

An Assessment of the Expert Drafting Group's Draft Supervision and Control Provisions

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List of Abbreviations

AIDCP	Agreement on the International Dolphin Conservation Program
CCAMLR	Convention (Commission) for the Conservation of Antarctic Marine Living Resources
CCSBT	Convention (Commission) for the Conservation of Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EDG	Experts Drafting Group of the IWC
FFA	South Pacific Forum Fisheries Agency
IATTC	Inter-American Tropical Tuna Convention (Commission)
ICCAT	International Convention (Commission) for the Conservation of Atlantic Tunas
ICRW	International Convention for the Regulation of Whaling
IUU	Illegal, Unregulated, and Unreported
NAFO	North Atlantic Fisheries Organization
NEAFC	Northeast Atlantic Fisheries Convention (Commission)
IOTC	Indian Ocean Tuna Convention (Commission)
MCS	Monitoring, Surveillance and Control
RMS	Revised Management Scheme
VMS	Vessel Monitoring System
WCPOC	Western and Central Pacific Ocean Convention (Commission)

I. Introduction

At its 53rd Annual Meeting, the International Whaling Commission (IWC) established the Expert Drafting Group (EDG) to progress the development of the Revised Management Scheme (the RMS). In particular, the IWC directed the EDG to review Chapters V (Supervision and Control) and VI (Information Required) of the Schedule to the International Convention for the Regulation of Whaling (ICRW).

This paper reviews the EDG draft to identify the additional required steps to complete the RMS. Section II analyzes the EDG approach for implementing the RMS into the Schedule. It proposes an alternative mechanism that ensures that the details of the RMS are binding elements of the Schedule and ensures that a version of the RMS applies to all IWC members regardless of objections to subsequent amendments. Section III compares the EDG draft with best practices found in other fisheries organizations, and concludes that many aspects of the EDG draft fail to meet best practices or the minimum provisions of other fisheries organizations. Section B of this Introduction briefly summarizes those conclusions. Section IV outlines the voting procedures for adopting alternative text in the EDG draft for which consensus cannot be reached and for adopting the RMS as a whole. Annexes 1 and 2 place the provisions of the EDG draft side-by-side with the provisions of other fisheries organizations.

A. Scope of the EDG Draft and Required Steps to Complete the RMS

The IWC introduced the four main elements of the RMS in IWC Resolution 1992-3 and reaffirmed them in IWC Resolutions 1994-5 and 2000-3:

1. an effective inspection and observation scheme;
2. guidelines for conducting surveys and analyzing the results;
3. arrangements to ensure that total catches over time are within the limits set under the RMS; and
4. incorporation of the RMP and RMS into the Schedule.¹

The EDG draft relates only to the first of these elements: an effective inspection and observation scheme, which addresses, among other things, the issues of under-reporting and mis-reporting of catches.² The three other elements, when considered with some of the implications of the EDG draft, indicate that the IWC must still complete several other remaining parts of the RMS and amend parts of the Schedule before the RMS is ready for incorporation into the Schedule.³

- **Definitions in Chapter 1 of the Schedule.** Additional work is needed in Chapter 1 of the Schedule (Interpretation) to ensure that key definitions such as “take” are revised to include non-natural mortalities, such as bycatch, that were not

¹ Resolution IWC1994-5 reaffirms that the Revised Management Scheme should not be implemented until all aspects of the Revised Management Scheme are incorporated into the Schedule.

² IWC Resolution 1994-5 states that the RMS must include agreement on “an effective inspection and observation scheme which fully addresses *inter alia* the issues of under-reporting and mis-reporting of catches.”

³ Resolution 2000-3 contemplates that more work needs to be done to complete the RMS than just the resolution of an inspection and observation scheme, noting that while the RMS “shall be structured as agreed in Resolution 1994-5,” discussions on the RMS “shall not be limited to the elements identified in 1992 and subsequent Resolutions of the Commission on the RMS.”

contemplated by the original drafters, but could have a serious impact on whale stocks.⁴ Similarly, “strike” contemplates only the use of a harpoon, although modern whaling may use by-catch or forced strandings to catch whales. As a result, “infraction” should be defined in a way that is consistent with the definitions of “strike” and “take.” This is discussed briefly in Section III(F) with respect to compliance mechanisms. New terms used in the EDG draft that should be defined include “coastal whaling” and “pelagic whaling”.

- **Table 1 of the Schedule.** The EDG draft calls for an automatic zero quota for a stock in the event of an infraction. As such, additional work is needed to ensure that potential adjustments are accurately represented in Table 1 of the Schedule. This is discussed briefly in Section III(F) with respect to compliance mechanisms.
- **Binding vs. Non-binding Elements of the RMS.** The Scientific Committee has provided Guidelines for Data Collection and Analysis under the Revised Management Scheme. The IWC has not yet resolved several issues relating to the legal status of these Guidelines. These include whether provisions for conducting population surveys and assessing survey data should be mandatory or remain “guidelines”; whether collection and assessment of survey data should be subject to independent oversight (for example observers on the survey vessels), and whether Annex K itself should form a constituent part of the Schedule. Section II discusses mechanisms for adopting the various elements of the RMS.
- **Total Catches over Time.** The IWC agreed in Resolution 1998-2 on Total Catches over Time that “catch limits for commercial purposes for any species of whale in any region shall be calculated by deducting all human-induced mortalities that are known or can reasonably be estimated, other than commercial catches, from the total allowable removal.” As Resolution 2000-3 notes, “the Scientific Committee has provided and the Working Group on the RMS has amended, a recommendation for arrangements on total catches over time.” The version of Schedule Chapter VI from IWC53 (which was not amended by the EDG) requires Contracting Governments to provide information for “all human induced mortalities.” However, the IWC has not agreed on a definitive list of “human induced mortalities” or determined how they will be deducted from catch limits set on the stock concerned. The IWC must determine how these deductions will be documented and enforced to ensure that total catches over time are within the limits set under the RMS. While this issue is not expressly discussed in this paper, it highlights the need for effective reporting, observation, and compliance mechanisms—issues that are discussed in Section III.
- **Voting on the RMS.** The EDG draft includes text in italics and brackets—text which the Parties have not agreed. The IWC must agree how options presented by the

⁴ Several IWC Members have raised concerns regarding a change in Japanese law in 2001 that permits the killing and commercialization of by-caught whales that might otherwise be freed. Japan responded that all by-caught whales must be properly registered on its DNA register and could then be sold. *Chair’s Report of the 53rd Meeting*, para. 15.1.7 (March 2002). These types of laws make it necessary for the IWC to distinguish between different non-natural mortalities, depending on the circumstances and the stock concerned. In the case of stocks for which catch limits are set in the future, quantified non-natural removals, such as by-catch, will be deducted from catch limits under the RMS’s “total catches over time” provisions. However, in the case of stocks for which catch limits are not set, no provision currently exists to forbid (or punish) commercially motivated removals using techniques that the current definitions in the Schedule do not anticipate as “takes.”

bracketed text will be voted upon and then how the RMS itself will be adopted into the Schedule. This issue is discussed in Section IV.

B. Overview of Comparison with Other Fisheries Organizations

The EDG has called for an inspection and observation scheme “based on best practice.”⁵ However, many of the provisions of the EDG draft fall far below best practice as judged against the provisions of other fisheries organizations. International fisheries agreements have made substantial progress towards creating effective inspection and observation schemes, which they refer to as Monitoring, Surveillance and Control (MCS) programs. Through comprehensive and highly specific MCS obligations in six areas—vessel registration, vessel monitoring systems (VMS), observation, catch documentation, inspection, and compliance—members of fisheries organizations are verifying legal fishing, identifying and deterring illegal, unregulated and unreported (IUU) fishing, and enforcing the organization’s conservation and management measures against both Parties and Non-Parties through landing bans and trade restrictions.

If bracketed text is considered, the EDG draft provisions for vessel registration and aspects of the observer program meet some elements of best practices of other fisheries organizations. However, the EDG draft fails to meet best practices with regard to:

- **VMS.** The EDG draft fails to require satellite based monitoring and an alternative means of communicating when the VMS malfunctions, among other things.
- **Catch Documentation.** The EDG draft fails to include a catch documentation scheme, although it does propose a framework for DNA testing.
- **Inspection.** While the EDG draft requires IWC Members to inspect shipments, it includes no mandatory specifications for inspection.
- **Compliance.** Although the EDG draft includes an excellent provision to eliminate quotas for a stock in the case of an infraction relating to that stock, it fails to include provisions for landing and transshipment bans and trade restrictions for noncompliance. It also fails to define what constitutes an infraction, a serious omission considering the continuing inability of IWC Members to agree on what constitutes an infraction, as well as compliance measures.

The failure of the EDG to meet best practices in these areas is surprising, because the MCS provisions, such as VMS, catch documentation, and compliance, of many fisheries organizations have been operational for several years. Moreover, the membership in the IWC overlaps significantly with some of these organizations, especially those organizations with the most comprehensive and specific MCS regimes, such as the Commission for the Conservation of Antarctic Living Marine Resources (CCAMLR), the North Atlantic Fisheries Organization (NAFO), and the Northeast Atlantic Fisheries Organization (NEAFC).

⁵ Report of the Revised Management Scheme Expert Drafting Group, IWC/54/RMS 1, para. 2.3 (March 19, 2002).

II. Mechanism for Including the RMS in the Schedule

The IWC must determine the appropriate mechanism for adopting the RMS into the Schedule. In this respect, the EDG appears overly concerned that certain practical/technical details in the RMS should not “overburden the Schedule with detail.”⁶ Thus, the EDG agreed to keep the practical details of the RMS in a single document, not the Schedule itself, and to include in the Schedule a dated version of the RMS, but with technical details of the RMS standing outside of the Schedule. The EDG believed that, once the RMS is adopted and amendments are offered to it, the Schedule will still refer to the earlier dated version if the IWC fails to approve any controversial amendments by a three-quarters majority. Similarly, if a Contracting Government objects to an adopted change in the RMS, it will still be bound by the earlier version of the RMS.

Such an approach, however, likely makes the details of the RMS non-binding, because the Schedule constitutes the binding provisions of the IWC. A document falling outside the Schedule would be presumptively non-binding.

Further, because this process requires two votes to amend the Schedule, it is unclear how this mechanism simplifies the voting procedure. Under this procedure, the IWC would first amend the details of the RMS, apparently by a simple majority. The IWC would then need to adopt this change, by amending the applicable dated version of the RMS, by a three-fourths majority.

Nonetheless, it is possible to bind a Member to an earlier RMS through binding annexes to the Schedule in the same way that the EDG envisioned. As with the EDG proposal, the text of the Schedule could refer to the general principles of the RMS and a dated version of it. The details of the RMS, however, could be included in an Annex or Annexes to the Schedule. In this way, the Annex constitutes a part of the binding Schedule. Any revisions, which would require a three-fourths majority rather than a simple majority, could be included in a separate Annex. The previous Annex would be repealed only if no Member objects to the revisions. However, the previous Annex would remain in force for any Member that objects to the changes in the new Annex.

This process is identical to the mechanism proposed by the EDG with only one change: inclusion of the details in an Annex to the Schedule. That change is critical, however, because it ensures that the details of the RMS are binding. This approach is no less complicated or cluttered than the mechanism proposed by the EDG. In both cases, the IWC may have two or more versions of an RMS.⁷ In fact, the EDG took this approach with respect to the International Observer Scheme. It is unclear why the EDG thought that this approach was appropriate for the observer scheme but not for other elements of the RMS.

⁶ Report of the Revised Management Scheme Expert Drafting Group, IWC/54/RMS 1, para. 2.2 (March 19, 2002).

⁷ While such a situation is imperfect, it is one that international law recognizes through the law on reservations. Where a State lodges a valid reservation to a treaty and only some Parties object to that reservation, a different treaty applies between the objecting and reserving State than applies between the non-objecting States and the reserving State. This situation does not arise, however, with respect to reservations to a constituent instrument to which a competent international organization rejects by less than unanimity. See Chris Wold, *Reservations to Multilateral Environmental Agreements: The Cases of Cuba and Iceland*, COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW & POLICY (in press 2002).

In addition, the EDG approach with respect to the International Observer Scheme points to another potential mechanism for addressing the details of the RMS: a series of annexes for individual components of the RMS: the International Observer Scheme, Vessel Registration, Vessel Monitoring Systems, Catch Documentation, Inspection, and Compliance. Under this approach, the IWC Members would be required to adopt the initial RMS as a complete package of Annexes. The Commission could limit any future revisions to a specific Annex, rather than opening up the entire RMS. The same mechanism could be used to accommodate technical provisions that are vital to the effective functioning of the RMP, but which are likely to be amended over time. These include Annex K, which establishes Requirements and Guidelines for Conducting Surveys and Analysing Data Within the Revised Management Scheme.

III. Comparison of the Draft Provisions with Other Fisheries Organizations

The EDG draft includes many of the ideas emerging in MCS provisions of fisheries organizations. For example, it includes significant provisions for observers. It also includes, albeit in bracketed text, provisions for a catch document scheme, a compliance committee, vessel registration, and vessel monitoring systems.

Taken as a whole, however, the EDG draft lacks the specificity of MCS provisions of other fisheries agreements. For example, where the EDG draft includes four paragraphs relating to catch documentation, CCAMLR includes almost five pages; the catch documentation scheme of the Inter-American Tropical Tuna Commission (IATTC) and the Agreement on the International Dolphin Conservation Program (AIDCP) is four pages. Similarly, where the EDG draft includes four sentences on VMS, the VMS of the Forum Fisheries Agency (FFA) includes almost three pages of details; the VMS schemes of the International Commission for the Conservation of Atlantic Tuna (ICCAT), CCAMLR, and NAFO include one page or more of detailed text. To the extent that the EDG and the IWC fear an RMS overburdened with detail, the MCS regimes of other fisheries organizations may assuage those fears. CCAMLR's Conservation and Management Measures cover 138 pages; NAFO's Conservation and Enforcement Measures fill 82 pages. Moreover, these organizations include their MCS provisions in a document similar to the ICRW's Schedule—outside the treaty text but within the organization's binding conservation and management measures.

A review of the MCS regimes of other fisheries organizations may also assist the IWC as it determines the adequacy of its proposed RMS. The following sections compare the specific provisions of the EDG draft with the MCS provisions of other fisheries organizations. While some aspects of the EDG draft meet or exceed other MCS provisions, other aspects, particularly with respect to inspection and compliance, fall far short.

A. Vessel Registration

1. Elements of Vessel Registration in Fisheries Organizations

Vessel registration with the fishery organization's administrative body provides an extremely common method for identifying and monitoring vessels authorized to fish within the area designated by an agreement. Any vessel not included in the registry is thus presumed to be fishing illegally. Because of the value of vessel registration for identifying legal and illegal fishing, every fisheries organization surveyed in this paper except the

CCSBT requires vessel registration and notification to the organization's secretariat. In addition, vessel registries are often coupled with vessel monitoring systems that track all vessel activity (*see* Section B below). In this way, any IUU fishing can be easily identified and appropriate actions taken.

Vessel registries typically have two components: (1) registration with the competent national authority which must transmit the information to the relevant fisheries organization, and (2) detailed vessel information requirements.

Registration with the Fisheries Organization. CCAMLR, IATTC, ICCAT, NAFO, NEAFC, FFA, and the Western and Central Pacific Ocean Convention (WCPOC) all require their Contracting Parties to provide their secretariat with specific information regarding each of its flagged vessels that intend to participate in the regulated fishery.⁸ Some, such as the NAFO and CCAMLR, also require registration of research vessels. Some governing bodies, such as FFA and CCAMLR, issue licenses based on this registration while others maintain the vessel registry for monitoring purposes. Marking of gear may also be required in this type of scheme, as in CCAMLR.

Vessel Information Requirements. The provisions establishing vessel registration require Parties to provide the convention secretariat with specific information regarding each of its flagged vessels that intend to participate in the regulated fishery. This information includes the following, which is required to various degrees by CCAMLR,⁹ IATTC,¹⁰ ICCAT,¹¹ Indian Ocean Tuna Commission (IOTC),¹² NAFO,¹³ FFA,¹⁴ WCPOC,¹⁵ Straddling and Highly Migratory Fish Stocks Agreement,¹⁶ the FAO Code of Conduct for Responsible Fisheries¹⁷ and the FAO Compliance Agreement¹⁸:

- name of vessel, registration number, previous names (if known), and port of registry;
- a photograph of the vessel showing its registration number;
- previous flag (if known and if any);
- International Radio Call Sign (if any);
- name and address of registered owner(s);

⁸ CCAMLR Conservation Measure 119/XX *Licensing and Inspection Obligations of Contracting Parties with regard to their Flag Vessels Operating in the Convention Area*, para. 3; IATTC Resolution *On a Regional Vessel Register*, at para. 1 (June 2000); ICCAT Recommendation 00-17, *Concerning Registration and Exchange of Information of Fishing Vessels Fishing for Tuna and Tuna-Like Species in the Convention Area*, at para. 1, entered into force June 26, 2000; IOTC Resolution 01/02 *Relating to Control of Fishing Activities*, at para. 1; NAFO Conservation and Enforcement Measures, NAFO/FC Doc. 00/1, Serial No. N4204, Part III, Sections C and D; NEAFC Scheme of Control and Enforcement, at art. 4; FFA *Minimum Terms and Conditions for Foreign Fishing Vessel Access*, at Section 11 & Annex 4; WCPOC, at art. 24(7).

⁹ CCAMLR Conservation Measure 119/XX *Licensing and Inspection Obligations of Contracting Parties with regard to their Flag Vessels Operating in the Convention Area*, para. 1.

¹⁰ IATTC Resolution *On a Regional Vessel Register* (June 2000).

¹¹ ICCAT Recommendation 00-17, *Concerning Registration and Exchange of Information of Fishing Vessels Fishing for Tuna and Tuna-Like Species in the Convention Area*, entered into force June 26, 2001.

¹² IOTC Resolution 01/02 *Relating to Control of Fishing Activities*.

¹³ NAFO Conservation and Enforcement Measures, NAFO/FC Doc. 00/1, Serial No. N4204, Part III, Sections C, D.

¹⁴ FFA *Minimum Terms and Conditions for Foreign Fishing Vessel Access*, at Section 11; Annex 4.

¹⁵ WCPOC, at arts. 23, 24.

¹⁶ Straddling and Migratory Fish Stocks Agreement, at Annex I, Art. 4(1).

¹⁷ FAO Code of Conduct for Responsible Fisheries, at art. 8.2.1.

¹⁸ FAO Compliance Agreement, at art. IV.

- where and when built;
- length, beam, and moulded depth;
- fish hold capacity in cubic meters, and carrying capacity in metric tons;
- name and address of operator (manager) or operators (if any);
- type of fishing method or methods;
- gross tonnage;
- power of main engine or engines.

2. The EDG Draft and Vessel Registration

Paragraph 3 of Revised Chapter V of the Schedule and Paragraph E of Revised Chapter VI of the Schedule require Contracting Governments to provide the Secretariat with the following information:

- the location of each point of landing/primary processing site and the authorized dates of operation;
- the name or identifying code of each vessel;
- its vessel category (as recognized in the International Observation Scheme);
- home port;
- authorized dates of operation;
- the name and gross tonnage of each factory ship;
- for each catcher ship attached to a factory ship or land station
 - the dates on which each is commissioned and ceases whaling for the season;
 - the number of days on which each is at sea on the whaling grounds each season;
 - the gross tonnage, horsepower, length and other characteristics of each; vessels used only as tow boats should be specified.
- a list of land stations which were in operation during the period concerned, and the number of miles searched per day by aircraft, if any.

The proposed vessel registration requirements currently do not meet the requirements found in other fisheries organizations. However, the RMS could be made consistent with other fisheries organizations if the RMS also requires Contracting Governments to provide the following information:

- vessel's owner;
- previous flags, names and owners of the vessel (if any);
- species targeted by the vessel; and
- gear type used by the vessel.

Of course, the vessel registry can only be effective if the Contracting Government's comply with these information requirements. The IWC vessel registry appeared to be working smoothly until 1987, when Norway, Iceland and Japan stopped giving information for the registry due to concerns relating to incidents between protestors and whaling vessels.¹⁹ Without information from these countries, which still had sizeable whaling fleets, the IWC

¹⁹ *Chairman's Report of the Thirty-Ninth Annual Meeting* Section 21, REP. INTL. WHAL. COMMN 38, 1988 (1987).

could not maintain a complete and accurate registry and the registry became officially dormant in 1994.

B. VMS

1. Elements of VMS in Fisheries Organizations

Vessel Monitoring Systems (VMSs) harness the power of Global Positioning Systems (GPS) and satellite technology to track fishing vessels via satellite transmitters installed on each vessel.²⁰ With some VMSs, an Automatic Location Communicator (ALC) installed on a vessel sends a signal (via satellite) that transmits information regarding the vessel's location, speed, and heading to a monitoring headquarters where the data is automatically correlated with a GPS vessel position. An automated system issues an alert to the relevant Parties if it identifies a vessel potentially involved in illegal fishing activities, such as fishing in a restricted area.

VMSs have become the norm for ensuring proper enforcement, monitoring, and data collection in international fisheries, because they allow for quick identification of potentially illegal fishing activity and rapid distribution of the surveillance data to enforcement officers.²¹ Japan has stated that VMSs are a "necessary measure to ensure the transparency of the research."²² Australia and New Zealand have noted that false position reports by vessels "particularly underline the need for... implementing measures such as properly functioning VMS and vessel registers."²³ As the FAO has reported, VMSs significantly reduce the time and costs associated with effective implementation of fisheries treaties and significantly contribute to restoration of global fisheries through better enforcement.²⁴ For example, when Chile initiated its satellite-based VMS in August 2000, it monitored 1,467 vessels in the first 30 days of operation, compared with 1,410 for all of 1999. Chile found 11 vessels fishing illegally and brought legal actions against them.²⁵ Because VMSs are accurate and efficient, many governments view VMS as an indispensable tool for scientific data gathering and fisheries enforcement.

The two most recent international fisheries agreements, the WCPOC²⁶ and the Straddling Stocks Agreement,²⁷ as well as CCAMLR,²⁸ FFA,²⁹ NAFO,³⁰ and NEAFC,³¹

²⁰ South Pacific Forum Fisheries Agency, *What is the VMS?*, [hereinafter *FFA VMS Summary*].

²¹ *FFA VMS Summary*.

²² *Report of the Commission*, CCSBT4(3), Agenda Item 3: Consideration of an Experimental Fishing Program (Feb. 19-21, 1998).

²³ *Report of the Commission*, CCSBT3(2), Agenda Item 2.

²⁴ *Report of the Technical Working Group On The Management Of Fishing Capacity*, U.N. FAO (1998), <http://www.fao.org/fi/faocons/twg/r586/r586e.asp#MONI>. (This working group was organized by Japan and the United States); FAO, *Essential Role of Monitoring, Control, and Surveillance in Fisheries Management*, Section 6, UNFAO Committee on Fisheries, 22nd Sess., COFI/97/Inf.6, at para. 6 (Mar. 17-20, 1997), COFI/97/Inf.6 <http://www.fao.org/docrep/meeting/w3861e.htm>.

²⁵ Fish Information Service, *Satellite Control System Proves to Be Effective*, Sept. 12, 2000.

²⁶ WCPOC, at arts. 10(1)(i), 24.

²⁷ Straddling and Migratory Fish Stocks Convention, at arts. 5(J), 18.

²⁸ CCAMLR Conservation Measure 148/XX, *Automated Satellite-Linked Vessel Monitoring Systems (VMS)*, art. 2(iv) (1998).

²⁹ *FFA VMS Summary*; South Pacific Forum Fisheries Agency, *Vessel Monitoring System: Guidelines for Installation and Registration of Automatic Location Communicators*, version A1.8, (Feb. 18, 2000); South Pacific Forum Fisheries Agency, *The Type Approval Process and Responsibilities for Automatic Location*

require vessels to use VMSs that report “real-time” data for enforcement and monitoring purposes. ICCAT has a pilot VMS program,³² CCSBT is exploring the use of VMS, and the FAO recommends that vessels use VMS. The European Union (EU) currently maintains the most extensive VMS program, monitoring all vessels in excess of 24 meters flagged under their jurisdiction.³³

The typical requirements of a VMS include the following:

Automatic Transmission. The flag State must receive automatic transmission of information. The VMS must be fully automatic and operational at all times regardless of environmental conditions.

Information Requirements. The information transmitted by the VMS must include the fishing vessel identification, location, date, and time. CCAMLR and others require the VMS to provide the geographical position of the vessel with a position error of less than 500 meters and with a confidence interval of 99%. In addition, the VMS must be able to provide special messages when the vessel enters or leaves the convention area and when it moves between one area, subarea or division within the convention area.

Regular and Frequent Transmission. Fisheries organizations require regular and frequent transmission of information. NEAFC requires transmissions continuously; CCAMLR every four hours; NAFO every six hours, and FFA every eight hours.

Satellite-based. Almost all fisheries organizations, including CCAMLR, ICCAT, NAFO, WCPOC, and NEAFC, require the VMS to be satellite-based.

Tamper proof. Fisheries organizations, such as CCAMLR, ICCAT, and FFA, specifically require that the VMS be tamper proof or prohibit anyone from tampering with the VMS.

Real-time. CCAMLR, ICCAT, and WCPOC require the VMS to be able to provide real-time or near real-time data.

Back up System and Procedure. CCAMLR, FFA, NAFO, and NEAFC require a system for communicating when the VMS malfunctions. In particular, the fishing vessel:

- must have an alternative means of communicating the required information every 24 hours;
- must repair the VMS immediately; and

Communicators, (Jan. 29, 1999) [hereinafter FFA ALC Approval]; South Pacific Forum Fisheries Agency, *Guidelines for Installation and Registration of ALCS*, (Feb. 2, 1999).

³⁰ NAFO, *Conservation and Enforcement Measures*, at Part VI. NAFO amended its VMS requirements in NAFO/FC Doc. 01/1, *Conservation and Enforcement Measures: Supplement of FC Doc. 00/1*, at Part VI.

³¹ NEAFC, *Scheme of Control and Enforcement*, arts. 9-12, entered into force July 1, 1999.

³² *ICCAT Resolution 95-3 on Vessel Monitoring*, adopted December 21, 1995; *ICCAT Recommendation 97-12 Concerning a Vessel Monitoring System Pilot Program*, entered into force June 13, 1998, available at <http://www.iccat.es/> [hereinafter *ICCAT VMS Recommendation*].

³³ Commission Regulation (EC) No 1489/97 of 29 July 1997 laying down detailed rules for the application of Council Regulation (EEC) No 2847/93 as regards satellite-based vessel monitoring systems(4), as last amended by Regulation (EC) No 2445/1999(5), determines the specific data that Community fishing vessels covered by satellite-based vessel monitoring systems (VMS) are required to transmit.

- is prohibited from fishing until the device is repaired or replaced upon returning to port.

Frequent Reports to Secretariat. Fisheries organizations require the competent national authority to report to the Secretariat within 24 hours (NAFO, NEAFC); within 2 working days of receipt of information (CCAMLR).

2. The EDG Draft and VMS

Members of the IWC clearly consider VMS to be an important tool for enforcing conservation and management measures of fisheries organizations. For example, several IWC members, including Norway, Japan, and the United States, among others, have supported VMS in CCAMLR. Japan has already implemented a VMS system in compliance with this treaty.³⁴ Norway and others have also expressed support for extending CCAMLR's VMS requirements to krill fisheries, which is not currently required.³⁵ The European Union and Norway have supported VMS in NAFO and NEAFC. Japan has also voluntarily adopted VMS for its vessels fishing pursuant to the CCSBT.

As such, it is surprising that the provisions of the EDG draft require only an autonomous VMS. The EDG draft otherwise fails to incorporate the other elements typically found in the VMS requirements of other fisheries organizations. *As such, the proposed VMS requirements currently do not meet the requirements found in other fisheries organizations.*

C. Observer Programs

1. Common Elements of Observer Programs in Fisheries Organizations

According to many fisheries management experts, compliance and accurate data collection are directly linked to the level of observer coverage on a fishing vessel.³⁶ Observers collect comprehensive data on fishing operations, including total catch and size composition by species, biological data, and incidental mortalities of non-target species. They also monitor compliance with conservation measures. Independent observers guarantee transparency among all Parties to a convention and ensure that all Parties comply with convention measures in a non-discriminatory manner.

For these reasons, all of the fisheries agreements reviewed in this paper except the IOTC and NEAFC have adopted observer programs. The programs vary, but have the following general elements:

³⁴ *Report of the Standing Committee on Observation and Inspection (SCOI)*, Section 2.15, CCAMLR XVIII Annex 5 (1999).

³⁵ *Conservation Measures Adopted at CCAMLR XVIII*, at Section 3.15. ("Argentina, Australia, New Zealand and Norway agreed that there was no reason for the exemption of VMS on krill vessels especially since it was possible that krill vessels could switch gear for fishing for other species and also be engaged in transshipment of other target species, e.g. *Dissostichus* spp. New Zealand urged all Members whose vessels operate in the krill fishery to consider implementing VMS in the very near future.")

³⁶ William A. Karp and Howard McElderry, *Catch Monitoring by Fisheries Observers in the United States and Canada, Alaska Fisheries Science Center*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON INTEGRATED FISHERIES MONITORING, U.N. Food and Agriculture Organization, Rome (1999).

Extent of Coverage. Most fisheries organizations are moving towards 100% observer coverage. For example, as of January 1, 2001, NAFO requires 100% observer coverage for all Party vessels fishing in NAFO's Regulatory Area.³⁷ CCAMLR requires 100% observer coverage in more than 12 fisheries.³⁸ ICCAT requires 100% observer coverage for all purse seine vessels that fish over floating objects in certain prescribed areas,³⁹ although other fisheries do not require 100% observer coverage.⁴⁰ The AIDCP requires those operating in the Agreement Area to carry an observer on each fishing trip.⁴¹ It has had 100% observer coverage for fishing vessels with a carrying capacity greater than 363 metric tons since 1994,⁴² and currently has 100% observer coverage in its Eastern Pacific Ocean (EPO) tuna fishery.⁴³

International vs. National Coordination. Fisheries organizations manage their observer programs differently. Some fisheries organizations, such as AIDCP/IATTC and WCPOC, have international observer programs.⁴⁴ The FFA has a regional observer program while CCAMLR relies on bilateral agreements between members.⁴⁵ The CCSBT and NAFO use national observer programs.⁴⁶

Commission-appointed Duties. CCAMLR,⁴⁷ AIDCP/IATTC,⁴⁸ NAFO, and WCPOC, have all established the duties of observers, as opposed to national authorities. Even in NAFO, which relies on national observer programs, the duties of the observer are prescribed in NAFO's Conservation and Enforcement Measures.⁴⁹ The CCSBT recently agreed to a draft observer structure.⁵⁰

Prescribed Observer Duties. The observer's duties, as prescribed by CCAMLR, AIDCP/IATTC, NAFO, and FFA, include: monitoring compliance with conservation and management measures; record and report on a vessel's fishing activities and location while fishing; observe and estimate catches to identify catch composition and they monitor

³⁷ NAFO Conservation and Enforcement Measures, at Part VI, chapeau. *See also* NAFO/FC Doc. 01/1, *Conservation and Enforcement Measures: Supplement of FC Doc. 00/1*, at Part VI (making minor changes to the observer scheme).

³⁸ *See, e.g.*, CCAMLR Conservation Measure 221/XX, *Limits on the Fishery for Dissostichus eleginoides In Statistical Subarea 48.3 in the 2001/02 Season*; CCAMLR Conservation Measure 225/XX, *Limits on the Fishery for Crab in Statistical Subarea 48.3 in the 2001/02 Season*.

³⁹ ICCAT Resolution 99-1, *Recommendation by ICCAT on the Establishment of a Closed Area/Season for the Use of Fish-Aggregation Devices*.

⁴⁰ ICCAT Recommendation 96-1, *Resolution on Bigeye Tunas and Yellowfin Tunas*, adopted at the 10th Special Meeting of the ICCAT Commission, entered into force August 4, 1997; ICCAT Resolution 95-8, *On Bigeye Tuna*, at para. 2(a).

⁴¹ AIDCP, at Annex 2, paras. 1 & 2.

⁴² Personal Communication with David Bratten, IATTC Senior Scientist (Nov. 17, 2000). The observer coverage has been exactly: in 1994, 99.8%; from 1995 through 1998, 100%, and in 1999, 99.9%. *Id.*

⁴³ *Id.*

⁴⁴ AIDCP, at Annex II, paras. 1, 2; WCPOC, at arts. 1, 2.

⁴⁵ CCAMLR Observer Scheme, at para. B.

⁴⁶ NAFO/FC Doc. 01/1, *Conservation and Enforcement Measures: Supplement of FC Doc. 00/1*, at Part VI(A)(1).

⁴⁷ CCAMLR Observer Scheme, at Annex I, para. 2.

⁴⁸ AIDCP, Annex II, paras. 3, 4.

⁴⁹ NAFO/FC Doc. 01/1, *Conservation and Enforcement Measures: Supplement of FC Doc. 00/1*, at Part VI(A)(3).

⁵⁰ Report of the Seventh Annual Meeting of the Commission, 18 - 21 April 2001, at Agenda Item 5.

discards, by-catches and the taking of undersized fish; record the gear type, mesh size and attachments employed by the master; and verify entries made to the vessel's logbooks.⁵¹

Confidentiality. Some information obtained by observers may be treated as confidential. For example, the AIDCP requires the observer to treat as confidential information with respect to fishing operations, such as fishing location, except if required for his/her reports.⁵² NAFO requires observer reports submitted to the Contracting Parties to omit catch location.⁵³

Submissions to Captains and National Authorities. Fisheries organizations, such as CCAMLR⁵⁴ and AIDCP/IATTC⁵⁵ have requirements to provide reports to vessel captains and competent national authorities.

Reporting Time. CCAMLR and NAFO require the observer to submit reports to their respective commissions within 30 days of completing the observer cruise, although NAFO requires a report within 24 hours if a violation is identified.⁵⁶

Training. CCAMLR,⁵⁷ AIDCP/IATTC,⁵⁸ and WCPOC⁵⁹ specifically require observers to complete technical training or have adequate training.

Language Requirements. At least one fishery organization, CCAMLR,⁶⁰ requires observers to speak the language of the flag State of the fishing vessel or vessel captain, although several organizations, including AIDCP/IATTC, NAFO, and FFA, do not specifically require that the observer speak the language of the flag State.

Selection Criteria. Some fisheries organizations require the observer to be a national of a Contracting Government and have familiarity with the harvesting activities and the conservation and management measures of the fisheries organization.⁶¹

Paying the Costs of the Observer Program. Fisheries organizations have various ways to pay for the costs of the observer program. Some, such as CCAMLR,⁶² share the costs of the observer between the “designating” country and the “receiving” country. Others, such as NAFO, require the vessel to pay the observer's direct costs.⁶³ The AIDCP/IATTC requires IATTC members to pay 30% and vessel operators 70% of the costs of the observer program.⁶⁴ WCPOC stipulates that the operator of the vessel pays all costs of food and

⁵¹ See, e.g., NAFO/FC Doc. 01/1, Conservation and Enforcement Measures: Supplement of FC Doc. 00/1, at Part VI(A)(3); CCAMLR Observer Scheme, at Annex I, paras. 1, 2; AIDCP, at Annex 2, paras. 3, 4.

⁵² AIDCP, at Annex II(5)(a); see also WCPOC, at art. 28(7)(a).

⁵³ NAFO/FC Doc. 01/1, Conservation and Enforcement Measures: Supplement of FC Doc. 00/1, at Part VI(A)(3)(d).

⁵⁴ CCAMLR Observer Scheme, at paras. A(f), B(f).

⁵⁵ AIDCP, at Annex II(4)(c).

⁵⁶ CCAMLR Observer Scheme, at para. A(f); NAFO Supplement of FC Doc. 00/1, at Part VI(A)(3)(d) and Part VI(A)(5).

⁵⁷ CCAMLR Observer Scheme, at para. A(c).

⁵⁸ AIDCP, at Annex II, para. 3(a).

⁵⁹ WCPOC, at art. 28(6)(c).

⁶⁰ CCAMLR Observer Scheme, at para. A(d).

⁶¹ CCAMLR Observer Scheme, at para. A(b)-(c); AIDCP, at Annex II, para. 3.

⁶² CCAMLR Observer Scheme, at para. B(i).

⁶³ AIDCP, at Annex II para. 11; NAFO Supplement of FC Doc. 00/1, at Part VI(A)(7).

⁶⁴ Personal Communication with David Bratten, IATTC (April 1, 2002).

accommodation “at no expense to the observer’s government” although the commission will assess other costs of the observer program when the treaty enters into force.⁶⁵

2. The EDG Draft and Observation

Paragraphs 9-11 of the Chapter V revisions and the International Observer Scheme in Annex A to the Schedule include provisions that are more specific than other elements of the EDG draft. These provisions include text on which the EDG agreed with respect to a secretariat-based observer program, observer training, reports from the Secretariat to the Commission, a selection process, observer duties, and visa assistance for observers. *These provisions are compatible with provisions of other fisheries organizations.*

Nonetheless, the observer scheme will be incompatible with the observer programs of other fisheries organizations unless the IWC adequately resolves issues of vessel coverage and waiver of the observer requirement.

Vessel Coverage. Although the entire text of the EDG draft with respect to observer coverage is bracketed, the two alternatives presented suggest that coverage will not be 100%. The draft contemplates exceptions to observer coverage for (1) catcher boats involved in pelagic whaling and (2) vessels involved in coastal whaling that operate trips of fewer than 24 hours, carry out no flensing onboard, and for which the number of crew equals the legal limit for persons onboard that vessel.

First, the EDG draft does not define “coastal whaling” or “pelagic whaling.” It is essential that these terms be defined, because the definitions will determine the applicability of the observer provisions and the scope of the exceptions.

However, it appears that an observer on these vessels is necessary to verify compliance with the IWC’s conservation and management measures. In addition, Chapter VI requires all whaling operations to provide position of capture or striking to the nearest minute of latitude and longitude as well as the number of animals struck but lost. The EDG draft further proposed to require the submission of information on whale escapes, animal welfare, and time to death. Only persons who witness the whale chase and kill can obtain or verify this information. Without an observer onboard these vessels, it is impossible to verify this information.

Moreover, catcher vessels, such as the Yusin-maru, weigh more than 700-800 tons and are more than 69 meters long. Although the EDG draft seeks to place two observers onboard a factory vessel, a catcher boat of this size is likely large enough to carry an observer.

In addition, the IWC may wish to consider placing observers on survey vessels. CCAMLR includes observers on scientific research vessels and the CCSBT has recently endorsed the same idea.⁶⁶ Effective oversight of the collection of data needed for the RMP seems especially important in light of the substantial differences between, for example, recent

⁶⁵ WCPOC, at art. 28(6).

⁶⁶ CCAMLR, Scheme of International Scientific Observation; CCSBT, Report of Seventh Annual Meeting, at paras. 11-16 & Attachment H.

and previous estimates of minke whales in the Southern Hemisphere which reflect the Commission's inability at present to provide reliable population estimates.⁶⁷

Waiver. Paragraph 10 allows or requires (depending on whether the IWC adopts “may” or “shall”) the Secretariat to waive the observer requirement if an observer is not available, “through no fault of the Contracting Government or relevant whaling operation.” Such a waiver is not inherently incompatible with other fisheries organizations, although no such waiver can be found in other organizations. However, it places the Secretariat, whose members serve at the discretion of the Contracting Governments, in the untenable position of determining whether its “employers” are “at fault.”

The “No Delay” Rule. Paragraph 10, in bracketed text, prohibits the delay of a vessel if an observer is not available through “no fault of the Contracting Government or relevant whaling operation.” This provision creates at least two problems. First, it does not clearly describe who makes the determination of whether a Contracting Government is at fault. A Contracting Government or the relevant whaling operation could thus unilaterally make that determination. Second, the provisions for observers do not require adequate notice of when a vessel or whaling operation will begin its whaling activities. The Secretariat and the IWC must have adequate notice of when whaling activities will begin in order to prevent delay.

Veto. The veto authority granted to each Contracting Government in Section 2 of the International Observer Scheme complicates the decision as to whether a Contracting Government is “at fault” for purposes of granting a waiver. If a Contracting Government vetoes every possible observer, the express veto authority makes it difficult to say that that Contracting Government is “at fault.” Nonetheless, the Contracting Government has caused a situation in which no observer is available. Moreover, this provision is unique; no fisheries organization with an international observer program grants veto authority to a member. Instead, the organizations require an independent and impartial observer who is adequately trained.

Observer Reporting. Section 3.2 of the International Observer Scheme requires an observer to report to the Secretariat at the end of a whaling voyage and on a monthly basis by land-based observers. In addition, the observer must report “immediately” to the captain, a national inspector, and the Secretariat in case of a suspected infraction.

While these aspects of Section 3.2 are consistent with other fisheries organizations, Section 3.2 also requires the observer to report “[daily] to the Secretariat on any whales [hunted] struck and/or killed.” While other fisheries organizations do not require daily reporting, those fisheries differ significantly from any future commercial whaling, which will target a very limited number of individual animals. Knowledge of the quota on a very frequent basis seems necessary to ensure compliance with such small quotas. Compliance with small quotas will be enhanced by frequent reporting to the Secretariat, which can then transmit the information to all Contracting Governments and/or whaling vessels. If reports must wait until the end of the voyage, the quota could easily be exceeded. If daily reporting is not required, a sensible alternative would be for the observer “to report immediately, but no later than 24 hours, after any whales are struck and/or killed.” The observer must also be provided with a list agreed by the Commission of what constitutes an infraction.

⁶⁷ For population estimates, see the IWC's website at: <http://www.iwcoffice.org/Estimate.htm>.

Costs. Although Section 2.6 of the EDG Report is entitled “Costs of the Supervision and Control Scheme,” Section 2.6 of the EDG Report and Paragraph 12 of Appendix V only discuss the costs of the Inspection and Observation Scheme. The Commission has yet to discuss how to apportion other costs of a full Supervision and Control Scheme, including a catch documentation scheme and the DNA register.

Paragraph 12 provides three alternatives for funding the observer program. Alternative 3 appears to be most consistent with other fisheries organizations. Alternative 3 requires the Commission to pay core administrative costs. The Contracting Governments under whose jurisdiction whaling operations are carried out would pay the direct costs of the observer program, such as observer salaries and capital costs. As noted above, CCAMLR and the AIDCP require shared costs and WCPOC contemplates shared costs. No fisheries organization requires anyone other than the vessel owner to pay for equipment costs. In addition, NAFO requires Contracting Governments whose vessels are engaged in fishing in the Regulatory Area to be equipped with computer hardware and software to enable automatic processing of data from VMS. NAFO then expressly provides that “each Contracting Government shall pay all costs associated with this [VMS] system.”⁶⁸ Alternative 3, which allows for amortization of equipment costs, appears to be an innovative compromise, because the IWC helps pay for the initial equipment costs.

Alternative 1 requires the Contracting Government under whose jurisdiction whaling activities are carried out to pay the costs of the observer program. This alternative is consistent with the user pays principle, which states that the costs of implementing an enforcement regime should be borne by those who exploit the resource. The principle is similar to the polluter pays principle in which the polluter generally bears the burden of paying for pollution prevention and clean up costs. Alternative 2 requires the IWC to recover the costs of the entire supervision and control scheme through membership contributions.

D. Catch Documentation

1. Elements of Catch Documentation in Fisheries Organizations

As IUU fishing for valuable fish species has increased, fisheries organizations have developed catch document schemes to distinguish legal from IUU catches. For example, CCAMLR has introduced a catch documentation scheme for toothfish. IATTC, ICCAT, IOTC, and CCSBT have catch documentation schemes for tuna species and ICCAT recently adopted catch documentation for swordfish and bigeye tuna.⁶⁹ Catch documentation schemes, which follow a catch from the time it is caught to its entry into the market, provide immediate documentation of the catch to ensure quotas are not exceeded. As commentators have said, “It is of utmost importance . . . that the staff have intimate knowledge of . . . [fishery activities] and an extensive and sophisticated system for collecting and processing the data.”⁷⁰

⁶⁸ NAFO Supplement of FC Doc. 00/1, at Part VI(A)(3)(d) and Part VI(B)(2), VI(B)(11).

⁶⁹ ICCAT Recommendation 00-22 *Establishing Statistical Document Programs for Swordfish, Bigeye Tuna, and Other Species Managed by ICCAT* (entered into force June 26, 2001).

⁷⁰ CLIFFORD L. PETERSON AND WILLIAM H. BAYLIFF, IATTC SPECIAL REPORT NO. 5: ORGANIZATION, FUNCTIONS, AND ACHIEVEMENTS OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION 12 (1985).

Although some IWC members maintain that catch documentation is “beyond the scope of the Convention,” the position of these members is difficult to reconcile with their widespread acceptance of catch documentation in other fisheries organizations. Catch documentation is no more than a means to verify the legality of catches and ensure the effective implementation of conservation and management measures.

The catch documentation schemes of CCAMLR, AIDCP/ICCAT, ICCAT, IOTC, and CCSBT include the following elements:

Documentation of Catch by Vessel Captain or Observer. The vessel captain, or the observer in the case of the AIDCP/ICCAT scheme, must complete catch documents and transmit them to the flag State.⁷¹

Information Requirements. The catch document must include the species caught, catch weight, names of importers and exporters, or in the case of the AIDCP/ICCAT, whether the catch was dolphin safe.⁷²

Validation of Catch Document by Importing Party. The importing Party or the flag State must ensure that all imports of toothfish in CCAMLR and tuna in ICCAT, AIDCP/ICCAT, and CCSBT are accompanied by a catch document, regardless of whether the fish was caught inside or outside the Convention Area.⁷³

Validation of Exports and Re-Exports. CCAMLR, ICCAT, and CCSBT require exports and re-exports to be accompanied by a catch document or certificate of re-export, and validation of these documents.⁷⁴ If a Party to AIDCP/ICCAT establishes a tracking system for storage, processing, and marketing of tuna, it must include require appropriate certification for exports.⁷⁵

Import Ban without Valid Catch Document. Each of the catch document schemes, other than the AIDCP/IATTC scheme, prohibits Contracting Governments from importing

⁷¹ CCAMLR Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., para. 6 & Annex 170A, para. A2(iv); AIDCP/ICCAT, System for Tracking and Verifying Tuna, Sections 3, 4 (amended June 2000);

⁷² Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., at para. 6; AIDCP/ICCAT, System for Tracking and Verifying Tuna, Section 4; ICCAT Recommendation 92-1 *Concerning the ICCAT Bluefin Statistical Document Program* (entered into force July 25, 1993); CCSBT Southern Bluefin Tuna Statistical Document Program,” at Annex 1; IOTC Resolution 01/06, *Concerning the IOTC Bigeye Tuna Statistical Document Programme*, at Annex 1.

⁷³ Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., at para. 8; AIDCP/ICCAT, System for Tracking and Verifying Tuna, Sections 3.4, 5.3, 5.4; ICCAT Recommendation 92-1 *Concerning the ICCAT Bluefin Statistical Document Program* (entered into force July 25, 1993); CCSBT Southern Bluefin Tuna Statistical Document, at paras. 2.2(a), 3.1, 3.2; IOTC Resolution 01/06, *Concerning the IOTC Bigeye Tuna Statistical Document Programme*, para. 2.

⁷⁴ Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., at Annex 170A, paras. A11, A12; ICCAT Recommendation 92-1 *Concerning the ICCAT Bluefin Statistical Document Program*; ICCAT Recommendation 97-4 *Concerning the Implementation of the ICCAT Bluefin Statistical Document Program on Re-Export* (entered into force December 12, 1997); CCSBT Southern Bluefin Tuna Statistical Document, at para. 6, Annex 1; IOTC Resolution 01/06, *Concerning the IOTC Bigeye Tuna Statistical Document Programme*, paras. 2, 6, Annex 2.

⁷⁵ AIDCP/ICCAT, System for Tracking and Verifying Tuna, Section 6.a.

species subject to a catch documentation scheme unless the import is accompanied by a catch document.⁷⁶

Transmission to Secretariat. CCAMLR requires the flag State to transmit information from the catch document to the Secretariat “by the most rapid electronic means available,” although the CCSBT requires quarterly reports and the IOTC two reports per year.⁷⁷

2. The EDG Draft and Catch Documentation

The detail of the catch documentation schemes of other fisheries agreements highlights the lack of specificity in the EDG draft for effective catch documentation. This lack of specificity is especially troubling because, despite the Convention’s Article VII requirement to report data on all whale catches, the acute failure of Contracting Governments to provide accurate and timely reports resulted in a 1980 resolution urging governments to prohibit whaling operations by vessels that fail to supply required catch documentation data.⁷⁸

Nonetheless, the request in Paragraph 13(a) for a unique identifier for each product derived from each animal provides the basis upon which to establish an effective catch document scheme. The international, standardized scheme and the types of information requested (date and location of catch, species, vessel identification, among other things), largely mirror the requirements of other fisheries organizations. Paragraphs 13(b)-(c) provide the basis for reporting and monitoring of catch, including whether the catch is from whaling activities, bycatch, or strandings. These paragraphs provide the basic purpose and framework for catch documentation.

However, these provisions do not require a catch document to follow whale products from the time of catch to entry into the market. They do not require validation of the catch document upon export or re-export. *As a result, these provisions are incompatible with provisions of other fisheries organizations.*

In addition, Paragraph 13(c), which requires the Commission to establish procedures to monitor the origins of perishable whale products, does not take into account the fact that as much as 80-100% of certain categories of whale meat or other whale parts are processed, and thus not “perishable.”⁷⁹ In addition, as recent market surveys in Japan have demonstrated,

⁷⁶ Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., at paras. 3, 8; ICCAT Recommendation 92-1 *Concerning the ICCAT Bluefin Statistical Document Program* (entered into force July 25, 1993); ICCAT Recommendation 93-3 *Concerning the ICCAT Bluefin Statistical Document Program on Fresh Products* (entered into force May 31, 1994); ICCAT Recommendation 97-4 *Concerning the Implementation of the ICCAT Bluefin Tuna Statistical Document Program on Re-export* (entered into force December 12, 1997); CCSBT Southern Bluefin Tuna Statistical Document Program, at para. 1.1; IOTC Resolution 01/06, *Concerning the IOTC Bigeye Tuna Statistical Document Programme*, at Annex 1, para. 4..

⁷⁷ Conservation Measure 170/XX Catch Documentation Scheme for *Dissostichus* spp., at para. 6 & Annex 170A, para. A2(iv); ICCAT Resolution 94-5 *Concerning the Effective Implementation of the ICCAT Bluefin Statistical Document Program* (transmitted to Contracting Parties January 23, 1995); Southern Bluefin Tuna Statistical Document Program, at para. 5.1; IOTC Resolution 01/06, *Concerning the IOTC Bigeye Tuna Statistical Document Programme*, para. 5.

⁷⁸ REPORT OF THE INT. WHAL. COMMN., 31ST MEETING (1980), at Appendix 12, page 33 (1981).

⁷⁹ The Institute for Cetacean Research reports that 90% of “lean meat” from sperm whales is processed, while 100% of “Meat A” from minke and Bryde’s whales is processed. The Institute of Cetacean Research, *The*

processed whale products often contain more than one individual cetacean, even more than one other species.⁸⁰ This will make “monitoring the origins of whale products” and, therefore enforcement, very difficult. In particular, genetic identification will be more difficult if products are so highly processed that genetic material is destroyed.

Moreover, although Paragraph 13(d) requires the Commission to undertake DNA testing of whale meat products to ensure that only whales caught consistently with the provisions of the Convention enter the market, that provision alone cannot achieve that goal. Because it is highly unlikely that the Commission could ever sample more than a small amount of whale meat in the market, a complimentary tool is needed to prevent products from illegally harvested whales from entering the market. A comprehensive catch documentation scheme as developed in CCAMLR, AIDCP/IATTC, ICCAT, IOTC, and CCSBT, which tracks catches from the moment a species is caught and which requires validation of imports, exports, and re-exports, provides that complimentary tool.

E. Inspection

1. Elements of Inspection in Fisheries Organizations

The authority to board and inspect fishing vessels is an integral part of the effectiveness of any fisheries agreement to enforce its provisions. For that reason, CCAMLR, ICCAT, NAFO, WCPOC, and the Straddling Stocks Agreement all have very detailed inspection provisions. In general, these inspections programs have the following elements:

Broad Inspection Authority. Inspectors have authority to inspect within its jurisdiction any fishing vessel, including the fish, fishing gear, fish samples, and all relevant documents, including fishing logbooks and cargo manifest (in the case of a mother ship or carrier vessel), to verify compliance with an organization’s measures.⁸¹ CCAMLR (for toothfish) and NAFO *require* Contracting Parties to board and inspect vessels of Parties that enter port with fish subject to those organization’s measures.⁸²

Duty to Prepare an Inspection Report and Submit it to the Secretariat. To ensure that information is properly distributed to all Contracting Governments, fisheries organizations require the inspector to prepare an inspection report and submit it to the flag State of the vessel. The Flag State must then forward a copy of the inspection report to the secretariat.⁸³

Standards of the Sale and Handling of By-products of Cetacean Research Hunting Project (January, 12, 2001, as amended September, 10, 2001)(private translation).

⁸⁰ Cipriano and Palumbi, *Rapid Genotyping Techniques for Identification of Species and Stock Identity in Fresh, Frozen, Cooked, and Canned Whale Products*, IWC Scientific Committee Document SC/51/09 (1999).

⁸¹ CCAMLR System of Inspection, at para. VI; ICCAT Recommendation 97-10, *On Port Inspections*, at para. 3; NAFO/FC Doc. 01/1, *Conservation and Enforcement Measure*, at Part IV(6)(ii)-(iii); NEAFC Scheme of Control and Enforcement, at art. 17.

⁸² CCAMLR Conservation Measure 147/XIX, *Provisions to Ensure Compliance with CCAMLR Conservation Measures by Vessels, including Cooperation between Contracting Parties*, para. 1; NAFO/FC Doc. 01/1, at Part VII.

⁸³ CCAMLR System of Inspection, at paras. VIII, IX; ICCAT Recommendation 97-10 *On Port Inspections*, at para. 2; NAFO/FC Doc. 01/1, *Conservation and Enforcement Measures*, at Part IV(6)(i); NEAFC Scheme of Control and Enforcement, at art. 17(6), art. 24, Annex XII.

Duty to Act on Violations. Parties must act on reports of apparent violations, collaborate with the Contracting Parties to facilitate judicial or other proceedings arising from reports of inspectors acting under these arrangements, and notify the Commission of any action taken to address the violation.⁸⁴

Duty to Board and Inspect Non-Party Vessels. CCAMLR, ICCAT, and NAFO *require* Contracting Parties to inspect a Non-Contracting Party vessel that has fished in the Convention Area and enters a port of a Contracting Party. The vessel cannot land or transship any fish until the inspection occurs. If the inspection reveals any fish regulated by the agreement and caught within the Convention Area, then all Contracting Parties must prohibit that vessel from landings and transshipments of all fish from that vessel.⁸⁵

Boarding and Inspection on the High Seas. CCAMLR, NAFO, and WCPOC allow for boarding and inspection of the fishing vessels of other Parties on the high seas.⁸⁶ In addition, in any high seas area covered by a fisheries management organization, a Party to the Straddling and Migratory Fish Stocks Agreement may authorize inspectors to board and inspect fishing vessels of any Party to the Agreement, regardless of whether that Party is also a member of the fisheries management organization, for the purposes of ensuring compliance with the management and conservation measures.⁸⁷ In negotiations of the Straddling and Migratory Fish Stocks Agreement, Australia, New Zealand, and Norway stated that these inspection and enforcement provisions break “significant new ground” and are “a significant development in international law.”⁸⁸

Duty of Captain to Cooperate. The master of the vessel must cooperate with the inspector.⁸⁹

2. The EDG Draft and Inspection

The EDG draft includes very few specific provisions on inspections. Instead, Paragraph 6 calls on Contracting Governments to have “appropriate enforcement legislation and effective administrative frameworks” to ensure compliance with the RMS. Paragraph 7 requires Contracting Governments to ensure “appropriate” inspection on each whaling vessel and at each point of landing/primary processing site and authorize inspectors to check compliance with the provisions of the Convention. These provisions are, in many ways, redundant, because Article IX of the ICRW already requires Contracting Governments to “take appropriate measures to ensure the application of the provisions of this Convention.”

⁸⁴ ICCAT Recommendation 97-10, *On Port Inspections*, at paras. 4, 5; NAFO/FC Doc. 01/1, *Conservation and Enforcement Measure*, at Part IV(7); NEAFC Scheme of Control and Enforcement, at art. 21.

⁸⁵ CCAMLR Conservation Measure 118/XX, *Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures*, at paras. 4, 5, 12; ICCAT Recommendation 98-11 *Concerning the Ban on Landings and Transshipments of Vessels from Non-Contracting Parties Identified as Having Committed a Serious Infraction adopted by the Commission* (entered into force June 21, 1999); NAFO *Scheme to Promote Compliance by Non-Party Vessels*, at paras. 9-11.

⁸⁶ CCAMLR, at art. 1 and CCAMLR System of Inspection, at Part III. NAFO Convention, at art. XVIII. Article XVII refers to inspection and boarding in the “Regulatory Area.” The NAFO Convention defines the “Regulatory Area” as “that part of the Convention area which lies beyond the areas in which coastal states exercise fisheries jurisdiction.” *Id.* at art. I(3). WCPOC, at art. 26(1).

⁸⁷ Straddling and Migratory Fish Stocks Agreement, at art. 21(1).

⁸⁸ U.N. Doc. A/50/PV.80, at 10, 18 (1995); U.N. Doc. A/50/PV.81, at 20 (1995).

⁸⁹ CCAMLR System of Inspection, at Part V; ICCAT Recommendation 97-10 *On Port Inspection*, para. 3 (entered into force June 13, 1998); NAFO/FC Doc. 01/1, at Part IV(5)(ii); Straddling and Migratory Fish stocks Agreement, at art. 22(3); NEAFC Scheme of Control and Enforcement, at art. 13(1), 18.

Paragraph 13(d), which requires the Commission to undertake DNA testing of whale meat products to ensure whale products in the market derive only from legally harvested whales, provides greater specificity in the inspection regime.

Although the ICRW requires Contracting Governments to “take appropriate measures to ensure the application of the provisions of this Convention”, the EDG has not addressed what domestic measures are appropriate, indeed necessary, to ensure compliance with the provisions of the RMS. By contrast, the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁹⁰ have defined an approach to review and evaluate domestic measures to implement its terms.⁹¹ Article VIII(1) of CITES requires Parties to take “appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation” of CITES. Because many CITES Parties failed to adopt appropriate measures, the Parties created the National Legislation Project, through CITES Resolution 8.4, which established a process for evaluating implementing legislation. Subsequent Decisions of the Parties have provided for technical assistance to Parties with inadequate legislation, as well as trade restrictions against those Parties who fail, within a reasonable amount of time, to adopt adequate legislation.⁹² It would be consistent with CITES for the IWC to establish minimum standards for implementing legislation and a procedure to evaluate and improve standards.

Nonetheless, the overall inspection regime in the EDG draft fails to provide the level of specificity found in other fisheries organization. It fails to grant broad authority to inspect gear, logbooks, and any other part of the vessel that may assist in the inspection. It fails to require the preparation of inspection reports and submission of those reports to the flag State and the Secretariat. It fails to require captains to cooperate with inspectors. It fails to require boarding and inspection of vessels at ports or elsewhere. In addition, because much whaling occurs on the high seas, the inspection program could be greatly improved by specifically allowing for boarding and inspection on the high seas.

F. Compliance

1. Elements of Compliance Regimes in Fisheries Organizations

International agreements to conserve and manage fisheries have little effect without adequate compliance regimes. Many fisheries agreements, including the ICRW, require Parties to adopt national legislation that makes breaches of the agreement a punishable offence and to prosecute and sanction violators. As efforts to protect tuna, toothfish and other species from IUU fishing highlight, national legislation alone is inadequate to enforce conservation and management measures effectively. At a minimum, there must be a means to ensure that national legislation is both adequate and enforced.

Perhaps the most important tool for building an effective compliance regime is a multilateral mechanism for applying a sanction or penalty for noncompliance. As a result, fisheries organizations have created international compliance mechanisms that include trade restrictions and loss or reduction of fishing privileges for the countries whose vessels fish

⁹⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed Mar. 3, 1973, entered into force July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243. Every ICRW/IWC Contracting Government is a Party to CITES, except Oman and the Solomon Islands.

⁹¹CITES Doc. SC.42.12.1, para. 2.

⁹²CITES Decisions 9.6-9.8, 10.18-10.23.

inconsistently with an agreement's conservation measures (CCAMLR, CCSBT, ICCAT, NAFO). Under some agreements (FFA, AIDCP, ICCAT), vessels may also lose their licenses. Many agreements now also include prohibitions against landings and transshipments by non-Party vessels sighted in the agreement area and against landings or transshipments of illegal catch (CCAMLR, NAFO, WCPOC, ICCAT). Parties also subject themselves to potential trade sanctions when their vessels violate an agreement's conservation measures. Multilateral environmental agreements, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁹³ and the Montreal Protocol on Substances that Deplete the Ozone Layer,⁹⁴ among others, impose trade restrictions to enforce their provisions. Not only has no country ever challenged these measures as a violation of the rules of the World Trade Organization (WTO), but the WTO's dispute resolution body has also endorsed and supported multilateral solutions based on international cooperation. In fact, it recently permitted the United States to maintain its import ban on shrimp from certain countries, because the United States had attempted serious, good faith efforts to resolve the problem.⁹⁵ Perhaps because these types of sanctions often focus on an entire country, rather than an individual vessel or person, they have had greater success than national measures.

Definition of “Violation” or “Apparent Infringement.” Other fisheries organizations define “violation” or “apparent infringement” broadly to include misreporting of catches, mesh size violations; hail system violations, interference with VMS, preventing an inspector or observer from carrying out his or her duties, directed fishing for a stock which is subject to a moratorium or for which fishing is otherwise prohibited.⁹⁶

Reduced Quotas. The AIDCP imposes limits on dolphin mortalities, and, if a Party's fleet meets or exceeds the total dolphin mortality limit (DML) distributed to it, that Party's fleet must stop fishing for tuna that associate with dolphins.⁹⁷ In addition, vessels that exceed their DMLs receive far fewer DMLs in the following year than they would have received.⁹⁸ A vessel may not have its initial DML increased if it sets on dolphins after reaching its DML or without a DML, knowingly sets on banned dolphin stock, makes a night set, uses explosives during any fishing phase involving dolphins, or fishes without an observer.⁹⁹ Vessels

⁹³ The CITES Standing Committee recommends that CITES Parties adopt trade restrictions in CITES-protected species with those Parties failing to implement CITES effectively. *See, e.g.*, Decisions of the Standing Committee in Rhinoceros Horn and Tiger Specimens, CITES Secretariat, Notification of the Parties No. 774, para. 6 (Oct. 15, 1993). This notification included the recommendation of the Standing Committee that Parties consider “stricter domestic measures [pursuant to Article XIV] up to and including prohibition of trade in wildlife species” with Taiwan and China. *Id.*

⁹⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, art. 4, signed Sept. 16, 1987, entered into force Jan. 1, 1989, 26 INTERNATIONAL LEGAL MATERIALS 1541. The Parties to the Montreal Protocol also established the Implementation Committee, which has recommended the withdrawal of funds from the Protocol's Multilateral Fund from those Parties that have failed to comply with the Protocol's reporting requirements. *See, e.g.*, UNEP/OzL.Pro/IMPCOM/12/3, at 2, 1 December 1995, with reference to Decision VI/5; UNEP/OZL.PRO.7/12, at 23, 27 December 1995 (reporting that Parties submitted data after the Implementation Committee threatened these countries with a loss of funds from the Multilateral Fund).

⁹⁵ *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS58/AB/RW (June 15, 2001); Appellate Body Report, WT/DS58/AB/RW, AB-2001-4 (Oct. 22, 2001).

⁹⁶ NAFO/FC Doc. 01/1, *Conservation and Enforcement Measure*, at Part IV(9); NEAFC Scheme of Control and Enforcement, at art. 20(1); Straddling Stocks Agreement, at art. 21(11).

⁹⁷ AIDCP, at Annex IV, para. I.9.

⁹⁸ *Id.* at Annex IV, para. III.6.

⁹⁹ *Id.* at para. III.4.

involved in repeat violations may lose their right to a DML completely and captains identified as continual offenders may be removed from the list of qualified captains.¹⁰⁰

ICCAT too has established a compliance regime to enforce its conservation measures for Bluefin tuna, North Atlantic swordfish, and South Atlantic swordfish. For example, Members may receive penalties for exceeding certain quotas in ICCAT's Agreement Area, including one-for-one reductions, additional quota penalties, and trade restrictions.¹⁰¹ If a Party exceeds its catch during any two consecutive years, the Commission may recommend a reduction in a catch quota equal to 125% of the excess harvest and, if necessary, trade restrictions.¹⁰² Based on this binding recommendation, the Commission recommended that Members to prohibit the importation of Bluefin tuna from Equatorial Guinea, an ICCAT Member.¹⁰³

NAFO also permits reductions in quotas for subsequent years against NAFO Parties that exceed their quotas.¹⁰⁴ A Party may be required to "compensate for damages" (such as reductions in quotas) to the stocks caused by its excessive catch if that Party uses prohibited gear, fishes in a closed area, or continues a directed fishery after its prohibition.¹⁰⁵

Landing and Transshipment Bans. CCAMLR requires Contracting Parties to inspect all shipments of toothfish and prohibit toothfish landings and transshipments of Contracting and Non-Contracting Parties if evidence exists that the vessel fished in contravention of the CCAMLR Conservation Measures.¹⁰⁶ It also prohibits landings and transshipments of any CCAMLR-regulated fish from a Non-Contracting Party vessel that has been sighted engaging in fishing activities in the Convention Area because it presumes that such vessels undermine the effectiveness of CCAMLR's Conservation Measures.¹⁰⁷ Mandatory inspection of Non-Party vessels that enter a Contracting Party's port enhances the effectiveness of this ban.¹⁰⁸

NAFO, NEAFC, and IOTC maintain almost identical landing and transshipment bans for Non-Contracting Party vessels.¹⁰⁹ IOTC also includes landing and transshipment bans, as well as trade bans, for flags of convenience longline vessels whether originating from Parties or Non-Contracting Parties.¹¹⁰ The CCSBT has also suggested prohibitions on transshipment

¹⁰⁰ *Id.* at paras. I.2, I.3, I.7.

¹⁰¹ ICCAT Recommendation 96-14 *Regarding Compliance in the Bluefin Tuna and North Atlantic Swordfish Fisheries* (entered into force August 4, 1997); Recommendation 97-8 *Regarding Compliance in the South Atlantic Swordfish Fishery* (entered into force Sep. 28, 1998)(applying Recommendation 96-14 to South Atlantic Swordfish).

¹⁰² ICCAT Recommendation 96-14, at para. 3.

¹⁰³ ICCAT Recommendation 99-10 *Regarding Equatorial Guinea pursuant to the 1996 Recommendation regarding Compliance for Bluefin and North Atlantic Swordfish Fisheries* (entered into force June 15, 2000).

¹⁰⁴ NAFO Conservation Measures, at Part I, Section C.2(a).

¹⁰⁵ *Id.* at Part I, Section C.2(b).

¹⁰⁶ CCAMLR Conservation Measure 147/XIX *Provisions to ensure Compliance with CCAMLR Conservation Measures by Vessels, including Cooperation between Contracting Parties*, paras. 1 and 3.

¹⁰⁷ CCAMLR Measure 118/XX, *Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures*, at paras. 1, 6.

¹⁰⁸ *Id.* at para. 4.

¹⁰⁹ NAFO Conservation Measures, at Part I, section J; NAFO Non-Party Compliance, at paras. 10 and 11; NEAFC, *Scheme to Promote Compliance by Non-Contracting Party Vessels with Recommendations established by NEAFC*, at para. 11 (entered into force July 1, 1999); IOTC Resolution 01/03, *Establishing a Scheme to Promote Compliance by Non-Contracting Party Vessels with Resolutions Established by IOTC*, at para. 4.

¹¹⁰ IOTC Resolution 99/02 *Calling for Actions against fishing Activities by Large Scale Flag of Convenience Longline Vessels*.

against those involved in FOC to avoid compliance with international conservation and management obligations.¹¹¹

Trade Bans. ICCAT has also imposed trade restrictions against Non-Members that diminish the effectiveness of ICCAT's conservation and management measures for Atlantic swordfish.¹¹² For example, non-discriminatory trade restrictive measures have been in force since 1997 against Belize and Honduras for their Bluefin tuna fishing activities that diminish the effectiveness of ICCAT's Conservation Measures.¹¹³ ICCAT also sent letters to Turkey, Denmark (on behalf of the Faroe Islands), and Iceland to request information on their Bluefin tuna fishing activities,¹¹⁴ and letters of warning to Vanuatu and Kenya for their swordfish fishing activities.¹¹⁵

Furthermore, a 1998 Commission resolution establishes a process to identify both Members and Non-Members that fish for ICCAT species with longline vessels in a manner that diminishes the effectiveness of its conservation and management measures.¹¹⁶ ICCAT identifies countries that are diminishing the effectiveness of ICCAT through its Compliance Committee and the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures.¹¹⁷ If countries fail to take appropriate measures after a request to do so from the Commission, ICCAT will revoke vessel registrations or licenses of Member countries and recommend trade restrictive measures for both Members and Non-Members.¹¹⁸ In 1999, the Commission prohibited the import of bigeye tuna and its products with Non-Parties, including Belize, Cambodia, Honduras, and St. Vincent and the Grenadines¹¹⁹ and one Party, Equatorial Guinea.¹²⁰

The CCSBT's Action Plan to seek cooperation of Non-Member countries¹²¹ requires the Commission to contact Non-Member States whose vessels diminish the effectiveness of the CCSBT's conservation and management measures and ask that they rectify their fishing

¹¹¹ *Report of the Commission*, CCSBT 5(1), Agenda Item 7.2 and Attachment 20 (22-26 Feb. 1999).

¹¹² ICCAT Resolution 95-13 *Concerning an Action Plan to Ensure the Effectiveness of the Conservation Program for Atlantic Swordfish* (entered into force June 22, 1996).

¹¹³ ICCAT Recommendation 99-8 *Regarding Belize and Honduras pursuant to the 1995 Swordfish Action Plan Resolution*. ICCAT recommended to its Members to prohibit the importation of Atlantic bluefin tuna products and swordfish and swordfish products in any form from these countries.

¹¹⁴ Letter to Turkey Requesting Information on Eastern Atlantic and Mediterranean Bluefin Tuna Coverage, *in* ICCAT REPORT 1998-99, Appendix 13 to Annex 7, at page 134; Letter to Denmark (on behalf of Faroe Islands) Requesting Information on Eastern Atlantic and Mediterranean Bluefin Tuna Coverage, *in* ICCAT REPORT 1998-99, Appendix 15 to Annex 7, at page 136; Letter to Iceland Requesting Information on Eastern Atlantic and Mediterranean Bluefin Tuna Coverage, *in* ICCAT REPORT 1998-99, Appendix 16 to Annex 7, at page 137.

¹¹⁵ National Oceanic and Atmospheric Administration, *Agreements of Interest to NOAA*, at 16.

¹¹⁶ ICCAT Resolution 98-18 *Concerning the Unregulated and Unreported Catches of Tuna by Large-Scale Longline Vessels in the Convention Area* (adopted by the Commission at its Eleventh Special Meeting (Santiago de Campostela Spain, November 1998), officially transmitted to Contracting Parties December 22, 1998).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Recommendation 00-15 *Regarding Belize, Cambodia, Honduras, and St. Vincent and the Grenadines Pursuant to the 1988 Resolution Concerning the Unreported and Unregulated Catches of Tuna by Large-Scale Longline Vessels in the Convention Area* (entered into force Oct. 15, 2001).

¹²⁰ Recommendation 00-16 *Regarding Equatorial Guinea Pursuant to the 1988 Resolution Concerning the Unreported and Unregulated Catches of Tuna by Large-Scale Longline Vessels in the Convention Area* (entered into force June 26, 2001).

¹²¹ Personal Communication with Campbell McGregor, CCSBT Executive Secretary (Oct. 3, 2000); *See* CCSBT Action Plan, CCSBT 6(2), Attachment I (21-23 March 2000).

activities.¹²² Based on a Japanese proposal,¹²³ the Commission agreed that Members may take trade restrictive measures on Southern Bluefin tuna products in any form against such Parties that fail to rectify their fishing activities.¹²⁴ IOTC contemplates trade bans for flags of convenience longline vessels whether originating from Parties or Non-Parties.¹²⁵

Compliance Committee. The AIDCP established the International Review Panel, which reports to Member Parties on compliance issues in the Agreement Area and makes recommendations concerning possible infractions.¹²⁶ Environmental and industry representatives play an active and participatory role in determining possible infractions of the Agreement through the AIDCP's International Review Panel.¹²⁷

Similarly, the IATTC's Permanent Working Group on Compliance, which allows non-governmental organizations (NGOs), owners of vessels, Non-Party representatives, and intergovernmental organizations to participate as observers, monitors compliance with the Commission's conservation and management measures and makes recommendations to address non-compliance.¹²⁸ Already, this Committee has provided recommendations on which the Commission has acted relating to monitoring compliance with Commission resolutions on bigeye tuna and fish-aggregating devices and on yellowfin tuna.¹²⁹ To limit fishing capacity and reduce the risk of over-capacity and over-fishing, the Commission has also recently adopted resolutions prohibiting the use of tender vessels for fish aggregating devices (FADs) and prohibiting the at-sea transfer of purse seine caught tuna.¹³⁰

2. The EDG Draft and Compliance

The proposed text of Paragraph 19 of the EDG draft establishes a Compliance Review Committee to review reports from Contracting Governments and to recommend actions to improve compliance. Importantly, it requires any quota to revert automatically to zero in the event of an infraction. It also requires fairness, transparency and due process with respect to deliberations and recommendations in relation to infractions and potentially two representatives from non-governmental organizations.

Taken as a whole, the compliance regime in the EDG draft is consistent with other fisheries organizations. However, the EDG draft could benefit immensely from a definition of infraction. The IWC has discussed at length at the last two annual meetings whether particular actions constitute an infraction. If the IWC cannot now identify an infraction, then a compliance regime based on reducing quotas in the event of an "infraction" cannot operate effectively. The penalty of a zero quota for a stock may be a powerful tool to compel compliance, particularly when nations other than the offending one, but who share the quota on that stock, may be penalized by the zero quota. This is especially true, because the zero quota will remain in place "unless and until determined by the Commission on the advice of

¹²² CCSBT Action Plan, at paras. 2-5.

¹²³ *Report of the Meeting*, CCSBT 6(1), paras. 14-17. Draft Resolution at attachment L.

¹²⁴ Action Plan, at f.

¹²⁵ IOTC Resolution 99/02 *Calling for Actions against Fishing Activities by Large Scale Flag of Convenience Longline Vessels*.

¹²⁶ AIDCP, at Annex VII, para. 12(d).

¹²⁷ *Id.* at Annex VII, para. 2.

¹²⁸ *See, e.g.*, Compliance Resolution Jun 00 Resolution on Compliance (June 2000) (IATTC acting on recommendations of the Permanent Working Group).

¹²⁹ *Id.*

¹³⁰ IATTC Resolution on Fish-Aggregating Devices, July 1999.

the Review Committee.” However, the Commission must still resolve how the reduction of a catch limit to zero will be effected and how it will be documented in the Schedule.

Nonetheless, the inability to determine which specific conduct constitutes an infraction seriously undermines the process. To overcome this problem, other fisheries organizations have defined “infraction” or “serious infraction”—whatever the Contracting Parties identify as the appropriate threshold for taking action. This is particularly important for the IWC because IWC Members seem to have different interpretations of what constitutes an infraction. For example, some Members have questioned whether a directed, unintentional kill of a Sei whale, or the killing of a mother and calf humpback,¹³¹ constitutes an infraction. Others have questioned whether unintentional bycatch constitutes an infraction.¹³²

As mentioned in Section I, this definition of infraction may require amendment of the Section I of the Schedule relating to definitions. In addition, a definition of infraction may lead to the need to define other terms. For example, the definition of “strike” means to penetrate with a weapon used for whaling and “take” means to flag, buoy or make fast to a whale catcher.” However, whales may be killed as bycatch or by means other than with a harpoon, either intentionally or unintentionally, and commercially motivated. Stranded whales may also enter the commercial market. Thus, it may be helpful to review all definitions for consistency with modern whaling activities and in particular review the definition of “strike” and “take” to include other intentional (or commercially motivated) removals, including intentional bycatch, live capture, and forced strandings.

In addition, the creation of the Compliance Review Committee, with the clear terms of reference as included in Paragraph 19 of the EDG Draft, would assist in the implementation and enforcement of the IWC’s Supervision and Control regime. The EDG, however, would probably function better as a smaller committee, rather than be open to all Contracting Governments. The Standing Committee of CITES, for example, currently includes 16 of 154 CITES Parties representing each of the six major geographical regions (Africa, Asia, Europe, North America, Central and South America and the Caribbean, and Oceania), with the number of representatives weighted according to the number of Parties within the region. It also includes a representative from the Depositary Government (Switzerland); the Party that hosted the previous meeting of the Conference of the Parties, and the Party that will host the next meeting of the Conference of the Parties.¹³³ Similarly, the Montreal Protocol’s Implementation Committee includes representatives from 10 of the 183 Parties to the Montreal Protocol based on equitable geographic representation.¹³⁴ However, the AIDCP, with just 11 Parties, includes all Contracting Governments in its International Review Panel, which also includes three representatives of non-government environmental organizations.¹³⁵

¹³¹ *Chairman’s Report of the 52nd Meeting*, para. 9.1.1 (February 2001).

¹³² *Chair’s Report of the 53rd Meeting*, para. 15.1.7 (March 2002).

¹³³ CITES Resolution Conf. 11.1, Annex 1.

¹³⁴ Montreal Protocol, Decision IV/5.

¹³⁵ AIDCP, at Annex VII, para. 2.

IV. Voting

The EDG draft currently includes text, included in italics and brackets, on which the Parties have not agreed. Assuming that the IWC Members cannot reach consensus on some elements of the EDG draft, questions arise concerning the majority required to pass options presented by the bracketed text. Questions also arise concerning the order of voting on bracketed text where that text is either mutually incompatible (*e.g.*, no observers versus observers) or where one option is not as inclusive as another option (*e.g.*, 50% observer coverage versus 100% observer coverage).

As Section A explains, a simple majority of IWC Members present and voting is required to adopt text currently bracketed. However, a three-fourths majority is necessary to adopt the entire RMS. As Section B explains, however, the order of voting is more complicated. The complexity is due to the inability to characterize the EDG draft as a “proposal” or an “amendment to a proposal.”

A. A Simple Majority Is Necessary to Adopt Bracketed Text

Rule E.3 of the IWC Rules of Procedure requires a simple majority to adopt votes taken “on any matter before the Commission” except for amendments to the Schedule which require a “three-fourths majority of those casting an affirmative or negative vote.”¹³⁶

According to Rule E.3, a proposal to amend the Schedule must “contain the text of the regulations proposed to amend the Schedule.” A proposal failing to contain the text of regulations can be adopted by simple majority except if it “would commit the Commission to amend the Schedule in the future.” A proposal committing the Commission to amend the Schedule in the future can neither be put to vote nor adopted.

In addition, at meetings of committees appointed by the Commission, a “simple majority of those casting an affirmative or negative vote” is sufficient for the adoption of decisions. Rule E.3(c) provides:

At meetings of committees appointed by the Commission, a simple majority of those casting an affirmative or negative vote shall also be decisive. The committee shall report to the Commission if the decision has been arrived at a result of the vote.

To the extent that votes on bracketed text occur in the RMS Working Group, any vote to adopt text will require a simple majority. Even if the vote is removed to plenary, a vote to

¹³⁶ Rule E.3 of the IWC Rules of Procedure provides:

(a) Where a vote is taken on any matter before the Commission, a simple majority of those casting an affirmative or negative vote shall be decisive, except that a three-fourths majority of those casting an affirmative or negative vote shall be required for action in pursuance of Article V of the Convention [amendment to the Schedule].

(b) Action in pursuance of Article V shall contain the text of the regulations proposed to amend the Schedule. A proposal that does not contain such regulatory text does not constitute an amendment to the Schedule and therefore requires only a simple majority vote. A proposal that does not contain such regulatory text to revise the Schedule but would commit the Commission to amend the Schedule in the future can neither be put to vote nor adopted.

adopt particular text within the EDG draft will require a simple majority. However, once all disputed, bracketed is removed and the IWC Members vote to approve the RMS as a whole for the purpose of incorporating it into the Schedule, a three-fourths majority is required.

B. The Order of Voting on Bracketed Text in the EDG Draft

The EDG draft sometimes includes more than one alternative for a single provision. For example, three alternatives exist for the payment of observer costs. Because the IWC Members have not identified a procedure for voting on separate alternatives, the IWC Rules of Debate govern. Thus, the order of voting on bracketed text will be based on whether the EDG draft constitutes a (1) “proposal” or (2) an “amendment to a proposal.” The IWC must determine the nature of bracketed text before any votes are taken, because the order of voting under the IWC Rules of Debate is reversed depending on whether the bracketed text constitutes a proposal or an amendment to a proposal.

1. “Amendments to a Proposal” and “Proposals”

According to Rule E.2 of the Rules of Debate, a motion is an amendment to a proposal “if it merely adds to, deletes or revises part of that proposal.” With respect to amendments to a proposal, Rule E.2 provides that an amendment must be voted on before the proposal itself.¹³⁷ Where two or more amendments are moved to a proposal, the Commission must vote first on the last amendment moved. However, where the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to a vote.¹³⁸ Although logically it makes sense to vote first on the amendment that necessarily implies the rejection of all other amendments, Rule E.2 does not require that. Instead, Rule E.2 requires that the last amendment moved be voted on first.

In direct contrast, Rule E.3 provides that if two or more “proposals” (as opposed to amendments to a proposal) relate to the same question, the Commission shall, unless it otherwise decides, vote on the proposals in the order in which they have been submitted. The Commission may, after voting on a proposal, decide whether to vote on the next proposal.¹³⁹ This rule is similar to that of other treaties.¹⁴⁰

¹³⁷ This is consistent with other treaties and common sense. *See, e.g.*, Northeast Atlantic Fisheries Commission, Rules of Procedure, Rule 24 available at <http://www.neafc.org>, Commission for the Conservation of Southern Bluefin Tuna, Rules of Procedure, Rule 44 (providing that: “An amendment shall be voted on before the proposal to which it relates is put to the vote, and if the amendment is adopted, the amended proposal shall then be voted on.”). This rule must be understood properly because it is often misapplied. If an amendment is adopted, the original proposal is void – it is replaced by the amended proposal. In essence, the original proposal has been rejected in favor of the amended proposal. *See* Commission for the Conservation of Antarctic Living Marine Resources, Rules of Procedure, Rule 23 (“As a general rule proposals which have been rejected may not be reconsidered until the next meeting of the Commission.”).

¹³⁸ Rule E.2 of the IWC Rules of Debate provides:

When the amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Commission shall first vote on the last amendment moved and then on the next to last, and so on until all amendments have been put to the vote. When, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon. A motion is considered an amendment to a proposal if it merely adds to, deletes or revises part of that proposal”.

¹³⁹ Rule E.3 of the IWC Rules of Debate provide:

2. Discussion

The EDG draft is best characterized as a new document that the IWC is creating, rather than a document that the Members are amending. This is true, because almost all provisions of the EDG draft are new and still not agreed upon. Given these circumstances, it is difficult to conceive of the EDG draft as a completed document that the Members are merely amending. If this assessment is correct, then bracketed text constitutes a “proposal.” Where more than one alternative exists for any provision, the first alternative proposed must be voted on first.

Given the long history of negotiating the RMS, the Members may have difficulties identifying which text was offered first. If that is true, the Members have the opportunity to create additional rules. The Rules of Debate already allow the IWC members to establish different rules for voting on proposals. Presumably they could also create a rule that grants them the power to adopt different rules for voting on amendments to proposals.

The CCSBT and CITES provide an alternative. In these meetings, the Parties first vote on the amendment *furthest removed in substance from the original proposal*, then on the amendment next furthest removed from the proposal until all amendments have been put to a vote.¹⁴¹ For example, assume that an original proposal called for 100% observer coverage and that IWC Member’s proposed two amendments: one calling for 50% observer coverage and other calling for 75% observer coverage. The amendment calling for 50% observer coverage is furthest removed from the original proposal calling for 100% coverage. The advantage of this voting procedure is that it may eliminate the need to address subsequent amendments to a proposal. That is, the amendment furthest removed from the original proposal may implicitly reject all other amendments. The disadvantage is that it may be difficult to determine which amendment is, in fact, furthest removed from the original proposal: not all situations will include simple calculations involving the extent of observer coverage.

If two or more proposals relate to the same question, the Commission shall, unless it otherwise decides, vote on the proposals in the order in which they have been submitted. The Commission may, after voting on a proposal, decide whether to vote on the next proposal.

¹⁴⁰ For example, Rule 41 of the Rules of Procedure for the Commission on the Conservation of Southern Bluefin Tuna provides:

If two or more proposals relate to the same question, the Conference of the Parties, unless it decides otherwise, shall vote on the proposals in the order in which they have been submitted. The Conference of the Parties may, after each vote on a proposal, decide whether to vote on the next proposal.

¹⁴¹ See, e.g., CCSBT Rules of Procedure, Rule 45:

If two or more amendments are moved to a proposal, the Conference of the Parties shall first vote on the amendment furthest removed in substance from the original proposal, then on the amendment next furthest removed therefrom, and so on, until all amendments have been put to the vote. The President shall determine the order of voting on the amendments under this rule.