

Identification of inconsistent use of terms, lack of definition of key terms and use of terms that are not “terms of legal art” IOTC Resolutions.

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PURPOSE

To assist participants at the Working Party on The Implementation of Conservation and Management Measures (WPICMM) to identify weaknesses in IOTC Resolutions due to inconsistent use of terms, lack of definition of key terms and use of terms that are not “terms of legal art” and outline area of concerns and recommendations to improve/amend active Resolutions.

BACKGROUND

Little attention has been paid to ensure the global coherence of IOTC conservation and management measures (CMMs). With the growing number of CMMs over the years, the need to clarify the state of these measures was recognized. Efforts to do so started with the adoption of Resolution 13/01 On the Removal of Obsolete Conservation and Management Measures and with the publication of a Compendium of Active Conservation and Management Measures for the Indian Ocean.

Additionally, there has been uncertainty for a number of definitions and the absence of an approved set of definitions of key terms combined with the lack of rigor in the terminology used within and throughout CMMs. It has affected the good and universal comprehension of these measures, which, in turn, is also likely to undermine the effectiveness of their implementation.

This issue was raised by an increasing number of Contracting Parties and Cooperating non-Contracting Parties (CPCs). At its 18th session, the Commission noted confusion among many CPCs regarding the lack of a clear definition of the term “fishing vessels” and agreed that the Compliance Committee (CoC) should develop a recommendation for a clear definition for the terms or expressions “fishing vessels”, “fishing” and “fisheries related activities”.

The 13th meeting of the Compliance Committee considered a set of harmonized Terms and Definitions for IOTC Conservation and management Measures and recommendations of additional measures for strengthening the global coherence of IOTC CMMs.² The Compliance Committee then recommended to the 20th session of IOTC that further work be undertaken in the future to ensure that a harmonized set of Terms and Definitions is developed for the Commission and its subsidiary bodies.³

DISCUSSION

The inconsistent use of terms in IOTC CMMs is underpinned by several elements discussed below, including inconsistent use of terms, lack of definition of key terms and use of terms that are not “legal terms of art”. The inconsistent use is augmented by inconsistent formatting, making it difficult to identify and understand the definition and contributing to the inconsistent use of terms. In addition, terms are used that are not “legal terms of art”, or terms that are misused.

1. INCONSISTENT USE OF TERMS

Inconsistencies in the use of terms appear in the same or different CMMs, and may be based on (a) inconsistent or weak definitions and/or (b) inconsistent use, whether or not definitions are given. Both areas are discussed below.

Where terms are defined, the formatting is inconsistent among CMMs and with standard legal best practices, adding to the confusion. Definition of terms is normally in the first paragraph/section/Article of a legal instrument to provide

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² IOTC-2016-CoC13-13[E]

³ IOTC–2016–S20–R, APPENDIX IXA.

a foundation for common understanding, interpretation and implementation. Among the formatting inconsistencies in the CMMs are definitions that:

- appear together in a preliminary paragraph applicable to the Resolution;⁴
- appear together in a preliminary paragraph, but not in alphabetical order or consistent form;⁵
- form part of a narrative in the text of the Resolution;⁶
- appear in parentheses;⁷
- appear in a footnote.⁸

Additionally, punctuation and style are often not in accordance with standard legal drafting rules. For example, the chapeau/listing style is not used or improperly used in many places, and phrases that should apply to the entire paragraph appear as applying to one element only.

In some cases, a term is defined “for the purposes of this Resolution” but could have much wider application, and this restriction appears to be used inconsistently.

The above is an indication of the ad hoc approach used in drafting the CMMs which has contributed to inconsistent definitions and use of terms and which can impede effective national implementation.

a. Inconsistent, weak or confusing definitions

Where terms used inconsistently are defined, the definitions can appear inconsistently in different resolutions, or be weak or confusing. To assist in understanding the problems, ANNEX 1 presents terms and definitions used in recent CMMs and comments on the inconsistencies and weaknesses. Some case studies of inconsistent use, based on inconsistent, weak or confusing definitions, are shown below.

- **Aircraft** as defined in the preamble of Resolution 16/08 (Prohibition of use of aircraft, unmanned aerial vehicles as fishing aids) *“GIVEN that “Aircraft” means a contrivance used for navigation of, or flight in the air and specifically includes, but is not limited to, planes, helicopters, and any other device that allows a person to fly or hover above the ground. “Unmanned aerial vehicle” means any device capable of flying in the air which is remotely, automatically or otherwise piloted without an occupant, including but not limited to drones;*
 - Definitions should not appear in the preamble, which is not legally binding;
 - These definitions are not a “given”, there are other best practice definitions.
 - These definitions are unwieldy, and tied to “allowing” a person to fly or hover.
 - a best practices definition for “aircraft” includes drones and other: any craft capable of self-sustained movement through the atmosphere and includes hovercraft and unmanned or remotely operated airborne devices.
- **Classification of vessels** Resolution 15/03 (VMS) and 15/04 (IOTC Record of Vessels) refer inconsistently to the authorized fishing vessels and there are several drafting errors in each. A major drafting concern is that the requirement for the vessels to be authorised to fish is not applicable to both categories. A detailed critique of each, and an example of proper legal drafting, is given in ANNEX 1, and summarized below:
 - *15/04 (Record of vessels) requires the Commission to maintain an IOTC Record of fishing vessels that are: a) 24 metres in length overall or above; or b) in case of vessels less than 24 meters, those operating in waters outside the Economic Exclusive Zone of the Flag State; and that are authorised to fish for tuna and tuna-like species in the IOTC area of competence (hereinafter referred to as ‘authorised fishing vessels’, or AFVs).*
 - It is not clear that both classifications of vessels have to be authorised to fish in the IOTC area of competence because this phrase forms part of subparagraph (b), despite the semicolon.

⁴ For example, Resolutions 16/11 and 17/03.

⁵ For example, Resolution 17/03.

⁶ For example, Resolutions 15/04, 17/08.

⁷ For example, Resolution 03/03.

⁸ For example, Resolution 17/07.

- The definition of authorized fishing vessel in Resolution 15/03 is inconsistent with this definition for the same reason.
 - This does not appear as a separate definition in the first paragraph.
 - The term “authorised to fish” is weak because “fish” is defined as the animal – “fishing” is defined as the activity and should be used.
 - Vessels to be used for fishing related activities are excluded by this definition. This is inconsistent with requirements in paragraph 7 which requires the flag CPCs of the vessels on the record to authorise their vessels to “operate” under certain conditions. “Operate” usually covers both fishing and related activities.
 - There is no indication that it is the flag State that must give the authorisation.
 - Areas within and beyond national jurisdiction of the flag State should be referenced, not just the EEZ of the flag State.
- 15/03 (VMS) requires CPCs to adopt a *“satellite-based vessel monitoring system (VMS) for all vessels flying its flag 24 metres in length overall or above or in case of vessels less than 24 meters, those operating in waters outside the Economic Exclusive Zone of the Flag State fishing for species covered by the IOTC Agreement within the IOTC area of competence.”*
 - The words “satellite based” VMS are not always used consistently in the different IOTC Resolutions. Where not used, this indicates that the VMS does not have to be satellite based.
 - There is inconsistency in references to the flag State of vessels of different size. In one case it is “flying its flag”, in another the more objective “flag State”.
 - “Vessel” is not defined, so it is not possible to understand if this applies to all vessels used for fishing and/or related activities, or others as well.
 - The reference to “vessels less than 24 meters” does not refer to “length overall” for consistency.
 - The vessels operation “outside the EEZ of the Flag State” does not address the territorial sea of the flag State, language should refer to areas within or beyond national jurisdiction.
 - There is no definition of “fishing”, and as drafted this Resolution would not apply to related activities. The meaning as written would require a vessel to be actually engaged in fishing before it fell within the requirements for a VMS programme. It is clearer to define “vessel”, either in the Resolution or a Glossary.
 - The word “or” should be replaced by “and”, so both categories of vessels are covered.
 - The way this is drafted, the requirement for the vessel to be operating in the IOTC Area of Competence only applies to vessels less than 24 meters.
 - More importantly, it is inconsistent with the definition of an Authorized vessel in Resolution 15/04, which also require an authorisation to fish.
- **Fish**, as defined in Resolution 16/11 (Port State Measures) means *“all species of highly migratory fish stocks covered by the IOTC Agreement.”* This definition is not consistent with Article III of the IOTC Agreement, SPECIES AND STOCKS, which does not refer to highly migratory fish stocks.
 - Article III provides: *The species covered by this Agreement shall be those set out in Annex B. The term “stocks” means the populations of such species which are located in the Area or migrate into or out of the Area.*
 - Annex B has no title, and simply lists species.
 - Other Resolutions use different terms to designate fish that are covered in the Agreement, including “tuna and tuna-like species”.
 - The Agreement refers many times to “stocks covered by this Agreement”, and not to species covered by this Agreement.
- **Fish aggregating device/instrumented buoy.** FADs are defined in Resolution 15/08 (FADs): “drifting (DFAD) or anchored floating or submerged objects (AFAD) deployed for the purpose of aggregating target tuna species”. Resolution 15/08 has been superceded by Resolution 17/08 (FAD Management Plan), which applies to CPCs having purse seine vessels and fishing on Drifting Fish Aggregating Devices (DFADs),

equipped with instrumented buoys for the purpose of aggregating tuna target species, in the IOTC area of competence. An instrumented buoy is defined as a *buoy with a clearly marked reference number allowing its identification and equipped with a satellite tracking system to monitor its position*. Other buoys, such as radio buoys used on DFADs, not meeting this definition, shall be gradually phased out by the 1st January 2017.

- The definition of FAD as a floating, semi-submerged or submerged object, etc., to attract fish, is not given.
 - The definition in 15/08 has been superseded by 17/08, which does not define FADs or drifting FADs.
 - This leaves a gap if the glossary defines “fishing related activities” as including setting, monitoring, tending and collecting FADs.
 - Reference to vessels “fishing” on DFADs implies that the vessel must be actually fishing; “used for fishing” is preferable.
- **Fisheries (types)** Resolution 15/02 (Statistical reporting requirements) defines the different types of fisheries according to the type of fishing gears used. Longline fisheries are “fisheries undertaken by vessels in the IOTC Record of Authorized Vessels that use longline gear”. By contrast, surface fisheries are “all fisheries undertaken by vessels in the IOTC Record of Authorized Vessels other than longline fisheries; in particular purse-seine, pole-and-line, gillnet fisheries, handline and trolling vessels”.
 - coastal fisheries are not included (Res 01/05), and could be confused with artisanal fisheries.
 - consistency with the descriptions of vessels in other resolutions would need to be established, e.g. “longline vessels” are not generally described as vessels that use longline gear.
 - **“Fishing related activities”** Resolutions 16/11 (Port State Measures) and 17/03 (IUU Vessel List) differ. Apart from some minor editorial differences, the term in the latter CMM is applied to transshipping, etc., *fish and/or fish products* but “fish products” are not included in the former (this is in line with the FAO Agreement). Similarly, the definition of fishing differs slightly, with Resolution 16/11 providing: “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.
 - Resolution 17/03 does not include the word “catching” in italics. In addition, neither refers to setting, monitoring, tending or retrieving fish aggregating devices (defined in Resolution 15/08 which was superseded by Resolution 17/08).
 - This does not include setting, monitoring tending and collecting FADs, as previously discussed in CoC.
 - **“Owner”, “operator” and “master”** are defined in Resolution 17/03 (IUU Vessel List). They are weak, do not reflect standards used in best practices and do not appear alphabetically. The CMM applies to vessels, together with their Owners, Operators and Masters that undertake fishing and fishing related activities, within the IOTC area of competence (IOTC Area). The definitions have a narrow scope, which may be useful for paperwork but perhaps too narrow for compliance purposes. The definitions are shown below and some weaknesses are noted in italics.
 - **“Master”** *means any person holding the most responsible position at any given time on-board a fishing vessel;*
 - Normally applies to persons in aircraft and vehicles as well, for purposes of spotter planes or helicopters used in relation to vessels, could apply also to aircraft as appropriate in relation to vessels in the IOTC Area;
 - Standard of “most responsible position” is subjective and may be difficult to prove, “in command or charge, or apparently in command or charge” is broader and more objective;
 - “on board” is limiting, should simply be “in relation to”.
 - Other weaknesses include failure to define vessels and reference to vessels “undertaking” fishing, which implies intention and fishing activity, and is more specific than “operating”. Also, the vessels could be working with others in a fleet and support their fishing. It could be better to use the term “involved in” or “operating”.
 - Best practice definition: “master” in relation to a vessel or aircraft, means the person in command or charge, or for the time being in charge, or apparently in command or in charge of the vessel or aircraft, but does not include a pilot on board a vessel solely for the purpose of navigation;

- **‘Owner’** means the natural or legal person registered as the owner of a vessel;
 - Joint ownership is not addressed.
 - Best practice definition: “owner” in relation to a vessel means any natural or legal person registered as the owner of the vessel and any person exercising or discharging or claiming the right or accepting the obligation to perform, exercise or discharge any of the powers or duties of the owner whether on the person’s own behalf or on behalf of another, and includes a person who is the owner jointly with one or more other persons and any manager, director, secretary or person in charge of any corporation which is an owner.
- **‘Operator’** means the natural or legal person who is responsible for taking commercial decisions regarding the management and operation of a vessel and includes: *i. a charterer of the vessel*;
 - “Commercial decisions” narrows the standard meaning, because it is not defined. A person could direct activities but easily argue they are not commercial in nature.
 - The best practices definition focuses more on control or apparent control of a vessel or aircraft.
 - Beneficial owner is not included.
 - Best practice definition: “operator” means any person who is in charge of, responsible for the operations of, or directs or controls a vessel, or is apparently in charge of such vessel, including the owner, charterer, master and the beneficiary of the economic or financial benefit of the vessel’s operations.

b. Inconsistent use of terms

Where terms may or may not be defined, there are different ways in which they are used inconsistently.

First is where various terms are used interchangeably in Resolutions. For example:

- The IOTC Record of fishing vessels established by Resolution 15/04 has been referred to as the “IOTC Record of Fishing Vessels”, “IOTC Record”, “IOTC Record of Authorized Vessels” and “IOTC Record of Vessels”;
- The IOTC area of competence designated in Article II of the IOTC Agreement has been referred to as “Area of Competence” and “IOTC Convention Area”;
- The vessel receiving transshipments described under Resolution 14/06 has been referred to as “carrier vessel” and “receiving carrier vessel”;
- Resolution 15/03 (VMS Programme) uses the following terms without definition, and it is difficult to understand the difference: satellite-based vessel monitoring system (VMS); vessel monitoring device; satellite monitoring device; on-board satellite monitoring device; satellite tracking device;
- Resolution 06/03 also uses interchangeably the terms “satellite tracking device”, “vessel monitoring device” and “satellite monitoring device”. None of them is defined. This could cause some confusion, and mindful that the Resolution was adopted some years ago and that the current best practices technical term is “Mobile Transceiver Unit”.
- Resolution 03/01 appears to use “large-scale tuna vessels” and “large-scale fishing vessels” interchangeably.

Second is where different terms are used in various Resolutions to describe the same thing. For example:

- “supply vessel”, “support vessel” auxiliary vessel” and “tender vessel” have been used together or separately to refer to any vessel supporting fishing operations and in particular assisting any purse seiner in the deployment, monitoring and retrieving of drifting FADs;
- “master” and “captain” are used to refer to the person in charge of a vessel;
- “bycatch” is sometimes used with the term “incidental”, and the term “incidental catch” has been used.

Third is where different terms are used to describe similar things. For example:

- The terms “observer”, “scientific observer” and “IOTC observer” are used to refer to the notion of observer, but it is not clear whether they are interchangeable or have different meanings. This may arise because the IOTC observer programme has two different objectives: one is for observers on fishing vessels for scientific purposes (Resolution 11/04) and the other applies to observers on carrier vessels for monitoring transshipments (Resolution 17/06).

Fourth is where the same term may have different meanings in different CMMS. For example:

- Resolution 15/02 defines “artisanal fisheries” as equivalent to “coastal fisheries”, that is fisheries other than longline or surface fisheries.
- Resolution 13/04 and Resolution 13/05 uses the term “artisanal fisheries” to exclude local fishing vessels (artisanal or not) operating exclusively within their flag State’s EEZs.
- Resolution 13/06 differs slightly from the meaning under Resolutions 13/04 and 13/05 as it refers to fishing vessels operating exclusively within their flag State’s EEZ for the purpose of local consumption (subsistence fishing).

2. LACK OF DEFINITION OF KEY TERMS

This section provides a list of terms:

- that are used frequently in the Resolutions but have not been defined;
- where a definition is given in the IOTC Glossary of Scientific Terms but should be reviewed for consistency with international instruments;
- where a definition is needed to accurately reflect language in the IOTC Agreement or another Resolution for clarification and to support consistent use.

The list does not include terms that have been defined, but only “for the purposes of this Resolution” and which could have broader application, for example *fishing, owner, operator, master, related activities, vessel*.

Areas beyond national jurisdiction of the flag State. This term is not used in IOTC Resolutions, but Resolutions should be reviewed to determine whether it is needed to indicate when a flag vessels are in areas beyond the national jurisdiction of its country, rather than “beyond the EEZ”, as discussed above. An alternative is “area beyond national jurisdiction of the flag State”.

Bycatch and Discards. Definitions for these terms are in the IOTC Glossary of Scientific Terms. They could be included in a more general glossary and as appropriate reviewed in light of the characteristics of bycatch and discards in paragraphs 2.4 and 2.5 of the FAO International Guidelines on Bycatch Management and Reduction of Discards.

Conservation and Management Measure. This should refer to IOTC CMMS as mandated in the IOTC Agreement. Articles V(2)(c) and IX, and more generally where not applicable to IOTC to measures consistent with international law.

Gear. A generic definition of fishing gear should be introduced.

Fish. A basic definition of fish should be given, particularly if reference is made to species and stocks not within the mandate of IOTC but incidental to operations.

Fish Aggregating Device. A full definition should be given, including a basic definition of FADs, and reference to anchored and drifting FADs.

Fishery or fisheries. The best practices definition should be given, in line with the definition in the FAO Fisheries Glossary.

Fishing vessel. No definition is provided, but it can include vessels used for harvesting and support (Resolution 15/07: the term includes support and supply vessels, Resolution 15/04 vessels it includes auxiliary, support and supply vessels). **Types of fishing vessels** should also be defined, for example “purse seine vessel” is a fishing vessel equipped with purse seine gear. Depending on the resolution an authorization may or may not be required. If required, it should not be an “authorization to fish” in the IOTC Area, but an authorization “for fishing”, because the fish is the animal and fishing is the activity.

IOTC Area of Competence. This is defined in the Agreement, but other terms are used in Resolutions and this could support consistent use.

IOTC Observer. A definition should be given to support consistent use of terms.

IOTC Record of Fishing Vessels. This is set out in Resolution 15/04, but other terms are used and this could support consistent use of terms.

Landing. A definition of landing is needed, among other things to distinguish it from transshipment and clarify the act of landing for purposes of prohibition of landing, among others.

Logbook (paper and electronic) Resolution 15/01 requires vessels (should be operators of vessels) to keep a bound paper or electronic logbook to record required data, but does not define those terms. Definitions of both types of logbooks should be included.

Transshipment. Resolution 17/06 establishes a programme for transshipment, but does not define transshipment. This should be included.

Vessel monitoring device. This term should be introduced to cover references to satellite tracking device, satellite monitoring device and VMS. Technical input would be needed, the definition of a **mobile transceiver unit** may be introduced as well. Technical advice is needed to understand if the following related terms need definition:

- satellite monitoring device
- on-board satellite monitoring device
- satellite tracking device

Vessel monitoring system. A best practices definition should be given, noting that it is satellite based.

3. USE OF TERMS THAT ARE NOT “TERMS OF LEGAL ART” AND MISUSE OF TERMS

Key terms that are considered “legal art” – those used in international and regional instruments, having a clear universal legal or technical meaning – are often not used where it is necessary to do so for clear meaning. Terms misused, and which should be replaced by terms of “legal art”, are described below.

Generally, terms are sometimes used that inconsistent with the legal terms of art used in the IOTC Agreement, including: “**area of competence**” and “**IOTC Convention Area**” which have been used to refer to the IOTC Area of Competence defined under Article II of the IOTC Agreement; “**highly migratory fish stocks**” referring to species and stocks over which IOTC has a mandate under Article III, which does not mention “highly migratory fish stocks”.⁹

“**Fishing**” is used improperly, for example in Resolution 17/08 when a Resolution refers to vessels “fishing” on FADs, the requirement is applicable to vessels actually engaged in fishing. This narrows the application considerably and should apply instead to vessels “**used for fishing**” or “**operating/that operate**” in specified situations or areas. A wide range of other Resolutions make a similar reference. “Fishing” is well understood and defined in many international instruments.

“**Flag of convenience**” is used improperly and inconsistently in Resolution 99/02. It is not a legal term of art, and recent instruments, including the FAO Voluntary Guidelines on Flag State Performance, refer instead to “**flags of non-compliance**”. The reason for this is the legal duty for flag States to effectively control their vessels, and many open registry countries (“flag of convenience” countries) now do so. The issue has become one of non-compliance.

“**(flag vessels) fishing outside the (flag State) EEZ**”. Where CMMs are applied to flag vessels “fishing outside the flag State EEZ”: There are two legal concerns: (a) this would apply to fishing in all areas under the IOTC competence: on the high seas, in other countries’ waters but also *in other zones of the flag country – e.g. the territorial sea*. The IOTC Agreement does not expressly exclude the territorial sea from its mandate. (b) If a country’s maritime zones do not include an EEZ as such, this would be inapplicable. The legal term of art to be used is **fishing outside areas under national jurisdiction**.

“**IUU Fisheries**” is used in Resolutions 15/04 and 14/05, the term “**IUU fishing**” is well understood and defined.

“**Private access agreement**” in Resolution 14/05 refers to a CPC issuing licenses to foreign vessels under a private access agreement or under a government to government access agreement. This term is not used in international fisheries instruments or national laws and instead **government to industry access agreement** is normally used.

“**Regional fishery management bodies**” is referenced in Resolution 03/03. The legal term of art is “**regional fisheries management organizations**”. “**Regional fishery bodies**” may be used where the body does not have a management mandate.

4. CONCLUSIONS AND RECOMMENDATIONS TO IMPROVE/AMEND ACTIVE RESOLUTIONS

This paper has identified several types of legal shortcomings in active IOTC Resolutions and given examples of each. The shortcomings include:

⁹ Article III. SPECIES AND STOCKS The species covered by this Agreement shall be those set out in Annex B. The term “stocks” means the populations of such species which are located in the Area or migrate into or out of the Area.

- Inconsistencies in the use of terms, whether based on inconsistent or weak definitions or on simple use;
- Failure to define key words;
- Failure to use “legal terms of art”, and misuse of terms.

Other important related aspects were identified, including:

- Improper legal drafting style, including formatting and punctuation, which changes the legal meaning;
- Improper placement of definitions in the Resolutions (e.g. footnotes, preambles) which diminishes their legal effectiveness;
- Limiting the application of the definition to the Resolution in which it appears, when it could or should have a broader application.

A separate paper, WPICMM01-04, presents a glossary of terms and definitions to be used by Members while drafting proposals for Resolutions of the Commission.

It is clear that improvement or amendment of active IOTC Resolutions will need to take into account all of the foregoing. It is therefore recommended that the following actions be considered:

1. The Glossary should be included in the IOTC Compendium of Resolutions, together with a framework for its use. For example, the glossary should be used as a basis for interpretation of all terms in IOTC active Resolutions. Definitions in the glossary would apply except where there is conflict with the context, intent and meaning of an adopted Resolution. It would also be used as a basis for preparation of new Resolutions.
2. A legal “scrub” of the active Resolutions should be performed, which could include both substance and style, and a Resolution prepared for consideration that recommends improvements/amendments. As appropriate, if it is decided to focus the “scrub” on priority areas, guidelines should be agreed to identify criteria for establishing priorities. For example, it should apply to key terms and inconsistencies based on the frequent use or importance of the terms.
3. For use of members in preparing future resolutions, and as appropriate for purposes of the “scrub”, a style guide for legal drafting could be prepared in order to ensure that the meaning of the terms remain intact and to support harmonized interpretation. In the alternative, proposed Resolutions could be submitted for legal review and recommendations to ensure proper legal language and style are used. A specific procedure should be endorsed by the Commission and the necessary budget should be allocated for a legal expert to undertake the legal review before discussion at the Commission meeting.

RECOMMENDATION

That the WPICMM:

- 1) **NOTE** paper IOTC–2018–WPICMM01–03, which identifies inconsistent use of terms, lack of definition of key terms and use of terms that are not “legal terms of art” in IOTC Resolutions, and makes recommendations to improve/amend active IOTC Resolutions,
- 2) **RECOMMEND** review recommendations to improve/amend active IOTC Resolutions and submit to the Compliance Committee for its consideration and potential endorsement,
- 3) **RECOMMEND** a way forward to improve/amend active IOTC Resolutions based on the analysis describe in this paper,
- 4) **NOTE** Appendix A.

APPENDICES

Appendix A: *Comments on terms defined or used in select IOTC Resolutions*

APPENDIX A

COMMENTS ON TERMS DEFINED OR USED IN SELECT IOTC RESOLUTIONS

Resolution	Term	Definition	Comment
RESOLUTION 17/08 PROCEDURES ON A FISH AGGREGATING DEVICES (FADS) MANAGEMENT PLAN, INCLUDING A LIMITATION ON THE NUMBER OF FADS, MORE DETAILED SPECIFICATIONS OF CATCH REPORTING FROM FAD SETS, AND THE DEVELOPMENT OF IMPROVED FAD DESIGNS TO REDUCE THE INCIDENCE OF ENTANGLEMENT OF NON-TARGET SPECIES	<ul style="list-style-type: none"> • Fish Aggregating Device • Instrumented buoy 	<p>2. This Resolution defines an instrumented buoy as a buoy with a clearly marked reference number allowing its identification and equipped with a satellite tracking system to monitor its position. Other buoys, such as radio buoys used on DFADs, not meeting this definition, shall be gradually phased out by the 1st January 2017.</p> <p>11. For the purpose of this Resolution, the term Fish Aggregating Device means drifting (DFAD) or anchored floating or submerged objects (AFAD) deployed for the purpose of aggregating target tuna species.</p>	<p>Inconsistency in language defining terms: “defines” and “means”.</p> <p>Inconsistent definition in context of Resolution – paragraph 11 refers to the “purpose of this Resolution”, but this limitation is not expressed in paragraph 2.</p> <p>Where terms are defined in Resolutions, it is recommended to do this for any and all terms in one preliminary paragraph.</p>
RESOLUTION 17/04 ON A BAN ON DISCARDS OF BIGEYE TUNA, SKIPJACK TUNA, YELLOWFIN TUNA, AND NONTARGETED SPECIES CAUGHT BY PURSE SEINE VESSELS IN THE IOTC AREA OF COMPETENCE	Unfit for human consumption	<p>"unfit for human consumption" are fish that: - is meshed or crushed in the purse seine; or - is damaged due to depredation; or - has died and spoiled in the net where a gear failure has prevented both the normal retrieval of the net and catch, and efforts to release the fish alive; -</p> <p>"unfit for human consumption" does not include fish that: - is considered undesirable in terms of size, marketability, or species composition; or - is spoiled or contaminated as the result of an act or omission of the crew of the fishing vessel.</p>	<p>The formatting, language and grammar are not in clear legal style that can be easily implemented in national legislation.</p> <p>The use of plural and singular are inconsistent, for example “ unfit for human consumption ‘are’ fish that... ‘is’”.</p> <p>It would give the meaning greater scope if the examples of ‘unfit for human consumption’ were inclusive.</p> <p>Conjunctives and disjunctives (‘and’, ‘or’) should only appear once.</p> <p>An example of acceptable drafting:</p> <p>"unfit for human consumption"</p>

Resolution	Term	Definition	Comment
			<p>(a) <i>includes</i> fish that:</p> <ul style="list-style-type: none"> i) <i>are</i> meshed or crushed in the purse seine; ii) <i>are</i> damaged due to depredation; or iii) <i>have</i> died and spoiled in the net where a gear failure has prevented both the normal retrieval of the net and catch and efforts to release the fish alive. <p>(b) <i>does not include</i> fish that:</p> <ul style="list-style-type: none"> i) <i>are</i> considered undesirable in terms of size, marketability, or species composition; or ii) <i>are</i> spoiled or contaminated as the result of an act or omission of the crew of the fishing vessel.
<p>RESOLUTION 16/08 ON THE PROHIBITION OF THE USE OF AIRCRAFTS AND UNMANNED AERIAL VEHICLES AS FISHING AIDS</p>	<ul style="list-style-type: none"> • Aircraft, • Unmanned aerial vehicle 	<p>GIVEN that “Aircraft” means a contrivance used for navigation of, or flight in the air and specifically includes, but is not limited to, planes, helicopters, and any other device that allows a person to fly or hover above the ground. “Unmanned aerial vehicle” means any device capable of flying in the air which is remotely, automatically or otherwise piloted without an occupant, including but not limited to drones;</p>	<p>These definitions appear in the preamble.</p> <p>Definitions are agreed and should not be described as a “given” unless there is reference to an internationally or regionally agreed instrument.</p> <p>This definition is not standard. Aircraft do not “allow a person” to fly, as permission does not need to be sought.</p> <p>A possible definition would refer to any craft capable of self-sustained movement through the atmosphere, and includes planes, helicopters and (as appropriate) unmanned or remotely operated airborne devices.</p>
<p>RESOLUTION 16/11 ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING</p>	<ul style="list-style-type: none"> • fish • fishing • fishing related activities • illegal, unreported and unregulated fishing 	<p>1. Use of terms</p> <p>For the purposes of this Resolution:</p> <ul style="list-style-type: none"> a) “fish” means all species of highly migratory fish stocks covered by the IOTC Agreement; 	<p>These definitions are consistent with those in the FAO Agreement on Port State Measures.</p> <p>“fish” does not conform to “legal terms of art” standards because it does not refer to the definition in</p>

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	<ul style="list-style-type: none"> • port • vessel 	<p>b) “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;</p> <p>c) “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;</p> <p>d) “illegal, unreported and unregulated fishing” refers to the activities set out in paragraph 1 of the Resolution 09/03 [superseded by Resolution 11/03, then by Resolution 17/03];</p> <p>e) “port” includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying; and</p> <p>f) “vessel” means 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.</p>	<p>the IOTC Agreement, and varies from it.</p> <p>“Article III. SPECIES AND STOCKS The species covered by this Agreement shall be those set out in Annex B. The term “stocks” means the populations of such species which are located in the Area or migrate into or out of the Area.</p> <p>It is inconsistent with the PSMA definition, which refers to “all species of living marine resources, whether processed or not”</p> <p>For purposes of all Resolutions, the best legal definition is: all species and stocks identified in Article III of the IOTC Agreement, being species set out in Annex B and the populations of such species located in the Area or migrate into or out of the Area.</p>
<p>RESOLUTION 17/07 TO PROHIBIT THE USE OF LARGE-SCALE DRIFTNETS ON THE HIGH SEAS IN THE IOTC AREA</p>	<ul style="list-style-type: none"> • Large-scale driftnets • Configured 	<p>1 “Large-scale driftnets” are defined as gillnets or other nets or a combination of nets that are more than 2.5 kilometers in length whose purpose is to enmesh, entrap, or entangle fish by drifting on the surface of, or in, the water column.</p> <p>2 “Configured” to use large-scale drift-nets means having on board assembled gear that collectively would allow the</p>	<p>Definitions appear in footnotes. It is not acceptable format to indicate legal meaning in footnotes, definitions should be in the text of the instrument because they are applicable to the entire instrument.</p>

Resolution	Term	Definition	Comment
		vessel to deploy and retrieve large-scale driftnets	
RESOLUTION 17/03 ON ESTABLISHING A LIST OF VESSELS PRESUMED TO HAVE CARRIED OUT ILLEGAL, UNREPORTED AND UNREGULATED FISHING IN THE IOTC AREA OF COMPETENCE	<ul style="list-style-type: none"> • Owner • Operator • Master • fishing • fishing related activities • Information 	<p>Use of terms</p> <p>1. For the purpose of this Resolution:</p> <p>a) ‘Owner’ means the natural or legal person registered as the owner of a vessel;</p> <p>b) ‘Operator’ means the natural or legal person who is responsible for taking commercial decisions regarding the management and operation of a vessel and includes: i. a charterer of the vessel;</p> <p>c) ‘Master’ means any person holding the most responsible position at any given time on-board a fishing vessel;</p> <p>d) ‘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, taking or harvesting of fish;</p> <p>e) ‘fishing related activities’ means any operation in support of, or in preparation for, fishing, including landing, packaging, processing, transshipment or transport of fish and/or fish products that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear, food and other supplies at-sea;</p> <p>f) ‘Information’ means suitably and sufficiently documented data which is capable of being presented as evidence to the Compliance Committee and/or Commission of any facts in issue.</p> <p>g) the singular also includes the plural.</p>	<p>Formatting</p> <ul style="list-style-type: none"> • The terms are not in alphabetical order, and the case used for the terms (upper, lower) is inconsistent. • There is an error in (c), which has a sub-i; this formatting should be used only when there is a sub-ii. • Sub-(g) should not appear as an additional numbered subparagraph, but should be open and applicable to all the above. However, it is not normally used as statutory interpretation assumes that the singular includes the plural. <p>Legal Substance</p> <p>“Master”</p> <ul style="list-style-type: none"> • Normally applies to persons in aircraft and vehicles as well, for purposes of spotter planes or helicopters used in relation to vessels, could apply also to aircraft as appropriate in relation to vessels in the IOTC Area; • Standard of “most responsible position” is subjective and may be difficult to prove, “in command or charge, or apparently in command or charge” is broader and more objective; • “on board” is limiting, should simply be “in relation to”. • Other weaknesses include failure to define vessels and reference to vessels “undertaking” fishing, which implies intention and fishing activity, and is more specific than “operating”. Also, the vessels could be working with others in a fleet and support

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			<p>their fishing. It could be better to use the term “involved in” or “operating”.</p> <ul style="list-style-type: none"> • Best practice definition: “master” in relation to a vessel or aircraft, means the person in command or charge, or for the time being in charge, or apparently in command or in charge of the vessel or aircraft, but does not include a pilot on board a vessel solely for the purpose of navigation; <p>Operator</p> <ul style="list-style-type: none"> • “Commercial decisions” narrows the standard meaning, because it is not defined. A person could direct activities but easily argue they are not commercial in nature. • The best practices definition focuses more on control or apparent control of a vessel or aircraft. • Beneficial owner is not included. • Best practice definition: “operator” means any person who is in charge of, responsible for the operations of, or directs or controls a vessel, or is apparently in charge of such vessel, including the owner, charterer, master and the beneficiary of the economic or financial benefit of the vessel’s operations. <p>Owner</p> <ul style="list-style-type: none"> • Joint ownership is not addressed. • Best practice definition: “owner” means any person exercising or discharging or claiming the right or accepting the obligation to perform, exercise or discharge any of the powers or duties of an owner whether on the person’s own behalf or on behalf of another, and includes a person who is the owner jointly with one or more other persons and any manager, director, secretary or person in

Resolution	Term	Definition	Comment
			charge of any corporation which is an owner.
<p>RESOLUTION 15/04 CONCERNING THE IOTC RECORD OF VESSELS AUTHORISED TO OPERATE IN THE IOTC AREA OF COMPETENCE</p>	<ul style="list-style-type: none"> • IOTC Record of Fishing Vessels 	<p>1. The Commission shall maintain an IOTC Record of fishing vessels that are:</p> <p>a) 24 metres in length overall or above; or</p> <p>b) in case of vessels less than 24 meters, those operating in waters outside the Economic Exclusive Zone of the Flag State; and that are authorised to fish for tuna and tuna-like species in the IOTC area of competence (hereinafter referred to as ‘authorised fishing vessels’, or AFVs).</p>	<p>The term is “IOTC Record of fishing vessels”, but the term “Record of Authorised Fishing Vessels”</p> <p>It is not clear that both classifications of vessels have to be authorised to fish in the IOTC area of competence because this phrase forms part of subparagraph (b), despite the semicolon.</p> <p>The lack of clarity inspired confusion in Resolution 15/03, which is also inconsistent with this definition.</p> <p>This does not appear as a separate definition.</p> <p>There is no indication that it is the flag State that must give the authorisation.</p> <p>Areas within and beyond national jurisdiction of the flag State should be referenced, not just the EEZ of the flag State. See under Resolution 15/03 for proposed definition.</p>
		CONFUSING LANGUAGE	
<p>RESOLUTION 15/03 ON THE VESSEL MONITORING SYSTEM (VMS) PROGRAMME</p>	<ul style="list-style-type: none"> • “satellite-based” vessel monitoring system • flying its flag • flag State • vessel • Exclusive Economic Zone • vessels fishing 	<p>Each Contracting Party and Cooperating Non-Contracting Party (CPC) shall adopt a satellite-based vessel monitoring system (VMS) for all vessels flying its flag 24 metres in length overall or above or in case of vessels less than 24 meters, those operating in waters outside the Economic Exclusive Zone of the Flag State fishing for species covered by the IOTC Agreement within the IOTC area of competence.</p>	<p>The words “satellite based” VMS are not used consistently in the context of different Resolutions. Where that language is omitted this is indicative that the VMS does not have to be satellite based.</p> <p>There is inconsistency in references to the flag State of vessels of different size. In one case it is “flying its flag”, in another the more objective “flag State”.</p>

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			<p>“Vessel” is not defined, so it is not possible to understand if this applies to all vessels used for fishing and/or related activities, or others as well.</p> <p>The reference to “vessels less than 24 meters” does not refer to “length overall” for consistency.</p> <p>The vessels operation “outside the EEZ of the Flag State” does not address the territorial sea of the flag State, language should refer to areas within or beyond national jurisdiction.</p> <p>There is no definition of “fishing”, and this would not apply to related activities. The meaning as written would require a vessel to be actually engaged in fishing before it fell within the requirements for a VMS programme. It is clearer to define “vessel”, either in the Resolution or a Glossary.</p> <p>The word “or” should be replaced by “and”, so both categories of vessels are covered.</p> <p>The way this is drafted, the requirement for the vessel to be operating in the IOTC Area of Competence only applies to vessels less than 24 meters. Suggested drafting to capture the above (mindful that this is incorrect if operation in the IOTC Area is applicable to both large and smaller vessels).</p> <p>More importantly, it is inconsistent with the definition of an Authorized vessel in Resolution 15/04:</p> <p>in case of vessels less than 24 meters, those operating in waters outside the Economic Exclusive Zone of the Flag State; and that are authorised to fish for tuna and tuna-like species in the IOTC area of competence (hereinafter referred to as ‘authorised fishing vessels’, or AFVs).</p> <p>Each Contracting Party and Cooperating Non-Contracting Party (CPC) shall adopt a satellite-based vessel monitoring system (VMS) for</p>

Resolution	Term	Definition	Comment
			<p>all vessels flying its flag that are:</p> <p>(a) 24 metres in length overall or above; and</p> <p>(b) less than 24 meters in length overall and operate in areas beyond national jurisdiction of the flag State and within the IOTC Area of Competence in relation to species within the mandate of the IOTC Agreement.</p> <p>“vessel” means any vessel, ship of another type of boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities.</p> <p>A definition of “fishing related activities” should be given, or reference made to a glossary.</p>
<p>RESOLUTION 03/03 CONCERNING THE AMENDMENT OF THE FORMS OF THE IOTC STATISTICAL DOCUMENTS</p>	<ul style="list-style-type: none"> • (regional fishery management bodies – improper term) • improperly documented 	<p>Preamble:</p> <p>The Commission shall communicate with other relevant regional fishery management bodies which established the statistical document programs and the authorised vessel records and request them to implement the similar reform</p> <p>4. Shipments of Bigeye tuna that are accompanied by improperly documented Bigeye Tuna Statistical Documents (i.e., improperly documented means that the Bigeye Tuna Statistical Document is either missing from the shipment, incomplete, invalid or falsified) will be considered illegitimate shipments of Bigeye tuna...</p>	<p>The term “regional fishery management bodies” is not a proper legal term of art; “fisheries” should replace “fishery” and “organizations” should replace “bodies”.</p> <p>Otherwise “regional fishery bodies” refers to those with advisory mandates only.</p> <p>The term “improperly documented” is defined in parentheses. It is not acceptable format to indicate legal meaning in parentheses, definitions should be in the text of the instrument because they are applicable to the entire instrument.</p>