected by the actions of those fishing for the target catch. Indeed, some governance regimes have gone further and have shaped their regime around a sustainability-based approach with not only species but environmental damage considered in conservation measures.

However, the question of what sustainability actually 'is' remains. This thesis adopts the following definition of sustainability as a mechanism which:

- *extends the socially useful life of organisations,*
- *enhances the planet's ability to maintain and renew the viability of the biosphere and protect all living species,*
- *enhances society's ability to maintain itself and to solve its major problems, and*
- *maintains a decent level of welfare for present and future generations of humanity.*¹⁴

In this way, it can be demonstrated that organisations engaging in sustainable leadership for example will engage in activities that contributes to one or a number of the above objectives¹⁵ This concept is explored further below in this chapter's examination of corporate social responsibility.

However, the notion that natural resources should be managed with consideration of the impacts of such exploitation on ecosystems is not new. 'Ecosystems-based management' (EBM) was originally contemplated in the mid-1980s and recognises that environmental impacts are almost always felt on an ecosystem-level rather than on a single species.¹⁶ Proponents of EBM argue that the environment ought to be managed in whole ecological units based on integrative biological, physical or socioeconomic assessments.

¹⁴ Dexter Dunphy, 'Corporate Sustainability: Challenge to Managerial Orthodoxies', *Journal of Management and Organisation*, Volume 9, Issue 1 January 2003, p. 2-11

¹⁵ Ibid.

¹⁶ National Oceanic and Atmospheric Administration, 'What is ecosystem-based management?', Available online at <<https://www.ecosystems.noaa.gov/EBM101/WhatIsEcosystem-BasedManagement.aspx>>

EBM represents a unique approach to fisheries governance in that it is concerned with sustaining ecosystems to meet ecological and human needs into the future. This approach continues to gain favour and in fisheries management, EBM emerged as an alternative approach to single-species management in the early 2000s.¹⁷ Since then, it has been implemented into fisheries governance frameworks on a national and international level, recognising the need to support the ecosystems in which single species depend to survive.

EBM aims to balance the need to protect ecosystem health with the need to provide resources to the people. In this way, EMB has a strong temporal element and cannot exist without recognition of an associated concept: that of sustainability.¹⁸ EBM is connected to sustainability in that it is required if we are to achieve intergenerational-equity, where the resource is to be managed not only for the short-term, but with recognition of the rights of future generations.¹⁹ Sustainability is inherently linked to basic questions of equity in that it requires fairness, social justice and quality of life.

2.2.2. Keystone Actors and Sustainable Leadership

As already discussed, to tackle the question of how governance of high seas fisheries may be reformed, we must understand who 'owns' the resource, in a technical legal sense as well as in a practical sense. It is the starting point of this thesis that while the legal framework governing high seas fisheries places the State at the centre of resource ownership, with thirteen global corporations controlling up to 16% of total wild capture fisheries worldwide,²⁰ stocks which are also, coincidentally, the largest and most valuable fisheries, we must question traditional notions of flag State responsibility on the high seas.

A recent study into these thirteen global influential corporations identifies them as 'keystone actors' in that they, 'dominate all segments of seafood production, operate through an extensive global network of subsidiaries and are profoundly involved in fisheries and aquaculture decision-making.'²¹ The study in question found that keystone actors comprise a central feature in this 'new global dynamic',²² but that they have yet to assume the responsibility that comes with this role on a global scale.

¹⁷ Ibid.

¹⁸ Dunphy, above n 14.

¹⁹ G.D. Meyers and S.C. Muller, "The Ethical Implications, Political Ramifications, and Practical Limitations of Adopting Sustainable Development as National and International Policy," 4 *Buffalo Environmental Law Journal* 1-44 (1996).

²⁰ Osterblom et al, above n 8.

²¹ Osterblom et al, above n 8.

²² Osterblom et al, above n 8.

However, we are increasingly seeing examples of the private-sector engaging in the compliance regime of AusRFMOs.²³ To describe this trend, this thesis adopts terminology applied in a recent study by the Stockholm Resilience Centre²⁴: the term ‘sustainable leadership’. While not explicitly defined by the Centre, sustainable leadership might be evident where influential keystone actors become leaders in their field by promoting sustainable fisheries measures. This concept is similar to the notion of ‘responsible leadership’ which is linked to corporate social responsibility and sustainability.²⁵

Where we can start to see examples of ‘sustainable leadership’ by keystone actors in AusRFMOs, this could in turn enable a critical transition towards improved management of marine living resources and ecosystems.²⁶ This thesis investigates how sustainable leadership by corporations in respect of achieving compliance with RFMO conservation measures may impact upon the compliance capability of the RFMO overall. Sustainable leadership has the power to strengthen RFMOs and enable a critical transition towards improved management of global fish stocks.²⁷

Having introduced the idea of ‘sustainable leadership’, this thesis suggests that corporations may attain ‘leadership status’ by engaging in ‘private-sector compliance measures’. These measures are explored further below for their ability to impact the conservation effort of AusRFMOs.

2.2.3. Private-Sector Compliance Measures

For the purposes of this thesis, ‘private-sector compliance measures’ may be defined as initiatives adopted by the private-sector in the interests of achieving sustainable high-seas fisheries. This may occur by any private-sector entity releasing sustainability reports, or by changing the fishing gear they use to achieve a sustainable seafood certification. While not necessarily directly linked to the compliance measures of AusRFMOs, private-sector compliance measures can assist in promoting or achieving the objectives of the relevant RFMO.

Private-sector compliance measures may take many forms and may be undertaken by corporations individually or as a group. Where a number of actors with similar incentives and values band together to develop mechanisms in the interests of sustainability, this may also be considered a private-sector compliance measure.²⁸ Private-sector compliance measures are

²³ Osterblom et al, above n 8.

²⁴ Stockholm Resilience Centre, Stockholm University, SE-106 91, Stockholm, Sweden.

²⁵ Meyers and Muller, above n 19.

²⁶ Osterblom, above n 8.

²⁷ Ibid.

²⁸ Osterblom, H., and C. Folke. 2013. Emergence of global adaptive governance for stewardship of regional marine resources. *Ecology and Society* 18(2): 4. Available online at: <<http://www.ecologyandsociety.org/vol18/iss2/art4/>>

voluntary and self-imposed,²⁹ and may leverage a certification scheme to achieve their goal.³⁰ The adoption of private-sector compliance measures by a company will often depend upon their willingness to invest in sustainability outcomes, their ability to fund these outcomes and to trust in their counterparts within the relevant fishery.³¹

Figure 1 of this thesis identifies three key categories of private-sector compliance measures and specific examples which fall under these key categories.³² These three categories are broadly described below:

- *Cooperative* – where the compliance measure is driven by the individual corporation or the association and utilises cooperation between fishing corporations to achieve sustainable leadership.
- *Benchmarking* – where the compliance measure, driven by either the individual corporation or the association, leverages corporate benchmarking to achieve sustainability leadership.
- *Political* – where an individual company, or association of companies, seeks to engage in the governance process of an RFMO by leveraging political engagement.

These categories are not, however, entirely distinct from one another and often one measure may deliver upon multiple objectives and outcomes.

This thesis argues that underneath each of these categories of private-sector compliance measures are different types of actions that may be undertaken by a company or a group of fishing companies. An explanation of each is outlined in the below table using examples of how they may operate in practice.

Table 1: Private-sector engagement in RFMOs

Cooperative Measures	Sustainability associations: a group of fishing corporations may join together to form an association in the interests of achieving sustainable outcomes for the fishery.
	Information sharing: fishing corporations operating in the same sector may share information regarding their catch to

²⁹ Self-imposed initiatives may be adopted by individual fishers for the purpose of demonstrating that they are meeting sustainability standards. Examples of this might include sustainability reporting or the adoption of sustainability policies.

³⁰ Association-based initiatives may include a group of entities which have united with a common mandate for sustainability. Improving the sustainability of the sector may be at stake here.

³¹ Osterblom, above n 10.

³² Refer Figure 2.

	monitor the overall take for the fishery amongst themselves at any given point in the season.
	Monitoring and surveillance: fishing corporations operating in the same sector may take it upon themselves to undertake monitoring and surveillance activities and provide this information to one another, the relevant State or the relevant RFMO.
Benchmarking Measures	Certification schemes: a group of fishing companies may fund the attainment of a sustainability certification for their fishery.
	Self-imposed sustainability reporting: a fishing company or group of companies may take it upon themselves to set their own sustainability goals and publicly report on progress against those goals on an annual basis (or otherwise).
	Transparency: a fishing company may agree to make their documentation publically available in the interests of demonstrating their legitimacy to consumers, in comparison to other companies.
Political Measures	Lobbying: a fishing company or group of companies may undertake political lobbying to achieve a sustainability goal for their fishery.
	Funding research projects: a fishing company or association may target certain States, including in particular developing States, to fund project to build their compliance capacity.
	Engagement in RFMOs: a fishing company or association may gain observer status to an RFMO and use this status to achieve a compliance outcome.

Specific examples of private-sector compliance measures have been examined in literature for their contribution to sustainable leadership;³³ however, there is little academic commentary on the phenomenon of private-sector compliance measures generally.

The thesis argues that if governance regimes are able to leverage and utilise private-sector compliance measures, this will encourage the adoption of the principle of shared responsibility in

³³ R. Quentin Grafton et al, 'Incentive-based approaches to sustainable fisheries' on *NRC Research Press* (15 February 2006) <https://crawford.anu.edu.au/pdf/staff/quentin_grafton/CJFAS_06.pdf>.

AusRFMOs. The ‘transition to sustainable development’³⁴ will most likely occur in an environment when there exists a synergy between public and private regulation.

2.3. Governance Theory and Conceptual Framework

Understanding how the resource-user can contribute to the compliance capability of RFMOs requires an understanding of terminology which has only recently been coined via social science studies.³⁵ Most notably, the work of Henrik Österblom³⁶ has influenced the framework for this thesis and has provided the basis for the assertion that private-sector compliance can drive institutional change in RFMOs as explained below.

2.3.1. Compliance Theory

From a sociological perspective, Tom Tyler³⁷ argues that there are two basic principles that explain why States adopt and implement international laws: the ‘instrumental’ approach and the ‘normative’ approach.³⁸ The instrumental approach reflects the notion of the ‘tragedy of the commons’ and recognises that States are primarily driven by self-interest.³⁹ It suggests that in a fisheries context, compliance is determined by States’ expectations that sanctions will flow from a violation of regulations and therefore their behaviour is dictated by external factors.⁴⁰

Both nationals and States under this view are seen as ‘utility maximising individuals’⁴¹ who compare the costs of non-compliance (both social and economic) to the potential gain to be made from such behaviour.⁴² Under this approach, coercive measures, such as the use of force or removal of fishing privileges, represent the most effective mechanism for ensuring compliance with fisheries regulations.⁴³ The ‘normative’ approach emphasises the voluntary aspect of compliance and places the ability of authorities to secure compliance, ‘in the hands of those they lead’.⁴⁴ In a global fisheries context, under both approaches, industry leaders often determine the effectiveness or otherwise of RFMO compliance measures.

³⁴ *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the General Assembly as an Annex to UN Doc A/42/427 (20 March 1987) (‘The Brundtland Report’) at para 53.

³⁵ Österblom, above n 10.

³⁶ Henrik Österblom, PhD, Associate Professor, Deputy Science Director, STOCKHOLM RESILIENCE CENTRE, Stockholm University, SE-106 91, Stockholm, Sweden

³⁷ Tom Tyler is Professor of Psychology, Department of Psychology, New York University, New York.

³⁸ T. R. Tyler, *Why People Obey the Law* (2006) 165.

³⁹ Olav Schram Stokke, *Governing High Seas Fisheries: the Interplay of Global and Regional Regimes* (2001) 122.

⁴⁰ Jesper Raakjær Nielsen, ‘An Analytical Framework for Studying: Compliance and Legitimacy in Fisheries Management’ (2003) 27(5) *Marine Policy* 425.

⁴¹ Tyler, above n 38.

⁴² Nielsen, above n 40 at 427.

⁴³ Nielsen, above n 40 at 427.

⁴⁴ Tyler, above n 38.

2.3.2. The Principle of Shared Responsibility

The principle of shared responsibility has to date been rarely used in legal literature and the concept is one relatively new to the academic discourse. It is a term that refers to the underexplored problem of allocation of responsibilities amongst multiple states and other actors, and has particular relevance in international environmental law.⁴⁵ In fact, the example of high seas fish stocks management is often cited as demonstrative of the principle of shared responsibility in that it poses challenging questions relating to who is responsible for the over-exploitation of high seas fish stocks.

Shared responsibility seeks to address the challenge where multiple actors contribute to harmful outcomes.⁴⁶ The determination of responsibility for such outcomes then becomes challenging and often, the law does not allow for the shared allocation of responsibility and blame. For example, the LOSC provides that under the principle of flag State responsibility, it is the sole responsibility of States to cooperate via RFMOs for the conservation of global fisheries resources. However, in reality, it is often more likely that key-stone actors, rather than the State, will have the primary ability to influence global fisheries resources.

The principle of shared responsibility refers to situations where a 'multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors'.⁴⁷ International law recognises States as the bearers of responsibility, however, states can only act through individuals or private corporations.⁴⁸ Therefore, international law must address certain questions concerning the interaction between these actors.

It is well recognised that regulatory authorities should constantly be concerned with maintaining the involvement of participants in the regime they administer.⁴⁹ However, there is a gap in legal discourse considering how RFMOs interact with the private-sector. This is particularly true in a compliance sense. As cooperative action between the private-sector and RFMOs increases, so does the strength of the argument that responsibility for regional fisheries failures is shared by both the State (often via the RFMO convention) and the private-sector.

This thesis applies the principle of shared responsibility to suggest that RFMOs will benefit from increased engagement by the private-sector in the regulatory compliance sphere. It seeks to

⁴⁵ A. Nol kaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Shared Responsibility in International Law, p. 1). Cambridge: Cambridge University Press.

⁴⁶ Ibid, at 1.

⁴⁷ Ibid at 7.

⁴⁸ Ibid at 61.

⁴⁹ Ibid at 27.

demonstrate that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance to leverage industry compliance mechanisms and engage with the opportunities they provide. As the frequency and variety of cooperative action between States and non-State actors increases, there is a need for new perspectives that help to address how RFMOs might develop approaches that better serve the interests of injured parties under regional fisheries regimes.⁵⁰

2.3.3. Corporate Social Responsibility

Today, the difference between flag State responsibility and corporate social responsibility in respect of the protection and preservation of global oceans is becoming blurred. Today, global corporations can take more fish than an entire State, and certainly have the capacity to 'buy-out' the resources of an entire State's EEZ.⁵¹ Yet complex and innovative solutions to 'improving'⁵² flag State responsibility and 'strengthening'⁵³ RFMOs continue to reside at the centre of legal discourse on the problem of global fisheries management.

As noted above private-sector compliance measures have evolved significantly in recent decades in an effort to address the deepening crisis of declining global fisheries. Industry has harnessed measures including sustainability reporting, eco-labelling, and monitoring and compliance schemes and to increase their engagement in the international fisheries governance space. Recent evidence suggests that this trend is on the increase.⁵⁴

An examination of the theoretical underpinnings of CSR can assist in how this theory might operate in international fisheries. Andrew Crane⁵⁵ explains that there exists no universally accepted definition of CSR⁵⁶ as it can mean different things depending upon the philosophical or political standpoint from which it is being approached. There are four groups of corporate social responsibility theories, of which two will now be contrasted to demonstrate the variation in approach. The first, 'shareholder value theory' or 'fiduciary capitalism' posits that the only social responsibility of business is to make profit and increase the value of the company for shareholders.⁵⁷ This theory views human beings as individuals who are free in society to make

⁵⁰ Ibid.

⁵¹ The Guardian, above n 7.

⁵² Best Practices for High Seas Fisheries Management: Lessons Learned Marjorie L. Mooney-Seus and Andrew A. Rosenberg EEDP BP 07/03 May 2007.

⁵³ Ibid.

⁵⁴ The Guardian, above n 7.

⁵⁵ Andrew Crane is the George R. Gardiner Professor of Business Ethics, and Director of the Centre of Excellence in Responsible Business at the Schulich School of Business at York University in Toronto. <acrane@schulich.yorku.ca>

⁵⁶ Andrew Crane Guido Palazzo Laura J. Spence Dirk Matten, Contesting the Value of "Creating Shared Value", California Management Review VOL 56, No. 2 2014 at 11.

⁵⁷ Ibid.

their own choices and as such, only those who may directly gain from the activities of the business should drive the management approach of that business.

The second, 'stakeholder theory' posits that groups and individuals who benefit from or who are harmed from the actions of a company should drive the management approach of that business.⁵⁸ Under this theory, it is recognised that economic success in the long run cannot be achieved unless shareholders' interests as well as the interests of, 'employees, customers, suppliers, local communities and others with an interest in companies' activities'⁵⁹ are taken into account. In this way, stakeholder theory is seen as a managerial theory related to business success in contemporary society where stakeholders have multiplied to include non-government organisations, activists, media, communities and many others.⁶⁰

An alternative approach to CSR to those theories described above is that of 'corporate social performance theory'. This theory asserts that corporate responsibility is a process whereby a company responds to social demands with policies, programs and tangible results.⁶¹ This theory highlights that society gives license to business to operate and as such, business must serve society beyond meeting its economic and legal responsibilities.⁶² Business has power and power entails responsibility; as a result, a company may be vulnerable to risk if its approach is contrary to the way its customers expect it to behave. Corporate social performance theory emphasises that companies must accept and work with their communities to integrate community expectations into their management approach.

While some may search for a legal, economic or ethical obligation to establish the premise that companies must act in a responsible manner towards their customers, Crane et al emphasise that many companies adopt a sustainable leadership approach not for reasons of economic gain but merely because they wish to 'do the right thing.' Perhaps companies recognise the position of power that they yield over the consumer and the morals of executives are driving the behaviour of the whole. Whatever the case, it is clear that as Davis⁶³ asserts, 'business needs social acceptance' to be successful and with society continually evolving, business must remain connected to society's expectations.

⁵⁸ Ibid at 19.

⁵⁹ Ibid at 17.

⁶⁰ Crane, above n 56 at 6.

⁶¹ Ibid at 4

⁶² Ibid.

⁶³ *The Oxford Handbook of Corporate Social Responsibility*, Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon, Donald S. Siegel, OUP Oxford, 15 Feb 2008.

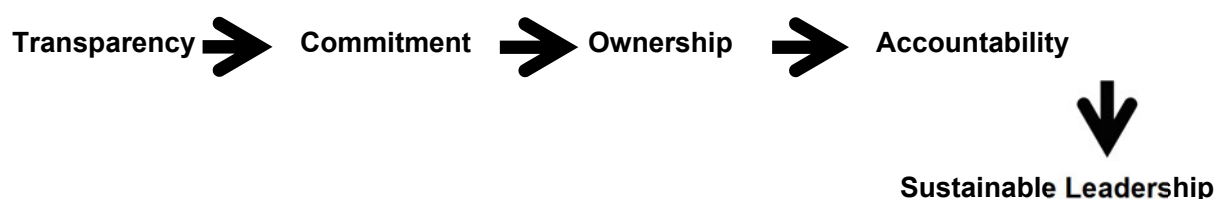
The 'Dexter Dunphy Scale,'⁶⁴ developed in 2003, provides a model for corporate social responsibility which recognises that businesses can no longer continue to operate as usual and must adapt to ensure business, social and ecological sustainability.⁶⁵ Dunphy supports the idea that responsibility for ensuring the sustainability of our global resources can no longer be said to fall solely to government.⁶⁶

Dunphy, then, develops phases within which a business might sit in terms of coming to acceptance of their role in achieving sustainable development. The phases include:

- rejection
- non-responsiveness
- compliance
- efficiency
- strategic pro-activity
- the sustaining corporation⁶⁷

Under this model, a company that is a 'sustaining corporation' is not just complying with a regime, but adopting its own measures to go beyond the requirements of the law. It is here that we can see the application of the Dexter Dunphy Scale to the increasing adoption of private-sector compliance measures. It is clear that today, certain fishing corporations are meeting this standard and are exceeding expectations. However others continue to linger in the traditional model whereby the State directs the corporation to comply or face RFMO enforcement tactics.

Essential steps to progression by the private-sector through the phases of Dunphy's model might be articulated as follows:



Where the corporation begins from the point of transparency, rather than corporate knowledge retention, they can then commence on the path to making a commitment to meeting and understanding their sustainability obligations. When they come to own those obligations, this is

⁶⁴ Dunphy, above n 14.

⁶⁵ Dunphy, above n 14.

⁶⁶ Professor Stuart Hart, Kenan-Flagler Business School, USA

⁶⁷ Suzanne Benn, Dexter Dunphy, Andrew Griffiths, 'Organizational Change for Corporate Sustainability, Understanding Organizational Change' Psychology Press, 2003.

where the true transition point occurs and they become accountable to themselves, rather than the State. This accountability leads to shared responsibility and sustainable leadership whereby the corporation can strengthen existing legal provisions, build fisheries compliance and fill their own governance gaps without requiring international fisheries arrangements to be modified or new agreements to be developed.

This thesis suggests that when keystone actors attain the status of 'sustaining corporations', we will see responsibility for global fisheries appropriately allocated and in turn, the effective governance of high seas fish stocks. This shift may be incentivised by the private-sector being able to frame their operations in a positive ethical light with the consumer, thereby enabling them to gain a business edge and often charge more for the product being sourced.⁶⁸ By claiming the impacts of their activities, it is demonstrated, corporations can gain a business advantage as well as contribute to the sustainability of their operation.

In an era where traditional governance frameworks on the high seas have failed to achieve sustainable global fish stocks, it is argued that the ability and efforts of corporations to fill gaps and contribute to improving the status of regulatory regimes is growing increasingly important. As with other industries, certification schemes and reporting initiatives instigated by industry in response to CSR obligations are growing increasingly popular in an international fisheries context. CSR can be seen as a linchpin for achieving positive behavioural change in the corporations responsible for the depletion of the resource with which this thesis is concerned. It is the objective of this thesis to examine the potential of CSR to counter the tragic effects of the freedom to fish on the high seas.

2.4. Methodology

This thesis aims to make recommendations for reform to assist AusRFMOs become more adaptive and resilient to the challenges posed by non-compliance. It achieves this by first testing the hypothesis that there are inconsistencies among AusRFMOs in their adoption of compliance measures. It then suggests that AusRFMOs may increase compliance rates by improving industry perceptions of regulatory legitimacy in AusRFMOs.

This thesis starts from the presumption that a combination of sustainable leadership by corporations *and* flag State responsibility exists today to 'govern' global fisheries. This has been demonstrated largely via the work of Henrik Österblom and co-authors to such works including,

⁶⁸ Crane, above n 56 at 24.

notably, Rashid Sumaila,⁶⁹ as already referred to throughout the course of this thesis. The presumption also allows for the problem of RFMO compliance to be viewed as a challenge to both the flag State, and the resource user, under the principle of shared responsibility.⁷⁰

This thesis posits that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance, to leverage industry compliance mechanisms and engage with the opportunities they provide. With wild-capture fisheries facing overexploitation, this thesis asserts that best-practice for AusRFMOs in a compliance sphere can and should encompass private-sector compliance measures.

2.4.1. AusRFMOs Analysed

At the time of writing, there are 18 RFMOs in operation globally as demonstrated in Table 1 below. While a definition of RFMOs has previously been provided, it is also worth noting that RFMOs have 'competence under international law to adopt legally binding conservation and management measures regarding fisheries.'⁷¹ Also, the area to which this legal competence applies includes a part of the high seas.⁷²

Some have suggested that it is useful to identify three different basic types of RFMOs:

- General RFMOs,⁷³
- Tuna RFMOs,⁷⁴ and
- Specialised RFMOs.⁷⁵

The RFMOs under analysis in this thesis include the following general RFMOs:

- Commission for the Conservation of Antarctic Living Marine Resources (CCAMLR)
- South Pacific Regional Fisheries Management Organisation (SPRFMO)
- Southern Indian Ocean Fisheries Commission (SIOFA)

The following RFMOs under analysis in this thesis are Tuna RFMOs:

⁶⁹ Institute for the Oceans and Fisheries, University of British Columbia. Profile available online at: <http://www.fisheries.ubc.ca/faculty-staff/rashid-sumaila>

⁷⁰ Nollkaemper, above n 45.

⁷¹ Stefan Asmundsson, 'Regional Fisheries Management Organisations (RFMOs): Who are they, what is their geographic coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialised RFMOs?' paper submitted to the 2016 meeting of the Convention on Biological Diversity. Available online at: <<https://www.cbd.int/doc/meetings/mar/soiom-2016-01/other/soiom-2016-01-fao-19-en.pdf>>

⁷² Ibid.

⁷³ Rather than having legal competence regarding specific species or groups of species, 'general RFMOs' can adopt measures for most fisheries in their respective areas. Stefan Asmundsson, 'Regional Fisheries Management Organisations (RFMOs): Who are they, what is their geographic coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialised RFMOs?' paper submitted to the 2016 meeting of the Convention on Biological Diversity.

⁷⁴ Because of the distinct nature of tuna fisheries, all over the world specific RFMOs have been established explicitly to manage fisheries for tuna and tuna-like species.

⁷⁵ Specialised RFMOs have very specific mandates that relate to a certain type of fish species. For example, anadromous fish.

- Indian Ocean Tuna Commission (IOTC)
- Commission for the Conservation of Southern Bluefin Tuna (CCSBT)
- Western and Central Pacific Fisheries Commission (WCPFC)

Interestingly, two of the most recently formed RFMOs are AusRFMOs: the SIOFA and the SPRFMO both of which entered into force in 2012.⁷⁶ Australia's key priorities in these regions include implementing best-practice approaches from the instigation of these agreements and continuing to work with a coalition of parties towards sustainable management of the species concerned.⁷⁷

2.4.2. Research Approach

This thesis seeks to demonstrate that AusRFMOs are currently facing critical challenges regarding their compliance capacity and that private-sector compliance measures represent a practical opportunity to address these challenges. As such, the research approach adopted in this thesis tests the hypothesis that there are significant inconsistencies between and amongst AusRFMOs in their adoption of conservation measures to support their compliance regime.

The thesis demonstrates that AusRFMOs have varied and inconsistent approaches to adopting compliance measures by collecting data on the current conservation measures of the six AusRFMOs currently in existence. Then, a comparison of how complete and comprehensive their respective suite of compliance enforcement mechanisms shows that while some AusRFMOs are doing well to implement the full range of compliance measures available to them, others are not as advanced.

Once it is established that there are inconsistencies across the AusRFMO collective compliance regime, the final chapters of this thesis demonstrate how private-sector compliance measures represent an opportunity to promote improved compliance with AusRFMOs. The following stages clarify the practical actions undertaken in the course of this research project to demonstrate whether the hypothesis could be met.

Stage 1:

Information was collected on each of the RFMOs under examination including member States, historical evolution, and fisheries regulated. An analysis was undertaken of the performance

⁷⁶ Australian Government Department of Agriculture, 'International Fisheries' (Web Page) <<http://www.agriculture.gov.au/fisheries/international/>>.

⁷⁷ Ibid.

reviews published by AusRFMOs and a summary was made of the key compliance issues facing each organisation. This summary served to highlight the key areas for improvement identified for each and provide a status update on how AusRFMOs are addressing the issues reflected in these reviews. This data was gained by accessing information including the founding agreements of the RFMO as well as their published conservation measures available online.

Stage 2:

The types of measures that might constitute 'private-sector compliance measures' were considered and a figure was developed to clarify the different categories of these measures as they are assessed in the context of this thesis. This figure, Figure 1, outlines 'cooperative', 'benchmarking' and 'political' as categories for bottom-up compliance measures which may be adopted by fishing corporations.

Stage 3:

Next a summary of the most recent performance reviews of AusRFMOs was undertaken to determine where the RFMO was placed in comparison to the other AusRFMOs under examination in the thesis. A ranking of 'basic', 'satisfactory' or 'established' was allocated to each RFMO in terms of their compliance performance by using pre-existing findings of their performance review.

Stage 4:

A comprehensive and up-to-date desktop assessment of the compliance measures in existence in each AusRFMO was collated and tabulated. This included consideration of any future compliance measures which may have been tabled at meetings of the AusRFMOs. Data was presented in Table 3.

Stage 5:

Finally, the ways in which private-sector compliance measures may fill certain gaps in the compliance capacity of AusRFMOs was considered and specific recommendations made for how this process might commence. Private-sector compliance measures were shown to have promise in areas of compliance enforcement that AusRFMOs had have been unable or unwilling to address.

As a group of organisations whose collective decisions impact on the strength of the wider compliance enforcement capacity of a region, it is critical that AusRFMOs work together if they are to achieve any real impact on the health of global fish stocks. Where the findings from this thesis demonstrate that there remain areas for improvement, it is suggested that an alternative vision of compliance enforcement, where the resource-user shares responsibility with the regulator to achieve compliance with conservation measures, holds significant promise to strengthen connections and compliance enforcement across AusRFMOs.

2.5. Conclusion

This chapter has introduced new terminology for the purposes of undertaking this study which include the notion of 'keystone actors', or large international organisations that have a significant influence in global fisheries management. This concept is critical to understanding how private-sector compliance measures can and should be taken into account in supporting the work that AusRFMOs have to do.

The chapter has also explained how sustainable leadership is given effect via private-sector compliance measures and that underlying both of these concepts is the international legal principle of shared responsibility. By suggesting that both the private-sector and the relevant governmental body share responsibility for the maintenance of the resource, the principle of shared responsibility holds significant promise for the future of a high-seas fisheries regime lacking 'teeth'.

This thesis is concerned with whether there are positive outcomes to be gained where the private-sector works alongside the RFMO in an effort to achieve sustainable fisheries. It is suggested that continually drafting new layers of treaty-type agreements in an attempt to improve fisheries governance is not the most effective use of energy and resources. To re-direct efforts in the most effective manner to achieve sustainable fisheries we must turn to promote sustainable leadership via CSR, to recognise the influence of 'keystone actors' and to understand how private-sector compliance measures can give effect to our shared goals for regional fisheries.

Table. 2. Regional Fisheries Management Organisations Currently in Force (AusRFMOs 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
1982	Convention on the Conservation of Antarctic Marine Living Resources	CCAMLR
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
1994	Commission for the Conservation of Southern Bluefin Tuna	CCSBT
1996	Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea	CCBSP
1996	Indian Ocean Tuna Commission	IOTC
2003	South East Atlantic Fisheries Organization	SEAFO
2004	Western and Central Pacific Fisheries Commission	WCPFC
2012	South Pacific Regional Fisheries Management Organisation	SPRFMO
2012	South Indian Ocean Fisheries Agreement	SIOFA

Chapter 3

The Mandate and Performance of AusRFMOs

3.1. Introduction

Effective fisheries management is the responsibility of fishers, fisheries management authorities, fishery scientists and other groups engaging in the regulation and exploitation of the resource.¹ The implications of this reality are that fisheries managers are not always best placed to take action to address problems within a particular fishery, or to fully understand the underlying causes of the problem in order to effectively address the situation.² Co-operation and communication between fisheries user-groups and regulators to ensure open channels for information exchange is therefore fundamental to achieving sustainable global fisheries.³

Damage to ecosystems and global marine environments as a result of unsustainable fishing approaches is, in a contemporary fishing climate, one of the major obstacles to effective fisheries management.⁴ Many commercial fishing operators target predatory species such as tuna; in some cases leading to an 80% reduction in tuna populations.⁵ 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.⁶

Contributing to this exploitation, the thriving aquaculture industry today requires a constant supply of prey to be caught and ground into meal to 'grow' fish bred within captivity.⁷ Inevitably, it is not fishing practices alone that reduce stocks 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.⁸

¹ Cochrane, K.L. (ed.) 'A fishery managers guidebook. Management measures and their application'. *FAO Fisheries Technical Paper*. No. 424. Rome, FAO. 2002.

² Ibid.

³ Andrew R Smith, Papers presented at the Expert Consultation on Sustainable Fishing Technologies and Practices St. John's, Newfoundland, Canada, 1 - 6 March 1998 pp 145.

⁴ 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.

⁵ Margot L. Stiles et al, *Hungry Oceans: What Happens When The Prey Is Gone?* (2009) 4.

⁶ Ibid.

⁷ Ibid.

⁸ 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.

So what is the role of fisheries managers in addressing this situation? In his Guidebook for Fisheries Managers, Kevern Cochrane explains that, 'all too often the fisheries manager remains either unaware of the state of the resources, or fails to act sufficiently as the fisheries slip further and further into decay and crisis, or both. This is rarely, if ever, a deliberate choice...'⁹

Cochrane suggests that a lack of available information, resources and a failure to understand the complexity of regulation are amongst the issues faced by fisheries managers which prevent effective governance. Escalating this problem is the fact that there exists no agreed definition of 'fisheries management' and the concept itself is one which can differ dramatically from regime to regime.

The ability of the regulatory organisation to employ incentives to encourage the voluntary engagement of the resource-user in compliance efforts has proven itself to be an effective alternative where traditional governance approaches have failed.¹⁰ There is an increasing body of evidence to suggest that leveraging the knowledge, information and skills of the resource-user to tackle new threats to the sustainability of a fishery is both logical and effective.¹¹

This thesis argues that where the regulator does not take into account the governance contribution of the resource-user and where the resource-user does not demonstrate sustainable leadership, this can pose a significant risk to the sustainability of a fisheries regime. One reason why engaging the resource-user in implementing regulatory measures has proven so effective may be that in doing so, responsibility transfer occurs, empowering those who are well-placed to address the problem.

Instead of stock level declines and depleted fisheries being viewed as a problem for which the regulator is to blame, responsibility transfer occurs and the onus is shared for the consequences of actions.¹² Critics have argued that a 'transition to sustainable development'¹³ must occur if governments are to ensure the sustainable development of life on our planet.

It is argued that commentary on reform to fisheries governance all too often considers legal and institutional efforts to advance governance without recognising the importance of engaging the sector itself. If, as many commentators continue to assert, a holistic and multi-sectoral and

⁹ Cochrane above n 1.

¹⁰ Crona B, Käll S, Van Holt T (2019) Fishery Improvement Projects as a governance tool for fisheries sustainability: A global comparative analysis. *PLoS ONE* 14(10).

¹¹ Ibid.

¹² Ibid.

¹³ *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the General Assembly as an Annex to UN Doc A/42/427 (20 March 1987) ('The Brundtland Report') at para 53.

collaborative solution provides the best option to achieving effective reform to fisheries governance, then further consideration of the role of the resource-user will be beneficial.

This chapter begins by clarifying some of the technicalities of how AusRFMOs operate. This includes exploring the process for adopting compliance-related conservation measures and the impact of such measures. It also explains the different types of membership to AusRFMOs including: 'contracting parties', 'cooperating non-contracting parties' and 'non-cooperating parties'.

This chapter then explores the operation of the individual AusRFMOs in question. This includes their mandates, geographic remit, States parties and, in particular, how they are currently performing with regards to achieving compliance. All bar one of the AusRFMOs under examination have published at least one performance review¹⁴ which will be analysed and used to gain a current perspective on the key compliance issues impacting each.

In an era where traditional governance frameworks on the high seas have largely failed to achieve sustainable global fish stocks, this chapter concludes that the ability and efforts of the private-sector to fill gaps and contribute to improving the status of regulatory regimes is growing increasingly important.

The chapter emphasises that if RFMOs are to protect against fisheries collapse, climate change, and the wide range of other factors impacting on their ability to maintaining stable and sustainable stock levels, it is in their interest to encourage a cooperative and communicative approach with the resource-users they regulate.

3.2. Regulatory framework of AusRFMOs

As explained in Chapter 1, RFMOs are, 'intergovernmental fisheries organisations or arrangements...that have the competence to establish fisheries conservation and management measures'.¹⁵ 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. RFMOs also have a secretariat that operates under the governing body of States to give effect to their decisions and functions.¹⁶

¹⁴ All AusRFMOs except the Southern Indian Ocean Fisheries Agreement have undertaken a review of their performance to date.

¹⁵ 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.

¹⁶ 'What are Regional Fisheries Bodies?', *Food and Agriculture Organisation of the United Nations*, Fisheries and Aquaculture, <<http://www.fao.org/fishery/topic/16800/en>>

RFMOs are a sub-group within the larger group of RFBs. RFBs also consist of a group of States or organisations that aim to work together towards conservation of fish stocks.¹⁷ They have varying mandates and some may be responsible for the conservation of associated species such as sea birds or turtles.¹⁸ However most RFBs have an advisory mandate and provide for mechanisms or decisions that are non-binding on their members. It is their unique ability to develop conservation measures to which States Parties must adhere that sets RFMOs apart from other RFBs.¹⁹

There are different types of membership that apply to RFMOs and accordingly, different legal obligations are attached. First, Contracting Parties (CPs) or Members. CPs have a legal obligation under international law to adhere to the conservation measures that they accept upon becoming a party to a RFMO. In this way, enforcement action can be brought against a CP in the event of non-compliance.

However in the case of non-Contracting Parties (NCPs), RFMOs have no legal standing to enforce their conservation measures in the case of non-compliance.²⁰ 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.²¹

In addition, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter referred to as 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.²²

There is some debate as to the extent to which RFMOs have the jurisdiction to create compliance mechanisms that apply to NCPs.²³ Despite this, certain RFMOs *have* adopted

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ 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>>

²⁰ This is because States must voluntarily agree to adopt and implement RFMO conservation measures. If a States chooses not to then they cannot be penalised, however there are exceptions to the rule. R. Quentin Grafton et al, *Handbook of Marine Fisheries Conservation and Management* (2010) 160.

²¹ *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), article 18(1).

²² *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).

²³ 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 Paragraphs 12.95 – 12.100 of the 2010 Commission Report available on line at <http://www.ccamlr.org/pu/e/e_pubs/cr/09/i12.pdf>.

conservation measures which aim to penalise non-compliant NCPs²⁴ and there are examples of NCPs demonstrating an acceptance of their responsibility to RFMOs by ordering their vessels to comply with these measures.²⁵

In a report entitled 'Practice of RFMOs Regarding Non-Members', Daniel Owen²⁶ states that all RFMOs should require CNCPs to confirm their commitment to 'respect the Commission's conservation and management measures'.²⁷ As a general rule, he argues, all the conservation and management measures of the RFMO in question are to be complied with by CNPs.²⁸

Where a measure refers only to members, there may be some difficulty determining how it will apply to CNCPs 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.

Another group of parties to an RFMO, known as 'cooperating non-contracting parties' (CNCPs), are States parties who have committed to complying with the conservation measures of the organisation but who have yet to ratify the relevant Agreement. These CNCPs can also act in a manner which is non-compliant with the conservation measures of the organisation.

To encourage compliance, many RFMOs have invited NCPs to accept CNCP status.²⁹ It is up to the individual RFMO to determine matters such as how CNCPs 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 have to CNCPs, with certain RFMOs only recognising CNCPs for their participation in specific conservation measures.³⁰

²⁴ 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>>.

²⁵ Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) LI *Netherlands International Law Review* 41, 62.

²⁶ 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.

²⁷ 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, 12.

²⁸ Ibid.

²⁹ Food and Agriculture Organisation of the United Nations, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2002) accessed on line at <http://www.fao.org/docrep/008/a0098e/a0098e00.htm>.

³⁰ Owen, above n 27.

In recent times, 'co-management' in fisheries governance has received increased attention whereby stakeholders play a role in decision-making and this has been flagged as an opportunity for reform in RFMOs.³¹ Many RFMOs have a mandate to consider biodiversity and ecologically sustainable development in their decision-making, however this objective can be difficult to implement.

3.3. Performance Reviews of AusRFMOs

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. However RFMOs must function under international principles established via the LOSC and the UNFSA. 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.

The challenges faced by RFMOs have most recently been highlighted by the publication of individual RFMO performance reviews; documents commonly compiled by a panel of experts and other relevant individuals which reflect upon the performance of the RFMO against specific objectives including resource management. These reviews have been prompted by a range of factors, including discussions at the Committee on Fisheries (COFI),³² review conferences of the UNFSA, as well as a series of meetings of the five RFMOs that manage the world's tuna fisheries.

The 2006 UNFSA Review Conference urged RFMOs to undergo performance reviews on an urgent basis and to publish results accordingly.³³ In 2007, several members of COFI supported the idea of performance reviews as an opportunity to develop 'common criteria for the evaluation of core functions and objection'³⁴ In 2007, at the annual meeting of the UNFSA Review Conference key themes, parameters and criteria which should be assessed in performance reviews were discussed and agreed. These criteria were published by the UNFAO and represent the 'gold standard' for RFMO performance reviews.³⁵

³¹ Ibid.

³² FAO, Report of the Twenty-Sixth Session of the Committee on Fisheries, Rome, 7-11 March 2005, FAO Fisheries Report No. 780 (FIPL/R780), FAO: Rome, 2005.

³³ *Recasting Transboundary Fisheries Management Arrangements In Light of Sustainable Development*, Legal Aspects of Sustainable Development, Russell and Vanderzwaag (eds).

³⁴ FAO, Report of the Twenty-Seventh Session of the Committee on Fisheries, Rome, 5-9 March 2007, FAO Fisheries Report No. 830 (FIEL/R830), FAO: Rome, 2007, p 14.

³⁵ Ibid.

Today, the practice of undertaking performance reviews has been widely adopted by RFMOs and, not unexpectedly, these reviews have been the subject of much debate and scrutiny. The results of assessments have reflected wide discrepancies in levels of performance across RFMOs.³⁶ While the performance review of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for example indicated positive results, the performance review of the International Commission for the Conservation of Atlantic Tunas exposed the RFMO as an ‘international disgrace’³⁷.

The performance reviews of many other RFMOs have highlighted significant issues to be addressed and recommended that large-scale changes be adopted in the organisation to provide for the future sustainability of the fisheries concerned.³⁸ In 2015, a circular commissioned by the UN FAO and authored by Drs Peter Szigeti and Gail Lugten entitled ‘The implementation of performance review reports by regional fishery bodies, 2004–2014’³⁹ was released. As an information paper, rather than an opinion piece, the circular provides an overview of the evolution of performance reviews and goes on to study the reviews of regional fisheries bodies that had been undertaken at that date.

Note that this report considered all regional fisheries *bodies* (not just RFMOs) which this thesis has previously explained includes RFMOs *as well as* organisations that do not have the capacity to make legally binding conservation measures. At 2014, 19 regional fisheries bodies had undertaken at least one performance review which the United Nations General Assembly had clarified should use transparent criteria, and some element of independent evaluation.⁴⁰ In addition, the results should be made publically available.⁴¹

In their 2015 circular, Szigeti and Lugten noted that it is, ‘sometimes hard to determine what counts as an independent, external performance review. Assessments and strategic plans for fisheries management, in the international sphere as well as for waters under coastal State jurisdiction, are nothing new.’ As was reported, many of the 19 performance reviews undertaken stated that they had been undertaken by an ‘external’ or ‘independent’ review panel however in reality, the panels were often a mix of internal and external individuals.

³⁶ International Programme on the State of the Ocean, ‘The Global State of the Ocean; Interactions Between Stresses, Impacts and Some Potential Solutions’ Synthesis papers from the International Programme on the State of the Ocean 2011 and 2012 Workshops. Marine Pollution Bulletin, 74, Issue 2, 495.

³⁷ Ibid.

³⁸ Ibid.

³⁹ FAO. 2015. The implementation of performance review reports by regional fishery bodies, 2004–2014, by Péter D. Szigeti and Gail L. Lugten. FAO Fisheries and Aquaculture Circular No. 1108. Rome, Italy.

⁴⁰ Ibid.

⁴¹ Ibid.

These findings should be taken into account when considering the recommendations of RFMO performance reviews, and indeed this chapter remains cognisant of the need to continually query the motivations behind certain findings. Despite this, performance reviews remain an authoritative source of information (and in fact one of the *only* sources of information) on how RFMOs are progressing in efforts to improve their compliance regimes.

In March 2019, a group of environmental non-governmental organisations published their submission⁴² to the '14th round of informal consultations of States Parties to the UN Fish Stocks Agreement (UNFSA) on Performance reviews of regional fisheries management organizations and arrangements'. Their submission undertook a review of the consistency of information contained in performance reviews across RFMOs.

The submission communicated their view that key provisions of the UNFSA 'continue to be far from effectively implemented by most if not all RFMOs'.⁴³ They recommended that there needs to be a regular review of the content of RFMO performance reviews and how they have implemented the findings in the reports. They also recommended that any RFMO performance review should include comments from member states, observers and the scientific community.⁴⁴

It would appear then that RFMO performance reviews, while desirable and important for the progression of regional management regimes, should be explored for the composition of their panel and contributing authors prior to making any firm conclusions on their implications. This thesis will continue to draw attention to this matter as it now turns to examine the mandate of the six AusRFMOs under examination in this thesis.

This next section discusses the findings of each AusRFMOs' most recent performance review. This section aims to highlight the unique compliance challenges facing each of the AusRFMOs under examination which will then be specifically addressed in the final chapter of this thesis: 'Conclusions and Recommendations'.

3.3.1. Commission for the Conservation of Antarctic Living Marine Resources

The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) was established on 7 April 1982 in response to, *inter alia*, fears that the krill fishery would become the

⁴² *Performance Reviews of Regional Fisheries Management Organisations and Arrangements*, available online at <<http://www.savethehighseas.org/wp-content/uploads/2019/04/Joint-observer-submission-on-Performance-Reviews-of-RFMOs-March-30-2019-final.pdf>>.

⁴³ Ibid.

⁴⁴ Ibid.

next in a line of species to be overfished in the Antarctic.⁴⁵ 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.⁴⁶

The CCAMLR manages populations of finfish, molluscs, crustacean and sea birds and explicitly excludes whales and seals which are subject to other international conventions.⁴⁷ The CCAMLR Convention Area surrounds Antarctica and extends to areas of the Southern Ocean south of the Antarctic Convergence.⁴⁸ The Southern Ocean itself represents approximately 15 percent of the world's oceans.⁴⁹

At the time of writing the CCAMLR has 26 members, or CPs, and 10 acceding States which include States that have signed but not ratified the agreement. The acceding states are legally bound by the terms of the Convention and so are considered CPs for the purposes of this thesis. The CCAMLR can also develop cooperative working relationships with intergovernmental and non-governmental organisations including entering into formal agreement with them.

At its Twenty-sixth meeting in 2007, CCAMLR decided to undertake a performance review during 2008.⁵⁰ The review was 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.⁵¹ In general, the review noted that in recent years, there had been a good degree of compliance by CPs and that levels of compliance actually increased with time.⁵² While there continued to be breaches by CPs, many of these appeared to be of a "technical nature" rather than physical acts of illegal fishing for instance.⁵³

The first CCAMLR Performance Review went on to state that despite the combined effect of CCAMLR's provisions relating to illegal, unreported and unregulated (IUU) fishing,⁵⁴ this practice

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ 'About CCAMLR', Commission for the Conservation of Marine Living Resources, <https://www.ccamlr.org/en/organisation> accessed 5 August 2019.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ CCAMLR, *Report of the CCAMLR Performance Review Panel* (2007) <<http://www.ccamlr.org/pu/E/revpanrep.htm>> at 21 May 2010.

⁵¹ Ibid.

⁵² Amb. 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>>

⁵³ Ibid.

⁵⁴ 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.

continued to be a significant problem, specifically in respect of localised areas in CCAMLR waters.⁵⁵

In reality, the report noted that a major problem was the failure of certain parties to discharge conservation and management obligations.⁵⁶ The first performance review of the CCAMLR proposed that the organisation should ensure that it continues to improve the efficiency, reach and use of compliance enforcement tools.

The second CCAMLR Performance Review was undertaken in early 2017 when Commission Members agreed to an eight-person panel⁵⁷ to undertake the review comprising:

- four experts from CCAMLR contracting parties,
- two external experts,
- one representative from the Antarctic Treaty Secretariat's Committee for Environmental Protection, and
- one representative from an environmental non-governmental organisation.⁵⁸

The panel submitted its report to the CCAMLR at its annual meeting in October 2017 and clarified that the review's purpose was to evaluate the progress of the CCAMLR in implementing the findings of the first CCAMLR Performance Review.⁵⁹ With respect to compliance, the Panel found that the CCAMLR Compliance Evaluation Procedure⁶⁰ could be strengthened by requiring enhanced reporting on the actions taken by states to address infringements.⁶¹ Where, for example, a Contracting Party failed to report on follow-up investigations, such failures should be identified as 'serious, frequent or persistent non-compliance'.⁶²

With respect to the CCAMLR IUU vessel listing procedures, the Panel recommended that these could be strengthened to provide for listing of 'stateless' fishing vessels.⁶³ In addition, any vessel owned by an individual or company named on the IUU vessel list could also be added to the list by association.⁶⁴

Recommendation 16 of the report suggested that the CCAMLR encourage Members to undertake bilateral and sub-regional actions to achieve effective cooperation by non-Members

⁵⁵ Amb. Jorge Berguño, above n 52, 64.

⁵⁶ Amb. Jorge Berguño, above n 52.

⁵⁷ Second Performance Review of CCAMLR, *Final Report of the Panel*, 23 August 2017, available online at <<https://www.ccamlr.org/en/organisation/second-ccamlr-performance-review>>

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid at 4.

⁶² Ibid at 4

⁶³ Ibid.

⁶⁴ Ibid.

with CCAMLR conservation measures.⁶⁵ To this end CCAMLR should also encourage Members to discourage non-Members from undermining the conservation measures of the CCAMLR.⁶⁶ A record of such efforts should be maintained by the CCAMLR to track requests for increased engagement.

3.3.2. Indian Ocean Tuna Commission

The Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement) 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. This relationship, however, has been reported to have caused significant problems for the IOTC in a budgetary context and in terms of participation by relevant flag States.⁶⁷

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.⁶⁸ In addition to the range of tuna stocks under the purview of the Commission,⁶⁹ the Secretariat also collates data on non-target, associated and dependent species which may be affected by tuna fishing in the Indian Ocean.⁷⁰

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...”⁷¹ However the fulfilment of this objective has proven difficult for the IOTC and its CPs.⁷² 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.⁷³

Membership to the IOTC is open to Indian Ocean coastal countries and countries whose vessels are fishing for tuna in the Indian Ocean.⁷⁴ At the time of writing there are 31 Contracting Parties (Members) to the IOTC including Australia.⁷⁵ The IOTC also has five cooperating non-contracting

⁶⁵ Ibid at 5.

⁶⁶ Including by strengthening port and market-related measures, as well as measures taken against nationals.

⁶⁷ Anonymous (2009). Report of the IOTC Performance Review Panel: January 2009. *Indian Ocean Tuna Commission*, 1.

⁶⁸ Indian Ocean Tuna Commission, *Welcome to the IOTC*, (Web Page) <www.iotc.org>.

⁶⁹ Indian Ocean Tuna Commission, *About IOTC: Species under IOTC management*, (Web Page), <http://www.iotc.org>.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² 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.

⁷³ IOTC Performance Review, above n 6767, 36.

⁷⁴ So long as those countries are members of the United Nations.

⁷⁵ Indian Ocean Tuna Commission, *Structure of the Commission*, (Web Page), <https://iotc.org/about-iotc/structure-commission>.

parties which are states with a 'real interest' in Indian Ocean fisheries.⁷⁶ These States, such as Liberia and Senegal, do not enjoy voting rights and are subject to the same regulations as full Members.⁷⁷ It should also be noted that while Taiwan cooperatively participates with the IOTC, they are not a member to the Commission as they are not members of the United Nations.

The IOTC committed to undertaking its first performance review in 2007 through an evaluation of any weaknesses and identification of necessary actions to improve efficiency.⁷⁸ The compliance concerns facing the IOTC at that time are highlighted throughout the 2009 'Report of the Performance Review Panel'.⁷⁹ The review demonstrated that low levels of compliance with IOTC measures were commonplace and limited action had been taken to remedy the situation.⁸⁰ For example, the IOTC IUU Vessel List applied only to NCPs with no sanctions or penalties available to address non-compliance.⁸¹

This first Performance Review of the IOTC suggested that the ability of their Compliance Committee to address and monitor non-compliance was very limited.⁸² The Report proposed that mechanisms to sanction non-compliance should be developed and the IUU vessel lists should be amended to allow for the inclusion of vessels flagged to CPs.⁸³

In 2014, the IOTC agreed to undertake its second performance review with members of the panel to include:

- An independent Chairperson,
- Contracting Parties from both coastal States and distant water fishing nations,
- A science expert not affiliated with the IOTC Membership,
- Members from environmental non-governmental organisations,
- Members from other RFMOs.⁸⁴

The second Report, published in 2015, noted that the functions of the IOTC Compliance Committee were only consolidated into the IOTC Rules of Procedure in 2014. The Report noted that 'it has only been in the recent past that the Commission has taken a more active approach to compliance of its members.'⁸⁵

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ IOTC Performance Review, above n 67.

⁷⁹ IOTC Performance Review, above n 67.

⁸⁰ IOTC Performance Review, above n 67.

⁸¹ IOTC Performance Review, above n 67.

⁸² *Report of the 2nd IOTC Performance Review*, Seychelles 2–6 February & 14–18 December 2015. IOTC–2016–PRIOTC02.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid at 11.

The 2015 recommended that the IOTC Agreement should be amended or replaced to incorporate modern fisheries management principles and compliance provisions.⁸⁶ While addressing compliance-related recommendations from the first Review was considered to be an ongoing process, the Panel commended the implementation by the IOTC of a transparent process for reviewing compliance by CPs. It was noted however that the process did not assess compliance by members against individual obligations.⁸⁷

The Panel recommended that the IOTC should establish a scheme of responses to non-compliance in relation to Member's obligations and identify reasons for non-compliance.⁸⁸ In this way, the need for capacity assistance or whether it is wilful or repeated non-compliance, should then guide the response taken by the Commission. An online reporting tool was also suggested as an option to automate the identification of non-compliance.⁸⁹

The Panel recommended that the Compliance Committee strengthen its compliance monitoring in relation to its timeliness and the accuracy of data submissions.⁹⁰ In addition, it should take action to support the implementation of requirements in accordance with the FAO Agreement on Port State Measures. The priority though, for the Commission, in relation to compliance measures appears to be the need for review of monitoring, control and surveillance measures to deter non-compliance and IUU fishing.⁹¹

3.3.3. Commission for the Conservation of Southern Bluefin Tuna

The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) arose out of a voluntary agreement between Australia, New Zealand and Japan established in the 1980s. In the early 1990s, the three States decided to formalise this agreement and in 1993 they signed a Convention creating the CCSBT.⁹² 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.⁹³

The CCSBT does not have a specific geographic remit and instead seeks to manage a specific globally-significant species: southern Bluefin tuna. The most recent States to join the Extended Commission as CPs include the European Union, in 2015 and South Africa in 2016.

⁸⁶ Ibid at 23.

⁸⁷ Ibid at 26.

⁸⁸ Commission for the Conservation of Southern Bluefin Tuna, *Report of the Performance Review Working Group*, 2016, available online at <https://www.iotc.org/sites/default/files/documents/2016/04/IOTC-2016-PRIOCTC02-RE - FINAL_0.pdf>

⁸⁹ Ibid.

⁹⁰ Ibid at 36.

⁹¹ Ibid at 35.

⁹² Commission for the Conservation of Southern Bluefin Tuna, *About the Commission* (Web Page) <www.ccsbt.org>.

⁹³ Such States include the Republic of Korea, Indonesia and the Fishing Entity of Taiwan.

In July 2008, the CCSBT underwent its first 'performance review' which constituted a self-assessment of its performance.⁹⁴ This assessment was 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 organisation.⁹⁵ 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.⁹⁶

The self-assessment conducted by the CCSBT in 2008 revealed that the RFMO had struggled to fulfil its original mandate to conserve and optimally utilize southern bluefin tuna (SBT) stocks.⁹⁷ 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 was found to have undermined the health of the resource and ability of the CCSBT to take adequate management measures.⁹⁸

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..."⁹⁹ 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.¹⁰⁰

In 2008, the Commission did not have a suite of measures in place relating to compliance. 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.¹⁰¹

The second performance review of the CCSBT assessed the performance of the RFMO from 2009-2013 and was released in 2014.¹⁰² It was undertaken by two independent experts: Dr. Serge Garcia¹⁰³ and Holly Koehler¹⁰⁴ who found that the CCSBT had made progress in regards

⁹⁴ 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>

⁹⁵ 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>

⁹⁶ *Ibid.*, 4.

⁹⁷ Commission for the Conservation of Southern Bluefin Tuna, *Independent Performance Review*, 2014. Available on line at <http://www.tuna-org.org/Documents/2014_CCSBT_Independent_Performance_Review.pdf>.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* 4.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* 11.

¹⁰² *Ibid.*

¹⁰³ Chair of the Fisheries Expert Group of the IUCN Commission on Ecosystem Management (IUCN-CEM-FEG)

¹⁰⁴ Vice President for Policy and Outreach at the International Seafood Sustainability Foundation (ISSF).

to its compliance monitoring system.¹⁰⁵ While the 2008 Review noted an ‘urgent need’ for the CCSBT to finalise longer term monitoring, control and surveillance measures, it was found that in 2014 significant progress had been made in this regard. In particular, the design and function of the CCSBT Compliance Committee had been clarified and a Compliance Action Plan had been developed.¹⁰⁶

The CCSBT Compliance Action Plan¹⁰⁷ provided a framework to improve compliance and address priority compliance risks within the Commission. The RFMO has adopted three compliance policies in accordance with the Plan which include:

- ‘Minimum Performance Requirements to Meet CCSBT Obligations’,
- ‘Corrective Actions Policy’, and
- ‘MCS Information Collection and Sharing’.¹⁰⁸

The CCSBT has also implemented a Quality Assurance Review (QAR) program to help members identify how well they are performing with respect to their CCSBT obligations and provide recommendations on where improvement required.¹⁰⁹ Despite the development of these new compliance measures, the 2014 Review found that the CCSBT should continue to improve its MCS measures and take additional steps to harmonise its MCS measures with other RFMOs.

3.3.4. Western and Central Pacific Fisheries Commission

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.¹¹⁰ The main object of the Commission is to enhance the provisions of the Agreement amongst CPs by developing conservation measures to that effect.¹¹¹ The RFMO was established after lengthy negotiations at the Multilateral High Level Conference which began in 1994 and concluded in Honolulu, Hawaii in 2000.¹¹²

The Commission has three subsidiary bodies: the Scientific Committee, Technical and Compliance Committee and the Northern Committee.¹¹³ These bodies, and the full session of the

¹⁰⁵ CCSBT Performance Review, above n 97.

¹⁰⁶ CCSBT Performance Review, above n 97.

¹⁰⁷ Commission for the Conservation of Southern Bluefin Tuna, *Monitoring, Control and Surveillance*, (Web Page), <<https://www.ccsbt.org/en/content/monitoring-control-and-surveillance>>

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Western and Central Pacific Fisheries Commission, *Frequently Asked Questions*, (Web Page) <<http://www.wcpfc.int/frequently-asked-questions-and-brochures>>.

¹¹¹ Dr. Gail Lugten, ‘The Role of International Fishery Organisations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources’ (Food and Agriculture Organisation of the United Nations, 2009) 36.

¹¹² WCPFC, above n 110.

¹¹³ WCPFC, above n 110.

Commission, meet at least once a year. The Commission operates in a unique geo-political environment with the special requirements of developing States and need to cooperate with other RFMOs whose respective areas of competence overlap with the geographic remit of the WCPFC. Australia signed the WCPFC in October of 2000 and ratified the Agreement in September of 2003.

At the time of writing, the Commission has 26 Members, including Chinese-Taipei.¹¹⁴ Participating territories include American Samoa, Commonwealth of the Northern Mariana Islands, French Polynesia, Guam, New Caledonia, Tokelau and Wallis and Fortuna. Cooperating non-members include Ecuador, El Salvador, Nicaragua, Panama, Liberia, Thailand and Vietnam.¹¹⁵

A 2010 study into the effectiveness of RFMOs rated the WCPFC consistently high across the board and at that time, the RFMO received the highest overall score out of all those assessed.¹¹⁶ However today, the WCPFC faces significant challenges regarding the sustainability of regulated fish stocks.¹¹⁷ A 2018 report of the WCPFC Scientific Committee found that it was very likely that stocks of Pacific bluefin tuna, Northern Pacific striped marlin and Oceanic Whitetip Shark were overfished.¹¹⁸ Whether many of the shark species of interest to the Commission were overfished or otherwise was unknown due to a lack of scientific evidence.¹¹⁹

A proposal to conduct a Performance Review of the WCPFC was initiated in 2007 by Australia in an effort to bring the WCPFC in to line with recommendations of the UNGA.¹²⁰ At that time it was agreed that the review should be deferred with Japan suggesting a review not be undertaken until 2009 in light of timing considerations.¹²¹ At the regular session of the WCPFC in 2008, it was agreed that the Performance Review would be undertaken in early 2010. When the 2009 meeting occurred, however, it was noted that the review could not be undertaken within the 2010 budget of the Commission.¹²² At the end of the 2009 meeting, the review had been postponed for future consideration.¹²³

¹¹⁴ Western & Central Pacific Fisheries Commission, About WCPFC (Web Page) <<https://www.wcpfc.int/about-wcpfc>>.

¹¹⁵ Ibid.

¹¹⁶ Cullis-Suzuki S, Pauly D. Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations. Marine Policy (2010), doi:10.1016/j.marpol.2010.03.002, 4.

¹¹⁷ Lugten, above n 111, 47.

¹¹⁸ Western & Central Pacific Fisheries Commission, *Overview of Stocks of Interest to the WCPFC*, (Web Page) <<https://www.wcpfc.int/doc/00/overview-stocks-interest-wcpfc>>

¹¹⁹ Ibid.

¹²⁰ 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>

¹²¹ Western and Central Pacific Fisheries Commission, "Fourth Regular Session", Tumon, Guam, USA, 3-7 December 2007, paragraph 15.2. Full document available on line at <<http://www.wcpfc.int/meetings/2007/4th-regular-session-commission>>

¹²² 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

¹²³ Western & Central Pacific Fisheries Commission, "WCPFC 6 Summary Report", Sixth Regular Session, Papeete, Tahiti, French Polynesia 7-11 December 2009, paragraph 393.

In December 2010, the Commission committed to reviewing its performance. The Executive Director was charged with developing appropriate criteria for review and proposing a panel of independent experts and members of the Commission, for approval.¹²⁴ The panel found that compliance with conservation measures relating to the reporting of fishery data was problematic; specifically with regards to meeting data submission requirements.¹²⁵

It stated, 'the Panel has a grave concern about failures by many CCMs to report fishery data as required.'¹²⁶ It advised that where Members were late, or failed to provide operational data before the required deadlines, this should be considered a serious problem to be addressed as a matter of urgency.¹²⁷ In 2012 it was also clear that the WCPFC needed to develop and implement a catch-documentation scheme as soon as possible to better track the progress of stocks under threat (such as bigeye tuna).¹²⁸

The review also found that in 2012, the WCPFC was lagging behind other RFMOs in developing port State measures to combat IUU fishing. They recommended that a new conservation measure on port State measures be adopted and implemented at the earliest opportunity. Additionally, the Panel recommended that clearer mechanisms be established to ensure that Members follow-up on infringements by their vessels and that guidelines be established for a range of penalties to be applied in these instances.¹²⁹

While the WCPFC in general has a good track record with regards to its compliance and enforcement measures, the lack of adoption of port State measures, market-related measures and a catch-documentation scheme were highlighted as the key issues still to be addressed by the RFMO.¹³⁰ The current status of the organisation's compliance measures will be clarified in Chapter 5, along with the rest of the AusRFMOs under examination.

3.3.5. South Pacific Regional Fisheries Management Organisation

International consultations on the South Pacific Regional Fisheries Management Organisation (SPRFMO) were initiated in February 2006 by Australia, Chile and New Zealand. In May 2007, voluntary interim measures were adopted by Australia and other participants to manage the

¹²⁴ Performance Review of the Commission, WCPFC Circular 2013-128, 2014, <<https://www.wcpfc.int/file/3290/download?token=Te4s8BX1>>.

¹²⁵ Ibid at 193.

¹²⁶ Ibid at 194.

¹²⁷ Ibid at 200.

¹²⁸ Ibid at 215.

¹²⁹ Ibid at 212.

¹³⁰ Ibid.

fishery whilst negotiations were being concluded.¹³¹ These measures were designed 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.¹³²

On 14 November 2009, the Convention on the Conservation and Management of the High Seas Fishery Resources of the South Pacific Ocean was adopted in New Zealand, solidifying the commitment of States signatories to managing the fishery.¹³³ To become a fully-fledged RFMO, the SPRFMO required ratification, accession, acceptance or approval by eight States.¹³⁴ This occurred in August 2012.

The entry into force of the SPRFMO closed the gap in the international conservation and management of fisheries from the most eastern part of the South Indian Ocean through the Pacific towards South America. Negotiations for the 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.¹³⁵

Commentators have highlighted the high standard set by the SPRFMO in terms of its objective and principles.¹³⁶ The emphasis of the SPRFMO on modern principles of fisheries management, international practices and provisions concerning robust decision-making processes all contribute to it being considered a model for other RFMOs.¹³⁷

At the time of writing, the SPRFMO has 15 Members.¹³⁸ In addition, States whose vessels fish in the Convention Area are requested to become party to the Convention or to agree to cooperate fully in the implementation of conservation measures as CNCPs.¹³⁹ The current list of CNCPs include the Republic of Columbia, Curacao, Republic of Liberia and Republic of Panama.

Article 30 of the SPRFMO Convention provides for the regular review of the effectiveness of the Commission every five years via performance review. In January 2018, the SPRFMO adopted a process to establish a review Panel, criteria for the review, timeline for the process and terms of

¹³¹ Australian Government Department of Agriculture Fisheries and Forestry, Australian fisheries jurisdiction and Fishery Status Reports, (Web Page) <http://adl.brs.gov.au/data/warehouse/brsShop/data/27_fsr06_austjurisdiction.pdf>

¹³² Ibid.

¹³³ Lugten, above n 111.

¹³⁴ Lugten, above n 111.

¹³⁵ South Pacific Regional Fisheries Management Organisation, *Participation*, (Web Page)

<<https://www.sprfmo.int/about/participation/>>

¹³⁶ United Nations Division for Ocean Affairs and the Law of the Sea, "Report of the resumed 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, 24-28 May 2010, A/CONF.210/2010_/ Full report available on line

<http://www.un.org/Depts/los/convention_agreements/reviewconf/review_conference_report.pdf>

¹³⁷ Ibid.

¹³⁸ SPRFMO, above n 135.

¹³⁹ SPRFMO, above n 135.

reference for the review.¹⁴⁰ The first performance review of the SPRFMO was released in January 2019 by a panel comprising four international independent experts, two of whom were nationals of SPRFMO members and two who were external to the SPRFMO.

At the time of the first performance review of the SPRFMO, the organisation was still in the early stages of implementation. The Panel reported a range of compliance-related recommendations for the SPRFMO however acknowledged that the organisation was still in the early stages of implementation. As such, it should focus most of its effort on conservation measures relating to management of relevant species.

The Panel recommended, inter alia, that the RFMO should:

- revise its Port Inspection measure to specify that all potential IUU vessels should be inspected,
- continue to work towards the adoption of its own high seas boarding and inspection regime,
- continue to develop the SPRFMO observer programme,
- consider requiring all transshipments to be observed, and
- take a more proactive approach towards identifying vessels of non-Members and CNCPs undertaking fishing operations in the Convention Area.¹⁴¹

The Panel noted that the SPRFMO had not yet adopted any market-related measures or a CDS, however at this stage, it did not recommend pursuing these objectives until the RFMO had functioned for longer.

3.3.6. Southern Indian Ocean Fisheries Agreement

The Southern Indian Ocean Fisheries Agreement¹⁴² (SIOFA) seeks to ensure the long-term conservation and sustainable use of fisheries resources other than tunas in areas that fall outside national jurisdiction.¹⁴³ This includes the management of demersal fish species including alfonsino and orange roughy.¹⁴⁴

¹⁴⁰ Decision 06-2018.

¹⁴¹ Review Panel, *2018 Report of the South Pacific RFMO Performance Review Panel*, 1 December 2018, <<https://www.sprfmo.int/assets/Basic-Documents/Convention-and-Final-Act/2018-SPRFMO-Performance-Review/2018-12-01-REPORT-SPRFMO-PERFORMANCE-REVIEW-FINAL.pdf>>.

¹⁴² Full text of the Agreement can be found on line at:

<<http://www.ecolex.org/server2.php/l/bcat/docs/multilateral/en/TRE144077.pdf>>

¹⁴³ 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.

¹⁴⁴ 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.

The creation of an RFMO for the Southern Indian Ocean had been a primary objective of the Southern Indian Ocean Deepsea Fisheries Association (SIODFA) since its formation in 2006.¹⁴⁵ The SIODFA is an organisation formed to represent the interests of deep-sea fishing operators in the area and to promote responsible management of relevant fisheries.¹⁴⁶

The achievement of management objectives in the SIOFA are provided for by the formulation of a “Meeting of Parties” designed to adopt legally binding conservation and management measures which CPs will be required to implement and enforce.¹⁴⁷ 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.¹⁴⁸ In this way, the SIOFA establishes a regional fisheries ‘arrangement’ or ‘mechanism’, rather than a fully-fledged RFMO.

In 2005, negotiations for a specific high seas agreement which could extend to cover the west coast of Australia began.¹⁴⁹ 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.¹⁵⁰ At this meeting, the text of the agreement establishing the Southern Indian Ocean Fisheries Agreement (SIOFA) was adopted. The FAO was named as the Depository of the Agreement.¹⁵¹

The SIOFA seeks to specifically recognise the needs of developing states bordering the region.¹⁵² The Mauritian government joined the Cook Islands, the European Union and the Seychelles in ratifying the SIOFA in 2010.¹⁵³ The Agreement provided that it would enter into force ninety days from the date of receipt of the fourth instrument of ratification, acceptance or approval and the agreement entered into force in June 2012.¹⁵⁴

¹⁴⁵ 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>.

¹⁴⁶ FAO Legal Office Treaties, *Southern Indian Ocean Fisheries Agreement* (Web Page) <<http://www.fao.org/legal/treaties/035s-e.htm>>.

¹⁴⁷ Ibid.

¹⁴⁸ 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>.

¹⁴⁹ Ibid.

¹⁵⁰ FAO, above n 146.

¹⁵¹ Ibid.

¹⁵² Asia-Pacific Fishery Commission, 'Regional Fisheries Contacts: South Indian Ocean Fishery Agreement' (Web Page) <<http://www.apfrc.org/modules/addresses/visit.php?cid=2&lid=110>>.

¹⁵³ Fish Information and Services, *Southern Indian Ocean Fisheries Agreement comes into force* (Web Page) <<http://fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=37823&ndb=1&df=0>>.

¹⁵⁴ Article 24, FAO Legal Office Treaties, *Southern Indian Ocean Fisheries Agreement* (2010) <<http://www.fao.org/legal/treaties/035s-e.htm>> at 8 May 2019.

At the time of writing, the Agreement has nine contracting parties,¹⁵⁵ one participating fishing entity (Chinese Taipei) and one CNCP (Comoros).¹⁵⁶ The Agreement covers the management of resources including fish, molluscs, crustaceans and other sedentary species within the area. The Agreement does not cover highly migratory species or sedentary species subject to the fishery jurisdiction of coastal states.

At the time of writing, the SIOFA has not published a performance review. However it has adopted a range of compliance-related conservation measures in 2018 that will be further explored in Chapter 5.

3.4. Conclusion

An increase in the popularity of participative decision-making and compliance effort has resulted in important developments for the regional fisheries sector including critical engagement which has been argued to have improved the quality of decision-making. The ability of RFMOs to adapt and be sufficiently flexible so as to deal with an increasing appetite for engagement by the resource-user in governance must be a critical factor in determining how new and unforeseen challenges will be approached.

This chapter has outlined the legal status of states parties to RFMOs, and those who choose not to engage in their regulatory regime. While there remains some doubt as to whether RFMOs can impose legally binding conservation measures on NCPs, a number of RFMOs have adopted measures to this effect. CNCPs were common across RFMOs which perhaps demonstrates the challenges States face in committing to the conservation measures of RFMOs.

Next the chapter has provided a brief overview of the inception, geographic mandate and States parties of AusRFMOs. It has been shown that while certain AusRFMOs have a specific geographic mandate, others are limited to the management of a particular fishery. Both options pose their own challenges as demonstrated by their performance reviews.

The recent and past performance reviews of the SPRFMO, CCAMLR, IOTC, WCPFC and CCSBT were considered for their findings with relation to compliance. While some reviews revealed wide-ranging issues in AusRFMOs with respect to compliance, others reflected that positive outcomes had been achieved and implemented successfully. In particular, the CCAMLR was applauded for its mature measures which had been implemented to great effect.

¹⁵⁵ Australia, the Cook Islands, the European Union, France on behalf of its Indian Ocean Territories, Japan, the Republic of Korea, Mauritius, the Seychelles and Thailand.

¹⁵⁶ Southern Indian Ocean Fisheries Agreement (SIOFA), *Introduction*, (Web Page) <<http://apsol.org/>>

This thesis will now take a deeper look at how the CCAMLR has tackled compliance-related challenges in the past, specifically with respect to its ability to effectively engage the resource-user. The next chapter will investigate how the relationship between the management organisation and the private-sector can actually improve the performance of the RFMO long-term. It explores how engaging the private-sector can encourage fishers to assume a sense of shared responsibility for the successful implementation of RFMO conservation measures.¹⁵⁷

¹⁵⁷ 'The Fisheries Secretariat', *Towards Sustainable Fisheries* (Web Page), 2019, <<http://www.fishsec.org/wp-content/uploads/2012/04/Annex-2-Regionalisation-to-improve-governance.pdf>>.

Chapter 4

Compliance Evaluation in the CCAMLR

4.1. Introduction

This chapter is largely comprised of an excerpt from a publication co-authored by the author and the late Dr Denzil Miller, who was first a friend, and second, a mentor to the author. Significantly, Dr Miller held the position of Executive Secretary for the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) from 2002-2010. Throughout this time, Dr Miller pioneered many important changes to the Commission and his loss was a tragedy for the Antarctic scientific community.

The content of this article was presented in December 2019 at the Polar Law Symposium held in Hobart, Tasmania by the author. At the time of writing, the article has been accepted by and will be included in vol. 12 of *The Yearbook of Polar Law*. Due to the relevance of the article to the topic of this thesis, and in recognition of the sudden and recent passing of Dr. Miller in November 2019, minimal alterations to the original article have been made.

This article explores the phenomenon of the compliance evaluation procedure (CEP) but specifically with regard to one RFMO-like organisation: the CCAMLR. CEPs represent an avenue for RFMOs to undertake internal evaluation of compliance by both Contracting and non-Contracting parties in line with their conservation measures.

The CEP of an RFMO is often reviewed annually and is designed to highlight instances where non-compliance has occurred and to track progress against these instances. CEPs are very relevant to this thesis in that they are one of the many compliance-related conservation measures being assessed, and they also demonstrate a critical means by which RFMOs can improve transparency.

The CCAMLR Compliance Evaluation Procedure (CCEP) was one of the first of its kind and constitutes a strong example of how the process can function to effectively address instances of non-compliance in a regional fisheries context. This paper evaluates the effectiveness of the CCEP over the first five years of its operation. The CCEP's achievements and shortcomings are contrasted with trends in fisheries compliance globally within the context of future uncertainty and risk.

CCAMLR has seen success as a regional conservation organisation as a result of its long-term engagement with non-regulatory entities and with the industry it regulates in particular. The CCEP is viewed as a model for other polar and high seas areas, suggesting that CCAMLR's management of a relatively small number of Antarctic marine living resources could enhance sustainable, and responsible, fishing practices worldwide.

As a brief introduction to the article, and demonstration of its relevance to this thesis, the following section explores private-sector engagement in the CCAMLR regime.

4.2. Private-Sector Engagement in the CCAMLR

The CCAMLR has a unique approach to regulation which stems from its inception as a 'conservation' organisation, rather than a management organisation. Since the instigation of the CCAMLR, the Antarctic and Southern Ocean Coalition (ASOC) has been engaged in negotiations to promote the effective incorporation of the precautionary approach and ecosystems-based approach within the regulatory regime.

In accordance with Article XXIII of the CAMLR Convention, if an intergovernmental or non-governmental organisation would contribute to the work of the Commission they may be granted observer status. Throughout CCAMLR's history, ASOC has been successful in applying for observer status at meetings of the Commission and its sub-committees. Gaining observer status does not enable participation by the organisation in decision-making but does allow them insight into the meeting and the ability to make a statement to the Commission where appropriate on matters relevant to their field.

ASOC has contributed in this capacity to inform the development of effective conservation measures and has engaged with the CCAMLR on IUU fishing tactics since the initial identification of the issue in the early 1990's. They have commented on matters including the destructive fishing methods employed by IUU vessels and in 2009, presented papers for the consideration of the Commission. Such contributions can inform and assist the CCAMLR in undertaking its regulatory functions.

Undertaking effective monitoring, control and surveillance (MCS) in an area of water as remote and isolated as the Southern Ocean is a significant challenge facing CCAMLR. To combat this issue, the Coalition of Legal Toothfish Operators (COLTO) comprises a group of legal toothfish operators who work with the CCAMLR to improve sustainability of Patagonian Toothfish. Formed in 2003, in light of the increase in IUU catch of Toothfish in the CCAMLR Convention Area, COLTO vessels became active participants in MCS activities. Such activities, which include

providing estimates of IUU catches, to monitoring and reporting sightings of IUU vessels, assist the capacity of the CCAMLR to achieve its objectives.

CCAMLR has enshrined the precautionary approach and ecosystems-based approach in its Convention to manage the interaction between science and policy development. This approach enables a balance between conservation and sustainable use to be struck to drive the direction of the organisation towards an effective regulatory regime. This approach is well suited to allowing scientific input from industry stakeholders.

In a recent example of this, the Association for Responsible Krill harvesting companies (ARK) has gained observer status at CCAMLR meetings. In 2014, the ARK convened a scientific workshop to discuss krill ecology and explore further how close collaboration between CCAMLR and the industry may assist in shaping the conservation policy of the regional organisation. This, and other efforts of ARK are likely to continue to influence the conservation approach of the CCAMLR into the future.

The complexity of the IUU problem is one which demands effective information exchange and cooperation between regulatory and non-regulatory authorities. Without a complete picture of the problem and its attributes, regulating to address the problem is often pointless. To address this issue, individual companies operating under the CCAMLR regime have taken steps to increase their level of transparency.

Aker BioMarine, for example, has made commitments improve transparency of their fisheries reporting to contribute to improved information and knowledge exchange in the krill fishery. This occurs via implementing practices which ensure 100% traceability of product caught and Marine Stewardship Certification (MSC) for the fishery which required the company to demonstrate greater transparency of fishing methods and stock trends. By undertaking public reporting processes on sustainability commitments, Aker BioMarine is an example of the industry engaging in CCAMLR's regulatory effort.

This thesis argues that if we are to prevent future fisheries decline, the most practical and effective steps RFMOs can take is to encourage greater cooperation and engagement between the regulator and the regulated. While a range of private-sector entities under CCAMLR's remit have taken steps to improve their accountability, the CCAMLR CEP represents an effort by the RFMO in turn to improve accountability, transparency and, ultimately, enforcement of its conservation measures.

The ways in which the CCAMLR CEP achieves these outcomes is explored in detail in the following article: 'Trust but Verify: Fisheries Compliance Evaluation and Sustainable Antarctic Marine Living Resource Management'.

4.3. Trust but Verify: Fisheries Compliance Evaluation and Sustainable Antarctic Marine Living Resource Management

Article II of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR Convention) contextualises a precautionary approach (PA) and ecosystem-based (EBM) method to managing marine living resources in the Convention Area south of the Antarctic Polar Front.^{1,2} Following its inception in 1982, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has developed a conservation, fisheries management, ecosystem and biodiversity protection framework consistent with the Convention's objective.³

A key principle of the CCAMLR framework is that conservation includes "rational use" (Article II.2).⁴ To ensure consistency with the Commission's PA and EBM mandates, CCAMLR manages harvested resources directly, with other relevant management needs being addressed more broadly (Article II.3)⁵. Both conservation and harvesting are subject to the conservation principles outlined in Article II.3 of the Convention. Consequently, CCAMLR's management approach addresses the Convention's primary management intent whilst considering situational and procedural uncertainties likely to challenge agreed, practical, effective, and realisable management priorities addressed by CCAMLR CMs.⁶

In addressing conservation and management needs, CCAMLR facilitates research⁷ and compiles data⁸ to assess uncertainty commensurate with available knowledge on Antarctic marine ecosystem dynamics, functioning and fisheries.⁹ Every effort is made to identify knowledge gaps

¹ CAMLR Convention Article I.4 defines the Convention Area's the northern boundary as the "Antarctic Convergence" or Antarctic Polar Front as currently known. In this paper, the "Convention Area" will be referenced as such, or as the "CCAMLR Area". CCAMLR, 2018. Basic Documents, CCAMLR, Hobart. 147.

² Established by the CAMLR Convention Contracting Parties (CPs) under Convention Article VII.1, the Commission's membership conditions are elaborated in Article VII.2.

³ Article II.1, states the Convention's objective as "the conservation of Antarctic marine living resources". In its broadest sense, this objective aims to conserve, including rational use of, Antarctic marine living resources south of the Antarctic Polar Front (Antarctic Convergence)(c. +45°S) through precautionary and ecosystem-based management.

⁴ The term 'rational use' has been widely debated (e.g. CCAMLR-VIII, 1989. Report of the Eighth Meeting of the Commission. CCAMLR, Hobart, paras 65 to 75; CCAMLR-IX, 1990. Report of the Ninth Meeting of the Commission, CCAMLR, Hobart, paras 8.1 to 8.14 and CCAMLR-X, 1991.

⁵ Österblom, H. and Olsson, O. (Österblom, H. and Olsson, O. 2017. CCAMLR: An ecosystem approach to the Southern Ocean in the Anthropocene. In: Dodds, K., Hemmings, A.D. and Roberts, 2017. Handbook on the Politics of Antarctica. Cheltenham, Edward Elgar p. 417) suggest that: "To clarify existing uncertainty and differences in the interpretation of 'rational use' appears to be an increasingly important issue for CCAMLR."

⁶ One of the Commission's primary tasks is to give effect to the objective and principles set out in CAMLR Convention Article II (Article IX). This includes (Article IX.1.(e)) identifying conservation needs and analysing the effectiveness of agreed Conservation Measures (CMs) to address such needs.

⁷ Under Article IX.1.(a), research includes comprehensive studies of Antarctic marine living resources and the Antarctic marine ecosystem. CCAMLR Basic Documents, 2018. op. cit.

⁸ Consistent with Article IX.1.(b), data to be compiled focuses on the status of, and populations changes in, Antarctic marine living resource, as well as on factors affecting harvested species distribution, abundance and productivity, including the potential effects of harvesting on dependent or related species populations as per Article II.3.

⁹ Constable, A.J., de la Mare, W.K., Agnew, D.J., Everson, I. and D.G.M. Miller 2000. Managing fishing to conserve Antarctic marine living resources: Practical implementation of the Convention on the Conservation of Antarctic Marine Living Resources. ICES journal of Marine Science, 57.(1): 778-791.

and deficiencies in terms of potential impacts on management decisions,¹⁰ as well as to evaluate inherent and residual risk(s) affecting such decisions.¹¹ To address these needs, CCAMLR CM formulation, adoption and revision are required to be based on the “the best scientific evidence available”.¹²

As intimated, catch monitoring and harvested stock sustainability assessment are key CCAMLR priorities.¹³ They stand in the face of growing acceptance that the natural world, including its biodiversity and constituent ecosystems, are as crucial to human and ecological well-being as economic prosperity.¹⁴ However, the natural world remains undervalued by conventional economic analyses,¹⁵ even though these analyses emphasise the need for informed decision-making to manage resource utilisation in a sustainable manner. Ideally, natural ecosystems, and the services they deliver, should underpin human existence by breaking-down waste products, producing essential food, regulating water supplies and responding to climate variability.

Furthermore, these attributes are valuable in less obvious ways - for example, where contact with nature induces pleasure, provides a sense of place and delivers recreational opportunities.¹⁶ Together, such attributes exert a positive, long-term impact on human health, well-being and happiness.¹⁷

It follows that the natural world's attendant, and important, socio-ecological values require the expenditure of political capital in order to address important issues that affect them.¹⁸ Nowhere is this better demonstrated than in the Antarctic, where the Antarctic Treaty System's (ATS)¹⁹ political and diplomatic benefits have served as global enablers of the Treaty's ideals for close to 60 years. These ideals aim to preserve Antarctica as an international zone of peace,

¹⁰ Heenan, A., Pomeroy, R. S., Bell, J. D., Munday, P. L., Cheung, W. H., Logan, C. A., Brainard, R. E., Amri, A., Alino, P., Armada, N., L David, L., Rivera-Guieb, R., Green, S., Jompa, J., Leonardo, T., Mamauag, S., Parker, B., Shackeroff, J. and Yasin, Z. 2015. A climate-informed, ecosystem approach to fisheries management. *Marine Policy*, 57: 182-192.

¹¹ Inherent risks exist before controls (i.e. mitigation) are applied, while residual risks remain after controls are applied.

¹² CAMLR Convention Article IX.1.(f). CCAMLR Resolution XXVIII.10 in CCAMLR Schedule of Conservation Measures in Force 2018/19, 322 pp. Unless otherwise stipulated, all CMs cited in this paper are based on the current (2018/19) version of CCAMLR Conservation Measures in Force.

¹³ CAMLR Convention Article IX.1.(b).

¹⁴ UK National Ecosystem Assessment: Understanding nature's value to society, Synthesis of the Key Findings, (Web Page) <https://www.researchgate.net/publication/317236524_UK_National_Ecosystem_Assessment_understanding_nature's_value_to_society_Synthesis_of_key_findings>

¹⁵ Piccolo, J.J., 'Intrinsic values in nature: Objective good or simply half of an unhelpful dichotomy?', *Journal for the Conservation of Nature*, 37. Available online <<https://www.sciencedirect.com/science/article/pii/S1617138117300742>>

¹⁶ Ibid.

¹⁷ Maller, C., Townsend, M., Pryor, A., Brown, P. and St Leger, L. 'Healthy nature healthy people: 'contact with nature' as an upstream health promotion intervention for populations', *Health Promotion International*, 2006, 21.(1), 45.

¹⁸ Pierce, J., Johnson, B.J. and White, S.S, 'Social, creative, human, and political capital effects on sustainability initiatives in Kansas counties: A research note', *Journal of Community Development*, 2014, 44.(2): 188-199.

¹⁹ The ATS is a complex arrangement of international arrangements with the expressed purpose of regulating relations among States in the Antarctic. The 1959 Antarctic Treaty is at its heart, as are Recommendations adopted by meetings of the Antarctic Treaty Consultative Parties (ATCPs).

cooperation, and science,²⁰ with the ATS becoming the home of significant, and precedent-setting, environmental protection, resource conservation and rational exploitation initiatives.²¹

As an important ATS institution, CCAMLR's diligent CM implementation provides a sturdy foundation for marine conservation and biodiversity protection in the Convention Area. This has meant that CCAMLR has actively pursued effective CM compliance enforcement to avoid undermining of its management efforts or violation of the Convention's objective, insofar that future sustainable and responsible²² fishing in the CCAMLR Area are a function of the effective implementation of, and compliance with, robust CMs.²³

For example, the Antarctic krill (*Euphausia superba*) fishery's vast potential and ecological importance²⁴ require effective compliance enforcement to meet the Convention's Article II objectives. In particular, attendant ecological and economic risks of a systemic krill fishery compliance failure would severely impact the Antarctic marine ecosystem as a whole, given the central position of krill in many Antarctic food webs.²⁵

In context, CCAMLR's experiences from the mid-1990s with the pervasively negative consequences of illegal, unreported and unregulated (IUU)²⁶ fishing for Toothfish (*Dissostichus* spp.) are particularly noteworthy. Nonetheless, IUU fishing continues to challenge CCAMLR in meeting Article II.3.(a) conservation principles,²⁷ and in ensuring that CCAMLR-sanctioned fisheries continue to be sustainable.²⁸ Overall, the need for robust CM compliance is crucial, despite CCAMLR having achieved considerable success in combating Toothfish IUU fishing *per se*.²⁹

However, it was not until 2006 that CCAMLR formally considered developing a compliance evaluation process³⁰ (i.e. the CCEP) to improve CM application. The organisation's efforts

²⁰ Dudeney, J.R. and Walton, D.W.H. 'Leadership in politics and science within the Antarctic Treaty', *Polar Research*, 2012, 31.(1), 11075, 1-9.

²¹ Ibid.

²² "Responsible fishing" is taken to be compatible with 1995 FAO Code of Conduct for Responsible Fisheries provisions. It is undertaken with due concern for the conservation of fisheries resources and their management, the development of fisheries and other uses of the aquatic environment associated with fishing (e.g. fisheries research).

²³ Miller, D.G.M. and Slicer, N.M. 2014. CCAMLR and Antarctic Conservation: The Leader to Follow, In: Garcia, S.M., Rice, J. and Charles, A.T. (eds), *Governance for Fisheries and Marine Conservation: Interactions and Co-Evolution*, Wiley-Blackwell – Oxford, United Kingdom, pp. 253-270.

²⁴ Hill, S.L. Atkinson, A., Darby, C., Fielding, S., Krafft, B.A., Godø, O.R., Skaret, G., Trathan, P.N. and Watkins, J.L., 'Is current management of the Antarctic krill fishery in the Atlantic sector of the Southern Ocean precautionary?', *Science*, 2012, 23.(1): 31-51.

²⁵ Equally, the CAMLR Convention was negotiated with the ecological importance of krill in mind.

²⁶ Rachel Baird credits CCAMLR as the first organisation to formally recognise the problem of non-compliant fishers and to coin the phrase "IUU fishing". Baird, R., 'Illegal, Unreported and Unregulated fishing: An analysis of the legal, economic and historical factors relevant to this development and persistence'. *Melbourne Journal of International Law*, 2004. 5: 36 pp.

²⁷ Ibid.

²⁸ Miller, D.G.M., Slicer, N.M. & Sabourenkov, E.N., 'IUU fishing in Antarctic Waters: CCAMLR actions and regulations', In *Law, Technology and Science for Oceans in Globalisation* (Ed. D. Vidas). 2010. Martinus Nijhoff, Leiden and Boston. pp. 175–196.

²⁹ Österblom, H., Bodin, Ö., Sumaila, U.R. and Press, A.J. 'Reducing illegal fishing in the Southern Ocean: A global effort', *Solutions*, 2015, 4.(5): 72-79.

³⁰ CCAMLR-XXX, 2011. Report of the Thirtieth Meeting of the Commission (CCAMLR-XXX), paragraph 8.7. Hobart, CCAMLR. At: <https://www.ccamlr.org/en/system/files/e-cc-xxx.pdf>.

focused on mitigating IUU fishing directly, as well as on CM compliance enforcement, in order to address the Convention's objective better through compliance monitoring.

In this chapter, we focus on how CCAMLR is boosting its marine governance and management strategies by improving CM compliance evaluation and monitoring.³¹ The Commission's compliance enforcement efforts are briefly summarised and the organisation's recently-developed compliance evaluation procedure (CCEP) is evaluated. We posit that the CCEP provides a model for other polar and high seas areas and illustrates that CCAMLR's management of a relatively small number of Antarctic fisheries may offer a way forward to promote sustainable, and responsible, fishing practices globally. We therefore contrast what the CCEP has achieved with other initiatives addressing sustainable fishing and ocean governance in a globally uncertain future.

4.4. CCAMLR Fisheries in a Global Context

Covering just over 70% of the earth's surface, the oceans are crucial to the important geochemical processes regulating world climate and sustaining planetary life.³² They are also fundamentally important to the global economy,³³ with about 40% of the world's human population living within 100 kms of the coast.³⁴ This figure is expected to rise to more than 60% by 2020³⁵ and to 75% by 2050, with tens of millions of people depending on fishing as a protein source.^{36,37}

A 2008 Organisation for Economic Co-Operation and Development (OECD) assessment³⁸ predicted that global crop production will increase from a 2000 level of 2143 million tonnes to 3402 million tonnes in 2050.³⁹ This increase slightly exceeds that assumed for future global population growth by 2050. While this may suggest no cause for concern, the 2005 Millennium Ecosystem Assessment⁴⁰ indicates that the 2015 estimated rate of crop development is not

³¹ A CCAMLR Contracting Party (CP) is a signatory to the CAMLR Convention in conformity with paragraph 1 of Article XXIX, with CCAMLR Members fulfilling the conditions of Article VII.1 outlined in Footnote 2 (Article XIX.3).

³² Pew Environment Group, 2010. Protecting Life in the Sea. Pew Environment Group, Washington DC. (Web Page) <<https://www.pewtrusts.org/-/media/legacy/uploadedfiles/peg/publications/report/protectinglifeintheseapdf.pdf>>.

³³ World Bank Group, 2017. 'The Potential of the Blue Economy'. Washington DC, The World Bank. (Web Page) <<https://openknowledge.worldbank.org/bitstream/handle/10986/26843/115545.pdf?sequence=1&isAllowed=y>>.

³⁴ United Nations, 'Factsheet: People and Oceans'. In: The Ocean Conference - 5 to 9 June, 2017. New York, United Nations, <<https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/05/Ocean-fact-sheet-package.pdf>>

³⁵ UNEP, GEO₄ Global Environment Outlook. Environment for Development. 2007, 572 pp. At: <https://na.unep.net/atlas/datas/sites/default/files/GEO-4_Report_Full_en.pdf>.

³⁶ World Bank Group, above n 33.

³⁷ In 2010, the United Nations estimated that fish provided more than 2.9 billion people with at least 15% of their average per capita animal protein intake. In 2014 an estimated 58.6 million people were directly engaged in producing fish, either by fishing or aquaculture.

³⁸ OECD Environmental Outlook to 2050: The Consequences of Inaction. Paris, OECD. 353 pp. At: https://read.oecd-ilibrary.org/environment/oecd-environmental-outlook-to-2050_9789264122246-en#page1.

³⁹ Ibid.

⁴⁰ Millennium Ecosystem Assessment, 'Ecosystems and Human Well-Being: Synthesis', 2005, (Web Page, <<https://www.millenniumassessment.org/documents/document.356.aspx.pdf>>.

sustainable. In the absence of new policies, progress in reducing environmental pressures will therefore continue to be profoundly influenced by the sheer scale of human population growth.⁴¹

In contrast, a United Nations Food and Agriculture Organisation (FAO) report has indicated that fish account for almost 17% of global animal protein intake.⁴² With global fish production currently approaching sustainable limits,⁴³ around 90% of the world's fish stocks are being fully fished, or are overfished. Nonetheless, the FAO forecasts a 17% fishery production increase by 2025, with aquaculture providing a larger contribution than at present.

Despite the obvious importance of the oceans to humanity,⁴⁴ as well as global environmental health⁴⁵, it has only been recently acknowledged that the world's oceans are not effectively managed.^{46,47} For many years, increasing and unrestrained human activity has impacted the global marine environment in fundamental, and possibly irreversible, ways.⁴⁸ For example, there has been a noticeable decline in the trophic standing of certain fished species since 1950⁴⁹, with such pressures appearing symptomatic of variable trends in food requirements since the 1960s. These observations mean that the common lexicon tend to depict current, and future, marine wild-capture harvesting as a "global fishing crisis".⁵⁰

Consequently, additional effort is being focused on ocean health which, once perceived inviolate, is undisputedly worsening with potentially significant and adverse consequences for both humanity and nature.⁵¹ Unless this trend is reversed, the livelihood of hundreds of millions of people remain at risk, as does the quality of life for billions worldwide.⁵²

Unsurprisingly, the noted global inadequacy in effective ocean management is associated with negative impacts on global fisheries, particularly in terms of ensuring that fish and other oceanic resources are not catastrophically overexploited.⁵³ Unsurprisingly, global catches since the 1860's have become progressively dominated by demersal and small pelagic species.⁵⁴ Equally, straddling and highly migratory fish stocks have also been heavily exploited, particularly in areas

⁴¹ Environmental Outlook, above n 38.

⁴² FAO, 'The State of World Fisheries and Aquaculture: Contributing to food security and nutrition for all', 2016, Rome, FAO, <<http://www.fao.org/fishery/sofia/en>>.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ European Marine Board, 'Linking Oceans and Human Health: A Strategic Research Priority for Europe', 2013, Position Paper 19. Ostend, European Marine Board.

⁴⁶ Agardy, T.S. 'Casting Off the Chains that Bind Us to Ineffective Ocean Management: The Way Forward', 2008, *Ocean Yearbook*, 22: 1-17.

⁴⁷ Pauly, D. and Zeller, D., 'Catch reconstructions reveal that global marine fisheries catches are higher than required and declining', 2016, *Nature Communication*, 7: 10244, 9 pp.

⁴⁸ Griffiths, C., et al. 'Impacts on human activities of marine life in the Benguela: A historical overview', 2004, *Oceanography and Marine Biology: An Annual Review*, 42: 303-392.

⁴⁹ Ibid.

⁵⁰ Jacques, P.J. 'Are world fisheries a global panarchy?', 2015, *Marine Policy*, 53: 165-170.

⁵¹ Worm, B., et al., 'Impacts of Biodiversity Loss on Oceans Ecosystem Services', *Science*, 2006, 314: 787-790.

⁵² Pew Environment Group, above n 32.

⁵³ Pauly and Zeller, above n 47.

⁵⁴ Watson, R. and Tidd, A., 'Mapping nearly a century and a half of global marine fishing: 1869-2015', 2018. *Marine Policy*, 93. DOI: 10.1016/j.marpol.2018.04.023.

where sustainable management remains a serious challenge and when such stocks spend significant time in international waters outside Exclusive Economic Zones (EEZ) or Fishing Zones (FZs).⁵⁵

Of nearly 600 species groups monitored by the FAO, only 23% are not fully exploited or are overexploited.⁵⁶ Many fisheries practitioners and scientists consider this an optimistic assessment since some 90% of the world's commercially valuable fish, such as tuna, have already disappeared, while close to one-third of the world's commercial fisheries have collapsed.⁵⁷ Such scenarios intimate that unless current trends are reversed, the remaining commercial fisheries will collapse by 2048; a suggestion not without controversy.⁵⁸

Whatever the global consequences of ineffective marine living resource management, a few key concerns are worth emphasising. Based on 2014 FAO figures, global fishing fleets comprise some 4.6 million vessels which harvest around 82 million metric tons of fish and invertebrates from the world's oceans.⁵⁹ Many believe that this level of harvest is beyond the global marine environment's sustainable limits. Furthermore, deployment of destructive fishing gear, along with other unsustainable or destructive fishing practices, cause significant long-term damage to vital breeding, nursery and feeding habitats for both fish and other marine life.⁶⁰ For example, deep-sea bottom trawling has been implicated, over a considerable period of time, in the destruction of the seamounts and deep-water corals providing critical habitats for marine biota in general.⁶¹

In the CCAMLR Area, Antarctic krill (*Euphausia superba*) catches increased substantially over the past 5-10 years to around 306,000 tonnes in the 2017/18 season; a level last experienced in the mid-1980s. Conversely, catches of highly prized Toothfish (*Dissostichus* spp.) totalled just below 17,000 tonnes in 2017/18; a situation particularly attributable to effective and robust CMs countering IUU fishing in the Convention Area.⁶² The relatively small Antarctic Icefish (*Champsocephalus gunnari*) catch has remained stable at about $\pm 1,000$ tonnes over the years. Involving some 55 vessels, these three CCAMLR fisheries are collectively valued at about US\$210 million annually, with the krill fishery continuing to grow and exhibit significant potential for expansion.⁶³

⁵⁵ Bjørndal, T. and Martin, S. 2007. The Relevance of Bioeconomic Modelling to RFMO Resources: Regional Fisheries Management Organizations: Technical Study No 3, Chatham House, London. 48 pp. <https://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/rfmotec_h3.pdf>.

⁵⁶ FAO, 2018. The State of World Fisheries and Aquaculture, 2018. Available online at: <<http://www.fao.org/3/i9540EN/i9540en.pdf>>.

⁵⁷ Stokstad, E. Global fisheries. Détente in the fisheries war. *Science*, 2009, 324: 170-171.

⁵⁸ Ibid.

⁵⁹ Of these vessels in 2014, some 64% were engine powered with 85 percent of such motorized vessels being less than 12 m in length overall.

⁶⁰ Worm, B. et al, above n 51.

⁶¹ de Groot, S.J. 'The Impact of Bottom Trawling on Benthic Fauna of the North Sea', *Ocean Management*, 1984, 9: 177-190.

⁶² Miller, D. et al, above n 28.

⁶³ Nicol, S. and Kawaguchi, S. 'The fishery for Antarctic krill - recent developments', *Fish and Fisheries*, 2011.

Nonetheless, fisheries trends in the CCAMLR Area have varied over the years, with krill catches even being dominant prior to the Convention's entry into force in 1982. Up until 1973, catch trends included overfishing of Marbled Rockcod (*Notothenia rossii*) as access to coastal fishing grounds became increasingly restricted due to a global increase of EEZ declarations in advance of the 1982 United Nations Convention on the Law of the Sea (the LOSC).⁶⁴ However, they rose again once CCAMLR began developing its fishery regulatory regime. Further declines in catches accompanied dissolution of the Soviet Union in 1991 and introduction of krill precautionary catch limits. Finally, although slightly affected by the 2008 Global Financial Crisis (GFC), krill catches have exhibited a steadily increasing trend following the 2005/06 deployment of Norwegian pumping technology that improves krill catch quality.⁶⁵

Compliance Enforcement

Monitoring, control and surveillance (MCS) provides for effective implementation of fisheries enforcement to ensure compliance with fisheries policy, standards and laws.^{66,67} Being able to evaluate compliance success and failure is vital to determining whether management measures are effective, or whether modification or redevelopment is required. Monitoring and evaluation are also crucial for identifying systemic non-compliance where common elements link vessel identity, vessel control, non-compliance deterrence, non-compliance sanction(s) and a need for cooperation from non-Contracting Parties (NCPs).

Globally, effective compliance enforcement promotes responsible fishing to maintain long-term sustainable⁶⁸ fisheries.⁶⁹ It draws on three key elements: prevention, intervention and postvention. Prevention blocks an event, or effect, and relies on timely response to any high probability non-compliance event. It is usually the product of both monitoring and surveillance in the MCS paradigm. Intervention acts to prevent harm, or improve fisheries, and ecosystem functioning. It is analogous to the control element of MCS. Postvention aims to increase compliant activities to avoid negative consequences of non-compliance precedents and further incidents. In this respect, postvention learns from past prevention and intervention, thereby promoting compliance enforcement by not repeating past mistakes and learning from past non-compliant events.

⁶⁴ Miller, D.G.M. 'Exploitation of Antarctic marine living resources: A brief history and a possible approach to managing the krill fishery', *South African Journal of Marine Science*, 1991 10: 321-339.

⁶⁵ Ibid.

⁶⁶ Clark, E.A. 'Compliance Enforcement in Regional Fisheries Management Organisations to which Australia is Party', Master of Laws Thesis, University of Tasmania, 2011, 145 pp.

⁶⁷ Bergh, P.E. and Davies, S. *A Fishery Manager's Guidebook* (Second Edition). Rome: FAO. Chapter 14: Fishery, Monitoring, Control and Surveillance. 2009, pp. 373-403.

⁶⁸ In this thesis, the term "sustainable" is used to indicate the maintenance of a particular property, quality or entity, at a rate or level that does not compromise that property's, quality's or entity's ability to meet its own, or other future needs.

⁶⁹ FAO, 1995, Code of Conduct for Responsible Fisheries.

For CCAMLR, a primary objective is to minimise negative effects from direct, or indirect, effects of harvesting on the Antarctic marine ecosystem as a whole, recognising that effective compliance enforcement through MCS ensures that CMs are effective and complied with.^{70,71}

In addressing compliance enforcement, various CAMLR Convention Articles require that Contracting Parties (CPs):⁷²

- (a) operate harmoniously and cooperatively,
- (b) comply with general principles and CMs,
- (c) ensure compliance by third parties, and
- (d) deal with compliance breaches.

They include, *inter alia*, Articles X (third parties and CM integrity), XI (harmonization with adjacent jurisdictions), XX (information), XXI (compliance), XXII (third party compliance), XXIV (observation and inspection), and XXV (dispute settlement). In effect, the Convention's compliance-focused provisions guide how CCAMLR undertakes policing, monitoring and CM application to meet Convention objectives.

Since 2002, the Standing Committee on Implementation and Compliance (SCIC),⁷³ previously the Standing Committee on Observation and Inspection (SCOI), has overseen development of CCAMLR's compliance-enforcement regime and the provision of relevant advice to the Commission. Its compliance evaluation process has been extensively summarised by Miller and Murray.⁷⁴

It is noteworthy that CCAMLR's management and conservation practices compare favourably with global best-practice in applying the PA and EBM to fisheries management, as well as in the systematic provision of objective scientific advice drawn from the best scientific evidence available.^{75,76} CCAMLR posts a close to perfect mean score of 4/5 for these activities, but an obvious black mark persists for efforts addressing attendant complexities explicitly accounting for ecosystem considerations in management decisions.⁷⁷

⁷⁰ Vidas, D. 'IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment'. In: Caron, D.D. and Scheiber, H.N. (Eds). 2004. *Bringing New Laws to Ocean Waters*. Leiden, Koninklijke Brill NV. pp. 1–20.

⁷¹ Miller, D.G.M., above n 28.

⁷² Under, Article XXIX, Contracting Parties (CPs) comprise all signatories of, or acceding parties to, the Convention, with Commission Members having fulfilled Article VII.2 requirements.

⁷³ Standing Committee on Implementation and Compliance (SCIC), 2002. Terms of Reference and Organisation of Work.

⁷⁴ Miller, D.G.M. and Murray, E. 'The CCAMLR Compliance Evaluation Procedure', *Australian Journal of Maritime & Ocean Affairs*, 2019.

⁷⁵ Willock, A. and Lack, M. *Follow the Leader: Learning from Experience and Best Practice in Regional Fisheries Management Organizations*, 2006, 64 pp.

⁷⁶ Mooney-Seus, M. and Rosenberg, A.A., 'Regional Fisheries Management Organizations Progress in Adopting the Precautionary Approach and Ecosystem-Based Management : Recommended Best Practices for Regional Fisheries Management Organizations', Technical Study No. 1., Chatham House, London. 2006, 177 pp.

⁷⁷ Miller, D.G.M., above n 28.

Nonetheless, CCAMLR has demonstrated significant progress in satisfying the conservation and management requirements⁷⁸ identified by the international community at large.⁷⁹ In this regard, the organisation has come a long way in developing guidelines for sustainable management practices, as well as in providing baselines against which future changes may be compared.⁸⁰ Akin with other Regional Fisheries Management Organisations' (RFMO) best compliance and enforcement practices, CCAMLR's efforts have focused on addressing its objectives to fulfil its governance obligations and conservation remit.⁸¹

Compliance Evaluation

Consistent with RFMOs as a whole,⁸² CCAMLR's institutional enforcement regime relies on individual Flag State control and CP actions to ensure CM compliance. Specifically, CPs are obligated to implement CMs under Convention Article IX, particularly Article IX.6. To optimise compliance enforcement, CMs may also include provisions to address MCS burden-sharing. This may result in joint enforcement action, as well as CP resource-sharing (e.g. vessels, at-sea inspection capabilities, information etc.).⁸³ The CCAMLR System of Inspection⁸⁴ is a notable example of such activities.

Concerns over meeting compliance enforcement needs led to CCAMLR's 2008 adoption of terms of reference (TORs) for an intersessional Working Group (WG) on the Development of a CCAMLR Compliance Evaluation Procedure (WG-DOCEP).⁸⁵ These TORs extended the remit of an existing intersessional Working Group at the time.⁸⁶ Following the inaugural DOCEP Workshop in 2009, CCAMLR became the first regional marine management organisation to formally address compliance evaluation.⁸⁷ The approach aimed to detect and rate CM compliance breakdowns generally, as well as potential ecosystem impact(s)⁸⁸ where possible.⁸⁹

⁷⁸ Constable, A.C., 'Lessons from CCAMLR on the implementation of the ecosystem approach to managing fisheries', *Fish and Fisheries*, 2011, 12(2): 138-151.

⁷⁹ Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organisations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organisations*, (2007), ix. Available online at: <http://www.oecd.org/sd-roundtable/papersandpublications/39374762.pdf>.

⁸⁰ Miller, D.G.M, above n 28.

⁸¹ Willock and Lack, above n 75.

⁸² Given its unique status and explicit linkages with the Antarctic Treaty, questions surround CCAMLR's status as a simple RFMO. It is recognised that while some of the Commission's function are RFMO-like, CCAMLR's objectives and practices are broader in intent than those of most RFMOs.

⁸³ Part 9 of CCAMLR Basic Documents.

⁸⁴ CCAMLR, 2008. Report of the Twenty-Eighth Meeting of the Commission (CCAMLR-XXVIII). CCAMLR, Hobart. Paper, CCAMLR-XXVIII/44 - Proposed Work Programme for the Development of a Compliance Evaluation Procedure Working Group. At: <https://www.ccamlr.org/en/system/files/e-cc-xxviii.pdf>. Accessed: 10 July 2019.

⁸⁵ Ibid.

⁸⁶ CCAMLR-XXV, 2006. Report of the Twenty-Fifth Meeting of the Commission (CCAMLR-XXV). CCAMLR, Hobart, para. 7.30. At: <https://www.ccamlr.org/en/system/files/e-cc-xxv.pdf>.

⁸⁷ CCAMLR-XXX, 2011. Report of the Thirtieth Meeting of the Commission (CCAMLR-XXX). Hobart, CCAMLR. paragraph 8.7. At: <https://www.ccamlr.org/en/system/files/e-cc-xxx.pdf> and CM 10-10 at <https://www.ccamlr.org/en/document/conservation-and-management/schedule-conservation-measures-force-2012/13-season>.

⁸⁸ CCAMLR-XXIX, 2010. Report of the Twenty-Ninth Meeting of the Commission (CCAMLR-XXIX). CCAMLR, Hobart, Annex 6, para. 2.42. At: <https://www.ccamlr.org/en/ccamlr-xxix>.

⁸⁹ Miller, D.G.M. above n 28.

This not only gave SCIC responsibility for providing general compliance advice to the Commission, but also responsibility for overseeing the CCAMLR Compliance Evaluation Procedure's (CCEP) development.

CCAMLR CPs are responsible for ensuring their vessels act in accordance (i.e. comply) with CMs in force (CAMLR Convention Article XXI.1). They are also obligated to take appropriate measures to ensure that this happens. Consequently, CPs are also required to ensure that CCAMLR is informed of any measures taken, "including the imposition of sanctions for violations".⁹⁰ With Convention Article XXII.1 requiring CPs to make sure that "no one engages in any activity contrary to the Convention objective in a manner consistent with the United Nations Charter", a CP is also required to "notify CCAMLR of any such activity which comes to its attention" (Article XXII.2).

It therefore seems reasonable to conclude that when IUU fishing takes place, to the extent that it systematically undermines CCAMLR's conservation efforts, paragraph 84 of the 2001 FAO IPOA-IUU applies.⁹¹ CAMLR Convention Article XXII provisions may then be more broadly applied to target vessels and nationals engaged in IUU fishing activities contrary to CCAMLR CMs. In effect, CCAMLR can act collectively to bring non-compliance with its CMs to the attention of the State(s) concerned and, if these persist, are not rectified or acted upon, individual CCAMLR Members may adopt appropriate, international law consistent measures to counter perceived threat(s) to the Convention objective.⁹²

Both the Inter-Ministerial High Seas Task Force (HSTF)⁹³ and 2016 UNFSA Review Conference⁹⁴ emphasise the key role played by unsatisfactory Flag State performance in allowing IUU fishing to take place. The Conference⁹⁵ in particular noted the need to promote:

the implementation of the Voluntary Guidelines for Flag State Performance as a valuable tool for strengthening compliance by flag States with their duties and obligations, and urge all flag States to implement the Guidelines as soon as possible, including, as a first step, by carrying out a voluntary assessment....

⁹⁰ CAMLR Convention Article XXI.2..

⁹¹ FAO, 2001. FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). FAO, Rome, 33 pp. At: <<http://www.fao.org/3/a-y1224e.pdf>>.

⁹² Such actions include bilateral and diplomatic demarches, as well as collective CCAMLR actions such as CMs and Resolutions ("Res.") targeting IUU fishing (e.g. Res. 25/XXV, 32/XXIX)) and non-compliance generally (CMs 10-06, 10-07 and 10-10; Res. 35/XXXIV).

⁹³ OECD, *Closing the Net: Stopping illegal fishing on the high seas. Summary Proposals of the Ministerially-Led Task Force on IUU Fishing on the High Seas*, 2006, United Kingdom Department for Environment, Food and Rural Affairs and the Department for International Development (DFID), London 30 pp. At: <<https://www.oecd.org/sd-roundtable/papersandpublications/39375316.pdf>>.

⁹⁴ United Nations, 2016. Report of the Resumed 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, Division for Ocean Affairs and the Law of the Sea, New York. A/CONF.210/2016, 50 pp. At: <https://undocs.org/A/CONF.210/2016/5>.

⁹⁵ Ibid, Section C, para. 2.(a).

This invocation reinforced obligations regarding flagged vessels set out in the 1993 FAO Compliance Agreement⁹⁶ and other relevant international instruments.⁹⁷

For CCAMLR, the question became - How can CP compliance with CMs be evaluated in operational terms? Drawing on Western Central Pacific Fisheries Commission (WCPFC) Licensing Obligations and International Commission for the Conservation of Atlantic Tuna (ICCAT) Trade Reporting, CCAMLR made a case for more detailed analyses of its unique compliance purview.⁹⁸ To standardise future analyses of 11 RFMOs, including itself, CCAMLR proposed a targeted and in-depth analyses of its compliance needs.⁹⁹ It recognised that such an assessments should be objectively formulated and procedurally standardised to provide an institution-wide view of CCAMLR's compliance performance and underpin development of institutional best-practices. The strategy aimed to account for the unique nature and specificity of many CCAMLR CMs. However, comprehensive comparison of CCAMLR compliance measures with other identified RFMOs remains outstanding, despite the CCEP's development remaining a CCAMLR priority.¹⁰⁰

Early in the CCEP's development, SCIC recognised that the accrual of essential, and relevant, detail should focus on "core" rather than "absolute" standards in formulating "best practice" criteria. For example, deployment of scientific observers is not necessarily equivalent to 100% observer coverage, as the former is a core standard and the latter an absolute one.

Consequently, comparable best practice endures as a key principle for CP optimisation of institutional CCAMLR compliance actions commensurate with higher-order considerations. CCAMLR stands alone in developing actions and measures to the extent that these address all the desired compliance qualities.¹⁰¹ Despite wide-ranging CMs having been agreed, CCAMLR has not universally applied these to all its fisheries for various reasons.¹⁰²

Recognising that risk and compliance are inclusive for any compliance evaluation, the 2009 DOCEP Workshop proposed a compliance procedure model.¹⁰³ In the model, scientific observers were seen to play an important role in providing relevant ancillary information to the CCEP process.¹⁰⁴ A non-compliance, risk severity matrix was also constructed and substantially adapted to provide non-compliance assignments for perceived impacts on the Antarctic marine

⁹⁶ The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement) was unanimously approved at the 27th Session of the FAO Conference of that year. It entered into force on 24 April 2003, and is accessible at: http://www.fao.org/fileadmin/user_upload/legal/docs/012t-e.pdf. (Accessed 30 April 2018)

⁹⁷ The 2015 FAO Voluntary Guidelines for Flag State Performance, available online at <<http://www.fao.org/3/a-i4577t.pdf>>

⁹⁸ CCAMLR, Assessing compliance performance of CCAMLR Contracting Parties. Paper DOCEP-09/4 2009, p. 3 of 16 pp. Appendix II of the Report of the Workshop for the Development of a Compliance Evaluation Procedure (DOCEP).

⁹⁹ Ibid.

¹⁰⁰ Miller, D.G.M. and Murray, E, above n 74.

¹⁰¹ Miller, D.G.M. and Murray, E, above n 74.

¹⁰² The CCAMLR Vessel Monitoring System is centralised with fishing vessel positions being predominantly reported directly to the CCAMLR Secretariat, or via the CP Fisheries Authority of concerned (CCAMLR CM 10-04).

¹⁰³ CCAMLR, above n 98.

¹⁰⁴ CCAMLR, above n 98.

ecosystem, as well as on harvested, dependent and related species as per Convention Article II.3.¹⁰⁵

Following the CCEP's formal adoption in 2012, SCIC extensively debated and trialled various processes before the current procedures were settled.¹⁰⁶ These focused on the CCEP's implementation of consistent and cost-effective actions to address the compliance performance elements proposed by WG-DOCEP in 2009. They were extensively inter-woven with requirements attached to the production of CCAMLR CP and NCP IUU Vessel Lists under CMs 10-06 and 10-07 respectively. Resultant summary and provisional versions of the CCAMLR Compliance Report are produced following the steps outlined in CM 10-10 paragraphs 2 and 3. The Final Provisional Compliance Report is considered and adopted by the Commission as the Annual CCAMLR Compliance Report.¹⁰⁷ Notably, all CMs in the applicable Schedule of Conservation Measures in Force are eligible for CCEP evaluation.¹⁰⁸

The Secretariat uses a risk-directed approach to compile the Preliminary CCAMLR Compliance Report, which is the first opportunity for SCIC and the CPs to develop responses to non-compliance.¹⁰⁹ Such a generic approach is consistent with WG-DOCEP's original approach to CCEP development.

Adoption of CM 10-10 in 2012 officially launched the CCEP, while subsequent modification of the CM in 2016 and 2017 merged DOCEP-identified compliance categories and actions. As already noted, WG-DOCEPP also compared compliance performance between CCAMLR and 11 RFMOs, along with the attendant considerations or measures, underpinning CM performance assessments. The consequent inventory of implied provisions was subsumed into CM 10-10. Most notably, the 2017 CM 10-10 revision addressed:

- (a) assignment of compliance status (particularly specific categories);
- (b) procedures for determining further Member action;
- (c) reaching consensus on issues involving individual Members; and
- (d) methods for CCEP improvement to avoid future problems like those encountered when the 2017 CCAMLR Compliance Report was not agreed as China could not accept its non-compliance rating for CM 10-04.¹¹⁰

This resulted in paragraph 1.(iii) of CM 10-10 being modified in 2018 to make it mandatory for a Member to propose a preliminary compliance status when responding to its Draft Compliance

¹⁰⁵ CCAMLR, above n 98.

¹⁰⁶ CCAMLR, above n 98.

¹⁰⁷ CCAMLR CM 10-10, paragraph 4.

¹⁰⁸ CCAMLR CM 10-10 para. 1.(i).

¹⁰⁹ Miller and Murray, above n 74.

¹¹⁰ Miller and Murray, above n 74.

Report.¹¹¹ Other difficulties encountered, and associated solutions developed during the CCEP's evolution have been elaborated elsewhere,¹¹² along with associated key events since 2012.

4.5. Evaluation

Accepting that enforcement is "the act of compelling compliance with a law,"¹¹³ it is recognised that current understanding of enforcement in international law is largely State-centric, having been tempered and broadened in various ways.¹¹⁴

Most commonly, it is accepted that a State's international law options to help itself include scope for implementing measures countering any violation of State rights. However, measures do not customarily include force, except when a State has the right to defend itself.¹¹⁵ This narrowing of permissible counter-measures has resulted in a growth of internationally-based enforcers, with self-help moving from an individual State right to bilateral or, more encompassing, multilateral arrangements that benefit all States.¹¹⁶ Consequently, States have become increasingly dependent on self-help assistance from international institutions, such as actions sanctioned by the United Nations Security Council, even when these provide limited collective, or unrealistic, enforcement options.^{117,118}

With self-help providing a limited international collective enforcement capability, self-judgement about perceived compliance violations, including assessment of appropriate responses, tends to be curtailed by collective processes, especially in the face of a widening range of non-state actors globally.¹¹⁹ To a large extent, therefore, the conformity of State conduct with international norms has come to rely on closer monitoring through reporting, periodic review and justificatory processes within international organizations or treaty-based institutions.¹²⁰ In ancillary terms, this raises profound questions about voluntary compliance, when attendant implications for

¹¹¹ See paragraph 9.17 in CCAMLR, 2018. Report of the Thirty-Seventh Meeting of the Commission (CCAMLR-XXXVII). Hobart, CCAMLR. At: <https://www.ccamlr.org/en/system/files/e-cc-xxxvii.pdf>.

¹¹² Ibid.

¹¹³ Garner, B.A. *Black's Law Dictionary*, 2004, Eighth Edition, West Group, USA. p. 569.

¹¹⁴ Brunnée, J. Enforcement Mechanisms in International Law and International Environmental Law. *Environmental Law Network International (ELNI)*, 2005, 1: 1-11.

¹¹⁵ Ibid.

¹¹⁶ Barcelona Traction, Light and Power Company, Limited Case (Second Phase), 1970. International Court of Justice Reports 1970, p. 3: paras 33-34. At: <https://www.icj-cj.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

¹¹⁷ Stein, T., 'Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent'. In Delbrück, J. (Ed.), *Allocation of Law Enforcement Authority in the International System, Proceedings of an International Symposium*, Kiel Institute of International Law, 1995, p. 135.

¹¹⁸ Barkin, J. S., & DeSombre, E. R. Unilateralism and multi-lateralism in *international fisheries management*. *Global Governance*, 2000, 6: 339-360.

¹¹⁹ Brunnée, J above n 114.

¹²⁰ Maupain, F. 'International Labor Organization Recommendations and Similar Instruments', In: Shelton, D. (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford University Press, 2000, 372-393.

international legitimacy¹²¹ and behaviour¹²² are concerned. Notably, voluntary compliance has only recently evolved into a fisheries compliance-enforcement tool,¹²³ but it requires further development.

As the CAMLR Convention Area is remote and predominantly comprises the high seas,¹²⁴ an added complication permeates the above. Under the LOSC Article 116, the right to fish is moderated by the requirement that States cooperate in taking, and supporting, measures necessary for the conservation of high seas living resources. While such conditions are generally applicable in the CCAMLR Area, there are notable exceptions.

In particular, certain islands in the CCAMLR Area north of the Antarctic Treaty Area are subject to undisputed territorial sovereignty and some are not. This means the States concerned are effectively Coastal States enjoying all the rights and obligations attached to their adjacent territorial seas.¹²⁵ These rights and obligations extend to the attached EEZ, 200 miles from the designated seashore baselines.¹²⁶ Coastal States thus have the right to determine allowable catches (LOSC Article 62.1) in their EEZs, as well as to promote optimal use of living resources (Article 62.2) and allow other States to fish in the Zone (Article 62.3).

To harmonise CCAMLR CMs and Coastal State measures in sovereign waters within the Convention Area, the latter measures are expected to be consistent with CCAMLR CMs applied on the high seas.¹²⁷ For this reason, the Chairman's Statement, attached to the CAMLR Convention, outlines how CMs are to be applied in CCAMLR Area waters over which State sovereignty is recognised by all CPs.¹²⁸ This has evolved into an intricate, and at times inconsistent, process aimed at applying CCAMLR CMs evenly throughout the Convention Area.¹²⁹ Furthermore, the attached practice of certain CCAMLR Coastal States recording CM exceptions under the Chairman's Statement has been questioned.¹³⁰

Moreover, jurisdiction within, and management of, the CCAMLR Area are explicitly linked with Antarctic Treaty provisions on sovereignty in the Treaty Area (south of 60°S) and various

¹²¹ Franck, T.M. 'The Power of Legitimacy Among Nations', *Netherlands International Law Review*, 1990, 38(3): 303 pp.

¹²² Henkin, L. 'How Nations Behave', 1970. *Law and Foreign Policy, Second Edition*, Columbia University Press, New York, USA p. 47.

¹²³ Clark, E. A. The Duty of States to Cooperate in International Marine Capture Fisheries Law. *Antarctic and Southern Oceans Law and Policy Occasional Papers*, 2009, 13: 46–63. Clark, E. A. 2011. Strengthening Regional Fisheries Management: An Analysis of the Duty to Cooperate. *New Zealand Journal of Public and International Law* 9(2), 223-246.

¹²⁴ This classification is consistent with Part VII, Section 2 of the 1982 *United Nations Convention on the Law of the Sea* (LOSC). 202 pp.

¹²⁵ LOSC Articles 2 and 3.

¹²⁶ LOSC Part V, Articles 56-58 and 61-62.

¹²⁷ CAMLR Convention Article XI explicitly addresses harmonisation of the conservation of any stock, or stocks of associated species, by promoting cooperation between the Commission and CPs that exercise jurisdiction in marine areas adjacent to the CCAMLR Area.

¹²⁸ CCAMLR, Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources. Text of the Convention on the Conservation of Antarctic Marine Living Resources, CCAMLR, Hobart Australia. 24 pp.

¹²⁹ Miller, D.G.M, 'CCAMLR Conservation Measures: How the Chairman's Statement Works', *The Yearbook of Polar Law*, 2015, VII: 501-530.

¹³⁰ Paragraph 100 and Criterion 3.32. of the 2008 CCAMLR Performance Review Report., 146.

CAMLR Convention Articles explicitly elaborate these linkages.¹³¹ Fittingly, paragraph 7 of the 1991 Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting in Madrid also notes that "nothing in the Protocol [to the Antarctic Treaty on Environmental Protection] shall derogate from the right and obligations under the Convention on the Conservation of Antarctic Marine Living Resources...".¹³² Such considerations raise questions concerning the extent to which the CCAMLR Area, as part of Antarctica as a whole, may be viewed as a global commons.¹³³

While it has been argued that a common heritage of humankind theme is applicable to the Antarctic, this is a notion with which many developing countries do not agree.¹³⁴ As Suarez notes, "[t]he riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race".¹³⁵ He goes on to highlight the fact that consideration has not been given to:

the interests of the moment, or of any particular country, but the general interest of mankind, which before long will have to draw upon the reserves of the sea to make good the inadequacy of the food production on land. It is our business to see that this step is not taken too late.

The clear and present danger alluded to above is that the effects of CCAMLR CMs will be short-lived if they cannot rely on long-term cooperation between, and the joint political will of, all CCAMLR CPs. To this extent CCAMLR's consensus-based decision-making could be strengthened, especially if CMs are agreed before their entry into force and are consequently supported in the absence of any substantive objection to their initial promulgation.¹³⁶ This has important implications for the CCEP's implementation when 'push back' on non-compliant events results in a lack of agreement on non-compliance ratings within SCIC. On occasion, such circumstances have provoked seemingly self-serving explanations from China, Russia, South Africa, Uruguay and other SCIC Members, with a consequent lack of consensus on a particular CCEP-evaluated compliance status.¹³⁷

With potential capacity issues at play in addressing collective compliance problems, a perception of unilaterality by a CCAMLR coalition of the willing runs the risk of the CCEP being perceived as lacking legitimacy. This could result in concern for a process intended to improve compliance

¹³¹ CAMLR Convention Articles III to V are linked to Treaty Articles I and V, IV and VI, and IV.2 respectively.

¹³² U.S. Department of State, 2002. *Handbook of the Antarctic Treaty System*, Ninth Edition. Washington D.C. p. 474 of 1012.

¹³³ The term 'global commons' denotes areas and natural resources not subject to the national jurisdiction of a particular State but which are shared by other States, if not the international community as a whole. Buck, S.J 1998. *The Global Commons: An Introduction*. 1998. Washington DC, Island Press., pp. 44-65 of 240.

¹³⁴ Ibid.

¹³⁵ Ibid..

¹³⁶ Turner, J., Jabour, J. and Miller, D. 'Consensus or Not Consensus: That is the CCAMLR Question', *Ocean Yearbook*, 2008, 22: 117-157.

¹³⁷ Miller and Murray, above n 74.

within the CCAMLR Area, where the Area is being managed for a collective good.¹³⁸ It could also pose a significant risk of being labelled trade protectionism. An obviously comparable example is the Shrimp-Turtle Case, where the World Trade Organisation's (WTO) Appellate Body stressed that measures addressing international environmental problems are more appropriately agreed by a multilateral rather than a unilateral process¹³⁹ - the exact solution CCAMLR seeks through its consensus-based decision-making regime.

Such implied tensions are central to CCAMLR CCEP-directed decisions, and they clearly highlight the dangers of situations that are both reactive and confrontational,¹⁴⁰ at least for some Members. There are several reasons for this. For example, difficulties in establishing unequivocal causal relationships between non-compliance and its detrimental effects, including associated counter-measures, are fraught with an *erga omnes* context.¹⁴¹ Additionally, capacity issues are probably better addressed in a climate of transparency, encouragement and engagement, rather than confrontationally, which is how the CCEP largely goes about its business.¹⁴²

Other complications include the Convention Area's size and remoteness, combined with the need for effective MCS over a substantial portion of the Area, and in the case of IUU fishing, beyond.¹⁴³ These considerations not only result in challenging financial costs (e.g. for at-sea inspections and sophisticated surveillance strategies), they complicate effective application of Flag State jurisdiction where capacity disparities, cost-efficiency needs and jurisdictional determinants are likely to impact MCS execution.

Despite such concerns, arguably, the CCEP has notably improved CCAMLR's compliance regime, without over-provoking adversarial confrontations. The current process promotes institutional transparency to allow CPs a fair opportunity to respond to non-compliant incidents and for CCAMLR to adopt a range of responses to CM issues, including necessary improvements enhancing technical operability.¹⁴⁴ Consequently, there is a strong appreciation within CCAMLR that CM compliance remains central to meeting the Convention's objective. This is accompanied by increasing acceptance that the CCEP offers a fair and equitable way to achieve institution-wide compliance, where due weight is afforded fairness along with CCAMLR fishery values and sustainability needs.¹⁴⁵

¹³⁸ Murray and Miller, above n 74.

¹³⁹ Parker, R.W. 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict', *Georgetown International Environmental Law Review*, 1999, 12(1): 126 pp.

¹⁴⁰ Ibid.

¹⁴¹ In legal terminology, *erga omnes* rights or obligations are owed to all.

¹⁴² Miller and Murray, above n 74.

¹⁴³ CCAMLR IUU catch estimates may be regarded as sub-global, or regional estimates, that are not applicable to all fisheries or ocean areas since they focus on 'far seas' IUU fishing, often by CCAMLR NCPs, which overlaps with other geographical areas and high seas fisheries in some cases.

¹⁴⁴ CCAMLR-XXXIII, 2014, Report of the Thirty-Third Meeting of the Commission. Hobart, CCAMLR. Australia, paras 3.5 to 3.6. At: <<https://www.ccamlr.org/en/system/files/e-cc-xxxiii.pdf>>

¹⁴⁵ Miller and Murray, above n 74.

It is also important to appreciate the extent to which the CCEP has emerged as an example of global best practice for compliance-focused developments within other RFMOs. As noted, CCAMLR has already considered a rudimentary and inventoried comparison of RFMO-adopted measures between such organisations.¹⁴⁶ This contrasted compliance categories, actions and developments for 11 RFMOs, including CCAMLR. Subsequently, the Commission has suggested that there is a need for further consideration of the CCEP in a global best practice context. As noted, this remains work in progress.

Despite CCAMLR largely standing alone in developing measures to address various CM compliance elements, there is still a need to standardise RFMO inter-comparability more rigorously. The expansion and elaboration of the rudimentary RFMO comparison highlighted further emphasises that additional in-depth analyses are required.¹⁴⁷ These must account for the circumstantial specificity of CCAMLR CMs compared to other RFMOs, particularly in regards the type(s) of non-compliance being assessed and compared.

The WCPFC has recently reviewed its Compliance Monitoring Scheme (CMS).¹⁴⁸ Like the CCEP, the CMS is a three-stage process where:

- (a) WCPFC Members, Cooperating Non-Members and Participating Territories (CCMs) provide compliance information to the WCPFC Secretariat;
- (b) the Secretariat reviews the information and responds; and
- (c) the information is reviewed and assessed by a meeting of Parties. In the WCPFC's case, the collective institutional review is undertaken by the SCIC-analogous Technical and Compliance Committee (TCC).

With the CMS being more complicated, onerous and wider-ranging than the CCEP, a case can be made that fisheries compliance evaluation regimes at the global level should, as far as possible, be simple, manageable, cost-effective and efficient for all concerned.

In CCAMLR's case, irrevocable proof is not yet available to confidently indicate that the CCEP has substantially and unequivocally contributed to increased compliance overall.¹⁴⁹ The attendant difficulty is that it is impossible to compare past and contemporary compliance histories objectively in the absence of a consistent and standardised information base for a period greater than the five plus years that the CCEP has been in existence. A lack of comparable non-compliance metrics on either side of the CCEP's entry into force further compounds such

¹⁴⁶ CCAMLR, *Report of the Workshop for the Development of a Compliance Evaluation Procedure* (DOCEP), 2009.

¹⁴⁷ Miller and Murray, above n 74.

¹⁴⁸ WCPFC, *Final Report from the Independent Review Panel to Review the Compliance Monitoring Scheme*, 2004, 164 pp. At: <https://www.wcpfc.int/doc/final-report-independent-panel-review-compliance-monitoring-scheme-0>.

¹⁴⁹ Miller and Murray, above n 74.

difficulties. Only the future will reveal whether CCAMLR CM compliance can ever be objectively compared, as CCEP data and the procedure's attached timeline grow. Meanwhile, the circumstances encountered in 2017¹⁵⁰ suggest that the CCEP is still bedding down to the extent that its future trajectory and ultimate success remains unclear.

Nonetheless, noting CCAMLR's global best MCS practice standing, there is no doubt that the CCEP offers a significant step forward for CCAMLR as a mature RFMO-like management organisation. In this regard, the CCEP could serve as a model from which other RFMOs may draw information and experience. This may prove useful in developing global standards to augment compliance evaluation as a crucial, best-practice management tool for the sustainable fisheries management 'toolbox'. However, a crucial question remains: What place do CCEP-like processes occupy in future efforts to cohesively address the global 'fisheries crisis' and to promote responsible fishing universally?

The UN has long recognised that global "environmental problems are greater than the sum of those in each country,"¹⁵¹ meaning that the world must transcend national self-interest to embrace the collective interests of human survival.¹⁵² In context, the UN has highlighted two areas of particular concern: Antarctica and the oceans. For the former, the importance of widening cooperation within the ATS appears to benefit responsible global custodianship of the region.

Three key imperatives underpin the above UN assertion in terms of mobilising the global commitment necessary to effectively manage the oceans. In particular, the UN has acknowledged that the:

- Oceans' underlying unity mandates effective global management; Shared-resource nature of many regional seas requires regionally-focused management, and
- Land-based threats require effective national actions based on international cooperation.

Implicit in these assertions is that, at a minimum, there is an essential 'commons' element attached to the responsible management¹⁵³ of both Antarctica and the oceans. Apart from associated *res communis* considerations having been implicated in encouraging overcapitalisation and overexploitation,¹⁵⁴ compliance-enforcement is essential to underpinning responsible fishing and ecosystem management along the lines posited here. This strongly

¹⁵⁰ Miller and Murray, above n 74.

¹⁵¹ United Nations, *Our Common Future: Report of the World Commission on the Environment and Development*, 1987, United Nations New York. Chapter 10 - Managing the Commons. UNGA Document A/42/427. At: <<http://www.ask-force.org/web/Sustainability/Brundtland-Our-Common-Future-1987-2008.pdf>>.

¹⁵² *Ibid.*

¹⁵³ Where responsible management implies constant weighing of social, economic and environmental effects, including impacts on decision-making and compliance within applicable legal norms.

¹⁵⁴ GESAMP, 'A Sea of Troubles. Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection', Report and Studies, GESAMP, 2001, No. 70: 35 pp. At: <<http://www.gesamp.org/publications/a-sea-of-troubles>>.

implies that effective and participatory compliance evaluation is paramount. Consequently, improving MCS integration with compliance evaluation implementation remain worth pursuing to promote the CEEP's development and refinement.

Within the CEEP's framework and its highlighted key standing, we offer five key elements to be considered further in improving the Procedure's processes and outcomes, as well as address the data/information uncertainties, scenario prediction, contextual and scale considerations.

Our suggested framework relies on:¹⁵⁵

- Using the best information available, especially scientific advice;
- Ensuring transparency to underpin comprehensive, informed and effective stakeholder participation in a minimally-adversarial environment;
- Where possible, avoiding reliance on false objectivity when taking decisions will avoid over-quantification of imprecise values, noting that the precision of non-compliance ratings are essentially a product of judging fulfilment of imprecise, or interpretable, CM provisions;
- Striving for efficiency, but not at the expense of effectiveness;
- Considering equity and vulnerability in terms of attached compliance costs and benefits;
- Ensuring global accountability by providing regular non-compliance monitoring and evaluation; and
- Where possible, considering cumulative and cross-scale effects to assess tradeoffs between the benefits of specific ecosystem services.

It has recently been suggested that global fisheries are really a panarchy, where four key dimensions drive the emergence of ocean hazards. These dimensions have profound implications, particularly in terms of their attached potential to drive global fisheries to collapse, as well as in improving risk-based, EBM approaches.¹⁵⁶

Improved understanding of factors most likely to affect compliance evaluation successes and failures remains crucial to resolving the above panarchy, as compliance evaluation is a primary driver of success and failure, as well as of effective compliance evaluation procedures in their own right. Here, effectiveness is a product of contextual factors, such as governance and

¹⁵⁵ Ibid.

¹⁵⁶ Gaichas, S.K., DePiper, G.S., Seagraves, R.J., Muffley, B.W., Sabo, M.G., Colburn, L.L., and Loftus, A.J., 'Implementing Ecosystem Approaches to Fishery Management: Risk Assessment in the US Mid-Atlantic', *Frontiers in Marine Science*, 2018, 5: 442.

socioeconomic considerations, rather than simply a consequence of how a compliance evaluation procedure has been designed and implemented.

Consequently, robust policies should counter potentially negative effects from unacceptable non-compliance risks, particularly where policies are predicated by a need to build/rebuild harvested stocks and area resilience so as to minimise pervasive, persistent, and irreversible disturbances and effects (i.e. "changes"). The potential for unforeseen, and extreme, events to negatively impact ocean management must therefore be taken into account.¹⁵⁷

Six interrelated, concerns drive human vulnerability to oceanic risk(s):¹⁵⁸

- (a) lack of recognition that the oceans are inherently sensitive systems;
- (b) inappropriate ocean financial and economic management mechanisms;
- (c) inadequate scientific information and knowledge;
- (d) human disconnection from the full range of ocean values;
- (e) lack of political will and corporate leadership to address ocean risk(s) specifically; and
- (f) ineffective implementation of appropriate governance.

Interlinking qualities of communication, ocean literacy, urgency and scale stand with these concerns as identifiable challenges to future development of compliance evaluation strategies and policy.

4.6. Conclusions

We consider that the CCEP, and compliance evaluation more generally, are essential for effective CCAMLR fisheries management, with MCS being a key integrating factor. We also see CCAMLR withstanding scrutiny as a worthy, and complete, example of best global MCS practice to date.

Based on the information and thoughts presented here, we conclude that the CCEP offers a useful model for developing compliance evaluation regimes more broadly. It could also be suggested that the merits of enhancing fisheries compliance via a CCEP-like process would improve fishery resilience and provide valuable input into a globally co-ordinated fishery governance regime, such as that proposed by Barkin and DeSombre.¹⁵⁹ An obvious advantage is that a more holistic approach to the global fisheries "crisis" might emerge.

¹⁵⁷ Brierley, A.S. and Kingsford, M.J., 'Impacts of Climate Change on Marine Organisms and Ecosystems', 2009, *Review, Special Issue - Current Biology* 19, 602-614. DOI 10.1016/j.cub.2009.05.046.

¹⁵⁸ Ibid.

¹⁵⁹ Barkin J.S., and DeSombre E.R., 'Do we need a global fisheries management organization?', *Journal Environmental Studies and Sciences*, 2013, 3(2): 232.

Stressing global conformity (i.e. "compliance" in fisheries parlance) targets established norms and standards. However, it has been, and is still, difficult to address non-compliance directly due to its diffuse and complex nature. Consistent compliance evaluation therefore infers that on-going monitoring would vitally facilitate, and narrow down, global conformity with regulatory measures. The principle that monitoring and evaluation benefits us all has been famously illustrated by Suzanne Massie's "trust but verify" notion.¹⁶⁰ Elaborated further by President Regan at the 1982 signing of the Intermediate-Range Nuclear Forces (INF) Treaty,¹⁶¹ it became the need for "extensive verification procedures that would enable both sides to monitor compliance with the [INF] Treaty". As a policy, trust but verify mutated further with Hilary Clinton's comment on the 2015 framework Iran nuclear deal that, "my approach will be to distrust and verify"¹⁶². A further contemporary interpretation emerged as the "trust, but don't verify"¹⁶³ United States (US) policy on drone rendition. It seems to us that the simplicity of Massie's original initial rendition is at the core of fisheries compliance enforcement evaluation, offering as it does a sensible mantra to pursue.

Highlighting the role of monitoring and trust in important international arrangements illustrates that such arrangements rely on compliance with an agreement's 'spirit' to meet its objectives. This is in keeping with the notion that compliance is as important as an arrangement itself, while it recognises that compliance enforcement evaluation is heavily nuanced by the prevailing expectations of the parties involved.

Obviously the financial and political costs of ensuring compliance vary immensely, depending on the attendant norms and standards to be met, as well as on how these are defined by policy, precedent or practice. Viewing the CCEP as a step in the right direction offers hope for improving MCS rendition as a fisheries management tool. In other words, by understanding how well MCS and compliance enforcement work through effective evaluation and monitoring of non-compliance is likely to comprehensively improve ocean management in the future.

We also recognise that recent closure of the Central Arctic Ocean to fishing for at least 16 years is a step in the right direction, "to better understand this ever-changing ecosystem and its marine life and to determine if fishing there could be ecologically sustainable".¹⁶⁴ Examining the role that

¹⁶⁰ The Washington Post, 'Trust, but verify ("Doverai no proveryai"): An untrustworthy political phrase', (Web Page) <https://www.washingtonpost.com/opinions/trust-but-verify-an-untrustworthy-political-phrase/2016/03/11/da32fb08-db3b-11e5-891a-4ed04f4213e8_story.html>.

¹⁶¹ Abbott, K.W. 'Trust but Verify: The production of Information in Arms Control Treaties and Other International Agreement', 1993, Available online at: <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1301&context=cj>>.

¹⁶² Clinton, H. 'Comments', 2015, (Web Page), <<https://www.brookings.edu/blog/markaz/2015/09/09/hillary-clinton-on-the-iran-nuclear-deal-distrust-and-verify>>.

¹⁶³ Romero, A.D., 'ACLU Comment on President's National Security Speech', 23 May 2013. (Web Page) <<https://www.aclu.org/press-releases/aclu-comment-presidents-national-security-speech?redirect=news/aclu-comment-presidents-national-security-speech>>.

¹⁶⁴ The signatories of this agreement include five Arctic Coastal States, the USA, Canada, Russia, Greenland/Denmark, and Norway as well as China, the European Union, Iceland, Japan, and South Korea.

compliance evaluation plays in the remote Arctic, as in the Antarctic is therefore probably worth exploring.

Equally, the notion that the CCEP offers a useful precedent for considering what might be achieved in reinforcing Arctic fisheries compliance enforcement along CCEP lines. To this extent, it should be borne in mind that the Antarctic and Arctic continue to attract significant international attention due to their perceived strategic, ecological, economic and political value. Both regions invoke profound ecological interest, and their resources are seen as potentially important economically. Nonetheless, concerns remain that the Arctic and Antarctic's strategic importance continue to pose significant risks to the international order.¹⁶⁵ The additional risks of non-compliance and unsustainable fishing practises would thus add to such concerns, particularly in light of the important role that seafood and common-access fisheries are likely to play in future global food security.¹⁶⁶

It is vitally important to, "cast off the chains that bind us to ineffective ocean management."¹⁶⁷ This entails:

- (a) improving the flow of relevant information by utilising/upgrading available technology;
- (b) expanding cross-sectional stakeholder involvement;
- (c) engaging the private sector more; and
- (d) enhancing regional-scale MCS and management.

In effect, the CCEP is striving for these attributes within the current framework of legal norms.

Therefore, as we strive for common understanding, considerably more effort must be directed at adaptive compliance evaluation to attain the best possible societal outcomes and minimise potential conflict(s).¹⁶⁸ Only public, industrial and academic discourse will achieve an effective, common and universal framework to underpin compliance evaluation globally.

¹⁶⁵ Dam-de Jong, D.. 'International Law and Governance of Natural Resources in Conflict and Post Conflict Situations', *Cambridge University Press*, Cambridge, UK, 2015..

¹⁶⁶ FAO, 'Oceans and sustainable development: Integration of the three dimensions of sustainable development, namely environmental, social and economic', *Part 1 of the Report of the Secretary-General on Oceans and the Law of the Sea*, Rome, available online at: <https://www.un.org/depts/los/general_assembly/contr butions_2015/FAO.pdf>.

¹⁶⁷ Ibid.

¹⁶⁸ Schupp, M.F., Bocci, M., Depellegrin, D., Kafas, A., Kyriazi, Z., Lukic I., Schultz-Zehden, A., Krause, G., Onyango, V., and Buck, B.H., 'Towards a Common Understanding of Ocean Multi-Use. *Frontiers*', 2019, *Marine Science*, 6: 1-12.

Chapter 5

Compliance-Related Conservation Measures in AusRFMOs

5.1. Introduction

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 international regulations than within them.¹ The lack of prescription within the LOSC on the nature and scope of flag State obligations has made clear and discernible sanctions almost impossible to identify. Additionally, the likelihood of being apprehended and often minimal implications for the perpetrator in the event of apprehension, means that RFMOs globally are facing an uphill battle with regards to achieving compliance with conservation measures.²

In recent years, RFMOs have had to adapt their compliance approach to include novel and targeted compliance-related conservation measures relevant to the specific challenges they face. Monitoring, control and surveillance (MCS) conservation measures aim to achieve conservation³ targets and ensure sustainable fishing practices are implemented appropriately. These terms were defined in 1981 by the United Nations' Food and Agriculture Organisation (FAO) Expert Consultation as:

- *'Monitoring' - continuous measurement of fishing characteristics and resource yields, which implies supervising and observing relevant activities with appropriate reporting,*
- *'Control' - regulatory conditions under which exploitation of fishery resources may be conducted, and*
- *'Surveillance' - degree and types of observations required to maintain compliance with regulatory controls ('measures') imposed on fishing activities.⁴*

¹ Baird, R, '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.

² 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).

³ In this context, 'conservation' includes the concept of sustainable resource use to allow the environment to yield the greatest net benefits to current generations while maintaining its potential to meet the needs and aspirations of future generations.

⁴ Flewwelling P. An introduction to monitoring, control and surveillance systems for capture fisheries. Rome, FAO. FAO Fisheries technical paper no. 338: p. 10.; FAO, 2001. Report on an expert consultation on MCS for Fisheries management. Rome, FAO. Accessed online March 2018 at: <<http://www.fao.org/DOCREP/003/V4250E/V4250E00.HTMS>>.

It is the ultimate aim of MCS to minimise the potential benefits to be gained from undertaking non-compliant activity.⁵ While MCS measures seeking to ensure compliance with conservation measures, enforcement actions seek to address, and rectify, violations.

This chapter identifies and examines the range of compliance-related conservation measures which may be adopted by RFMOs in their pursuit of compliance. It establishes three categories of compliance-related conservation measures and analyses some of the specific measures that may fall under each (refer Figure 1, Attachment A).

Figure 2 demonstrates that there are categories of approach RFMOs can pursue to improve rates of compliance by flag States which include policy approaches, diplomatic action, and countermeasures. The thesis argues that 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 adopts to combat non-compliance will depend upon whether the non-compliance is a perceived threat or an actual occurrence.

The chapter then goes on to identify how the compliance-related conservation measures under examination in this thesis may be categorised and why. The measures under examination include:

- 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
- monitoring and inspection procedures.

The primary purpose of this chapter, however, is to collect data to determine *which* AusRFMOs have implemented *which* compliance-related conservation measures. This data will be used in

⁵ Sumaila UR. 'The cost of being apprehended fishing illegally: Empirical evidences and policy implications'. 2004. *Organisation for Economic Cooperation and Development* (OECD), AGR/FI/IUU(2004): 11, p. 4.

Chapter 6 to allocate each AusRFMO a compliance ranking of basic, developing or established. These findings highlight the limitations of AusRFMOs when it comes to implementing effective compliance regimes and it is emphasised that compliance must now be viewed as a challenge to both the flag State, *and* industry, if progress is to be made.⁶

Regardless of the capacity of each of the AusRFMOs under examination, it is clear that compliance enforcement is pivotal to the success of the individual RFMO.⁷ 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.⁸

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.⁹

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.¹⁰ 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.

5.2. The Membership Problem

In considering compliance with conservation measures, a unique difficulty presents itself: the problem of RFMO membership. Today, several categories of RFMO membership exist. These include contracting parties (CPs) and non-contracting parties (NCPs) and what will be referred to for the purposes of this thesis as a Cooperating Non-Party (CNP).

⁶ Andre Nol kaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* at 365.

⁷ D M Miller and M Jacobsson, 'Fisheries Management and Good Governance: Global, Regional and National Legislation and Regulation' in J Sundberg (ed), *Fish, Trade and Development* (in press.)

⁸ Rosemary Rayfuse, *Non-flag State Enforcement in High Seas Fisheries* (2004) 21.

⁹ 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.

¹⁰ For example, RFMO '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.

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 an RFMO.¹¹ 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 in the case of non-compliance.¹²

In an attempt to overcome this problem, UNFSA provides that all States, regardless of their membership, have an obligation to ensure their vessels comply with the conservation measures of RFMOs.¹³ In addition, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter referred to as 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 conservation measures.¹⁴

Unfortunately, since its inception, ratification or accession to the FAO Compliance Agreement has been low,¹⁵ 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) also imposes an obligation on all State parties to cooperate in the conservation and management of high seas resources.¹⁶

The difficulty that arises is that international agreements only apply *inter partes*.¹⁷ 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 an 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

¹¹ Lodge, Michael W 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).

¹² This is because States must voluntarily agree to adopt and implement RFMO conservation measures. If a States chooses not to then they cannot be penalised, however there are exceptions to the rule. R. Quentin Grafton et al, *Handbook of Marine Fisheries Conservation and Management* (2010) 160.

¹³ United Nations Fish Stocks Agreement, article 18(1).

¹⁴ FAO Compliance Agreement, article 3(1).

¹⁵ Kevern L. Cochrane and David J. Doulman, 'The Rising Tide of Fisheries Instruments and the Struggle to Keep Afloat' (2005) 360 (1453) *Philosophical Transactions: Biological Sciences* 77, 80.

¹⁶ United Nations Convention on the Law of the Sea, articles 116-118.

¹⁷ 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>>.

apply to NCPs.¹⁸ Despite this, certain RFMOs *have* adopted conservation measures which aim to penalise non-compliant NCPs¹⁹ and there are examples of NCPs demonstrating an acceptance of their responsibility to RFMOs by ordering their vessels to comply with these measures.²⁰

Finally, CNPs hold a different status altogether within the RFMO framework. To encourage compliance, many RFMOs have invited CNPs to accept 'cooperating non-member' status.²¹ 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 different RFMOs have to CNPs, with certain RFMOs only recognising CNPs for their participation in specific conservation measures.²² For practical purposes, this chapter considers compliance mechanisms that could theoretically be adopted by an RFMO to combat non-compliance by flag States with varying degrees of membership.

5.3. Compliance-Related Conservation Measures

5.3.1. Policies

RFMO policies and their approach towards both CPs and NCPs are essential to the effectiveness of the regional system of fisheries management.²³ Without guidelines to determine how the individual RFMO will deal with CPs and NCPs differently, there can be no common and consistent approach to implementing conservation measures. 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,

¹⁸ 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 Paragraphs 12.95 – 12.100 of the 2010 Commission Report available on line at < http://www.ccamlr.org/pu/e/e_pubs/cr/09/i12.pdf>.

¹⁹ 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%2003.pdf>>.

²⁰ Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) LI *Netherlands International Law Review* 41, 62.

²¹ Food and Agriculture Organisation of the United Nations, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2002) accessed on line at <<http://www.fao.org/docrep/008/a0098e/a0098e00.htm>>

²² 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.

²³ 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.

including transparency and new and exploratory fisheries,²⁴ this section is specifically concerned with the manner in which an RFMO can minimise non-compliance.

5.3.1.1. Cooperative policies

Cooperation is the foundation of regional fisheries management. 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 an 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'²⁵ in the interests of conservation, and therefore one of the purposes of a RFMO is to act as a forum for negotiations between States on conservation matters.²⁶ 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'.²⁷ 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.²⁸ 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'²⁹ and 'request non-contracting Parties to

²⁴ A Willock and M Lack, *Follow the Leader: Learning from Experience and Best Practice in Regional Fisheries Management Organisations* (2006) 16.

²⁵ United Nations Convention on the Law of the Sea, article 118.

²⁶ 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.

²⁷ Adopted and CCAMLR-XVIII and amended at CCAMLR-XXV. Available on line <http://www.ccamlr.org/Pu/e/cds/policy-to-enhance.pdf>.

²⁸ Lodge et al, above n 11, 64.

²⁹ Policy to Enhance Cooperation, above n 27.

prevent their flag vessels from fishing in the Convention Area in a manner which undermines the effectiveness of measures adopted by CCAMLR'.³⁰

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 chose to cooperate, their catch quotas will be increased.³¹

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.

5.3.1.2. 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.³² 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.³³ In fact, it is estimated that about 10 percent of the total catch in ICCAT fisheries is undertaken by vessels flagged to non-member States³⁴ 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.

³⁰ Policy to Enhance Cooperation, above n 27.

³¹ Henriksen, above n 26.

³² Willock and Lack, above n 24, 1.

³³ Elizabeth R. DeSombre, 'Fishing Under Flags of Convenience: Using Market Power to Increase Participation in International Regulation' (2005) 5(4) *Global Environmental Politics* 79.

³⁴ Ibid.

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.

5.3.1.3. 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.³⁵ 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 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.

5.3.2. 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,³⁶ 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.³⁷

³⁵ 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>

³⁶ Rayfuse, above n 8.

³⁷ For example, in the commission reports of CCAMLR XXVIII, the USA reiterated its commitment to continued intersessional discussions on approaches to manage the krill fishery. See paragraph 12.70 of the 2010 Commission Report available on line at <http://www.ccamlr.org/pu/e/e_pubs/cr/09/12.pdf>.

However, the diplomatic ambitions of a State or group of States can also be made entirely tangible 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.

5.3.2.1. IUU Vessel Lists

Today, it is common policy for a RFMO to compile an annual list of vessels it has found to be engaged in IUU fishing in its area of competence and undermining their conservation measures.³⁸ The CCAMLR was the first RFMO to adopt a scheme for an IUU vessel list at its twenty-second annual meeting in 2003.³⁹ Since then, numerous other RFMOs 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'⁴⁰ 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 considerable and such pressure can often lead to the State taking action to remove the vessel from their register.⁴¹

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.⁴² There are several 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,

³⁸ CCAMLR's IUU list can be found at <<http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-vess.htm>>.

³⁹ Unreported and Unregulated Fishing Illegal, *Monitoring IUU Fishing Vessels in Southern African Ports* (2009) <http://www.iuufishing.org/index.php?option=com_frontpage&Itemid=1> at 15 March 2010.

⁴⁰ 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)

⁴¹ Lodge et al, above n 11, 68.

⁴² CCAMLR, *IUU Vessels* (2009) <<http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-vess.htm>> at 15 March 2010.

- 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.⁴³

Generally, these are all activities considered to be ‘serious violations’ under UNFSA.⁴⁴

The quality of information included in the IUU vessel lists of different RFMOs has been found to vary greatly.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.

5.3.2.2. 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, a 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.’⁴⁸ The ability of a RFMO to achieve comprehensive

⁴³ Lodge et al, above n 11, 63.

⁴⁴ Ibid.

⁴⁵ The PEW Environment Group, *Port State Performance* (2009) <<http://www.portstateperformance.org/index.php/content/execsummary>>

⁴⁶ Lodge et al, above n 11, 63.

⁴⁷ The PEW Environment Group, above n 45.

⁴⁸ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, above n 21, paragraph 83.

membership of all States with a potential to influence the fishery in question is a prerequisite for effective management.⁴⁹ 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.⁵⁰ Alternatively, it may request a State to recall its vessel to port so that enforcement action might ensue.⁵¹

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.⁵² Such efforts, however, are not always rewarded and despite continued pressure, Indonesia remains outside of the CCSBT.⁵³

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.⁵⁴ These negotiations were aimed at encouraging these States to close their ports to illegal trade in Patagonian Toothfish.⁵⁵ Three years later, in June 2000, Namibia acceded to the CCAMLR and in 2001 they became a permanent member.⁵⁶

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 fishery in question.⁵⁷ 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.⁵⁸

5.3.2.3. Diplomatic Demarches

⁴⁹ Willock and Lack, above n 24, iv.

⁵⁰ Organisation for Economic Cooperation and Development, *Review of Fisheries in OECD Countries* (2005), 20.

⁵¹ Ibid.

⁵² Organisation for Economic Cooperation and Development, *Strengthening Regional Fisheries Management Organisations* (2009) 34.

⁵³ Ibid.

⁵⁴ 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.

⁵⁵ Ibid.

⁵⁶ 'Report of the CEP Observer to CCAMLR XIX and SC-CCAMLR XIX', 23 October to 3 November, 2000, Information Paper IP-26, Australia. Report available on line at <http://cep.ats.aq/cep/MediaItems/ml_376387248032407_ip026e.pdf>

⁵⁷ Willock and Lack, above n 24, 6.

⁵⁸ Willock and Lack, above n 24, 6..

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.⁵⁹ 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.⁶⁰ In 1998, Australia and France sent a joint demarche to Mauritius in regards to a vessel illegally fishing in the CCAMLR conservation area.⁶¹ Australia and France requested that the *Salvora*, an IUU vessel, not be allowed to unload its catch without an investigation into its fishing activities.⁶² 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.⁶³ 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.⁶⁴

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 seine⁶⁵ 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.⁶⁶ 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 tuna in its area of competence. In this case, the vessels withdrew from the area as a result of a 'series of diplomatic demarches'⁶⁷ which persuaded the flag States to exercise control over their vessels.

⁵⁹ A 'demarche' is defined as 'a political step or proceeding'. See McIntosh (ed), *The Concise Oxford Dictionary of Current English* (1964) 323.

⁶⁰ *Deep Sea 2003: Conference on the Management of Deep Sea Fisheries*, 2003, Queenstown New Zealand at 695.

⁶¹ Baird, above n 54.

⁶² Baird, above n 54.

⁶³ Greenpeace, *The Case of the Salvora* (2000)

<http://archive.greenpeace.org/oceans/southernoceans/expedition2000/pirate/report_salvora.html>

⁶⁴ Ibid.

⁶⁵ 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>

⁶⁶ Rayfuse, above n 26, 145.

⁶⁷ Ibid.

5.3.3. Countermeasures

International law concerning countermeasures is founded in the concept of flag State responsibility.⁶⁸ 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.⁶⁹ However, countermeasures are viewed as exceptional measures, the scope of which is limited to 'the cessation of the internationally wrongful act.'⁷⁰

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.⁷¹ 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'.⁷²

Rosemary Rayfuse⁷³ argues that countermeasures must be reversible and they must not involve the threat or use of force.⁷⁴ 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 group of States or to the international community as a whole and a breach of that obligation can radically

⁶⁸ Ibid.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ Rayfuse, above n 2669, 11.

⁷² 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>>

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⁷⁴ Rayfuse, above n 2669, 11.

change the position of all other States.⁷⁵ 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.⁷⁶

The potential for a RFMO to take countermeasures against uncooperative flag States was considered a viable option for RFMOs to achieve compliance at a 2008 United Nations Food and Agriculture (FAO) workshop on flag State responsibilities.⁷⁷ At this workshop it was discussed that so long as countermeasures are transparent, non-discriminatory and compatible with the regulations of the World Trade Organisation (WTO), they represent an effective tool to encourage cooperation with the mandate of the RFMO.⁷⁸

5.3.3.1. Trade-related Measures

Trade-related measures are probably the largest remaining category of countermeasures available to induce other States to comply with international law. 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.'⁷⁹

This agreement defines what types of actions might constitute trade-related measures in a RFMO context as multi-lateral catch documentation and certification requirements and import and export controls or prohibitions.⁸⁰ 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 vessel has established that they were taken in a manner consistent with conservation and management measures.⁸¹

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 countries⁸² asked for a panel of the WTO to decide whether the US

⁷⁵ Rayfuse, above n 26, 45.

⁷⁶ Katselli, above n 70.

⁷⁷ *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. A second Expert Workshop on Flag State Responsibilities was held in Rome in June 2009.

⁷⁸ Ibid.

⁷⁹ *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, above n 21, paragraph 68.

⁸⁰ Ibid.

⁸¹ 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>>

⁸² World Trade Organisation, *Mexico etc versus US: 'Tuna-Dolphin'* (1996) <http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>

had the right to ban imports of tuna that had been caught in a manner that did not meet US dolphin protection standards.⁸³

The panel concluded that the US could not prevent the imports of tuna simply because of the way it was produced and that the GATT rules did not allow one country to take trade action for the purposes of enforcing its domestic legislation in another country.⁸⁴ 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*⁸⁵ 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'.⁸⁶ On an appeal by the US, the four countries succeeded based on a finding of the WTO that in implementing this measure, the US has failed to provide for the non-discriminatory allocation of technical and financial assistance.⁸⁷ However, this finding fails to reflect the positive outcome of this decision for the protection of the marine environment.

In passing down its decision, the WTO Appellate Body also clarified in its report that countries have the right to take action to protect the environment, especially endangered species and exhaustible resources.⁸⁸ It held: '...we have not decided that sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles'.⁸⁹ It found that measures to protect the marine environment will fall under article XX of the General Agreement on Tariffs and Trade⁹⁰ (GATT) which provides a general exception to all GATT trade rules.⁹¹

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.⁹² This highly controversial case involved a challenge to the jurisdiction of the WTO, with

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ 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>

⁸⁶ World Trade Organisation, *India etc vs US: 'shrimp-turtle'* (1999) <http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947.

⁹¹ Article XX (g) of the GATT enables 'measures necessary' relating to the conservation of exhaustible natural resources, and taken in conjunction with restrictions on domestic production or consumption. Article XX (b) enables 'measures necessary', contrary to the GATT obligations, to protect human, animal or plant life or health.

⁹² 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>

Chile asserting that the appropriate dispute settlement body in this case would be the International Tribunal for the Law of the Sea (the Tribunal).⁹³

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 2009.⁹⁴ This understanding provides for access of EC vessels to Chilean ports in exchange for commitments on cooperation in the management of stocks.⁹⁵

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-based action on the part of that RFMO would currently be consistent with international law.⁹⁶

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 flag State.

5.3.3.2. Graded Sanctions

Today it is seen as best-practice for RFMOs to ensure compliance by providing punishments for non-compliance.⁹⁷ This notion is reiterated in the FAO Compliance Agreement which is a legally binding agreement clarifying the importance of punitive sanctions. The FAO Compliance Agreement states that where 'serious offences' result in 'serious violations' of the Agreement, sanctions are applicable.

The FAO Compliance Agreement also 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

⁹³ Jiaxiang Hu, 'The Role of International Law in the Development of WTO Law' (2004) 7(1) *Journal of International Economic Law* 143.

⁹⁴ 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.

⁹⁵ Ibid.

⁹⁶ Implementation of the International Plan of Action, above n 21.

⁹⁷ 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>>.

compliance...and to deprive offenders of the benefits accruing from their illegal activities.'⁹⁸ Excluding the use of trade-related measures, however, other such penalties that might be available to RFMOs to achieve compliance include the use of fines, reduced fishing opportunities, vessel confiscations, denying non-compliant States access to national fisheries.⁹⁹

Certain RFMOs continue to resist the use of sanctions or penalties to address non-compliance.¹⁰⁰ At a meeting of the Tuna RFMOs in 2007,¹⁰¹ 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.¹⁰² In 2009, the 'Second Joint Meeting of Tuna RFMOs noted with concern the need establish a comprehensive system of non-discriminatory sanctions to address the actions of States that repeatedly fail to comply with their obligations.¹⁰³ It was decided that this system should include incentives to encourage transparent recognition of overfishing and reinforced sanctions for unreported overfishing.¹⁰⁴

However, certain RFMOs have taken steps towards imposing penalties in instances of non-compliance.¹⁰⁵ 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.¹⁰⁶ 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.

5.3.3.3. Monitoring and Inspection

RFMOs may seek to implement strict monitoring and inspection requirements to address the potential for vessels to fail to comply with their conservation measures. Not all RFMOs have adopted monitoring and inspection schemes, and no single RFMO provides for a positive right of arrest, detention or prosecution in the event of non-compliance. Yet despite this, effective monitoring and control on the high seas, 'represents the best hope for preventing, deterring and eliminating IUU fishing'.¹⁰⁷

⁹⁸ FAO Compliance Agreement, article 3(8).

⁹⁹ Implementation of the International Plan of Action, above n 21.

¹⁰⁰ Including the Indian Ocean Tuna Commission. See <<http://www.iotc.org/English/index.php>>

¹⁰¹ *Report of the Joint Meeting of Tuna RFMOs*, January 22 - 26, 2007, Kobe, Japan, TunaRFMOs2007/1.

¹⁰² 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.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Report of the Joint Meeting of Tuna RFMOs*, January 22 - 26, 2007, Kobe, Japan, TunaRFMOs2007/1 Appendix 10.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

Paragraph 80.8 of the IPOA-IUU clarifies that the inspection and arrest of non-compliant vessels falls within the ambit of RFMO mandates.¹⁰⁸ The 2002 FAO Technical Guideline entitled, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing', specifically deals with the implementation of the IPOA-IUU by RFMOs. At Section 8, the Guideline clarifies:

*In one sense, RFMOs can be only as effective in dealing with IUU fishing as their members (and others who participate in their work) direct or allow them to be. In another sense, however, RFMOs can often accomplish things that their members, acting individually, cannot. One reason for this is that governments are generally more willing to impose controls on their fishing fleets if other governments do so as well.*¹⁰⁹

While vessel inspections for example and the monitoring of non-compliance are often considered the responsibility of individual States, RFMOs can collect and disseminate information relating to IUU fishing, identify vessels that are engaging in IUU fishing and coordinate measures to be taken against them.¹¹⁰ The information-sharing facility provided by RFMOs in particular is of critical importance in tackling the IUU fishing problem.

5.4. Compliance-related Conservation Measures in AusRFMOs

This section examines the compliance-related conservation measures currently in place in AusRFMOs to identify, apprehend and punish non-compliance. To do this, it is important to highlight that AusRFMOs utilise both legally binding and non-legally binding measures to regulate the activities of States, vessels and nationals. The terminology adopted by RFMOs to distinguish between legally binding and non-legally binding compliance measures varies significantly and so for the purposes of this thesis, legally binding measures are referred to as 'formal' compliance measures whereas non-legally binding measures are referred to as 'informal' compliance measures.

This section considers each AusRFMO in turn to identify their compliance mandate and discuss the extent of the regulatory compliance measures they have implemented.

¹⁰⁸ Implementation of the International Plan of Action, above n 21.

¹⁰⁹ Implementation of the International Plan of Action, above n 21, Section 8.

¹¹⁰ Implementation of the International Plan of Action, above n 21, Section 8.

5.4.1. Commission for the Conservation of Antarctic Marine Living Resources

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.

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'¹¹¹ 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.¹¹² 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.

5.4.1.1. Formal CCAMLR Regulatory Compliance Measures

Formal compliance measures imposed by CCAMLR are referred to by the Commission as 'Conservation Measures,' with each measure allocated a number and a title.¹¹³ Informal measures may be referred to either as 'Regulations' or 'Policies.'

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-

¹¹¹ Article XXI, The Chairman of the Conference on the Conservation of Antarctic Marine Living Resources, 'Convention on the Conservation of Antarctic Marine Living Resources' (1982).

¹¹² Ibid.

¹¹³ For instance, CCAMLR's 'Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures' may also be referred to as 'Conservation Measure 10-07'.

compliant vessels and their flag States.¹¹⁴ 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 identify NCPs whose vessels are engaged in IUU fishing in the Convention Area.¹¹⁵

Further to the formal CCAMLR IUU vessel list, Conservation Measure 10-02 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 goes on to provide that CPs should not take any trade 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. 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. The same provision is contained in Conservation Measure 10-06 which relates to promoting compliance by the vessels of CPs rather than NCPs.

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.¹¹⁶ 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

¹¹⁴ CCAMLR Conservation Measure 10-07 'Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures', paragraph 2. Available on line at <http://www.ccamlr.org/pu/e/e_pubs/cm/09-10/all.pdf>

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

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, apply sanctions to the vessel.¹¹⁷

Additionally, Conservation Measure 10-04 was adopted in 2010 to require CPs to ensure that their flagged vessels are equipped with automated satellite-linked vessel monitoring systems (VMS). CCAMLR Conservation Measure 10-09¹¹⁸ also seeks to address IUU fishing by requiring notification of any transshipments occurring within the Convention Area. This CM required that all Contracting Parties notify the CCAMLR secretariat with 72 hours' notice regarding transshipments between vessels in the Convention Area.

Finally, and significantly, the CCAMLR Compliance Evaluation Procedure¹¹⁹ addresses flag State non-compliance and establishes a process which in a 'responsible, open, transparent and non-discriminatory nature' the Commission should be made aware of any information regarding non-compliance with conservation measures. This CM also provides for a procedure by which this information will be shared and disseminated. Chapter 4 has elaborated widely on this topic and as such, no further detail will be provided at this stage.

5.4.1.2. Informal CCAMLR regulatory compliance measures

The informal compliance 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 States¹²⁰ 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.

¹¹⁷ CCAMLR Conservation Measure 10-03 'Port inspections of vessels carrying toothfish', paragraph 3. Available on line at <http://www.ccamlr.org/pu/e/e_pubs/cm/09-10/all.pdf>

¹¹⁸ CCAMLR Conservation Measure 10-03, 'Notification system for transshipments within the Convention Area'.

¹¹⁹ CCAMLR Conservation Measure 10-10 (2018) <https://www.ccamlr.org/en/measure-10-10-2018>

¹²⁰ The CCAMLR has eleven acceding States at 12 August 2018. Details available on line at <<https://www.ccamlr.org/en/organisation/acceding-states>>

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,¹²¹ 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 could be achieved via the imposition of diplomatic demarches, requests or entering into negotiations with the flag State/s concerned.¹²²

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.

5.4.2. Western and Central Pacific Fisheries Commission

The founding Convention of the WCPFC includes a comprehensive suite of provisions aimed at achieving compliance from both CPs and NCPs. Among these, notable provisions for the purposes of this thesis include those relating specifically to the compliance duties and responsibilities of flag States, as well as port State measures and trade-related measures.

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

¹²¹ See Resolution 25/XXV 'Combatting illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties'. Available on line at <http://www.ccamlr.org/pu/e/e_pubs/cm/09-10/all.pdf>

¹²² Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) LI *Netherlands International Law Review* 41.

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 Convention in areas beyond national jurisdiction, unless authorised to do so.¹²³ Furthermore, CPs must take measures to ensure that nationals and fishing vessels comply with the provisions of the Convention.¹²⁴

More specifically, CPs are required to cooperate to establish mechanisms for effective monitoring, control and surveillance; including the use of vessel monitoring systems (VMS).¹²⁵ 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.¹²⁶ Finally, CPs must establish arrangements for making available information required to allow for the exchange of evidence in respect of alleged violations.¹²⁷

5.4.2.1. Formal WCPFC Regulatory Compliance Measures

In the WCPFC, formal and binding decisions are referred to as ‘Conservation and Management Measures’ (CMMs). 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’.

The formal measures the WCPFC has implemented in respect of compliance range from boarding and inspection measures to IUU vessel lists. Due to the comprehensive nature of the WCPFC Convention on all aspects of compliance, the need for some of the formal measures adopted by other RFMOs has been reduced. CMM 2006-08 entitled ‘Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures’ provides that each CP must

¹²³ Article 25, WCPFC Convention.

¹²⁴ Art 23(5), WCPFC Convention.

¹²⁵ Article 10(1)(i), WCPFC Convention.

¹²⁶ Article 25(4), WCPFC Convention.

¹²⁷ Article 25(5), WCPFC Convention.

ensure that their vessels accept these procedures and that any evidence obtained in the contrary should be referred to the authorities of the fishing vessel.

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.¹²⁸ Once the list has been adopted, CPs must take all necessary measures to eliminate these activities including non-discriminatory trade measures or withdrawing the registration of fishing license of the vessels involved.¹²⁹

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.

Additionally, 'Conservation and Management Measure – Commission VMS' (2014-02) embodies the Convention's requirement that all vessels operate vessel monitoring systems when fishing in the region. 'Conservation and Management Measure for Minimum Standards for Port State Measures' (2017-02) requires all vessels fishing in the Convention Area to adhere to certain requirements as outlined in the 'Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing FAO Port State Measures Agreement'.¹³⁰

Significantly, the 'Conservation and Management Measure for Compliance Monitoring Scheme' (CMS) (2018-07) seeks to ensure compliance with obligations arising under conservation measures adopted by the Commission. The purpose of the CMS is to assess the action of States parties in relation to alleged violations by their vessels.

5.4.3. Commission for the Conservation of Southern Bluefin Tuna

¹²⁸ Paragraph 4, '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', available on line <<http://www.wcpfc.int/conservation-and-management-measures>>

¹²⁹ Paragraph 16, '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', available on line <<http://www.wcpfc.int/conservation-and-management-measures>>

¹³⁰ 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

The primary objective of the CCSBT is to ‘ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.’¹³¹ Article 5 of the Convention for the Conservation of Southern Bluefin Tuna¹³² 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.¹³³

The Convention 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.¹³⁴ 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.¹³⁵

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.

The CCSBT has implemented both formal ‘Resolutions’ and informal ‘Recommendations’ to give effect to its mandate.

5.4.3.1. Formal CCSBT Regulatory Compliance Measures

The CCSBT has implemented a ‘Resolution on action plans to ensure compliance with Conservation and Management Measures’¹³⁶ requiring CPs and NCPs to submit an action plan on compliance with conservation and management measures. 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

¹³¹ Article 3 ‘Text of the Convention for the Conservation of Southern Bluefin Tuna’, (entered into force 20 May 1994)

¹³² ‘Text of the Convention for the Conservation of Southern Bluefin Tuna’, (entered into force 20 May 1994), Available on line at <http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf>

¹³³ Article 8 ‘Text of the Convention for the Conservation of Southern Bluefin Tuna’, (entered into force 20 May 1994)

¹³⁴ Article 14 ‘Text of the Convention for the Conservation of Southern Bluefin Tuna’, (entered into force 20 May 1994)

¹³⁵ Art 15(1) Convention for the Conservation of Southern Bluefin Tuna’, (entered into force 20 May 1994)

¹³⁶ http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/Resolution_ComplianceActionPlans.pdf

the need to ensure monitoring of such transshipment in areas beyond national jurisdiction. It was updated in 2015 to include requirements for monitoring transshipments in port.

Similarly, in 2015 the CCSBT adopted a 'Resolution for a CCSBT Scheme for Minimum Standards for Inspections in Port'. Under this scheme, a member wishing to grant port access to a foreign fishing vessel must meet certain notification and inspection requirements. This Resolution entered into force in 2017 and was updated in 2018.

The 'Resolution on establishing the CCSBT Vessel Monitoring System' 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. Additionally, the Executive Secretary is to maintain a CCSBT Record of fishing vessels registered to fish for SBT and to ensure this information is published.¹³⁷

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'¹³⁸ covers all landings, transshipments, exports, imports and re-exports of SBT whereas the TIS only covered international trade in SBT.¹³⁹ 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.¹⁴⁰ The CDS was updated in 2014.

The CCSBT has also adopted a 'Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unregulated and Unreported Fishing Activities for Southern Bluefin Tuna'¹⁴¹ that replaced the previous Resolution adopted at the CCSBT15 in 2008.¹⁴² The 2008 Resolution was not designed to be a specific list of vessels considered to be undertaking IUU fishing for southern bluefin tuna. The current Resolution is designed to identify vessels that have undermined the effectiveness of the CCSBT.

¹³⁷ Paragraph 5, 'Resolution on establishing the CCSBT Vessel Monitoring System', available on line at <http://www.ccsbt.org/docs/pdf/about_the_commission/Resolution_VMS.pdf>

¹³⁸ 'Resolution on the Implementation of a CCSBT Catch Documentation Scheme'

Available on line at <http://www.ccsbt.org/docs/pdf/about_the_commission/Resolution_CDS.pdf>

¹³⁹ 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).

¹⁴⁰ Ibid.

¹⁴¹ CCSBT, Monitoring, control and surveillance, available online at <<https://www.ccsbt.org/en/content/monitoring-control-and-surveillance>>

¹⁴² Ibid.

5.4.3.2. Informal CCSBT Regulatory Compliance Measures

The CCSBT Compliance Action Plan¹⁴³ provides a framework to improve compliance and address priority compliance risks within the Commission. The RFMO has adopted three compliance policies in accordance with the Plan which include:

- 'Minimum Performance Requirements to Meet CCSBT Obligations',
- 'Corrective Actions Policy', and
- 'MCS Information Collection and Sharing'.¹⁴⁴

The CCSBT has also implemented a Quality Assurance Review (QAR) program to help members identify how well they are performing with respect to their CCSBT obligations and provide recommendations on where improvement required.¹⁴⁵ Despite the development of these new compliance measures, the 2014 Review found that the CCSBT should continue to improve its MCS measures and take additional steps to harmonise its MCS measures with other RFMOs.

5.4.4. Indian Ocean Tuna Commission

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'¹⁴⁶ information sharing activities and recognise the need for participation by 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.¹⁴⁷ 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.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Article V, *Agreement for the Establishment of the Indian Ocean Tuna Commission*, adopted by the FAO Council 25 November 1993, Rome, Italy.

¹⁴⁷ Article X, *Agreement for the Establishment of the Indian Ocean Tuna Commission*, adopted by the FAO Council 25 November 1993, Rome, Italy.

The IOTC adopts the terminology of ‘resolutions’ rather than ‘conservation measures’ to describe the measures it adopts to regulate the activities of its CPs.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰

5.4.4.1. Formal IOTC Regulatory Compliance 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 letter to all NCPs known to have vessels fishing in the IOTC Area to urge them to become CPs. Such an approach is an 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. Finally, 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.

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 transshipment 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

¹⁴⁸ Indian Ocean Tuna Commission, ‘About IOTC’, <https://iotc.org/> accessed online 1 October 2019.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

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.¹⁵¹ 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.

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 conservation measures.

5.4.4.2. Informal IOTC Regulatory Compliance Measures

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.

5.4.5. South Pacific Regional Fisheries Management Organisation

¹⁵¹ Report of the Fourteenth Session of the IOTC, 2010, available online <http://www.iotc.org/sites/default/files/documents/2014/03/iotc-2010-s14-re_final.pdf>

The SPRFMO Convention comprehensively outlines the duties of States parties and provides a clear picture of the manner in which compliance is to be achieved within the RFMO.¹⁵² 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.

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.

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'. However where the SPRFMO Convention stands out against other RFMOs is 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 directed towards monitoring, control, surveillance, compliance and enforcement.

¹⁵² Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean. Full text of the Convention available on line <<http://www.southpacificrfmo.org/assets/Convention-and-Final-Act/2353205-v2-SPRFMOConvention-textascorrectedApril2010aftersignatureinFebruary2010forcertificationApril2010.pdf>>

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 the EEZs of 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 vessel monitoring systems (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.

5.4.5.1. Formal SPRMFO Compliance Measures

The first compliance-related conservation measure adopted by the SPRFMO was their Boarding and Inspection Procedure in 2015. This Procedure was adopted as an interim measure and specifies that Articles 21 and 22 of the UN Fish Stocks Agreement 2015 will apply as the SPRFMO at-sea inspection procedure. Article 21.4 of the Fish Stocks Agreement states that:

Prior to taking action under this article, inspecting States shall, either directly or through the relevant subregional or regional fisheries management organization or arrangement, inform all States whose vessels fish on the high seas in the subregion or region of the form of identification issued to their duly authorized inspectors. The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service. At the time of becoming a Party to this Agreement, a State shall designate an appropriate authority to receive notifications pursuant to this article and shall give due publicity of such designation through the relevant subregional or regional fisheries management organization or arrangement.

Details submitted by States parties to the SPRFMO in accordance with this measure are available on their website.¹⁵³ This measure is supported by CMM 16, 'The SPRFMO Observer Programme' which entered into force in April 2019.

In 2016, the SPRFMO adopted CMM 15-2016, 'Vessels without Nationality in the SPRFMO Convention Area', as well as CMM 05-2016; 'Establishment of the Commission Record of Vessels Authorised to Fish in the SPRFMO Convention Area'. The list of vessels authorised to fish in the Convention Area is updated annually and is accompanied by reports of vessels that have fished the Area in any given year.

More recently, in 2017 the SPRFMO established an IUU list via conservation and management measure 04-2017 entitled, 'Establishing a List of Vessels Presumed to have Carried Out IUU Fishing Activities in the SPRFMO Convention Area'. Combatting IUU fishing is an important objective of the SPRFMO and is reflected in Articles 8, 23, 24, 25, 27 and 31 of the SPRFMO Convention.

According to CMM-04, vessels are presumed to have carried out IUU fishing if they:

- a) Engage in fishing for fishery resources and are not registered on the SPRFMO list of vessels authorised to fish in the Convention Area;*
- b) Engage in fishing for fishery resources whose flag State has exhausted or has no quotas, catch limit or effort allocation, including, if applicable, those received from another Member or CNCP under relevant SPRFMO conservation and management measures;*

¹⁵³ South Pacific Regional Fisheries Management Organisations, 'SPRFMO Conservation and Management Measures', <<https://www.sprfmo.int/measures/information-related-to-boarding-and-inspection-at-sea/>> Accessed online 1 October 2019

- c) Do not record or report their catches or catch related data made in the Convention Area, or make false reports;*
- d) Take on board, tranship or land undersized fish in a way that undermines SPRFMO conservation and management measures;*
- e) Engage in fishing during closed fishing periods or in closed areas, without or after exhaustion of a quota or beyond a closed depth, in contravention of SPRFMO conservation and management measures;*
- f) Use prohibited or non-compliant fishing gear in a way that undermines SPRFMO conservation and management measures;*
- g) Tranship with, or participate in joint operations such as re-supply or re-fuelling vessels included in the IUU Vessel List;*
- h) Are without nationality and engage in fishing for fisheries resources in the Convention Area, or*
- i) Engage in fishing activities contrary to any other SPRFMO conservation and management measures.*

In 2017, the SPRFMO adopted their 'Minimum Standards of Inspection in Port' (CMM-07). This measure is inherently linked to CMM-04 in that it is designed to assist in apprehending IUU fishers when they dock at port. Similarly, CMM 12 'Regulation of Transshipment and Other Transfer Activities' was adopted in 2018 to support the detection and apprehension of IUU fishing activities.

The SPRFMO also has an active and mandatory vessel monitoring system in place via CMM 06. Their Compliance and Monitoring Scheme, CMM 10, was established in 2019 to identify and address instances of non-compliance by States parties, and cooperating non-parties, with the conservation measures of the organisation.

5.4.6. Southern Indian Ocean Fisheries Agreement

The SIOFA Agreement sets out compliance measures relating to CP obligations, the control of NCPs, boarding and inspection, transshipment regulations and the creation of a compliance committee.¹⁵⁴ 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.

¹⁵⁴ FAO Legal Office Treaties, *Southern Indian Ocean Fisheries Agreement* (2010) <<http://www.fao.org/legal/treaties/035se.htm>>

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 necessary 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,¹⁵⁵ 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.

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.

¹⁵⁵ 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.

The Agreement goes into little detail on how a system for boarding and inspection might be installed.¹⁵⁶ 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).

The SIOFA Agreement contains 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. However the Agreement does not detail how CPs are to establish whether a catch has been caught in consistency with conservation measures.

5.4.6.1. Formal SIOFA regulatory compliance measures

Given its recent entry into force, the SIOFA has taken some significant steps towards building a strong suite of compliance-related conservation measures. The 2016 meeting established CMM-04, 'Conservation and Management Measure on Vessels without Nationality', to make publically available the actions the SIOFA will take to address the implications of un-flagged vessels fishing in the Agreement Area. 2016 also saw the adoption of CMM-06, the SIOFA IUU Vessels List, to name and shame those vessels, and their associated flag-States, whose activities connect them with IUU fishing activities.

The SIOFA has also adopted significant measures to ensure all States parties implement port state inspections to detect and apprehend IUU fishing activities via CMM-08. CMM-07 similarly implements requirements to assist in the detection of non-compliance by establishing processes to authorise vessels to fish in the Agreement Area and associated notification processes.

¹⁵⁶ Clark, E. A. 2010. 'Compliance Enforcement and the Southern Indian Ocean Fisheries Agreement' SIOFA Tech. Rep. 01/10, at 7.

The 2018 meeting of the SIOFA established Conservation and Management Measure 2018-10 entitled, 'Conservation and Management Measure for the Monitoring of Fisheries in the Agreement Area'. This measure gives effect to Article 6 of the SIOFA Agreement by specifying requirements for a SIOFA vessel monitoring system, entry and exit reporting and outlining restrictions on vessel transshipments.

2018 also saw the adoption of CMM-09, 'Conservation and Management Measure for Control of Fishing Activities in the Agreement Area', and, significantly, a compliance and monitoring scheme for the organisation via CMM 2018-11. In line with the practice of other RFMOs, the SIOFA Compliance and Monitoring Scheme establishes a compliance review mechanism to assess the performance of States parties and cooperating non-parties to the SIOFA with their obligations under the Agreement.

5.5. Conclusions

This chapter began by identifying and categorising the compliance enforcement mechanisms specifically under examination in this thesis. These mechanisms included:

- 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
- monitoring and inspection procedures.

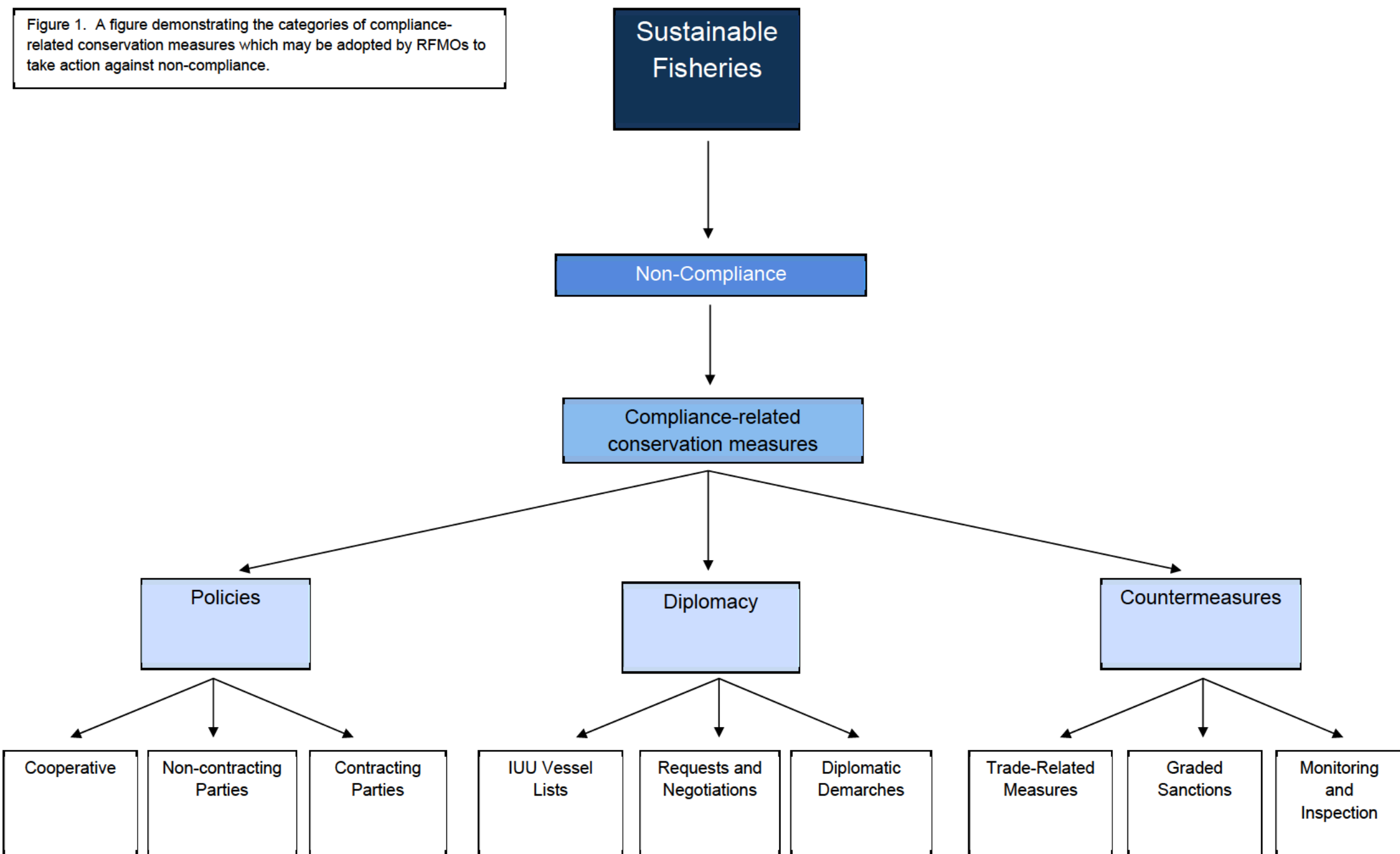
Figure 1 demonstrates how these mechanisms can be categorised to better understand their purpose within the compliance regime of AusRFMOs.

This chapter then detailed the compliance-related conservation measures in place in the AusRFMOs under examination in this thesis. The review clarified that there is significant variation in the nature and number of conservation measures implemented across the range of AusRFMOs. This situation is likely to pose challenges when attempting to understand the effectiveness or otherwise of AusRFMOs as a conglomerate.

Various factors which may have influenced AusRFMOs' uptake of regulatory compliance measures include the political inclinations of the parties to the organisation, the number of parties to the organisation, and the timing and reasons behind the creation of the organisation.

By considering the founding agreement upon which individual AusRFMOs have been formed, as well as the formal and informal compliance measures each have in place, this chapter has provided an in-depth assessment of the actual methods currently operating in AusRFMOs to encourage compliance. This information provides the data necessary to understand the relationship between the performance of the RFMO, and their uptake of compliance-related conservation measures; an analysis which is undertaken in the next chapter of this thesis.

Figure 1. A figure demonstrating the categories of compliance-related conservation measures which may be adopted by RFMOs to take action against non-compliance.



Chapter 6

Analysis

6.1. Introduction

The ability of AusRFMOs to enforce compliance with the conservation measures they administer is a critical factor in addressing the decline of high seas fish stocks.¹ However the performance of RFMOs in this regard has been poor;² with discontinuity between the compliance approaches of individual RFMOs cited as one of the key contributing factors to the challenges facing regional fisheries management.³ The question of how to improve compliance in RFMOs has been widely addressed in academic literature to date,⁴ but almost exclusively from the perspective of how flag State compliance can be strengthened to improve the compliance of the RFMO overall.⁵

While it is indeed the flag State who is responsible for upholding compliance with the conservation measures of RFMOs,⁶ this thesis suggests that limiting discussion of regional fisheries compliance to a consideration of flag State compliance alone is an unhelpful one. Instead it suggests that under the principle of shared responsibility,⁷ the resource-user shares the responsibility for management of the species in question.

By examining the compliance measures currently in place across all six AusRFMOs, this thesis provides a comprehensive picture of the compliance capacity of AusRFMOs as a group. It demonstrates that there are marked gaps in their implementation of the range of compliance-related conservation measures available and that the founding agreements that underpin AusRFMOs are similarly varied in their approach to compliance.

The thesis posits that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance, to leverage industry compliance mechanisms and engage with the opportunities they provide. With wild-capture fisheries facing overexploitation,

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

² FAO Fisheries and Aquaculture Circular No. 1072, 'Performance Reviews by Regional Fishery Bodies: Introduction, Summarise, Synthesis and Best Practices', (2012) available online at <<http://www.fao.org/docrep/015/i2637e/i2637e00.pdf>> at 56.

³ Lodge et al, above, n 1.

⁴ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 57; Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) *LI Netherlands International Law Review* 41.

⁵ The principle of flag State jurisdiction is embodied in article 91 of 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).

⁶ Articles 63 and 64 of the United Nations Convention on the Law of the Sea require States to cooperate via regional and subregional organisations for the purposes of conserving and managing the marine living resources of the high seas.

⁷ Andre Nol kaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* at 365.

this thesis asserts that AusRFMOs can, and should, engage more with the private-sector to address gaps in their implementation of compliance measures.

The introductory section of this chapter establishes the context in which this analysis is undertaken with a discussion of incentive-based approaches to compliance and how such approaches interact with the principle of shared responsibility. The legal status of the resource-user in RFMOs is also examined to demonstrate the difficulties faced by the private-sector seeking to engage directly via the forum provided by the RFMO.

Following this introduction, the chapter undertakes an analysis of the data presented in Chapter 5 and Table 1. Table 1 comprises a summary of the compliance-related conservation measures of each AusRFMO contained in Chapter 5. This table provides a quick reference guide and also demonstrates the respective strengths and weaknesses of each AusRFMO.

Based on this information, the analysis is undertaken by allocating each AusRFMO a status of 'basic', 'satisfactory' or 'established' with regard to its compliance capacity. This finding is then considered in light of the performance of the RFMO as determined by their most recent performance review outcome and other factors. Areas for improvement are identified and discussed to highlight the key compliance concerns of each AusRFMO as determined by this thesis.

The chapter concludes that the six AusRFMOs under examination have a vastly different approach to compliance and have implemented different compliance-related conservation measures with differing levels of success. There is little uniformity across AusRFMOs with respect to their compliance regimes and this has resulted in a confusing situation for the resource-user. It is argued that notions of legitimacy are undermined when there is insufficient collaboration and cooperation between and amongst regulators.

In light of the above finding, this chapter examines the ways in which the private-sector can contribute to the compliance capacity of AusRFMOs. Figure 2 is introduced to highlight how avenues for private-sector engagement can be categorised into cooperative measures, benchmarking measures, and political measures to assist in understanding their operation and desired effect.

Finally this chapter highlights that private-sector engagement represents a viable alternative to regulatory reform with regards to the compliance capacity of AusRFMOs. To demonstrate this point, specific and practical recommendations for how both AusRFMOs and the private-sector can improve their respective engagement with one another to a positive effect are made. The

chapter concludes there is significant work to be done to rebuild perceptions of the legitimacy of compliance conservation measures in AusRFMOs and that private-sector engagement can assist in addressing this challenge.

6.2. Incentive-based Approaches to Compliance and Shared Responsibility

The term ‘shared responsibility’ has, to date, been rarely used in legal literature⁸ and the concept is one relatively new to the academic discourse.⁹ It is a term that refers to the underexplored problem of allocation of responsibilities amongst multiple states and other actors, and has particular relevance in international environmental law.¹⁰ In fact, the example of high seas fish stocks management is often cited as demonstrative of the principle of shared responsibility in that it poses challenging questions relating to who is responsible for the over-exploitation of high seas fish stocks.¹¹

The principle of shared responsibility provides the conceptual framework for the research methodology adopted. The premise of the thesis is that fishing industry associations and individuals can and have assumed responsibility for regional fisheries failures and in doing so, have assumed a significant compliance function in this regard. By documenting this trend in AusRFMOs and analysing its impacts upon the compliance capability of these organisations, this thesis presents a unique insight into the compliance capacity of AusRFMOs.

It is well recognised that regulatory authorities should constantly be concerned with maintaining the involvement of participants in the regime they administer.¹² This thesis applies the principle of shared responsibility to suggest that RFMOs will benefit from increased engagement with the resource-user in the regulatory compliance sphere. It seeks to demonstrate that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance to leverage industry compliance mechanisms and engage with the opportunities they provide.

As the frequency and variety of cooperative action between States and non-State actors increases, there is a need for new perspectives that help to address how RFMOs might develop approaches that better serve the interests of injured parties under regional fisheries regimes.¹³

⁸ Ibid

⁹ Ibid.

¹⁰ Andrew Nollkaemper and Ilias Plakokefalos, ‘Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art’ (Universiteit van Amsterdam, 2014) 27.

¹¹ Nollkaemper and Jacobs, above n 7, 362.

¹² Nollkaemper and Plakokefalos, above n 10.

¹³ Nollkaemper and Jacobs, above n 7, 362.

According to Andrew T Guzman, compliance is one of the most central questions in international law.¹⁴ This is exceptionally true of international fisheries law. Compliance, under international fisheries law, is achieved via the resource user being controlled by the state which is in turn governed by the decisions of the RFMO. However because RFMO membership is voluntary, there exists significant opportunity for non-compliance to occur unchecked. Even where RFMO membership exists, rates of non-compliance within the regime are high.¹⁵

In areas where the resource is the property of the 'commons',¹⁶ such as international fisheries, it has been demonstrated that compliance is easier to achieve when resource users support effective monitoring and rule enforcement.¹⁷ In a fisheries context, numerous studies have reinforced the success of co-management regimes, or regimes which engage the resource user throughout different stages of governance.¹⁸ While co-management may not be possible under an international regime which is founded in the principle of flag State compliance, industry initiatives have nevertheless been occurring and have been successful in respect of achieving compliance with the objectives of RFMOs.¹⁹

Hilborn, Orensanz and Parma²⁰ found that successful fisheries management usually includes institutional systems that provide incentives to individual operators.²¹ Such an approach, they suggest, leads to behaviour compliant with conservation.²² One of the key challenges that arises when regulators and the regulated do not 'talk to' or cooperate with one another is that of misunderstanding. Without the ability to determine accurately why a certain conservation measure may be unsuccessful, assumptions can distort reality and result in the unnecessary diversion of precious time and effort.

Communication is at the heart of effective cooperation and to achieve such communication, incentive-based management has proven very successful in a fisheries management context. To understand how incentive-based management works best, it is vital to first understand who the key players are in a regulatory regime akin to an RFMO. In this respect, there are two key stakeholders in the fishery management process: the fishing community and the RFMO.²³

¹⁴ Andrew T. Guzman, 'A Compliance Based Theory of International Law' (2002) 90 *California Law Review* 1826.

¹⁵ FAO Fisheries and Aquaculture Circular, above n 2.

¹⁶ Garret Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1234.

¹⁷ Thomas Dietz et al, 'The Struggle to Govern the Commons' (2003) 302 *Science* 1907.

¹⁸ Robert S Pomeroy et al, 'Conditions affecting the success of fisheries co-management: Lessons from Asia' (2001) 25 *Marine Policy*, 197.

¹⁹ For example, in 2003 the Coalition of Legal Toothfish Operators was formed by industry members to eliminate illegal, unreported and unregulated catch of Patagonian toothfish and to improve the sustainability of the stock.

²⁰ *Institutions, incentives and the future of fisheries* Ray Hilborn, J.M. (Lobo) Orensanz and Ana M.Parma Phil.Trans.R. Soc. B (2005) 360, 47.

²¹ Ibid.

²² Ibid.

²³ Ibid.

RFMO governance consists of a system which imposes rules or regulations on the resource-user in the interests of conserving the resource.²⁴ Regional fisheries management can then be said to comprise:

*The division and/or delegation of decision-making responsibilities to the most appropriate institutional or governance structures and level of society given the circumstances of the fishery (fisheries) or marine regions concerned.*²⁵

This thesis has suggested that incentive-based approaches to management represent a currently underutilised tool at the disposal of RFMOs. This approach incorporates incentives for fishers to engage constructively in the management of the resource.

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,²⁶ that vessels only land catches in ports that are fully implementing the CCAMLR Catch Documentation Scheme (CDS). Resource-users engaging in the CDS fetch a higher price for their product at market and in turn gain an incentive for participating in the conservation measure.

By incentivising compliance, the RFMO achieves the 'buy-in' of the resource-user which is in turn, necessary for the successful management of the resource.²⁷ If fishers are not provided the opportunity to engage constructively in fisheries management then they are likely to become suspicious of the regulation and fail to implement it.²⁸ Incentive-based management represents an approachable, effective and implementable alternative to traditional regulation.

While certain RFMOs have incorporated incentives into their conservation measures to the benefit of the fishery, there remain those that are resistant to recognising the fundamental role that engagement by the resource-user can play in achieving sustainable fisheries management. RFMOs must become adaptable and flexible to preserve global fisheries resources and encouraging communication with the resource-user via participation in conservation measures is an ideal place to begin such communication.

²⁴ *Participatory Deliberation, Risk Governance and Management of the Marine Region in the European Union*, Journal of Environmental Policy and Planning, 16(4) October 2014. Available online at <<http://www.maritimestudiesjournal.com/content/11/1/7>>

²⁵ 'Regional Governance: Making it work for fisheries and the environment', Conference Paper, Conference on Regional Fisheries Management Brussels, 29th September 2009, available online at <http://ec.europa.eu/fisheries/reform/docs/pew_annex2_en.pdf>

²⁶ See Resolution XXII entitled "Use of ports not implementing the Catch Documentation Scheme", available on line at <http://www.ccamlr.org/pu/e/e_pubs/cm/09-10/all.pdf>

²⁷ J Beddington, D Agnew, and C Clark, 'Current Problems in the Management of Marine Fisheries', *Science* 22 Jun 2007: Vol. 316, pp. 1713-1716.

²⁸ Ibid.

This thesis recognises that voluntary corporate activity *can* be more effective in achieving sustainable fisheries management than traditional regulation.²⁹ However it also recognises that approaches to corporate sustainability can vary greatly, as can the motivation behind such sustainability efforts.

That said, many major corporations now report to their stakeholders on a regular basis on the social and environmental impact of their business. They consider this to be 'good for business'³⁰ and to mitigate the need for externally imposed regulation in that the reporting is said to positively influence the sustainability practices of the organisation.³¹ By securing the active support of resource-users, voluntary compliance can result in a greater willingness to comply with relevant legal and regulatory frameworks.³²

Consultation with parties who have a vested interest in the management decisions of any given regulatory authority is considered a critical step in the process of fisheries management. The FAO Technical Guidelines for Responsible Fisheries No. 4: Fisheries Management³³ provide that fisheries management is:

*The integrated process of information gathering, analysis, planning, consultation, decision-making, allocation of resources and formulation and implementation, with enforcement as necessary, of regulations or rules which govern fisheries activities in order to ensure the continued productivity of the resources and the accomplishment of other fisheries objectives.*³⁴

Information gained during consultation can, and often is, influential at all stages of the management process.

For example, information gathering on the nature of a management challenge, analysis of the underlying causes of the challenge, and planning of reform will all be informed by and often prompted by consultation with the individual or organisations being managed. While their role is not to make any binding decisions to address the situation, open streams of communication and cooperation between the regulator and the regulated will clearly be fundamental to the ultimate management decision appropriately addressing the initial challenge.

²⁹ Susan Wild, Sustainability Reporting in Fishing Industry Management - Regulation versus Voluntarism, *Australasian Accounting, Business and Finance Journal*, 2(3), 2008, 57-75. Available online <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1038&context=aabfj>>

³⁰ Ibid.

³¹ Ibid at 57.

³² 'Marine Regions Forum provides multi-stakeholder platform for regional ocean governance', Stop Illegal Fishing, 22 October 2019, <<https://stopillegalifishing.com/news-articles/marine-regions-forum-provides-multi-stakeholder-platform-for-regional-ocean-governance/>> accessed 10 July 2019.

³³ FAO. Fisheries management. 'Marine protected areas and fisheries. FAO Technical Guidelines for Responsible Fisheries'. No.4, Suppl. 4. Rome, FAO. 2011, available online at <<http://www.fao.org/docrep/015/i2090e/i2090e.pdf>>

³⁴ Ibid.

To reinforce this point, Cochrane's Guidebook provides that 'communication, consultation and co-management should underlie all stages of management'³⁵ and 'genuine participation in the management process by fully-informed users is consistent with the democratic principle...and encourages compliance with laws and regulations.'³⁶ This is a critical point if we are to achieve effective fisheries management globally and one which can be better implemented by RFMOs to ensure that the resource-user is viewed not as the source of the *problem*; but instead the source of the *solution*.

The next section of this chapter examines the legal status of the resource-user within the governance framework of RFMOs to understand their capacity to contribute to the decisions of the organisation.

6.3. The legal status of the private-sector in RFMOs

While the ability of States parties to RFMOs to effect change in the organisation is one matter, the status of the private-sector in the RFMO is quite another. While States can elect to engage in an RFMO, the private-sector is only able to engage in an RFMO in a limited capacity or may not be given the opportunity to engage at all. This legal limitation on engagement exists because RFMOs are created via treaty agreement and States are the principal actors.³⁷

Upon joining a RFMO convention, States indicate a willingness to be bound by the convention and its associated conservation measures.³⁸ This includes implementing the intent and effect of the conservation measures on an international level and reporting against those measures accordingly. With domestic implementation of conservation measures, vessels and individuals regulated by the responsible flag State are held to account for the conservation measures implemented by the RFMO.

This distinction means that the private-sector is often not engaged in the decision-making that occurs at an international level which directly impacts them until negotiations for domestic implementation commence. By this stage, of course, the domestic implementation must reflect the international agreement and so any potential modifications under domestic law are limited. While some States engage the relevant private-sector prior to making commitments at an international level, this is not always the case.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Hjortur B. Sverrisson, *Countermeasures, the International Legal System and Environmental Violations* (2008) 337.

³⁸ Ibid.

Ideally, this thesis contends, States would be required to reflect the position of the private-sector in their deliberations and decision-making at an international level. However what is in the best interests of the State is not always in the best interests of the private-sector. Complaints regarding a lack of transparency and lack of implementation of decisions made at a regional level have often been associated with RFMO decision-making for this reason.³⁹

This is not to say that the private-sector cannot influence decision-making by RFMOs. Article 12 of the UNFSA requires RFMOs to be transparent in decision-making and to permit observers at meetings of the RFMO.⁴⁰ Article 12 of the UNFSA also states that RFMOs should provide timely access to the reports and records of the RFMO, subject to procedural constraints.⁴¹

Formally, many RFMOs have allocated resource-users 'observer status' which incorporates the right to make statements at meetings of the RFMO and the right to listen to deliberations to encourage increased participation and engagement by the private-sector.⁴² However the attitude towards observers and their participation in meeting proceedings varies greatly amongst AusRFMOs.⁴³

While granting private-sector entities observer status at RFMO meetings is clearly a positive move to promote engagement and transparency, it is clear that the role of the private-sector is one of participation, rather than influence. To add to this, there is a lack of consistency with regards to whether, how and when observer status will be granted across different RFMOs.⁴⁴

Another factor impacting upon the ability of the private-sector to engage with the decision-making of the RFMO is their capacity to attend such meetings and to be represented appropriately. In the CCAMLR, for example, the regulated species represent economically strong stocks such as Patagonian toothfish and krill; both of which require extensive financial backing to fish for and a high-value for the catch in return. In this way, the private-sector in the CCAMLR, for the most part, have the financial backing required to participate actively in the organisation.⁴⁵

³⁹ *Routledge Handbook of Maritime Regulation and Enforcement*, Warner and Kaye (eds), Routledge Taylor and Frances Group at 55.

⁴⁰ Article 12, *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*.

⁴¹ *Ibid.*

⁴² *Law and politics in ocean governance: the UN Fish Stocks Agreement and regional fisheries management regimes*, Tore Henriksen, Geir Hønneland, and Are Sydnæs, 2006 at 41.

⁴³ *The quest for sustainable international fisheries: regional efforts to implement the 1995 United Nations Fish Stocks Agreement: an overview for the May 2006 review conference*, 2009, Evelyne Meltzer at xxxvi.

⁴⁴ *Ibid.*

⁴⁵ The CCAMLR does not consider itself to be an RFMO in that it regulates the marine living resources of the Antarctic; not simply the fisheries resources. However for the purposes of this thesis, it will be referred to as an RFMO as it is considered sufficiently similar in scope to other RFMOs discussed.

This lack of consistency has led Michael Lodge⁴⁶ to recommend that all RFMOs ensure that the private-sector be ‘afforded an opportunity to participate in meetings on reasonable terms.’⁴⁷ Lodge also states that RFMOs should streamline applications for observer status, grant long-term approval to observers and grant observers access to all official documentation of the RFMO. He emphasises that the standard of transparency in RFMO meetings which include observers, compared to those meetings where observers are not involved, should not differ.

Given the significance of the actions of the private-sector in determining whether an RFMO conservation measure achieves compliance outcomes, this thesis argues that their current status is insufficient. Some States have come a long way towards integrating legislative consultation on a domestic basis and it is argued that the international regime must now do the same.

6.4. Analysis

Table 2 (see below) is designed to assist in identifying key areas where compliance gaps exist in AusRFMOs, as well as to summarise the compliance mechanisms that these organisations have implemented. This section draws directly from Table 2 and comprises the analytical basis of the thesis. It starts by considering the ‘compliance capacity’ of each RFMO in comparison to other AusRFMOs.

The term ‘compliance capacity’ when used in this thesis refers to the extent to which AusRFMOs have embedded compliance tactics in their founding agreement *as well as* the range of compliance-related conservation measures they have adopted. A status is allocated to each AusRFMO based on their compliance capacity. These include:

- *Basic* – the RFMO has demonstrated some degree of commitment to compliance in its founding agreement and has adopted minimal measures to give effect to this commitment;
- *Satisfactory* – the RFMO has demonstrated an adequate commitment to compliance in its founding agreement and has adopted satisfactory measures to give effect to this commitment; and
- *Established* – the RFMO has demonstrated a strong commitment to compliance in its founding agreement and has adopted strong compliance measures to give effect to this commitment.

⁴⁶ Lodge et al, *Recommended Best Practices for RFMOs*, above n 1.

⁴⁷ Lodge et al, *Recommended Best Practices for RFMOs*, above n 1.

This section considers the status of each AusRFMO alongside the findings of the most recent performance review of the AusRFMO to offer new insights on the key areas requiring attention. This analysis demonstrates that while this group of organisations is slowly moving closer to achieving a greater sense of unity across their collective compliance approach,⁴⁸ there remain key areas for improvement.

6.4.1. CCAMLR

Status: Established

The CCAMLR has a long history of encouraging compliance actions, as demonstrated in Table 1 below. With a strong foundation of compliance-related provisions enshrined in its Convention, the CCAMLR has developed and implemented an effective compliance enforcement procedure which has provided a model for other RFMOs (as discussed in Chapter 4).

The most recent (2017) CCAMLR Performance Review found that the CCAMLR Compliance Evaluation Procedure (CEP) could be strengthened by requiring enhanced reporting on the actions taken by states to address infringements. Where, for example, a Contracting Party failed to report on follow up investigations, such failures should be identified as ‘serious, frequent or persistent non-compliance’.⁴⁹

The CCAMLR IUU-vessel list, established by CCAMLR Conservation Measure 10-07, is reviewed at each annual meeting and made publically available. With respect to the CCAMLR IUU-vessel listing procedures, the performance review panel had some minor recommendations to make and suggested that the list could be strengthened to provide for listing of ‘stateless’ fishing vessels.⁵⁰ In addition, any vessel owned by an individual or company named on the IUU vessel list could also be added to the list by association.⁵¹

Finally, recommendation 16 of the CCAMLR performance review suggested that the CCAMLR encourage Members to undertake bilateral and sub-regional actions to achieve effective cooperation by non-Members with CCAMLR conservation measures.⁵² Cooperative action such as this is a key mechanism through which AusRFMOs can promote compliance with their conservation measures both formally and informally.

⁴⁸ As demonstrated by the adoption of compliance evaluation or compliance monitoring schemes across AusRFMOs in recent years.

⁴⁹ Commission for the Conservation of Antarctic Marine Living Resources, Performance Review Panel, ‘Second Performance Review of CCAMLR – Final Report of the Panel’, 2017, available online at: <<https://www.ccamlr.org/en/organisation/second-ccamlr-performance-review>> at 4.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid at 5.

Today, the CCAMLR has made significant progress in implementing the recommendations contained in its first performance review which was undertaken in 2008.⁵³ The 2017 performance review reflected this finding providing that: 'CCAMLR has adopted an impressive array of monitoring, control and surveillance (MCS) measures and cooperative mechanisms to monitor compliance and detect non-compliance and IUU fishing activities.'⁵⁴ The report went on to note that the adoption of the CCEP, and the role of the compliance committee in assessing compliance with CCAMLR conservation measures, demonstrates notable progress by the CCAMLR organisationally.⁵⁵

Most significantly, however, is the success of the CCEP. This is demonstrated in the finding of the 2019 meeting of the CCAMLR in October in Hobart, Tasmania that the CCEP is functioning as intended to identify and address instances of non-compliance in relation to CCAMLR conservation measures.⁵⁶ The 'Summary CCAMLR Compliance Report' consolidates responses received from Contracting Parties and the draft Report identified 16 potential compliance issues that had arisen over the period 1 August 2018 until 31 July 2019.⁵⁷

These compliance issues related to infringements to seven CCAMLR compliance measures and six Contracting Parties were involved.⁵⁸ While some infringements were minor, others were more serious including the retrieval of a 'ghost net', or discarded fishing net that continues to fish while it remains in the water, which was located in the CCAMLR Convention Area.⁵⁹ The discussion of such infringements at the CCAMLR Standing Committee on Implementation and Compliance (SCIC) is a critical factor in ensuring Contracting Parties are accountable for their actions.

If the CCAMLR can continue to strive for this level of transparency in decision-making and debate, the future compliance capacity of this organisation is looking very positive.

6.4.2. IOTC

Status: *Satisfactory*

⁵³ Ibid at 6.

⁵⁴ Ibid at 8.

⁵⁵ Ibid at 9

⁵⁶ 'CCAMLR Compliance Evaluation Procedure – Summary Report and Analysis', available online at: <<https://www.ccamlr.org/en/ccamlr-38/13-rev-2>>

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

The treaty underpinning the IOTC, the Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC),⁶⁰ has failed to sufficiently incorporate modern compliance provisions. The IOTC treaty was formed under article XIV of the FAO Constitution which means that since its inception, the RFMO has been somewhat limited in its autonomy.⁶¹ In fact, whether the IOTC constitutes an 'international legal personality'⁶² was, in 2007, a topic of debate between the organisation and the FAO.

Perhaps because of the limitations of the treaty underpinning the IOTC, the Commission has recently recognised, discussed and sought to extend its compliance capacity via the adoption of compliance-related conservation measures. It now has measures in place to address inspections and transshipments, including via the introduction of IOTC Resolution '2018 - 06 on Establishing a Programme for Transshipment by Large - Scale Fishing Vessels'. This Resolution requires that all transshipments of tuna, tuna-like species and sharks taken by large-scale fishing vessels must take place in port and in accordance with rules outlined in the Resolution.

To support the implementation of IOTC Resolution 2018-06, ports and landing States are required to verify the accuracy of the information received.⁶³ The recently formed IOTC Compliance Committee has been a positive step for the organisation, however this Committee needs to take action to better support the implementation of requirements in accordance with the FAO Agreement on Port State Measures.⁶⁴ This Agreement was formulated in August 2009 under Article XIV of the FAO Constitution⁶⁵ and seeks to establish common procedures for inspection and agreed measures against illegal, unregulated and unreported (IUU) fishing vessels.⁶⁶

The IOTC has also been encouraged to strengthen monitoring, control and surveillance measures, such as vessels monitoring systems and their regional observer scheme and develop trade-related measures to penalise non-compliance.⁶⁷ While the IOTC has implemented a process for reviewing compliance by Contracting Parties, this process does not assess

⁶⁰ Treaty available online at: <http://www.fao.org/fishery/docs/DOCUMENT/iotc/Basic/IOTCA_E.pdf>

⁶¹ Edeson, W. R. (2007). An International Legal Extravaganza in the Indian Ocean: Placing the Indian Ocean Tuna Commission outside the Framework of FAO. *International Journal of Marine and Coastal Law*, 22 (4), 486.

⁶² *Ibid* at 485.

⁶³ Global Fishing Watch, 'Analysis of Possible Transshipment Activity in the Indian Ocean Tuna Commission Convention Area in 2017 through the Use of AIS Data', 2017, at 11. Report available online at: <https://globalfishingwatch.org/wp-content/uploads/GFW_IOTC_TransshipmentReview_2017.pdf>

⁶⁴ *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.

⁶⁵ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries* (2010) 64.

⁶⁶ *Ibid*.

⁶⁷ Bernadette Carreon, 'At IOTC meeting, calls made to save yellowfin tuna stocks from potential collapse', SeafoodSource, 19 June 2019. Article available online at <<https://www.seafoodsource.com/news/environment-sustainability/at-iotc-meeting-calls-made-to-save-yellowfin-tuna-stocks-from-potential-collapse>>

compliance with the individual obligations of States parties.⁶⁸ This should be amended to bring the IOTC into line with the practice of other RFMOs.

The latest performance review of the IOTC recommended that the process for reviewing compliance should identify reasons for why such non-compliance may have occurred.⁶⁹ In this way, the need for capacity assistance or whether it is wilful or repeated non-compliance, can guide the response taken by the Commission.

6.4.3. CCSBT

Status: Satisfactory

During a 2009 meeting of the CCSBT Strategy and Fisheries Management Working Group, the need to promote membership and compliance by non-contracting parties was recognised as fundamental to the performance of the RFMO.⁷⁰ Indeed, the CCSBT Convention identifies membership and compliance by non-contracting parties with the conservation measures of the organisation as being something Contracting Parties must encourage and promote. This is reflected in Resolutions of the CCSBT which make provision for CCSBT members to continue to encourage non-Contracting Parties to become Members or Cooperating non-members.⁷¹

However, it is argued that the ability of CCSBT Contracting Parties to review their own compliance and be open to a round table discussion on the topic is an area which still requires development. To address this, the CCSBT has implemented a Quality Assurance Review program to provide independent reviews and help Members identify how well their management systems function.⁷² This Review process also recommends areas where improvement is needed.

Developments in recent years have also strengthened the performance of the CCSBT with regards to its monitoring, control and surveillance measures; including via the introduction of a 'Resolution on action plans to ensure compliance with Conservation and Management Measures'⁷³. Most recently, in 2015 the Commission adopted a Resolution on Port State

⁶⁸ *Report of the Second IOTC Performance Review*, 2015 at 26. Report available online at: <https://iotc.org/documents/report-2nd-iotc-performance-review>.

⁶⁹ Commission for the Conservation of Southern Bluefin Tuna, Report of the Performance Review Working Group, 2016, available online at <<https://www.iotc.org/sites/default/files/documents/2016/04/IOTC-2016-PRITOC02-RE - FINAL 0.pdf>>

⁷⁰ CCSBT Report, Compliance with CCSBT Management Measures, CCSBT-CC/0910/04 rev4, available online at <https://www.ccsbt.org/en/system/files/resource/en/4d9169534e0d4/cc04_rev4.pdf>

⁷¹ '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', October 2014, available on line at <https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs_english/operational_resolutions/Ammended_resolution_on_autho_rised_24m_vessel_list.pdf>

⁷² Commission for the Conservation of Southern Bluefin Tuna, 'Monitoring, Control and Surveillance', available online at: <<https://www.ccsbt.org/en/content/monitoring-control-and-surveillance>>

⁷³ Ibid.

Measures⁷⁴ to place restrictions on the landing of catch and assist in the detection of illegal, unreported and unregulated fishing (IUU). Significant other compliance measures that are currently operational in the CCSBT include measures to regulate transshipments, an IUU fishing vessel list, a catch documentation scheme and a resolution on the use of vessel monitoring systems.

Some of the recent improvements by the CCSBT with regards to its compliance capacity were driven by the findings of the 2014 CCSBT performance review. Steps that may still be taken by the Commission, however, include the harmonisation of CCSBT monitoring, control and surveillance measures with the measures adopted by other RFMOs. Additionally, while the design and function of the CCSBT Compliance Committee has been clarified in recent times, it has yet to be seen how the Committee will influence positive change within the organisation.

Due to the relative newness of many of the compliance measures adopted by the CCSBT, at the time of writing, this organisation is ranked 'Satisfactory' with regards to its compliance capacity for the purposes of this thesis.

6.4.4. WCPFC

Status: Established

The WCPFC in general has a good track record with regards to its compliance and enforcement measures. At the forefront of compliance evaluation, this RFMO has gained the commitment of its members with respect to self-reporting and voluntary compliance for many years. Indeed the Compliance Monitoring Scheme of the WCPFC was adopted in 2011 and has been updated regularly, most recently in May 2019.⁷⁵

The WCPFC committed to undertaking a review of their Compliance Monitoring Scheme in 2018. The Review found that the Scheme is fundamentally sound, robust and comprehensive.⁷⁶ It also found that the Scheme seems to be having a positive effect on compliance with the conservation measures of the WCPFC.⁷⁷ However it did find that the process is overly burdensome on WCPFC contracting parties and is 'at risk of collapsing under its own weight'⁷⁸ if reporting obligations are not simplified.

⁷⁴ Ibid.

⁷⁵ Western and Central Pacific Fisheries Commission, 'Compliance Monitoring Scheme', available online at: <<https://www.wcpfc.int/compliance-monitoring>>

⁷⁶ Western and Central Pacific Fisheries Commission, 'Final Report from the Independent Panel to review the Compliance Monitoring Scheme', available online at: <<https://www.wcpfc.int/doc/final-report-independent-panel-review-compliance-monitoring-scheme-executive-summary>>

⁷⁷ Ibid.

⁷⁸ Ibid.

To address these concerns, the 2019 meeting of the WCPFC considered a discussion paper on 'Streamlining WCPFC Reporting Requirements'.⁷⁹ The paper made recommendations for consolidating certain reporting requirements under the compliance monitoring scheme without compromising the integrity of the process.

With respect to the performance review of the WCPFC, it made very some very positive findings with respect to the compliance regime of the organisation. However there were other less glowing findings with the Panel communicating: 'grave concern about failures by many CCMs to report fishery data as required.'⁸⁰ It advised that where Members were late, or failed to provide operational data before the required deadlines, this should be considered a serious problem to be addressed as a matter of urgency.⁸¹

The review also found that in 2012, the WCPFC was lagging behind other RFMOs in developing port State measures to combat IUU fishing. They recommended that a new conservation measure on port State measures be adopted and implemented at the earliest opportunity. Since this time, the WCPFC has adopted a conservation measure on port State measures and the use of unique vessel identification numbers.⁸²

The performance review Panel also recommended that clearer mechanisms be established to ensure that Members follow-up on infringements by their vessels and that guidelines be established for a range of penalties to be applied in these instances.⁸³ However the WCPFC has yet to adopt the review's suggestion to make a range of penalties, or market-related measures, available in instances of non-compliance.⁸⁴

Due to the commitment of the WCPFC to continually reviewing its processes and specifically, to reviewing their compliance monitoring procedure, a ranking of 'established' has been awarded to this AusRFMOs.

6.4.5. SPRFMO

⁷⁹ The Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Summary Report of the Fifteenth Regular Session of the Technical and Compliance Committee, 1 Dec 2019, available online at:

<https://www.wcpfc.int/system/files/WCPFC162019TCC15%20TCC15%20Summary%20Report_issued%201%20December.pdf>

⁸⁰ Ibid at 194.

⁸¹ Ibid at 200.

⁸² PEW Environment Group, International Fisheries Managers' Response to Performance Reviews Insufficient, 1 May 2019, available online at <<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/international-fisheries-managers-response-to-performance-reviews-insufficient>>

⁸³ Ibid at 212.

⁸⁴ Ibid.

Status: Satisfactory

The first performance review of the SPRFMO was released in January 2019 by a panel comprising four international independent experts, two of whom were nationals of SPRFMO members and two who were external to the SPRFMO.

At the time of the first performance review of the SPRFMO, the organisation was still in the early stages of implementation. The Panel reported a range of compliance-related recommendations for the SPRFMO however acknowledged that the organisation was still in the early stages of implementation. As such, it should focus most of its effort on conservation measures relating to management of relevant species.

The Panel recommended, inter alia, that the RFMO should:

- revise its Port Inspection measure to specify that all potential IUU vessels should be inspected,
- continue to work towards the adoption of its own high seas boarding and inspection regime,
- continue to develop the SPRFMO observer programme,
- consider requiring all transshipments to be observed, and
- take a more proactive approach towards identifying vessels of non-Members and CNCPs undertaking fishing operations in the Convention Area.⁸⁵

The Panel noted that the SPRFMO had not yet adopted any market-related measures or a CDS, however at this stage, it did not recommend pursuing these objectives until the RFMO had functioned for longer.

6.4.6. SIOFA

Status: Basic

At the time of writing, the SIOFA has not published a performance review. However it adopted a range of compliance-related conservation measures in 2018, including CMM 2018/09 for Control of Fishing Activities and CMM 2018-10 which specifies requirements for a SIOFA VMS and transshipments occurring in the SIOFA area. While the 2018 suite of measures represent a significant turning point in implementing the compliance requirements embedded in the SIOFA

⁸⁵ Review Panel, *2018 Report of the South Pacific RFMO Performance Review Panel*, 1 December 2018, <<https://www.sprfmo.int/assets/Basic-Documents/Convention-and-Final-Act/2018-SPRFMO-Performance-Review/2018-12-01-REPORT-SPRFMO-PERFORMANCE-REVIEW-FINAL.pdf>>

founding Agreement, at the time of writing the effectiveness of these provisions has yet to be felt. As such, a status of Basic has been allocated to this AusRFMO.

6.5. Improving consistency in the compliance capacity of AusRFMOs

The analysis undertaken above suggests that there are three key areas AusRFMOs can focus on to achieve greater consistency *across* their respective compliance regimes. In doing so, their individual regimes will also be strengthened and enforcement capacity bolstered. These three areas, it is suggested, include trade-related measures, graded sanctions and provisions relating to non-Contracting Parties.

6.5.1. Trade-related measures

One of the key ways in which AusRFMOs can promote an incentive-based approach to regulation is by adopting trade-related measures. 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 publication 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.⁸⁶ 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.⁸⁷

However, countermeasures remain a controversial topic in RFMOs. 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.⁸⁸ 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* under which a treaty cannot establish rules or obligations with regard to a third State.⁸⁹

⁸⁶ Hjortur B. Sverrisson, *Countermeasures, the International Legal System and Environmental Violations* (2008) 337.

⁸⁷ Ibid.

⁸⁸ 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.

⁸⁹ Ibid.

This thesis contends that so long as trade-related measures are consistent with international legal principles, there is nothing preventing AusRFMOs 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 line with the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁹⁰ (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.'⁹¹ Unfortunately, such instances do arise and this thesis suggests that it is best that RFMOs have the capacity to take action where appropriate.

However 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.⁹² Certain RFMOs have overcome this hurdle by providing that trade-related measures should only 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.

Notable academics⁹³ have suggested that today, trade-related measures may be the key to achieving compliance on a regional scale if carried out in accordance with the provisions of the United Nations Fish Stocks Agreement⁹⁴ and other relevant principles under international law.

6.5.2. 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 International Plan of action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU).⁹⁵ The IPOA-IUU also provides that RFMOs should develop additional compliance

⁹⁰ 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.

⁹¹ Ibid.

⁹² Rayfuse, Rosemary, *Regional Allocation Issues or Zen and the Art of Pie Cutting* (March 1, 2007). UNSW Law Research Paper No. 2007-10. Available at on line at <<http://ssrn.com/abstract=966686>>.

⁹³ 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.

⁹⁴ *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*.

⁹⁵ IPOA-IUU above n 90.

measures, including graded sanctions, to promote compliance by their members.⁹⁶ 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.'⁹⁷

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.⁹⁸ 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.⁹⁹ Sanctions should be transparent and, most importantly, consistent, in order to avoid potential or perceived discrimination.¹⁰⁰

The conventions of certain AusRFMOs specifically grant the capacity to apply sanctions in the face of non-compliance, however others fail to raise the question of sanctions in their convention text.¹⁰¹ Where conservation measures regarding the use of graded sanctions are in place in AusRFMOs, the use of such sanctions are often applied narrowly or do not specify the type of sanctions to be imposed.¹⁰²

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, this thesis contends that the imposition of monetary fines, confiscation of fishing vessels and denial of fishing licences¹⁰³ should be a common resource relied upon by AusRFMOs to achieve compliance.

Enhanced communication and information sharing regarding the imposition of sanctions by AusRFMOs is also essential to improving compliance.¹⁰⁴ 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 can and should adopt similar measures. With the success of IUU vessel lists in

⁹⁶ Food and Agriculture Organisation of the United Nations, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2002).

⁹⁷ Ibid.

⁹⁸ 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).

⁹⁹ 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.

¹⁰⁰ IPOA-IUU, above n 90.

¹⁰¹ The founding texts of the IOTC, CCSBT and SIOFA fail to specifically mention the use of sanctions in appropriate circumstances.

¹⁰² 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.

¹⁰³ Diane Erceg, 'Deterring IUU fishing through state control over nationals' (2006) 30(2) *Marine Policy*.

¹⁰⁴ 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>>.

RFMOs, it is apparent that these organisations are well placed to adopt specific strategies such as graded sanctions to target non-compliance.

6.5.3. Provisions relating to non-contracting parties

In the 1970s, RFMOs began to recognise the need to undertake management and conservation of activities and deter the activities of non-contracting parties (NCPs).¹⁰⁵ The CCAMLR was one of the first to recognise the problems caused by an increasing incidence of fishing by NCPs in their Convention Area¹⁰⁶ and have since implemented cooperative mechanisms aimed at targeting this behaviour.¹⁰⁷

International agreements have also sought to address the problems posed by NCPs, with the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing calling on States Parties to RFMOs to prevent landings from vessels flagged to non-members.¹⁰⁸ 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.¹⁰⁹

All of the AusRFMOs under examination have adopted framework provisions or conservation measures to deter the non-compliant actions of NCPs. For example, 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.¹¹⁰ 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.

Despite such measures being in place, the ability of AusRFMOs to address the non-compliance actions of NCP nationals and vessels is limited. 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.

¹⁰⁵ Ibid at 2.

¹⁰⁶ Baird Rachel, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', 2004 5(2), *Melbourne Journal of International Law* 299.

¹⁰⁷ For instance, CCAMLR Resolution 14/XIX urges NCPs to cooperate with the Commission by implementing the provisions of the CCAMLR Catch Documentation Scheme.

¹⁰⁸ IPOA-IUU, above n 90.

¹⁰⁹ PEW Environment Group, above n 82.

¹¹⁰ Art 32, SPRFMO Convention.

6.6. Leveraging Private-Sector Engagement in AusRFMOs to Promote Improved Compliance

This thesis has provided evidence to demonstrate that intangible considerations such as operator attitudes towards the legitimacy of regulation, the method of compliance enforcement employed and perceptions as to the likelihood of apprehension can contribute to the decision to fish responsibly or otherwise. The result is that the decision to fish responsibly or otherwise can be influenced by factors beyond the control of AusRFMOs.

In positive examples of effective regional fisheries management, certain fishing corporations and non-government actors have assumed an important role in creating a powerful counteractive to the activities of irresponsible fishers. Throughout the CCAMLR's history, for example, a range of non-regulatory entities with an interest in responsible and sustainable fishing of the marine living resources of the high seas have sought to engage with the regulator to the benefit of cooperative efforts within the Commission.

Certain fishing companies have taken it upon themselves to promote compliance within their own networks and have created initiatives to preserve the marine resources. Other corporations have engaged in such behaviour in the interests of upholding their corporate social responsibility obligations.¹¹¹ Some representative bodies or environmental non-government organisations have also run effective interference programs to tackle irresponsible fishing on all levels of its operation.¹¹²

Figure 2 clarifies a range of ways in which the private-sector can engage in the compliance effort of AusRFMOs. This list can be categorised based on the ways in which the private-sector may influence compliance outcomes; whether they seek to strengthen compliance by building cooperation between like-minded companies or individuals, utilise sustainability standards to gain accreditation for their fishery or look to engage with the political process inherent in RFMO governance.

The labels given to these categories include:

- *Cooperative measures* – where the private-sector utilises cooperation between fishing corporations to achieve sustainability outcomes. For example, fishing corporations operating in the same sector may share information to monitor the overall take for the fishery amongst themselves.
- *Benchmarking measures* - driven by an individual company or association to leverage corporate benchmarking measures and achieve compliance outcomes. For example, a

¹¹¹ Susan Wild, above n 29.

¹¹² Susan Wild, above n 29.

sustainable leadership fisheries association can allocate resources to gain accreditation by a reputable sustainability certification scheme.

- *Political measures* – where an individual or association seeks to achieve compliance outcomes by engaging in the political environment of RFMO governance. For example, a fisheries association may seek to influence the outcomes of an RFMO meeting by presenting as an observer at a meeting.

Cooperative Measures

Approaches to corporate sustainability reporting vary greatly in content, as does the motivation behind such reporting. Many major corporations now report to their stakeholders on a regular basis on the social and environmental impact of their business. They consider this to be ‘good for business’¹¹³ and to mitigate the need for externally imposed regulation in that the reporting is said to positively influence the sustainability practices of the organisation.

By securing the active support of like-minded companies, voluntary compliance can result in a greater willingness to comply with relevant legal and regulatory frameworks.¹¹⁴ It can occur via the development of responsible fishing associations, where members of the same fishing sector band together to promote compliance in their fishery. Such associations can then promote these actions and improve the value of their product as an ethical and sustainable option.

Companies in a fishery may also formally or informally elect to undertake voluntary information sharing activities as an exercise incidental to their operation fishing on the high seas. Such information sharing improves the likelihood of apprehension and reporting of illegal, unreported and unregulated (IUU) fishing occurring in an RFMO area. Finally, the private-sector may elect to undertake their own monitoring and surveillance activities by funding efforts themselves, or with the support of research and development organisations.

Benchmarking Measures

Voluntary engagement in the regulatory sphere by the private-sector is a tactic belonging to the category of ‘benchmarking’ whereby the company benchmarks their progress against their competitors and measures their performance accordingly. The popularity of voluntary engagement is built upon the premise that voluntary corporate activity can be more effective in achieving sustainable fisheries management than traditional government regulation.¹¹⁵

¹¹³ Susan Wild, above n 29.

¹¹⁴ Kristina Murphy, *Regulatory Theory: Foundations and Applications*, ‘Procedural justice and its role in promoting voluntary compliance’, available online at: <<http://press-files.anu.edu.au/downloads/press/n2304/pdf/ch03.pdf>>

¹¹⁵ Ibid.

Voluntary sustainability reporting is an important element of voluntary engagement by the fishing sector as it has served as a valuable prompt to instigate other kinds of voluntary engagement in governance. This measure involves the private-sector undertaking monitoring of their own performance with regards to their sustainability and often publishing and promoting the outcomes. Such measures can lead to positive outcomes for both the fishery and the company.

Sustainability reporting is often linked to the use of accreditation schemes, such as the Marine Stewardship Council.¹¹⁶ These registered organisations serve to certify fisheries that demonstrate that they can achieve certain sustainability requirements. Fishers then receive a label for the marketing and promotion of their product as a sustainable choice and are often able to obtain a greater value to their product.

Engaging in the use of market-related measures is another way in which the seafood industry can actively promote the purchase of seafood from sustainable sources.¹¹⁷ By voluntarily engaging in a catch documentation scheme (CDS) of an RFMO, or creating their own CDS, fishing companies are able to better monitor the sustainability of their fishery.

Political Measures

Another critical way that the private-sector can engage in the outcomes of RFMO meetings is to lobby politicians and relevant State organisations in an effort to encourage them to adopt their desired approach. Direct engagement such as this can help States to understand the implications of a certain conservation measure on the private-sector and raise awareness of the need for consideration of issues that may not have previously been understood.

In a similar way, the private-sector may work together to promote certain research outcomes in areas where there remains scientific uncertainty. By funding projects, either individually or by working with government organisations, the private-sector can influence the approach of States parties to RFMOs by providing evidence to support their decisions.

Direct contributions to the work of RFMOs and regional fisheries bodies in general is another way in which the private-sector can leverage political influence to achieve conservation outcomes. By attending meetings of RFMOs, contributing to the conversations of State representatives and sharing lessons learned in the fishery, the private-sector can make critical contributions to the outcomes of RFMO meetings.

¹¹⁶ Marine Stewardship Council, 'Sustainable Fishing', available online at: <<https://www.msc.org/>>.

¹¹⁷ International Centre For Trade and Sustainable Development, 'Natural resources, international trade and sustainable development', available online at: <<https://www.ictsd.org/tags/natural-resources>>

While the idea that industry can and should take a more proactive approach in influencing management outcomes is not new, the application of this principle to the field of RFMO management requires further investigation. The benefits of engaging the private-sector in fisheries governance are well understood. They range from improving relationships between government and the governed, to increasing industry stewardship and simplification.

The above categorisation of specific techniques the private-sector might use when engaging with RFMOs provides a reference point to promote further discussions in this area. It is clear that where it appears the private-sector is acting from a sense of corporate social responsibility, RFMOs should explore every opportunity to provide incentives for such behaviour.

6.7. Recommendations for AusRFMOs and the private-sector to improve ways of working together

This chapter will now make recommendations in support of compliance actions that may be implemented by AusRFMOs and the private-sector as alternatives to a traditional regulatory approach. These recommendations are made in support of the notion that the private-sector must perceive the conservation approach of AusRFMOs as legitimate, appropriate and worthwhile if they are to effectively comply with the regime.

To this end, recommendations for adoption by AusRFMOs are explored in the first instance. These recommendations include options to improve the profile of the private-sector within AusRFMOs and to increase their engagement in the decision-making processes of AusRFMOs. Second, recommendations that may be adopted by the private-sector to support their engagement in AusRFMO forums are provided. Options include the development of industry guidelines for engagement in AusRFMOs and initiatives for the private-sector to work with academia to publish examples of effective private-sector engagement in AusRFMOs.

6.7.1. Recommendations for how AusRFMOs can increase engagement with the private-sector

The below recommendations seek to address the issue of the need for increased cooperation between AusRFMOs and the private-sector to prevent against the occurrence of failures in the regional compliance regime. One of the key challenges which arises when AusRFMOs and the private-sector do not 'talk to' or cooperate with one another is that of misunderstanding.

Without the ability to determine accurately why a conservation measure may be unsuccessful in controlling a certain behaviour by fishers, or unsuccessful in eliciting a certain behaviour, assumptions can distort reality and result in the unnecessary diversion of precious time and effort. Recommendations to improve high seas governance efforts should, in that case, be targeted towards improving engagement and finding synergies. It is suggested that where responsible members of the private-sector work with AusRFMOs, this can result in successful compliance outcomes where traditional methods of achieving compliance would otherwise fail.

6.7.1.1. AusRFMOs should, wherever possible, encourage voluntary compliance by incentivising conservation measures

Successful fisheries management usually involves a system that provides incentives to individual operators.¹¹⁸ Incentive-based management and voluntary engagement represent just two key techniques available to RFMOs that show promise for increasing cooperative efforts between the resource-user and the regulator. Such approaches will likely encourage fishers to assume a sense of shared responsibility for the making, and successful implementation, of RFMO conservation measures.¹¹⁹

Incentive-based approaches to management represent a currently underutilised tool at the disposal of RFMOs. Participation by the private-sector in the conservation measures of the RFMO has been demonstrated to have been of key importance and in fact, necessary to the successful management of the resource.¹²⁰ If fishers are not provided the opportunity to engage constructively in fisheries management then they are likely to become suspicious of the regulation and fail to implement it.¹²¹

This thesis suggests that if AusRFMOs can primarily look to shape any compliance approach around the need to incentivise, rather than penalise, this will improve the strength of their compliance capacity. While certain AusRFMOs have taken positive steps towards incorporating incentives into their conservation measures to the benefit of the fishery, there remain those that are resistant to this approach.

¹¹⁸ Ibid at 47.

¹¹⁹ The Fisheries Secretariat, 'Towards Sustainable Fisheries', available online at: <<http://www.fishsec.org/wp-content/uploads/2012/04/Annex-2-Regionalisation-to-improve-governance.pdf>>

¹²⁰ Beddington et al, above n 29.

¹²¹ Beddington et al, above n 29.

6.7.1.2. AusRFMOs should consider adopting a policy position to formally acknowledge the role of the private-sector and observers at meetings and to specify any requirements for how they are to be engaged.

This recommendation recognises that the role of the private-sector and observers in meetings of AusRFMOs is often negligible, or vague at best. In accordance with Lodge's findings in relation to the role of observers in meetings,¹²² this thesis suggests that one of the best ways to ensure that the private-sector be 'afforded an opportunity to participate in meetings on reasonable terms'¹²³ is by clarifying what that role is in the form of a policy position on the role of the private-sector.

Such a position might take the form of a policy issued by the RFMO, or may simply be agreed in the form of a paper submitted to a commission meeting, however an open discussion of the types of documentation observers/the private-sector should be privy to, how their perspectives should be communicated in meetings and how they should be consulted would be beneficial for all. Such a policy may even formally recognise their role in encouraging compliance with the management objectives of the RFMO. Of course, consultation by the private-sector groups concerned would be critical in ensuring the policy was appropriate and reasonable.

To effectively address the challenges of globally depleted fisheries, fisheries management regimes must be flexible and adaptive enough to address challenges as they arise and this thesis suggests that the need to formally recognise the role of the private sector in RFMO management is a current challenge to be addressed. It is suggested that where the RFMO regime does not have a clear position and in-built techniques to encourage engagement with the private-sector, communications can become confused and decisions misguided.

6.7.1.3. AusRFMOs should reconsider the role of observers in the interests of achieving greater transparency in decision-making.

In 2010, Lodge argued that RFMOs should streamline applications for observer status, grant long-term approval to observers and grant observers access to all official documentation of the RFMO.¹²⁴ He also emphasises that the standard of transparency in RFMO meetings which include observers, compared to those meetings where observers are not involved, should be no different. Transparency results in trust and good faith between States parties to RFMOs but also in trust and good faith with the private-sector being impacted by the decisions of the RFMO.

¹²² Lodge, Recommended Best Practices for RFMOs, above n 1.

¹²³ Lodge, above n 1.

¹²⁴ Lodge, above n 1.

This thesis has argued that there is nothing preventing AusRFMOs from reconsidering the role of observers within their organisation. In 2019, many RFMOs are still working towards the appropriate engagement of observers in meetings to ensure transparency standards are met.¹²⁵

A 2019 report argued that any performance review undertaken by an AusRFMO should include consideration of the perspectives of observers to the meetings and, importantly, the views of the private-sector.¹²⁶ This thesis would agree and suggests that without requiring RFMO performance reviews to take into account the perspective of the private-sector and other observers, any attempt to identify and acknowledge the key issues within the organisation are limited to the perspective of a select few.

6.7.2. Recommendations for the private-sector to increase engagement in AusRFMOs

The work of Henrik Österblom has provided the theoretical basis for this thesis and prompted the finding that the private-sector *can* drive institutional change in AusRFMOs.¹²⁷ Österblom's work demonstrates that the private-sector can and should contribute to the compliance capability of AusRFMOs. This finding has arisen as a result of research he has undertaken that demonstrates the positive impact of private-sector engagement in the CCAMLR.¹²⁸

The below recommendations are based on the author's view that the private-sector *and* AusRFMOs share responsibility for the effective management and conservation of regional fisheries. There is no need to debate who is more responsible than the other; simply to acknowledge that any degree of responsibility entails the need to act in a manner that complies with the conservation measures of RFMOs. The recommendations can be considered by the private-sector as practical suggestions to potentially increase their engagement in the management of the resource.

6.7.2.1. *The private-sector should develop a set of standardised guidelines for engagement with AusRFMOs.*

While AusRFMOs are encouraged to adopt policies to clarify their position with respect to observers and the private-sector, by the same token, it is recommended that the private-sector

¹²⁵ WWF and Greenpeace International, Deep Sea Conservation Coalition, 'Performance reviews of regional fisheries management organizations and arrangement', available online at: <<http://www.savethehighseas.org/wp-content/uploads/2019/04/Joint-observer-submission-on-Performance-Reviews-of-RFMOs-March-30-2019-final.pdf>>.

¹²⁶ Ibid.

¹²⁷ Henrik Österblom, PhD, Associate Professor, Deputy Science Director, Stockholm Resilience Centre, Stockholm University, SE-106 91, Stockholm, Sweden.

¹²⁸ Orjan Bodin and Henrik Österblom, 'International fisheries regime effectiveness: activities and resources of key actors in the Southern Ocean', *Global Environmental Change*, 23 (2013) 948.

adopt guidelines for their agreed approach to engaging with AusRFMOs. By empowering the private-sector to develop guidelines on how to best engage with AusRFMOs, experiences can be shared and successful approaches to working with different groups can be implemented.

Such guidelines could be led by an organisation such as the World Oceans Council,¹²⁹ or by a new group of interested parties comprised of private-sector groups operating in any given AusRFMO regardless of their target stock. This group could then communicate developments and liaise with the Secretariat of different organisations. The private-sector today must adapt to ensure business, social and ecological sustainability¹³⁰ and recognise the benefit of uniting in progressing towards becoming a 'sustaining corporation'.¹³¹

6.7.2.2. The private-sector should uphold corporate social responsibility obligations to maximise opportunities for increased engagement in AusRFMOs.

This thesis has argued that today, a combination of sustainable leadership by corporations *and* flag State responsibility exists to govern global fisheries. Keystone actors in fisheries regimes are today, 'profoundly involved in fisheries and aquaculture decision-making'¹³² however many have yet to assume the responsibility that comes with this role.¹³³

What is clear is that sustainable leadership by keystone actors could enable a critical transition towards improved management of marine living resources and ecosystems under the principle of corporate social responsibility.¹³⁴ This principle can be utilised by corporations to frame their operations in a positive ethical light with the consumer; thereby enabling them to gain a business edge and often charge more for the product being sourced.¹³⁵

The adoption of corporate social responsibility by a corporation or otherwise will depend upon the willingness of the corporation to invest in sustainability and to trust in their counterparts within the relevant fishery.¹³⁶ If corporations better engage their corporate social responsibility obligations, this would mean that AusRFMOs would be in a better position to engage with the private-sector and the private-sector would be in a better position to ensure compliance with the regime of AusRFMOs.

¹²⁹ Ibid.

¹³⁰ Suzanne Benn, Dexter Dunphy, Andrew Griffiths, *Organizational Change for Corporate Sustainability*, 3rd Ed, 'Understanding Organizational Change'.

¹³¹ Ibid.

¹³² Österblom H, Jouffray J-B, Folke C, Crona B, Troell M, Merrie A, et al. (2015) Transnational Corporations as 'Keystone Actors' in Marine Ecosystems. PLoS ONE 10(5): e0127533. Available online at:

<<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0127533>>

¹³³ Ibid

¹³⁴ Crane et al, 'Corporate Social Responsibility Theories', *The Oxford Handbook of Corporate Social Responsibility*, 24.

¹³⁵ Ibid.

¹³⁶ Henrik Österblom and Orjan Bodin, 'Global cooperation among diverse organisations to reduce illegal fishing in the Southern Ocean', *Conservation Biology*, 2012.

6.7.2.3. The private-sector should work together to fund research efforts to establish and publish findings that support the work of AusRFMOs.

The private-sector may choose to engage in the work of an AusRFMO individually, or as a group, where a number of actors with similar incentives and values will band together to develop mechanisms in the interests of sustainability.¹³⁷ Indeed, many methods of engagement by the private-sector in the compliance sphere of AusRFMOs are self-imposed, or association-based and can involve leveraging certification schemes to give effect to sustainable leadership.¹³⁸

As previously discussed, the principle of shared responsibility refers to situations where a 'multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors'.¹³⁹ If the private-sector can accept shared responsibility for regional fisheries compliance, they can benefit greatly from this responsibility. This can occur via an increase in the market value of their product, or, for example, by being allowed to fish in areas or for fisheries that have previously been restricted.

If the private-sector can band together to undertake their own research into a fishery, or work with governments towards this same end, AusRFMOs will have a better scientific understanding of stock levels and can make better decisions as a result. It is suggested that these decisions can often benefit the private-sector engaged in the fishery.

6.8. Conclusion

The compliance mechanisms implemented by AusRFMOs have significantly contributed to strengthening the high seas fisheries regime by enforcing the conservation objectives of each region.¹⁴⁰ This chapter has demonstrated that AusRFMOs have adopted a wide range of compliance mechanisms, but that more still needs to be done particularly in the field of trade-related measures, graded sanctions and provisions relating to NCPs.

The introductory section of this chapter explored how incentive-based approaches to compliance, when viewed in light of the principle of shared responsibility, represent the most effective approach to achieving compliance with conservation measures. The legal status of the resource-

¹³⁷ Ibid.

¹³⁸ For example, utilising the Martine Stewardship Council for the purposes of certifying the fishing practices of individual entities or the sustainable nature of a fishery.

¹³⁹ Nollkaemper, above n 7.

¹⁴⁰ 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).

user in RFMOs was also examined to demonstrate the difficulties faced by the private-sector when seeking to engage directly via the forum provided by the RFMO.

The chapter then undertook an analysis of the data presented in Chapter 5 to highlight the respective strengths and weaknesses of each AusRFMO. The analysis was undertaken by allocating each AusRFMO a status of 'basic', 'satisfactory' or 'established' with regard to their compliance capacity. This finding was then considered in light of the performance of the RFMO.

The summary of compliance measures in place across AusRFMOs provided by Table 1 revealed that significant inconsistencies currently exist in terms of the degree and extent to which compliance 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, this recognition must be translated into conservation measures if their true effect is to be felt.

The chapter concludes that the six AusRFMOs under examination currently have a vastly different approach to compliance as demonstrated by the analysis of their founding agreements, as well as the compliance measures they have implemented. There is little uniformity across AusRFMOs with respect to their compliance regimes and this has resulted in a confusing situation for the resource-user.

This chapter has also examined the ways in which the private-sector can contribute to the compliance capacity of AusRFMOs. Figure 2 was introduced to highlight how avenues for private-sector engagement can be categorised into 'cooperative measures', 'benchmarking measures', and 'political measures' to assist in understanding their operation and desired effect. Using this discussion of private-sector engagement mechanisms, the chapter went on to make recommendations for reform that may be adopted by both the AusRFMOs and the private-sector as they work together towards a stronger regime for regional fisheries.

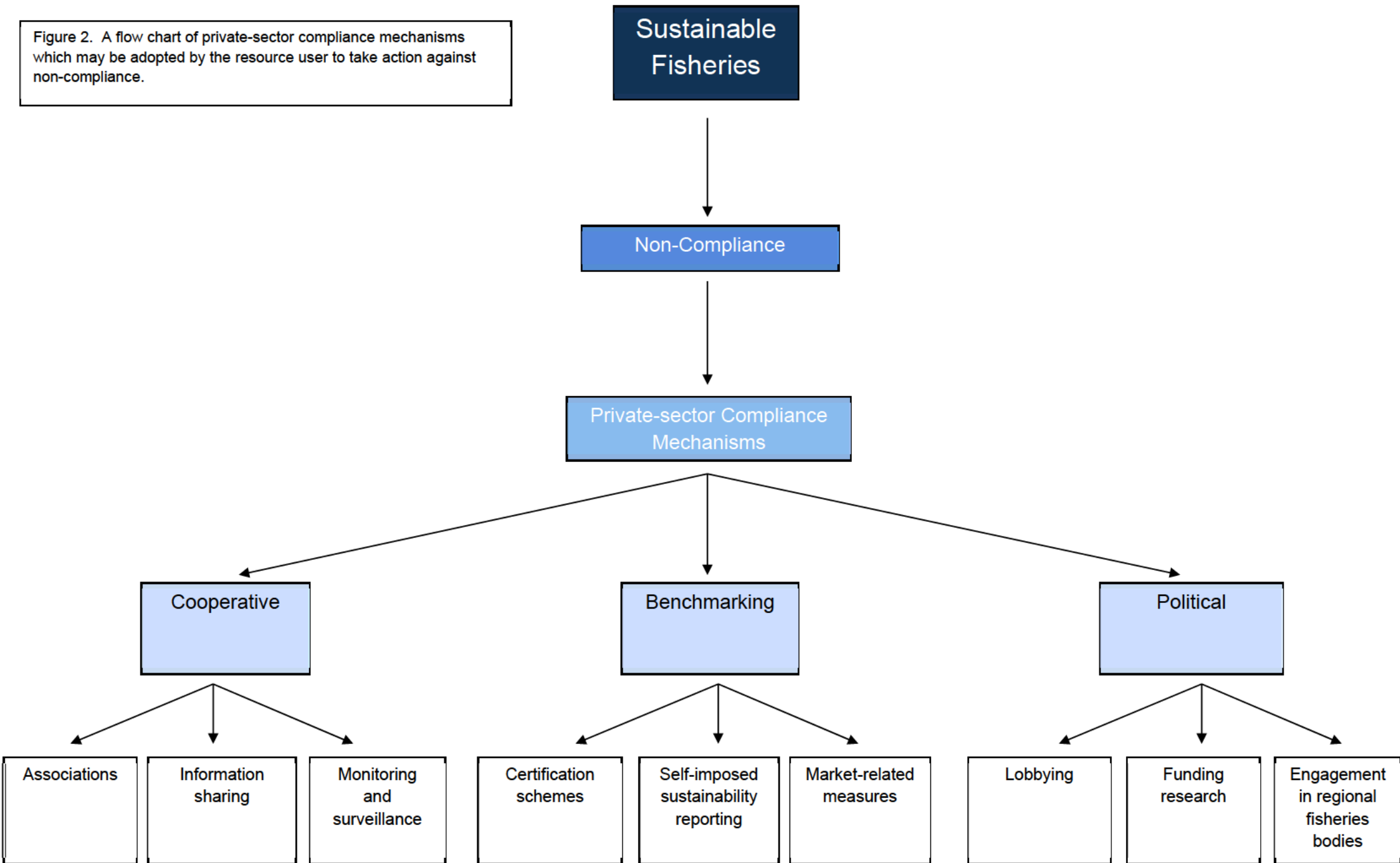
This chapter concludes that there is still significant work to be done to rebuild perceptions of the legitimacy of compliance-related conservation measures in AusRFMOs. In addition, there are challenges regarding the uniform implementation of compliance-related conservation measures. One way this may be addressed is by recognising that strengthening the legal mandates of AusRFMOs via additional conservation measures is not the only way to progress positive change.

It is suggested that an alternative vision of compliance enforcement, where the private-sector shares responsibility with the regulator to achieve compliance with conservation measures, holds

significant promise in a modern regional fisheries climate. While it is indeed the flag State who is responsible for compliance with relevant RFMOs, this thesis suggests that limiting discussion on how to improve this compliance to consideration of flag State capacity alone does not reflect the practical influence of the private-sector.

It concludes that instead, it should be recognised that private-sector engagement in the regulatory mandate of AusRFMOs represents an important opportunity to increase compliance rates by improving industry perceptions of regulatory legitimacy in AusRFMOs. There is significant work to be done to rebuild perceptions of the legitimacy of compliance conservation measures in AusRFMOs, and if we start to engage better with those who are directly impacted by the decisions of RFMOs then we will start to see real change for global fisheries.

Figure 2. A flow chart of private-sector compliance mechanisms which may be adopted by the resource user to take action against non-compliance.



Chapter 7

Conclusion

7.1. Introduction

This thesis has established that effective fisheries management is the responsibility of numerous stakeholders including fishers, fisheries management authorities, fishery scientists and other groups engaging in the sustainability, regulation and exploitation of the resource.¹ The implications of this reality are that fisheries managers alone are not always the best placed to take action to address problems within a particular fishery, or to fully understand the underlying causes of the problem in order to effectively address the situation.² Co-operation and communication between all stakeholders in order to ensure open channels for information exchange, is fundamental to achieving sustainable global fisheries.³

In addition to increased cooperative and communication efforts, the ability of the regulator to employ incentives to encourage the (often voluntary) engagement of the private sector in the regulatory sphere has proven an effective alternative where traditional governance approaches have failed.⁴ Today, fisheries regulators have an increasing body of evidence before them to suggest that leveraging the knowledge, information and skills of the resource-user to tackle new threats to stock sustainability is both logical and effective in achieving improved compliance rates.⁵

This thesis has argued that where the regulator does not take into account the governance contribution of the private-sector, or where the private-sector does not demonstrate sustainable leadership, this can pose a significant risk to the sustainability of any given fisheries regime. It has been demonstrated that fishers and researchers working together can; 'promote better science and management for fisheries, as well as effective communication and collaboration among fishing professionals in the region.'⁶

¹ Cochrane, K.L. (ed.) A fishery managers guidebook. Management measures and their application. *FAO Fisheries Technical Paper*. No. 424. Rome, FAO. 2002. 231p.

² Ibid.

³ Andrew R Smith, Papers presented at the Expert Consultation on Sustainable Fishing Technologies and Practices: St. John's, Newfoundland, Canada, 1 - 6 March 1998 pp 145.

⁴ Heather Goldstone, *WGBH*, 'How Cooperative Research Could Ease Tensions Between Fishermen, Regulators', July 9 2013

⁵ Tim S. Gray, 'Participation in Fisheries Governance', Springer Science & Business Media, 9Jan, 2006 - Science at 46.

⁶ National Oceans and Atmospheric Administration, 'Northeast Cooperative Research Program' available online at <http://www.nefsc.noaa.gov/coopresearch/> accessed 24 November 2019.

One reason that engaging the private-sector in implementing regulatory effort has proven so effective may be that in doing so, responsibility transfer occurs, empowering those who are best placed to address the problem.⁷ This approach evokes the principle of shared responsibility. Instead of stock level declines and depleted fisheries being viewed as a problem for which the regulator is solely responsible, responsibility transfer occurs and onus is shared with the private-sector.⁸

An increase in the popularity of participative decision-making and compliance effort⁹ by the private-sector has resulted in important developments for the regional fisheries sector. In the case of one regional fisheries management organisation to which Australia is a party, the Commission for the Conservation of Antarctic Marine Living Resources, it has been argued that this engagement has improved the quality of decision-making by the organisation. In this way, the CCAMLR provides a model AusRFMOs may wish to adopt or learn from in developing and implementing their own version.

Today, there is an increasing impetus for the private-sector to contribute to the governance of the fishery and innovate to adopt their own solutions to fisheries governance challenges. This thesis has argued that commentary on reform to fisheries governance all too often considers scientific, legal and institutional efforts to advance governance without recognising the importance of engaging the private-sector throughout this process.

In this final chapter, the thesis will make its final conclusions to support the proposition that the ability of AusRFMOs to increase their engagement with the private-sector will be a critical determinant of their future compliance capacity.¹⁰ The results of the thesis demonstrate that a holistic, multi-sectoral and collaborative approach represents the best option for achieving effective reform to regional fisheries governance.

To support these assertions, this chapter begins with a recap of the content and findings of previous chapters. When read as a whole, this thesis contains evidence to suggest that AusRFMOs can and should increase their engagement with the private-sector in the interests of achieving improved compliance outcomes for their respective fisheries. Additionally, the private-sector should be encouraged to demonstrate sustainable leadership and assume shared

⁷ United Nations Development Program, Civic Engagement, <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/topics_civic_engagement.html> accessed 1 November 2019.

⁸ Ibid.

⁹ Gray T.S. (2005) Theorising about Participatory Fisheries Governance. In: Gray T.S. (eds) *Participation in Fisheries Governance. Reviews: Methods and Technologies in Fish Biology and Fisheries*, vol 4. Springer, Dordrecht available online at: <http://link.springer.com/chapter/10.1007/1-4020-3778-3_1#>

¹⁰ OECD (2011), *The Economics of Adapting Fisheries to Climate Change*, OECD Publishing, Paris, available online at <<https://doi.org/10.1787/9789264090415-en>> 23.

responsibility for the resource, if it wishes to see an impact on the sustainability of global fish stocks.

The next section of this chapter outlines a series of conclusions that are primarily based on the data and analysis contained in Chapters 5 and 6 of this thesis. Chapter 6 demonstrates that there are commonalities in the type of compliance challenges facing AusRFMOs. This also means that there are commonalities when it comes to identifying how AusRFMOs may improve their compliance capacity.

As outlined in the introductory chapter of this thesis, the author's thesis submitted in fulfilment of the requirements for the Degree of Master of Laws (Thesis)¹¹ in 2011 found little evidence of consistency across AusRFMOs in existence at the time with regard to the type of compliance measures in place. This thesis has found that almost a decade later, little has changed and the same group of organisations must continue to work towards a greater sense of unity in their compliance approach.

This thesis goes a step further to demonstrate that the solution to the inconsistency across the compliance approach of AusRFMOs is likely to reside in their ability to engage the private-sector in their regulatory effort. It argues that by becoming a part of the solution, rather than the problem, the private-sector will be better placed to understand the impacts of their behaviour whether it be compliant or non-compliant behaviour.

This chapter also concludes that based on the analysis undertaken in Chapter 3, there is no legal barrier preventing AusRFMOs from increasing private-sector engagement in their governance processes. AusRFMOs have the potential to better contemplate how they engage with the private-sector; constitutionally, philosophically, legislatively and procedurally. AusRFMOs also have significant scope to re-consider how and whether they are effectively engaging with the private-sector in the interests of improving their compliance capacity.

The voluntary nature of international law means that there is a need for AusRFMOs to increase their engagement with the private-sector and work together in the management of the resource. In an era where traditional legal frameworks to secure the suitability of high seas fish stocks has been found wanting, AusRFMOs must now look beyond their internal compliance capacity to engage the private-sector if we are to see real progress for the sustainability of high seas fish stocks.

¹¹ Elise Clark, 'Compliance enforcement in regional fisheries management organisations to which Australia is a party', thesis available online at: <https://eprints.utas.edu.au>

7.2. Thesis Review

This thesis has contributed to the wealth of information currently being collected on the performance of these organisations by analysing the ability of AusRFMOs to encourage greater compliance from both contracting and non-contracting parties. This section 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. It is demonstrated that on a global level, there is a need for more effective cooperation between members of AusRFMOs and AusRFMOs themselves in the area of compliance enforcement.

Chapter 1 of this thesis highlighted the challenges posed by flag State jurisdiction and the need for increased recognition of the roles and responsibilities of the resource-user to enable change in the compliance capacity of AusRFMOs. It introduced the thesis as an opportunity to present a contemporary assessment of the compliance capacity of RFMOs to which Australia is a party.

Chapter 1 went on to highlight ‘the problem’ by providing an overview of how unsustainable fishing in high seas areas has led to a global crisis of fisheries management. The need for a collaborative approach to governance of high seas fisheries was offered as a solution to this problem to increase the engagement of the private-sector regional fisheries management.

The chapter goes on to argue that if sustainable fisheries are the objective, increased interaction between the government and the governed will always be of benefit to the work of AusRFMOs. To support this assertion, a brief case study of a recent advisory opinion issued by the ITLOS highlighted the complexities of reliance on flag State responsibility alone in a compliance context.

Lastly, Chapter 1 outlined the structure of the thesis, and how the chapters are organised into three key segments. This includes the beginning chapters 1-4 which present the context for the thesis. Next, the empirical data is presented in Chapters 5 and 6 of the thesis. Ultimately, thesis conclusions are presented in Chapter 7.

The second chapter of this thesis, entitled ‘Governance Theory and Research Methodology’ sought to explain the theoretical framework underpinning the analysis undertaken in later chapters. It examined the objectives of fisheries governance at a regional level, and the concepts of sustainable management and ecosystem-based management. These principles demonstrated that the private-sector plays a vital role in achieving the objectives of regional fisheries governance.

The second chapter also explained that both rationalist and normative models of compliance are taken into consideration in this thesis. These models included deterrence and enforcement measures, as well as punitive approaches that seek to 'name and shame' non-compliance. It was also explained that normative approaches focus on cooperation and compliance assistance as a means to prevent non-compliance.

Finally, the second chapter explained that the thesis seeks to test the hypothesis that there are significant inconsistencies between and amongst AusRFMOs in their adoption of conservation measures to support their compliance capacity. An assessment as to whether and where the main gaps exist between and amongst AusRFMOs was to be undertaken, assisted by insights from the performance reviews of AusRFMOs.

Next, the thesis moved to examine in detail the AusRFMOs under examination in the thesis. Chapter 3 explores the mandate, geographic application and recent performance reviews of AusRFMOs. It examines how calls to qualitatively assess the performance of RFMOs led to the development of common criteria for the delivery of ongoing review and assessment. Currently, the practice of undertaking performance reviews and monitoring the implementation of associated findings has become common across RFMOs globally.

The most recent performance reviews of each AusRFMO were examined to determine their respective compliance issues and areas for improvement. The basics of RFMO management were then explained, including the operation of conservation measures in RFMOs, their legal force and other key basics behind how RFMOs regulate.

Chapter 4 comprised a stand-alone case study of how a specific compliance tactic adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) had made a significant contribution to the regulatory function of the organisation. This chapter analysed the rise of the CCAMLR Compliance Evaluation Procedure (CCEP) and explored in detail how the CCEP contributed to the compliance capacity of the CCAMLR.

Comprising, for the most part, an article co-authored by the author and the late Dr. Denzil Miller, Chapter 4 is relevant to many of the conclusions and recommendations made in this thesis but can also be viewed as a stand-alone case study. Chapter 4 found that the rise of the CCEP was one of the first of its kind and constituted a strong example of how compliance evaluation can function to effectively address instances of non-compliance in AusRFMOs.

Chapter 5, entitled 'Compliance-Related Conservation Measures in AusRFMOs', identified and categorised the compliance measures under examination in this thesis. These were found to

include 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 and inspection and arrest. Each of the categories was clarified by Figure 1 which provides a graphic representation of the compliance capabilities of AusRFMOs.

The penultimate chapter, Chapter 6, comprised the analytical basis of the thesis. It tabulated the data collected to determine how each of the AusRFMOs under examination is performing with regards to their compliance capacity. An overall compliance ranking of basic, developing or established was allocated to each AusRFMO with regard to its compliance capacity. This finding was then considered in light of the performance of the RFMO in accordance with their most recent performance review outcomes.

The findings of Chapter 6 highlighted the limitations of AusRFMOs and emphasised that compliance should now be viewed as a challenge to both the flag State, and the private-sector. To address this challenge, a series of specific recommendations were made for AusRFMOs and the private-sector to adopt.

Recommendations included leveraging opportunities to engage the private-sector in compliance efforts, formally recognising the role of the private-sector in governance and involving private entities or associations in the decision-making process. It was demonstrated that in adopting these recommendations, the potential for the 'regulated' to perceive the measures to which they must conform as being legitimate would dramatically increase.

Finally, the seventh and final chapter of this thesis concludes that efforts to improve the governance regime for high seas fisheries via amendment to international agreements or development of new agreements may be limited in effect. It highlights that so long as the impacts of depletion of fish stocks continue to be felt by the 'whole', rather than the individual, significant governance challenges will remain in achieving sustainable fisheries.

This final chapter demonstrates that applying the international legal principle of shared responsibility in AusRFMOs represents an exciting alternative to governance by RFMOs alone in the regional fisheries regime. This chapter draws an important connection between the voluntary nature of international law and international governance frameworks. It highlights that increasing government utilisation and engagement with the private-sector is beneficial to both parties but that more importantly, it is essential if we are to achieve sustainable global fisheries.

7.3. Conclusions

This chapter will now explore the conclusions that can be reached from the analysis undertaken in Chapters 5 and 6, combined with the contextual information presented in the introductory chapters. These conclusions are listed in order of the significance to the research undertaken in this thesis and are directly related to the recommendations made in Chapter 6.

1) *AusRFMOs continue to face serious challenges to their ability to achieve effective compliance outcomes.*

The findings of Chapter 5 and 6 of this thesis demonstrate that there remain significant inconsistencies in the compliance capacity of AusRFMOs. As a group, AusRFMOs have differing approaches to achieving compliance and have adopted varying compliance measures across the board. The result is that while some AusRFMOs have succeeded in building strong and resilient compliance regimes, others continue to struggle to adopt meaningful compliance measures for various reasons. The reasons some AusRFMOs struggle include: a limited mandate as a result of the ways in which their constitution has been drafted, insufficient demonstration of the benefits to be gained from compliance, and a lack of political will to hold States parties to account for the actions of their flagged vessels.

Arguably, intangible considerations such as operator attitudes towards the legitimacy of regulation,¹² the method of compliance enforcement employed¹³ and perceptions as to the likelihood of apprehension are becoming increasingly important to the compliance capacity of AusRFMOs.¹⁴ The decision to fish responsibly or otherwise can be influenced by factors outside the traditional governance framework.

2) *Efforts to improve the governance regime for high seas fisheries via amendment to international agreements or development of new agreements may be limited in effect.*

As an extension of the findings of conclusion 1, this thesis concludes that it is time to consider reasonable alternatives to legislative reform or development to improve compliance rates in

¹² Davis, BW, *The legitimacy of CCAMLR, Governing the Antarctic*, Cambridge University Press, Stokke, Olav Schram and Vidas Davor (ed), Cambridge, UK, pp. 233-245. (1996).

¹³ Darren S. Calley, 'Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry'.

¹⁴ Australian Institute of Criminology, 'Illegal, Unreported and Unregulated Fishing', available online at <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp109/08.html>

AusRFMOs. Often it is the case that complex solutions to ‘improving’¹⁵ flag State responsibility and ‘strengthening’¹⁶ RFMOs continue to be at the centre of critical discourse on the problem of global fisheries management.

However, this thesis recognises that in an environment where certain corporations take more fish from our oceans than an entire State on an annual basis, and have the capacity to ‘buy-out’ the resources of an entire State’s EEZ,¹⁷ any realistic solution to the compliance problem must consider both legislative reform *and* opportunities to better engage the private-sector.

3) *Applying the principle of shared responsibility to the RFMO regime provides an exciting alternative with respect to the impacts of fishing on the target stock, its environment and the associated ecosystems.*

As discussed in the introductory chapters of this thesis, the legal principle of shared responsibility represents an alternative approach to strengthening the compliance capacity of AusRFMOs. Today there exist examples of the private-sector assuming responsibility for the resource and creating a powerful counteractive to the activities of irresponsible fishers.¹⁸ The role and influence of a limited number of large companies on the high seas has only recently been recognised;¹⁹ however, it has long been the case that certain influential fishing companies can have a great influence on RFMO decision-making.²⁰

As previously discussed, the principle of shared responsibility is relatively new to the academic discourse but refers to the underexplored problem of the allocation of responsibilities among states and ‘other actors’.²¹ This principle has particular relevance in international environmental law where the example of high seas fish stocks management is often cited as a demonstrative of the principle of shared responsibility. This is because it poses challenging questions relating to who is responsible for the over-exploitation of high seas fish stocks.

The principle of shared responsibility seeks to address the challenges posed by multiple actors contributing to harmful environmental outcomes.²² The determination of responsibility for such

¹⁵ Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organisations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organisations*, (2007), ix available online at: <<http://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf>>

¹⁶ Ibid.

¹⁷ Henrik Österblom, ‘A handful of corporations could hold the answer to crisis in the seafood industry’, *The Guardian*, available online at <<http://www.theguardian.com/sustainable-business/2015/may/28/seafood-industry-overfishing-corporations-control-potential-solution>>

¹⁸ Margaret Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law*, 305.

¹⁹ Österblom, above n 17.

²⁰ Österblom, above n 17.

²¹ Principles of Shared Responsibility in International Law. (2014). In A. Nollkaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Shared Responsibility in International Law, p. I). Cambridge: Cambridge University Press.

²² Ibid.

outcomes can become challenging and often, the law does not allow for the shared allocation of responsibility and blame. It has been asserted in this thesis that in reality, often key-stone actors, or members of the private-sector, have greater influence over the future of global fisheries resources than States. Therefore, the private-sector should share the same responsibilities as States parties to AusRFMOs.

It has been demonstrated that international law recognises States as the bearers of responsibility, however, states can only act through individuals or private corporations. This regime must at least address certain questions concerning the interaction between the private-sector and AusRFMOs in order to move forward in a logical way towards sustainability.²³

It is well recognised that regulatory authorities should constantly be concerned with maintaining the involvement of participants in the regime they administer. However, there is a gap in legal discourse relating to the regional fisheries regime in considering how RFMOs in general interact with the private-sector. This thesis has asserted that this statement is particularly true in a compliance sense.

If cooperative action between the private-sector and RFMOs increases, so does the strength of the argument that responsibility for regional fisheries failures is shared by both the State (often via the RFMO convention) and the resource user. This thesis has applied the principle of shared responsibility to suggest that AusRFMOs will benefit from increased engagement by the private-sector in the regulatory compliance sphere.

It seeks to demonstrate that the strongest regional regimes are those which extend beyond conventional notions of flag State compliance to leverage industry compliance mechanisms and engage with the opportunities they provide. As the frequency and variety of cooperative action between States and non-State actors increases, there is a need for new perspectives that help to address how RFMOs might develop approaches that better serve the interests of injured parties under regional fisheries regimes.

Many influential fishing corporations have yet to demonstrate their uptake of responsible management measures to ensure the long term best-interests of high seas fisheries.²⁴ However, if AusRFMOs can enshrine the principle of shared responsibility in their founding agreements, and adopt an approach consistent with this principle in practice, this would represent an exciting alternative to the traditional approach to high seas fisheries management.

²³ Ibid.

²⁴ Ibid.

4) *The ability of AusRFMOs to incentivise compliance with their regime is critical to achieving sustainable fisheries.*

Where it appears the private-sector is acting from a sense of corporate social responsibility, AusRFMOs should explore every opportunity to provide incentives for such behaviour. In a governance context, the primary determinants of success relate to the institutional structure of the regulatory authority, and whether the authority has implemented incentives for participants.

In the context of AusRFMOs, it has been demonstrated that certain fishing organisations have taken it upon themselves to promote compliance within their own networks and have created initiatives to preserve the marine living resources of the Antarctic. Industry has harnessed measures including sustainability reporting, eco-labelling and certifications, monitoring and compliance schemes and the adoption of fishing associations to increase engagement in the governance of international fisheries.

However, the most effective AusRFMO compliance regimes will be those that incentivise compliance with their conservation measures to show that the benefits to be gained from complying can be greater than those to be gained by non-compliance.

5) *There is no legal barrier preventing AusRFMOs from increasing private-sector engagement in the making of conservation measures.*

It has been shown that currently, few AusRFMOs are fully utilising and involving the private-sector in governance practices. Where examples of effective industry engagement do exist, there remains significant potential to provide the private-sector with greater responsibilities and autonomy over the resource, thereby legitimising perceptions of the regulator and empowering the resource-user.

AusRFMOs have the potential to better contemplate how they incorporate and engage industry, constitutionally, philosophically, legislatively and procedurally. They have significant scope to reconsider how and whether they are currently leveraging industry initiatives in conservation measures and in their approach to governance.

However, it is also recognised that obstacles including irresponsible fishers and jurisdictional issues can pose challenge to the effective implementation of this conclusion. Despite this, AusRFMOs can and should improve efforts to engage and consult with the private-sector in the interests of securing sustainable regional fisheries.

Information gathering on the nature of a management challenge, analysis of the underlying causes of the challenge, and planning of reform should all be informed by and often prompted by consultation with the persons being managed. While their role is not to make any binding decisions to address the situation, open streams of communication and cooperation between the regulator and the regulated will clearly be fundamental to the ultimate management decision appropriately addressing the initial challenge.

7.4. Conclusion

Some have argued that a 'transition to sustainable development'²⁵ must occur if governments are to ensure the future development of life on our planet. This thesis argues that in a fisheries context, this means achieving a synergy between public and private regulation. This thesis has argued that where law and diplomacy fail, increased incentive-based regulation and voluntary engagement by the private-sector will provide a viable alternative to ensure the effective regulation of the resource.

The premise of the thesis is that fishing industry associations and individuals can and have assumed responsibility for regional fisheries failures. In doing so, these organisations have assumed a significant compliance function and associated responsibilities. By documenting this trend in AusRFMOs and analysing its impacts upon the compliance capability of these organisations, this thesis hopes to demonstrate that the global challenge of unsustainable fisheries is not a problem for RFMOs alone to answer. Indeed, it is one RFMOs cannot and should not tackle alone.

The private-sector operating in regional fisheries can and should assume shared responsibility for the resource. This thesis has examined examples whereby this is already occurring in the Southern Ocean. The thesis has recommended that if AusRFMO and the private-sector are able to better engage and unite to achieve compliance objectives, responsibility transfer can occur, empowering the 'regulated' who are well placed to achieve compliance outcomes.

The 'transition to sustainable development',²⁶ means that AusRFMOs must engage the private-sector in decision-making and by the same token, the private-sector must connect with their responsibilities. This thesis recommends that failures of fisheries governance should no longer be seen as a problem for AusRFMOs alone to resolve and that the compliance capacity of these organisations is today, inherently connected to the responsibilities assumed by their respective sector.

²⁵ *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the General Assembly as an Annex to UN Doc A/42/427 (20 March 1987) ('The Brundtland Report') at para 53.

²⁶ *Ibid.*

Effective fisheries governance, particularly international fisheries governance, will benefit from a synergy between public and private regulation. A wealth of corporation-driven sustainability mechanisms have evolved in recent decades in an effort to address the deepening crisis of declining global fisheries. There are many examples where the private-sector has harnessed measures including sustainability reporting, eco-labelling, and monitoring and compliance schemes and to increase their engagement in the international fisheries governance space. Recent evidence suggests that this trend is on the increase.²⁷

This thesis has touched on, but has not been primarily focussed on, the motivations of the private-sector when it comes to engaging with the compliance capacity of AusRFMOs. Indeed, corporate social responsibility²⁸ can mean different things depending upon the philosophical or political standpoint from which it is being approached.²⁹ However, what is clear is that economic success in the long run cannot be achieved unless, 'employees, customers, suppliers, local communities and others with an interest in companies' activities'³⁰ are taken into account by the private-sector.

This thesis contends that when the private-sector responds to social demands with policies, programs and tangible results,³¹ responsibility transfer occurs and the regulatory regime becomes stronger. The private-sector has significant power to encourage change and such power entails responsibility. Today, this means that a company may be vulnerable to risk if its approach is contrary to the way its customers expect it to behave.

Where the private-sector can demonstrate sustainable leadership, they can strengthen existing legal provisions, build fishery compliance and fill their own governance gaps *without* requiring international fisheries arrangements to be modified or new agreements to be developed. That is the crux of the findings of this thesis. Sustainable change in the regional fisheries sector can and should occur via many methods and private-sector engagement with their responsibilities is just one avenue for this to occur.

In the last decade, a multitude of international organisations and high-profile critics have stepped up the pressure on RFMOs to have a real impact on global fisheries. This pressure has, in turn, led to a focus on performance-based assessment.³² However, it is only the performance of AusRFMOs and other RFMOs globally that is being assessed via such methods. This thesis

²⁷ Österblom, above n 17.

²⁸ Andrew Crane Guido Palazzo Laura J. Spence Dirk Matten, Contesting the Value of "Creating Shared Value", California Management Review VOL 56, No. 2 2014 at 11.

²⁹ Ibid.

³⁰ Ibid at 17.

³¹ Ibid at 4

³² Lodge et al, above n 15.

argues that we must go beyond consideration of the compliance capacity of AusRFMOs and look to the compliance capacity of the private-sector if we are to achieve a true understanding of the state of the fishery.

As highly politicised and sensitive organisations, AusRFMOs are continually held to account for the decisions that they make. They seek to make progress in the field of fisheries conservation and management. This thesis has demonstrated that there is another party, the private-sector, which should equally be held to account for the state of global fisheries and the progress of regional fisheries regimes.

Table 3. Summary of compliance measures of AusRFMOs

<i>TOPIC</i>	<i>CCAMLR</i>	<i>IOTC</i>	<i>CCSBT</i>	<i>WCPFC</i>	<i>SPRFMO</i>	<i>SIOFA</i>
Cooperative Policies	<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.</p> <p><i>CCAMLR</i> has a "Policy to Enhance Cooperation between <i>CCAMLR</i> and Non-Contracting Parties" to encourage accession and compliance.</p>	<p>Resolution 98/05 provides that the Chairman of the <i>IOTC</i> should send a letter to all NCPs known to have vessels fishing in the <i>IOTC</i> Area to cooperate and become members to the Commission.</p> <p>Article IV of the <i>IOTC Agreement</i> provides CPs should cooperate to encourage any State to become a member to the <i>Agreement</i>.</p> <p>Article V of the <i>IOTC Agreement</i> provides that the <i>IOTC</i> shall encourage, recommend and coordinate information sharing.</p>	<p>Articles 13 and 14 of the <i>CCSBT Convention</i> provide that CPs must cooperate to invite membership by any State not party to the <i>Convention</i> if their nationals fish for southern bluefin tuna (SBT).</p>	<p>Part V of the <i>WCPFC Convention</i> provides States should cooperate to allow easy exchange of information. Under this section of the <i>Convention</i> CPs are also required to cooperate to establish effective mechanisms for monitoring, control and surveillance.</p>	<p>Article 19 of the <i>SPRFMO Convention</i> 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.</p>
Non-Contracting Parties (NCPs)	<p>Resolution 14/XIX urges <i>CCAMLR</i> acceding States and NCPs to implement the Catch Documentation</p>	<p>Resolution 01/03 provides that evidence that NCP vessels are fishing contrary to <i>IOTC</i> regulations should be</p>	<p>Article 15 of the <i>CCSBT Convention</i> provides that States Parties should draw the attention of NCPs to the activities of</p>	<p>The "Conservation and Management Measure for Vessels Without Nationality" provides that such vessels are</p>	<p>Article 32 of the <i>Convention</i> provides that members of the Commission must take measures to deter the</p>	<p>Under Article 6 of the Agreement, the Meeting of Parties is charged with drawing the attention of NCPs to activities which</p>

	<p>Scheme (CDS) as soon as possible.</p> <p>Article X of the <i>CAMLR Convention</i> 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 <i>CCAMLR</i>.</p>	<p>reported and the flag State should be made aware.</p>	<p>its nationals, residents or vessels which may affect the attainment of the objectives of the <i>Convention</i>.</p>	<p>presumed to be operating in contravention of the <i>Convention</i>.</p>	<p>detrimental activities of vessels flying the flag of NCPs. Such incidences should be reported to the Commission along with any action taken against NCPs.</p> <p>CMM 15-06 applies certain requirements to 'Vessels without Nationality in the SPRFMO Convention Area'.</p>	<p>undermine the objectives of the Agreement.</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> <p>CMM-04. 'Conservation and Management Measure on Vessels without Nationality' makes publically available the actions SIOFA will take against vessels without nationality.</p>
Contracting Parties (CPs)	<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 07/01 provides relevant agencies of CPs and cooperating non-parties (CNPs) should cooperate to investigate allegations concerning the</p>	<p>The "Resolution on action plans to ensure compliance the Conservation and Management Measures" requires CPs and CNPs</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></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</p>	<p>Article 10 of the Agreement provides that flag States are responsible for any breach of a conservation measure that might occur. CPs are also</p>

	<p>Resolution 25/XXV urges all CPs to pursue diplomatic and other action to encourage NCPs to recognise CCAMLR 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>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>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>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>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>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 17(4) of the <i>Agreement</i> requires CPs to request NCPs to cooperate fully in the implementation of conservation measures.</p> <p>CMM 2018-11 establishes a compliance and monitoring scheme for the SIOFA which includes a compliance review mechanism for CPs.</p>
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IUU Vessel Lists	<p>Conservation Measure 10-07 establishes a NCP IUU Vessel List and provides that such vessels be identified on an annual basis.</p> <p>Conservation Measure 10-02 requires all CPs to ensure their vessels are licensed to fish in the Convention Area.</p>	<p>Resolution 09/03 provides for the creation of the <i>IOTC</i> IUU Vessel List to record vessels presumed to have carried out IUU fishing in the <i>IOTC</i> Area.</p>	<p>The CCSBT has a 'Resolution on establishing a List of Vessels Presumed to have Carried Out Illegal, Unregulated and Unreported Fishing Activities for Southern Bluefin Tuna'.</p>	<p>The <i>WCPFC</i> IUU Vessel List is established via 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".</p>	<p>The creation of a <i>SPRFMO</i> IUU Vessel List is required under Article 27 of the <i>Convention</i>.</p> <p>CMM 04-2017 is entitled 'Establishing a List of Vessels Presumed to have Carried Out IUU Fishing Activities in the <i>SPRFMO</i> Convention Area'.</p>	<p>CMM-06 establishes the SIOFA IUU Vessel List to name and shame vessels and flag States engaged in IUU fishing in the SIOFA Area.</p>
Requests and Negotiations	<p>Resolution 14/XIX urges <i>CCAMLR</i> acceding States and NCPs to implement the Catch Documentation Scheme (CDS) as soon as possible.</p> <p>Resolution 15/XXII urges all CPs to require their vessels to land catches in States that are fully implementing the CDS.</p>	<p>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.</p>			<p>Under Article 8, the <i>SPRFMO</i> Commission must adopt measures to prevent, deter and eliminate IUU fishing.</p> <p>Article 11 of the <i>SPRFMO Convention</i> provides for the creation of a Compliance and Technical Committee to monitor and review compliance.</p>	

	Resolution 25/XXV urges all CPs to pursue diplomatic and other action to encourage NCPs to recognise <i>CCAMLR</i> conservation measures.					
Trade Measures	<p>Conservation Measure 10-07 provides CPs should not take any trade measures against vessels as a result of their inclusion on the IUU Vessel List.</p> <p>Conservation Measure 10-05 provides that the Commission is committed to taking steps to ensure fish are caught consistent with international law.</p> <p>Resolution 14/XIX urges <i>CCAMLR</i> acceding States and NCPs to implement the CDS as soon as possible.</p>	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 adopted.	<p>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.</p> <p>The 2017 ‘Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port’ requires that foreign fishing vessels must meet certain notification requirements.</p> <p>Article 15 of the <i>Convention</i> provides that Parties should cooperate</p>	<p>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 measures to eliminate the activities of IUU listed vessels.</p> <p>Article 27 of the <i>Convention</i> provides port States may adopt regulations to prohibit landings and transshipments where catch has been taken in</p>	<p>Article 8 of the <i>Convention</i> provides that the Commission must adopt procedures, including non-discriminatory trade measures, to ensure compliance. To this effect the Commission must develop processes in accordance with international law to assess flag State performance.</p> <p>Article 27 of the <i>Convention</i> contains further references to the implementation of trade related measures.</p>	CMM-08 establishes measures to implement port-state inspections to detect and apprehend IUU fishing activities.

			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>a manner which undermines the objectives of the <i>WCPFC</i>.</p> <p>'Conservation and Management Measure for Minimum Standards for Port State Measures' (2017-02) requires all vessels to adhere to the Agreement on Port State Measures.</p> <p>Article 25(11) of the <i>Convention</i> authorises the Commission to develop procedures to allow for non-discriminatory trade measures to be taken against any State undermining the objectives of the Commission.</p>	CMM-07. 'Minimum Standards of Inspection in Port' can assist in imposing trade measures on IUU fishers.	
Graded Sanctions	Conservation Measure 10-03 provides that where an act of non-compliance has	Resolution 99/02 provides that action be taken against the activities of "flag of	The "Resolution on establishing the CCSBT Vessel Monitoring System" provides that all	Article 25 of the <i>Convention</i> provides that where it has been established that a	Article 3 of the <i>Convention</i> provides that CPs, the Commission and	

	<p>occurred, CPs will take appropriate action and, if necessary, apply sanctions to that vessel.</p> <p>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>convenience” vessels including denying vessels a license to fish and refusing landing and transshipments.</p> <p>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>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.</p> <p>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>member vessel has been non-compliant, States must ensure that the vessel ceases fishing activities until sanctions have been complied with.</p>	<p>subsidiary bodies should ensure compliance by implementing sanctions to deprive offenders of the benefits to be gained from their activities.</p>	
Monitoring and Inspection	<p>Conservation Measure 10-04 requires CPs to ensure that their flagged vessels are equipped with automated satellite-linked vessel monitoring systems (VMS).</p>	<p>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.</p> <p>Resolution 99/03 provides for a control and</p>	<p>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.</p> <p>The “Resolution on establishing the <i>CCSBT</i></p>	<p>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.</p>	<p>Article 8 of the <i>Convention</i> provides that the Commission must develop and establish effective monitoring, control and surveillance enforcement procedures.</p> <p>The SPRFMO ‘Boarding and Inspection Procedure’</p>	<p>Article 6(1) of the Agreement provides that the Meeting of Parties shall develop rules concerning the boarding and inspection of vessels operating in the Area.</p> <p>Article 11(1) of the Agreement provides that CPs should take measures to ensure that they develop a “satellite</p>

		<p>inspection scheme to be established.</p> <p>Resolution 06/03 establishes a vessel monitoring system in the <i>IOTC</i> Area to standardise the systems adopted by CPs.</p>	<p>Vessel Monitoring System" provides all CPs and CNPs are to ensure that no vessels carry out IUU fishing activities.</p>	<p>Article 10 of the <i>Convention</i> provides that CPs must cooperate to establish mechanisms for effective monitoring, control and surveillance.</p>	<p>was adopted in 2015. This procedure is supported by the SPRFMO Observer Programme which entered into force in April 2019.</p> <p>CMM 06 creates the SPRFMO VMS and in 2019, the SPRFMO Compliance and Monitoring Scheme was established to identify and address instances of non-compliance.</p> <p>CMM 12 'Regulation of Transhipment and Other Transfer Activities' supports the detection and apprehension of IUU fishing activities.</p>	<p>vessel monitoring system" for fishing vessels flying their flag.</p> <p>CMM 2018-10 specifies requirements for a SIOFA VMS, entry and reporting requirements, as well as restrictions on vessel transhipments.</p>
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