



Legal analysis of the IPHC Convention to ensure its adequacy relative to current global best practice principles of fisheries management

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PURPOSE

To provide the PRIPHC02 with a Legal analysis of the IPHC Convention to ensure its adequacy relative to current global best practice principles of fisheries management.

BACKGROUND

The *Terms of Reference and Criteria to Conduct the 2nd Performance Review of the IPHC* includes a requirement to undertake a legal review of the IPHC Convention relative to global best practices, and which is the foundation element upon which the rest of the review rests:

Criteria 1: “*Legal analysis of the Convention to ensure its adequacy relative to current global best practice principles of fisheries management,*”

On 27 June 2017, the IPHC Secretariat widely circulated a call for expressions of Interest (EOI) for a ‘*Consultancy to undertake a legal analysis of the Convention between Canada and the United States of America for the preservation of the halibut fishery of the northern Pacific Ocean and Bering Sea.*’ ([IPHC-2019-PRIPHC02-INF02](#)).

DISCUSSION

The IPHC Secretariat received a total of five (5) EOI’s by the deadline, and one (1) after the deadline which was not considered. The selection panel unanimously endorsed Mr Terje Løbach of Norway, to undertake the consultancy.

The final report was submitted by Mr Løbach to the IPHC Secretariat on 5 September 2017 and is provided at [Appendix A](#).

RECOMMENDATIONS

That the PRIPHC02 **NOTE** paper IPHC-2019-PRIPHC02-04 which provides a legal analysis of the IPHC Convention, prepared by Mr Terje Løbach, against global best practice principles of fisheries management.

APPENDICES

[Appendix A](#): Legal analysis of the IPHC Convention against relevant international instruments

APPENDIX A

LEGAL ANALYSIS OF THE IPHC CONVENTION AGAINST RELEVANT INTERNATIONAL INSTRUMENTS¹

Terje Løbach, International legal consultant

The International Pacific Halibut Commission (IPHC) was established in 1923 by the *Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and the Bering Sea*. Following a series of amendments, the legal framework currently in force is a protocol from 1979.

Since then, several global instruments concerning the conservation and management of world fishery resources have been agreed, many of them containing obligations and principles relevant to transboundary fish stocks. The key legally binding instrument is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which provides the framework for all maritime activities, including conservation and utilization of living marine resources. Among other treaties related to fishing, and relevant to IPHC include the 2005 UN Fish Stocks Agreement (UNFSA)² and the 2009 FAO Port State Measures Agreement (PSMA)³. In addition, a series of soft-law instruments have been adopted. Those relevant in this context include the 1995 FAO Code of Conduct on Responsible Fisheries (the Code of Conduct), the 1999 FAO International Plan of Action for the Management of Capacity (IPOA-Capacity), the 1999 FAO International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds), the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU), the 2010 FAO Guidelines on Bycatch Management and Reduction of Discards (the Bycatch Guidelines), and the 2014 FAO Guidelines for Flag State Performance (the Flag State Guidelines). The UN General Assembly annually addresses fisheries issues, among other things calling upon States, individually or through regional fisheries management organisations (RFMOs), to address specific topics in order to achieve sustainable fisheries. Likewise, several declarations, both ministerial and other, have called for specific actions to address conservation and management of fisheries and the ecosystem in which they take place. While UNCLOS, UNFSA and the PSMA entail legally binding obligations on their parties, all these other instruments are voluntary. They serve as guidelines/toolboxes for conservation and management of fisheries, including some specific options for states and RFMOs.

Summaries of relevant instruments are contained in [Annex I](#).

The role of RFMOs has been significantly strengthened over the last twenty years, in particular by UNFSA, and RFMOs are regarded as the appropriate mechanism for responding to the duties set out in UNCLOS for cooperation between states for fisheries management. Five of these RFMOs, the North Pacific Fisheries Commission (NPFCC), the South East Atlantic Fisheries Organisation (SEAFO), the South Indian Ocean Fisheries Agreement (SIOFA), the South Pacific Regional Fisheries Management Organization (SPRFMO) and the Western Central Pacific Fisheries

¹ This paper has been prepared by Terje Løbach, international legal consultant, to be incorporated into the 2nd Performance Review process being undertaken for the IPHC.

² Its full title is: «Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 to the Conservation and management of Straddling Fish Stocks and Highly Migratory Fish Stocks».

³ Its full title is: »Agreement on port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing».

Commission (WCPFC) have been established after the adoption of UNFSA, using that agreement and other international instruments as inspirations and models for developing their treaties. Most of the other RFMOs have revised and/or amended their legislative frameworks in order to be in line with principles set out in these instruments. Furthermore, in recent years, all RFMOs have used the global instruments as a basis and inspiration for the development and subsequent adoption of conservation and management measures within their areas of competence.

Thus new and/or amended RFMO treaties build on the global instruments developed under the auspices of the United Nations and the FAO. Many of the principles for management of fish stocks in those instruments overlap, and the major sources of inspiration seem to be found in the Code of Conduct and in UNFSA. In addition, to assess the IPHC Convention against these instruments, it would be appropriate to compare it with RFMO instruments developed after the adoption of UNFSA and the Code of Conduct in 1995. Both Canada and the USA are parties to the Antigua Convention,⁴ which is the new legal framework of the Inter-American Tropical Tuna Commission (IATTC), and to the North Pacific Fisheries Commission (NPFC) Convention⁵ established in 2015. Thus, it would be appropriate to examine the IPHC Convention also against standards set out in these two treaties.

The Antigua Convention was drafted to update the original IATTC from 1949, and entered into force in 2010. The initial idea was to amend the 1949 Convention in order to bring it into harmony with the principles of international law as reflected in UNCLOS, and with relevant provisions of other international instruments such as UNFSA and the Code of Conduct. But the gap was so great between these instruments and the 1949 Convention that very little could be preserved from the original text.⁶ The institutional continuity of the IATTC was maintained, but the new instrument has filled a number of gaps and uncertainties. The Commission has been institutionally strengthened with the establishment of a compliance committee and a scientific advisory body. The functions of the Commission have been updated and expanded to enable it to perform its tasks and adopt appropriate conservation and management measures. These tasks now cover a broad range of areas, such as scientific research, data collection, application of the precautionary approach, ecosystem considerations, fishing capacity, and allocation. Rights and obligations concerning implementation, compliance, and enforcement have been specified, as well as duties of flag states. Furthermore, decisions are now made by consensus and provisions on the settlement of disputes have been included.

The NPFC Convention entered into force in 2015, and responds to calls from the United Nations to close international jurisdictional gaps for high seas fisheries and, in particular, to take measures to address impacts of fishing on vulnerable marine ecosystems (VMEs) on the high seas. The Convention reflects many of the important developments in international fisheries law, including the precautionary approach, the ecosystem approach, and protecting biodiversity in the marine environment. The Convention sets out quite detailed provisions concerning conservation and management measures and strategies for both targeted species and species belonging to the same ecosystem, including by preventing significant adverse impacts on VMEs. Furthermore, the NPFC

⁴ See: https://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf

⁵ Its full title is: The Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Region. See: <https://www.npfc.int/npfc-convention>

⁶ The Northwest Atlantic Fisheries Organization (NAFO) experienced similar challenges concerning the Convention dating back to 1978. NAFO chose, however, to amend its Convention, but in fact rewriting it completely, only keeping provisions on denunciation and registration unchanged.

Convention focuses on effective monitoring, control, and surveillance, as well as compliance with enforcement both through measures to be adopted by the Commission and through special provisions in the Convention concerning flag-state duties, port-state duties, and compliance and enforcement.

Some relevant standards are also contained in the treaty between Canada and the United States concerning Pacific Salmon (PSC Convention) and the Convention on Great Lakes Fisheries between Canada and the United States (GLFC Convention).

Another interesting instrument is the Benguela Current Commission Convention (BCC Convention) from 2012,⁷ which applies within the exclusive economic zones of Angola, Namibia and South Africa. The BCC Convention relates to all human activities, which thus also includes conservation and management of transboundary fishery resources.⁸

The structure of international cooperating frameworks developed over the last 25 years or so are quite similar. They include at least the following elements: preamble, use of terms, objective, area of application, general principles, establishment of a commission and its functions, subsidiary bodies and secretariat, decision-making, implementation, compliance, transparency, settlement of disputes, and final provisions (signature, ratification, acceptance, approval or accession, entry into force, reservations, relation to other instruments, amendments, annexes, withdrawal and depositary). This analysis of the IPHC Convention follows such a structure.

Preamble

Unlike other treaties, the IPHC Convention does not include a preamble stating the purpose and justification for the instrument, as well as commitments thereto. There is a preamble in the protocol amending the IPHC Convention, but its purpose is to explain the need for those amendments.

The Antigua Convention and the NPFC Convention recall the relevant provisions of UNCLOS. The Antigua Convention in particular refers to the sovereign rights of coastal states for the purpose of exploring and exploiting, conserving and managing living marine resources, as well as the duty to cooperate with other states. It furthermore stresses the need to implement the principles and standards in the Code of Conduct and the action plans established pursuant to it.⁹ The NPFC Convention also refers to the Code of Conduct in general, focusing on steps to protect VMEs from significant adverse impact of destructive fishing practices as well as combatting IUU fishing.

The PSC Convention includes a preamble referring to the interests of the parties and their commitments to cooperate in management, research and enhancement, while the preamble of the GLFC Convention focuses on joint and coordinated efforts to maximise sustained productivity in the fisheries.

⁷ See: <http://www.benguelacc.org/index.php/en/about/the-benguela-current-convention>

⁸ The BCC shall also take all possible steps to prevent abate and minimize pollution and take necessary measures to protect the marine ecosystem against any adverse impact, which may include measures related to shipping, mining, drilling etc.

⁹ Those action plans are IPOA-Capacity, IPOA-Seabirds, IPOA-IUU, and the International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks).

The BCC Convention preamble refers to UNCLOS and other global instruments concerning conservation and management of marine resources, the need for collective actions to ensure effective long-term transboundary co-operation, and to stable institutional arrangements.

Recommendation:

- 1) Incorporate a preamble setting forth the purpose of the Convention, and make references to relevant international instruments such as UNCLOS, the Code of Conduct and its action plans, etc.

Use of terms

The IPHC Convention does not, like other regional fisheries treaties, contain a specific provision on definitions/use of terms, but a few terms are explained in various provisions. In Article I the terms “Convention waters” and “maritime area” are introduced, and “the Commission” is referred to in article III. The purpose of definitions is to facilitate the understanding and not least the interpretation of the instrument. It is noted that some key terms used in the IPHC Convention such as “commercial fishing”, “fish”, “fishing”, “fishing operations”, “sport fishing,” and “fishing vessel”/“vessel” are not explained. The terms “commercial fishing,” “fishing,” and “sport fishing” are, however, defined in the Pacific Halibut Fishery Regulations 2017. “Fishing” is defined to mean “the taking, harvesting, or catching of fish, or any activity that can reasonably be expected to result in the taking, harvesting, or catching of fish, including specifically the deployment of any amount or component part of gear anywhere in the maritime area”.

The Antigua Convention includes in Article I.2 a very detailed and extensive definition of “fishing”, namely as “(a) the actual or attempted searching for, catching, or harvesting of the fish stocks covered by this Convention; (b) engaging in any activity which can reasonably be expected to result in the locating, catching, harvesting of these stocks; (c) placing, searching for or recovering any fish-aggregating device or associated equipment, including radio beacons; (d) any operation at sea in support of, or in preparation for, any activity described in sub-paragraphs (a), (b) and (c) of this paragraph, except for any operation in emergencies involving the health and safety of crew members or the safety of a vessel; (e) the use of any other vehicle, air- or sea-borne, in relation to any activity described in this definition except for emergencies involving the health or safety of crew members or the safety of a vessel.”

The NPFC Convention does not define “fishing,” but pursuant to Article 1(i) “fishing activities” means “(i) the actual or attempted searching for, catching, taking or harvesting of fisheries resources; (ii) engaging in any activity that can reasonably be expected to result in locating, catching, taking or harvesting of these resources for any purpose; (iii) the processing of these resources at sea and the transshipping of these resources at sea or in port; and (iv) any operation at sea in direct support of, or in preparation for, any activity described in subparagraphs (i) to (iii) above, except for any operation related to emergencies involving the health and safety of crew members or the safety of fishing vessels.”

The term “fishing vessel” is defined in Article 1(j) of the NPFC Convention to mean any vessel used or intended for use for the purpose of engaging in fishing activities, including fish processing vessels,

support ships, carrier vessels and any other vessel directly engaged in such fishing activities, while the Antigua Convention use the term “vessel,” which means any vessel used or intended for use for the purpose of fishing, including support vessels, carrier vessels and any other vessels directly involved in such fishing operations, (see Article I.3).

The PSC Convention contains a specific article for definitions of relevant terms used in the treaty.

In the most recent global fisheries treaty, the PSMA, both terms “fishing” and “fishing related activities” are used. “Fishing” means “searching for, attracting, locating, catching, taking or harvesting fish or any activity, which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish.” “Fishing related activities” means “any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea.” The PSMA defines “vessel” as any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities.

Recommendation:

- 2) Incorporate an article for “Definitions,” thereby removing or reducing ambiguity in term usage and meaning.

Objective

Most RFMO treaties and most other international instruments contain specific provisions setting out their objectives. Such a provision is not included in the IPHC Convention. However, in Article I, paragraph 2 it is referred to “regulations promulgated pursuant to Article III of the Convention and designed to develop the stocks of halibut in the Convention waters to those levels which will permit the optimum yield from the fishery and to maintain the stocks at those levels,” which might be interpreted to be the objective of the coordinated efforts by Canada and the USA pursuant to the IPHC Convention. Similar language is used in Article III, paragraph 3, where it is stated “for the purpose of developing the stocks of halibut of the Northern Pacific Ocean and Bering Sea to levels which will permit the optimum yield from that fishery, and for maintaining the stocks at those levels, the Commission may.....”,

The objective of the Antigua Convention is “to ensure the long-term conservation and sustainable use of fish stocks covered by the Convention, in accordance with relevant rules of international law”(see Article II). More recent treaties such as the NPFC Convention also focus on the possible environmental impact of fishing, as its objective is “to ensure the long-term conservation and sustainable use of the fisheries resources in the Convention Area while protecting the marine ecosystems of the North Pacific Ocean in which these resources occur” (see Article 2). As mentioned above, the BCC Convention sets out a broader mandate than RFMOs, and its objective is “to promote a coordinated regional approach to the long-term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem, to provide economic, environmental and social benefits” (see Article 2).

Recommendation:

- 3) Incorporate an article for “Objective” reflecting international standards for conservation and management of living marine resources.

Application

Application relates to geographical area, target species, and activities.

The target species for IPHC is halibut (*Hippoglossus*), as referred to in Article 1, paragraph 1 of the Convention. Paragraph 4 states that fishing for other species in seasons closed to halibut fishing is not prohibited, which probably is not needed to be stated from a legal point, but it provides clarity.

There seems to be a deficiency with respect to the clarity of the authority under the Convention to regulate non-commercial fishing. From the outset, the Convention applies to all fishing for halibut, but pursuant to Article 1, paragraph 5 it applies to commercial halibut fishing,¹⁰ with the exception of sport fishing addressed in that particular paragraph.¹¹

The geographical area, i.e., “the Convention waters,” is described in Article 1, paragraph 3 to be “waters off the west coasts of Canada and the United States, including the southern as well as the western coasts of Alaska, within the respective maritime areas in which either Party exercises exclusive fisheries jurisdiction.”

It is understood that Pacific halibut also occur in the national waters of some other countries. In order to have a comprehensive management regime in place, all areas of distribution should be included in the geographical area of application. Options could be either to extend the geographical area and thereby also the membership of the IPHC to include also these states, or to establish some kind of cooperating mechanisms between them and the Commission.¹²

Most treaties of regional fisheries bodies provide for a more prominent placement of such an important provision, i.e., a specific article clearly stating application, in particular the geographical areas covered by the treaty. Examples are Article III of the Antigua Convention, Article 4 of the NPFC Convention, Article I GLFC Convention and Article 3(1) of the BCC Convention. In addition to a stand-alone article there could be a cross-reference to the geographical area in a list of terms, as described above.

Recommendations:

- 4) Incorporate an article for “Area of application of the Convention,” including a detailed map, noting that the northern boundary of the Convention area is vague.
- 5) Include explicit language confirming that the Convention applies to all removals of Pacific halibut in the Convention waters by directed and non-directed fisheries, commercial, recreational, and other.

¹⁰ “Commercial fishing” is defined in section 3, subparagraph (1)(d) of the Pacific Halibut Fishery Regulations 2017.

¹¹ “Sport fishing” is defined in section 3, subparagraph (1) (r) of the Pacific Halibut Fishery Regulations 2017.

¹² If this latter option is chosen, provisions concerning “Cooperation with non-parties” should be included in the Convention.

- 6) Specify the current species is Pacific halibut (*Hippoglossus stenolepis*), though other species of *Hippoglossus* would also be covered under the convention should they be identified.

General principles

The IPHC Convention does not contain general or management principles per se. There are a couple of principles included, e.g., the reference in Article 1, paragraph 2 to “develop the stocks of halibut in the Convention waters to those levels which will permit the optimum yield from the fishery and to maintain the stocks at those levels” and in Article III, paragraph 2 stating that the Commission “shall make such investigations as are necessary into the life history of the halibut.”

The Code of Conduct contains provisions on fisheries management, which include data gathering and management advice, application of the precautionary approach, the establishment of management measures as well as their implementation (see in particular Article 6¹³). The international plans of actions established by the FAO also contain elements regarded to be common general principles for fisheries management.¹⁴ In addition, FAO guidelines established in recent years contain general principles relevant to regional efforts in conservation and management of fisheries.¹⁵

Article 5 of UNFSA sets out the general principles to be applied by RFMOs and coastal states in order to conserve and manage straddling fish stocks and highly migratory fish stocks. These principles are now associated with common standards for the conservation of living marine resources, and consequently relevant to conservation and management of all fish stocks, including those occurring only in national waters. Article 5 provides, among other things, that in order to conserve the stocks concerned, states are required to adopt measures to ensure their “long term sustainability” and promote the objective of their optimum utilization, to ensure that such measures are based on the best scientific evidence available and to apply the precautionary approach in accordance with article 6 of UNFSA. The aim of the application of the precautionary approach to fisheries management is to reduce the risk of overexploitation and depletion of fish stocks. The use of precaution is required at all levels of the fishery system, including management decisions, research, technology development as well as institutional frameworks. Article 5 also promotes the protection of marine ecosystems and the protection of biodiversity in the marine environment. States are further called upon to minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species. States are also required to collect, share and complete accurate data concerning fishing activities on, among other things, vessel position, catch, and fishing effort, as set out in Annex I of UNFSA, as well as information from national and international research programmes.

In giving effect to its objective, the NPFC Convention in Article 3 contains a rather long list of general principles, in essence mirroring Article 5 of UNFSA, stating that measures shall be based on the best scientific information available, and in accordance with the precautionary approach and ecosystem approach, that the impacts of fishing activities on species belonging to the same

¹³ The most relevant paragraphs in this context are paragraphs 6.3-6.6, and 6.11.

¹⁴ IPOA-Capacity, IPOA-Seabirds, IPOA-Sharks, and IOPA-IUU.

¹⁵ Examples are the Bycatch Guidelines and the Flag State Guidelines.

ecosystem shall be assessed, that biodiversity in the marine environment shall be protected, that overfishing and excess capacity shall be prevented or eliminated, that collection and sharing of complete and accurate data, that pollution and waste, and discards shall be minimized, and that compliance with conservation and management measures shall be ensured.

The Antigua Convention does not contain a specific provision on general principles. Article IV specifies, however, the application of the precautionary approach, making cross-references to the relevant parts of the Code of Conduct and UNFSA. In this regard, it is stated that IATTC shall be more cautious when information is uncertain, unreliable, or inadequate. In addition, some principles are indirectly included in the functions of its commission by stating that “measures shall be based on the best scientific evidence available...” and “to maintain or restore the populations of harvested species at levels of abundance which can produce the maximum sustainable yield.”

Article III of the PSC Convention contains principles concerning each party’s fisheries and enhancement programs, which shall prevent overfishing and provide for optimum production and provide for each party to receive benefits equivalent to the production of salmon originating in its waters.¹⁶

General principles relevant to fishing contained in the BCC Convention include the protection of biodiversity in the marine environment and conservation of the marine ecosystem, taking necessary measures to protect the marine ecosystem against any adverse impacts, undertaking environmental assessments for proposed activities that are likely to cause adverse impacts on the marine and coastal environment, applying management measures based on best scientific evidence available, and protecting vulnerable species and biological diversity.

Recommendation:

- 7) Incorporate an article for “General principles” to include references to long-term sustainability, science-based decisions, application of the precautionary approach, minimisation of harmful impact on the marine ecosystem, collection and sharing of data, and ensuring effective compliance, etc.

The Commission

Pursuant to Article III, paragraph 1 of the IPHC Convention, the Commission referred to in previous instruments continues. The Commission comprises six members, three appointed by each party. Details concerning location, representation, sessions, and selection and functions of Chairperson and Vice-Chairperson are described in the Rules of Procedure (2017).

The IATTC was maintained in a similar manner when the 1949 Convention was replaced by the Antigua Convention- (see Article VI), which also includes provisions on the Commission’s legal status and its location.

¹⁶ “Overfishing” means fishing patterns which results in escapements significantly less than those required to produce maximum sustainable yields, see Article 1, paragraph 5 of the PSC Convention.

Article 5 of the NPFC Convention establishes the Commission, and includes provisions on meeting frequency and request for additional meetings, election of chairperson and vice-chairperson, and on the legal status of the Commission.

The PSC is established by Article II of its Convention, which also includes the composition of the Commission, election of Chairman and Vice-Chairman, the frequency of meetings and the location of the seat of the Commission (see paragraphs 1, 3-5, and 9-10).

Article II of GLFC Convention establishes the Commission and its composition, while election of Chairman and Vice-Chairman, and conduct of meetings are addressed in Article III (see paragraphs 1, 3 and 5).

Recommendations:

- 8) Maintain, but in a stand-alone article, the current provisions for continuation of the Commission, with all its assets and liabilities established by the 1923 Convention and subsequent revisions.
- 9) Consider whether elements of the current Rules of Procedure are better placed in the Convention or a Headquarters Agreement.

Functions of the Commission

Most of the functions of the Commission are set out in Article III, paragraph 3 of the IPHC Convention. The functions are to: (a) divide the Convention waters into areas; (b) establish one or more open or closed seasons as to each area; (c) limit the size of the fish and the quantity of the catch to be taken from each area within any season during which fishing is allowed; (d) during both open and closed seasons, permit, limit, regulate or prohibit the incidental catch of halibut that may be taken, retained, possessed, or landed from each area or portion of an area, by vessels fishing for other species of fish; (e) fix the size and character of halibut fishing appliances to be used in any area; (f) make such regulations for the licensing of vessels and for the collection of statistics on the catch of halibut as it shall find necessary to determine the condition and trend of the halibut fishery and to carry out the other provisions of this Convention; (g) close to all taking of halibut any area or portion of an area that the Commission finds to be populated by small, immature halibut and designates as nursery grounds.

Additional functions are set out in Article III, paragraph 2; “the Commission shall make such investigations as are necessary into the life history of the halibut and may conduct or authorize fishing operations to carry out such investigations”.

Functions of the NPFC as set out in Article 7 relevant in the context of the IPHC Convention are: (i) adopt conservation and management measures to ensure the long-term sustainability of the fisheries resources within the Convention Area, including the total allowable catch or total allowable level of fishing effort for those fisheries resources as the Commission may decide; (ii) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or dependent upon or associated with the target stocks; (iii) adopt, where necessary, management strategies for any fisheries resources and for species belonging to the same ecosystem or

dependent upon or associated with the target stocks, as may be necessary to achieve the objective of this Convention; and (iv) adopt conservation and management measures to prevent significant adverse impacts on vulnerable marine ecosystems in the Convention Area.

The Antigua Convention in Article VII provides a long and detailed list of Commission functions, requiring it to perform the following relevant in this context: (i) promote, carry out and coordinate scientific research concerning the abundance, biology and biometry in the Convention Area of fish stocks covered by the Convention and, as necessary, of associated or dependent species, and the effects of natural factors and human activities on the populations of these stocks and species; (ii) adopt standards for collection, verification, and timely exchange and reporting of data concerning the fisheries for fish stocks covered by the Convention; (iii) adopt measures that are based on the best scientific evidence available to ensure the long-term conservation and sustainable use of the fish stocks covered by the Convention and to maintain or restore the populations of harvested species at levels of abundance which can produce the maximum sustainable yield, inter alia, through the setting of the total allowable catch of such fish stocks as the Commission may decide and/or the total allowable level of fishing capacity and/or level of fishing effort for the Convention Area as a whole; (iv) determine whether, according to the best scientific information available, a specific fish stock covered by the Convention is fully fished or overfished and, on this basis, whether an increase in fishing capacity and/or the level of fishing effort would threaten the conservation of that stock; (v) adopt, as necessary, conservation and management measures and recommendations for species belonging to the same ecosystem and that are affected by fishing for, or dependent on or associated with, the fish stocks covered by the Convention, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened; (vi) adopt appropriate measures to avoid, reduce and minimize waste, discards, catch by lost or discarded gear, catch of non-target species (both fish and non-fish species) and impacts on associated or dependent species, in particular endangered species; (vii) adopt appropriate measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of the fish stocks covered by the Convention; (viii) establish a comprehensive program for data collection and monitoring which shall include such elements as the Commission determines necessary. Each member of the Commission may also maintain its own program consistent with guidelines adopted by the Commission; (ix) promote, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques and such other related activities, including activities connected with, inter alia, transfer of technology and training; and (x) promote the application of any relevant provision of the Code of Conduct and of other relevant international instruments including, inter alia, the International Plans of Action adopted by FAO in the framework of the Code of Conduct.

The PSC Convention includes a general provision related to management, stating that the Commission may make recommendations to or advise the Parties on any matter relating to the Treaty, see Article II, paragraph 8. But the bulk of conservation and management options and guidance is contained in articles related a system of panels/specific areas, see Articles IV, paragraphs 4-6, Articles VI and VIII.¹⁷

¹⁷ See also Annex II and Annex IV, noting that all references to the Convention shall be understood to include the Annexes.

Article IV of the GLFC Convention contains the following duties; (a) formulate a research program or programs designed to determine the need for measures to make the maximum sustained productivity of any stock of fish in the Convention Area; (b) coordinate research and, if necessary, to undertake research itself; (c) recommend appropriate measure to the Contracting Parties on the basis of the findings of such research programs, and (d) formulate and implement a comprehensive program for the purpose of eradicating or minimizing the sea lamprey populations.

Recommendations:

- 10) The functions concerning fishing set out in the Convention to be streamlined in a specific article, and to include the following additional functions: (i) adopt standards for collection and sharing of data, (ii) adopt measures for species belonging to the same ecosystem or dependent upon or associated with halibut, (iii) adopt measures to avoid, reduce and minimize waste, discards, catch by lost or discarded gear, (iv) adopt measures to prevent significant adverse impacts on VMEs, and (v) adopt measures to ensure effective monitoring, control and surveillance, as well as compliance.

Subsidiary bodies

There are no references to subsidiary bodies of the Commission in the IPhC Convention, but the Commission has by the Rules of Procedure established seven such bodies in two committees and five boards: the Finance and Administration Committee, the Scholarship Committee, the Conference Board, the Processor Advisory Board, the Research Advisory Board, the Management Strategy Advisory Board and the Scientific Review Board (Rule 14 of the Rules of Procedure 2017). The terms of reference for each of them are set out in appendices to the Rules of Procedure.

The NPFC Convention established a Scientific Committee and a Technical Committee, and their respective duties and functions are described in the convention itself in articles 6, 10 and 11. In addition, the Commission may establish any other subsidiary bodies from time to time to assist in meeting the objective of the NPFC Convention, see Article 6, paragraph 1.

The same approach was taken by IATTC. The Antigua Convention established the Committee for the Review of Implementation of Measures Adopted by the Commission and a Scientific Advisory Committee (Articles X and XI). Their general functions are described in its Convention, while the details are set out in two annexes, Annex 3 and Annex 4. The Commission may also establish such other subsidiary bodies as it considers necessary, see Article VII, paragraph 1(u).

Pursuant to Article II, paragraph of the PSC Convention, the Commission shall establish a Committee on Research and Statistics and a Committee on Finance and Administration. In addition, the PSC shall establish four panels as described in Annex I of the Convention.

The BCC Convention also established subsidiary bodies to its Commission in the statutory document. These are an Ecosystem Advisory Committee, a Finance and Administration Committee, and a Compliance Committee (Article 9 of the BCC Convention). The functions of those committees are set out in Articles 10, 11 and 12, respectively.

Recommendation:

11) Consider whether the establishment some of the Commission's subsidiary bodies to be moved from the Rules of Procedure to the Convention.

Administration

There are no specific references to administrative issues in the IPHC Convention. But pursuant to Rule 13 of the Rules of Procedure, the Commission shall appoint an Executive Director, whose duties are described therein.

Many other RFMO treaties contain guidance concerning administrative issues. In accordance with Article 5, paragraph 9 the NPFC Convention, the Commission may establish a permanent Secretariat consisting of an Executive Secretary and other such staff as the Commission may require and/or enter into contractual arrangements with the Secretariat of an existing organization for the provision of services. NPFC has chosen to establish a permanent secretariat.

The Antigua Convention includes a specific provision on the appointment of a Director and his or her functions, and it contains rather detailed descriptions of the required competence of the director as well as the responsibilities (see Article XII). In addition, the Commission shall maintain a qualified staff under the supervision of a Director according to Article VII, paragraph 2. Pursuant to Article 13 of the BCC Convention, a secretariat to be headed by an Executive Secretary was established, and some of the key duties of the Executive Secretary are described.

The availability of adequate financial resources is critical to the effective functioning of an RFMO. Concerning financial issues, the IPHC Convention states that each party shall pay the salaries and expenses of its own members, and that joint expenses incurred by the Commission shall be paid by the two parties in equal shares. But it should be noted that the parties may agree to vary the proportion of such joint expenses (see Article III, paragraph 1). IPHC and other RFMOs have established permanent subsidiary bodies to deal with financial issues, which are responsible for reviewing the operation of the budget for the current year and examining the draft budget for the coming year. But to underscore the importance of this issue, most RFMO treaties also contain specific provisions on budgets and contributions.

The Antigua Convention deals with the budget and the contributions by parties in separate provisions, Article XIV and Article XV, respectively. They address issues like financial audit, determination of member contributions, additional funding mechanisms and arrears in payment. Article 12 of the NPFC Convention deals with the organisation's budget, and includes provisions on adoption, member contributions, deadline for payment, arrears and auditing. Article 15 of the BCC Convention sets out the basic principles concerning finance and budget, which includes equal contributions and consequences of failing to pay contributions.

In accordance with Article II of the PSC Convention, the Commission shall; (i) prepare an annual budget, and bear the costs of the budget in equal shares unless otherwise agreed; (ii) authorize the disbursement of funds, and may enter into contracts and acquire property necessary for the performance of its functions; (iii) submit an annual report on its activities an annual financial

statement, and (iv) shall appoint an Executive Secretary, who, subject to the supervision of the Commission, shall be responsible for the general administration of the Commission.

Pursuant to Article III of the GLFC Convention, the Commission shall appoint an Executive Secretary, who shall have the full power and authority of the staff and shall perform such functions as the Commission may describe, see paragraphs 6-8. Some general guidance concerning financial arrangements are included in Articles VIII and IX.

Recommendation:

- 12) Incorporate in the Convention a specific article dealing with administrative issues, such as to appoint of a Director,¹⁸ to approve program of work, to approve budget, to adopt or amend rules of procedures, financial regulations and other internal administrative regulations.

Decision-making

Among other things, Article III, paragraph 1 of the IPHC Convention also includes a decision-making clause. All decisions of the Commission shall be made by concurring vote of at least two of the Commissioners of each Party. However, this is modified by Rule 11, paragraph 1 of the Rules of Procedure 2017, which states that as a general rule, decision-making in the Commission should be by consensus, defined to mean the absence of any formal objection made at the time the decision was taken. A voting procedure will be invoked if it appears that all efforts to reach consensus have been exhausted, and the decision will be made by voting as referred to in Article III, paragraph 1 of the Convention.

Many other agreements contain stand-alone provisions for decision-making, underpinning their importance.

Decision-making based on voting has been the traditional process agreed to in RFMOs. Notwithstanding the formal procedures established by them, the practice is to rely on decision-making based on consensus. The notion of “consensus” is typically, as defined in the Rules of Procedure of IPHC, the adoption of a decision without any vote or formal opposition at the time of adoption.

The NPFC operates under a consensus rule (see Article 8). However, if all efforts to reach consensus have been exhausted, voting is an option. The IATTC also make decisions by consensus (see Article IX). The decision-making provision of the Antigua Convention also sets out clearly how to decide if any party is absent from the meeting. The BCC takes decisions and makes recommendations by consensus only (see Article 16).¹⁹

¹⁸ The appointment and duties of the Director then to be moved from the Rules of Procedure to the Convention.

¹⁹ Concerning decisions and recommendations on transboundary issues affecting only two of the three parties of the BCC, consensus means that those decisions and recommendations are supported by the affected parties.

Recommendation:

- 13) Harmonize the decision-making provisions of the Convention and the Rules of Procedure, and incorporate those in a specific article of the Convention.

Implementation

Although it is obvious that members of regional bodies shall, taking into account the decision-making process,²⁰ implement decisions to which they are bound, some RFMO agreements make this clear in the statutory document. This is also the case of the IPhC Convention. Pursuant to Article IV, parties shall take any action, including enactment of legislation and enforcement, as may be necessary to make effective the provisions of the Convention and any regulations adopted thereunder. Other RFMO treaties contain similar provisions, but recent instruments are more explicit when referring to member duties.

Global organisations and regional bodies have taken initiatives to combat IUU fishing. The IPOA-IUU calls on States, through RFMOs, to take various actions, such as developing boarding and inspection schemes, implementing vessel monitoring systems (VMS) and observer programmes, identifying vessels that are engaged in IUU fishing, regulating transshipment operations as well as adopting port inspection schemes, certification, and/or trade documentations schemes and other marked-related measures.

Each Party of the Antigua Convention shall provide to the Commission statistical and biological information and information concerning its fishing activities, and shall provide information regarding actions taken to implement measures adopted in accordance with the Convention. To this end, the Antigua Convention requires that parties promptly provide their national legal and administrative provisions related to conservation and management measures adopted by the Commission (see Article XVIII, paragraphs 2 and 3). In addition, parties shall provide to the Commission every six months a report on the activities of their vessels and any other relevant information (see Article XVII, paragraph 4(c)).

The NPFC Convention includes specific and very detailed provisions on flag-state duties, port-state duties and on data collection, compilation, and exchange in Articles 13, 14 and 16, respectively. On flag-state duties, it includes required authorizations, monitoring and real-time reporting obligations, observer coverage, and record of fishing vessels. Furthermore, the Commission shall adopt measures for the effective monitoring, control, and surveillance that shall include an observer program, procedures for boarding and inspection,²¹ and mechanisms to combat IUU fishing (see Article 7, paragraph 2).

Article IV of the PSC Convention contains provisions to facilitate the implementation of Articles III, VI and VII of the Convention, which includes an obligation to submit annual reports on fishing activities, and to establish and enforce regulations to implement fishery regimes adopted by the Parties. Each Party shall notify the Commission and the other Party of these regulations and shall

²⁰ Many RFMO treaties include provisions on how and when binding decisions shall take effect, which also include the right to object under certain conditions, as well as internal procedures if an objection is launched.

²¹ If, within three years of entry into force of the Convention, the Commission is not able to agree on procedures for boarding and inspection, Articles 21 and 22 of UNFSA shall be applied as if they were part of the Convention.

promptly communicate to the Commission and the other Party any in-season modification. Furthermore, each Party shall require reports from its nationals and vessels of catch, effort and related data for all stocks subject to the Convention and make such data available to the Commission, see Article XIV of the Convention.

In accordance with Article XI of the GLFC Convention the Parties have agreed to enact such legislation as may be necessary to give effect to the provisions of the Convention.

The BCC Convention states that each party shall take measures to ensure implementation, including adoption of the necessary legislation, and shall report to the Commission on an annual basis indicating how it has implemented decisions of and acted on recommendations by the Commission.

Recommendation:

- 14) Expand the current text to also include obligations to provide national legal provisions related to measures adopted by the Commission, and submit reports on vessel activities at appropriate intervals.

Compliance and enforcement

Closely linked to implementation is compliance and enforcement. Pursuant to Article II of the IPHC Convention, each Party shall have the right to enforce the Convention and any regulation adopted pursuant thereto in all Convention waters against its own nationals and fishing vessels, and in the portion of the waters in which it exercises exclusive fisheries jurisdiction against nationals or fishing vessels of either Party or third parties. This approach reflects the sovereign rights of the coastal state within its exclusive economic zone as set out in Part V of UNCLOS, in particular Article 73. Parties shall also ensure that their nationals and fishing vessels allow and assist boarding and inspections by duly authorized officials of the other Party (see Article II, paragraph 3).²² In paragraph 2 it is stated that each Party may conduct prosecutions or take other action under domestic law for violation of the Convention or of any regulations adopted pursuant thereto. This means that a Party may take actions against vessels entitled to fly its flag for violations anywhere in the Convention Area, and against vessels entitled to fly the flag of the other Party within its national waters.

The approach taken in the IPHC Convention reflects relevant provisions of UNCLOS, in particular Article 73. It should also be noted that there is a section in the Flag State Guidelines dealing with cooperation between flag states and coastal states, which addresses issues like their respective roles and responsibilities, including the flag state's duty to impose sanctions notwithstanding those that may be applied by a coastal state under coastal state's own laws and jurisdiction, on vessels flying its flag that have violated the flag state's legislation related to fishing and fishing related activities in maritime areas under coastal state jurisdiction (see paragraphs 39-43 of the guidelines).

UNFSA places a series of obligations on flag states concerning compliance and enforcement, including immediate and full investigation of alleged violations, prompt reporting on the progress and outcome of the investigation to the relevant RFMO, and if a serious violation has been proven,

²² Basic procedures for boarding and inspection are set out in UNFSA Article 22. Although they apply to the high seas, some elements could be relevant also for boarding and inspection procedures in national waters.

the requirement not to allow the vessel to fish until such time as imposed sanctions have been complied with. Furthermore, the flag state must ensure that applicable sanctions are adequate in severity to secure compliance and to discourage violations and deprive offenders of the benefits accruing from non-compliance.

The Antigua Convention contains quite detailed descriptions in relation to compliance and follow-up actions in Article XVIII, paragraphs 5-10. One party has the duty to act when a vessel flying the flag of another party is suspected of being engaged in activities that undermine the effectiveness of applicable measures. Each Party is obliged to thoroughly investigate if one of its vessels has carried out activities which contravene adopted measures, and shall apply sanctions of sufficient gravity as to be effective in securing compliance and to deprive offenders of the benefits accruing from such activities,²³ including refusal, suspension, or withdrawal of the authorization to fish. The Antigua Convention also established a Committee for the Review of Implementation of Measures Adopted by the Commission (see Article X). The functions of the Committee are set out in Annex 3 to the Convention, which include to review and monitor compliance with adopted conservation and management measures, analyse information provided by flag states and provide the Commission with information, technical advice, and recommendations relating to the implementation, and compliance with, conservation and management measures.

The NPFC Convention contains a specific article on compliance and enforcement, Article 17. Each Party shall investigate any allegation that vessels entitled to fly its flag have violated any provision of the Convention or any measures adopted by the Commission, and take appropriate actions if the allegation is proven to be correct. The flag state shall order its vessel to leave the Convention Area if involved in the commission of a serious violation.²⁴ The NPFC Convention goes further than other treaties concerning beneficial owners, as it specifies that the flag state shall ensure, to the greatest extent possible, compliance by its nationals, and fishing vessels owned, operated, or controlled by its nationals. Like other instruments, it requires that sanctions shall be adequate in severity to be effective in securing compliance, and shall deprive offenders of the benefits accruing from their illegal activities.

Recommendations:

- 15) Noting the adequate provisions in the Convention, the text should also contain follow-up actions by the flag state that include application of sanctions of sufficient gravity as to be effective in securing compliance, such as depriving offenders of benefits, and refusal, suspension, or withdrawal of authorizations.
- 16) Consider establishment of a Compliance Committee for reviewing implementation of measures adopted by the Commission.

Transparency

The IPHC Convention does not make reference to observer participation, but according to Rule 6.2 of the Rules of Procedure 2017 meetings of the Commission may be open to observers and the

²³ Similar language is included in the IPOA-IUU, see paragraph 21 and in UNFSA Article 19, paragraph 2.

²⁴ A serious violation includes any of the violations specified in Article 21, subparagraphs 11(a) to (h) of UNFSA.

general public. Rule 12 specifies IPHC's relationship to observers and the general public, and states that all sessions of the Commission and its subsidiary bodies may be open to observers and the general public, unless the Commission decides otherwise. It may invite States, RFMOs and other relevant governmental and intergovernmental organisations and non-governmental organisations.

As a general principle set out in the Code of Conduct, states should at national levels ensure that decision-making processes are transparent, and should facilitate consultation and effective participation of industry, fishery workers, environmental and other interested organizations in decision-making with respect to the development of laws and policies related to fisheries management and development.

Although Article 12 of UNFSA relates to straddling and highly migratory fish stocks, standards set out therein are regarded as best practice concerning transparency in fisheries organizations. It requires transparency in decision-making processes and other activities. Most RFMOs have publicly accessible websites, which include meeting minutes, reports, and scientific information. Many RFMOs have amended their rules of procedures for commission meetings or agreed on specific guidelines and criteria for observer status in order to meet the obligations under article 12(2) of UNFSA. The NPFC Convention and the Antigua incorporate provisions mirroring those in article 12 of UNFSA, see Article 18 of the NPFC Convention and Article XVI of the Antigua Convention.²⁵

In order to carry out its duties, the GLFC may hold public hearings in Canada and United States, see Article V (c).

Recommendation:

- 17) Incorporate in a specific article of the Convention general language concerning transparency.

Dispute settlement

IPHC Convention does not address potential disputes.

International standards for dispute settlement in RFMOs are established by part VIII of UNFSA. Article 27 of UNFSA provides that all disputes shall be settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means chosen by the parties to the dispute. The UNFSA emphasizes that in order to prevent disputes, states shall cooperate with a view to agreeing on efficient and expeditious decision-making procedures within RFMOs and to strengthen existing ones as necessary.

Article 30 of UNFSA provides the application of arrangements in part XV of UNCLOS also to disputes about UNFSA itself, about RFMO instruments, or about conservation and management measures taken by an RFMO, whether or not they are also parties to the UNCLOS. Part XV of the UNCLOS provides for mandatory procedures leading to a binding decision by the International Court of Justice or the International Tribunal on the Law of the Sea. It should be noted that, concerning RFMO

²⁵ Details for IATTC are set out in Annex 2 of the Antigua Convention.

measures, these mechanisms only apply to parties to UNFSA, and for this reason many recent RFMO agreements consequently have adopted their own specific arrangements.

Articles 28 and 29 of the UNFSA provide for the prevention of disputes by efficient and expeditious decision-making procedures and for the prompt resolution of technical disputes by *ad hoc* expert panels.

The Antigua Convention contains requirement to address disputes, and members of the Commission are required to consult in order to find a quick solution. If this fails, parties to a dispute shall settle the dispute through peaceful means they may agree upon, in accordance with international law. A dispute on technical nature may be referred to a non-binding *ad hoc* expert panel constituted within the framework of the Commission.

NPFC simply applies Part VIII of UNFSA to any dispute between NPFC parties, whether or not they are also parties to UNFSA (see Article 19 of the NPFC Convention).

The BCC Convention also contains a clause on settlement of disputes, stating that if a dispute arises between Parties concerning the interpretation or implementation of the Convention, those concerned shall consult among themselves as soon as possible in order to settle the dispute by negotiation or any other means they agree upon.

Article XII of the PSC Convention deals with technical disputes, which are described as disputes concerning estimates of the extent of salmon interceptions and data related to questions of overfishing. Such disputes shall be referred to a Technical Dispute Settlement Board, established in accordance with Annex III of the Convention.

Recommendation:

- 18) Incorporate in the Convention a specific article, which in general terms states that in order to settle a possible dispute between Contracting Parties, concerning interpretation or implementation of the Convention, the parties shall consult by means they agree upon.

Final clauses

Most RFMO treaties contain so-called “final provisions,” such as rules on signature and ratification, entry into force, reservations, declarations and statements, relationship with other instruments, amendments, withdrawal, and depository.²⁶

Recommendations:

- 19) Incorporate an article on signature, ratification, acceptance and approval, stating who are entitled to become parties, as well as the timeframe for signature.

- 20) Incorporate an article stating when it enters into force, and conditions thereto.²⁷

²⁶ Examples are Part IX of the Antigua Convention, Articles 23-31 of the NPFC Convention, and Articles 22-31 of the BCC Convention.

²⁷ This is present in Article VII, which became effective 29 March 1979 and continues until 1981, and thereafter until either party gives notice to terminate.

- 21) Incorporate an article stating whether or not reservations or exceptions may be made.
- 22) Incorporate an article allowing parties to make statements or declarations that do not exclude or modify the legal effect of the provisions.
- 23) Incorporate an article making references to for example the UNCLOS concerning sovereign rights of coastal States as well as other possible relevant instruments.
- 24) Incorporate an article describing the amendment mechanisms such as time frames, communication, adoption and entering into force. If annexes or appendices are regarded as an integral part of the treaty, more flexible mechanism for those.
- 25) Incorporate an article describing possible withdrawal procedures.²⁸
- 26) Incorporate an article stating who will be the depository government as well as its obligations and functions.

²⁸ This is present in Article VII. Like most other RFMO treaties, one year notice is required.

ANNEX I

Summaries of various relevant international instruments

UN Convention on the Law of the Sea (UNCLOS)

UNCLOS provides the legal framework for all uses of the oceans as well as their superjacent air space and subjacent seabed and subsoil. UNCLOS includes provisions on limits of various maritime zones, such as the territorial sea, the exclusive economic zone (EEZ) and the continental shelf, rules on navigation, a framework for conservation and utilization of living marine resources, a regime for the deep seabed beyond national jurisdiction, rules for protection and preservation of the marine environment from pollution, rules on scientific research and provisions on dispute settlement. Article 56 gives the coastal state sovereign rights to explore and exploit, conserve and manage natural resources, whether living or non-living, within its EEZ. The core provisions on fisheries are Articles 61 and 62 which deal with the conservation, management and utilization of the living resources of the EEZ, while in this context in particular Article 63, paragraph 1 is essential as states shall, where the same stock or stocks of associated species occur within the EEZs of two or more coastal states, these states shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon measures necessary to coordinate and ensure the conservation and development of such stocks. Article 73 allows the coastal state in the exercise of its sovereign concerning the living marine resources of the EEZ to take measures, including boarding and inspection, arrest and judicial proceedings as may be necessary to ensure compliance with its laws and regulations.

Furthermore UNCLOS Article 192 imposes a broad obligation on states to “protect and preserve the marine environment” and pursuant to Article 194(5) this includes taking measures to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life”.

UN Fish Stocks Agreement (UNFSA)

The objective of UNFSA is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of UNCLOS. Straddling stocks is also generally understood to refer to stocks which occur both within the EEZ and in an area beyond or adjacent to the zone, in accordance with Article 63(2) of UNCLOS. The focus of the agreement is on cooperation within regional fisheries management organizations (RFMOs).

Although the main objective of UNFSA is related to the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas, Articles 5 (general principles) and 6 (application of the precautionary approach) also apply to the conservation and management of those stocks in areas under national jurisdiction.

Article 5 sets out the general principles, which includes, among other things, that states are required to adopt measures to ensure the ‘long term sustainability’ of fish stocks and to promote the objective of their optimum utilization; to ensure that such measures are based on the best scientific evidence available; and to apply the precautionary approach in accordance with Article 6 of the agreement. Article 5 calls for the conservation and management of marine ecosystems and the protection of biological diversity in the marine environment, and states are also required to minimize pollution,

waste, discards, catch by lost or abandoned gear; catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species. Under Article 5(d), states are required to assess the impact of fishing on target stocks and species belonging to the same ecosystem or associated with or dependent upon target stocks. States are further required to collect, share and complete accurate data concerning fishing activities on, among other things, vessel position, catch and fishing effort, as set out in Annex I to the agreement, as well as information from national and international research programs.

Article 6 requires states to apply the precautionary approach to conservation and management in order to protect the living marine resources and preserve the marine environment. Annex II of the agreement provides guidance for the application of precautionary reference points in conservation and management of the stocks concerned. The aim of the application of the precautionary approach to fisheries management is to reduce the risk of overexploitation and depletion of fish stocks. The application of the precautionary approach entails that the lack of full scientific information should not be used as a reason to postpone taking action by the establishment of conservation and management measures. The approach involves the setting of reference points for management and threshold levels for spawning stock size and fish mortality. The management objectives are to ensure that the fish mortality rates and the size of the spawning stock biomass are maintained at or above desired levels.

Although the flag state duties set out in UNFSA Article 18 apply to high seas fishing, they are regarded as common international standards. It imposes the basic obligation for a flag state to ensure that vessels flying its flag comply with RFMO measures and do not undermine the effectiveness of such measures, and contains rather detailed specifications of the required suite of necessary measures.

FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)

The objective of the PSMA is to combat IUU fishing through the implementation of effective port state measures as a means of ensuring the long-term conservation and sustainable use of living marine resources and marine ecosystems. The PSMA sets out minimum standards for port control of foreign fishing vessels, i.e. such vessels that have been fishing in areas beyond the jurisdiction of the port state. For those fishing within the jurisdiction of the port state, UNCLOS Article 73 would apply.

The PSMA establishes a step-by-step process for the port state to allow or deny the entry to and the use of its ports. Article 7 requires each party to designate and publicize ports to which entry may be requested, and to ensure sufficient capacity to conduct inspections.

A party shall pursuant to Article 8, prior to allowing a foreign vessel access to its port, require the provision of information on place, time and purposes of the port call, vessel information, authorizations, transshipment information and catch details.

Article 9 requires prior authorization of entry into port and presentation of authorization upon entry into port. It also requires the denial of entry or other actions that are as effective as denial, where there is sufficient proof of IUU fishing. Entry must be denied where the port state has sufficient proof

that a vessel has engaged in IUU fishing, in particular where it is on an IUU vessel list established by an RFMO.

Pursuant to Article 11, a vessel that has entered a port shall not be permitted to use that port if the vessel does not have a fishing authorization required by the relevant flag state or coastal state, or if there is clear evidence that the fish on board was taken in contravention of applicable measures. To this end, use of port shall also be denied if the flag state, on request, fails to confirm within reasonable time that the fish on board was taken in accordance with requirements of an RFMO or the port state has reasonable grounds to believe that IUU fishing had taken place, unless the vessel can establish otherwise. For this purpose, use includes landing, transshipping, packaging, processing, refueling and resupplying, maintenance and dry-docking.

Article 13 of the PSMA lists a series of duties on port states in carrying out inspections, including qualification of inspectors, identity cards, examination, cooperation and communication and an obligation to minimize interference and inconvenience. The port state must thus ensure that inspectors perform functions of verification, review, examination, determination and evaluation. Inspections must be carried out in a fair, transparent and non-discriminatory manner (Article 13(2)(h)).

The port state is, pursuant to Article 14, required to include into a report of the inspection the result indicators such as information on the vessel itself, authorizations, catch, gear and records as well as findings by the inspector and apparent infringements, if any. If, following an inspection, there are clear grounds for believing that the vessel has engaged in IUU fishing, the port state must, pursuant to Article 18, deny the vessel use of the port except for services essential for the safety or health of the crew or the safety of the vessel.

Code of Conduct for Responsible Fisheries (the Code of Conduct)

The Code of Conduct provides a framework for national and international efforts to ensure sustainable exploration of aquatic living resources with an overall objective to promote a framework for sustainable use of fisheries resources. Some of the measures suggested overlap with obligations contained in UNFSA, but the Code of Conduct contains principles and standards applicable to the conservation, management and development of all fisheries.

Article 6 underscores that the right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources. It refers to the maintenance of the quality, diversity and availability of fishery resources, including species belonging to the same ecosystem or associated with or dependent upon the target species. It requests that conservation and management decisions should be based on the best scientific evidence available, and refers to the application of the precautionary approach to conservation and management and to preserve the aquatic environment. In addition, selective and environmentally safe fishing gear and practices should be used in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems. This is further elaborated in Article 8, under which states should require that fishing gear, methods and practices are sufficiently selective so as to minimize waste, discards, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species.

Article 7 includes provisions on management objectives, management framework and procedures, data gathering and management advice, application of the precautionary approach, and the establishment of management measures as well as their implementation. It also addresses management objectives of fisheries, which should include the avoidance of excess capacity, the conservation of biodiversity of aquatic habitats and ecosystems, the protection of endangered species, and the minimization of pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species and impacts on associated or dependent species. In addition states should assess impacts of environmental factors on target stocks and species belonging to the same ecosystem.

The implementation of the precautionary approach is described as taking into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities, including discards, on non-target and associated or dependent species, as well as environmental and socio-economic conditions.'

Article 8 also sets out responsibilities of flag states, including to ensure that its vessels are properly marked, and the FAO Standard Specifications for Marking and Identification of Fishing Vessels is given as an example. Gear should also be marked.

Article 6.11 calls on flag states to exercise control over their vessels and to ensure that they do not undermine the effectiveness of international or national conservation and management measures. Pursuant to Article 7.1.7 states should also establish effective mechanisms for monitoring, surveillance, control and enforcement of fishing vessels. States should ensure that documentation with regard to fishing operations, retained catch of fish and non-fish species is collected, and states should establish programs, such as observer and inspection schemes, in order to promote compliance with applicable measures. A flag state is required to take enforcement measures against any of its vessels that have contravened applicable conservation and management measures, including, where appropriate, making such contravention an offence under national legislation. Sanctions must be of adequate severity to be effective in securing compliance and discourage violations and should deprive offenders of the benefits accruing from their illegal activities and are to include, for serious offences, refusal, suspension, or withdrawal of the authorization to fish.

International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)

Combating IUU fishing has been one of the main priorities on the international fisheries agenda for many years. A number of initiatives have been taken by global organizations, regional bodies and states to counteract such activities. In this context, in particular, the IPOA-IUU is important.

FAO adopted the IPOA-IUU in 2001. The objective of the IPOA-IUU is to prevent, deter and eliminate IUU fishing through comprehensive, effective and transparent measures. Measures should be consistent with the conservation and long-term sustainable use of fish stocks and the protection of the environment. Although it is not binding, the action plan contains several suggested measures for combating IUU fishing, including those to be used by flag states, coastal states, port states and RFMOs. The IPOA-IUU calls on states, through RFMO/As, to take various actions, such

as developing boarding and inspection schemes, implementing VMS and observer programs, identifying vessels that are engaged in IUU fishing, regulating transshipment operations, as well as adopting port inspection schemes, certification and/or trade documentation schemes and other marked-related measures.

The IPOA-IUU contains a specific section on national legislation, which addresses some particular issues, including state control over nationals, sanctions and monitoring, control and surveillance.

Paragraphs 18 and 19 call on states to take measures to ensure that their nationals do not support or engage in IUU fishing, which would require the scope of any IUU fishing legislation to be applicable to nationals wherever they are involved in fishing and fishing related activities. In particular, the action plan highlights the possibility of targeting measures at the operators or beneficial owners of fishing vessels.

In accordance with paragraph 21, states should ensure that sanctions for IUU fishing and their nationals are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and deprive offenders of the benefits accruing from such activities. An example of a sanction regime is the administrative penalty scheme.

Pursuant to paragraph 24, states should undertake comprehensive and effective MCS of fishing from its commencement, through the point of landing and to final destination. A set of actions is listed in the said paragraph, including establishing access schemes, maintaining records of all vessels and their current owners and operators authorized to undertake fishing subject to their jurisdiction, and the use of VMS and observer programs.

Flag state responsibilities are addressed in a specific section of the IPOA-IUU, which deals with issues related to fishing vessel registration, record of fishing vessels and authorizations to fish.

According to paragraphs 42 and 43, a flag state should maintain a record of fishing vessels entitled to fly its flag. Concerning the content of such record, and provides identification details to be included.

Paragraphs 44-47 deal with fishing authorizations and their conditions. A flag state should not allow its vessels to fish unless so authorized and should ensure that each vessel fishing beyond national waters holds a valid authorization. Minimum content of such an authorization is listed in paragraph 46, while authorization conditions are outlined in paragraph 47.

According to paragraph 48, flag states should ensure that their fishing, transport and support vessels do not support or engage in IUU fishing. It is the responsibility of the flag State to ensure that none of its vessels resupply fishing vessels engaged in IUU fishing or transship fish to or from such vessels.

Paragraph 49 calls on flag states to ensure that their vessels involved in transshipment operations have a prior authorization and apply reporting requirements concerning the operation.

International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds)

There are concerns about incidental catch of seabirds in longline fisheries. According to the action plan, states should, either individually or through appropriate RFMOs, conduct assessments of these fisheries to determine if a problem exists with respect to incidental catch of seabirds. If a problem is identified, initiatives should include the adoption of mitigation measures, plans for research and development, awareness campaigns and data collection programmes. The IPOA-Seabirds also contains an annex describing some optional technical and operational measures for reducing the incidental catch of seabirds in longline fisheries.

Regulations might include a duty to reduce visibility of bait by setting during hours of darkness. In order to reduce the attractiveness of the vessel to seabirds a regulation should require dumping of garbage or offal, either by banning the practice, or if unavoidable requiring dumping to be done on the opposite side of the vessel where lines are being set. Furthermore area and seasonal closures should be established when concentrations of breeding or foraging take place, preferential licencing should be given to vessels that use mitigation measures that do not require compliance monitoring, and there should be a duty to release possible alive birds,

There are available some technical installations and devices that reduces the incidental mortality of seabirds. Regulations may require such devices to be used in order for the sink rate of baits to be increased, the line to be set below the water, birds to be scared, and bait to be casted.

International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity)

In 1999 FAO adopted the IPOA-Capacity with the objective for states and RFMOs to achieve an efficient, equitable and transparent management of fishery capacity. The IPOA-Capacity is not binding, but it may be used as guidance by states as to how to comply with their obligations under other international instruments.

IPOA-Capacity specifies actions to be taken for assessing and monitoring capacity, preparing and implementing national plans, international considerations and immediate actions for major international fisheries requiring urgent measures. Overcapacity may be addressed in many ways, for example by input regulations (fishing seasons/days, area closures, gears and vessel-related restrictions), as well as by output regulations, such as right-based measures. Coordinated efforts are, however, essential.

From a conservation perspective, the management of capacity should, pursuant to paragraph 9(iv) of the IPOA-Capacity, be designed to achieve the conservation and sustainable use of fish stocks and the protection of the marine environment consistent with the precautionary approach. The IPOA-Capacity is developed in the context of the Code of Conduct, which provides that states should take measures to prevent and eliminate excess fishing capacity and should ensure that levels of fishing effort are commensurate with sustainable use of fishery resources. In the context of deep-sea fishing, states should limit participation by its vessels to the effort regarded to be commensurate with sustainable use of the deep-sea fisheries in question. This may be achieved through a form of licensing.

FAO Guidelines for Flag State Performance (Flag State Guidelines)

Improvement of flag state performance has been a topic on the international agenda for several years. The Flag State Guidelines were endorsed by the FAO Committee on Fisheries (COFI) in June 2014. The Flag State Guidelines are not legally binding, but they are an important indication of what flag states may need to do in order to comply with their obligations under the UNCLOS and other relevant treaties.

The Flag State Guidelines contain an extensive set of assessment criteria, which include detailed criteria about how a flag state handles fisheries management, authorizations, information, registration and records as well as monitoring, control, surveillance and enforcement. The guidelines also contain procedures for carrying out assessments, encouraging compliance and deterring non-compliance.

States are required to establish grounds for refusal of registration of a vessel, which would include vessels on an IUU vessel list adopted by an RFMO, vessels holding registration from another state and vessels with a history of non-compliance.

States should maintain up-to-date records of vessels authorized to engage in fishing and fishing related activities on the high seas. The Flag State Guidelines list a number of items to be contained in such a record in order to properly identify vessels, and include vessel name, names of owner, operator and beneficial owner and their respective addresses, history and characteristics of the vessel.

Pursuant to the Flag State Guidelines, states should ensure that no vessel is allowed to operate unless authorized by it. States are to be advised to establish appropriate scope for such authorization, including conditions for the protection of marine ecosystems. Authorizations should also include minimum information requirements that include the name of the vessel and the owner of the vessel, the areas and duration of the authorization, as well as species targeted and the fishing gear used.

The Flag State Guidelines require states to implement a control regime. Such a regime should include the legal authority to take control of the vessels (e.g. denial of sailing, recall to port) as well as monitoring tools, such as VMS, logbooks/documentation, and observers. In addition, a regime should include mandatory requirements regarding fisheries-related data that must be recorded and reported in a timely manner (e.g. catches, effort, bycatches and discards, landings and transshipments) and an inspection regime.

States should have in place an enforcement regime authority to conduct investigations of violations, and should implement sanctions that are proportionate to the seriousness of the violation and are adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and deprive offenders of benefits accruing from their illegal activities.

States should require its vessels to be marked in accordance with the FAO Standard Specifications and Guidelines for Marking and Identification of Fishing Vessels and relevant requirements of the International Maritime Organization. The guidelines also require states to have in place the legal means to manage capacity, fishing effort, catch limits and transshipment.

International Guidelines on Bycatch Management and Reduction of Discards (Bycatch Guidelines)

Concerns about bycatch and the practice of discarding have been expressed in many fora, including on repeated occasions at the UN General Assembly, urging states and others to reduce or eliminate bycatch, catch by lost and abandoned gear, fish discards and post-harvest losses, including juvenile fish. The Bycatch Guidelines were adopted by FAO in 2010 to assist states and RFMOs in implementing the Code and pursuing an ecosystem approach to fisheries through effective management of bycatch and reduction of discards. The main objective of the Bycatch Guidelines is to promote responsible fisheries by minimizing the capture and mortality of species and sizes. They contain a series of suggested measures that contribute towards more effective management of bycatch and reduction of discards, as well as how to improve reporting and the accounting of all components of the catch of which bycatch and discards are subsets. The Bycatch Guidelines are not legally binding, but they may be relevant for states in implementing their other international obligations.

Suggested measures to manage bycatch and reduce discards are contained in section 7 of the Bycatch Guidelines, while pre-catch losses and ghost fishing are dealt with in section 8. States are expected to ensure that bycatch management and discards reduction measures are, among other things, binding, clear and direct, ecosystem-based, ecologically efficient and enforceable. The Bycatch Guidelines suggest that a range of tools are available to manage bycatch and reduce discards, including input and/or output controls, the improvement of the design and use of fishing gear and bycatch mitigation devices, spatial and temporal measures, limits and/or quotas on bycatches and bans on discards.

UN General Assembly Resolutions

Since 2003 the UN General Assembly has adopted annually a resolution dedicated to fisheries and fisheries related issues, the so-called Sustainable Fisheries Resolution. The UN General Assembly resolutions are not legally binding, but they call on states and RFMOs to implement them.

The Sustainable Fisheries Resolution addresses numerous issues, including the implementation of UNFSA, combating IUU fishing, monitoring, control, and surveillance and enforcement, fishing overcapacity, fisheries bycatch and discards, sub-regional and regional cooperation, responsible fisheries in the marine ecosystem, and protection of vulnerable marine ecosystems (VMEs) from bottom fisheries. Many of the paragraphs are general in nature and directed at policy considerations rather than legal implementation. However, there are also paragraphs that call for states to take legal actions at the national level.

The UN General Assembly emphasizes that IUU fishing remains one of the greatest threats to fish stocks and the marine environment, and lists a series of actions that should be taken to counteract this activity, in particular through RFMOs. States are also addressed in various ways, both on policy and suggested measures that require legal implementation at national level.

The UN General Assembly urges states to exercise effective control over their nationals, including beneficial owners, and vessels flying their flag in order to deter them from engaging in IUU fishing or supporting vessels engaged in IUU fishing.

Recent UN General Assembly Resolutions have paid particular attention to the protection of VMEs from fishing activities, particularly bottom fishing and similar destructive fishing practices. The UN General Assembly calls upon states to sustainably manage deep-sea fish stocks and protect VMEs, including seamounts, hydrothermal vents and cold water corals, from destructive fishing practices, recognizing the immense importance and value of deep-sea ecosystems and the biodiversity they contain. In this regard, states are explicitly called upon to ensure that their vessels do not engage in deep-sea fishing until impact assessments have been carried out. States are requested to make publicly available, assessments of whether individual deep-sea fishing activities would have significant adverse impacts on VMEs and the measures adopted, which should be consistent with domestic law.

Furthermore states should identify where VMEs are known to occur or are likely to occur and adopt conservation and management measures to prevent significant adverse impacts on such ecosystems, or close such areas to bottom fishing until conservation and management measures (which can include fisheries closures, gear modification, etc) have been established.

States are requested to establish and implement appropriate protocols, including definitions of what constitutes evidence of an encounter with a VME, in particular threshold levels and indicator species.

The UN General Assembly calls on states to establish mechanisms to promote and enhance compliance with applicable measures related to the protection of VMEs, which would in most cases require implementation in national law.

ANNEX II

Outline example of regional fisheries treaty

Preamble

Note: Introductory statement setting forth the purpose of the treaty in general terms, including references to relevant instruments, documents etc.

Article 1

Use of terms

Note: Description of specific terms used in the treaty, in order to facilitate the understanding and interpretation of the instrument.

Article 2

Objective

Note: Setting forth the purpose and standards that can be achieved, containing the main goals of parties to the treaty.

Article 3

Application

Note: Description of the geographical area, to which the treaty applies as well as targets and activities covered by it.

Article 4

General principles

Note: General principles concerning harvesting of marine living resources may include references to long-term sustainability, science based decisions, maintenance and restoration of the resources, application of the precautionary approach, minimisation of harmful impact on the marine ecosystem, collection and sharing of data, and ensuring effective compliance etc.

Article 5

The Commission

Note: Establishment of the Commission and details concerning participation, chair, meetings etc.

Article 6

Functions of the Commission

Note: Listing the functions and responsibilities of the Commission, related to, inter alia, conservation and management measures, research activities, data and information, and control.

Article 7

Subsidiary bodies of the Commission

Note: If it is decided to establish any subsidiary body of the Commission, its composition, role and functions could be described. Alternatively, it could be a function of the Commission pursuant to

the previous article to establish subsidiary bodies as it considers desirable for its functions and direct activities.

**Article 8
Administration**

Note: Setting forth the functions and responsibilities of the secretariat. Could also include financial arrangements.

**Article 9
Financial arrangements**

Note: Budget, parties contributions, funds from other sources, consequences of being in arrears of payment etc.

**Article 10
Decision-making**

Note: General rule for decisions; consensus and/or potential voting.

**Article 11
Implementation**

Note: Specifying obligations concerning steps to be taken to implement the treaty and relevant decisions by the Commission. These may also include cooperation in furthering the objective of the treaty, enforcement of agreed measures, collection and exchange of scientific, technical, and statistical data and knowledge.

**Article 12
Compliance and enforcement**

Note: Obligations concerning enforcement. Requiring parties to report periodically on implementation of the treaty and Commission's decisions, Based on these reports the Commission assesses compliance.

**Article 13
Transparency**

Note: Describing various categories of observers that may attend meetings of the Commission, and potential its subsidiary bodies, including their rights and obligations. Also to include provisions on access to information by the civil society

**Article 14
Settlement of disputes**

Note: Describe how to handle disputes relating to the interpretation or application of the treaty and decisions taken by the Commission.

Article 15
Signature, ratification, acceptance and approval

Note: Stating who are entitled to become parties to the treaty, as well as the timeframe for signature.

Article 16
Entry into force

Note: Stating when the treaty enters into force, and conditions thereto.

Article 17
Reservations and exceptions

Note: Stating whether or not reservations or exceptions may be made.

Article 18
Declarations and statements

Note: Allowing parties to make statements or declarations that do not exclude or modify the legal effect of the provisions of the treaty.

Article 19
Relationship with other international instruments

Note: Considering references to for example the UNCLOS concerning sovereign rights of coastal States as well as other possible relevant instruments.

Article 20
Amendments to the treaty

Note: Describing the amendment mechanisms such as time frames, communication, adoption and entering into force. If annexes or appendices are regarded as an integral part of the treaty, more flexible mechanism for those.

Article 21
Withdrawal

Note: Describing possible withdrawal procedures.

Article 22
Depositary

Note: Stating who will be the depositary government as well as its obligations and functions.

Article 23
Authentic texts

Note: Stating that, if relevant, texts in different languages of the treaty are equally authentic.