

EXPLANATORY NOTES

Draft Amendments to the Agreement for the Establishment of the General Fisheries Commission for the Mediterranean and the Black Sea and Connecting Waters (GFCM)

Following the findings of the Task Force to Improve and Modernize the Legal and Institutional Framework of GFCM, the Commission decided at its 36th session to initiate a process for amending the GFCM Agreement and associated rules and regulations. In order to assist the Secretariat in this process, the attached draft amendments to the GFCM Agreement, have been prepared. The work has, to some extent, been undertaken in liaison with the FAO Legal Office. The consultants are of the opinion that none of the proposed amendments create new obligations for the Members.

A number of sources has been used as inspiration for drafting the proposed amendments, in particular the work of the Task Force established for the improvement and modernisation of the GFCM, including the reports of the four sub-regional meetings of the Task Force, as well as the documents presented at the 36th session of the GFCM, and in particular the report of the final meeting on the validation of the outcomes of the Task Force. Other documents relevant to the process include the Performance Review of GFCM, reports of GFCM expert meetings and reports of sessions of the Commission and its subsidiary bodies, and the Basic texts of FAO and the Review of Article XIV Stationary Bodies by CCLM.

International instruments of relevance have also been considered. These include the UN Fish Stocks Agreement, the FAO Port State Agreement, the FAO Compliance Agreement, the FAO Code of Conduct for Responsible Fisheries and a number of international action plans, such as the IPOA-IUU, the IPOA-Seabirds, the IPOA-Sharks and the IPOA-Capacity. FAO has also developed International Guidelines for Management of Deep-Sea Fisheries in the High Seas and International Guidelines on Bycatch Management and Reduction of Discards. Furthermore the UN General Assembly adopts annually so-called fisheries resolutions, which, among other things calling upon States, individually or through RFMOs, to address specific topics in order to achieve sustainable fisheries.

Inspiration has also been found in the global network of RFMOs that has been established for the conservation and management of living marine resources. Many RFMOs have recently expanded their mandates to apply the precautionary approach, to take due account of the impact of fisheries on other species and the marine ecosystem and to take due account of the need to conserve marine biological diversity. Among the governing frameworks examined are those of IATTC (the Antigua Convention), IOTC, NAFO (the amended version not yet in force), SEAFO, SIOFA, SPRFMO, SWIOFC, WCPFC and WECAFC.

The structure of the draft, partly draws on the current agreement and partly on other international instruments, and is more or less regarded as a modern international standard.

The draft consists of the following framework:

Preamble	
Article 1	Use of terms
Article 2	Objective

Article 3	Area of application
Article 4	Membership
Article 5	General principles
Article 6	The Commission
Article 7	Functions of the Commission
Article 8	Subsidiary bodies of the Commission
Article 9	The Scientific Advisory Committee
Article 10	The Advisory Committee on Aquaculture
Article 11	The Compliance Committee
Article 12	The Committee on Administration and Finance
Article 13	Sub-regional working groups
Article 14	The Bureau
Article 15	Secretariat
Article 16	Financial arrangements
Article 17	Expenses
Article 18	Decision making
Article 19	Obligations of Members
Article 20	Duties of the flag State
Article 21	Duties of the port State
Article 22	Monitoring, compliance and enforcement
Article 23	Observers
Article 24	Cooperation with other organizations and institutions
Article 25	Recognition of the special requirements of developing State Members
Article 26	Non-members
Article 27	Dispute settlement
Article 28	Relation to other international instruments
Article 29	Official languages of the Commission
Article 30	Amendments
Article 31	Acceptance
Article 32	Entry into force
Article 33	Territorial application
Article 34	Withdrawal
Article 35	Termination
Article 36	Certification and registration

Below are some explanations and comments to the draft provisions.

Preamble

The preamble explains the purpose of the Agreement and underlying philosophy, as well as making references to relevant international instruments.

Use of terms (Article 1)

The terms defined should be limited to those required to facilitate the interpretation and understanding of the Agreement. The suggested definitions on “fishery resources”, “fishing”, “fishing related activities”, “illegal, unreported and unregulated fishing”, “regional economic integration organization” and “vessel” are all copied from the FAO Port State Agreement, which is the most recent global binding instrument concerning fisheries management, and could thus be regarded as the current standards. In order to create a consistent and streamlined instrument some of the definitions are closely interlinked, see in particular the terms

“aquaculture”, “conservation and management measures”, “fishery resources”, “fishing” and “fishing activities”.

Objective (Article 2)

All modern RFMO instruments contain provisions stating their objectives. The draft focuses fishing as well as aquaculture and aims at taking due account of the ecosystem approach by striking a balance between utilization of fishery resources, including aquaculture development and the protection of the environment.

Area of application (Article 3)

The Agreement shall contain a clause regarding the geographical application in order to avoid any ambiguity in this respect. Currently the agreement applies to the Mediterranean and the Black Sea and connecting waters (the Region). The draft specifies that this means marine waters, and the western boundary has been defined.

Although the area of application has been defined, the GFCM competence seems not to be clearly stated. The GFCM Agreement refers to relevant provisions of the UN Law of the Sea Convention in the preamble, which could indicate the intention of maintaining the sovereignty of national waters of the Members concerning the resources under auspices of GFCM. But the preamble is not a formal part of the legal framework. Furthermore the GFCM Agreement contains a clause requiring members to state explicitly to which territories their participation shall extend (Article XV), and that in absence of such a declaration, participation shall be deemed to apply to all territories for international relations of which the Member is responsible. Several GFCM documents refer to the management of shared stocks or straddling stocks, which clearly indicate that there are boundaries between the coastal States and between coastal States and high seas areas within the Region relevant for management of resources. It is noted that in RFMOs such as NAFO and NEAFC, the areas of application include all marine waters, while the regulatory powers are limited to areas beyond national jurisdiction, and the IOTC Agreement contains a specific clause on coastal states’ rights (Article XVI).

It is, however, understood the current approach should be maintained, and the draft amendments to the Agreement take this into account.

If decided otherwise, one option is to make a reference to the provision on the relationship to other international instruments in the application provision, to provide as a function of the Commission to promote compatibility of conservation and management measures with those within areas under national jurisdiction and to make it an obligation on members to report on action taken in this respect. It could also be considered to distinguish between fishing and aquaculture.

Possible provisions could be the following:

“Article 3 - Area of application:

1 Subject to Article 28, the geographical area of application, hereafter the “Agreement Area”, comprises all marine waters of the Mediterranean Sea, the Black Sea and connecting waters as bounded to the west by a line running from a point on the coast of Morocco at 5°36’ west longitude to the coast of Spain (isthmus of Punta Marroqui). Article 28 shall not apply to aquaculture.

Article 7- Functions of the Commission

(i) bis: promote compatibility of conservation and management measures with those within areas under national jurisdiction.

Article 19 – Obligations of Members

3 bis: Each Member shall report annually, where relevant, compatible measures taken within areas under national jurisdiction.”

Membership (Article 4)

The draft contains in essence the same elements as Article I, paragraph 2 of the current text, but updated and streamlined to be harmonized with other suggested amendments.

General principles (Article 5)

It should be noted that many of recent international instruments contain provisions on general principles, and such an article is included in the draft. Those principles are meant to apply to all members, regardless of any specific decision or recommendation by the Commission. The clause seek to, when conducting fishing or aquaculture activities, taking due account of protection, conservation as well as sustainable use of the marine ecosystem. Many of the draft principles are drawn from relevant international instruments such as Article 6 of the FAO Code of Conduct for Responsible Fisheries and Article 5 of the UN Fish Stocks Agreement, while others such as those on aquaculture development and sub-regional approaches are based on specific suggestions by the Task Force.

The Commission (Article 6)

The draft contains the relevant provisions, slightly modified, of Articles I and II of the current text.

Functions of the Commission (Article 7)

The draft contains a list of Commission functions, including those related to conservation and management of fishery resources relevant to fishing and aquaculture activities. Many of them are based on inputs by the Task Force, while others are reflecting the current state of art. In addition to a general reference to such measures, the Commission may establish marine protected areas, determine catch and effort levels and extent of participation, adopt measures concerning data, adopt measures to combat IUU fishing and establish cooperative MSC mechanisms, including trade-related measures.

It is noted that the Task Force would like to see a strengthening of the transportation of the scientific advice into the Commission for decision. In the draft it is suggested to embody a sub-regional approach as well as the possibility to establish reviewing mechanisms concerning advices and recommendations by subsidiary bodies prior to their submission to the Commission.

Subsidiary bodies of the Commission (Articles 8 - 12)

The Task Force has suggested including the establishment and functions of SAC, ACQ, COC and CAF in the Agreement. The draft contains a general provision on subsidiary bodies, intended to be applicable to all of them, and possible new ones. Concerning the functions of

these bodies it should be taken into account that rules likely to be liable to future modifications should not be expressed in the Agreement itself. Thus the draft contains general functions, while details should be included in the rules of procedure or in stand-alone terms of references for each of the subsidiary bodies. The draft functions of all the committees are drawn partly from the most important ones in current Rules of Procedures and partly from similar provisions of other RFMO instruments.

As mentioned above, one of the Commission's functions is to establish adequate mechanisms, for example panels, for a more comprehensive examination of proposals developed in the subsidiary bodies, which could improve the basis for discussions within the Commission, cf. draft Article 7, paragraph (f). It is understood that this is in particular relevant to advices and recommendations by SAC.

In addition the draft includes a provision on the formal establishment of five sub-regional working groups, including their links to SAC and CAQ. It is proposed to describe the five sub-regions and to set out the working group's functions in the Rules of Procedure.

Sub-regional working groups (Article 13)

Noting the proposed structure of the Commission, the formal establishment of five sub-regional working groups is included in the draft, while their functions are suggested to be set out in the Rules of Procedure.

Bureau (Article 14)

It is suggested to formally establish the Bureau in the Agreement, and some key functions of the Bureau are included in the draft.

Secretariat (Article 15)

As suggested by the Task Force the main functions of the Executive Secretary has been included in the draft Agreement, which currently are in the Rules of Procedure. All modern RFMO instruments contain provisions on the secretariat, including the duties of its supervisor.

Financial arrangements and expenses (Articles 16 and 17)

It is suggested to keep the current text of Articles IX, X and paragraphs 3 and 4 of Article XI, but with some minor modifications to ensure consistency throughout the Agreement. It is suggested to transfer Article XI (Administration), paragraphs 3 and 4 of the current agreement into draft Article 17 (Expenses), while paragraphs 1 and 2 are addressed in draft Article 15 (Secretariat). Some of the current provisions have been merged and moved.

Decision making (Article 18)

It is noted that GFCM may make binding recommendations relating to fisheries conservation and management. The term "recommendations" seems not to be appropriate. Synonyms to "recommendations" are "proposals", "propositions", "suggestions" and "motions".

IOTC adopts binding "resolutions", while for example CCAMLR and SEAFO adopt binding "Conservation Measures" and non-binding "resolutions". The draft refers to neither recommendations nor resolutions, but provides for the Commission to "take decisions". Two categories are included:

- (i) decisions binding on Members, in line with the current practice, concerning conservation and management measures, which is suggested to be defined as “measures to conserve one or more species of fishery resources and include measures for their implementation”; and
- (ii) non-binding decisions concerning all other functions of the Commission.

Included in the draft are also procedures on how the first category shall become binding on Members, which is the same as the existing provision except for the time periods. In addition, there is a new proposed requirement where the Member objects to a decision it must explain its reasons, including alternative measures that member is going to implement. This latter requirement has become common standard in modern RFMO agreements and conventions.

Obligations of Members (Article 19)

The draft also contains provisions on Member obligations in meeting the objective of the Agreement, including steps to be taken concerning implementation of agreed measures. The provisions furthermore includes, the duties of Members to provide information to the Commission and, as suggested by the Task Team, its subsidiary bodies.

Another aspect is about transparency among parties to the Convention, not at least concerning implementation of decisions taken by the Commission. In responding to those calls, a provision has been drafted obliging Members to report to the Commission on the implementation, including providing legal and administrative documentation.

Duties of the flag State (Article 20)

Most RFMOs have recognised the importance of focussing on flag State obligations, and all modern regional fisheries instruments contain provisions spelling out the crucial duties of parties as flag States. The draft contains a provision in this regard, drawing mostly from Article 18 of the UN Fish Stocks Agreement.

Duties of the port State (Article 21)

Also the port State duties have gained a lot of attentions in recent years, in particular by the adoption by FAO of the port State Agreement in 2009, and the draft contains a short provision also in this regard.

Monitoring, compliance and enforcement (Article 22)

The Task Force observed that compliance and enforcement is a weak link within the organization, and it is proposed to include a separate provision to strengthen this aspect by establishing cooperative mechanism including, among other things, VMS, reciprocal boarding and inspection schemes, non discriminatory market-related measures and penalty schemes.

Observers (Article 23)

Global instruments, among them the UN Fish Stocks Agreement, have focused on transparency in the decision-making processes and other activities of RFMOs, and all modern RFMO instruments contain provisions to address this issue. The draft contains a provision in this regard.

Cooperation with other organizations and institutions (Article 24)

The current text states that the Commission shall cooperate closely with other international organizations (Article VIII). In order to broaden the scope it is suggested to include a reference also to institutions, to give guidance on how the cooperation could be carried out, and the relationship with other regional bodies with overlapping competence.

Recognition of special requirements of developing State Members (Article 25)

All modern international instruments recognize the special requirements of developing States. Noting that some members of GFCM fall into this category, the draft contains a provision to address the issue, drawing from Part VII of the UN Fish Stocks Agreement and text agreed in other RFMOs.

Non-members (Article 26)

Also included in the draft is an article on non-members, which is inspired by Part IV of the UN Fish Stocks Agreement and text agreed in other RFMOs. The Task Force recommended establishing the status of cooperating non-members in the Agreement, and such an option is included in paragraph 4. But it should be noted that such an approach is now being questioned in other RFMOs as this status creates an unbalance between benefits and obligations. If established, it should be considered to limit the status in time, and regard this status more as a transition into full membership.

Dispute Settlement (Article 27)

The current text contains a provision, which includes settlement of disputes (Article XVII). A new draft has been prepared, taking into account of the comments by the Task Force, including providing the option of referring a dispute to an ad hoc expert panel. Draft rules concerning such a panel have been included in the draft Rules of Procedure.

Relation to other international instruments (Article 28)

The draft also contains a standard formulation on the relationship to the UN Law of the Sea Convention and the UN Fish Stocks Agreement.

Language (Article 29)

Included is also an article on official languages, which may be decided by the Commission taking into account the languages of FAO. However, it is suggested that in technical meetings the working languages shall be limited to English and French. Concerning this last point, it should be noted that the meetings of *ad hoc* Working Group under Part 6 of the FAO Port State Agreement in principle shall be conducted in English, while documents related to its work shall be prepared in English only.

Final clauses (Articles 30 – 36)

It is suggested to keep the current article XII-XVI, XVIII and XIX, with some minor amendments to ensure consistency throughout the Agreement. A date is required under draft Article 36.