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**The Impracticability Exemption to the WCPFC's Prohibition
on Transshipment on the High Seas**

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Chris Wold*
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* Professor of Law and Director, International Environmental Law Project, Lewis & Clark Law School; wold@lclark.edu. He also thanks IELP law clerks Manisha Chowdhry, Danielle Elefritz, Nick Tealer, and Tayt Weingarten for their valuable research, as well as Vivian Fernandes, FFA Compliance Policy Advisor, and Wez Norris, Pontus Consulting, for their fantastic comments that significantly improved this paper. The views expressed in this paper remain those of the author alone.

The Impracticability Exemption to the WCPFC's Prohibition on Transshipment on the High Seas

I. Introduction

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Pacific Ocean (WCPFC Convention) establishes the Western and Central Pacific Fisheries Commission (WCPFC)¹ to manage tuna and other fish stocks in an area that covers roughly 20% of Earth's surface.² The WCPFC includes a mix of Pacific Island States that manage tuna stocks in their jurisdictional waters and rely on tuna as a major economic resource and distant water fishing nations that have historically had short-term economic interests in the fisheries.³ As a consequence, the WCPFC has found it difficult to manage tuna and other species effectively, with the short-term profit motives often prevailing over a more conservation-oriented approach. For example, Pacific bluefin tuna is now at 2.6% of historic spawning biomass and stock levels for other tuna species appear headed in the same direction.⁴

Fisheries scientists tasked with providing advice to the WCPFC on maximum sustainable yields for fish catches have been challenged to provide this advice⁵ for a number of reasons,⁶

¹ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 2275 U.N.T.S. 40532 [hereinafter WCPFC Convention], <https://www.wcpfc.int/system/files/text.pdf>.

² WCPFC, Frequently Asked Questions and Brochures, About WCPFC, <https://www.wcpfc.int/frequently-asked-questions-and-brochures>.

³ Pepe Clarke, *Management of Tuna Fisheries in the Western and Central Pacific*, in SHARED RESOURCES: ISSUES OF GOVERNANCE 199, 203–204 (Sharelle Hart ed., 2008) (describing how Japan, Chinese Taipei, South Korea, and the United States—all distant water fishing nations—wanted the fish for commercial sale at large profit margins, whereas the Pacific island developing states wanted greater economic benefits from their tuna fisheries).

⁴ WCPFC, *Report of the Twelfth Regular Session of the Scientific Committee*, xvii (2016), https://www.wcpfc.int/system/files/01_SC12%20Summary%20Report-adopted%20-%202013Oct2016%20%28t-c%29_3.pdf.

⁵ A regular feature of WCPFC meetings is a document, prepared by the WCPFC's science providers, called "data gaps." See, e.g., Peter Williams, WCPFC, Scientific Data Available to the Western and Central Pacific Fisheries Commission, WCPFC-SC11-2015- ST WP-1 rev.1 (2015) [hereinafter Data Gaps 2015], <https://www.wcpfc.int/system/files/ST-WP-01%20Data%20Gaps%20Rev1.pdf>; Peter Williams, WCPFC, Scientific Data Available to the Western and Central Pacific Fisheries Commission, WCPFC-SC10-2014/ST WP-1 (2014), <http://www.wcpfc.int/system/files/SC10-ST-WP-01%20Data%20Gaps.pdf>.

⁶ For example, several WCPFC members refused to provide operational level data on fish catches. Chris Wold et al., *Bringing Pacific Bluefin Tuna Back from the Brink: Ensuring the Submission of Operational Data to the Western and Central Pacific Fisheries Commission*, 6 MICH. J. ENVTL. & ADMIN. L. 239 (2016), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=mjreal>. These members now appear to be providing that data moving forward but they still have not provided historical data on fish catches. Peter Williams, WCPFC, Scientific Data Available to the Western and Central Pacific Fisheries Commission, WCPFC-SC13-2017/ST-WP-01, 1 (2017) (stating that "The continued provision of operational data for the Japanese, Chinese and Korean tuna fleets is also noteworthy."), available at https://www.wcpfc.int/system/files/ST-WP-01%20Data%20Gaps_1.pdf. See also Chris Wold et al., *Bringing Pacific Bluefin Tuna Back from the Brink: Enhancing Understanding of the Scientific Process in the Western and Central Pacific Fisheries Commission*, 42 B.C. ENVTL. AFFAIRS L. REV. 347 (2015) available at http://ealr.bclawreview.org/files/2015/04/03_wold.pdf (describing the conflicting scientific advice that the WCPFC receives from its two different science providers).

including “important gaps” in catch, effort, and size composition data.⁷ For example, the vessels of some members transship fish on the high seas to carrier vessels (often referred to as refrigerated vessels or “reefers”), non-fishing vessels with massive capacity to move refrigerated or frozen fish from ocean to port.⁸ Most regional fisheries management organizations (RFMOs) like the WCPFC have identified transshipment at sea—both within waters under national jurisdiction and on the high seas—as a major concern because it is difficult, if not impossible, to monitor.⁹ Without effective monitoring, transshipment provides easy opportunities to mix illegal or unreported catch with legal catch, thus allowing illegal operators to “launder” their product.¹⁰ Transshipment at sea has also been implicated in a range of criminal activities, including wildlife trafficking, drug trafficking, human smuggling, and more.¹¹

For these reasons, the international community has sought to limit or ban transshipment at sea. The UN Fish Stocks Agreement requires flag States to regulate transshipment on the high seas “to ensure that the effectiveness of conservation and management measures is not undermined.”¹² The United Nations General Assembly has noted “the importance of adequately regulating, monitoring and controlling trans-shipment at sea to contribute to combating illegal, unreported and unregulated fishing activities.”¹³ It has called on States to take “all measures necessary” to ensure that vessels flying their flag do not transship fish caught by vessels engaged in illegal, unreported, and unregulated (IUU) fishing by monitoring, controlling, and preventing transshipment at sea.¹⁴ The UN Food and Agriculture Organization (FAO) Technical Guidelines for Responsible Fisheries state that a high seas transshipment ban would be an effective means of limiting IUU fishing.¹⁵

The WCPF Convention and the WCPFC have also sought to limit transshipment at sea, but they have established different transshipment rules for purse seine vessels and other fishing vessels. The WCPF Convention expressly prohibits transshipment at sea (on the high seas and in a WCPFC

⁷ Peter Williams, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, WCPFC-SC14-2018 ST-WP-01 (Rev. 1) (Aug. 13, 2018), available at <https://www.wcpfc.int/file/218151/download?token=6FMZgOhS>.

⁸ Lacey Malarky & Beth Lowell, No More Hiding at Sea: Transshipping Exposed, 4 (Oceana, Feb. 22, 2017), available at https://usa.oceana.org/sites/default/files/oceana_transshipping_exposed_report_final_0.pdf.

⁹ Christopher Ewell et al., *Potential Ecological and Social Benefits of a Moratorium on Transshipment on the High Sea*, 81 MARINE POL’Y 293, 296 (2017).

¹⁰ *Id.* at 294–95.

¹¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN THE FISHING INDUSTRY: FOCUS ON TRAFFICKING IN PERSONS, SMUGGLING OF MIGRANTS, ILLICIT DRUGS TRAFFICKING 10 (2011), available at [http://www.unodc.org/documents/human-trafficking/Issue Paper - TOC in the Fishing Industry.pdf](http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf).

¹² U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of this United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, UNDOC A/Conf.164/37, art. 18(1) (entered into force Dec. 11, 2001) [hereinafter Fish Stocks Agreement].

¹³ UN General Assembly, *Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments*, UNGA Res. A/Res/70/75, preamble, para. 27 (Feb. 22, 2016) (adopted without a vote Dec. 6, 2016), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/414/49/PDF/N1541449.pdf?OpenElement>.

¹⁴ *Id.* at ¶¶ 79, 99.

¹⁵ FAO, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 29 (FAO Technical Guidelines for Responsible Fisheries, No. 9, 2002), available at <http://www.fao.org/3/a-y3536e.pdf>.

Member's territorial sea and exclusive economic zone) by purse seine vessels operating within the WCPFC Convention Area.¹⁶ For longliners and other vessels, however, the WCPF Convention only requires WCPFC members and cooperating non-parties (collectively known as CCMs) to “encourage their vessels, to the extent practicable, to conduct transshipment in port.”¹⁷ Through a binding conservation and management measure (CMM)—CMM 2009–06—the WCPFC prohibits longliners and other vessels from transshipping on the high seas except where CCM has determined that “it is *impracticable* for certain vessels . . . to operate without being able to tranship on the high seas.”¹⁸ CMM 2009–06 requires WCPFC Members to make vessel-specific determinations as to impracticability and submit a plan detailing the steps being taken to encourage transshipment in port.¹⁹ However, certain CCMs are not implementing either of these duties and transshipment on the high seas has become the norm rather than the exception.²⁰ More than 50% of longline and other non-purse vessels are registered to tranship on the high seas²¹ and significant amounts of valuable tuna, including 36.9% of bigeye tuna, are transhipped on the high seas.²² Clearly, CMM 2009–06 is not effectively reducing transshipment on the high seas.

Moreover, the evidence indicates that transshipment in port is not impracticable. Port infrastructure throughout the region is sufficient to support and supply fishing vessels.²³ The purse seine fleet, which catches a significant amount of fish on the high seas,²⁴ still manages to tranship in port. At least three longline fleets—those of the EU, Japan, and the United States—fish on the high seas hundreds of nautical miles from port yet tranship all (EU and U.S.) or most (Japan) of their high seas catch in port.²⁵ A large number of high seas transshipments occur just outside the exclusive economic zones (EEZs) of CCMs,²⁶ suggesting that these vessels are able to travel a much shorter distance than the EU, U.S. and Japanese longliners do to transship in port and that they are moving from waters under national jurisdiction to the high seas in order to avoid monitoring by coastal State CCMs. In fact, over the last two years, just three CCMs—China,

¹⁶ WCPF Convention, *supra* note 1, at art. 29(5).

¹⁷ *Id.* at art. 29(1). In addition, it requires transshipping in jurisdictional waters to take place in accordance with applicable national laws WCPF Convention, *supra* note 1, at art. 29(2).

¹⁸ WCPFC, *Conservation and Management Measure on the Regulation of Transshipment*, Conservation and Management Measure 2009–06, ¶ 34 (emphasis added) [hereinafter CMM 2009–06], available at <https://www.wcpfc.int/doc/cmm-2009-06/conservation-and-management-measure-regulation-transshipment-0>.

¹⁹ *Id.* at ¶ 35(a)(ii), (v).

²⁰ WCPFC, *Guidelines for Determining Impracticability—High Seas Transshipment Activities*, WCPFC-TCC9-2013-17, at 9 (2013) (stating that Members have not complied with paragraph (a)(v)), available at <https://www.wcpfc.int/system/files/WCPFC-TCC9-2013-17%20Guidelines%20for%20determining%20impracticability-%20high%20seas%20transshipment.pdf>; WCPFC, *Development of Guidelines for High Seas Transshipment from Vessels Other than Purse Seine Vessels (CMM 2009-06 Para 37)*, WCPFC-TCC12-2016-15_rev2 (2016) (stating that since July 2014 determinations of impracticability must be implied from information in the WCPFC's Record of Fishing Vessels), available at https://www.wcpfc.int/system/files/WCPFC-TCC12-2016-15_rev2%20Draft%20Guidelines%20on%20Impracticability%20of%20Transshipment.pdf.

²¹ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 15.

²² WCPFC Secretariat, *Annual Report on WCPFC Transshipment Reporting, with an Emphasis on High Seas Activities*, WCPFC-TCC13-2017-RP03, tbl. 3 (2017), available at: https://www.wcpfc.int/system/files/WCPFC-TCC13-2017-RP03%20Transshipment%20Report_0.pdf.

²³ See *infra* Section VI.B.

²⁴ Personal Communication with Peter Williams, Oceanic Fisheries Programme (OFP), Secretariat of the Pacific Community (SPC) (Dec. 5, 2017).

²⁵ See *infra* Section III.C.

²⁶ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at figs. 3, 4, 5.

Chinese Taipei, and Vanuatu—accounted for 84% and 89% of those transshipments in 2015 and 2016, respectively.²⁷ Moreover, costs associated with transshipment in port are insignificant in relation to the costs of operating a tuna vessel.²⁸ Fuel and labor costs do not fully explain an impracticability of transshipping in port as overcapacity may play a more significant role as evidenced by the profitability of the Japanese fleet.²⁹ Given the variables affecting profitability—operational costs, subsidies, over-capitalization—assessing whether transshipment in port causes “significant economic hardship” on a vessel-by-vessel basis is challenging. Even two factors that have been proposed recently for exemptions from a high seas transshipment ban—the lack of ultra-low temperature (ULT) freezer capacity at some ports³⁰ and the need to get fresh fish to market—are questionable.

Thus, this paper proposes replacement of the “impracticability” test with bright line rules. It begins with a presumption against transshipment on the high seas but allows, at least in the short term, exemptions to tranship ULT frozen fish from a fishing vessel to a carrier vessel with ULT freezer capacity and for fresh fish. However, it directs the WCPFC Secretariat to study whether ports have a shortage of ULT freezer capacity and whether carrier vessels can be placed in various ports to accept ULT frozen fish just as they would on the high seas. It also directs the Secretariat to identify the circumstances under which fresh fish needs to be transhipped in order to maintain a high-quality fish product. In addition, and in sharp contrast to the current regime, the exemptions must be approved by the WCPFC; they cannot be unilaterally established. The abject failure of CCMs to comply with the WCPFC’s information requirements, including the submission of a plan to encourage transshipment in port, indicates that unilateral decision-making should be abandoned. Moreover, to promote the implementation of a plan to encourage transshipment in port, exemptions may not be granted for more than three years. While a CCM may apply for a new exemption for a vessel at the end of the three years, presumably the WCPFC will want evidence that the CCM is implementing its plan before granting the exemption.

Section II of this paper describes the reasons why the international community has moved to limit transshipment at sea, particularly transshipment on the high seas. Section III reviews the rules for transshipment in the WCPFC as well as the current transshipment practices of CCMs. Section IV summarizes two previous Secretariat proposals to revise the impracticability standard as well as the transshipment rules of the four other tuna RFMOs. Section V discusses CCMs’ views of the impracticability standard as well as their views of the two Secretariat proposals. Section VI evaluates a number of factors, including location of the catch, port infrastructure and fuel costs, and concludes that transshipment in port is not impracticable. Section VII then recommends the rejection of the impracticability standard and articulates a new test for granting time-limited exemptions to a ban on high seas transshipment. Section VIII concludes that the WCPFC should adopt this new test to protect the region’s most valuable economic resource, prevent IUU fishing, and minimize human rights abuses and illegal activity associated with transshipment on the high seas.

²⁷ *Id.* at tbl. 2.

²⁸ *See infra* Section VI.C.

²⁹ *See infra* Section VI.D.

³⁰ *See infra* Section VI.B. *See also Development of Guidelines for High Seas Transshipment, supra* note 20, at ¶ 19.

II. The Move Towards Transshipment in Port

Transshipment, as defined by the WCPFC, is the unloading of all or any of the fish aboard a fishing vessel to another fishing vessel, including support ships and carrier vessels, either at sea or in port.³¹ Transshipment is a practice that allows fishing vessels to offload their catch, take on supplies, and continue fishing without leaving their fishing grounds.³² Fishing vessels can thus stay at sea and continue fishing “for many years at a time.”³³ Fishing vessels that tranship at sea likely save time and money by avoiding fuel costs and eliminating the time needed to transit to port for transshipment.³⁴ As Interpol reports, “[i]t makes commercial sense for [fishing vessels] to tranship and resupply near the fishing grounds, which may be mid-ocean. Many fishing vessels can be serviced by one reefer, and valuable fishing time is not lost by long journeys to designated transshipping sites near to shore.”³⁵

Nonetheless, transshipment at sea is increasingly viewed as a serious concern. Studies have found that transshipment at sea is associated with higher levels of IUU fishing.³⁶ In fact, four RFMOs have expressed “grave concern” that transshipment at sea facilitates organized tuna laundering and significant levels of IUU fishing.³⁷ But the problem is not unique to tuna fisheries. In salmon and pollock fisheries, legal catches have been mixed with illegal catches during high seas transshipments.³⁸ Investigations of IUU fishing for toothfish have found that fishing operators tranship on the high seas to avoid the inevitable scrutiny that would occur during transshipment in port. As with the salmon and pollock fisheries, transshipment at sea of toothfish allows fishers to launder illegally caught fish with legally caught fish in order to “circumvent quota and licensing regulations.”³⁹ The United Nations Office on Drugs and Crime (UNODC) has concluded that fishers understand clearly that “transshipments are often hard to detect due to the lack of adequate surveillance and vessel tracking of fishing vessels” and that “this *modus operandi* is quite

³¹ WCPFC Convention, *supra* note 1, at art. I(e), (h). The Food and Agriculture Organization of the United Nations similarly defines it as the “act of transferring the catch from one fishing vessel to either another fishing vessel or to a vessel used solely for the carriage of cargo.” FAO, *Fishing Operations: FAO Technical Guidelines for Responsible Fisheries*, ¶ 3 (1996), available at [ftp://ftp.fao.org/docrep/fao/003/W3591e/W3591e00.pdf](http://ftp.fao.org/docrep/fao/003/W3591e/W3591e00.pdf).

³² Ewell et al., *supra* note 9, at 293.

³³ UNODC, *supra* note 11, at 34.

³⁴ Ewell et al., *supra* note 9, at 293.

³⁵ Interpol, *STUDY ON FISHERIES CRIME IN THE WEST AFRICAN COASTAL REGION 15* (Sept. 2014), available at <https://www.interpol.int/content/download/27590/369574/.../WACS%20EN.pdf>.

³⁶ D.A. Kroodsma, et al., *The Global View of Transshipment: Revised Preliminary Findings*, 2 (Global Fishing Watch & SkyTruth, Aug. 2017), available at http://globalfishingwatch.org/wp-content/uploads/GlobalViewOfTransshipment_Aug2017.pdf.

³⁷ IOTC, *Establishing a Programme for Transshipment by Large-scale Fishing Vessels*, Resolution 17/06, preamble, para. 2 (2017), available at <http://www.iotc.org/cmm/resolution-1706-%E2%80%A8on-establishing-programme-transshipment-large-scale-fishing-vessels>; ICCAT Resolution 16-15, *Transshipment*, preamble, para. 2, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2016-15-e.pdf>; IATTC, *Establishing a Program for Transshipments by Large-scale Fishing Vessels*, Resolution C-12-07, preamble, para. 2 (1912), available at <https://www.iattc.org/PDFFiles/Resolutions/English/C-12-07-Amendment-C-11-09-Transshipments.pdf>; CCSBT, *Resolution on Establishing a Program for Transshipment by Large-scale Fishing Vessels*, preamble, para. 2 (2017), available at https://www.ccsbt.org/sites/default/files/userfiles/file/docs_english/operational_resolutions/Resolution_Transshipment.pdf.

³⁸ Ganapathiraju Pramod, et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 *MARINE POL’Y* 102, 110 (2014).

³⁹ UNODC, *supra* note 11, at 107.

common” in fisheries other than the toothfish fishery.⁴⁰ More than just facilitating the evasion of rules, transshipments at sea have real conservation and human costs: transshipments to evade fisheries rules and other IUU activities “deplet[e] fish stocks and severely affect[] food security.”⁴¹

Transshipment at sea also raises concerns about slavery, links to organized crime, and other criminal activity.⁴² In fact, the UNODC has reported a litany of criminal activities associated with transshipment at sea. Within the fishing industry, the “most prevalent” reason for human trafficking is forced labor, although trafficking of women and children for prostitution also occurs.⁴³ The UNODC makes clear that transshipment at sea abets this crime: “Fishers report that they are traded from vessel to vessel whilst at sea to meet crewing needs.”⁴⁴ Fishers also smuggle migrants as part of criminal networks, including in the Oceania region.⁴⁵ Fishing vessels and the fish processing industry are crucial components of drug smuggling, and transshipment facilitates that smuggling.⁴⁶ These activities are also frequently associated with corruption and money laundering.⁴⁷ As the UNODC reports, with the ability of fishing vessels to stay at sea for very long periods of time, transshipment allows these criminal activities to remain out of sight and undetected.⁴⁸ With almost 40% of the transshipments occurring on the high seas,⁴⁹ the scale of criminal activity, including IUU fishing, is potentially huge.

Transshipment at sea is also associated with the use of carrier vessels flagged by States known to issue flags of convenience.⁵⁰ This should be a concern of the WCPFC, with a large number of carrier vessels flagged by Panama (113 vessels), Liberia (25 vessels), and Vanuatu (4 vessels).⁵¹ These States have historically been associated with the issuance of flags of convenience.⁵²

⁴⁰ *Id.* at 107.

⁴¹ *Id.* at 97.

⁴² *Id.* at 9–10 (2011).

⁴³ *Id.* at 23. Some of these concerns, such as prostitution and human trafficking, are not associated only with transshipment at sea. The port of Majuro, for example, is known as “a destination for East Asian and Marshallese girls and women subjected to sex trafficking and a transit point for foreign fishermen subjected to labor trafficking.” U.S. DEP’T. OF STATE, TRAFFICKING IN PERSON REPORT 296 (June 2018) available at <https://www.state.gov/documents/organization/282798.pdf>.

⁴⁴ UNODC, *supra* note 11, at 34.

⁴⁵ *Id.* at 70.

⁴⁶ *Id.* at 84–86.

⁴⁷ *Id.* at 97. UNODC also reported that “environmental crimes (including marine living resource crimes) are the third most frequent predicate of money laundering in the Pacific,” although it did not draw a connection to transshipment at sea. UNODC, *supra* note 11, at 108.

⁴⁸ *Id.* at 4; see also Malarky & Lowell, *supra* note 8, at 2.

⁴⁹ Malarky & Lowell, *supra* note 8, at 2.

⁵⁰ Ewell et al., *supra* note 9, at 296–97.

⁵¹ WCPFC, WCPFC Record of Fishing Vessels, <https://www.wcpfc.int/record-fishing-vessel-database>. The WCPFC has recognized this issue and decided in 2017 to require CCMS to report observer coverage on carrier vessels. WCPFC, *Fourteenth Regular Session Summary Report*, ¶ 387 (2018), available at https://www.wcpfc.int/system/files/WCPFC14%20Summary%20Report%202017%20Issued%2016%20March%202018_complete.pdf.

⁵² Allan I. Mendelsohn, *Flags of Convenience: Aviation and Maritime*, 79 J. AIR L. & COM. 151, 157 (2014), available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1336&context=jalc>. See also Nathan A. Miller et al., *Identifying Global Patterns of Transshipment Behavior*, FRONT. MAR. SCI (July 23, 2018) available at <https://www.frontiersin.org/articles/10.3389/fmars.2018.00240/full> (stating, “In contrast, China, Chinese Taipei, South Korea and Japan (the next most common fishing vessel flag states involved in encounters) associated with

III. The Transshipment Rules of the WCPFC

In light of these concerns, RFMOs and other international bodies have been seeking to ban or strictly limit transshipment at sea. The South East Atlantic Fisheries Organisation has completely banned transshipment at sea within its Convention Area.⁵³ The WCPFC, like other tuna RFMOs, however, has created a compromise that prohibits transshipment at sea for purse seine vessels while allowing it for other types of vessels.

A. The WCPF Convention

The WCPF Convention endeavors to limit transshipment at sea by establishing both a general framework for transshipment and a specific prohibition against transshipment at sea by purse seine vessels.⁵⁴ The WCPF Convention's general framework requires CCMs to "encourage" their fishing vessels to tranship in port "to the extent practicable."⁵⁵ For any transshipment, including transshipment on the high seas, the WCPF Convention requires all vessels that tranship to comply with WCPFC procedures to verify the quantity and species being transhipped and allow full access by persons authorized by the WCPFC to gather any information to fully monitor the transshipment.⁵⁶ In addition, any transshipment in port or in waters under national jurisdiction must take place in accordance with applicable national laws.⁵⁷

In addition, the WCPF Convention prohibits, subject to exemptions that the WCPFC may adopt, transshipment at sea by purse seine vessels operating anywhere in the Convention Area.⁵⁸ The WCPFC has adopted two exemptions to this prohibition. The first exempts existing group seine operations composed of purse seine vessels with a fish hold capacity of 600 metric tons or less flagged to Papua New Guinea and Philippines.⁵⁹ The second exempted transshipment activities involving vessels flagged by New Zealand for one year provided that all fishing and transshipping activities take place within New Zealand waters.⁶⁰ No other exemption has been granted;

transshipment vessels flying an array of flags including several [flags of convenience (FoCs)] (Panama, Liberia, Vanuatu).").

⁵³ South East Atlantic Fisheries Organisation, System of Observation, Inspection, Compliance and Enforcement, art. 5 (2016), available at http://www.seafo.org/media/a3636990-9491-4827-8869-f9c3f9159565/SEAFOweb/pdf/COMM/open/eng/SEAFO_SYSTEM_2016.pdf.

⁵⁴ See WCPF Convention, *supra* note 1, at art. 29.

⁵⁵ *Id.* art. 29(1).

⁵⁶ *Id.* art. 29(4) & Annex III, art. 4.

⁵⁷ *Id.* art. 29(2).

⁵⁸ *Id.* art. 29(5).

⁵⁹ CMM 2009-06, *supra* note 18, at ¶ 25(a).

⁶⁰ *Id.* at ¶ 25(b). New Zealand sought the one-year exemption for its purse seine fleet due to the vastness of its EEZ—the fourth largest in the world—with fishing grounds up to 600 miles from the nearest port; it further assured the WCPFC that it had a comprehensive management and monitoring scheme for vessels operating within New Zealand's EEZ. WCPFC, *New Zealand Transshipment Exemption*, WCPFC8-2011-DP-02, 3, at 5–6 (2011), available at <https://www.wcpfc.int/system/files/WCPFC8-2011-DP-02%20New%20Zealand%20Transshipment%20Exemption.pdf>. Satisfied with these reasons, and because the exemption was temporary, the WCPFC granted New Zealand an exemption. WCPFC, *Eighth Regular Session Summary Report*, ¶ 284 (2011), available at <https://www.wcpfc.int/system/files/WCPFC8-Summary-Report.pdf>.

regardless, the WCPFC may not grant an exemption for transshipment on the high seas by a purse seine vessel.⁶¹

B. CMM 2009–06

Due to the composition of the fleet and the nature of the catch, the WCPF Convention’s prohibition against transshipment at sea by purse seiners affects a small number of registered vessels operating in the Convention Area (8%)⁶² but a large percentage of the catch (69%).⁶³ Nonetheless, more than 3,000 longline vessels⁶⁴ and smaller numbers of pole-and-line vessels⁶⁵ registered to fish in the Convention Area are not subject to the prohibition against transshipment at sea.

Consequently, and consistent with its obligation to develop procedures relating to transshipment,⁶⁶ the WCPFC has adopted CMM 2009–06 to provide additional rules for transshipment at sea and on the high seas.⁶⁷ CMM 2009–06 sets out general policy considerations in the preamble and, in the operative section, generally applicable provisions relating to observers, reporting, and documentation, as well as specific rules relating to longline and other non-purse seine vessels.

The preamble begins by recognizing that transshipment at sea is a common global practice, but that “unregulated and unreported transshipment of catches of highly migratory fish stocks at sea, in particular on the high seas, contributes to distorted reporting of catches of such stocks and supports IUU fishing in the Convention Area.”⁶⁸ Misreporting of catches not only supports IUU fishing but also undermines effective conservation and management of fish stocks, which is “dependent on the provision of accurate reporting of catches of such stocks in the Convention Area.”⁶⁹ Consequently, a goal of the WCPF Convention and CCM 2009–06 is to conduct transshipment in port, to the extent practicable.⁷⁰ Doing so could also deliver important economic benefits to Small Island Development State (SIDS) CCMs.⁷¹

The generally applicable provisions require, for each transshipment, both the fishing vessel and the carrier vessel to complete a WCPFC Transshipment Declaration⁷² that includes the names of the relevant vessels, the species and quantities transhipped, the location of the catches and transshipment, and other information.⁷³ CCMs responsible for the fishing and carrier vessels must

⁶¹ CMM 2009–06, *supra* note 18, at ¶ 32.

⁶² Peter Williams et al., *Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions–2016*, WCPFC-SC13-2017/GN-WP-01, 4 (2017), available at https://www.wcpfc.int/system/files/GN-WP-01%20Overview%20of%20WCPFC%20Fisheries_1.pdf.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 21–22.

⁶⁶ WCPF Convention, *supra* note 1, at art. 29(3).

⁶⁷ CMM 2009-06, *supra* note 18.

⁶⁸ *Id.* at preamble, para. 2.

⁶⁹ *Id.* at preamble, para. 1.

⁷⁰ *Id.* at preamble, para. 3.

⁷¹ *Id.* at preamble, para. 7.

⁷² *Id.* at ¶ 10.

⁷³ *Id.* at Annex 1.

submit the Transshipment Declaration to the WCPFC Executive Director within 15 days of transshipment.⁷⁴

In addition, any transshipment at sea requires an observer from the WCPFC Regional Observer Programme to observe the transshipment.⁷⁵ In the case of transshipments to receiving vessels less than or equal to 33 meters in length and not involving purse-seine-caught or frozen longline-caught fish, the observer may be deployed on either the offloading or receiving vessel.⁷⁶ For transshipments involving troll caught or pole-and-line-caught fish not covered by the first condition and in all other cases, the observer must be deployed on the receiving vessel.⁷⁷ In all cases, observers must be given full access to both the fishing vessel and the receiving vessel.⁷⁸ The observer has the responsibility to confirm that the quantities of fish transhipped align with the quantities reported in the logsheets and WCPFC Transshipment Declaration.⁷⁹

In CMM 2009–06, the WCPFC also establishes the conditions for transshipment at sea by non-purse seine fishing vessels—longline, troll, and pole-and-line fishing vessels. For these vessels, transshipment in national waters must occur in accordance with relevant domestic laws.⁸⁰ Transshipment on the high seas, however, is prohibited except where a CCM determines that it is “impracticable for certain vessels . . . to operate without being able to tranship on the high seas.”⁸¹

The WCPFC has established a two-part test for determining when transshipment in port is “impracticable.” First, the prohibition on high seas transshipment must create “significant economic hardship.”⁸² The relevant CCM must determine whether transshipment in port causes “significant economic hardship” based on

the cost that would be incurred to transship or land fish at feasible and allowable locations other than on the high seas, as compared to total operating costs, net revenues, or some other meaningful measure of costs and/or revenues.⁸³

Second, the prohibition on high seas transshipment must cause the vessel to make “significant and substantial changes to its historical mode of operation.”⁸⁴ The CMM does not provide guidance on how that determination should be made, leaving considerable discretion to individual CCMs. However, the test does not provide CCMs with unfettered discretion. Significantly, this test contemplates a vessel-by-vessel analysis rather than a fisheries-wide determination. For example, it refers to “the vessel”; both the use of the definite article (“the”) and the singular “vessel” indicate that the test must be applied to a specific vessel. The test also refers to historical modes of operation, an assessment which must be made for a particular vessel since

⁷⁴ *Id.* at ¶ 24.

⁷⁵ *Id.* at ¶ 13.

⁷⁶ *Id.* at ¶ 13(a).

⁷⁷ *Id.* at ¶ 13(b), (c).

⁷⁸ *Id.* at ¶ 15.

⁷⁹ *Id.* at ¶ 14.

⁸⁰ *Id.* at ¶ 33.

⁸¹ *Id.* ¶ 34.

⁸² *Id.* ¶ 37(a).

⁸³ *Id.*

⁸⁴ *Id.* ¶ 37(b).

each vessel will have a different history. Each vessel, due to the location of where it fishes, the size of the vessel, the size of the crew, and other factors, will have different costs associated with transhipping in port, within national waters, or on the high seas.

CMM 2009–06 further contemplates a multilateral process for reducing and monitoring transshipment on the high seas. While the relevant CCM may unilaterally determine when transshipment in port or in national waters is “impracticable,” it must advise the WCPFC of its procedures for monitoring and verifying transshipments, indicate the vessels to which an “impracticability” finding applies, notify the Executive Director 36 hours prior to transshipment, and provide the Executive Director with the Transshipment Declaration within 15 days of completion of each transshipment.⁸⁵ Moreover, each CCM allowing transshipment on the high seas must submit to the WCPFC a plan detailing the steps it is taking to encourage transshipment in port.⁸⁶

Lastly, the guidelines embodied in this two-part test are intended to be interim guidelines. CMM 2009–06 expressly calls for the Executive Director to propose new guidelines for determining the circumstances under which it is impracticable to tranship in port or in waters under national jurisdiction.⁸⁷ It contemplates the adoption of new guidelines in 2012,⁸⁸ although that deadline has passed without the adoption of new guidelines. Until new guidelines are adopted, the interim guidelines remain in place because CMM 2009–06 does not include an expiration date for the interim guidelines (i.e., a sunset clause).

C. Transshipment in Practice

Transshipment practice within the WCPFC varies by region and by CCM. Some CCMs, for example, prohibit transshipment at sea by all vessels in all circumstances, including the Parties to the Nauru Agreement (PNA).⁸⁹

Other CCMs, however, are availing themselves of the exemption for transshipping at sea at a rate that indicates they are not making vessel-specific impracticability determinations. In 2016, for example, CCMs authorized 2,223 of 4,468 (49.75%) WCPFC-registered vessels to tranship on the high seas, including 58.2% of all longline vessels, 88.2% of all pole-and-line vessels, and 42.8% of carrier and bunker vessels.⁹⁰ The percentage of vessels authorized to tranship on the high seas rose to 52% (2,431 out of 4,658 vessels) in 2017, with the majority of these vessels being longline vessels (1,831 vessels).⁹¹

⁸⁵ *Id.* at ¶¶ 35(a)(i)–(iv).

⁸⁶ *Id.* at ¶¶ 35(a)(v).

⁸⁷ WCPFC, *Technical and Compliance Committee Ninth Regular Session Summary Report*, ¶ 257 (2013), available at <https://www.wcpfc.int/system/files/FinalTCC9%20summary%20report.pdf>. See CMM 2009-06, *supra* note 18, at ¶ 37.

⁸⁸ *Id.*

⁸⁹ A Second Arrangement Implementing the Nauru Agreement Setting Forth Additional Terms and Conditions of access to the Fisheries Zones of the Parties, signed Sept. 19, 1990, art. I(2), available at https://www.pnatuna.com/sites/default/files/2nd%20Implementing%20Arrangement_0.pdf. The Parties to the Nauru Agreement are Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu. PNA, About Us, <https://www.pnatuna.com/about-us>.

⁹⁰ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 15.

⁹¹ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at ¶ 4 & fig. 1.

The number of reported high seas transshipment events has fluctuated from year to year between 2011 to 2016, with a high of 948 in 2016 and a low of 525 in 2012.⁹² The number of high seas transshipments, however, appears to be trending upwards. *See* Table 1. One possible reason is the move of some fleets from fishing in EEZs to the high seas due to increasing costs of fishing in the EEZs of some Pacific Island States.⁹³ All reported high seas transshipments in 2015 and 2016 were conducted by fishing vessels registered to just 5 CCMs—China, Korea, Chinese Taipei, Vanuatu, and Japan—but the vessels of China, Chinese Taipei, and Vanuatu accounted for 84% and 89% of those transshipments in 2015 and 2016, respectively.⁹⁴ *See* Table 2. As 22 of the 24 registered longline vessels flagged by Vanuatu are owned by individuals or companies in China and Chinese Taipei,⁹⁵ it may be possible to attribute an even greater portion of high seas transshipments to those two CCMs.

Table 1. Number of Reported High Seas Transshipment: 2011–2016

Year	2011	2012	2013	2014	2015	2016
Transshipments	680	525	593	552	754	948

Table 2. Number of Reported High Seas Transshipment by CCM: 2015–2016

CCM	2015	2016
China	239	306
Japan	29	28
Korea (Republic of)	88	77
Chinese Taipei	186	289
Vanuatu	212	248
Total	754	948

High seas transshipments in 2016 accounted for a large percentage of the catches for certain species, including 25.3% of albacore, 36.9% of bigeye tuna, and 10% of yellowfin tuna.⁹⁶ The proportion of high seas catch relative to catch limits appears to be even greater when the small number of vessels transshipping on the high seas is considered: just 352 fishing vessels of the more than 3,100 non-purse seine fishing vessels registered to fish in the WCPFC Convention Area⁹⁷ accounted for the catch transhipped on the high seas in 2016.⁹⁸

⁹² *Id.* at tbl. 1.

⁹³ Peter Terawasi & Chris Reid, *Economic and Development Indicators and Statistics: Tuna Fisheries of the Western and Central Pacific Ocean*, 2 (FFA, 2016), available at <https://www.ffa.int/node/1877> (stating that the high seas purse seine catch in 2015 “was almost double that in 2014 and more than treble that between 2010 and 2013 as some fleets increased their high seas fishing likely, at least in part, in response to the increasing cost of access to PNA EEZs.”).

⁹⁴ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at tbl. 2.

⁹⁵ WCPFC Record of Fishing Vessels, at https://www.wcpfc.int/record-fishing-vessel-database?flag=All&field_vessel_submitted_by_ccm_value=Vanuatu&type=Longliner&name=&ircs=&win=&vid=&imo=&auth_tranship_hs=All&fishing_methods=All.

⁹⁶ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at tbl. 3.

⁹⁷ WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

⁹⁸ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at tbl. 1.

Yet, according to the annual reports of CCMs, some longline fleets rarely, if ever, tranship on the high seas. For example, 23 CCMs reported that vessels they flag fish on the high seas, but just 7 of these CCMs (including carrier vessels from Liberia and Panama) reported that vessels they flag tranship on the high seas.⁹⁹ The 157 U.S. and 446 Japanese longline vessels rarely tranship on the high seas. In fact, no U.S. vessels transhipped on the high seas in 2014, 2015, and 2016; Japanese vessels reported just 31, 29, and 28 high seas transhipments in those years.¹⁰⁰ Significantly, these vessels typically fish far from the ports in which they land their fish. U.S. tuna longline vessels fish up to 1,000 nautical miles from Honolulu, although most trips are within 500 nautical miles, yet land their catch in Honolulu.¹⁰¹ Japanese longline vessels focus their fishing in tropical waters easily more than 1,000 nautical miles from Japan,¹⁰² yet land their catch back in Japan.¹⁰³

IV. Other Approaches to Defining “Impracticability” and to High Seas Transhipment

CMM 2009–06 calls on the WCPFC’s Executive Director to prepare new guidelines for determining the circumstances in which it is impracticable for certain vessels to tranship in port or in waters under national jurisdiction.¹⁰⁴ On two occasions, the Executive Director has submitted proposals for redefining “impracticability” that account for certain aspects of the fishery, but CCMs have rejected these proposals. The four other tuna RFMOs have taken a different approach. They simply grant large-scale longliners the option to tranship at sea provided that they meet certain conditions.

A. The Executive Director’s 2013 Approach

With the adoption of CMM 2009-06, the WCPFC Secretariat began to receive notifications of high seas transhipments. Surprised by the receipt of 878 notifications of high seas transhipments over a 16-month period between July 2010 and October 2011,¹⁰⁵ the Executive Director proposed new guidelines to the Technical and Compliance Committee (TCC) and its Ninth Regular Session (TCC9).¹⁰⁶

The Executive Director contextualized his recommendations by setting out trends in international law and specific facts about the WCPFC fishery.¹⁰⁷ He reported, for example, that

⁹⁹ *Id.* at ¶ 8.

¹⁰⁰ *Id.* at tbl. 2.

¹⁰¹ Western Pacific Reg’l Fishery Mgt. Council, Overview of Fisheries—Pelagics, at <http://www.wpcouncil.org/managed-fishery-ecosystems/pacific-pelagic/historical-overview-of-the-fisheries-pelagics/>.

¹⁰² Williams et al., *supra* note 62, at 24 (noting that the distant water longline vessels of Japan fish for bigeye and yellowfin tuna “primarily in the eastern tropical waters” of the WCPFC Convention Area).

¹⁰³ Liam Campling et al., *The Tuna Longline Industry in the Western and Central Pacific Ocean and its Market Dynamics* 128 (2017), available at <https://www.ffa.int/node/2025> (“Japanese [distant water] vessels operating in WCPO waters are authorized to undertake high seas transhipment, but typically return to Japanese ports at the end of a voyage and only occasionally tranship on the high seas.”). About 85% of Japan’s fishing in the WCPFC Convention Area occurs outside its EEZ. *Id.* at 18.

¹⁰⁴ CMM 2009–06, *supra* note 18, at ¶ 37.

¹⁰⁵ WCPFC8 Summary Report, *supra* note 60, at ¶ 282.

¹⁰⁶ *Guidelines for Determining Impracticability*, *supra* note 20.

¹⁰⁷ *Id.* at 2.

the FAO’s Technical Guidelines for Responsible Fisheries provide that flag States should prevent their vessels from transshipping at sea without authorization, but that “[a]n even more effective approach would be to prohibit transshipment of fish at sea entirely, as some states have already done.”¹⁰⁸

With respect to the WCPFC fishery, he noted that purse seine vessels and some large longline operators conduct all transshipments in port,¹⁰⁹ calling into question the impracticability of transshipment in port.¹¹⁰ He reported that transshipment data revealed that most transshipment occurs just beyond the EEZs of member countries—“not very far from port”¹¹¹—again, calling into question whether it is really impracticable to transship in port.¹¹² The Executive Director also noted that most transshipment at sea occurs near countries with well-established port and transport infrastructure, indicating there are no physical barriers to transshipment in port,¹¹³ and transshipment in port would provide “far stronger monitoring and surveillance” of fish catches and operations.¹¹⁴

Further, the Executive Director challenged longliners’ economic argument that banning transshipment at sea would render longline fishing unviable.¹¹⁵ He stated that, while transshipping frozen fish on the high seas might be more profitable, “it is arguable that there are no cases where it is impracticable to transship frozen longline caught product in port.”¹¹⁶ Moreover, if profit margins are so small for longliners such that transshipping in port truly is impracticable, then “the likelihood of accurate and honest reporting is small and they are more likely to undertake IUU activity than profitable operators.”¹¹⁷ He did indicate, however, that transshipment at sea of sashimi grade product “is one circumstance where it is impractical to transship in port.”¹¹⁸

Lastly, the Executive Director concluded that no CCM has provided advice to the WCPFC on its procedures for monitoring and verification of transshipment on the high seas, as required by CMM 2009–06.¹¹⁹ Moreover, “no CCM has provided the Secretariat with a plan detailing steps it has taken to encourage transshipping in port in the future,” also required by CMM 2009–06.¹²⁰

In light of these observations, the Executive Director proposed the following revisions to CMM 2009–06:

- Instead of a single observer to monitor the transshipment, an observer should be posted on both the fishing vessel and the carrier vessel for all transshipments at sea.¹²¹

¹⁰⁸ *Id.*, citing Technical Guidelines for Responsible Fisheries, *supra* note 15, at 29.

¹⁰⁹ *Id.* at 2. He did not specifically identify the United States and Japan but those two CCMs were likely the focus of his comment. See *supra* Section III.C (describing high seas transshipments of U.S. and Japanese vessels).

¹¹⁰ *Guidelines for Determining Impracticability*, *supra* note 20, at 7.

¹¹¹ *Id.* at 3 & map 1.

¹¹² *Id.* at 5.

¹¹³ *Id.* at 8.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 5.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 5.

¹²¹ *Id.* at 12.

- Transshipment at sea should occur only if the relevant CCM fully complies with the requirements to advise the WCPFC of its procedures for monitoring and verifying transshipments and submit a plan to the WCPFC detailing the steps it is taking to encourage transshipment in port.¹²²
- Instead of relying on inferences of “significant economic hardship,” a CCM must provide “documented evidence” to the Secretariat that it has complied with the “significant economic hardship” assessment of CCM 2009–06.¹²³ CMM 2009–06 does not currently require the submission of documented evidence prior to transshipment.
- Although not included in his written proposal, the Executive Director also indicated that transshipment in high seas pockets should be prohibited.¹²⁴

As described in Section V, the TCC did not recommend that the WCPFC consider the proposal.

B. The Secretariat’s 2016 Approach

The Secretariat returned in 2016 with a new proposal that dramatically reshaped how to determine when transshipment in port might be impracticable.¹²⁵ The Secretariat acknowledged the challenges of assessing “significant economic hardship” and “significant and substantial changes” to a vessel’s historical mode of operation because no criteria existed to make those determinations.¹²⁶ Nonetheless, the use of words like “significant” and “substantial” indicates a “high threshold” for allowing transshipment on the high seas.¹²⁷

As with the 2013 proposal, the Secretariat made a number of observations to support its proposal.

- CCMs believe that the current interim guidelines are “unsatisfactory and not workable”¹²⁸ as indicated by their (1) failure to implement the guidelines; (2) their failure to submit plans to encourage transshipment in port;¹²⁹ (3) their view that the guidelines are subjective; and (4) their view that transshipment at sea remains a common global practice.¹³⁰

¹²² *Id.*

¹²³ *Id.* at 14–15.

¹²⁴ In introducing his proposal at TCC9, the Executive Director invited TCC9 to consider “whether allowing transshipment from vessels other than purse seines is in the best interest of the Commission . . . and whether to prohibit transshipment in the high seas pockets.” *TCC9 Summary Report*, *supra* note 87, at ¶ 257.

¹²⁵ *Development of Guidelines for High Seas Transshipment*, *supra* note 20.

¹²⁶ *Id.* at ¶ 9.

¹²⁷ *Id.*

¹²⁸ *Id.* at ¶ 12.

¹²⁹ *Id.*

¹³⁰ *Id.*

- The United Nations General Assembly adopted a resolution calling for effective control of transshipment to prevent, deter, and eliminate IUU fishing activities and the FAO indicated that prohibiting transshipment at sea was an effective way to accomplish that goal.¹³¹
- The number of vessels authorized to tranship at sea is rising.¹³²
- CCMs were authorizing transshipment on the high seas not when it is “impracticable,” that is, when it is “practically impossible,” but rather when it is “difficult.”¹³³
- Transferring an observer between vessels poses “significant observer safety issues” and “inspection of documentation alone may not be sufficient for verification purposes.”¹³⁴ Consequently, monitoring of transshipments “remains a concern.”¹³⁵
- Allowing transshipment of shark products, including fins, undermines conservation efforts and may increase IUU fishing.¹³⁶
- The large number of transshipments occurring on the high seas just outside the EEZs of CCMs, including just inside high seas pockets, indicates that vessels are transshipping in these areas for convenience and to avoid monitoring by coastal states.¹³⁷

Despite these arguments for more strictly regulating or prohibiting transshipment at sea, the Secretariat believed that certain vessels did need to tranship at sea to maintain high quality standards. According to the Secretariat, fresh fish from ice-chilled longliners, troll, and pole-and-line vessels that supply fresh sashimi market may need to tranship at sea.¹³⁸ Similarly, vessels supplying high-grade ULT fish to sashimi markets may need to tranship at sea.¹³⁹ On the other hand, vessels supplying tuna for the cannery market do not.¹⁴⁰

Based on these observations, the Secretariat proposed new guidelines for transshipment at sea that sought to balance the high threshold for determining when transshipment in port was impracticable with the characteristics of the fishing fleet and tuna markets.¹⁴¹ New guidelines should also include criteria that “are easily measured, able to be monitored effectively, . . . do not advantage inefficient operators[, and are] consistent with the objectives of ensuring effective conservation and management, obtaining fisheries data, monitoring compliance, and preventing

¹³¹ *Id.* at ¶ 14.

¹³² *Id.* at ¶ 15.

¹³³ *Id.* at ¶ 16.

¹³⁴ *Id.* at ¶ 18.

¹³⁵ *Id.*

¹³⁶ *Id.* at ¶ 21.

¹³⁷ *Id.* at ¶ 22.

¹³⁸ *Id.* at ¶ 19. Whether tuna caught on the high seas by longline vessels needs to be transhipped is debatable. The U.S. longline vessels catch substantial amounts of tuna on the high seas and return to Honolulu with it for the fresh fish market. See United States, *Annual Report to the Commission: Part 1: Information on Fisheries, Research, and Statistics*, WCPFC-SC14-AR/CCM-27, at 22–23 (2018), available at <https://www.wcpfc.int/file/208009/download?token=8iEdoCha>.

¹³⁹ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 20.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at ¶ 24.

IUU fishing.”¹⁴² Based on these observations and factors, the Secretariat proposed the following guidelines:¹⁴³

- CCMs may only make an “impracticability” finding to allow transshipment on the high seas for the following vessels:
 - Non-purse seine vessels using flake ice or refrigerated sea water and which tranship fresh fish to receiving vessels, where “fresh fish” means tuna or other highly migratory species that are alive, whole or dressed/gutted, but not further processed or frozen;
 - ULT freezer longline vessels which tranship tuna to ULT freezer carriers in order to supply the high-grade frozen sashimi market; and
 - Non-purse seine vessels which fish in WCPFC//Inter-American Tropical Tuna Commission (IATTC) overlap area, provided that the CCM flag State has notified the WCPFC and IATTC that it will apply IATTC resolutions in accordance with the WCPFC9 Decision on the WCPFC-IATTC Overlap Area.
- Any transshipment on the high seas requires an observer deployed on both the fishing vessels and the receiving vessel.
- CCMs may not make an impracticability finding if the vessel is authorized to tranship shark products.
- CCMs must include in their annual reports information concerning their procedures for monitoring and verifying transshipments and a plan detailing the steps it is taking to encourage transshipment in port.

As with the Executive Director’s 2013 proposal, the TCC did not forward this proposal to the WCPFC for consideration.

C. Transshipment Rules of the Other Tuna RFMOs

The four other tuna RFMO (t-RFMOs)—the Indian Ocean Tuna Commission (IOTC),¹⁴⁴ International Commission for the Conservation of Atlantic Tuna (ICCAT),¹⁴⁵ IATTC,¹⁴⁶ and

¹⁴² *Id.*

¹⁴³ *Id.* at page 7.

¹⁴⁴ The Indian Ocean Tuna Commission was established by the Agreement for the Establishment of the Indian Ocean Tuna Commission, art. I, *signed* Mar. 3, 1973, *entered into force* March 27, 1996, *available at*: <http://www.iotc.org/about-iotc/basic-texts> [hereinafter IOTC Convention].

¹⁴⁵ ICCAT was established by the International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 673 U.N.T.S. 63, 20 U.S.T. 2887, art. III, *available at*: <http://www.iccat.es/Documents/Commission/BasicTexts.pdf> (entered into force Mar. 21, 1969) [hereinafter ICCAT].

¹⁴⁶ Inter-American Tropical Tuna Convention, May 31, 1949, 80 U.N.T.S. 3, U.S.T. 230, T.I.A.S. 2044, *available at*: <http://www.iattc.org/> (entered into force Mar. 3, 1950) [hereinafter IATTC Convention]. The IATTC and its rules for fishing were updated in the Convention for Strengthening the Inter-American Tropical Tuna Convention, June 27, 2003, *available at*: <https://www.iattc.org/IATTCdocumentationENG.htm> (entered into force on Aug. 27 2010) [hereinafter Antigua Convention].

Commission for the Conservation of Southern Bluefin Tuna (CCSBT)¹⁴⁷—have virtually identical rules for addressing transshipment at sea.¹⁴⁸ They do not differ in any meaningful way,¹⁴⁹ but they differ markedly from the WCPFC’s rules by not requiring a finding of impracticability. Instead, large-scale longliners are allowed to tranship at sea provided they meet certain conditions.

These four t-RFMOs begin by expressing “grave concern” about the role of transshipment at sea in organized tuna laundering operations and IUU fishing.¹⁵⁰ Due to these concerns, some parties and cooperating non-parties (collectively referred to as CPCs) have proposed a complete ban on transshipment at sea.¹⁵¹ Some tuna RFMOs prohibit transshipment at sea within their relevant Convention Areas for species subject to their management authority. For example, the IOTC prohibits transshipment at sea for tuna and tuna-like species and sharks caught in association with such tuna species.¹⁵² The CCSBT prohibits transshipment at sea for southern bluefin tuna.¹⁵³

These prohibitions against transshipment at sea, however, include a significant exception: they do not apply to large-scale tuna longline vessels (LSTLVs)¹⁵⁴ or similar vessels that meet specific conditions. In the IOTC, these vessels are presumably at least 24 meters long¹⁵⁵ whereas ICCAT specifically exempts large-scale pelagic longline vessels (LSPLVs)¹⁵⁶—those vessels greater than 24 meters long.¹⁵⁷ The IATTC exempts large-scale tuna-fishing vessels—those vessels fishing beyond areas of national jurisdiction or beyond CPC-controlled areas.¹⁵⁸ The CCSBT exempts large-scale tuna longline vessels, which are defined as tuna longline fishing vessels “with Freezing Capacity.”¹⁵⁹ “Freezing capacity” is then defined to mean a vessel with a freezer capable of storing more than 500 kilograms of southern bluefin tuna at -30°C or below.¹⁶⁰

¹⁴⁷ The CCSBT is established by the Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1819 U.N.T.S. 360, art. 6, available at <https://www.ccsbt.org/en/content/basic-documents-commission> (entered into force May 20, 1994) [hereinafter CCSBT Convention].

¹⁴⁸ IOTC Resolution 17/06, *supra* note 37; ICCAT Resolution 16-15, *supra* note 37; IATTC Resolution C-12-07, *supra* note 37; CCSBT Transshipment Resolution, *supra* note 37.

¹⁴⁹ For a comprehensive assessment of the transshipment rules for these tuna RFMOs, as well as other RFMOs, see Claire van der Geest, *Transshipment: Strengthening Tuna RFMO Transshipment Regulations* (Int’l Seafood Sustainability Fdn., Apr. 2018), available at <https://iss-foundation.org/downloads/16691/>.

¹⁵⁰ IOTC Resolution 17/06, *supra* note 37, at preamble, paras. 1–2, ICCAT Resolution 16–15, *supra* note 37, at preamble, paras. 1–2, IATTC Resolution C-12-07, *supra* note 37, at preamble, paras. 1–2, CCSBT Transshipment Resolution, *supra* note 37, at preamble, paras. 1–2.

¹⁵¹ See IOTC, *Report of the Twelfth Session of the Indian Ocean Tuna Commission*, IOTC-2008-S12-R[E], ¶ 50, (2006), available at <http://www.iotc.org/sites/default/files/documents/proceedings/2008/s/IOTC-2008-S12-R%5BE%5D.pdf> (noting that France had proposed such a ban in three consecutive years).

¹⁵² IOTC Resolution 17/06, *supra* note 37, at ¶¶ 1, 2. See also ICCAT Resolution 16–15, *supra* note 37, at ¶ 1 (applying to tuna and tuna-like species and other species caught in association with these species); IATTC Resolution C-12-07, *supra* note 37, at ¶ 1 (applying to tuna and tuna-like species).

¹⁵³ CCSBT Transshipment Resolution, *supra* note 37, at ¶ 2.

¹⁵⁴ IOTC Resolution 17/06, *supra* note 37, at ¶¶ 1, 2.

¹⁵⁵ The IOTC does not expressly define LSTLVs, but the IOTC requires vessels at least 24 meters in length to be included in the IOTC’s Record of Vessels. IOTC, *The IOTC Record of Vessels Authorized to Operate in the IOTC Area of Competence*, ¶ 2 (2015), available at: <http://www.iotc.org/cmm/resolution-1504-concerning-iotc-record-vessels-authorized-operate-iotc-area-competence>.

¹⁵⁶ ICCAT Resolution 16-15 *supra* note 37, at ¶ 1.

¹⁵⁷ *Id.*

¹⁵⁸ IATTC Resolution C-12-07, *supra* note 37, at ¶ 2, fn. 1.

¹⁵⁹ CCSBT Transshipment Resolution, *supra* note 37, at ¶ 1(a) (2017).

¹⁶⁰ *Id.* at ¶¶ 1(c), 2.

In addition to meeting these threshold conditions, a vessel may not tranship at sea unless a number of other conditions are met. First, a CPC must affirmatively authorize its LSTLVs to tranship at sea.¹⁶¹ Second, at least 24 hours prior to any transhipment, the fishing vessel must notify the flag State of the intended transhipment.¹⁶² In addition, where transhipment takes place in waters under the jurisdiction of a CPC, that CPC must provide authorization prior to the transhipment occurring.¹⁶³

Third, any transhipment must be accompanied by a transhipment declaration that includes information about the carrier vessel, the fishing vessel, the location of the transhipment, and the species transhipped, including the weight of each species and the type of product (whole, gutted, etc.).¹⁶⁴ The fishing vessel has 15 days to complete and submit the transhipment declaration to the flag State;¹⁶⁵ the master of the carrier vessel must complete and transmit the transhipment declaration to the relevant RFMO Secretariat and flag State within 24 hours after completing transhipment and to the competent authorities in the State where the fish will be landed at least 48 hours before landing.¹⁶⁶

Fourth, the carrier vessel must be registered on the RFMO's Record of Carrier Vessels.¹⁶⁷ Carrier vessels must install and operate a vessel monitoring system¹⁶⁸ and have on board an observer trained and chosen from the RFMO's Regional Observer Programme.¹⁶⁹ Without an observer, vessels are prohibited from commencing or continuing at-sea transhipment.¹⁷⁰

Some of the t-RFMOs apply additional rules. For example, ICCAT bans transhipment at sea for Mediterranean swordfish¹⁷¹ and bluefin tuna¹⁷² without exceptions for LSPLVs. The

¹⁶¹ IOTC Resolution 17/06, *supra* note 37, at ¶ 11; ICCAT Resolution 16–15, *supra* note 37, at ¶ 15; IATTC Resolution C–12–07, *supra* note 37, at ¶ 12; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 13.

¹⁶² IOTC Resolution 17/06, *supra* note 5, at ¶ 12; ICCAT Resolution 16–15, *supra* note 37, at ¶ 16; IATTC Resolution C–12–07, *supra* note 37, at ¶ 14; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 14.

¹⁶³ IOTC Resolution 17/06, *supra* note 37, at ¶ 10; ICCAT Resolution 16–15, *supra* note 37, at ¶ 14; IATTC Resolution C–12–07, *supra* note 37, at ¶ 11; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 11.

¹⁶⁴ IOTC Resolution 17/06, *supra* note 37, at ¶ 13 & Annex 2; ICCAT Resolution 16–15, *supra* note 37, at ¶ 16 & Appendix 1; IATTC Resolution C–12–07, *supra* note 37, at ¶ 16 & Annex 2; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 15 & Annex 1.

¹⁶⁵ IOTC Resolution 17/06, *supra* note 37, at ¶ 13; ICCAT Resolution 16–15, *supra* note 37, at ¶ 16; IATTC Resolution C–12–07, *supra* note 37, at ¶ 13; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 14.

¹⁶⁶ IOTC Resolution 17/06, *supra* note 37, at ¶¶ 15–16; ICCAT Resolution 16–15, *supra* note 37, at ¶ 17–18; IATTC Resolution C–12–07, *supra* note 37, at ¶ 14–15; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 17–18.

¹⁶⁷ IOTC Resolution 17/06, *supra* note 37, at ¶¶ 5–6; ICCAT Resolution 16–15, *supra* note 37, at ¶¶ 6–8; IATTC Resolution C–12–07, *supra* note 37, at ¶¶ 6–8; CCSBT Transhipment Resolution, *supra* note 37, at ¶¶ 4–5.

¹⁶⁸ IOTC Resolution 17/06, *supra* note 37, at ¶ 9; ICCAT Resolution 16–15, *supra* note 37, at ¶ 11; IATTC Resolution C–12–07, *supra* note 37, at ¶ 10; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 8.

¹⁶⁹ IOTC Resolution 17/06, *supra* note 37, at ¶ 17; ICCAT Resolution 16–15, *supra* note 37, at ¶ 19; IATTC Resolution C–12–07, *supra* note 37, at ¶ 16; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 19.

¹⁷⁰ IOTC Resolution 17/06, *supra* note 37, at ¶ 18; ICCAT Resolution 16–15, *supra* note 37, at ¶ 20; IATTC Resolution C–12–07, *supra* note 37, at ¶ 17; CCSBT Transhipment Resolution, *supra* note 37, at ¶ 20.

¹⁷¹ ICCAT, *Multi-annual Recovery Plan for Mediterranean Swordfish*, Recommendation 16–05, ¶ 38, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2016-05-e.pdf>.

¹⁷² ICCAT, *Multi-annual Recovery Plan for Mediterranean Bluefin Tuna in the Eastern Atlantic and Mediterranean*, Recommendation 14–04, ¶ 58, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2014-04-e.pdf>.

IATTC's resolution does not apply to troll vessels, pole-and-line vessels, or vessels engaged in the transshipment of fresh fish at sea.¹⁷³

Based on these rules, transshipment at sea by longliners continues in large numbers, although by only a few fishing nations. LSTLVs transhipped 1,215 times in 2016 (compared to 726 in 2015) within the IOTC area of competence,¹⁷⁴ the vast majority occurring on the high seas.¹⁷⁵ LSTLVs from Chinese Taipei accounted for 67% of these transshipments with Chinese, Seychellois, Japanese, Malaysian and Korean flagged vessels accounting for 11%, 11%, 6%, 4% and 1%, respectively; Tanzania and Oman accounted for roughly 1%.¹⁷⁶ Fishing vessels transhipped to carrier vessels predominantly flagged to Vanuatu (29%), Chinese Taipei (24%), and Malaysia (10%), with other transshipments to vessels flagged by Korea, Seychelles, Panama, Liberia, Singapore, Kiribati and Japan.¹⁷⁷

ICCAT reported 854 transshipments in 2016,¹⁷⁸ accounting for 31,057 metric tons of tuna and tuna-like species.¹⁷⁹ Chinese Taipei, Japan, and China accounted for the vast majority of these transshipments (94%), with 384, 238, and 177 high seas transshipments, respectively.¹⁸⁰ ICCAT has registered 110 carrier vessels, 41 of which are flagged by Panama and 23 by Liberia.¹⁸¹

The IATTC posted its highest number of at-sea transshipments in 2016 at 676; the previous high was 515 transshipments in 2011.¹⁸² China accounted for almost half of the transshipments in 2016, with Chinese Taipei, Vanuatu, Japan, Panama, and Korea accounting for the remainder.¹⁸³ Of the 73 registered carrier vessels, 29 are flagged by Liberia and 17 by Panama.¹⁸⁴

¹⁷³ IATTC Resolution C-12-07, *supra* note 37, at ¶ 3.

¹⁷⁴ MRAG & CapFish, *A Summary of the IOTC Regional Observer Programme During 2016*, IOTC-2017-CoC14-04b [E], 5, 10 (2017), available at <http://www.iotc.org/sites/default/files/documents/2017/04/IOTC-2017-CoC14-04b E - IOTC ROP Contractor 0.pdf>.

¹⁷⁵ *Id.* at 7, fig. 3.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.* at 5.

¹⁷⁸ ICCAT, *Report on the Implementation of the ICCAT Regional Observer Programme (ROP) for Transshipment 2016/2017*, Doc. No. PWG-402/2017, 3 (Nov. 15, 2017).

¹⁷⁹ *Id.* at 3, tbl. 1.

¹⁸⁰ *Id.* at 3. Vessels from Belize, Côte d'Ivoire, Korea, Senegal, and St. Vincent and the Grenadines accounted for the remaining high seas transshipments. *Id.*

¹⁸¹ Van der Geest, *supra* note 149, at 60.

¹⁸² IATTC, *Implementation of the IATTC Regional Observer Program for Transshipment at Sea*, Doc. No. 92-06, tbl. 3.2 (2017), available at <https://www.iattc.org/Meetings/Meetings2017/IATTC-92/PDFs/Docs/English/IATTC-92-06 Observer-program-for-transshipments-at-sea.pdf>.

¹⁸³ *Id.* at fig. 3.3.

¹⁸⁴ List of carrier vessels authorized to receive tuna and tuna-like species at sea from large-scale tuna longline fishing vessels (LSTFVs) (Resolution C-12-07 on a program for transshipments) (May 9, 2018), available at <https://www.iattc.org/VesselDataBaseENG.htm>.

V. The CCM's Views of "Impracticability"

CCMs have made various statements about whether transshipment in port is truly impracticable. As explained in Section A, several CCMs believe that transshipment in port is impracticable based on the "significant economic hardship" element of the current two-part test. PNA members and the EU believe that transshipment in port is feasible.¹⁸⁵ No CCM has commented on the second element of the test—that transshipment in port would alter "historical modes of operation."

In the WCPFC's early years prior to adoption of CMM 2009–06, CCMs recommended harmonizing the WCPFC's transshipment rules with those of other RFMOs,¹⁸⁶ noting that other RFMOs prohibited transshipment at sea by purse seine vessels and established exemptions for non-purse seine vessels.¹⁸⁷ As noted in Section IV.C, the other tuna RFMOs continue to prohibit at-sea transshipment except by large scale longliners complying with a number of conditions. In 2007, China, Korea, and Japan continued to urge consistency with the rules of other RFMOs, but other CCMs advocated for stricter transshipment rules as a means to combat IUU fishing that is facilitated by transshipment at sea; still, they acknowledged that legitimate transshipment was "an integral part of current fishing operations for some fleets."¹⁸⁸

Based on a range of issues identified as important for a transshipment CMM,¹⁸⁹ the WCPFC at its fourth annual session (WCPFC4) in 2007 undertook the first comprehensive discussion of drafting a transshipment CMM.¹⁹⁰ At the meeting, CCMs advocating for high seas transshipment stated that a requirement to tranship in port would not be economically viable.¹⁹¹ One CCM argued that the WCPF Convention does not call for an explicit ban on at-sea transshipment.¹⁹² Korea expressed interest in developing monitoring measures for transshipment at sea, requesting

¹⁸⁵ See, e.g., WCPFC, *Technical and Compliance Committee Twelfth Regular Session Summary Report*, ¶¶ 250, 260 (2016), available at

<https://www.wcpfc.int/system/files/TCC12%20Summary%20Report%2017%20Nov%202016.pdf>.

¹⁸⁶ WCPFC, *Technical and Compliance Committee First Regular Session Summary Report*, ¶ 46(a) (2005), available at <https://www.wcpfc.int/meetings/1st-regular-session-technical-and-compliance-committee>.

¹⁸⁷ WCPFC, *Technical and Compliance Committee Second Regular Session Summary Report*, ¶ 80 (2006), available at <https://www.wcpfc.int/meetings/2nd-regular-session-technical-and-compliance-committee>.

¹⁸⁸ WCPFC, *Technical and Compliance Committee Third Regular Session Summary Report*, ¶ 64 (2007), available at <https://www.wcpfc.int/system/files/TCC3%20Summary%20Report%20and%20Attachments.pdf>.

¹⁸⁹ *Id.* at ¶ 75 ("TCC agreed that these issues are important points to be considered in a measure concerning transshipment, including, *inter alia*: (i) encouraging transshipment in port under Article 29 of the Convention; (ii) allowance for transshipment outside the Convention Area and on the high seas under conditions that allow for appropriate monitoring of these activities; (iii) allowance for carrier vessels to be flagged to non-CCMs; (iv) allowance [of] continued operation of all legitimate transshipment activities; (v) consideration of the necessary linkage with observer programmes; (vi) development of registers and reporting requirements for carrier vessels; (vii) specification of the types and scale of vessels that will fall under the scheme; (viii) consideration of the consistency with the provisions of other RFMOs.").

¹⁹⁰ The draft was modeled on the transshipment rules of other RFMOs. WCPFC, *Draft Conservation and Management Measure Establishing Procedures for Transshipment s by Fishing Vessels* (Proposal of Australia and Japan), WCPFC–2007/DP03 Rev.2, available at: <https://www.wcpfc.int/system/files/WCPFC4-2007-DP03%20Rev.2%20%5BAustralia%20and%20Japan%20-%20Draft%20Transshipment%20CMM%5D.pdf>.

¹⁹¹ WCPFC, *Fourth Regular Session Summary Report*, ¶ 153 (2007), available at <https://www.wcpfc.int/system/files/WCPF4%20Summary%20Report%20and%20Attachments.pdf>.

¹⁹² *Id.*

consideration of cost effectiveness and practicability.¹⁹³ Those CCMs supporting a ban on high seas transshipment noted that transshipment monitoring with vessel monitoring systems and observers might not be effective and that transshipment in port would be economically beneficial to and promote the development of those ports.¹⁹⁴ The CCMs could not reach an agreement at WCPFC4.

The impracticability standard first emerged in 2008 at WCPFC5 on a proposal from the Republic of the Marshall Islands.¹⁹⁵ The proposal included the two-part test of “significant economic hardship” and “significant and substantial change to historical mode of operation” that was eventually included in CMM 2009–06, although the significant economic hardship test was framed differently.¹⁹⁶ Regardless, CCMs did not comment on the proposed impracticability test until the following year at TCC5; the proposal included brackets around the draft CMM’s language relating to significant economic hardship, indicating that CCMs disagreed over how to make that determination.¹⁹⁷ Even so, the Republic of the Marshall Islands, now joined by Nauru, presented WCPFC6 with a new draft, which modified the “significant economic hardship” test to its current form;¹⁹⁸ no discussion indicates why the change was made or agreed,¹⁹⁹ although one participant in the negotiations has indicated that the adopted text provided a better representation of what the test was trying to determine.²⁰⁰

Because the two-part impracticability test included in CMM 2009–06 was intended to be an interim test, CCMs have continued discussing it. Discussions relating to the impracticability standard intensified in 2013 when the WCPFC’s Executive Director called into question the need to tranship on the high seas except in very limited circumstances.²⁰¹ Under the Executive Director’s

¹⁹³ *Id.* at Attachment G (Opening Statement by the Republic of Korea), at pages 95–96.

¹⁹⁴ *Id.* at ¶ 156.

¹⁹⁵ WCPFC, *Draft Conservation and Management Measure on Regulation of Transshipment*, WCPFC5-2008/DP02 (Rev.3) (2008), available at: <https://www.wcpfc.int/system/files/WCPFC5-2008-DP02%20Rev%203%20%205BRMI-Transshipment%20Verification%205D.pdf>.

¹⁹⁶ *Compare id.* at § 2.2 (“The prohibition of transshipment on the high seas would cause a significant economic hardship, which would be assessed by comparing the average value of the catch to be transhipped with the average cost that would be incurred to move into waters under the national jurisdiction of a CCM[.]”) with CMM 2009–06, *supra* note 18, at ¶ 37(a) (“The prohibition of transshipment in the high seas would cause a significant economic hardship, which would be assessed in terms of the cost that would be incurred to trans[hip or land fish at feasible and allowable locations other than on the high seas, as compared to total operating costs, net revenues, or some other meaningful measure of costs and/or revenues[.]”) (emphasis added).

¹⁹⁷ WCPFC, *Technical and Compliance Committee Fifth Regular Session Summary Report*, Attachment D, p. 68 (2009), available at

<https://www.wcpfc.int/system/files/TCC5%20Summary%20Report%20and%20Attachments%20%28Edited%20Version%29.pdf>.

¹⁹⁸ WCPFC, *Draft Conservation and Management Measure on Regulation of Transshipment*, WCPFC6-2009/DP03 (Rev.2), ¶ 37(a) (2009), available at: https://www.wcpfc.int/system/files/WCPFC6-2009-DP-03%20_Rev.2_%20%205BNauru%20and%20RMI%20-%20Draft%20CMM%20on%20Regulation%20of%20Transshipment%205D.pdf.

¹⁹⁹ See generally WCPFC, *Sixth Regular Session Summary Report*, ¶¶ 303–09 (2009), available at <https://www.wcpfc.int/system/files/WCPFC6%20final%20edited%20and%20re-formatted.pdf>.

²⁰⁰ Personal Communication from Wez Norris, Pontus Consulting, to Alfred Cook, WWF Western and Central Pacific Tuna Programme Manager (Aug. 27, 2018). Previously, Mr. Norris was the Deputy Director-General, Pacific Islands Forum Fisheries Agency (FFA).

²⁰¹ *Guidelines for Determining Impracticability*, *supra* note 20; For more on the Executive Director’s critique and his proposal, see *supra* Section IV.A.

proposal, if transshipment on the high seas were to occur, both the fishing vessel and the receiving vessel must have an observer on board.²⁰²

In reaction to the proposal, Fiji responded that transshipment in port is an economic hardship for fishing vessels far from port as it leads to lost fishing time and increased fuel costs.²⁰³ The members of the Pacific Islands Forum Fisheries Agency (FFA) agreed with the Executive Director that observers should be on both vessels, but reiterated that all transshipments should take place within EEZs or in port where transshipment is easier to monitor.²⁰⁴ Similarly, the EU restated its support for a total ban on transshipment at sea, but agreed that if transshipment on the high seas occurs it should be strictly monitored with observers on both vessels.²⁰⁵ However, other unidentified CCMs found the two-observer requirement “excessive and unnecessary.”²⁰⁶ The United States sought to move away from a consideration of economic hardship and toward a focus on whether the CCM has fully implemented the notice, reporting, and observer requirements for transshipment monitoring.²⁰⁷ In this way, the WCPFC could tackle the root problem—IUU fishing.²⁰⁸ Because CCMs could not reach agreement on a way forward, the TCC did not recommend consideration of the proposal at the WCPFC’s next meeting.

The discussion of impracticability resumed at WCPFC12 in 2015 when the Republic of Marshall Islands noted numerous problems associated with the impracticability provisions and proposed a ban on transshipment at sea.²⁰⁹ The EU supported further work to revise CMM 2009–06²¹⁰ and noted that the current two-part impracticability test imposes a “very high threshold” for transshipment at sea.²¹¹ It further recognized that transshipment in port raised costs but vessels flagged by EU member States have shown that it is nonetheless feasible.²¹² The FFA noted that the impracticability standards had not been implemented in good faith.²¹³ Japan opposed consideration of a high seas transshipment ban, arguing that transshipment at sea is “a common global practice;” it would, however, support greater traceability of transshipments.²¹⁴ Korea appeared to support greater observer coverage, noting that observers help ensure compliance, but

²⁰² *Guidelines for Determining Impracticability*, *supra* note 20, at 12.

²⁰³ *Id.* at 6. Fiji transships tuna species at sea but within its archipelagic waters and territorial seas. Under paragraph 33 of CMM 2009–06, it is allowed to do so provided that it transships consistently with national law. CMM 2009–06, *supra* note 18, at ¶ 33.

²⁰⁴ *TCC9 Summary Report*, *supra* note 87, at ¶¶ 258–59.

²⁰⁵ *Id.* ¶ 260.

²⁰⁶ *Id.* ¶ 261.

²⁰⁷ *Id.* ¶ 264.

²⁰⁸ *Id.*

²⁰⁹ WCPFC, *Twelfth Regular Session Summary Report*, ¶ 50, 698 (2015), available at https://www.wcpfc.int/system/files/WCPFC12%20Summary%20Report_final1_rev2.pdf.

²¹⁰ *Id.* at ¶ 699.

²¹¹ *Id.* at ¶ 712.

²¹² *Id.* See also *TCC12 Summary Report*, *supra* note 185, at ¶ 250. WCPFC, *Thirteenth Regular Session Summary Report*, ¶ 167 (2017), available at

https://www.wcpfc.int/system/files/WCPFC13%20Summary%20Report%20final_issued%20%20March%202017%20complete.pdf.

²¹³ *WCPFC12 Summary Report*, *supra* note 209, at ¶ 701.

²¹⁴ *Id.* at ¶ 703. Although Japan did not make a link to CMM 2009–06, the preamble of that CMM recognizes that “transshipment at sea is a common global practice, but that unregulated and unreported transshipment of catches of highly migratory fish stocks at sea, in particular on the high seas, contributes to distorted reporting of catches of such stocks and supports IUU fishing in the Convention Area.” CMM 2009–06, *supra* note 18, at preamble, para. 2.

it opposed a ban on transshipment at sea, which it said would create an “operational burden.”²¹⁵ As a closing point, Korea stated its view that the WCPFC should “strike a balance between compliance, conservation and operational stability.”²¹⁶ China added that transshipment in port “is practically difficult due to operational costs and conflicts between SIDS’ domestic laws and WCPFC laws, especially around shark species.”²¹⁷ China also reported that some SIDS have increased their port costs and that “many SIDS ports do not have facilities for handling deep frozen product.”²¹⁸

This 2015 discussion led to the development of the Secretariat’s 2016 transshipment proposal,²¹⁹ which replaced the “impracticability” test with bright line rules.²²⁰ CCMs reacted to the Secretariat’s proposal with a variety of views. Korea and China did not understand the need to ban transshipment on the high seas if the vessel is authorized to tranship sharks or shark fins;²²¹ China noted the increase in the price of port transshipment fees²²² and that some ports did not have sufficient frozen container capacity;²²³ China and Chinese Taipei sought additional flexibility to tranship at sea for vessels catching albacore;²²⁴ China feared that a requirement to tranship in port could cause its albacore tuna industry to collapse.²²⁵ The PNA opposed transshipment on the high seas by ULT freezer longliners.²²⁶

On the other hand, the EU, FFA, and PNA supported the shark provision;²²⁷ the EU acknowledged that some vessels carrying ULT fish may need to tranship on the high seas;²²⁸ and the United States supported the approach overall, commenting that the “bright lines” established in the guidelines were a positive step forward.²²⁹ The EU concluded by lamenting that the “impracticability” exception “has become the norm” regarding transshipment.²³⁰

²¹⁵ *WCPFC12 Summary Report*, *supra* note 209, at ¶ 706.

²¹⁶ *Id.*

²¹⁷ *Id.* at ¶ 715.

²¹⁸ *Id.*

²¹⁹ *Id.* at ¶ 718.

²²⁰ For a discussion of the Secretariat’s 2016 proposal, see *supra* Section IV.B.

²²¹ *TCC12 Summary Report*, *supra* note 185, at ¶¶ 247, 251.

²²² *Id.* at ¶¶ 249, 262.

²²³ *Id.* at ¶ 262.

²²⁴ *Id.* at ¶¶ 249, 256.

²²⁵ *Id.* at ¶ 249.

²²⁶ *Id.* at ¶ 258.

²²⁷ *Id.* at ¶¶ 250, 254, 258.

²²⁸ *Id.* at ¶ 250.

²²⁹ *Id.* at ¶ 257.

²³⁰ WCPFC, *Thirteenth Regular Session Summary Report*, *supra* note 212, at ¶ 167.

VI. Is Transshipment in the WCPFC Convention Area Really Impracticable?

Globally, transshipment at sea, and in particular transshipment on the high seas, remains a common practice in the tuna RFMOs but, as recognized by CMM 2009–06, “contributes to distorted reporting of catches of such stocks and supports IUU fishing in the Convention Area if it is unregulated.”²³¹ In addition, globally, transshipment on the high seas is undertaken by relatively few fishing nations. Global trends are mirrored in the WCPFC. Many WCPFC vessels are authorized to tranship on the high seas and a significant percentage of the catch is transhipped on the high seas, but three CCMs are responsible for the vast majority of high seas transshipments.

Despite the goal to minimize, if not end, transshipment on the high seas, it appears that the WCPFC’s impracticability exception has become the rule. CCMs have failed to report on procedures to monitor high seas transshipment and failed to provide plans detailing how they are encouraging a reduction in transshipment on the high seas,²³² as required by CMM 2009–06.²³³ CCMs are not making vessel-specific determinations of impracticability; instead, the Secretariat has reported that “determinations of impracticability made by individual CCMs are implied from information provided as part of the Record of Fishing Vessels.”²³⁴

But is transshipment in port really impracticable? A review of relevant data concerning location of the catch, quality of port facilities, and fuel and other costs indicates that it is not.

A. Location and Composition of the Catch in the WCPFC Convention Area

A breakdown of where fish are caught by different gear types can help determine whether transshipment in port is impracticable. As the Secretariat noted in its 2013 proposal to redefine “impracticability,” purse seine vessels are able to tranship their catch in port, as are many longline vessels.²³⁵ In fact, purse seine vessels tranship in port even though they caught a significant portion of their catch (9%) on the high seas in 2016. *See* Table 3. In addition, vessels used both gear types to catch a variety of tuna species both in EEZs and on the high seas. *See* Table 4.

Table 3: Percentage of Total 2016 Catch in WCPFC Convention Area by Area²³⁶

Gear	EEZ	High Seas
Longline	68%	32%
Purse seine	91%	9%

²³¹ CMM 2009–06, *supra* note 18, at preamble, para. 2.

²³² *Guidelines for Determining Impracticability*, *supra* note 20, at 5.

²³³ CMM 2009–06, *supra* note 18, at ¶ 35(a)(i), (v).

²³⁴ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 10.

²³⁵ *Guidelines for Determining Impracticability*, *supra* note 20, at 2.

²³⁶ Personal Communication with Peter Williams, *supra* note 24.

Table 4: Percentage of Total 2016 Catch in WCPFC Convention Area by Area and Gear Type²³⁷

Longline		
Species	EEZ	High Seas
Skipjack	74.0%	26.0%
Yellowfin	75.5%	24.5%
Bigeye	60.7%	39.3%
Albacore	66.7%	33.3%

Purse seine		
Species	EEZ	High Seas
Skipjack	90.5%	9.5%
Yellowfin	94.4%	5.6%
Bigeye	88.2%	11.8%

Despite these similarities, longliners tend to fish further east in the WCPFC Convention Area than purse seine vessels,²³⁸ with a significant amount of longline fishing occurring east of 160°W longitude.²³⁹ However, the two fisheries have significant overlap in the area just east of 160°E longitude.²⁴⁰ In fact, the Korean and Chinese Taipei purse seine fleets fished well east of 160°E longitude²⁴¹ yet transhipped those catches in port.

Consequently, distance from port and the species caught are unlikely, alone, to result in a finding of impracticability. Indeed, as noted earlier, the U.S. and Japanese longline fleets rarely tranship at sea and travel 500 nautical miles and even much greater distances to tranship in port.²⁴² Similarly, the EU longline fleet does not tranship at sea.²⁴³ In addition, several years of transshipment records show that vessels tend to tranship on the high seas just on the other side of a

²³⁷ Personal Communication with Peter Williams, Oceanic Fisheries Programme (OFF), Secretariat of the Pacific Community (SPC) (Mar. 28, 2018).

²³⁸ Williams et al., *supra* note 62, at 9–13, figures 11–19 (showing distribution of purse seine catch and effort) and 26–28, figs. 35–38 (showing distribution of longline catch and effort).

²³⁹ *Id.* at fig. 35.

²⁴⁰ *Id.* at figs. 18, 19, 38. Purse seine fishing effort moves back and forth across 160°E longitude depending on El Niño–Southern Oscillation Index (ENSO) conditions. The concentration of fishing effort west of 160°E longitude in 2016 is consistent with El Niño to neutral ENSO conditions. The previous two years saw more purse-seine effort east of 160°E longitude. *Id.* at 7.

²⁴¹ *Id.* at figs. 14, 15.

²⁴² See *supra* Section III.C.

²⁴³ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at tbl. 2 (showing no EU transshipments at sea). Three Spanish-flagged vessels—the “EU fleet”—fish primarily for swordfish in temperate waters south of 20° south but primarily 30° south and typically use Papeete for transshipment and resupplying, although they also use Auckland, Suva, and Taroa. European Union, *Annual Report to the Commission: Part I: Information on Fisheries, Research, and Statistics*, WCPFC-SC13-AR/CCM-05, § 2.3, Addendum (July 13, 2017), available at <https://www.wcpfc.int/system/files/AR-CCM-05%20EUROPEAN%20UNION%20PART%201%20Addendum%20Submitted%202813%20July%202017%29.pdf>.

CCM's EEZ boundary,²⁴⁴ suggesting that they are moving from areas under national jurisdiction to the high seas to tranship.²⁴⁵ Even if that is not true, the vessels are much closer to port than the U.S. fleet and many vessels in the Japanese fleet, and potentially the EU fleets as well, that tranship in port.

B. Ports and Port Infrastructure

In general, port infrastructure in the region appears adequate to fulfill the needs of different vessel types fishing in the WCPFC Convention Area.²⁴⁶ Although port facilities exist throughout the region, from Papeete in the southeastern corner of the Convention area to Rabaul in the northwestern corner, fishing vessels of the four primary WCPFC distant water fishing nations (DWFN)—China, Chinese Taipei, Japan, and Korea—use five ports far more (1,276 times) than any others: Pohnpei, Majuro, Rabaul, Honiara, and Tarawa.²⁴⁷ Vessels from these four DWFNs also use Funafuti, Lae, Kiritimati, Noro, Suva, and Wewak, but these ports accounted for just 64 of the total transshipments in the ports of Pacific Island CCMs,²⁴⁸ with Wewak accounting for 38 (60%) of them.²⁴⁹

Other ports appear to be viable as they are used by some of the major fishing operators in the WCPFC Convention Area. For example, Luen Thai Fishing Venture Ltd (LTFV), one of the major Chinese tuna companies operating in the WCPFC Convention Area, uses Majuro, Kosrae, Pohnpei, Palau, and Samoa.²⁵⁰ It uses the Pohnpei and Samoa ports for transshipping containers of frozen fish,²⁵¹ while it uses the other ports for buying fresh fish and for other fisheries purposes.²⁵² Spanish vessels tranship and resupply primarily in Papeete.²⁵³ This indicates that these ports are viable for transhipment.

Vessel captains choose a port for transhipment based on a few factors. The most significant factor is proximity to the fishing grounds.²⁵⁴ However, other factors play a role. For example, in 2012, Majuro, in the Republic of the Marshall Islands (RMI), hosted a disproportionate number of purse seine transshipments relative to fish caught in its EEZ.²⁵⁵ Captains use Majuro because it

²⁴⁴ See *Guidelines for Determining Impracticability*, *supra* note 20, at map 1; *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at figs. 3, 4, 5.

²⁴⁵ Kristina Boerder et al., *Global Hot Spots of Transshipment of Fish Catch at Sea*, 4 SCIENCE ADVANCES 3 (July 25, 2018), available at <http://advances.sciencemag.org/content/4/7/eaat7159> (stating, “For most of the time vessels spent fishing before meeting a reefer, they were located in EEZs.”).

²⁴⁶ See *Guidelines for Determining Impracticability*, *supra* note 20, at 6 (stating that WCPFC members “have well establish[ed] port and transport infrastructure and countries welcome the business associated with port based activities.”).

²⁴⁷ MIKE A. MCCOY, A SURVEY OF TUNA TRANSSHIPMENT IN PACIFIC ISLAND COUNTRIES: OPPORTUNITIES FOR INCREASING BENEFITS AND IMPROVING MONITORING 21–22 (2012), available at <https://www.ffa.int/system/files/Transshipment%202012%20Report.pdf>.

²⁴⁸ *Id.* at 22.

²⁴⁹ *Id.*

²⁵⁰ Campling et al., *supra* note 103, at 182.

²⁵¹ *Id.* at 183.

²⁵² *Id.* at 182–83.

²⁵³ EU, *Annual Report: Part 1*, *supra* note 243, at § 2.3.

²⁵⁴ MCCOY, *supra* note 247, at 22.

²⁵⁵ Majuro hosted 25% of DWFN transshipment operations, but only 17,500 tons of the reported transshipments were captured by distant water purse seine vessels in the entire Republic of Marshall Islands EEZ for that entire year. In

established clear procedures before other ports in the region.²⁵⁶ For example, it ensured that quarantine and other government personnel were at the ports at the same time as purse seine vessels.²⁵⁷ It is not uncommon to have 15 purse seine vessels in Majuro at the same time, which has led carrier vessels to congregate there as well.²⁵⁸ In addition, even if the catch did not occur in RMI's EEZ, the fishing grounds are relatively close; in contrast, the longline fishing grounds are typically much further from Majuro to use it for transshipment.²⁵⁹

The size of the catch may also play a role in where transshipment occurs. As in Majuro, tuna trading companies place carrier vessels in locations that are convenient for purse seiners.²⁶⁰ However, some purse seine vessels with smaller catches may not be able to compete for space on a carrier vessel with those vessels and companies with larger quantities of fish; they may need to travel to less convenient ports to tranship.²⁶¹ Consequently, carrier vessels are less likely to wait in port for a longliner that may not come as it attempts to fill its hold. Thus, carrier vessels are more likely to meet longliners on the fishing grounds.²⁶² Of course, if longliners were required to transship in port, carrier vessels may establish a presence in certain ports to take advantage of increased fish product from those vessels.²⁶³

The average catch per purse seine vessel prior to transshipment is typically going to be much larger due in part to the larger size of the vessels. For example, all vessels in the Korean purse seine fleet are 501 gross registered tonnage (GRT) or larger while all of its longline vessels are between 201 and 500 GRT.²⁶⁴ Japanese purse seine vessels show a greater range of sizes, but the majority (37 of 69) are larger than 200 GRT.²⁶⁵ The average amount transhipped by its purse seine vessels in 2016 was 788.62 metric tons per transshipment,²⁶⁶ while Korea's longline vessels transhipped a total of 14,425 metric tons of fish caught in the WCPFC Convention Area in 104 transactions, for 138.70 metric tons per transshipment.²⁶⁷

Korea's amount of fish transhipped from longliners appears to be much higher than average. Based on data from WCPFC transshipment forms, longline vessels transhipped on the high seas 948 times in 2016²⁶⁸ and transhipped 23,640 metric tons of bigeye, 9,099 metric tons of

contrast, Tarawa documented only 8% of transshipments occurring in port, even though there was a reported catch of 239,000 tons of fish originating from their EEZ. *Id.* at 23.

²⁵⁶ Personal Communication with Mike McCoy (Mar. 2018).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ MCCOY, *supra* note 247, at 22.

²⁶¹ *Id.*, at 20.

²⁶² Personal Communication with Mike McCoy (Mar. 2018).

²⁶³ Personal Communication between Wez Norris and Alfred Cook, *supra* note 200.

²⁶⁴ Republic of Korea, *Annual Report to the Commission: Part 1: Information on Fisheries, Research, and Statistics*, WCPFC-SC13-AR/CCM-12 (Rev01), tbl. 6.A (2017), available at <https://www.wcpfc.int/system/files/AR-CCM-12%20Korea%20%28Rev01%29.pdf>.

²⁶⁵ Japan, *Annual Report to the Commission: Part 1: Information on Fisheries, Research, and Statistics*, WCPFC-SC13-AR/CCM-10 (Rev3), 9, tbl. 1 (31 July 2017), available at <https://www.wcpfc.int/system/files/AR-CCM-10%20JAPAN%20PART%201%20Rev%203%20%28%2031%20July%202017%29.pdf>.

²⁶⁶ Korea reported a total purse seine catch of 272,863.5 metric tons and 346 transshipments. Korea, *Annual Report to the Commission: Part 1*, *supra* note 264, at at tbl. 6.B.

²⁶⁷ *Id.* at at tbl. 6.A.

²⁶⁸ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at 7, tbl. 4.

yellowfin, and 18,135 metric tons of albacore for a total of 50,874 metric tons.²⁶⁹ That equates to 53.66 metric tons of tuna per transshipment. When swordfish and other species are added to the catch, the total rises to 61,698 metric tons,²⁷⁰ or 65.08 metric tons per transshipment. A review of Japan's data is roughly consistent with these averages: 44.07 metric tons per transshipment.²⁷¹

A range of other factors may also lead captains to choose one port over another. These factors include the desire of fishermen to be paid.²⁷² A tuna trading company may have an office that can issue checks in one port but not another. In the longline fishery, fishermen may not get paid until they sell their fish; thus, they may decide to sell and tranship their catch whenever it is convenient, including on the high seas.²⁷³ Other factors may include weather, the need for international air travel connections to replace crew, past experiences in a port with government officials, the need to make repairs, and the availability of supplies, equipment, and other port amenities.²⁷⁴

A comparison of the five heavily used ports for transshipment with ten other ports spread throughout the WCPFC Convention Area²⁷⁵ shows little difference in their physical attributes. In other words, the region has the port infrastructure to accommodate mandatory transshipment in port by non-purse seine vessels.

For example, all 15 ports are of sufficient depth and size to allow transshipment by even the biggest longliners authorized to fish in the WCPFC Convention Area. Heavily used ports such as Pohnpei and Rabaul have channels that are around 12.5 to 15.2 meters deep,²⁷⁶ anchorages that are at least 23 meters deep,²⁷⁷ and berths that are at least 122 meters.²⁷⁸ The channels at Honiara, and Tarawa are not quite as deep, ranging from 6.4 to 9.1 meters,²⁷⁹ but their berths—at a minimum of 150 meters²⁸⁰—are long enough to accommodate tuna longliners. The ten ports less frequently

²⁶⁹ *Id.* at 7, tbl. 3.

²⁷⁰ *Id.* at 8, tbl. 5.

²⁷¹ Japan recorded 261 mt of fish transhipped on the high seas and 28 high seas transshipments. Japan, *Annual Report to the Commission: Part 1*, *supra* note 265, at tbls. 6-1, 6-2.

²⁷² MCCOY, *supra* note 247, at 22.

²⁷³ Personal Communication with Mike McCoy (Mar. 2018).

²⁷⁴ MCCOY, *supra* note 247, at 23.

²⁷⁵ The following ten ports were assessed for this paper: Lae and Wewak in Papua New Guinea, Noro in the Solomon Islands, Kiritimati in Kiribati, Funafuti in Tuvalu, Apia in Samoa, Pago Pago in American Samoa, Suva and Lautoka in Fiji and Papeete in French Polynesia.

²⁷⁶ World Port Source, Pohnpei Harbour, Port of Call,

http://www.worldportsource.com/ports/portCall/FSM_Pohnpei_Harbour_2333.php; World Port Source, Port of Rabaul, Port of Call, http://www.worldportsource.com/ports/portCall/PNG_Port_of_Rabaul_2365.php; World Port Source, Port of Majuro, Port of Call,

http://www.worldportsource.com/ports/portCall/MHL_Port_of_Majuro_2327.php.

²⁷⁷ Pohnpei Harbour, *supra* note 276; Port of Rabaul, *supra* note 276; Port of Majuro, *supra* note 276.

²⁷⁸ Pohnpei Harbour, *supra* note 276; PNG Ports Corporation, Rabaul,

<http://www.pngports.com.pg/index.php/operations/port-information/70-rabaul>.

²⁷⁹ World Port Source, Port of Honiara, Port of Call,

http://www.worldportsource.com/ports/portCall/SLB_Port_of_Honiara_2382.php; World Port Source, Port of Betio, Port of Call, http://www.worldportsource.com/ports/portCall/KIR_Port_of_Betio_2286.php.

²⁸⁰ Logistics Capacity Assessment, Solomon Islands Port of Honiara,

<http://dlca.logcluster.org/display/public/DLCA/2.1.1+Solomon+Islands+Port+of+Honiara>; Port of Betio, *supra* note 279.

used have similar physical attributes. Channel depths range from a low of 4.9 meters in Funafuti²⁸¹ to 55 meters in Pago Pago²⁸² but with most between 7 and 23 meters deep.²⁸³ They can accommodate vessels that are at least 150 meters in length.²⁸⁴

The amenities of these ports also overlap significantly. For example, all have airports, although the frequency of flights varies from airport to airport. Kiritimati, for example, has very few flights, making it less desirable for switching crews.²⁸⁵ The quality of waste disposal also varies from port to port. Pohnpei, for example, appears to have inadequate waste disposal facilities.²⁸⁶

One important factor to consider is the availability of refrigerated containers. If a carrier vessel is not present to tranship frozen fish, then the port must have refrigerated containers to store the fish until a vessel arrives to take the fish.²⁸⁷ China has noted that some ports do not have adequate ULT facilities.²⁸⁸ The Secretariat implicitly agreed with this assessment when it proposed an exception to a high seas transshipment ban for ULT freezer longliners transshipping to ULT freezer carrier vessels.²⁸⁹

However, this may only represent current practices. Longline vessels are currently transshipping their ULT frozen fish to carrier vessels with ULT freezer capacity on the high seas. If longliners are required to tranship in port, presumably these carrier vessels would move their operations to port. Questions remain as to the cost-effectiveness of this business model. For example, insufficient information exists to determine whether carrier vessels move great distances to accommodate longline vessels fishing in preferred areas or whether carrier vessels remain

²⁸¹ World Port Source, Port of Funafuti, Port of Call,

http://www.worldportsource.com/ports/portCall/TUV_Port_of_Funafuti_2406.php.

²⁸² Department of Port Administration of the American Samoa Government, Port of Pago Pago, American Samoa, <http://americansamoaport.as.gov/>.

²⁸³ See, e.g., World Port Source, Port of Lae, Port of Call, (23.2 meters)

http://www.worldportsource.com/ports/portCall/PNG_Port_of_Lae_2360.php; World Port Source, Port of Wewak, Port of Call, (7.1 to 9.1 meters), http://www.worldportsource.com/ports/portCall/PNG_Port_of_Wewak_2368.php; Ports.com, Port of Noro, Solomon Islands, <http://ports.com/solomon-islands/port-of-noro/>; World Port Source, Port of Apia, Port of Call (23.2 meters), http://www.worldportsource.com/ports/portCall/WSM_Port_of_Apia_2410.php; World Port Source, Port of Papeete, Port of Call (11 to 12.2 meters), http://www.worldportsource.com/ports/portCall/PYF_Port_of_Papeete_2203.php.

²⁸⁴ See, e.g., Port of Funafuti, *supra* note 281; Port of Papeete, *supra* note 283; Fiji Ports, Port of Lautoka, <http://www.fijiports.com.fj/port-of-lautoka/>; Port of Pago Pago, *supra* note 282; World Port Source, Port of Apia, Port of Call, http://www.worldportsource.com/ports/portCall/WSM_Port_of_Apia_2410.php; Ports.com, Port of Noro, Solomon Islands, <http://ports.com/solomon-islands/port-of-noro/>.

²⁸⁵ Personal Communication with Mike McCoy (Mar. 2018).

²⁸⁶ See World Bank, Project Information Document/Integrated Safeguards Data Sheet (PID/ISDS) (Feb. 12, 2018) (“The near-shore water quality and ecosystems are degraded due to urban runoff, reclamations and sea walls, dredging, poor waste management and wastewater and ballast discharges from vessels at the docks.”).

²⁸⁷ Personal Communication with Mike McCoy (Mar. 2018).

²⁸⁸ *TCC12 Summary Report*, *supra* note 185, at ¶ 715 (statement of China). The precise number of Chinese ULT-equipped vessels is not clear. Chinese labels its longline vessels as “deep frozen.” China, *Annual Report to the Commission: Part 1: Information on Fisheries, Research, and Statistics*, WCPFC-SC14-AR/CCM-03, § 2.1 & tbl. 4 (Aug. 2018), available at <https://www.wcpfc.int/file/209910/download?token=sLJd8BBP>. However, it does not distinguish between those that freeze to -55°C and -60°C which is considered ULT. Campling et al., *supra* note 103, at 171.

²⁸⁹ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at 7.

stationary and longline vessels travel to the carriers. Despite these questions, it would seem that this strategy is feasible in principal.

C. The Role of Transshipment Fees and other Port Costs

In 2016, China complained that port costs were rising, reaching \$300 per metric ton of fish, and creating an incentive to tranship on the high seas.²⁹⁰ Although preceding China's concern by four years, a 2012 study indicates that port costs are significantly lower than reported by China and not high enough to make transshipment in port economically infeasible—or in the words of CMM 2009–06—“impracticable.”²⁹¹

That study estimated that the five Pacific Island States hosting the five major ports for purse seine transshipment received between \$9.7 million and \$15.9 million in 2010 in combined gross revenue resulting from purse seine vessels transshipping in port.²⁹² The average dollar amount per transshipment varied by port but ranged from a low of \$2,600 to \$6,700 in Rabaul to a high of \$9,500 to \$14,500 in Majuro.²⁹³ In contrast, the Solomon Islands reported receiving gross revenue of approximately \$750 from each longline in-port transshipment in 2011.²⁹⁴

The 2012 study also broke down various costs by port. It reported that transshipment fees varied from port to port. For example, Majuro charged no transshipment fees, while the Solomon Islands charged \$2 per ton, and RMI charged \$1,500 for seiners with a fishery access license and \$3,000 for seiners without a fishery access license for each transshipment.²⁹⁵ Based on these data, the study estimated that the ports charging transshipment fees earned \$1.45 million from those fees, or approximately \$1.90 per metric ton transhipped.²⁹⁶ It also concluded that the lack of transshipment fees does not provide a competitive advantage over Pacific Island States with transshipment fees.²⁹⁷ This lack of competitive advantage reinforces the view that multiple factors contribute to the choice of port for transshipment.²⁹⁸

Similarly, ports charge a range of fees (\$600 to \$6,000 for a typical purse seine visit of 5 to 10 days)²⁹⁹ for a variety of government services, such as customs, quarantine, and anchorage, among other services.³⁰⁰ Additional fees or costs may be associated with the purchase of goods and services, such as food and disposal services. These costs would presumably apply to transshipment at sea as well, as would fuel costs. Other fees, such as pilot fees, would not apply to transshipment at sea. Given the general applicability of most of these costs, they should not be considered for determining whether transshipment in port is impracticable.

²⁹⁰ *TCC12 Summary Record*, *supra* note 185, at 262.

²⁹¹ *MCCOY*, *supra* note 247, at 1.

²⁹² *Id.* at 39–40.

²⁹³ *Id.* at 39, tbl. 5.

²⁹⁴ *Id.* at 40.

²⁹⁵ *Id.* at 33, tbl. 1. Pohnpei in FSM charged \$1.37 per ton while Kiribati charged \$3 per ton. *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 33.

²⁹⁸ *Id.* at 33.

²⁹⁹ *Id.* at 35, tbl. 2.

³⁰⁰ *Id.* at 34–35.

This 2012 study was designed to determine the value of in-port transshipment to Pacific Island States. Based on the estimated revenue to the five ports included in the study, the average revenue earned per transshipment by a purse seine vessel was \$8 to \$13 per metric ton transhipped.³⁰¹ The corollary is that each transshipment cost a purse vessel \$8 to \$13 per metric ton transhipped—far lower than the figure provided by China. As noted above, however, not all of the costs associated with the transshipment can be attributed to transshipping in port. Regardless of where a vessel tranships, it will need supplies. In any event, relative to wholesale prices of tuna that can easily reach \$10,000 per metric ton in the longline fishery³⁰² and the overall costs of operating a tuna vessel, a charge of \$8 to \$13 per metric ton would appear to be small. Similarly, a longliner’s total cost of \$750 to tranship in port³⁰³—about \$11.54 per metric ton³⁰⁴—would also appear to be negligible relative to the costs of operating a vessel. For context, in 2006, a WCPFC Scientific Committee paper noted that the purchase of electronic devices of \$US150,000 by a typical longliner in the late 1990s represented “a very small proportion of the value of a large longliner’s annual landings (about \$US 2.435 million per year).”³⁰⁵

D. Fuel, Labor, and Other Costs and Trends

The major fishing fleets in the Pacific have been declining, and they continue to decline despite the tremendous economic value of the fishery. For example, Japan’s tuna fleet began to shrink in the mid-1980s, turning Japan into a net importer of tuna, due to “rising competition from Chinese Taipei, Korea, and other fleets and also because of soaring labor and fuel costs, declining catch rates, and shortage of labor supply.”³⁰⁶ Longline fleets overall—and in particular those from Chinese Taipei, Korea, and Japan—are projected to continue shrinking due to smaller catches, higher fuel costs, and higher labor costs,³⁰⁷ as well as overcapacity of the fishery.³⁰⁸

Determining the relative influence of each factor—competition, catch size, overcapacity, labor costs, and fuel costs—is difficult because each factor plays a role, which complicates a determination of whether transshipment in port is impracticable. For example, if fuel costs are the driving factor, then one might be able to legitimately claim that transshipment in port imposes substantial economic costs on a vessel, making transshipment in port impracticable. However, if

³⁰¹ *Id.* at 40.

³⁰² Maggie Skirtun & Chris Reid, *Analysis and Projections of Economic Conditions in WCPO Fisheries*, WCPFC-SC14-2018 ST-WP-04 Rev. 1, 5 (Aug. 6, 2018), available at <https://www.wcpfc.int/file/217936/download?token=gb7n3-9p> (finding that fresh bigeye and yellowfin import prices into Japan were \$10,158 and \$9,491 in 2017 and that these amounts were 13% and 6% lower than the average price from 1999 to 2017).

³⁰³ *Id.*

³⁰⁴ If the average longline transshipment includes 65.08 metric tons of tuna and other fish caught in the WCPFC Convention Area, then a total transshipment fee of \$70 equates to \$11.54 per ton. See *supra* 270 and accompanying text.

³⁰⁵ Peter Ward & Sheree Hindmarsh, *An Overview of Historical Changes in the Fishing Gear and Practices of Pelagic Longliners*, WCPFC-SC2-2006/FT WP-1, 18 (2006), available at https://www.wcpfc.int/system/files/SC2_FT_WP1.pdf.

³⁰⁶ Harry N. Scheiber et al., *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 97, 113 (2007), available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1732&context=facpubs>.

³⁰⁷ Campling et al., *supra* note 103, at 12–13, 130.

³⁰⁸ Enric Sala et al., *The Economics of Fishing the High Seas*, 4 SCIENCE ADVANCES __ 7 (June 2018), available at <http://advances.sciencemag.org/content/4/6/eaat2504/tab-pdf>.

the major driver is overcapacity, then the influence of fuel prices or labor costs on profitability would not be a compelling determinant of whether transshipment in port is impracticable. Under this latter scenario, fuel prices might merely be the “straw that broke the camel’s back” by which one action causes an unpredictably large or extreme reaction because of the cumulative effect of other actions.³⁰⁹

Undeniably, the size of the fleets of Chinese Taipei, Japan, and Korea have declined. Although Japan currently has 446 longliners registered to fish in the WCPFC Convention Area,³¹⁰ only about half of these are distant water vessels; the others fish in coastal waters.³¹¹ This number represents a significant decline from Japan’s 1963 peak of 1,901 distant waters vessels and 1972 peak of 940 small offshore vessels.³¹² The fleet of Chinese Taipei registered to fish in the WCPFC Convention Area has declined from more than 2,300 in 1997³¹³ to 1,495 in 2018.³¹⁴

The number of Korean vessels peaked at 220 in 1991 before dropping to roughly 125 in 2011.³¹⁵ It currently has 117 longliners registered to fish in the WCPFC Convention Area.³¹⁶ In contrast, the Chinese fleet has grown. The Chinese longline fleet fishing in the WCPFC Convention Area grew dramatically from 219 to 429 vessels between 2009 and 2015³¹⁷ and now consists of 488 vessels.³¹⁸

The decline of the three Asian fleets does not necessarily indicate that the fishery is in economic trouble because teasing out the relative adverse effects of costs, declining fish stocks, and competition is complex and difficult. For example, total catches of tuna species in the WCPFC Convention Area have increased throughout the 1980s and peaked in 2014.³¹⁹ The catch more than tripled between 1982 and 2016.³²⁰ The vast majority of the additional catch was captured by purse seine vessels³²¹ for skipjack tuna.³²² Still, the longline catch has “steadily increased” since the 1950s except for a dip in the 1980s.³²³ Nonetheless, catches by Japan’s distant water and offshore longline fleets have declined from 20,725 metric tons in 2004 to 5,746 metric tons in 2016;³²⁴ catches by Chinese Taipei vessels declined from 16,888 metric tons in 2004 to 4,751 metric tons in 2016; Korean catches also declined.³²⁵

³⁰⁹ Grammarist, Straw that Broke the Camel’s Back and Last Straw, at <http://grammarist.com/idiom/straw-that-broke-the-camels-back-and-the-last-straw/>.

³¹⁰ WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

³¹¹ Campling et al., *supra* note 103, at 124.

³¹² *Id.* at 125.

³¹³ *Id.* at 139.

³¹⁴ WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

³¹⁵ Campling et al., *supra* note 103, at 154.

³¹⁶ WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

³¹⁷ Campling et al., *supra* note 103, at 167.

³¹⁸ WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

³¹⁹ Williams et al., *supra* note 62, at 2.

³²⁰ *Id.*

³²¹ *Id.* at 2, fig. 1.

³²² *Id.* at 2, fig. 2.

³²³ *Id.* at 25, fig. 34.

³²⁴ *Id.* at 25.

³²⁵ *Id.*

These catch declines correspond to a decline in vessels fishing in the Convention Area, but they also correspond to increased competition from vessels flagged by Pacific Island States. Fiji, French Polynesia, Vanuatu, and others have developed longline fleets³²⁶ that did not exist in the 1980s or even a decade ago.³²⁷ Because Vanuatu's fleet is primarily owned by nationals and companies of China and Chinese Taipei,³²⁸ one might reasonably attribute the Vanuatuan catch to China and Chinese Taipei, thereby shrinking the catch and vessel declines experienced by Chinese Taipei.

With regard to labor costs, vessel owners are clearly turning to lower-cost sources of labor to manage operational costs. The influence of labor costs on total operational costs can be seen in the change in the nationality of crews. Although the vast majority of longline vessels are flagged by Japan, Korea, and Chinese Taipei, the nationality of the crews on these vessels is primarily Indonesian, Filipino, and Vietnamese,³²⁹ and a growing number of Chinese vessels are crewed by Indonesians and Filipinos.³³⁰ Korean vessel owners increasingly turn to Nepalis for crew.³³¹ Whether this indicates rising labor costs or simply an urge to increase profitability is not known. For example, Chinese vessels apparently pay crew the equivalent of US\$400 per month, less than the US\$450 per month paid to women working in factories and living in dorms.³³² Given the isolation and danger of working on a longline vessel, any claim that these wages constitute sufficient pay is questionable.³³³

The reduction in the three Asian fleets may simply be a market correction to overcapitalization and excessive fleet capacity. In fact, a June 2018 study concluded that the fleets of China and Chinese Taipei are unprofitable and that "massive overcapacity" may be the reason.³³⁴ Japan's fleet, in contrast, is profitable; that profitability may be associated with its vessel-scraping programs, which reduced capacity.³³⁵ Japan bought back and scrapped 132 distant water longline vessels in 1998-1999 and another 64 in 2009.³³⁶ Chinese Taipei has also bought back tuna longline vessels,³³⁷ but its longline fleet still remains by far the largest in the WCPFC Convention Area with 1,495 registered vessels; China has the next largest fleet at 488 vessels.³³⁸

³²⁶ See WCPFC, Vessels in the RFV by Vessel Type, at <https://www.wcpfc.int/vessels/charts/types>.

³²⁷ See Williams et al., *supra* note 62, at 25 ("A significant change in the [WCPFC] longline fishery over the past 10 years has been the growth of the Pacific Islands domestic albacore fishery, which has risen from taking 33% of the total south Pacific albacore longline catch in 1998 to accounting for around 50–60% of the catch in recent years."). See also *id.* at 24, fig. 33 (showing an increase in the number of Pacific island vessels from 1992 to 2016).

³²⁸ See *supra* note 95 and accompanying text (reporting that 22 of 24 of the vessels flagged by Vanuatu and registered to fish in the WCPFC Convention Area are owned by nationals or companies of China and Chinese Taipei).

³²⁹ Campling et al., *supra* note 103, at 131, 147, 159.

³³⁰ *Id.* at 175–76.

³³¹ Personal Communication with Mike McCoy (Mar. 2018).

³³² Campling et al., *supra* note 103, at 175–76.

³³³ *Accord id.* at 176 (stating that claims of sufficient pay to crew "might be questioned").

³³⁴ Sala et al., *supra* note 308, at 5, 7.

³³⁵ *Id.* at 5, 7.

³³⁶ Campling et al., *supra* note 103, at 130–31.

³³⁷ Theodore Groves & Dale Squires, *Lessons from Fisheries Buybacks*, in FISHERIES BUYBACKS 15, 39 (2007) available at <https://onlinelibrary.wiley.com/doi/book/10.1002/9780470277836>.

³³⁸ WCPFC Vessels in the RFV by Vessel Type, <https://www.wcpfc.int/vessels/charts/types>.

Consistent with the Executive Director’s suggestion in 2013 that vessels transshipping on the high seas may be more likely to engage in underreporting of catch,³³⁹ the authors of a June 2018 study surmise that underreporting catch is “the most obvious reason” that vessels remain profitable.³⁴⁰ They conjecture, however, that high seas fishing

could become rational for the most unprofitable fisheries due to a combination of factors including the following: (i) currently available catch data continue to underrepresent real catches, (ii) vessels fish only part of the time in the high seas and make most of the economic benefit from fishing in EEZs, (iii) government subsidies not accounted for in this analysis, (iv) reduced costs because of unfair wages or forced labor, and (v) reduced costs because of transshipment at sea.³⁴¹

Even with reductions in fleet size, it is possible that fleet numbers remain excessive. In fact, the WCPFC has expressed concern over the size of the fleet.³⁴² In the purse seine fishery, for example, vessels have become more efficient at catching “due to improved technical developments (e.g. faster vessels, new net technology, smart FADs, etc.).”³⁴³ This has resulted in increased effort, which “implies notable reductions” in effort are needed to reduce impacts to the fishery.³⁴⁴

Longline vessels have also become more technologically advanced and more efficient over time. The technological improvements to longline vessels considered to be “especially significant” include

1. improved monofilament longline reels (more power, higher capacity, less wear, lighter);
2. electric fishing lights to replace chemical light sticks;
3. use of temperature/depth recorders during sets;
4. electronic chart plotting software integrated with bridge electronics;

³³⁹ *Guidelines for Determining Impracticability*, *supra* note 20, at 5 (stating, “where operators are operating on small margins and concerned about profit and survivability the likelihood of accurate and honest reporting is small and they are likely to undertake IUU activity than profitable operators.”).

³⁴⁰ The authors state:

How is it possible that some countries continue to fish in certain high-seas regions while exhibiting an apparent economic loss? For this behavior to be incentive-compatible, there must be a net benefit for individual companies to continue operating in the high seas. The most obvious reason is underreporting the catch, which would result in an underestimate of fishing revenue and profits.

Sala, *supra* note 308, at 7.

³⁴¹ *Id.* The study reports that “Without bunkers and reefers, fishing in the high seas would be far less profitable, especially for China, which showed the largest number of encounters with reefers for transshipment.” *Id.* at 8. This statement, however, is not specific to fishing in the WCPFC Convention Area.

³⁴² See Alex Tidd & Graham Pilling, *Preliminary Capacity Utilization Analysis of the WCPO Purse Seine Fleet using Data Envelopment Analysis (DEA)*, WCPFC-SC12-2016/MI-IP-03, at 1 (2016), available at https://www.wcpfc.int/system/files/SC12-MI-IP-03%20Data%20Envelope%20Analysis_0.pdf.

³⁴³ Graham Pilling & Shelton Harley, *Estimating Potential Tropical Purse Seine Fleet Sizes Given Existing Effort Limits and Candidate Target Stock Levels*, WCPFC-SC11-2015/ MI-WP-10, at 7 (2015), available at <https://www.wcpfc.int/system/files/MI-WP-10%20Capacity%20PS%20fleet%20sizes.pdf>.

³⁴⁴ *Id.*

5. use of remote sensing data . . . ;
7. development of onboard processing of tuna to loins; combination of freezing and chilling capability on the same vessel; diversification of markets.³⁴⁵

These and other developments in longline fishing gear and practices have likely increased catch:

Bait, hooks, lightsticks, and leaders directly interact with the species; they change catchability by affecting the probability of an animal attacking bait, being hooked or landed. Other changes may increase catchability by increasing the availability of baited hooks (e.g., deeper longlines), improving searching efficiency (e.g., satellite imagery), or increasing the time spent on fishing grounds (e.g., freezers), thereby providing fishers with more time to adapt to local conditions and to “follow the fish”. In addition to increasing catch rates, improved fishing gear and practices reduce operating costs. Labor-saving devices, such as line-haulers, reduce costs, but do not directly affect catchability. Our review does not cover the effects of changes in fishing gear and practices on the size (“selectivity”) or quality of target species.³⁴⁶

Still, a combination of price for tuna and costs of operating a vessel—particularly fuel costs³⁴⁷—may be driving the decline in vessel numbers of Chinese Taipei, Japan, and Korea. Economic conditions for the tropical longline fishery declined “continuous[ly] and rapid[ly]” between 1998 and 2008 “as costs increased and prices and catch rates declined.”³⁴⁸ Economic conditions improved in 2009 and 2016 as fuel costs fell and catch rates improved.³⁴⁹ As the long-distance journeys of the profitable U.S. and Japanese fleets indicate, however, fuel prices alone cannot lead one to a finding of impracticability.

³⁴⁵ David G. Itano, *An Examination of Vessel, Gear and Operational Details Useful for Fishery-specific Effort Standardization, including FAD-related Gear and Fishing Strategies*, WCPFC-SC2-2006/FT WP-6, 4 (2006), available at https://www.wcpfc.int/system/files/SC2_FT_WP6.pdf.

³⁴⁶ Ward & Hindmarsh, *supra* note 305, at 18.

³⁴⁷ Fuel costs are considered “the single most important operational cost across all fleets, subject to the largest fluctuations across all cost categories and, hence, a major determinant in the change of costs over time.” Terawasi & Reid, *supra* note 93, at 9.

³⁴⁸ Williams et al., *supra* note 62, at 33. For a comprehensive review of economic conditions in the tuna fisheries of the WCPFC Convention Area, see Terawasi & Reid, *supra* note 93.

³⁴⁹ Williams et al., *supra* note 62, at 33, 34, figs. 48–49.

VII. Rethinking the Impracticability Standard: A Proposal

A. Problems with the Impracticability Test

CMM 2009–06 attempted to prohibit transshipment on the high seas except in a very narrow set of circumstances by setting a “high threshold” for “impracticability.”³⁵⁰ The lack of clarity of the two-part impracticability test—“significant economic hardship” and “significant and substantial changes” to a vessel’s historical mode of operation—do not explain the unwillingness of some CCMs to tranship in port. In fact, some CCMs have treated transshipment in port as the exception and not the rule.³⁵¹ CCMs have failed to report on procedures to monitor high seas transshipment and have failed to provide plans detailing how they are encouraging a reduction in transshipment on the high seas.³⁵²

Even if transshipment at sea remains a common global practice, that does not mean that it is an appropriate practice. Indeed, research indicates that numerous illegal activities, including IUU fishing and human rights abuses, are associated with high seas transshipment³⁵³ and that some fleets in the WCPFC may be profitable only because of their IUU fishing associated with high seas transshipment.³⁵⁴ These activities strongly indicate that transshipment at sea must be prevented or sharply reduced and heavily monitored.

Moreover, as described in the preceding sections, the evidence indicates that transshipment in port is not impracticable:

1. A review of port infrastructure appears to support the 2013 conclusion of the Executive Director that CCMs in the region “have well establish[ed] port and transport infrastructure.”³⁵⁵ Some may lack ULT freezer capacity, but that lack could potentially be filled by carrier vessel with ULT freezer capacity.³⁵⁶
2. A significant portion of the purse seine catch is taken from the high seas yet those vessels tranship in port.
3. At least three longline fleets—those of the EU, Japan, and the United States—fish on the high seas hundreds of nautical miles from port yet tranship all (EU and U.S.) or most (Japan) of their high seas catch in port.³⁵⁷ A large number of high seas transshipments occur just outside the EEZs of CCMs,³⁵⁸ suggesting that these vessels are able to tranship in port.

³⁵⁰ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶¶ 9, 23.

³⁵¹ *WCPFC13 Summary Report*, *supra* note 212, at ¶ 167 (statement of the EU).

³⁵² *Guidelines for Determining Impracticability*, *supra* note 20, at 5.

³⁵³ *See supra* Section II.

³⁵⁴ Sala et al., *supra* note 308, at 7.

³⁵⁵ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at 6.

³⁵⁶ *See supra* Section VI.C.

³⁵⁷ *See supra* Section III.C.

³⁵⁸ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at figs. 3, 4, 5.

4. Only five CCMs have transhipped on the high seas in the last two years, with just three CCMs—China, Chinese Taipei, and Vanuatu—accounting for 84% and 89% of those transhipments in 2015 and 2016, respectively.³⁵⁹
5. Costs associated with transhipment in port are insignificant in relation to the costs of operating a tuna vessel.³⁶⁰
6. Fuel and labor costs do not fully explain an inability to tranship in port as overcapacity may play a more significant role, as evidenced by the profitability of the Japanese fleet.³⁶¹
7. Given the variables affecting profitability—operational costs, subsidies, over-capitalization—assessing whether transhipment in port causes “significant economic hardship” on a vessel-by-vessel basis is challenging.

In addition, CCMs have abused their discretion under paragraph 34 of CMM 2009–06 to determine when transhipment in port is impracticable. As noted above, no CCM has made impracticability findings on a vessel-by-vessel basis and no CCM has advised the WCPFC of its monitoring and verification procedures for high seas transhipments and submitted to the WCPFC a plan detailing the steps it is taking to encourage transhipment in port.

These failures to submit required information could be considered an abuse of right under international law.³⁶² In the *Shrimp-Turtle* case,³⁶³ the Appellate Body of the World Trade Organization relied on abuse of rights in its analysis of whether U.S. rules fell within the Article XX(g) exception to the core obligations of the General Agreement on Tariffs and Trade (GATT).³⁶⁴ The Appellate Body stated:

The chapeau of Article XX [concerning exceptions to the GATT’s rules] is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.” An abusive exercise by a Member of its own treaty right thus results

³⁵⁹ *Id.* at tbl. 2.

³⁶⁰ *See supra* Section VI.C.

³⁶¹ Sala et al., *supra* note 308, at 5, 7.

³⁶² An abuse of right occurs when the exploitation of an individual right injuriously affects the interests of the international community. *See, e.g.*, Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL LAW J. 389, 391–92 (2002), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5574&context=faculty_scholarship. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286 (1966).

³⁶³ United States-Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R (adopted Nov. 6, 1998).

³⁶⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.³⁶⁵

Moreover, the two elements of the impracticability test are inherently problematic. The “substantial economic hardship” finding in a fisheries context is a difficult one to make. Fuel costs are not constant and could change even during a fishing season.³⁶⁶ Tuna change location based on El Niño cycles and other conditions, which affects fuel and transport costs. Thus, it might be difficult to predict whether transshipment in port during any particular season—prior to the season starting—is likely to cause substantial economic hardship.

In addition, as long as the finding is unilateral, other CCMs will likely be unable to verify a determination of “substantial economic hardship.” Economic data concerning fisheries is frequently closely guarded. When the FFA suggested in 2017 that CCMs submit economic data to allow for a better evaluation of the economic health of the fishery, Japan responded that economic data “were often considered as sensitive information.”³⁶⁷ China noted that seeking such information was premature,³⁶⁸ while Chinese Taipei responded that any proposed guidelines be voluntary.³⁶⁹

The second component of the impracticability test—whether transshipment in port might cause “significant and substantial changes to [a vessel’s] historical mode of operation”—also poses serious challenges to meaningful implementation. First, one could argue, for example, that a requirement for a vessel to tranship in port when it has not done so in the past constitutes, in and of itself, a significant and substantial change to a vessel’s mode of operation. Second, CCMs have failed to identify the distinction between “significant” and “substantial” or determine that it is a single standard. In the United States, for example, courts may overturn agency actions if they are considered to be “arbitrary or capricious.”³⁷⁰ U.S. courts, including the Supreme Court, have treated this as a single standard, not two.³⁷¹ If “significant and substantial” impose two thresholds, they are not easily distinguished. *The Oxford English Dictionary* defines “significant,” when used as an adjective, as “[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential.” “Substantial,” meanwhile, means “[f]irmly or solidly established; of solid worth or value; of real significance, weighty; reliable; important, worthwhile.” There is clear overlap in these definitions, including that the item be “important.”

³⁶⁵ United States-Import Prohibition of Certain Shrimp and Shrimp Products, *supra* note 363, at ¶ 158.

³⁶⁶ See United States, *Annual Report to the Commission: Part 1*, *supra* note 138, at 23 (2018) (stating that the “price of fuel is increasing in 2018 which may hinder the economic performance of both sectors of the longline fishery.”)

³⁶⁷ WCPFC, *Thirteenth Regular Session of the Scientific Committee: Summary Report*, ¶ 145 (2017), available at https://www.wcpfc.int/system/files/0_SC13%20Summary%20Report%20%28Adopted%20Version%20-%202017Nov2017%29.docx.

³⁶⁸ *Id.* at ¶ 146.

³⁶⁹ *Id.* at ¶ 148.

³⁷⁰ Pursuant to the Administrative Procedure Act, courts may set aside agency decisions that are “arbitrary, capricious, an abuse of discretion or not in accordance with law.” 5 U.S.C. § 706(2)(A) (2000).

³⁷¹ See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (consistently referring to the “arbitrary and capricious test”).

B. A New Test: A Presumption Against High Seas Transshipment

Against this background, where does one find a compromise? The FFA has urged the adoption of a high seas transshipment ban and RMI proposed the impracticability test only as a compromise to the ban.³⁷² FFA members will likely oppose the continuation of the status quo. In addition, they will likely oppose the adoption of the rules of other tuna RFMOs, which allow transshipment at sea if various conditions are met. At the same time, the Asian CCMs have stated their belief that transshipment is a common practice that should be allowed in the WCPFC Convention Area

For all of the reasons mentioned in Section A, this paper proposes a presumption against transshipment on high seas. Yet, it also recognizes some of the possible challenges posed by this fishery. Thus, it carves out express time-limited exemptions to the ban while also ensuring that the exemptions are not abused. This paper thus proposes the replacement of paragraphs 34 to 38 of CMM 2009–06 with the following paragraphs.

Permissible Exemptions. This paper proposes the same exemptions for fresh fish and ULT-frozen fish proposed by the Secretariat at TCC12 but with some caveats. These two exemptions may be justifiable for some vessels in light of the dynamics of the fishery, the unavailability of ULT freezer capacity at some ports, and the need to get fresh fish to market as soon as possible.

Whether these exemptions are necessary in all circumstances, however, bears some scrutiny. The exemption for fresh fish, for example, may not always be necessary. Suppliers indicate that fish stays fresh if properly iced for up to 30 days.³⁷³ The U.S. and Japanese fleets act accordingly. The U.S. longline fleet catches substantial amounts of fish within the WCPFC Convention Area in the North Pacific Ocean³⁷⁴ and yet lands all of the catch in port.³⁷⁵ Japan also catches much of its fish for the fresh market. In 2015, 66,200 metric tons of fresh tuna were sold in Japan³⁷⁶ (compared to 232,000 metric tons of frozen tuna).³⁷⁷ During that year, Japan reported 31 high seas transshipments³⁷⁸ totaling 1,744 metric tons of bigeye, yellowfin, and other species caught in the WCPFC Convention Area.³⁷⁹ While the total amount of fresh fish sold in Japan includes imports from other CCMs, it is inconceivable that Japan transhipped all of the fish landed by its vessels and destined for the fresh fish market; its vessels must have caught more than 1,744 metric tons of tuna for the fresh fish market.³⁸⁰

³⁷² *WCPFC6 Summary Report*, *supra* note 202, at ¶ 305 (stating, “Some CCMs noted their general opposition to allowing transshipment on the high seas but stated their willingness to support the measure as a first step.”).

³⁷³ Personal Communication with Eric Kingma, International Fisheries/Enforcement/NEPA Coordinator, Western Pacific Regional Fishery Mgt. Council (Aug. 7, 2018).

³⁷⁴ United States, *Annual Report to the Commission: Part 1*, *supra* note 138, at 22.

³⁷⁵ *See supra* Section III.C.

³⁷⁶ Campling et al, *supra* note 103, at 80.

³⁷⁷ *Id.* at 70.

³⁷⁸ WCPFC Secretariat, *Annual Report on WCPFC Transshipment Reporting, with an Emphasis on High Seas Activities*, WCPFC-TCC12-2016-RP03_rev1, Annex 2A (Sept. 7, 2016), available at https://www.wcpfc.int/file/88693/download?token=wpE_VQCU.

³⁷⁹ *Id.* at Annex 2B.

³⁸⁰ *See supra* Section III.C.

Clearly high seas transshipment of fresh fish is not always necessary. As a consequence, any approval of an exception for fresh fish should be accompanied by a separate provision that directs the Secretariat to determine whether or under what circumstances transshipment on the high seas of fresh fish is necessary. To ensure that CCMs fund the study, the exception for fresh fish could include a sunset provision. The exception could be renewed provided that it is renewed consistent with the findings of the study.

The exception for vessels carrying ULT frozen fish also requires some scrutiny. It appears accepted that some ports have inadequate ULT container capacity, whereas many longline vessels do have ULT freezer capacity. In such circumstances, it would appear justifiable to allow these vessels to tranship to carrier vessels with ULT freezer capacity.

Still, the identification of those ports lacking ULT container capacity has not been documented. In addition, and perhaps more relevant, it may be economically feasible for carrier vessels to move operations from the high seas to port. Before granting or as a condition of granting such an exemption, CCMs should direct the Secretariat to prepare a report to determine (1) which ports lack freezer capacity, which might be necessary until carrier vessels can get to port and (2) determine whether it is economically feasible to move carrier vessels that tranship fish from longline vessels from the high seas to port.

The third exemption proposed by the Secretariat for vessels fishing in the overlap area simply honors the WCPFC's decision to allow those vessels registered in both the IATTC Convention Area and the WCPFC Convention Area to follow either the rules of the IATTC or the WCPFC, depending on the rules chosen by the flag State.³⁸¹ However, due to the information and procedural requirements proposed below, the exemptions proposed here are not as open-ended as proposed by the Secretariat at TCC12.

The new paragraphs to implement these exemptions could be written as follows:

34. Transshipment on the high seas by non-purse seine vessels is permissible only in the following situations:
- a. Non-purse seine vessels using flake ice or refrigerated sea water and which tranship fresh fish to receiving vessels until [insert specific date], where “fresh fish” means tuna or other highly migratory species that are alive, whole or dressed/gutted, but not further processed or frozen;
 - i. This exception may be extended beyond [the date mentioned in sub-paragraph (a)] only if the Secretariat concludes, based on a report it prepares or commissions, that transshipment on the high seas of fresh fish is necessary;
 - ii. If the report required by sub-paragraph (a)(i) concludes that transshipment on the high seas of fresh fish is necessary but only under specific conditions, the

³⁸¹ WCPFC, *Ninth Regulation Session Summary Report*, ¶ 80 (2012), available at <https://www.wcpfc.int/system/files/WCPFC9-Summary-Report-final.pdf>.

exception can be extended beyond [the date mentioned in sub-paragraph (a)], provided that it is amended consistently with the conclusions of the report.

- b. Ultra-low temperature (ULT) freezer longline vessels which tranship tuna to ULT freezer carriers in order to supply the high-grade frozen sashimi market until [insert specific date];
 - i. This exception may be extended beyond [the date mentioned in sub-paragraph (b)] only if the Secretariat concludes, based on a report it prepares or commissions, that ports in specific regions of the Convention Area fished have insufficient ULT freezer capacity and it is not economically feasible for carrier vessels to move operations from the high seas to port or, in the alternative, to waters under national jurisdiction.
 - ii. If the report required by sub-paragraph (b)(i) concludes that transhipment on the high seas of ULT fish is necessary but only under specific conditions or in certain areas, the exception can be extended beyond [the date mentioned in sub-paragraph (b)], provided that it is amended consistently with the conclusions of the report.
- c. Non-purse seine vessels which fish in WCPFC/IATTC overlap area, provided that the CCM flag State has notified the WCPFC and IATTC that it will apply IATTC resolutions in accordance with the WCPFC9 Decision on the WCPFC-IATTC Overlap Area.

Information Requirements. Currently, CMM 2009–06 imposes far different information and procedural requirements for obtaining an exemption for purse seine vessels and non-purse seine vessels. With respect to purse seine vessels, for example, CCMs must describe where transhipments are likely to occur and provide an explanation for the exemption. This paper proposes the adoption of information requirements for non-purse seine vessels that are similar to those that apply to purse seine vessels, while also retaining the requirement to submit a plan that encourages vessels to tranship in port. Thus, a CCM seeking an exemption to allow transhipments of ULT frozen fish would need to demonstrate that relevant ports do not have adequate ULT freezer capacity and that it is not economically feasible for carrier vessels to locate in relevant ports.

In addition, by harmonizing procedural requirements for obtaining an exemption, this proposal eliminates the unilateral discretion to authorize exemptions that has been wholly ineffective at minimizing transhipment on the high seas in the WCPFC Convention Area. The new paragraphs could be written as follows:

- 35. CCMs seeking to apply an exemption for a vessel(s) that meets one of the conditions set out in paragraph 34 shall submit a written request to the Executive Director by 1 July of a given year that includes, at a minimum, the following information:
 - a. the information required by paragraph 26 of this CMM;

- b. the CCM’s procedures for monitoring and verification of the transhipments;
- c. a list of vessels for which the CCM seeks an exemption;
- d. a plan detailing the steps it is taking to encourage transhipment in port by the vessels included in the list provided pursuant to paragraph (b).

36. Paragraphs 27 to 31 of this CCM [concerning review of the requests by the TCC] shall apply *mutatis mutandis* to requests to tranship on the high seas by non-purse seine vessels.

Time Limits for Exemptions. To make the information requirements effective—in particular, the plan detailing efforts to encourage transhipment in port—exemptions should be limited to a specified period of time, for example, three years. If a CCM is not implementing its plan to encourage transhipment in port, then presumably the WCPFC will not grant a renewal of an exemption for a vessel flagged by that CCM. That should create a strong incentive to develop and implement such plans. The new paragraph could be written as follows:

37. The Commission shall not grant an exemption of more than three years.

38. A CCM may seek renewal of an exemption for a vessel(s) provided that it submits the information required by paragraph 35 and the Commission follows the process required by paragraph 36.

Notification Requirements. The paragraphs on notification of transhipments are currently found in paragraph 35 of CMM 2009–06. However, this paper proposes to shorten the timeframe for providing the Executive Director with the Transhipment Declaration, as indicated below. With modern communication systems on board tuna vessels, there is no reason that vessels cannot immediately transmit forms.³⁸² In fact, the CCSBT, IATTC, ICCAT, and IOTC already require transmission of the CCSBT transhipment declaration within 24 hours of completing the transhipment by the master of the carrier vessel.³⁸³ Moreover, near real-time submission of the transhipment declaration would provide additional time “for all relevant actors to cross reference and verify the information and therefore be confident that the produce has been sourced legally.”³⁸⁴ The new paragraph could be written as follows:

39. If the Commission authorizes transhipment on the high seas, the CCMs responsible for reporting against both the offloading and receiving vessels shall, as appropriate:

- a. notify the information in Annex III to the Executive Director at least 36 hours prior to each transhipment; and
- b. provide the Executive Director with a WCPFC Transhipment Declaration within ~~15 days~~ 24 hours of completion of each transhipment.

³⁸² See Van der Geest, *supra* note 149, at 58, 67 (calling for real-time transmission of the transhipment declaration).

³⁸³ CCSBT Transhipment Resolution, *supra* note 37, at ¶ 27; IATTC Resolution C–12–07, *supra* note 37, at ¶ 14; ICCAT Resolution 16–15, *supra* note 37, at ¶ 17; IOTC Resolution 17/06, *supra* note 37, at ¶ 15.

³⁸⁴ Van der Geest, *supra* note 149, at 58, 67.

Observer Requirements. This paper also proposes the replacement of paragraph 13 of CMM 2009–06 to require deployment of an observer from the Regional Observer Programme on both the offloading vessel and the receiving vessel. CMM 2009–06 currently requires an observer on the receiving vessel or either the receiving or offloading vessels, depending on the situation.³⁸⁵ The placement of observers on both the offloading and receiving appears necessary to overcome IUU fishing concerns and other issues associated with transshipment at sea. It also helps fulfill the WCPFC’s goal to put observers on at least 5% of the effort in the longline fishery.³⁸⁶ The Secretariat of the Pacific Community (SPC) estimates observer coverage on Chinese longliners at 2.2% to 2.6%, Vanuatu coverage at 2.0%, and Chinese Taipei at 1.9% to 3.9% for its small tuna longliners and a more favorable 8.2% for its large tuna longliners.³⁸⁷ Because observer coverage on carrier vessels is poorly known, the WCPFC agreed in 2017 to require CCMs to report observer coverage on carrier vessels conducting transshipments at sea.³⁸⁸

CCMs have complained about the cost of deploying an observer on both the offloading and receiving vessels. However, if all vessels are required to have observers or tranship in port, then no vessel has a competitive advantage. CCMs and vessel owners should therefore not worry that the additional costs imposed by having an observer on board will cause economic harm.

The Secretariat has noted a shortage of qualified observers.³⁸⁹ Yet, the Pacific Island Regional Observer Programme has supplied observers for each of the 506 purse seine vessels registered to fish in the WCPFC Convention Area.³⁹⁰ Training additional observers for the 352 vessels that actually transhipped on the high seas in 2016 and a number of carrier vessels may be challenging but it is not an insurmountable obstacle to a two-observer requirement. The number of new observers needed may be lower since some of the longliners or carrier vessels transhipping on the high seas may already deploy observers.

Electronic monitoring—the use of video cameras, sensors, and the Global Positioning System (GPS) aboard fishing vessels—shows promise for observing transshipments and trials on its use have begun in the WCPFC Convention Area.³⁹¹ Yet, CCMs are still developing standards not only for the collection of data from electronic monitoring systems³⁹² but also for training, assessment, and certification of analysts to interpret the data resulting from electronic monitoring.³⁹³

³⁸⁵ CMM 2009–06, *supra* note 18, at ¶ 13.

³⁸⁶ WCPFC Secretariat, *Conservation and Management Measure for the Regional Observer Programme*, CMM 2007–01, at Annex C, ¶ 6 (2007), at <https://www.wcpfc.int/system/files/CMM-2007-01%20%5BRegional%20Observer%20Programme%5D.pdf>.

³⁸⁷ Peter Williams et al., *Status of Observer Data Management*, WCPFC-SC13-2017/ST IP-02, at 16, tbl. 4.

³⁸⁸ *WCPFC14 Summary Report*, *supra* note 51, at ¶ 387.

³⁸⁹ WCPFC Secretariat, *9th Annual Report for the Regional Observer Programme*, WCPFC-TCC13-2017-RP02, ¶ 34 (2 Sept. 2017), available at https://www.wcpfc.int/system/files/WCPFC-TCC13-2017-RP02%209th%20Annual%20ROP%20Report%20%20for%202017_0.pdf.

³⁹⁰ *Id.* (stating that the Pacific Island Regional Observer Programme supplied 100% observer coverage for purse seine vessels); WCPFC, *Vessels in the RFV by Vessel Type*, <https://www.wcpfc.int/vessels/charts/types> (reporting the number of purse seine vessels registered to fish in the WCPFC Convention Area).

³⁹¹ Malo Hosken, et al., *Progress on ER and EM Implementation in the Region*, WCPFC-2018-ERandEMWG3-IP-01, §§ 2, 4.1, (23 July 2018), available at <https://www.wcpfc.int/file/216827/download?token=tAaI-Goi>.

³⁹² *Id.* at § 4.5.

³⁹³ *Id.* at § 4.6.

Electronic monitoring systems may be able to complement observers in the future,³⁹⁴ but difficult issues need to be resolved first. As the United States has commented,

Successful use of electronic monitoring technologies must take into account complex hardware and software, varied boat sizes and designs, and the damage that can be done to electronics when exposed to saltwater and pounding waves. These are just some of the real-world practical challenges. We've also identified a number of policy and data-related challenges presented by adoption of new technologies. These include the handling of the enormous amount of data generated by electronic monitoring, effects on time series of data used in stock assessments, confidentiality, and cost allocation between government and non-government partners.³⁹⁵

Until these issues can be resolved, the WCPFC should adopt a two-observer requirement for high seas transshipment. The WCPFC could implement such an obligation as follows:

13. Each CCM shall ensure that vessels it is responsible for carries an observer from the WCPFC Regional Observer Programme (ROP) to observe transshipments at sea.

13 *bis* A CCM shall not authorize transshipment on the high seas by a vessel it is responsible for to a receiving vessel that does not have an observer from the ROP to monitor the transshipment.

Review. These rules are a departure from current rules. Thus, it is appropriate to review them to identify what the impact is on fishing operations and particular vessels. In addition, technological changes may allow for new methods, such as e-reporting and e-monitoring, to monitor transshipments at sea. The technology is improving for viewing a transshipment, although it is not clear whether it helps review logbooks and other documentation that observers are expected to review. The new paragraph that requires a review of the effectiveness and impacts of these provisions could be written as follows:

40. The Commission, through the TCC, shall review these provisions annually to assess their appropriateness. The review will consider
- a. whether additional controls should be implemented or controls relaxed;
 - b. the impacts, both positive and negative, on fishing operations and specific vessels; and
 - c. the appropriateness of e-monitoring as a cost-effective strategy for monitoring transshipment on the high seas.

³⁹⁴ See WCPFC, Report of the Third E-Reporting and E-Monitoring Working Group Meeting, ¶ 40 (Draft: Aug. 2018) (stating, “Japan agreed with Nauru’s earlier statement that human observer cannot be replaced by E-monitoring.”).

³⁹⁵ U.S. NOAA Fisheries, Fisheries Observers, Electronic Monitoring, <https://www.fisheries.noaa.gov/national/fisheries-observers/electronic-monitoring>.

VIII. Conclusion

Worldwide, transshipment at sea, particularly on the high seas, is a serious problem. It has been linked to IUU fishing, human trafficking, prostitution, and movement of drugs, guns, and wildlife.³⁹⁶ Thus, even though it is a common global practice, the international community has moved to restrict it and, in the case of the South East Atlantic Fisheries Organisation, to prohibit it.

The WCPFC has sought to limit transshipment at sea, but its efforts, at least with respect to longline vessels, have not been effective. While transshipment at sea by purse seine vessels is expressly prohibited, the WCPFC authorizes CCMs to determine unilaterally that transshipment in port is “impracticable” for longline and other non-purse seine vessels. The WCPFC established a “high threshold” for making “impracticability” findings.³⁹⁷ CCMs must make vessel-specific determinations that transshipment in port would cause “significant economic hardship” and a vessel would have to make “significant and substantial changes to its historical mode of operation.”³⁹⁸ They are also required to advise the WCPFC of their monitoring and verification procedures for transshipments on the high seas and submit a plan detailing the steps being taken to encourage transshipment in port.³⁹⁹

However, certain CCMs are not implementing any of these duties. No CCM has advised the WCPFC of its monitoring and verification procedures or submitted a plan to encourage transshipment in port, and CCMs do not make vessel-specific determinations.⁴⁰⁰ Instead, authorizations to tranship on the high seas are implied from information submitted by CCMs for the Register of Fishing Vessels.⁴⁰¹ Such authorization has become more the rule than the exception: More than 50% of longline and other non-purse vessels are registered to tranship on the high seas⁴⁰² and significant amounts of valuable tuna, including 36.9% of bigeye tuna, are transhipped on the high seas.⁴⁰³ Clearly, CMM 2009–06 is not effectively reducing transshipment on the high seas.

Moreover, the evidence indicates that transshipment in port is not impracticable. Port infrastructure throughout the region appears sufficient to support and supply fishing vessels,⁴⁰⁴ except that some ports lack ULT freezer capacity, which could be mitigated by placement of carrier vessels with ULT freezer capacity in those ports.⁴⁰⁵ All purse seine fleets and the longline fleets of the United States, EU, and Japan catch fish on the high seas yet travel hundreds of nautical miles to tranship in port.⁴⁰⁶ A large number of high seas transshipments occur just outside the EEZs of CCMs,⁴⁰⁷ suggesting that these vessels are able to tranship in port but choose not to in order to

³⁹⁶ See *supra* Section II.

³⁹⁷ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 9.

³⁹⁸ CMM 2009–06, *supra* note 18, at ¶ 37.

³⁹⁹ *Id.* at ¶ 35(a)(ii), (v).

⁴⁰⁰ *Guidelines for Determining Impracticability*, *supra* note 20, at 5.

⁴⁰¹ *Development of Guidelines for High Seas Transshipment*, *supra* note 20, at ¶ 10.

⁴⁰² *Id.* at ¶ 15.

⁴⁰³ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at tbl. 3.

⁴⁰⁴ See *supra* Section VI.B.

⁴⁰⁵ See *supra* Section VI.B.

⁴⁰⁶ See *supra* Section III.C.

⁴⁰⁷ *Annual Report on WCPFC Transshipment Reporting*, *supra* note 22, at figs. 3, 4, 5.

avoid monitoring by coastal State CCMs. Moreover, costs associated with transshipment in port are insignificant in relation to the costs of operating a tuna vessel.⁴⁰⁸ Fuel and labor costs do not fully explain an inability to tranship in port as overcapacity may play an equal or more significant role as evidenced by the profitability of the Japanese fleet, which has declined in number due to a vessel scrapping program.⁴⁰⁹

Thus, this paper proposes replacement of the “impracticability” test with a presumption against transshipment on the high seas. It allows, however, time-limited exemptions to ensure transshipment of ULT frozen fish from a fishing vessel to a carrier vessel and for fresh fish. However, it directs the Secretariat to study the circumstances under which these exemptions are needed; the exemptions expire unless these studies conclude that the exemptions are necessary. In addition, and in sharp contrast to the current regime, the exemptions must be approved by the WCPFC; they cannot be unilaterally established. The process that applies to exemptions for purse seine vessels would be applied to all other vessels. Moreover, to allow the WCPFC to review implementation of such plans to encourage transshipment in port, exemptions may not be granted for more than three years, although CCMs may apply for a new exemption at the end of the three years. Only through such a process can the WCPFC help minimize IUU fishing, prevent human rights abuses, and reduce opportunities for human trafficking and smuggling of guns, drugs, and wildlife. At the same time, it will help Pacific Island States develop their ports and economies.

⁴⁰⁸ See *supra* Section VI.C.

⁴⁰⁹ See *supra* Section VI.D.