
DRAFT IOTC AGREEMENT TEXTS – WITH MEMBERS' COMMENTSPREPARED BY: SECRETARIAT

PURPOSE

To provide the Commission with the latest draft IOTC Agreement texts.

BACKGROUND

The Technical Committee on Performance Review (TCPR) was tasked by the Commission to develop new text for the IOTC Agreement.

A consultant was engaged to propose language, taking into account, existing convention texts e.g. from IOTC, ICCAT, SPRFMO and WCPFC, and the results of a gaps analysis of the current Agreement's text.

Given the that there has been no agreement among IOTC Members as to whether IOTC should remain within the FAO framework, the Consultant produced two texts: (1) a modernization of the current IOTC Agreement amended in track-changes in which IOTC remains as a FAO body and (2) a draft new agreement/convention where IOTC is independent of FAO.

In March 2019, the TCPR02 discussed the modernization text in detail and the general issues raised were recorded for each article of the text. However, the TCPR did not discuss the new IOTC Agreement/Convention text in detail.

The TCPR agreed that both draft texts should be circulated to Members for additional comments before the texts and comments were submitted to the Commission. Thus, the following documents are now being provided to the Commission:

1. the modernization text ([Appendix 1](#)), containing comments from the author, the TCPR and several responding Members. The G16 position on modernising the IOTC Agreement is provided as [Appendix 2](#).
2. the new IOTC Agreement/Convention text ([Appendix 3](#)), containing comments from two responding Members.

Note: there has been a clear understanding throughout the TCPRs process to develop the above texts that the comments made by Members will not prejudice their final decision regarding the IOTCs institutional relationship with FAO, or their final position regarding any aspect of the text.

RECOMMENDATION/S

That the Commission:

- a) **NOTE** paper IOTC–2019–S23–07 which contains the latest draft IOTC Agreement texts and comments from Members.
- b) **NOTE** that the development of the Agreement text is at a crossroads, and a decision on the institutional link with FAO is required if the TCPR is to be able to undertake further work on the text.
- c) **PROVIDE GUIDANCE** and direction on the future work of the TCPR regarding the development of the new IOTC Agreement.

Appendix 1:
Draft Text modernising the IOTC Agreement — with comments

DRAFT AMENDMENTS TO

THE AGREEMENT FOR THE ESTABLISHMENT OF THE INDIAN OCEAN TUNA COMMISSION

PREAMBLE

The Contracting Parties,

~~*Recognizing* the desirability of promoting the peaceful uses of the seas and oceans, and the equitable and efficient utilization and conservation of their living resources,~~

***Determined* to ensure the long-term conservation and sustainable use of living marine resources in the Indian Ocean,**

***Recalling* relevant provisions of the United Nations Convention on the Law of the Sea of 1982, the 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 of 1995, the Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993, and the FAO Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing of 2009,**

***Taking into account* the Code of Conduct for Responsible Fisheries adopted by the Conference of the Food and Agriculture Organization of United Nations in 1995 and related instruments adopted by the Food and Agriculture Organization Conference,**

***Recognizing* the economic and social benefits deriving from sustainable use of highly migratory fish stocks in the Indian Ocean,**

***Conscious* of the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of use and exploitation of highly migratory fish stocks,**

***Mindful* that effective conservation and management measures must be based on the best scientific information available and on the application of the precautionary approach and an ecosystem approach to fisheries management,**

***Determined* to cooperate effectively to prevent, deter and eliminate illegal, unreported and unregulated fishing,**

Desiring to contribute to the realization of a just and equitable international economic order, with due regard to the special interests and needs of developing countries,

*Desiring **further** to cooperate with a view to ensuring the conservation of tuna and tuna-like species in the Indian Ocean and promoting their optimum utilization, and the sustainable development of the fisheries,*

~~*Considering the United Nations Convention on the Law of the Sea opened for signature on 10 December 1982 and, in particular, Articles 56, 64 and 116 to 119 thereof,*~~

Considering that the conservation of tuna and tuna-like species and the sustainable and rational utilization of tuna resources in the Indian Ocean would be greatly enhanced by the establishment of cooperative measures by both the coastal states of the Indian Ocean and other States whose nationals harvest tuna and tuna-like species in the region,

~~*Bearing in mind the Western Indian Ocean Tuna Organization Convention which was opened for signature on 19 June 1991,*~~

*Considering **further** that the aforementioned objectives could best be achieved through the establishment of a Commission set up under Article XIV of the Constitution of the Food and Agriculture Organization of the United Nations,*

Have agreed as follows:

Consultant notes: The draft amendments include references to relevant international instruments and to some of the modern principles for fisheries management. The draft combines elements included in the preambles of the Agreement of General Fisheries Commission for the Mediterranean (GFCM), the Convention of South Pacific Regional Fisheries Management Organization (SPRFMO) and the Convention of Western Central Pacific Fisheries Commission (WCPFC).

TCPR: The TCPR AGREED that the preamble would not be discussed as this section is usually agreed once the body of the document is finalized and thus would be addressed at a future stage. Similarly, the definitions were not discussed as this step would overlap with the review of the IOTC Glossary being undertaken by the WPICMM and this work should not be conflicting or duplicated.

Australia:

Australia suggests the following changes:

- That the reference to ‘use and exploitation of highly migratory fish stocks’ be changed to ‘fishing and fishing related activities’
- That the reference to ‘sustainable and rational utilization’ be changed to ‘sustainable use’

Given the inclusion of coastal States waters within the Agreement Area, it is appropriate that the preamble include recognition of the rights of coastal States in those waters. Australia suggests the addition of the following paragraph (adapted from SPRFMO):

Considering that, under international law reflected in the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, coastal States have waters under national jurisdiction within which they exercise their sovereign rights for the purpose of exploring, exploiting, conserving and managing fishery resources and conserving living marine resources upon which fishing has an impact;

Australia considers that the existing reference in the preamble to the interests and needs of developing countries is inadequate, including because it does not refer to least-developed and small island developing States. Australia suggests that the paragraph beginning ‘Desiring to contribute to the realization of a just and equitable international economic order’ be replaced with the following paragraphs (adapted from SIOFA and SPRFMO):

Recognising economic and geographical considerations and the special requirements of developing States, in particular the least-developed among them and small island developing States and their coastal communities, for equitable benefit from fishery resources;

Bearing in mind that the achievement of the above will contribute to the realization of a just and equitable economic order in the interests of all humankind, and in particular the special interests and needs of developing States, in particular the least-developed among them and small island developing States.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article I. USE OF TERMS *(new)*

For the purposes of this Agreement

- (a) **“1982 Convention” means the United Nations Convention on the Law of the Sea of 10 December 1982;**
- (b) **“1995 Agreement” means the Agreement for the Implementation of the Provisions of the United 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 of 4 December 1995;**
- (c) **“Area” is the area of application described in Article IV;**
- (d) **“Commission” refers to the Indian Ocean Fisheries Commission established pursuant to Article II;**
- (e) **“Director-General” refers to the Director-General of FAO;**
- (f) **“Executive Secretary” refers to the executive secretary of the Commission;**
- (g) **“FAO” refers to the Food and Agriculture Organization of the United Nations;**
- (h) **“fishery resources” means all species of highly migratory fish stocks that occur in the Area, whether processed or not;**
- (i) **“fishing” means searching for, attracting, locating, catching, taking or harvesting of fishery resources or any activity which can reasonably be expected to result in attracting, locating, catching, taking or harvesting of fishery resources;**
- (j) **“fishing related activities” means any operation in support of, or in preparation for fishing activities, including landing, packaging, processing, transshipping or transporting of fish, as well as provisioning of personnel, fuel, gear and other supplies;**

- (k) **“illegal, unreported and unregulated fishing” refers to the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;**
- (l) **“Member” means any State and regional economic integration organization comprising the Commission pursuant to Article V;**
- (m) **“regional economic integration organization”** (*current Article VI(a)(iii)*) means a regional economic integration organizations of which any State has transferred competence over matters within the purview of this Agreement;
- (n) **“vessel” means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for fishing or fishing related activities.**

COMMENTS

Consultant notes: The current IOTC Agreement does not contain a provision on terms, but some terms are located in various provisions throughout the text. A single provision is useful as it provides a uniform understanding of these terms in all work of the Commission, and those used in the current Agreement are moved to a new Article I. The suggested definitions on “fishing”, “fishing related activities”, “illegal, unreported and unregulated fishing”, and “vessel” are all copied from the FAO Port State Measures Agreement, which is the most recent global binding instrument concerning fisheries management, and could thus be regarded as the current standards.

TCPR: The TCPR AGREED that the preamble would not be discussed as this section is usually agreed once the body of the document is finalized and thus would be addressed at a future stage. Similarly, the definitions were not discussed as this step would overlap with the review of the IOTC Glossary being undertaken by the WPICMM and this work should not be conflicting or duplicated.

Australia:

Australia suggests that:

- The definition of ‘Commission’ should refer to the ‘Indian Ocean Tuna Commission’ (not ‘Fisheries Commission’)
- In the definition of ‘regional economic integration organization’, the phrase ‘of which’ should be ‘to which’
- ‘nationals’ be defined: “nationals” includes both natural and legal persons
- ‘transshipment’ be defined: “transshipment” means the unloading of all or any of the fishery resources on board a vessel to another vessel either at sea or in port

Regarding the proposed definition of ‘fishery resources’, Australia:

- queries why is it proposed to move away from the list of stocks covered by Annex B of the existing agreement. Australia notes the Secretariat's comment that 'relitigating elements such as the species list could also add to the duration of the [treaty renegotiation] process'.
- notes that any list used need not be exhaustive. For example, WCPFC uses the list of species in Annex 1 of UNCLOS ‘and such other species of fish as the Commission may determine’.
- notes that there is a need to minimise overlap with the species managed by SIOFA. SIOFA excludes sedentary species on a coastal state’s extended continental shelf and highly migratory species.
- notes that under the existing agreement, 13 of the 16 species listed in Annex B are included in the list of highly migratory species given in Annex I of UNCLOS. Three species listed on Annex B do not occur on Annex I of UNCLOS and are straddling species in the sense of

article 63 of UNCLOS. A reference to 'highly migratory fish stocks' may not capture these straddling species.

- suggests the following definition: "fishery resources" means the species listed in Annex [X] that occur in the Area and such other species of fish as the Commission may determine, whether processed or not;

Regarding the proposed definition of 'fishing', Australia:

- suggests referring to 'actual or attempted searching for...', as is done in WCPFC, SIOFA and SPRFMO
- suggests excluding from the definition 'any operation related to emergencies involving the health or safety of crew members or the safety of a vessel' (as is done in SPRFMO and, in similar terms, in WCPFC).
- notes the need to clarify whether FAD setting is intended to be included in the definition of 'fishing' (as an activity 'expected to result in attracting' fish) or in the definition of 'fishing related activities' (as an 'operation in support of' fishing)
- suggests the following definition: "fishing" means the actual or attempted searching for, attracting, locating, catching, taking or harvesting of fishery resources or any activity which can reasonably be expected to result in attracting, locating, catching, taking or harvesting of fishery resources but does not include any operation related to emergencies involving the health or safety of crew members or the safety of a vessel;

Regarding the proposed definition of 'fishing related activities', Australia suggests:

- that 'operation' should be 'operation at sea directly' (consistent with WCPFC)
- 'preparation for fishing activities' should be 'preparation for fishing' (as 'fishing activities' is not a defined term)

France-OT: No comments.

Mauritius:

the term used for UNCLOS is '1982 Convention', since UNCLOS is widely-referred to abbreviation, should read as UNCLOS;

Re. Art I(d) 'Fisheries' is to be replaced by 'Tuna'

Seychelles: No comments.

Thailand:

AGREED to contain terms but should not be conflicting or duplicated with IOTC Glossary.

Article II. ESTABLISHMENT (*current Article I*)

The Contracting Parties hereby agree to establish the Indian Ocean Tuna Commission (~~hereinafter referred to as the "Commission"~~) within the framework of the Food and Agriculture Organization of the United Nations (~~hereinafter referred to as "FAO"~~).

COMMENTS

Consultant notes: No substantive amendment.

TCPR: No comments

Australia: No comments

France-OT: No comments.

Mauritius: No comments.
Seychelles: No comments.
Thailand: No comments.

<p><u>Article III. OBJECTIVE</u> <i>(new)</i></p> <p><i>(current Article V, paragraph 1)</i> The Commission shall promote cooperation among its Members with a view to ensuring <u>the long-term conservation and sustainable use of fishery resources, and, in doing so, to safeguard the marine ecosystems in which these resources occur and development takes place</u> through appropriate management, the conservation and optimum utilization of stocks <u>fishery resources</u> covered by this Agreement and encouraging sustainable development of fisheries based on such stocks <u>resources</u></p>
COMMENTS
<p>Consultant notes: All modern RFMO instruments contain provisions stating their objectives. The objective of the current Agreement is a part of Article II, but it is more appropriate to create a stand-alone provision for this purpose. The amendments to the current objective aim at taking due account of the ecosystem approach by striking a balance between utilization of fishery resources and the protection of the environment. Draft language mirrors to a large extent the objectives set out in Article 2 of the Convention of the North Pacific Fisheries Commission (NPFC), Article 2 of SPRFMO and Article 2 of WCPFC.</p>
<p>TCPR: The TCPR NOTED that the text in this article could be simplified.</p> <p>The TCPR also NOTED a suggestion that the article could include text that provides greater emphasis on the needs of developing coastal states.</p>
<p>Australia:</p> <p>Australia suggests:</p> <ul style="list-style-type: none"> • that it is better to begin the paragraph ‘The objective of this Agreement is to...’ (rather than referring to something the Commission shall do). This is because the objective is relevant to the interpretation of the Agreement as a whole, rather than being relevant only to the Commission’s functions. • ‘effective management’ in place of ‘appropriate management’ • deleting ‘and development takes place’ • deleting ‘and encouraging sustainable development of fisheries based on such resources’ as it duplicates the earlier reference to the ‘sustainable use of fishery resources’. • including a reference to the needs of developing States, as is done in SIOFA (‘taking into account the needs of developing States ... that are Contracting Parties to this Agreement, and in particular the least-developed among them and small island developing States’)
<p>France-OT:</p> <p>France (Territories) only supports the additions suggested by the consultant on Article III.</p>
<p>Mauritius:</p> <p>needs to be further amended to ensure that there is no ambiguity that the Commission will only promote cooperation, not ‘safeguard the marine ecosystems’, especially given that ‘marine ecosystems’ is much wider and encompasses much more than highly migratory species;</p>
<p>Seychelles:</p> <p>Proposal that developing coastal states be given importance.</p>
<p>Thailand:</p>

Add the provision: Considering the special requirements of developing coastal States, including Small Island Developing States (SIDS) and Least developed countries (LDCs) are accommodated including food security and development aspirations, thereby promoting opportunities for economic development and development aspirations.

Article IV. AREA OF COMPETENCE APPLICATION (*current Article II*)

1. The **geographical** area of ~~competence~~ **application** of the Commission (~~hereinafter referred to as the “Area”~~) shall be the Indian Ocean (defined for the purpose of this Agreement as being FAO statistical areas 51 and 57 as shown on the map set out in Annex A to this Agreement) and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing ~~stocks~~ **fishery resources** that migrate into or out of the Indian Ocean.

2. (*current Article VI, paragraph 6*) Nothing in this Agreement, nor any act or activity carried out in pursuance of this Agreement, shall be interpreted as changing or in any way affecting the position of any party to this Agreement with respect to the legal status of any area covered by this Agreement.

COMMENTS

Consultant notes: It is suggested to change from “competence” to “application”, which is the common term used in most other RFMO treaties. It is also suggested to move current Article VI, paragraph 6 to this provision as they are closely interlinked.

It is proposed to remove current Article III as the content is now intended to be covered by the term “fishery resources” in draft Article I.

TCPR: The TCPR AGREED that the title of the article should revert to being ‘Area of Competence’

Australia:

Australia suggests that it would be preferable to define the Agreement Area by reference to the boundaries of ICCAT, CCAMLR and WCPFC, to avoid areas of overlap.

Australia further suggests that:

- it is not appropriate to refer to the ‘geographical area of application of the Commission’. The reference should either be to the ‘area of competence of the Commission’ or to the area to which the Agreement applies.
- the term ‘Indian Ocean’ could be defined in Article I, instead of here.
- ‘Annex A’ be reinserted (it has been deleted from the draft text circulated).

France-OT: No comments.

Mauritius:

Not agreeable to this amendment.

Seychelles:

Seychelles agrees to use the words “Area of Application”.

Thailand:

Thailand AGREED that the title of the article should revert to being ‘Area of Competence’.

Article V. SPECIES AND STOCKS (deleted)

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

COMMENTS

Consultant notes: If a list of species is required, it would be more appropriate for the Commission to adopt such a list. This would simplify possible amendment processes.

TCPR: The TCPR NOTED that there was general acceptance for retaining this article that had been deleted but that some language should be added to provide the Commission with the flexibility to amend the species listed in Annex B in the future if required by the Commission.

The Consultant was of the opinion that amending annexes in agreements is not a trivial task, and other management bodies have preferred to remove the definitive annex of species from their agreements.

Australia: No comments.

France-OT

In line with the general acceptance noted by the TCPR, France (Territories) supports retaining Article V and its objective list included in Annex B.

France (Territories) notes that this Article is clear regarding the area of competence of the IOTC: any stock entering the high seas falls into IOTC area of competence and the measures on these stocks apply both in the high seas and in the Exclusive Economic Zones (EEZs) if these stocks migrate into or out the EEZ.

To avoid any confusion with the “Area” which generally refers in the Law of the sea to the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Art 1, para 1, United Nations Convention on the Law of the Sea), France (Territories) proposes that the current Article V be clarified as follows :

“[...] The term “stocks” means the populations of such species which are located in the area of competence of the Commission or migrate into or out of this Area.

France (Territories) is open to any discussions on an arrangement that would facilitate the inclusion of new species on this list, if deemed appropriate by the Scientific Committee and the Indian Ocean Tuna Commission.

Mauritius:

to keep the article. The annex may contain very material information and parameters, it is advisable to consider that the annexes be amended after a strict procedure.

Seychelles: No comments.

Thailand:

AGREED to retain list of species in Annex A and change the provision to Article V. FISHERIES RESOURCES

The fishery resources covered by this Agreement shall be those species set out in Annex B. ~~The term “stocks” means the populations of such species which are located in the Area or migrate into or out of the Area.~~

Article V. COASTAL STATES' RIGHTS (*current Article XVI*)

This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.

COMMENTS

Consultant notes: No amendments suggested.

TCPR: The TCPR NOTED that there was a divergence of views on this article. Some members reflected that it was better to be placed alongside flag state duties.

The TCPR also NOTED that some members stated that the rights of CPCs in their own EEZs is beyond question, but CMMs apply to EEZs and high seas unless otherwise agreed.

The TCPR AGREED that it should be made clear that CMMs adopted by the Commission shall apply to EEZs of coastal states and high seas unless otherwise agreed and this should be reflected in the agreement.

Australia:

Australia notes that there is the potential for ambiguity in how this article interacts with the area of application of the Agreement. The Commission has the power to adopt binding CMMs that apply within waters under national jurisdiction, and yet the Agreement ‘shall not prejudice’ coastal States’ rights in such waters.

In 2013, the IOTC Secretariat was requested to provide an interpretation of this article to clarify this ambiguity. The Secretariat subsequently issued an explanatory note ([IOTC Circular 2014-32](#)) clarifying that the article ‘cannot, by itself, be used to restrict the application of a CMM that is in force and to which the Contracting Party has not filed an objection, and whose application is not restricted by a general reservation filed by the State in accordance with article XIX’. The argument was that the reservations mechanism and the objection procedure provided sufficient means for coastal States to safeguard their EEZ rights and that this article should not be read as otherwise rendering CMMs inapplicable in members’ EEZs.

Australia suggests that it would be appropriate, at a minimum, to seek to have recorded in the record of negotiations, the understanding that this article does not preclude the application of IOTC CMMs in members’ EEZs.

See also Australia’s suggestion of additional text in Article XVI to clarify the application of CMMs within members’ EEZs in the Area.

France-OT: No comments.

Mauritius:

consider requiring the designation of areas not to be covered by CMMs ‘state’ should be written as ‘State’.

Seychelles: No comments.

Thailand:

AGREED to move from Article XVI to address here without amendment.

Article VI. COASTAL STATES’ RIGHTS

This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.

Article VI. COMPATIBILITY *(new)*

The conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible, in order to ensure the conservation and management of fishery resources covered by this Agreement.

COMMENTS

Consultant notes: Article 7 of the UN Fish Stocks Agreement (UNFSA) requires States to establish measures for highly migratory fish stocks that are compatible for the high seas and national waters. The draft provision is based on those contained in other RFMO treaties, for example Article V of the Convention of the Inter-American Tropical Tuna Commission (IATTC), Article 4 of SPRFMO and Article 8 of WCPFC.

TCPR: The TCPR NOTED that there were divergent views on this article. Some members expressed the opinion that this article clarifies the text of the agreement ensuring that there is clear guidance on the compatibility of high seas and national regulations. Others felt that as CMMs apply to both EEZ and high seas unless otherwise agreed, there is no need to raise an issue of compatibility. These differences will need to be discussed and resolved in the future.

Australia:

Australia notes that equivalent provisions in other RFMO agreements include more than a bare requirement that high seas and in-zone CMMs be compatible and suggests that it is necessary to link this provision more closely to the duty to cooperate to ensure compatibility, rather than merely stating the requirement for compatibility.

Australia suggests:

- The addition of a new sentence to the end of the first paragraph: ‘To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such resources.’
- The addition of a new paragraph:
 2. In establishing compatible conservation and management measures for highly migratory fish stocks in the Area, the Commission shall:
 - (a) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;
 - (b) take into account the conservation and management measures adopted and applied in accordance with article 61 of the 1982 Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Area as a whole do not undermine the effectiveness of such measures;
 - © take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and
 - (d) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

France-OT:

France (Territories) considers that IOTC Conservation and Management Measures apply equally to the EEZs and the high seas for the management of highly migratory fishes, in accordance with Art. 3 of the 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. Consequently, France (Territories) considers that the new article VI proposed by the Consultant is not useful and supports its deletion.

Mauritius:

The heading is grammatically incorrect. Given this and should the article be maintained, it would be advisable to insert a sentence to Art. VI: “To this end, the members fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.”

Seychelles: No comments.

Thailand:

AGREED with the TCPR comment that CMMs apply to both EEZ and high seas unless otherwise agreed, there is no need to raise an issue of compatibility.

Article VII. MEMBERSHIP (*current Article IV*)

1. Membership in the Commission shall be open to Members and Associate Members of FAO

(a) that are:

(i) coastal States or Associate Members situated wholly or partly within the Area;

(ii) States or Associate Members whose vessels engage in fishing **or fishing related activities** in the Area ~~for stocks covered by this Agreement~~; or

(iii) regional economic integration organizations ~~of which any State referred to in subparagraphs (i), or (ii) above is a member and to which that State has transferred competence over matters within the purview of this Agreement;~~
and

(b) that accept this Agreement in accordance with the provisions of paragraph 1 of Article **XXVII**.

2. The Commission may, by a two-thirds majority of its Members, admit to membership any other States that are not Members of FAO, but are Members of the United Nations, or of any of its Specialized Agencies ~~or of the International Atomic Energy Agency~~, provided that such States:

(a) are

(i) coastal States situated wholly or partly within the Area; or

(ii) States whose vessels engage in fishing **or fishing related activities** in the Area ~~for stocks covered by this Agreement~~; and

(b) have submitted an application for membership and a declaration made in a formal instrument that they accept this Agreement as in force at the time of acceptance in accordance with paragraph 2 of Article **XXVII**.

3. ~~With a view to furthering the objectives of this Agreement, the Members of the Commission shall cooperate with each other to encourage any State or regional economic integration organization which is entitled to become, but is not yet, a Member of the Commission, to accede to this Agreement.~~

3. If any Member of the Commission ceases to meet the criteria set out in paragraphs 1 or 2 ~~above~~ for two consecutive calendar years, the Commission may, after consultation with the Member concerned, determine that the Member is deemed to have withdrawn from this Agreement effective as from the date of that determination.

4. For the purposes of this Agreement, the term “whose vessels” in relation to a Member Organization means vessels of a Member State of such Member Organization.

~~6. Nothing in this Agreement, nor any act or activity carried out in pursuance of this Agreement, shall be interpreted as changing or in any way affecting the position of any party to this Agreement with respect to the legal status of any area covered by this Agreement.~~

COMMENTS

Consultant notes: - It is suggested to remove the reference to “the International Atomic Energy Agency” as it seems irrelevant in this context. The draft also includes some changes in line with other proposed amendments.

TCPR: No comments.

Australia:

Australia notes that the terminology used in the FAO Constitution is ‘Member Nations’ (not ‘Members’), ‘Member Organizations’ and ‘Associate Members’ and queries if the terminology used in this article (and throughout the text) should be harmonized with that used in the FAO Constitution.

Australia suggests that in paragraph 4, ‘vessels of a Member State’ should be ‘vessels flying the flag of a Member State’.

France-OT: No comments.

Mauritius:

Not agreeable to this amendment.

Seychelles: No comments.

Thailand: No comments.

Article VIII. GENERAL PRINCIPLES *(new)*

In giving effect to the objective of this Agreement, the Contracting Parties shall:

- (a) **promote the long-term sustainability and optimum utilization of fishery resources;**
- (b) **adopt conservation and management measures based on the best scientific advice available, taking into account relevant environmental, economic and social factors;**
- (c) **apply the precautionary approach in accordance with Article 6 of the 1995 Agreement;**
- (d) **take due account of the impact of fishing activities on species belonging to the same ecosystem or dependent upon or associated with the target stocks, and in doing so, adopt measures to minimize harmful impacts;**

- (e) take due account of the need to preserve marine biological diversity;
- (f) prevent or eliminate overfishing and excess fishing capacity, and ensure that levels of fishing effort do not exceed those commensurate with sustainable use of fishery resources;
- (g) ensure that complete and accurate data concerning fishing and fishing related activities are collected and shared among them in a timely manner;
- (h) take due account of the need to minimize pollution and waste originating from fishing activities as well as minimize discards, catch by lost or abandoned gear, catch of species not subject to a directed fishery and impacts on associated or dependent species; and
- (i) make best efforts to effectively implement all decisions of the Commission, including imposing penalties for violations that are of appropriate severity to secure compliance, discourage further violations and deprive offenders of the benefits accruing from their illegal activities.

COMMENTS

Consultant notes: The current Agreement does not contain general principles. All recent international instruments contain provisions on general principles, and such an article is included in the draft. The draft additional 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 UNFSA, as well as other RFMO treaties. These RFMO treaties include texts of Article 3 of NPFC, Article 4 of the Southern Indian Ocean Fisheries Agreement (SIOFA), Article 3 of SPRFMO and Article 5 of WCPFC.

TCPR: The TCPR NOTED that there were divergent views on this article. The items listed by the consultant were generally accepted by the TCPR although some changes to the items listed were discussed.

A member indicated that there could be additional elements to be added to the article, while others did not agree that the addition of those elements would be appropriate.

Australia:

Australia suggests that the reference should be to Members rather than Contracting Parties.

Australia notes that in SPRFMO,

- the general principles are to be applied by Members, the Commission and its subsidiary bodies.
- the principles are tied to ‘giving effect to the objective of this Convention and carrying out decision making under this Convention’

Australia suggests that the first paragraph begin: ‘In giving effect to the objective of this Agreement, and carrying out decision-making under this Convention, Members, the Commission and subsidiary bodies shall.’

Australia suggests that:

- subparagraph (b) should begin ‘ensure that conservation and management measures are based on...’
- subparagraphs (d) and (h) should refer to ‘fishing and fishing related activities’ instead of ‘fishing activities’

- the words ‘make best efforts to’ should be deleted from subparagraph (i). When adopt binding decisions, the Commission should be free to stipulate the standard of compliance required. In many, perhaps most, cases this standard may be to ‘make best efforts’, but there may be cases in which the Commission wishes to impose a different standard.

Australia suggests the inclusion of new paragraphs outlining how these principles are to be implemented in areas under national jurisdiction. The following is based on Article 3(2) of UNFSA and Article 7 of WCPFC:

2. The principles enumerated in paragraph 1 shall be applied by coastal States within areas under national jurisdiction in the Area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.

3. The members of the Commission shall give due consideration to the respective capacities of developing coastal States, in particular small island developing States, in the Area to apply the provisions of Article VIII within areas under national jurisdiction and their need for assistance as provided for in this Agreement.

France-OT:

France (Territories) only supports the additions suggested by the Consultant on Article VIII and is reluctant to include more text to this new article which already provides enough details.

Mauritius: No comments.

Seychelles:

Seychelles agrees with the new addition.

Thailand:

Add the provision: Considering the special requirements of developing coastal States, including Small Island Developing States (SIDS) and Least developed countries (LDCs) are accommodated including food security and development aspirations, thereby promoting opportunities for economic development and development aspirations.

Article IX. OBJECTIVES, FUNCTIONS AND RESPONSIBILITIES OF THE COMMISSION (*current Article V*)

~~1. The Commission shall promote cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and encouraging sustainable development of fisheries based on such stocks.~~

~~2. In order to achieve these objectives, t~~ **The Commission shall, in accordance with its objective and general principles**, have the following functions and responsibilities, ~~in accordance with the principles expressed in the relevant provisions of the United Nations Convention on the Law of the Sea:~~

(a) ~~to~~ **regularly** keep under review the conditions and trends of the stocks **living marine resources** and to gather, analyse and disseminate scientific information, catch and effort statistics and other data relevant to the conservation and management of the **fishery resources** ~~stocks and to fisheries based on the stocks covered by this Agreement;~~

~~(b) to encourage, recommend, and coordinate research and development activities in respect of the stocks and fisheries covered by this Agreement, and such other activities as the Commission may decide appropriate, including activities connected with transfer of technology, training and enhancement, having due regard to the need to ensure the equitable participation of Members of the Commission in the fisheries and the special interests and~~

needs of Members in the region that are developing countries;

(b) *(current sub-paragraph c)* to adopt, in accordance with Article **XVI** and on the basis of **the best scientific evidence available**, conservation and management measures, ~~to ensure the conservation of~~ **for the fishery resources** stocks covered by this Agreement and to promote the objective of their optimum utilization throughout the Area; **including:**

(i) where necessary, for species belonging to the same ecosystem as, or associated with or dependent upon, fishery resources; and

(ii) minimize impacts of fishing on living marine resources and their ecosystems

(c) determine, when appropriate, total allowable catch, or total allowable level of effort, and where necessary, the nature and extent of participation in fishing;

(d) adopt measures for the collection, submission, verification, storing and dissemination of data and information;

(e) adopt measures and take actions to prevent, deter and eliminate illegal, unreported and unregulated fishing;

(f) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance, compliance and enforcement, including sanctions such as non-discriminatory market-related measures;

(g) promote the development and use of electronic means to facilitate communication and exchange of data and information among Contracting Parties;;

(h) regularly review the implementation of decisions into national legislation;

(i) promote and coordinate, and as appropriate, undertake scientific research and development activities;

(j) *(current sub-paragraph d)* to keep under review the economic and social aspects of ~~the fishing~~ **eries and fishing related activities** based on the stocks covered by this Agreement bearing in mind, in particular, the interests of developing coastal states;

(k) *(current sub-paragraph b)* to encourage, recommend, and coordinate research and development activities in respect of the stocks, ~~and~~ **fishing eries and fishing related activities** covered by this Agreement, and such other activities as the Commission may decide appropriate, including activities connected with transfer of technology, training and enhancement, having due regard to the need to ensure the equitable participation of Members of the Commission in ~~the fishing ies~~ and **fishing related activities and** the special interests and needs of Members in the region that are developing countries;

(l) (*current paragraph e*) ~~to~~ consider and approve its programme and autonomous budget, as well as the accounts for the past budgetary period;

(m) (*current paragraph f*) to transmit to the Director-General of FAO (hereinafter referred to as the “Director- General”) reports on its activities, programme, accounts and autonomous budget and on such other matters as may be appropriate for action by the Council or the Conference of FAO;

(n) (*current paragraph g*) ~~to~~ adopt its own Rules of Procedure, Financial Regulations and other internal administrative regulations as may be necessary to carry out its functions; and

(o) (*current paragraph h*) ~~to~~ carry out such other activities as may be necessary to fulfil its objectives **and general principles of this Agreement.** ~~as set out above.~~

~~3. The Commission may adopt decisions and recommendations, as required, with a view to furthering the objectives of this Agreement.~~

COMMENTS

Consultant notes: The current Article V of the Agreement contains the functions and responsibilities of the Commission, which have been modified to be in line with other draft amendments. The content of current paragraph 2(b) has been addressed in a stand-alone provision on “Special requirements of developing States Contracting Parties”, see draft Article XXII. The draft amendments include an additional list of Commission functions, which reflects the current state of art. Similar functions are included in Article VII of IATTC, Article 7 of NPFC, Article 8 of SPRFMO and Article 10 of WCPFC.

TCPR: The TCPR NOTED that there were some concerns about the inclusion of sanctions in the text and that this would need to be carefully considered before any agreement could be reached on potential wording of this clause.

Some members noted that references to decision making should not be included in this article, but should be referred to in the ‘Sessions of the Commission’ article.

Australia:

Australia suggests that a revised version of the deleted first paragraph should be reintroduced: 1. The Commission shall promote cooperation among its Members to achieve the objective of this Agreement.

Australia notes that if our suggestion on Article II is accepted, then the Commission will not have an objective – the agreement will. Further, the general principles outlined in Article VIII are not the Commission’s. If there is a desire to apply the general principles to the Commission this should be done in Article VIII. Australia suggests that the second paragraph should begin: ‘In pursuit of the objective of this Agreement, the functions of the Commission shall be to:’

Australia further suggests:

- the deletion of the words ‘the fishery resources’ in subparagraph (b)
- the reference in subparagraph (b)(ii) to ‘fishing’ should be to ‘fishing and fishing related activities’
- in subparagraph (c), the deletion of ‘and where necessary, the nature and extent of participation in fishing activities’ (noting that we have suggested a new subparagraph on allocation decisions below).
- the addition of a new sub-paragraph on allocation decisions, which should require consensus: adopt, by consensus, decisions relating to the allocation of the total allowable catch or the total level of fishing effort

- the deletion of the words ‘sanctions such as’ in subparagraph (f)
- that subparagraph (h) be rephrased to read: ‘taking into account the advice of the Compliance Committee, review Members’ implementation of and compliance with this Agreement and conservation and management measures’
- that subparagraph (i) begin: ‘promote, coordinate and, as appropriate, undertake...’
- that subparagraph (j) begin: ‘keep under review the impacts of conservation and management measures on the economic...’
- that subparagraph (k) begin: ‘to encourage, recommend, and coordinate such research and development activities as the Commission decides appropriate, including...’
- the reinsertion of ‘autonomous’ in subparagraph (l)
- the deletion of the bracketed text in subparagraph (m)
- that subparagraph (n) should read: ‘adopt its own Rules of Procedure and Financial Regulations’.

that subparagraph (o) should read: ‘adopt decisions and recommendations as required and carry out such other activities as may be necessary to fulfil the objective of this Agreement’. Australia notes that Commission doesn’t have objectives (the Agreement does). Further, the ‘general principles’ (which can’t be ‘fulfilled’) are already referred to in the chapeau of this paragraph. If it is desired to have these principles apply to the Commission too, then this should be done in the text of Article VIII, not here. It is also preferable to re-introduce a reference to ‘decisions and recommendations’ (deleted from paragraph 3) as this forms the basis for the Commission making non-binding recommendations. Further, the language of ‘decisions and recommendations’ appears again in article X(2).

France-OT:

France (Territories) questions whether it is appropriate to delete para 3 from Article VII and reintroduce it partially in para 2 (i) of Article IX.

France (Territories) also suggests to use the typical expression ‘Best Available Science’

(b) (current subparagraph c) adopt, in accordance with Article XVI and on the basis of the best available science, conservation and management measures, including:

Mauritius:

The insertion of the words ‘living marine resources’ instead of ‘stocks’ or ‘fishery resources’ in para. 2(a) considerably widens the ambit of this paragraph. It is advisable that this reverts to ‘fishery resources’.

The same comment is made in relation to para. 2(b) – ‘ecosystems’ and ‘living marine resources’ are wider than the original ambit and fall under the Commission who can decide without consensus.

At para. (o), the term should be rephrased as ‘objectives and be in line with the general principles of this Agreement’.

fails to specify the status of the subsidiary body vis-à-vis the Scientific Committee and the Compliance Committee and is therefore lacking.

Seychelles: No comments.

Thailand:

2 (a) ~~to regularly~~ keep under review the conditions and trends of the ~~stocks~~ **living marine fishery resources** and to gather, analyses and disseminate scientific information, catch and effort statistics and other data relevant to the conservation and management of the **fishery resources** ~~stocks and to fisheries based on the stocks covered by this Agreement;~~

For 2 (f) should not contain this Article in the Agreement but rather in CMMs.

~~2. (f) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance, compliance and enforcement, including sanctions such as non-discriminatory market related measures;~~

For 2 (h) **regularly review the implementation of decisions into national legislation level;**

Article X. SESSIONS OF THE COMMISSION *(current Article VI)*

1. Each Member of the Commission shall be represented at sessions of the Commission by a single delegate who may be accompanied by an alternate and by experts and advisers. Alternates, experts and advisers may take part in the proceedings of the Commission but may not vote, except in the case of an alternate who is duly authorized to substitute for the delegate.

2. Each Member of the Commission shall have one vote. Unless otherwise provided in this Agreement, decisions and recommendations of the Commission shall be taken by a majority of the votes cast. A majority of the Members of the Commission shall constitute a quorum.

3. The Commission may adopt and amend, as required, its own Rules of Procedure by a two-thirds majority of its Members, which Rules shall not be inconsistent with this Agreement or with the Constitution of FAO.

4. The Chairperson of the Commission shall convene an annual regular session of the Commission.

5. Special sessions of the Commission may be convened by the Chairperson of the Commission at the request of at least one-third of its Members.

6. The Commission shall elect its Chairperson and no more than (two) Vice-Chairpersons, each of whom shall serve for a term of two years and shall be eligible for re-election but shall not serve for more than four years in succession. In electing the Chairperson and the Vice-Chairpersons the Commission shall pay due regard to the need for an equitable representation from among the Indian Ocean States.

7. The Commission may adopt and amend, as required, the Financial Regulations of the Commission by a two-thirds majority of its Members, which Financial Regulations shall be consistent with the principles embodied in the Financial Regulations of FAO. The Financial Regulations and amendments thereto shall be reported to the Finance Committee of FAO which shall have the power to disallow them if it finds that they are inconsistent with the principles embodied in the Financial Regulations of FAO.

8. In order to ensure close cooperation between the Commission and FAO, FAO shall have the right to participate without vote in all meetings of the Commission and subsidiary bodies established in accordance with ~~paragraph 5 of Article XI~~ **XII**.

COMMENTS

Consultant notes: No substantive amendments.

TCPR: The TCPR NOTED the view of a member that Article X is the more appropriate place for including issues such as voting and the decision-making processes that are currently included under Article IX.

Australia:

Australia notes that consensus is required for the adoption of Rules of Procedure and Financial Regulations in SPRFMO, WCPFC and SIOFA and suggests that the same should apply here. Australia suggests the phrase 'by a two-thirds majority of its Members' be replaced in paragraphs 3 and 7 with 'by consensus'.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XI. SUBSIDIARY BODIES (*current Article XII*)

1. The Commission shall establish a ~~permanent~~ Scientific Committee **and a Compliance Committee.**

2. Each Member of the Commission shall be entitled to appoint one representative to the Scientific Committee and one representative to the Compliance Committee who may be accompanied by alternate representatives and advisors.

~~2. The Commission may establish sub-commissions to deal with one or more of the stocks covered by this Agreement.~~

~~3. Such sub-commissions shall be open to Members of the Commission which are coastal States lying on the migratory path of the stocks concerned in the sub-commission or are States whose vessels participate in the fisheries of these stocks.~~

~~4. A sub-commission shall provide a forum for consultation and cooperation on matters related to the management of the stocks concerned and in particular: (a) to keep under review the stocks concerned and to gather scientific and other relevant information relating to the stocks concerned;~~

~~(b) to assess and analyse the conditions and trends of the stocks concerned;~~

~~(c) to coordinate research and studies of the stocks concerned;~~

~~(d) to report to the Commission on its findings;~~

~~(e) to propose such recommendations for action by the Members of the Commission as may be appropriate, including action to obtain necessary information relating to the stocks and proposals for conservation and management measures;~~

~~(f) to consider any matter referred to it by the Commission.~~

3. The Commission may, subject to the provisions of this Article, establish such ~~committees, working parties or~~ other subsidiary bodies as may be necessary for the purposes of this Agreement.

4. The establishment by the Commission of any ~~sub-commission~~ **subsidiary body** which requires funding by the Commission, ~~and of any committee, working party or other subsidiary body~~ shall be subject to the availability of the necessary funds in the approved autonomous budget of the Commission or of FAO as the case may be. When the related expenses are to be borne by FAO, the determination of such availability shall be made by the Director-General. Before taking any decision involving expenditure in connection with the establishment of subsidiary bodies, the Commission shall have before it a report from the **Executive** Secretary or the Director-General, as appropriate, on the administrative and financial implications.

5. Subsidiary bodies shall provide to the Commission such information regarding their activities as the Commission may require.

COMMENTS

Consultant notes: - Current Article XII deals with subsidiary bodies. It requires the establishment of a permanent Scientific Committee. The Agreement does not provide any guidance on functions or its tasks nor is there any formal link between the Scientific Committee and the Commission. The Commission may, however, establish sub-commissions to deal with one or more stocks covered by the IOTC Agreement, which are mandated to keep under review and gather information, assess and analyse conditions and trends as well as coordinate research and studies on the stocks concerned. Other RFMO treaties contain a general provision establishing permanent subsidiary bodies, as well as participation therein, while their functions are outlined in specific provisions for each of them. Examples are found in Article 6 of NPFC, Article 9 of SPRFMO and Article 11 of WCPFC.

TCPR: The TCPR discussed several issues under this article and NOTED comments suggesting that a new subsidiary body could be created for capacity development.

The TCPR also ACKNOWLEDGED that if a subsidiary body of the Commission does not have its own rules of procedure, the rules of procedure for the Commission should apply as a default.

The TCPR generally accepted that subsidiary bodies should be mandated to not only provide information, but also advice and recommendations to the Commission.

Australia:

Australia suggests a new paragraph:

6. All subsidiary bodies shall operate under such terms of reference and rules of procedure as the Commission may decide.

France-OT: No comments.

France (Territories) supports the institutionalization of the IOTC Compliance Committee together with the Scientific Committee

Mauritius: No comments.

Seychelles: No comments.

Thailand:

AGREED with TCPR comment.

Article XII. SCIENTIFIC COMMITTEE *(new)*

The Scientific Committee shall provide advice to the Commission on the technical and scientific basis for the conservation and management of fishery resources, including biological and environmental aspects, and, shall in particular:

(a) assess information provided by Contracting Parties and relevant organizations, institutions or programmes on catches, fishing effort, fleet capacity and other relevant data;

- (b) assess status and trends of the fishery resources;**
- (c) assess the impacts of fishing on the fisheries resources and species belonging to the same ecosystem or dependent upon or associated with the target stocks;**
- (d) identify and reinforce cooperative research programmes and coordinate their implementation;**
- (e) transmit advice and reports to the Commission regarding conservation and management measures and research; and**
- (f) undertake such other functions or responsibilities as may be conferred on it by the Commission.**

COMMENTS

Consultant notes: This draft article sets out the functions of the Scientific Committee drawing from the current Terms of Reference and texts of other RFMOs such as Article XI of IATTC, Article 10 of NPFC, Article 7 of SIOFA, Article 10 of SPRFMO and Article 12 of WCPFC.

TCPR: The TCPR NOTED that there were divergent views on this article in relation to which IOTC body might deal with socio-economic matters. Some members nominated the Scientific Committee while others nominated the Compliance Committee which as a result of the additional mandate could be expanded to be called the Technical and Compliance Committee.

Australia:

Australia suggests that:

- ‘technical’ be deleted from the chapeau, noting that it is used in other RFMOs to refer to compliance matters (and that the Compliance Committee is subsequently asked to provide ‘technical advice’ – art XIII(b)).
- ‘Contracting Parties’ should be ‘Members’
- In subparagraph (c), ‘fishing’ should be ‘fishing and fishing related activities’ and ‘target stocks’ should be ‘those resources’

France-OT:

Following its comment on Article IX, France (Territories) suggests that the first paragraph of the new Article XII be clarified as follows:

The Scientific Committee shall provide advice to the Commission on the technical and scientific basis for the conservation and management of fishery resources, including biological and environmental aspects based on the best available science and, shall in particular:

France (Territories) also suggests to specify the nature of the Scientific Committee advice adding the following to paragraph (e) of the new Article XII:

e) transmit advice suggesting each time several management options and, if appropriate, the associated risks, and reports to the Commission regarding conservation and management measures and research; and

France (Territories) objects to the proposal that the Scientific Committee might deal with socio-economic matters. France (Territories) considers that the implementation of conservation and management measures based on the concept of a «biological and economic» maximum sustainable yield is not suitable to manage coastal and high seas activities having too different economic concerns to be accommodated adequately by a model that associates biological and economic concerns.

Mauritius:

it appears contradictory for the Scientific Committee to look at socioeconomic impact, this would more appropriately be dealt with at the level of the Commission when the Members discuss and decide.

Seychelles:

Seychelles believes that socio-economic data should be collected by the Scientific Committee and not by the Compliance Committee.

Thailand:

Add terms as in Bold font.

(a) assess information provided by Contracting Parties, **Cooperating Non - Contracting Parties, Non - Contracting Parties** and relevant organizations, institutions or programmes on catches, fishing effort, fleet capacity and other relevant data;

To eliminate the conflict of duty with SIOFA SC this provision should be narrow down to:

(c) assess the impacts of fishing on the ~~fisheries~~ fishery resources ~~and species belonging to the same ecosystem or dependent upon or associated with the target stocks;~~

Article XIII. COMPLIANCE COMMITTEE *(new)***The Compliance Committee shall:**

(a) review compliance with conservation and management measures adopted by the Commission, including those related to monitoring, control, surveillance and enforcement, and make such advice and recommendations to the Commission as may be necessary to ensure their effectiveness;

(b) provide such other information, technical advice and recommendations as it considers appropriate or as may be requested by the Commission relating to the implementation and compliance with provisions of this Agreement and the conservation and management measures adopted by the Commission;

(c) review the implementation of any cooperative measures for monitoring, control and surveillance and enforcement adopted by the Commission and provide advice and recommendations to the Commission in this regard;

(d) monitor, review and analyse information pertaining to fishing and fishing related activities of non- contracting parties and their vessels that are presumed to undermine the objectives of this Agreement, and recommend actions to be taken by the Commission to combat such activities; and

(e) undertake other functions or responsibilities as may be conferred on it by the Commission.

COMMENTS

Consultant notes: This draft article sets out the functions of the Compliance Committee drawing from the current Terms of Reference and texts of other RFMOs. Examples are those of Article X of IATTC, Article 11 of NPFC, Article 11 of SPRFMO and Article 14 of WCPFC.

TCPR: The TCPR NOTED that some members suggested that the Compliance Committee be renamed as the Technical and Compliance Committee, as it would have an increased technical advisory role.

Australia:

Australia suggests that subparagraph (a) should begin: ‘review compliance with the provisions of this Agreement and conservation and management measures...’

While the equivalent provisions of SIOFA, SPRFMO or WCPFC don't refer to compliance with their constitutive treaties, the EU proposal for an IOTC CMS includes consideration of Members and CNCPs' compliance with both the Agreement and IOTC CMMs. Further, in sub-paragraph (b), the Committee is asked to provide information, advice and recommendations on compliance with the Agreement. It is therefore appropriate to refer to compliance with the Agreement in sub-paragraph (a).

France-OT:

France (Territories) suggests the inclusion of a new sub-paragraph (f) specifying that the Compliance Committee shall:

(f) improve compliance by the Parties with the Resolutions and propose any solution in response to any non-compliance.

France (Territories) suggests to include a reference to the works of definition of the IOTC list of vessels presumed to have carried out illegal, unreported and unregulated fishing (IUU) which depend on this body.

Mauritius:

Re. (e) the words 'ancillary to any of the above' may be added at the end.

Seychelles: No comments.

Thailand:

Both Scientific and Compliance Committee provide technical advice to the Commission so, the name of Compliance Committee should be remained.

Article XIV. ADMINISTRATION (*current article VIII*)

1. The **Executive** Secretary of the Commission (~~hereinafter referred to as the "Secretary"~~) shall be appointed by the Director-General with the approval of the Commission, or in the event of appointment between regular sessions of the Commission, with the approval of the Members of the Commission. The staff of the Commission shall be appointed by the **Executive** Secretary and shall be under the **Executive** Secretary's direct supervision. The **Executive** Secretary and staff of the Commission shall be appointed under the same terms and conditions as staff members of FAO; they shall, for administrative purposes, be responsible to the Director-General.

2. The **Executive** Secretary shall be responsible for implementing the policies and activities of the Commission and shall report thereon to the Commission. The **Executive** Secretary shall also act as **Executive** Secretary to ~~other~~ subsidiary bodies established by the Commission, as required.

3. The expenses of the Commission shall be paid out of its autonomous budget except those relating to such staff and facilities as can be made available by FAO. The expenses to be borne by FAO shall be determined and paid within the limits of the biennial budget prepared by the Director-General and approved by the Conference of FAO in accordance with the General Rules and the Financial Regulations of FAO.

4. Expenses incurred by delegates, their alternates, experts and advisers when attending, as government representatives, sessions of the Commission, its ~~subsidiary bodies -commissions and its committees~~, as well as the expenses incurred by observers at sessions, shall be borne by the respective governments or organizations. The expenses of experts invited by the Commission to attend, in their individual capacity, meetings of the Commission or its ~~subsidiary bodies -commissions -or committees~~ shall be borne by the budget of the Commission.

COMMENTS
Consultant notes: It is suggested to change “Secretary” to “Executive Secretary”, and a few minor other amendments to be in line with other proposals.
TCPR: No comments.
Australia: No comments.
France-OT: No comments.
Mauritius: no mention seems to be made of the duty to act impartially and revocation. A discussion on these issues would be required prior to any finalisation of the text.
Seychelles: No comments.
Thailand: No comments.

Article XV. FINANCES (*current Article XIII*)

1. Each Member of the Commission undertakes to contribute annually its share of the autonomous budget in accordance with a scale of contributions to be adopted by the Commission.

2. At each regular session, the Commission shall adopt its autonomous budget by consensus of its Members provided, however, that if, after every effort has been made, a consensus cannot be reached in the course of that session, the matter will be put to a vote and the budget shall be adopted by a two-thirds majority of its Members.

3. Contributions shall be determined in the following manner:

(a) The amount of the contribution of each Member of the Commission shall be determined in accordance with a scheme which the Commission shall adopt and amend by consensus.

(b) In adopting the scheme, due consideration shall be given to each Member being assessed an equal basic fee and a variable fee based, inter alia, on the total catch and landings of species covered by this Agreement in the Area, and the per capita income of each Member.

(c) The scheme adopted or amended by the Commission shall be set out in the Financial Regulations of the Commission.

4. Any non-Member of FAO that becomes a Member of the Commission shall be required to make such contribution towards the expenses incurred by FAO with respect to the activities of the Commission as the Commission may determine.

~~5.~~4 Contributions shall be payable in freely convertible currencies unless otherwise determined by the Commission with the concurrence of the Director-General.

~~6.~~5 The Commission may also accept donations and other forms of assistance from organizations, individuals and other sources for purposes connected with the fulfilment of any of its functions.

7.6. Contributions and donations and other forms of assistance received shall be placed in a Trust Fund administered by the Director-General in conformity with the Financial Regulations of FAO.

8.7 A Member of the Commission which is in arrears in the payment of its financial contributions to the Commission shall have no vote in the Commission if the amount of its arrears equals or exceeds the amount of the contributions due from it for the two preceding calendar years. The Commission may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay was due to conditions beyond the control of the Member.

COMMENTS

Consultant notes: The only suggested amendments are editorials.

TCPR: Some members queried whether IOTC should be comparable with FAO and employ FAO procedures in the way it adopts its budget.

The TCPR NOTED that a budget agreed by consensus has a risk of not being agreed in any one year. This risk could be mitigated by having a procedure whereby if no budget is adopted, the budget from the previous year is adopted by default as is the practice in some other RFMOs.

Australia:

Australia suggests that paragraph 2 should read:

2. At each regular session, the Commission shall adopt its autonomous budget by consensus of its Members. In the event that the Commission cannot reach consensus on the adoption of an annual budget for any given year, the budget for the previous year shall be carried forward for that year.

Australia notes that the budget formula in paragraph 3(b) relies on assessing catch of ‘species covered by this Agreement’. This is another reason why the certainty created by the inclusion of an Annex of species is important – see our suggestion on the definition of ‘fishery resources’ in Article I.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand:

AGREED TCPR Noted.

Article XVI. PROCEDURES CONCERNING CONSERVATION AND MANAGEMENT MEASURES DECISION MAKING (*current Article IX*)

1. ~~Subject to paragraph 2, t~~ **The Commission may, by a two-thirds majority of its Members present and voting, adopt conservation and management measures pursuant to Article IX, paragraphs b-f,** binding on Members of the Commission in accordance with this Article.

~~2. Conservation and management measures for stocks for which a sub-commission has been established under paragraph 2 of Article XII, shall be adopted upon the proposal of the sub-commission concerned.~~

2. The **Executive** Secretary shall, without undue delay, notify the Members of the Commission of any conservation and management measures adopted by the Commission.

3. Subject to paragraphs **4** and **5**, conservation and management measures adopted by the Commission under paragraph 1, shall become binding on Members 120 days from the date specified in the **Executive** Secretary's notification or on such other date as may be specified by the Commission.

4. Any Member of the Commission may, within 120 days from the date specified or within such other period as may be specified by the Commission under paragraph **3**, object to a conservation and management measure adopted under paragraph 1. A Member of the Commission which has objected to a measure shall not be bound thereby. **The objection shall include a written explanation of reasons for objecting, and where appropriate, its proposals for alternative conservation and management measures that the Member is going to implement.** Any other Member of the Commission may similarly object within a further period of 60 days from the expiry of the 120-day period. A Member of the Commission may also withdraw its objection at any time and become bound by the measure immediately if the measure is already in effect or at such time as it may come into effect under this article.

5. If objections to a measure adopted under paragraph 1 are made by more than one-third of the Members of the Commission, the other Members shall not be bound by that measure; but this shall not preclude any or all of them from giving effect thereto.

6. The **Executive** Secretary shall notify each Member of the Commission immediately upon receipt of each objection or withdrawal of objection.

7. The Commission may, by a simple majority of its Members present and voting, adopt recommendations concerning conservation and management of the stocks for furthering the objectives of this Agreement.

COMMENTS

Consultant notes: Concerning objection procedures, there is a new proposed requirement that if a Member objects to a decision it must explain its reasons, including alternative measures that Member is going to implement. Such requirements have become common standard in modern RFMO agreements and conventions, such as Article 3, paragraph 3 of GFCM, Article 9 of NPFC and Article 17, paragraph 2 of SPRFMO.

Additional amendments are suggested to be in line with other proposals

TCPR: The TCPR NOTED that the timeline for new resolutions entering into effect could be reduced.

The TCPR NOTED the position of some CPCs that consensus on certain matters could be preferable but that this required further consideration.

The TCPR was divided on the suggestion by a CPC of adopting a "2 chamber" voting system with the majority of coastal CPCs indicating that they did not accept the concept of a 2 chamber proposal.

Australia:

Australia does not support the suggestion that IOTC adopt a two chamber voting system.

Australia suggests:

- the words 'pursuant to Article IX, paragraphs b-f' be deleted from paragraph 1, as they would impose an unnecessary restriction on the matters about which the Commission can adopt CMMs.

- noting our comments on Article V, the inclusion of a sentence at the end of paragraph 1 to clarify the application of CMMs to waters under national jurisdiction within the Area: ‘Subject to paragraphs [xx – objection procedure], and unless the Commission decides otherwise, conservation and management measures adopted by the Commission shall apply to the whole of the Area, including waters under the jurisdiction of Members.’
- that the ‘default’ rule in paragraph 3 should be 120 days from the date the Executive Secretary transmits notification, rather than 120 days from a date specified by the Executive Secretary: ‘3. Subject to paragraphs 4 and 5, conservation and management measures adopted by the Commission under paragraph 1, shall become binding on Members 120 days after the date of transmittal specified in the notification made by the Executive Secretary pursuant to paragraph 2 or on such other date as may be specified by the Commission.’
- that it would be beneficial to know about any objections in advance of the date a measure is to come into effect. Accordingly, suggest that ‘120 days’ in the first line of paragraph 4 should be ‘60 days’.
- that it would be preferable if, as is the case in SPRFMO, it were possible to only partially opt-out of measures. Australia suggests that the second sentence in paragraph 4 end with ‘to the extent of the objection’.
- that it is important to require Members that object to measures to inform the Commission of the alternative means by which they will achieve the objectives of a measure to which they object. Australia suggests that the third sentence in paragraph 4 read: ‘The objection shall include a written explanation of reasons for objecting and its proposals for alternative conservation and management measures that are equivalent in effect to the decision to which it has objected and have the same date of application that the Member is going to implement’. The text proposed is adapted from that in SPRFMO.
- that paragraph 7 should refer to ‘fishery resources’ (a defined term) rather than ‘stocks’: ‘...management of the fishery resources consistent with the objective of this Agreement’

France-OT: No comments.

Mauritius:

the move from ‘measures’ to ‘decision-making’ has negative imputations which ought to be avoided and the wording should not be changed.

Not agreeable to the 2-chamber proposal as it is potentially prejudicial as States’ position would be arguably diluted.

Seychelles: No comments.

Thailand:

Add terms as in Bold font.

Article XVI. ~~PROCEDURES CONCERNING CONSERVATION AND~~

~~MANAGEMENT MEASURES~~ **DECISION MAKING AND OBJECTION** *(current Article IX)*

Article XVII. IMPLEMENTATION *(current Article X and partly Article XI)*

1. Each Member of the Commission shall ensure that such action is taken, under its national legislation, including the imposition of adequate penalties for violations, as may be necessary to make effective the provisions of this Agreement and to implement conservation and management measures which become binding on it under paragraph 1 of Article **XVI**.

2. Each Member of the Commission shall transmit to the Commission an annual statement of the actions it has taken pursuant to paragraph 1. Such statement shall be sent to the Secretary of the Commission not later than 60 days before the date of the following regular session of the Commission.

3. The Members of the Commission shall cooperate, through the Commission, in the establishment of an appropriate system to keep under review the implementation of conservation and management measures adopted under paragraph 1 of Article **XVI**, taking into account appropriate and effective tools and techniques to monitor the fishing activities and to gather the scientific information required for the purposes of this Agreement.

4. Each Member of the Commission shall provide to the Commission copies of laws, regulations and administrative instructions in force or, where appropriate, summaries thereof, relating to the conservation and management of **fishery resources** ~~stocks covered by this Agreement~~ and shall inform the Commission of any amendment or repeal of such laws, regulations and administrative instructions.

5. The Members of the Commission shall cooperate in the exchange of information regarding any fishing for **fishery resources** ~~stocks covered by this Agreement~~ by nationals of any State or entity, which is not a Member of the Commission.

COMMENTS

Consultant notes: The only suggested amendments are to be in line with other proposals.

TCPR: The TCPR NOTED a divergence of views on whether to retain or delete paragraph 4. Furthermore, the species under the IOTC competence should be defined in the Agreement as IOTC fisheries resources.

Australia:

Australia suggests that paragraph 4 be deleted on the basis that it is overly prescriptive and duplicates the reporting obligations Members already have as part of their implementation reporting mandated by paragraph 2 of this article.

France-OT: No comments.

Mauritius:

No proposal.

Seychelles: No comments.

Thailand: No comments.

Article XVIII. FLAG STATE DUTIES *(new)*

1. Each Contracting Party shall take all necessary measures to ensure that vessels entitled to fly its flag:

(a) comply with the provisions of this Agreement and conservation and management measures adopted by the Commission; and

(b) do not conduct unauthorized fishing or fishing related activities within waters under national jurisdiction of any member.

2. Each Contracting Party shall:

(a) authorize the use of vessels entitled to fly its flag only where it is able to exercise effectively its responsibilities in respect of the vessels under this Agreement and in accordance with international law;

(b) maintain a register of vessels entitled to fly its flag and authorized for fishing or fishing related activities, ensure that such information as may be specified by the Commission is entered into that register, and exchange the information in accordance with such procedures as may be specified by the Commission;

(c) in accordance with procedures adopted by the Commission, investigate immediately and report fully on actions taken in response to any alleged violation by vessels entitled to fly its flag of provisions of this Agreement or any conservation and management measures adopted by the Commission; and

(d) ensure that penalties applicable for such violations are of an appropriate severity to secure compliance, discourage further violations and deprive offenders of the benefits accruing from such activities.

COMMENTS

Consultant notes: Most RFMOs have recognised the importance of focussing on flag State obligations, and modern RFMO instruments contain provisions spelling out the crucial duties of parties as flag States. The draft is in essence based on Article 18 of the UNFSA, but also other RFMO treaties. These include Article XX of IATTC, Article 13 of NPFC, Article 11 of SIOFA, Article 25 of SPRFMO and Article 24 of WCPFC.

TCPR: There was general acceptance of the inclusion of an article on ‘Flag State Duties’ in the Agreement text but further discussions are needed on the content.

Australia:

Australia suggests:

- that each reference to ‘Contracting Party’ in this article should be to ‘Member’
- that the following be added after the word ‘Commission’ in paragraph 1(a): ‘and do not engage in any activity which would undermine the effectiveness of such measures’. A similar requirement is included in SPRFMO, WCPFC, SIOFA and article 18(1) of UNFSA.
- the addition of two new sub-paragraphs to paragraph 1 (adapted from SPRFMO):
 - (c) carry and operate equipment sufficient to comply with vessel monitoring system standards and procedures adopted by the Commission; and
 - (d) land or tranship fishery resources caught in the Area in accordance with standards and procedures adopted by the Commission.
- The addition of two new sub-paragraphs to paragraph 2 (adapted from SPRFMO and WCPFC):
 - (a) not allow any fishing vessel entitled to fly its flag to be used for fishing in the Area unless it has been authorised to do so by the appropriate authority or authorities of that member of the Commission
 - ...
 - (f) ensure in particular that, where it has been established, in accordance with its laws, that a fishing vessel flying its flag has been involved in the commission of a serious violation of the provisions of this Agreement or of any conservation and management measures adopted by the Commission, the vessel concerned ceases fishing and does not fish in the Area until it has complied with all outstanding sanctions imposed by the member of the Commission in respect of the violation.
- The addition of a new paragraph 3 (adapted from SPRFMO):
 - 3. Each member of the Commission is encouraged to ensure that fishing vessels flying its flag operate in the Area in accordance with applicable international obligations, and with regard to relevant recommendations and guidelines, regarding safety at sea for vessels and their crews.

France-OT:

France (Territories) only supports the additions suggested by the consultant on Article XVIII.

In addition to minor editorial amendments, France (Territories) proposes to specify the Contracting Parties duties in implementing data collection tools, by including a new sub-paragraph to paragraph 1:

1. ~~Each~~ **The Contracting Parties shall take all necessary measures to ensure that vessels entitled to flying their ~~its~~ flag:**

(a) comply with the provisions of this Agreement and conservation and management measures adopted by the Commission; and

(b) do not conduct unauthorized fishing or fishing related activities within waters under national jurisdiction of any member.

In particular, each Contracting Party shall develop and continuously improve the tools available to the vessels flying its flag to comply with its reporting requirements and store and analyse its data.

France (Territories) proposes the following editorial improvements to para 2 of the new Article XVIII:

2. ~~Each~~ **The Contracting Parties shall:**

(a) authorize the vessels flying their flag to fish in the Agreement Area beyond areas of national jurisdictions only where they are able to exercise effectively its responsibilities in respect of such vessels ~~authorize the use of vessels entitled to fly its flag only where it is able to exercise effectively its responsibilities in respect of the vessels under this Agreement and in accordance with international law;~~

(b) maintain a register of vessels entitled to fly ~~its~~ their flag and authorized for fishing or fishing related activities, ensure that such information as may be specified by the Commission is entered into that register, and exchange the information in accordance with such procedures as may be specified by the Commission;

(c) in accordance with procedures adopted by the Commission, investigate immediately and report fully on actions taken in response to any alleged violation by vessels entitled to fly ~~its~~ their flag of provisions of this Agreement or any conservation and management measures adopted by the Commission; and

(d) ensure that penalties applicable for such violations are of an appropriate severity to secure compliance, discourage further violations and deprive offenders of the benefits accruing from such activities.

Seychelles: No comments.

Thailand:

Revise 1(b): Control its vessel to do not conduct unauthorized fishing or fishing related activities within waters under national jurisdiction of any member.

Article XIX. PORT STATE DUTIES (new)

Each Contracting Party shall take all measures and actions, to the extent possible, necessary to implement port State measures in accordance with international instruments and decisions by the Commission.

COMMENTS

Consultant notes: Port State duties have also gained attention in recent years, in particular by entering into force of the FAO Port State Measures Agreement. Article 23 of UNFSA also addresses port State measures, and the amended draft contains a short provision in this regard. This provision could be include more details. Similar approaches have been taken by other RFMOs such as in Article 14 of NPFC, Article 12 of SIOFA, Article 26 of SPRFMO and Article 27 of WCPFC.

TCPR: There was general acceptance of the inclusion of an article on ‘Port State Duties’ in the Agreement text but further discussions are needed on the content.

Australia:

Australia suggests that:

- the reference to ‘Contracting Party’ should be to ‘Member’
- the article be added to, noting that SPRFMO, WCPFC and SIOFA all include much more expansive provisions on port state duties. Specifically, these other agreements include:
 - An affirmation of the right and duty of port State Members to take measures to promote the effectiveness of subregional, regional and global CMMs.
 - A requirement that such measure not discriminate in form or fact against any State
 - A requirement that Members give effect to Commission CMMs related to entry into and use of ports
 - A requirement that Members provide appropriate assistance when a foreign vessel is in its port and the flag State requests assistance with ensuring the vessel's compliance with CMMs
 - A requirement that port State members notify flag States, the Commission and other international orgs when violations are identified and provide inspection reports.
 - A savings provision that nothing in the article affects Members' sovereignty over their ports.
- Australia suggests that the current draft article be replaced with the following:
 1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures, a port State shall not discriminate in form or in fact against the fishing vessels of any State.
 2. Each Member shall:
 - (a) in accordance with the conservation and management measures adopted by the Commission, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals;
 - (b) not permit landings, transshipment, or supply services in relation to fishing vessels unless they are satisfied that fishery resources on board the vessel have been caught in a manner consistent with the conservation and management measures adopted by the Commission; and
 - (c) provide assistance to flag States, as reasonably practical and in accordance with its national law and international law, when a fishing vessel is voluntarily in its ports or at its offshore terminals and the flag State of the vessel requests it to provide assistance in ensuring compliance with the provisions of this Agreement and with the conservation and management measures adopted by the Commission.
 3. In the event that a Member considers that a vessel making use of its ports or offshore terminals has violated a provision of this Agreement or a conservation and

management measure adopted by the Commission, it shall draw this to the attention of the flag State concerned, the Commission and other relevant States and appropriate international organisations. The Member shall provide the flag State and, as appropriate, the Commission with full documentation of the matter, including any record of inspection.

4. Nothing in this Article affects the exercise by Contracting Parties of their sovereignty over ports in their territory in accordance with international law.

France-OT:

France (Territories) only supports the additions suggested by the consultant on Article XIX.

Mauritius: No comments.

Seychelles: No comments.

Thailand:

AGREED with TCPR comment. **Add the provision:**

1. Each Contracting Party has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
2. Each Contracting Party may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. Each Contracting Party may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.
4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

Article XX. MONITORING, COMPLIANCE AND ENFORCEMENT *(new)*

The Commission shall establish appropriate cooperative mechanisms for effective monitoring, control and surveillance of fishing and fishing related activities and to ensure compliance with this Agreement and the adopted conservation and management measures including, *inter alia*:

(a) a record of vessels authorised to conduct fishing and fishing related activities in the Area;

(b) requirements for the reporting of vessel movements and activities by a satellite vessel monitoring system or other means that shall be designed to ensure the integrity and security of near real time transmissions, and such other systems as may be agreed by the Commission from time to time;

(c) inspection programmes both at sea and in port, including joint or reciprocal boarding and inspection schemes;

(d) reporting obligations on violations detected, progress and outcomes of investigations, and enforcement actions taken;

(e) lists of vessels having engaged in illegal, unreported and unregulated fishing, including actions to be taken against vessels on such lists;

(f) a process, including through the Compliance Committee, to examine cases of non-compliance with any recommendation adopted by the Commission and, as appropriate, determine sanctions;

(g) sanctions consistent with international law to be applied by the Commission in cases of non-compliance with recommendations of the Commission as determined pursuant to paragraph (f) of this Article, including non-discriminatory market-related measures; and

(h) guidelines for penalties and/or sanctions to be applied by the Commission and/or its members.

COMMENTS

Consultant notes: Many RFMOs treaties include a specific provision to strengthen the compliance aspect by establishing cooperative mechanism. This draft provision contains amendments drawing from Article XVIII of IATTC, Article 17 of NPFC, Article 27 of SPRFMO and Articles 25 and 27 of WCPFC.

TCPR: The TCPR NOTED a divergence of views, particularly with regards to the introduction of high seas boarding inspection programme and/or the use of a centralized VMS system.

A member recalled the ongoing work of the CMS undertaken by a consultant and the WPICMM and suggested that the outcome of that work be taken under consideration in the revision of the agreement.

Australia:

Comments from individual members:

Australia suggests:

- The chapeau should refer to ‘conservation and management measures adopted by the Commission’
- The addition of a new sub-paragraph: ‘(b bis) regulation and supervision of transshipment’
- Sub-paragraph (e) be amended to read: ‘lists of vessels having engaged in illegal, unreported or unregulated fishing, and actions to be taken against vessels on such lists’
- That it is not appropriate to refer to the Commission as ‘determining’ sanctions. It is more appropriate, as is already done in art VIII(i) and XVII(1), to indicate that sanctions imposed by Members must be of sufficient severity to deter violations. Australia suggests:
 - The words ‘and, as appropriate, determine sanctions’ be deleted from sub-paragraph (f).
 - The deletion of sub-paragraph (g). The reference to non-discriminatory market related measures could be retained if tied more closely to IUU – such as in SPRFMO: ‘non discriminatory market-related measures, consistent with international law, to monitor transshipment, landings, and trade to prevent, deter and eliminate IUU fishing including, where appropriate, catch documentation schemes’.
 - Sub-paragraph (h) refer to ‘sanctions to be recommended by the Commission and applied by its members’.
- The addition of a new paragraph on the sharing of evidence:
 2. Each member of the Commission shall, to the extent permitted by its national laws and regulations, establish arrangements for making available to prosecuting authorities of other members evidence relating to alleged violations.
- The addition of a new paragraph on high seas boarding and inspection. The suggestions is made as an example of best-practice drafting incorporated into a range of contemporary RFMOs:

3. If, by [XXXX], the Commission has not adopted at sea inspection procedures as outlined in paragraph 1(c), or an alternative mechanism which effectively discharges the obligations of the members of the Commission under the 1995 Agreement and this Agreement to ensure compliance with the conservation and management measures adopted by the Commission, Articles 21 and 22 of the 1995 Agreement shall apply among Contracting Parties as if those Articles were part of this Agreement, and boarding and inspection of fishing vessels in the Area, as well as any subsequent enforcement action, shall be conducted in accordance with Articles 21 and 22 of the 1995 Agreement and such additional practical procedures as the Commission may decide are necessary for the implementation of those Articles.

France-OT:

France (Territories) only supports the additions suggested by the consultant on Article XX

Mauritius:

the words ‘of fishery resources covered by this Agreement’ may be added after ‘fishing related activities’ to ensure clear parameters.

para. (h)- it has substantial legal implications and it is not appropriate.

Seychelles: No comments.

Thailand:

AGREED with general principle that the Commission shall establish appropriate cooperative mechanisms defined in this agreement but the detail of procedures should be carefully consider in particular high sea boarding inspection.

Article XIII. INFORMATION (deleted)

~~1. The Members of the Commission shall, on the request of the Commission, provide such available and accessible statistical and other data and information as the Commission may require for the purposes of this Agreement. The Commission shall decide the scope and form of such statistics and the intervals at which they shall be provided. The Commission shall also endeavor to obtain fishing statistics from fishing States or entities, which are not Members of the Commission.~~

COMMENTS

Consultant notes: The Commission may establish measures concerning reporting, see draft Article IX, paragraph 2(d). Suggested to delete this one.

TCPR: No comments.

Australia:

Australia notes that data collection remains an area in which the IOTC needs to improve. Australia suggests the re-insertion of this article.

France-OT: No comments.

Mauritius: No comments

Seychelles: No comments.

Thailand: No comments.

Article XXI. OBSERVERS (*current Article VII*)

1. Any Member or Associate Member of FAO that is not a Member of the Commission may, upon request, be invited to be represented by an observer at sessions of the Commission. It may submit memoranda and participate without vote in the discussions.

~~2.1~~ States which, while not Members of the Commission, nor Members or Associate Members of FAO, are Members of the United Nations, any of its Specialized Agencies ~~or the International Atomic Energy Agency~~ may, upon request and subject to the concurrence of the Commission through its Chairperson and to the provisions relating to the granting of observer status to nations adopted by the Conference of FAO, be invited to attend sessions of the Commission as observers.

~~3.2~~ The Commission may invite intergovernmental or, on request, non-governmental organizations having special competence in the field of activity of the Commission to attend such of its meetings as the Commission may specify.

COMMENTS

Consultant notes: Admission of observers are addressed in current Article VII. Minor amendments suggested to be in line with other proposals.

TCPR: The TCPR NOTED that many CPCs supported the need for transparency and full participation of observers in the processes of the Commission, noting that confidentiality issues need to be addressed.

Australia:

Australia suggests that Member Organization of the FAO be included in the list at the beginning of paragraph 1.

Australia also suggests that the following should also be entitled to observer status:

- States which participated in the international consultations for the existing agreement or the amended agreement;
- The UN, the IMO and the ILO

Australia further suggests that the final sentence of paragraph 1 become a standalone paragraph at the end of the article applicable to all observers, whether their status as observers depends on paragraphs 1, 2 or 3. Consistent with the best-practice transparency principles embedded in the SPRFMO and SIOFA agreements, this new paragraph could also provide that the Commission's Rules of Procedure shall provide for the participation of observers, that the rules should not be unduly restrictive, and that observers shall be given timely access to pertinent information. Australia suggests:

3bis. Observers may submit memoranda and participate without vote in discussions of the Commission and its subsidiary bodies. The rules of procedure of the Commission shall provide for such participation and shall not be unduly restrictive in this respect. The rules of procedure shall also provide for such representatives to have timely access to all relevant information.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand:

AGREED with TCPR comment.

Article XXII. SPECIAL REQUIREMENTS OF DEVELOPING STATES CONTRACTING PARTIES *(new)*

1. The Commission shall give full recognition to the special requirements of developing States Contracting Parties to this Agreement in relation to conservation and management of fishery resources and to the development of fishing and fishing related activities.

2. In giving effect to the duty to cooperate in the establishment of conservation and management measures, the Commission shall take into account the special requirements of developing State Contracting Parties, in particular:

(a) the vulnerability of such developing States Contracting Parties which are dependent on the exploitation of fishery resources, including for meeting the nutritional requirements of their populations or part thereof;

(b) the need to avoid adverse impacts on, and ensure access to fisheries by subsistence, and artisanal fishers small-scale and fish workers; and

(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto such developing States Contracting Parties.

3. The Contracting Parties shall cooperate either directly or through the Commission for the purposes set out in this Article, which may include provision of financial assistance, assistance to human resource development, technical assistance, transfer of technology, including joint venture arrangements, and advisory and consultative services. Such assistance shall, *inter alia*, be directed towards:

(a) improved conservation and management of fishery resources through collection, submission, verification, storing and dissemination of data;

(b) stock assessment and scientific research;

(c) development of fishing activities; and

(d) monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level and access to technology and equipment.

COMMENTS

Consultant notes: Special requirements of Members that are developing States are mentioned in current Article V (b). All modern international instruments recognize the special requirements of developing States in stand.-alone provisions. The draft contains a provision to address this issue in a more appropriate manner, drawing from part VII of the UNFSA and texts of other RFMO treaties such as Article XXVI of IATTC, Article 20 of NPFC, Article 17 of SIOFA, Article 32 of SPRFMO and Article 32 of WCPFC.

TCPR: The TCPR NOTED a strong general support for the requirements of developing states to be included in the Article. However there was no agreement on the inclusion of disproportionate burden contained in 2c. Many coastal CPCs expressed their strong preference for the requirements of developing states to be prominently included, in particular the principle of disproportionate burden, noting it is derived from UNFSA (Article 24:2c) and operational in one RFMO. However, some members indicated that the definition of disproportionate burden (2c) would need to be clearly defined before it can be considered to avoid facing the challenges in making this concept operational. The idea of creating a working group to elaborate the definition of disproportionate burden and criteria for its application was raised.

In relation to paragraph 3, while generally supporting the principle a member expressed the view this article should not be mandatory. The TCPR NOTED that many members contributed and assisted the region in various forms including financial assistance. One member highlighted their substantive contribution but indicated that an RFMO is not an aid agency. Another member indicated that any form of assistance to the region is only done so at will and not in a charitable obligation

Australia:

Australia strongly supports the retention of sub-paragraph 2(c), which replicates article 24(2)(c) of UNFSA. Similar language is included in WCPFC (article 30(2)(c)), SIOFA (article 13(2)(c)) and SPRFMO (article 19(2)(c)). Australia does not consider that there is a need for a working group to further define the concept of ‘disproportionate burden’.

Australia suggests that:

- the words ‘,in particular small island developing States,’ be inserted after ‘this Agreement’ in paragraph 1. Australia also suggests that paragraph 1 should refer to ‘the development of fisheries for such resources’ rather than to the development of fishing.
- Sub-paragraph 2(b) would be clearer if it read: ‘...fisheries by subsistence, small-scale and artisanal fishers and fish workers’
- The word ‘such’ be deleted from sub-paragraph 2(c).
- Paragraph 3 refer to Members rather than Contracting Parties.
- Rewording paragraph 3 to avoid the suggestion that the activities listed in the first setence are the purposes of the Article: ‘...set out in this Article. Such cooperation may include...’.
- Sub-paragraph 3(c) refer to ‘fishing and fishing related activities’

France-OT:

France (Territories) suggests the following amendement to para 3 of Article XXII:

3. The Contracting Parties ~~shall~~ may cooperate either directly or through the Commission for the purposes set out in this Article, which may include provision of financial assistance, assistance to human resource development, technical assistance, transfer of technology, including joint venture arrangements, and advisory and consultative services. Such assistance ~~shall~~ would, inter alia, be directed towards:

Mauritius: No comments.

Seychelles: No comments.

Thailand:

Revise (1):

The Commission shall give full recognition to the special requirements of developing States Contracting Parties, **in particular, SIDs and LDCs**, to this Agreement in relation to conservation and management of fishery resources and to the development of fishing and fishing related activities.

Article XXIII. NON-CONTRACTING PARTIES (*new*)

1. Contracting Parties shall exchange information with respect to vessels engaged in fishing or fishing related activities in the Area that are flying the flags of non-contracting parties to this Agreement.

2. Contracting Parties shall, individually or collectively, take measures consistent with this Agreement and international law to deter the activities of such vessels, which undermine the effectiveness of applicable conservation and management measures, and shall report to the Commission any action taken in response to fishing or fishing related activities in the Area by non-contracting parties.

3. Contracting Parties shall, individually or collectively, draw the attention of any non-contracting party to this Agreement to any activity, which in the opinion of the Contracting Party or Contracting Parties negatively affects the implementation of the objective of this Agreement.

4. Contracting Parties shall, individually or collectively, request non-contracting parties to this Agreement whose vessels are engaged in fishing or fishing related activities in the Area to become parties to this Agreement or to cooperate fully in the implementation of conservation and management measures adopted by the Commission. Such cooperating non-contracting parties may enjoy benefits from participation in fishing or fishing related activities commensurate with their commitments to comply with conservation and management measures established under this Agreement.

COMMENTS

Consultant notes: A draft article related to non-contracting parties is also included, which is based on Part IV of the UNFSA and texts of other RFMO treaties. These include Article XXVI of IATTC, Article 20 of NPFC, Article 17 of SIOFA, Article 32 of SPRFMO and Article 32 of WCPFC.

TCPR: Some members indicated that the title of the article could better reflect the content of the Article, and because the actions appear to relate to IUU fishing, this article might be more appropriately included in a CMM.

Australia:

Australia suggests that this article should refer to Members rather than Contracting Parties.

Australia also suggests that paragraph 1 should read: 'Members shall exchange information with respect to vessels engaged in fishing or fishing related activities in the Area that are not flying the flag of a Member of the Commission.' This phrasing would enable the exchange of information on stateless vessels not flying a flag.

Australia suggests that paragraph 4 begin: 'Members shall, individually or collectively, request and encourage...'

France-OT:

France (Territories) proposes the following editorial improvements to para 1 of the new Article XXIII

1. Contracting Parties shall exchange information ~~with respect to~~ on the activities of vessels flying the flag of States that are not Parties to this Agreement that are engaged in fishing or fishing related activities in the Area ~~that are flying the flags of non-contracting parties to this Agreement~~

Mauritius: No comments.

Seychelles: No comments.

Thailand:

Revise:

1. Contracting Parties shall exchange information with respect to vessels engaged in ~~fishing or fishing related~~ activities in the Area that are flying the flags of non-contracting parties to this Agreement.

2. Contracting Parties shall, ~~individually or collectively~~, take measures consistent with this Agreement and international law to deter the activities of such vessels, which undermine the effectiveness of applicable conservation and management measures, and shall report to the Commission any action taken in response to fishing or fishing related activities in the Area by non-contracting parties.

3. Contracting Parties shall, ~~individually or collectively~~, draw the attention of any non-contracting party to this Agreement to any activity, which in the opinion of the Contracting Party or Contracting Parties negatively affects the implementation of the objective of this Agreement.

4. Contracting Parties shall, ~~individually or collectively~~, request non-contracting parties to this Agreement whose vessels are engaged in ~~fishing or fishing related~~ activities in the Area to become parties to this Agreement or to cooperate fully in the implementation of conservation and management measures adopted by the Commission. Such cooperating non-contracting parties may enjoy benefits from participation in ~~fishing or fishing related~~ activities commensurate with their commitments to comply with conservation and management measures established under this Agreement.

Article XXIV. COOPERATION WITH OTHER ORGANIZATIONS AND INSTITUTIONS (*current Article XV*)

1. The Commission shall cooperate and make appropriate arrangements ~~therefore~~ with other intergovernmental organizations and institutions, especially those active in the fisheries sector, which might contribute to the work and further the objectives of the Commission in particular with any intergovernmental organization or institution dealing with ~~tuna~~ **fishery resources** in the Area. The Commission may enter into agreements with such organizations and institutions. Such agreements shall seek to promote complementarity and, subject to paragraph 2, to avoid duplication in and conflict with the activities of the Commission and such organizations.

2. Nothing in this Agreement shall prejudice the rights and responsibilities of other intergovernmental organizations or institutions dealing with ~~tuna or a species of tuna~~ **fishery resources** in the Area or the validity of any measures adopted by such organization or institution.

COMMENTS

Consultant notes: Minor amendment suggested to be in line with other proposals.

TCPR: No comments.

Australia: No comments.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXV. ~~INTERPRETATION AND SETTLEMENT OF DISPUTES~~ (current Article XXIII)

1. Contracting Parties shall cooperate in order to prevent disputes.

2. In the event of a dispute between two or more Contracting Parties concerning the interpretation or application of this Agreement, those Contracting Parties shall consult among themselves with a view to resolving the dispute, or to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

3. Any ~~Where a~~ dispute regarding the interpretation or application of this Agreement, if ~~is~~ not settled by the ~~Commission~~ ~~the means set out in paragraph 2~~, ~~they may jointly~~ shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. ~~If as the result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement.~~

4. Where a dispute is not resolved through the means set out in paragraphs 2 or 3, such dispute shall, at the request of any party to the dispute, be referred to procedures for settlement of disputes provided in Part XV of the 1982 Convention or in Part VII of the 1995 Agreement.

COMMENTS

Consultant notes: Settlement of disputes is addressed in current Article XXIII, which includes a possible conciliation procedure adopted by the Commission. It could be considered whether to include such a procedure as an annex to the Agreement. Such an approach has been taken by NPFC, SPRFMO and WCPFC. Drawing from texts of other RFMOs, some amendments are suggested, including references to binding procedures provided in Part XV of the UN Convention on Law of the Sea and Part VII of UNFSA. Similar approaches have been taken through Article 19 of NPFC, Article 20 of SIOFA, Article 34 of SPRFMO and Article 31 of WCPFC.

TCPR: No comments.

Australia:

Australia notes that these provisions are expressed to apply to Contracting Parties. Query if it is intended to limit these dispute resolution procedures to States? If so, 'Contracting Parties' could be retained (noting that 'Members' could include non-State entities – such as Associate Members of the FAO). However, Australia suggests that consideration be given to how to handle disputes involving non-State Members.

Regarding paragraph 3, Australia suggests that 'they may jointly refer for settlement' be replaced with 'the parties to the dispute may jointly refer the dispute'.

Regarding paragraph 4, Australia queries whether it is intended that disputing parties must first go through the paragraph 3 conciliation process before accessing the dispute resolution provisions in paragraph 4. Paragraph 3 suggests that the conciliation procedure is optional ('may jointly refer'). However, paragraph 4 is capable of being read in a way that would make the paragraph 3 conciliation process a pre-requisite for accessing the paragraph 4 dispute resolution provisions (i.e. if 'paragraphs 2 or 3' is read conjunctively). Suggest that the intention be clarified, and better reflected in the text.

Australia also suggests that it would be preferable for paragraph 4 to provide, either:

- ‘...at the request of any party to the dispute, be submitted for binding decision in accordance with the procedures for the settlement of disputes provided in Section II of Part XV of the 1982 Convention or the procedures set out in Part VIII of the 1995 Agreement’ (adapted from the SIOFA construction), or
- ‘is not resolved through the means set out in paragraphs 2 or 3 [subject to rewording of this clause], the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, mutatis mutandis, to the dispute’ (adapted from the SPRFMO and WCPFC constructions).

Australia further suggests the addition of a sentence to clarify that the UNCLOS/UNFSA dispute resolution provisions shall apply whether or not the disputants are parties to those agreements:

- *If both UNCLOS and UNFSA are referred to in para 4:* The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to either of these instruments.
- *If only UNFSA is referred to:* The relevant part of the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to that instrument.

France-OT:

France (Territories) only supports the additions suggested by the consultant on Article XXV.

Mauritius:

Not agreeable with this amendment.

Seychelles: No comments.

Thailand: No comments.

Article XXVI HEADQUARTERS (*current Article XIV*)

The Commission, after consultation with the Director-General, shall determine the place of its headquarters.

COMMENTS

Consultant notes: No amendments to current Article XIV.

TCPR: No comments.

Australia: No comments.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXVII. ACCEPTANCE (*current Article XVII*)

1. Acceptance of this Agreement by any Member or Associate Member of FAO shall be effected by the deposit of an instrument of acceptance with the Director-General.

2. Acceptance of this Agreement by any State referred to in paragraph 2 of Article **VII** shall be effected by the deposit of an instrument of acceptance with the Director-General. Acceptance shall become effective on the date on which the Commission approves the application for membership.

3. The Executive Secretary shall inform all Members of the Commission, all Members of FAO and the Secretary-General of the United Nations of all acceptances that have become effective.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia: No comments.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXVIII. ENTRY INTO FORCE (*current Article XVIII*)

This Agreement shall enter into force as from the date of receipt by the Director-General of the tenth instrument of acceptance. Thereafter, with respect to each Member or Associate Member of FAO or State referred to in paragraph 2 of Article **VII** which subsequently deposits an instrument of acceptance, this Agreement shall enter into force on the date on which such acceptance takes effect or becomes effective in accordance with Article **XXIV** above.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia: No comments.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXIX. RESERVATIONS (*current Article XIX*)

Acceptance of this Agreement may be made subject to reservations in accordance with the general rules of public international law as reflected in the provisions of Part II, Section 2 of the Vienna Convention on the Law of Treaties of 1969.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.
Australia: No comments.
France-OT: No comments.
Mauritius: No comments.
Seychelles: No comments.
Thailand: No comments.

Article XXX. AMENDMENT (*current Article XX*)

1. This Agreement may be amended by a three-quarters majority of the Members of the Commission.
2. Proposals for amendments may be made by any Member of the Commission or by the Director-General. Proposals made by a Member of the Commission shall be addressed to both the Chairperson of the Commission and the Director-General and those made by the Director-General shall be addressed to the Chairperson of the Commission, not later than 120 days before the Session of the Commission at which the proposal is to be considered. The Director-General shall immediately inform all Members of the Commission of all proposals for amendments.
3. Any amendment to this Agreement shall be reported to the Council of FAO which may disallow an amendment which is clearly inconsistent with the objectives and purposes of FAO or the provisions of the Constitution of FAO.
4. Amendments not involving new obligations for Members of the Commission shall take effect for all Members from the date of their adoption by the Commission. subject to paragraph 3 above.
5. Amendments involving new obligations for Members of the Commission shall, after adoption by the Commission, subject to paragraph 3 above, come into force in respect of each Member only upon its acceptance thereof. The instruments of acceptance of amendments involving new obligations shall be deposited with the Director-General. The Director-General shall inform all Members of the Commission and the Secretary-General of the United Nations of such acceptance. The rights and obligations of any Member of the Commission that has not accepted an amendment involving new obligations shall continue to be governed by the provisions of this Agreement in force prior to the Amendment.
6. Amendments to Annexes to this Agreement may be adopted by a two-thirds majority of the Members of the Commission and shall come into force from the date of approval by the Commission.
7. The Director-General shall inform all Members of the Commission, all Members and Associate Members of FAO and the Secretary-General of the United Nations of the entry into force of any amendment.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia:

Australia notes that membership of the Commission may come to include non-State actors (i.e. Associate Members of the FAO) and queries if it is intended to include these non-State actors in these treaty amendment provisions? In other RFMOs, participation in the process of amending a treaty is limited to Contracting Parties (i.e. States).
France-OT: No comments.
Mauritius: No proposal.
Seychelles: No comments.
Thailand: No comments.

Article XXXI. WITHDRAWAL (*current Article XXI*)

1. Any Member of the Commission may withdraw from this Agreement at any time after the expiry of two years from the date upon which the Agreement entered into force with respect to that Member, by giving written notice of such withdrawal to the Director-General who shall immediately inform all the Members of the Commission and the Members and Associate Members of FAO and the Secretary- General of the United Nations of such withdrawal. Withdrawal shall become effective at the end of the calendar year following that in which the notice of withdrawal has been received by the Director- General.

2. A Member of the Commission may give notice of withdrawal with respect to one or more of the territories for the international relations of which it is responsible. When a Member gives notice of its own withdrawal from the Commission, it shall state to which territory or territories the withdrawal is to apply. In the absence of such a statement, the withdrawal shall be deemed to apply to all the territories for the international relations of which the Member of the Commission is responsible, with the exception of territories belonging to an Associate Member which is a Member of the Commission in its own right.

3. Any Member of the Commission that gives notice of withdrawal from FAO shall be deemed to have simultaneously withdrawn from the Commission, and this withdrawal shall be deemed to apply to all the territories for the international relations of which the Member of the Commission is responsible, with the exception of territories belonging to an Associate Member which is a Member of the Commission in its own right.

4. Withdrawal may also take place as provided for under paragraph 4 **3** of Article ~~IV~~**VII**.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia:

Suggest that paragraph 4 should refer to ‘paragraph 3 of Article VII’.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXXII. TERMINATION (*current Article XXII*)

This Agreement shall be automatically terminated if and when, as the result of withdrawals, the number of Members of the Commission drops below ten, unless the remaining Members of the Commission unanimously decide otherwise.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia: No comments.

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Article XXXIII DEPOSITARY (*current Article XXIV*)

The Director-General shall be the Depositary of this Agreement. The Depositary shall:

(a) send certified copies of this Agreement to each Member and Associate Member of FAO and to such non-Member States as may become party to this Agreement;

(b) arrange for the registration of this Agreement, upon its entry into force, with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations;

(c) inform each Member and Associate Member of FAO which has accepted this Agreement and any non-Member State which has been admitted to membership in the Commission of:

(i) the application of a non-Member State to be admitted to membership in the Commission;

(ii) proposals for the amendment of this Agreement or of the Annexes thereto;

(d) inform each Member and Associate Member of FAO and any non-Member States as may become party to this Agreement of:

(i) the deposit of instruments of acceptance in accordance with Article ~~XVII~~ **XXVII**;

(ii) the date of entry into force of this Agreement in accordance with Article ~~XVIII~~ **XXVIII**;

- (iii) reservations made to this Agreement in accordance with Article ~~XIX~~ XXIX;
- (iv) the adoption of amendments to this Agreement in accordance with Article ~~XX~~ XXX;
- (v) withdrawals from this Agreement pursuant to Article ~~XXI~~ XXXI; and
- (vi) termination of this Agreement in accordance with Article ~~XXII~~ XXXII.

COMMENTS

Consultant notes: There are no proposed amendments to this provision.

TCPR: No comments.

Australia: No comments

France-OT: No comments.

Mauritius: No comments.

Seychelles: No comments.

Thailand: No comments.

Annex A

Annex B FAO English name	Nom FAO en français	Nombre FAO en español	Scientific name
Nom FAO en anglais	FAO French name	FAO Spanish name	Nom scientifique
Nombre FAO en inglés	Nombre FAO en francés	Nom FAO en español	Nombre científico
1. Yellowfin tuna	Albacore	Rabil	<i>Thunnus albacares</i>
2. Skipjack	Listao; Bonite à ventre rayé	Listado	<i>Katsuwonus pelamis</i>
3. Bigeye tuna	Patudo; Thon obèse	Patudo	<i>Thunnus obesus</i>
4. Albacore tuna	Germon	Atún blanco	<i>Thunnus alalunga</i>
5. Southern Bluefin tuna	Thon rouge du sud	Atún del sur	<i>Thunnus maccoyii</i>
6. Longtail tuna	Thon mignon	Atún tongol	<i>Thunnus tonggol</i>
7. Kawakawa	Thonine orientale	Baroceta oriental	<i>Euthynnus affinis</i>
8. Frigate tuna	Auxide	Melva	<i>Auxis thazard</i>
9. Bullet tuna	Bonitou	Melva (= Melvera)	<i>Auxis rochei</i>
10. Narrow barred Spanish Mackerel	Thazard rayé	Carite estraido (Indo-Pacífico)	<i>Scomberomorus commerson</i>
11. Indo Pacific king mackerel	Thazard ponctué	Carite (Indo-Pacífico)	<i>Scomberomorus guttatus</i>
12. Indo Pacific Blue Marlin	Makaire bleu de l'Indo-Pacifique	Aguja azul (Indo-Pacífico)	<i>Makaira mazara</i>
13. Black Marlin	Makaire noir	Aguja negra	<i>Makaira indica</i>
14. Striped Marlin	Marlin rayé	Marlin rayado	<i>Tetrapturus audax</i>
15. Indo Pacific Sailfish	Voilier de l'Indo-Pacifique	Pez vela (Indo-Pacífico)	<i>Istiophorus platypterus</i>
16. Swordfish	Espadon	Pez espada	<i>Xiphias gladius</i>

Appendix 2: Comments from the G16 on the text to modernise the IOTC Agreement

G16 position on modernising the IOTC Agreement

Submitted on behalf of G16 members

3 May 2019

The G16 offers the following position on modernising the IOTC Agreement without any prejudice to future comments or legal positions on the text/s provided individually or as the G16.

The G16:

Continues to support the recommendation of the second IOTC Performance Review to modernise the IOTC Agreement, as endorsed by the IOTC Commission.

Appreciates the work of the consultant, Terje Løbach.

Does not at this time have a unified position on the question of whether the IOTC should remain an Article IV body of the FAO; but agrees in principle that this should not preclude consideration of the elements of the two draft proposals.

Welcomes the inclusion of definitions in a future IOTC treaty and may provide technical comments on these definitions throughout the process.

Queries the change proposed to the species covered by the IOTC.

The G16 notes that the current species under the IOTC's competence are those set out in Annex B, which includes 3 stocks in the sense of Art 63 of UNCLOS (straddling stocks).

The proposal(s) from the consultant changes the scope of the Agreement to cover *only* highly migratory species which means that narrow barred Spanish mackerel, indo-pacific king mackerel and longtail tuna would be excluded.

The G16 would appreciate clarification on this proposed change.

The G16's position at this time is that the species over which the IOTC has competence should not be reduced.

The G16 suggests that 'fishery resources' be defined as follows, and that Annex B of the current treaty be retained. *'...the species listed in Annex B that occur in the [Convention] Area and such other species of fish as the Commission may determine, whether processed or not.'*

Supports inclusion of concepts such as the precautionary approach, the ecosystem-based approach, preservation of marine biodiversity and reducing harmful impacts of fishing on the marine environment and agrees that these important concepts will strengthen the IOTC treaty.

Supports the concept of better reflecting contemporary legal principles on the duties of port States and flag States.

Supports consideration of a provision on compatibility of measures adopted for high seas and national waters, which is linked to the duty to cooperate. The G16 considers that this could be elaborated better, and suggests Article 8 of WCPFC and Article 4 of SPRFMO be considered as a model.

Strongly supports the specific inclusion of a requirement to take into account the special requirements of developing States, but ALSO strongly suggests that this be reflected prominently in the new treaty including in the objective.

Considers that any new or amended treaty must give appropriate recognition to the rights of coastal States.

Is open to dispute resolution provisions that reflect contemporary practice and so welcomes the proposed text.

If this approach is followed, it should be clear that the UNCLOS and/or UNFSA procedures would apply whether the disputants are party to those agreements or not.

Would like to give further thought to decision-making thresholds with reference to practice in other RFMOs, noting consensus should be required for amendments to basic texts.

The G16 would appreciate further clarification from the consultant on the proposed change to simple majority as a default.

Would appreciate further clarification on why the consultant has removed the ability to make reservations under the new treaty.

If the IOTC makes the decision to leave the FAO framework, **the G16:**

Notes that the FAO could not be the depositary for the new Convention as it could not accept an instrument of commitment from a participating fishing entity.

Supports the meaningful inclusion of fishing entities in the IOTC's work.

Notes that the IOTC would need to be granted international legal personality and capacity.

Supports the Secretariat continuing to be hosted by the Seychelles.

Appendix 3: Draft text for a new IOTC Agreement — with comments

Consultant notes

The design of a new Convention should take into account the need for clarity, simplicity and flexibility. The structure and the issues addressed in the draft Convention draw on other RFMO treaties, in particular those agreed within the last twenty years, which could be considered as international standards.

Some of the recent RFMO treaties contain quite detailed provisions. In order to respond to changing needs, the details of the Convention would require that rules that are likely to be liable to future modifications should not be expressed in the Convention itself. On the other hand, certain points concerning procedures, rights and obligations have to be included in the Convention in order to create clarity and to avoid disputes. Thus one challenge is to strike the balance between the need for flexibility and the need for safeguarding the rights/obligations of members.

The draft in Appendix B addresses the basic requirements for a modern RFMO instrument, which of course could be expanded on, if desired. The structure and issues addressed are the following: Preamble, Use of Terms, Area of Application, Coastal States' rights, Compatibility, General Principles, Commission, Functions of the Commission, Subsidiary Bodies of the Commission, Scientific Committee, Compliance Committee, Committee on Administrations and Finance, Secretariat, Financial Arrangements, Decision-making, Obligations of Contracting Parties, Duties of the Flag State, Duties of the Port State, Monitoring, Control and Enforcement, Transparency, Cooperation with Other Organizations and Institutions, Recognition of the Special Requirements of Developing State Contracting Parties, Non-Contracting Parties, Dispute Settlement, Relation to other International Instrument, Amendments, Signature, Ratification, Acceptance and Approval, Accession, Entry into force, Reservations and Exceptions, Annex, Withdrawal, and Depositary. The draft also includes an Annex concerning fishing entities.

Most of the content, including text proposals of each provision are in essence drawn from other RFMO treaties and should be self-explanatory. The draft contains the possible formal involvement of a fishing entity in the work of the Commission, see the draft Article 7, paragraph 3 and the draft Annex. As mentioned above this is the same approach as taken by the South Pacific Regional Fisheries Management Organization (adopted in 2009) and the North Pacific Fisheries Commission (adopted in 2012).

The draft Article 27 (Signature) and the draft Article 30 (Entry into force) address a possible way of replacing the current IOTC Agreement with the new IOTC Convention.

The draft Convention contains some markings, which are related to numbers (days, months, years) to be agreed upon.

DRAFT**Convention for the establishment of the Indian Ocean Tuna Commission (IOTC)*****Preamble***

The Contracting Parties,

Determined to ensure the long-term conservation and sustainable use of living marine resources in the Indian Ocean,

Recalling relevant provisions of the United Nations Convention on the Law of the Sea of 1982, the 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 of 1995, the Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993, and the FAO Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing of 2009,

Taking into account the Code of Conduct for Responsible Fisheries adopted by the Conference of the Food and Agriculture Organization of United Nations in 1995 and related instruments adopted by the Food and Agriculture Organization Conference,

Recognizing the economic and social benefits deriving from sustainable use of highly migratory fish stocks in the Indian Ocean,

Further recognizing that under international law States are required to cooperate in the conservation and management of highly migratory fish stocks,

Conscious of the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of use and exploitation of highly migratory fish stocks,

Mindful that effective conservation and management measures must be based on the best scientific information available and on the application of the precautionary approach and an ecosystem approach to fisheries management,

Determined to cooperate effectively to prevent, deter and eliminate illegal, unreported and unregulated fishing,

Recognizing the special requirements of developing States to assist them to participate effectively in the conservation, management of highly migratory fish stocks,

Convinced that the long-term conservation and sustainable use of highly migratory fish stocks in the Indian Ocean, and the protection of the marine ecosystems in which those resources occur are best achieved through international cooperation within the Indian Ocean Fisheries Commission,

Have agreed as follows:

COMMENTS

Australia:

Australia suggests that the title should refer to the Indian Ocean Fisheries Commission (IOFC).

Australia notes that various paragraphs refer to ‘living marine resources’ and ‘highly migratory fish stocks’. Australia queries whether in all cases these differences are deliberate, or whether there should be some harmonisation of the terms used.

Australia suggests that the reference in PP6 to ‘use and exploitation of highly migratory fish stocks’ be changed to ‘fishing and fishing related activities’.

Given the inclusion of coastal States waters within the Convention Area, it is appropriate that the preamble include recognition of the rights of coastal States in those waters. Australia suggests the addition of the following paragraph (adapted from SPRFMO):

Considering that, under international law reflected in the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, coastal States have waters under national jurisdiction within which they exercise their sovereign rights for the purpose of exploring, exploiting, conserving and managing fishery resources and conserving living marine resources upon which fishing has an impact;

Australia considers that the existing reference in the preamble to the interests and needs of developing countries is inadequate, including because it does not refer to least-developed and small island developing States. Australia suggests that the paragraph beginning ‘*Recognizing* the special requirements of developing States...’ be replaced with the following paragraphs (adapted from SIOFA and SPRFMO):

Recognising economic and geographical considerations and the special requirements of developing States, in particular the least-developed among them and small island developing States and their coastal communities, for equitable benefit from fishery resources;

Bearing in mind that the achievement of the above will contribute to the realization of a just and equitable economic order in the interests of all humankind, and in particular the special interests and needs of developing States, in particular the least-developed among them and small island developing States

Japan: no comments.

Article 1

Use of terms

For the purposes of this Convention

- (a) “1982 Convention” means the United Nations Convention on the Law of the Sea of 10 December 1982;
- (b) “1993 Agreement” means Agreement for the Establishment of the Indian Ocean Tuna Commission of 25 November 1993;

- (c) “1995 Agreement” means the Agreement for the Implementation of the Provisions of the United 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 of 4 December 1995;
- (d) “Commission” refers to the Indian Ocean Fisheries Commission established pursuant to Article 7;
- (e) “Convention Area” is the area of application described in Article 3;
- (f) “fishery resources” means all species of highly migratory fish stocks that occur in the Convention Area, whether processed or not;
- (g) “fishing” means searching for, attracting, locating, catching, taking or harvesting of fishery resources or any activity which can reasonably be expected to result in attracting, locating, catching, taking or harvesting of fishery resources;
- (h) “fishing related activities” means any operation in support of, or in preparation for fishing activities, including landing, packaging, processing, transshipping or transporting of fish, as well as provisioning of personnel, fuel, gear and other supplies;
- (i) “illegal, unreported and unregulated fishing” refers to the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;
- (j) “member” means any State and regional economic integration organization comprising the Commission pursuant to Article 7;
- (k) “regional economic integration organization” means a regional economic integration organization to which its member States have transferred competence over matters covered by this Convention, including the authority to make binding decisions on its member States in respect of those matters; and
- (l) “vessel” means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for fishing or fishing related activities.

COMMENTS

Australia:

Australia notes that this article includes key definitions relevant to the scope of the agreement and that while it is important to consider the work being undertaken by the WPICMM, discussion on the definitions proposed should be allowed to continue.

Australia suggests that:

- The definition of ‘member’ be deleted, as it duplicates Article 7(2), and has the potential to complicate the interpretation of paragraph 3 of the Annex on fishing entities.
- ‘nationals’ be defined: “nationals” includes both natural and legal persons
- ‘transshipment’ be defined: “transshipment” means the unloading of all or any of the fishery resources on board a vessel to another vessel either at sea or in port

Regarding the proposed definition of ‘fishery resources’, Australia:

- queries why is it proposed to move away from the list of stocks covered by Annex B of the existing agreement. Australia notes the Secretariat's comment that 'relitigating elements such as the species list could also add to the duration of the [treaty renegotiation] process'.
- notes that any list used need not be exhaustive. For example, WCPFC uses the list of species in Annex 1 of UNCLOS ‘and such other species of fish as the Commission may determine’.

- notes that there is a need to minimise overlap with the species managed by SIOFA. SIOFA excludes sedentary species on a coastal state’s extended continental shelf and highly migratory species.
- notes that under the existing agreement, 13 of the 16 species listed in Annex B are included in the list of highly migratory species given in Annex I of UNCLOS. Three species listed on Annex B do not occur on Annex I of UNCLOS and are straddling species in the sense of article 63 of UNCLOS. A reference to ‘highly migratory fish stocks’ may not capture these straddling species.
- suggests the following definition: "fishery resources" means the species listed in Annex [X] that occur in the Convention Area and such other species of fish as the Commission may determine, whether processed or not;

Regarding the proposed definition of ‘fishing’, Australia:

- suggests referring to 'actual or attempted searching for...', as is done in WCPFC, SIOFA and SPRFMO
- suggests excluding from the definition 'any operation related to emergencies involving the health or safety of crew members or the safety of a vessel' (as is done in SPRFMO and, in similar terms, in WCPFC).
- notes the need to clarify whether FAD setting is intended to be included in the definition of 'fishing' (as an activity 'expected to result in attracting' fish) or in the definition of 'fishing related activities' (as an 'operation in support of' fishing)
- suggests the following definition: “fishing” means the actual or attempted searching for, attracting, locating, catching, taking or harvesting of fishery resources or any activity which can reasonably be expected to result in attracting, locating, catching, taking or harvesting of fishery resources but does not include any operation related to emergencies involving the health or safety of crew members or the safety of a vessel;

Regarding the proposed definition of ‘fishing related activities’, Australia suggests:

- that ‘operation’ should be ‘operation at sea directly’ (consistent with WCPFC)
- ‘preparation for fishing activities’ should be 'preparation for fishing' (as ‘fishing activities’ is not a defined term)

Japan:

(f) The definition of HMS is vague, particularly for sharks. When ICCAT started discussion on the amendment of the Convention, it initially referred to the list attached to UNCLOS, but later found the list was obsolete. ICCAT finally decided to establish a list of its own HMS, taking into recent scientific evidence. The ICCAT list can be modified without amending the Convention. We suggest a similar approach.

Article 2

Objective

The objective of this Convention is to ensure the long-term conservation and sustainable use of fishery resources and, in doing so, to safeguard the marine ecosystems in which these resources occur and development takes place.

COMMENTS

Australia:

Australia suggests:

- the addition of ‘...is, through the application of the precautionary approach and an ecosystem approach to fisheries management, to ensure...’
- deleting ‘and development takes place’

- including a reference to the needs of developing States, as is done in SIOFA ('taking into account the needs of developing States ... that are Contracting Parties to this Agreement, and in particular the least-developed among them and small island developing States').

Japan:

What kind of development does “development” mean?

Article 3**Area of application**

1 The geographical area of application, hereafter the “Convention Area”, comprises the Indian Ocean and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such areas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean.

2 Nothing in this Convention shall constitute recognition of claims or positions of any Contracting Party concerning legal status and extent of waters and zones by any such Contracting Party.

COMMENTS**Australia:**

Australia suggests that it would be preferable to define the Convention Area by reference to the boundaries of ICCAT, CCAMLR and WCPFC, to avoid areas of overlap.

If this suggestion is not adopted, Australia suggests, in respect of paragraph 1:

- the deletion of ‘,hereafter the “Convention Area”,’ (as the term is defined in Article 1)
- that ‘Indian Ocean’ be defined in Article 1
- that the paragraph begin ‘The geographical area to which this Convention applies...’
- that ‘such areas’ should be ‘such seas’ (to make it clear that the qualification beginning ‘insofar as it is necessar’ applies only to the ‘adjacent seas’ part of the Area, not to the Indian Ocean itself (because the Convention will cover some straddling stocks that don’t migrate into and out of the Indian Ocean)).
- that ‘stocks’ should be ‘fishery resources’

Japan:

What is “stock”? There is no definition.

Article 4
Coastal States’ rights

This Convention shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species in areas under its jurisdiction.

COMMENTS

Australia:

Australia notes that there is the potential for ambiguity in how this article interacts with the area of application of the Convention. The Commission has the power to adopt binding CMMs that apply within waters under national jurisdiction, and yet the Convention ‘shall not prejudice’ coastal States’ rights in such waters.

In 2013, the IOTC Secretariat was requested to provide an interpretation of the equivalent article in the existing Agreement to clarify this ambiguity. The Secretariat subsequently issued an explanatory note ([IOTC Circular 2014-32](#)) clarifying that the article ‘cannot, by itself, be used to restrict the application of a CMM that is in force and to which the Contracting Party has not filed an objection, and whose application is not restricted by a general reservation filed by the State in accordance with article XIX’. The argument was that the reservations mechanism and the objection procedure provided sufficient means for coastal States to safeguard their EEZ rights and that this article should not be read as otherwise rendering CMMs inapplicable in members’ EEZs.

Australia suggests that it would be appropriate, at a minimum, to seek to have recorded in the record of negotiations, the understanding that this article does not preclude the application of IOTC CMMs in coastal State members’ EEZs. By becoming members of IOTC, coastal State members recognise the competence of the IOTC to adopt measures that apply in their national waters (subject to the objection procedure).

See also Australia’s suggestion of additional text in Article 15 to clarify the application of CMMs within members’ EEZs in the Area.

Japan:

“species” should be “fish stocks” to for consistency.

Article 5
Compatibility

The conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure the conservation and management of fishery resources covered by this Convention.

COMMENTS

Australia:

Australia notes that equivalent provisions in other RFMO agreements include more than a bare requirement that high seas and in-zone CMMs be compatible and suggests that it is necessary to link this provision more closely to the duty to cooperate to ensure compatibility, rather than merely stating the requirement for compatibility. Australia also considers that there are a number of matters which

should be taken into account when adopting such measures, and that there is merit in elaborating these matters.

Australia suggests:

- The addition of a new sentence to the end of the first paragraph: ‘To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such resources.’
- The addition of a new paragraph:
 2. In establishing compatible conservation and management measures for highly migratory fish stocks in the Convention Area, the Commission shall:
 - (a) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;
 - (b) take into account the conservation and management measures adopted and applied in accordance with article 61 of the 1982 Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Convention Area as a whole do not undermine the effectiveness of such measures;
 - (c) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and
 - (d) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

Japan: no comments.

Article 6

General principles

In giving effect to the objective of this Convention, the Contracting Parties shall:

- (a) promote the long-term sustainability and optimum utilization of fishery resources;
- (b) adopt conservation and management measures based on the best scientific advice available, taking into account relevant environmental, economic and social factors;
- (c) apply the precautionary approach in accordance with Article 6 of the 1995 Agreement;
- (d) take due account of the impact of fishing activities on species belonging to the same ecosystem or dependent upon or associated with the target stocks, and in doing so, adopt measures to minimize harmful impacts;
- (e) take due account of the need to preserve marine biological diversity;
- (f) prevent or eliminate overfishing and excess fishing capacity, and ensure that levels of fishing effort do not exceed those commensurate with sustainable use of fishery resources;
- (g) ensure that complete and accurate data concerning fishing and fishing related activities are collected and shared among them in a timely manner;
- (h) take due account of the need to minimize pollution and waste originating from fishing activities as well as minimize discards, catch by lost or abandoned gear, catch of species not subject to a directed fishery and impacts on associated or dependent species; and

- (i) make best efforts to effectively implement all decisions of the Commission, including imposing penalties for violations that are of appropriate severity to secure compliance, discourage further violations and deprive offenders of the benefits accruing from their illegal activities.

COMMENTS

Australia:

Australia suggests that the reference should be to Members rather than Contracting Parties.

Australia notes that in SPRFMO,

- the general principles are to be applied by Members, the Commission and its subsidiary bodies.
- the principles are tied to ‘giving effect to the objective of this Convention and carrying out decision making under this Convention’

Australia suggests that the first paragraph begin: ‘In giving effect to the objective of this Agreement, and carrying out decision-making under this Convention, Members, the Commission and subsidiary bodies shall.’

Australia suggests that:

- subparagraph (b) should begin ‘ensure that conservation and management measures are based on...’
- subparagraphs (d) and (h) should refer to ‘fishing and fishing related activities’ instead of ‘fishing activities’
- the words ‘make best efforts to’ should be deleted from subparagraph (i). When adopt binding decisions, the Commission should be free to stipulate the standard of compliance required. In many, perhaps most, cases this standard may be to ‘make best efforts’, but there may be cases in which the Commission wishes to impose a different standard.

Australia suggests the inclusion of new paragraphs outlining how these principles are to be implemented in areas under national jurisdiction. The following is based on Article 3(2) of UNFSA and Article 7 of WCPFC:

2. The principles enumerated in paragraph 1 shall be applied by coastal States within areas under national jurisdiction in the Convention Area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.

3. The members of the Commission shall give due consideration to the respective capacities of developing coastal States, in particular small island developing States, in the Convention Area to apply the provisions of paragraph 1 within areas under national jurisdiction and their need for assistance as provided for in this Convention.

Japan:

(e) should come before (d). Both sub-paras could be merged.

(d) and (h) duplicate to some extent. Part of (h) could be integrated to (d).

Article 7

The Commission

1 There is hereby established the Indian Ocean Fisheries Commission, hereafter “the Commission”, for the purpose of exercising the functions and discharging the responsibilities set out in this Convention.

- 2 Each Contracting Party shall be a member of the Commission, and each member shall have one vote.
- 3 A fishing entity may participate in the work of the Commission in accordance with the Annex. The participation of a fishing entity in the work of the Commission shall not constitute a deviation from accepted application of international law, including the 1982 Convention.
- 4 Each member shall designate one representative to the Commission who at sessions of the Commission may be accompanied by an alternate representative and advisers.
- 5 The Commission shall elect a Chairperson and a Vice-Chairpersons from among the members, each of whom shall serve for a term of (xx) years and shall be eligible for re-election but shall not serve for more than (xx) years in succession in the same capacity. The Chairperson and the Vice-Chairpersons shall be representatives of different members.
- 6 Meetings of the Commission shall be convened once a year unless the Commission decides otherwise, at a time and location to be decided by the Commission in consultation with the members. The Commission shall hold such other meeting as may be necessary to carry out its functions under this Convention.
- 7 The principle of cost-effectiveness shall apply to the frequency, duration and scheduling of sessions and other meetings and activities held under the auspices of the Commission.
- 8 The headquarters of the Commission shall be in (x).

COMMENTS

Australia:

Australia suggests:

- deleting 'hereafter "the Commission"' from paragraph 1 as this is a defined term.
- linking, in paragraph 1, the Commission's functions and responsibilities with the Convention's objective (as is done in SPRFMO):
There is hereby established the Indian Ocean Fisheries Commission, which shall exercise its functions and discharge its responsibilities in order to achieve the objective of this Convention.
- including, in paragraph 2, a reference to decision-making: '...of the Commission, including decision-making, in accordance...'
- deleting the second sentence in paragraph 3, which has an ambiguous meaning.
- replacing in paragraph 5 both references to 'members' with 'Contracting Parties', noting that eligibility for the positions of Chairperson and Vice-Chairperson should be limited to Contracting Parties, not members (which could include fishing entities)
- pluralising 'meeting' in the second sentence of paragraph 6
- the addition of a new paragraph providing that the Commission has international legal personality and capacity. Australia suggests the following (adapted from WCPFC):

The Commission shall have international legal personality and such legal capacity as may be necessary to perform its functions and achieve the objective of this Convention. The privileges and immunities which the Commission and its officers shall enjoy in the territory of a Contracting Party shall be determined by agreement between the Commission and the Contracting Party concerned.

Japan:

1. Delete ~~hereafter "the Commission~~

5. “unless the Commission decides otherwise” should be inserted.

Article 8
Functions of the Commission

The Commission shall, in accordance with its objective and general principles, exercise the following functions:

- (a) regularly review the state of living marine resources;
- (b) adopt conservation and management measures for fishery resources, including:
 - (i) where necessary, for species belonging to the same ecosystem as, or associated with or dependent upon, fishery resources; and
 - (ii) to minimize impacts for fishing activities on living marine resources and their ecosystems.
- (c) determine, when appropriate, total allowable catch, or total allowable level of effort, and where necessary, the nature and extent of participation in fishing activities;
- (d) adopt measures for the collection, submission, verification, storing and dissemination of data and information;
- (e) promote the development and use of electronic means to facilitate communication and exchange of data and information among Contracting Parties;;
- (f) adopt measures and take actions to prevent, deter and eliminate illegal, unreported and unregulated fishing;
- (g) regularly review the implementation of decisions into national legislation;
- (h) elaborate multiannual management plans for the conservation and management of fishery resources;
- (i) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance, compliance and enforcement, including sanctions such as non-discriminatory market-related measures;
- (j) promote and coordinate, and as appropriate, undertake scientific research and development activities;
- (k) regularly review the socio-economic aspects of the fishing industry, including obtaining and evaluating economic and other data and information relevant to the work of the Commission;
- (l) promote, coordinate and, as appropriate, strengthen the development of institutional capacity and human resources, particularly through education, training and extension activities in areas of competence of the Commission;
- (m) enhance communication and consultation with civil society concerned with fishing and fishing related activities;

- (n) adopt its Rules of Procedure and Financial Regulations and such other internal administrative regulations as may be necessary to carry out its functions;
- (o) approve the budget and programme of work of the Commission; and
- (p) exercise any other function as may be necessary for achieving the objective of this Convention.

COMMENTS

Australia:

With regard to the chapeau, Australia notes that the Commission does not have an objective – rather the Convention has an objective. Note that we have suggested linking the Commission’s functions with the Convention’s objective in Article 7. Also, if there is a desire to apply the general principles to the Commission this should be done in Article 6. Australia suggests that the chapeau should read: ‘The functions of the Commission, in pursuit of the objective of the Convention, shall be to:’

Regarding subparagraph (a), Australia suggests the addition of ‘...state of living marine resources in the Convention Area’.

Australia suggests that subparagraph (b)(ii) should begin: ‘to minimize the impacts of fishing and fishing related activities on...’

Regarding subparagraph (c), Australia queries the distinction being made between ‘when appropriate’ and ‘when necessary’. Australia considers that it would be preferable to

- delete ‘and where necessary, the nature and extent of participation in fishing activities’ from subparagraph (c), and
- include a new subparagraph on allocation decisions, which should require consensus: ‘adopt, by consensus, decisions relating to the allocation of the total allowable catch or the total level of fishing effort’;

Regarding subparagraph (e), Australia suggests that the reference to ‘Contracting Parties’ should be to ‘Members’.

Regarding subparagraph (g), Australia suggests that this paragraph be rephrased: ‘Taking into account the advice of the Compliance Committee, review Members’ implementation of and compliance with this Convention and conservation and management measures’

Australia suggests the deletion of ‘sanctions such as’ from subparagraph (i).

Australia suggests that subparagraph (j) begin: ‘promote, coordinate and, as appropriate, undertake...’

Australia suggests that the objective at which subparagraph (l) is directed needs to be more clearly articulated.

Regarding subparagraph (n), Australia notes that consensus is required for the adoption of these rules and regulations in SPRFMO, WCPFC and SIOFA. Under the existing agreement, a 2/3 majority would be required. Under this draft convention, a simple majority would be required. A simple majority is inadequate in Australia’s view; and we likewise believe that there is room for improvement

on existing practice. Therefore, Australia suggests that the subparagraph should read: ‘adopt by consensus its Rules of Procedure and Financial Regulations’ (i.e. introduce the requirement that these rules and regulations be adopted by consensus and delete ‘and such other internal administrative regulations as may be necessary to carry out its functions’ as this is covered by the final subparagraph).

Australia suggests that subparagraph (p) be amended to clarify that the Commission can make non-binding recommendations: ‘Adopt decisions and recommendations, as required, and exercise...’

Japan:

(a) state should be reworded to ‘status’?

(bii) replace ‘for’ with ‘of’.

Article 9

Subsidiary bodies of the Commission

1 There are hereby established as permanent subsidiary bodies of the Commission a Scientific Committee, a Compliance Committee and a Committee on Administration and Finance to provide advice and recommendations to the Commission on matters within their respective areas of competence and carry out such other activities as requested from time to time by the Commission.

2 The Commission may establish such other subsidiary bodies as may be necessary to meet the objective of this Convention. The Commission shall provide specific mandates to any such subsidiary body, which shall include terms of reference, methods of work and reporting requirements.

3 The establishment of such additional subsidiary bodies shall be subject to the availability of necessary funds. Before taking any decision involving expenditure in connection with the establishment of such subsidiary bodies, the Commission shall have before it a report from the Executive Secretary on administrative and financial implications.

4 All subsidiary bodies may establish working groups.

5 Each member shall be entitled to appoint one representative to any subsidiary body who at sessions may be accompanied by alternates, experts and advisers.

6 Members shall provide information relevant to the functions of each subsidiary body in such a way as to enable them to fulfil their responsibilities.

7 Any subsidiary body shall operate under the Rules of Procedure of the Commission unless otherwise decided by the Commission.

COMMENTS

Australia: no comments.

Japan: no comments.

Article 10***The Scientific Committee***

The Scientific Committee shall provide advice on the technical and scientific basis for the conservation and management of fishery resources, including biological, environmental, social and economic aspects, and, shall in particular:

- (a) assess information provided by Contracting Parties and relevant organizations, institutions or programmes on catches, fishing effort, fleet capacity and other relevant data;
- (b) assess status and trends of the fishery resources;
- (c) assess the impacts of fishing on the fisheries resources and species belonging to the same ecosystem or dependent upon or associated with the target stocks;
- (d) identify and reinforce cooperative research programmes and coordinate their implementation;
- (e) transmit advice and reports to the Commission regarding conservation and management measures and research; and
- (f) undertake such other functions or responsibilities as may be conferred on it by the Commission.

COMMENTS
<p>Australia:</p> <p>Australia suggests that:</p> <ul style="list-style-type: none"> • 'technical' be deleted from the chapeau, noting that it is used in other RFMOs to refer to compliance matters (and that the Compliance Committee is subsequently asked to provide 'technical advice' – art 11(b)). • the reference in subparagraph (a) to Contracting Parties should be to Members • in subparagraph (c), 'fishing' should be 'fishing and fishing related activities' and 'target stocks' should be 'those resources'
<p>Japan:</p> <p>Not mentioned about the decision making.</p>

Article 11***The Compliance Committee***

The Compliance Committee shall:

- (a) review compliance with conservation and management measures adopted by the Commission, including those related to monitoring, control, surveillance and enforcement, and make such advice and recommendations to the Commission as may be necessary to ensure their effectiveness;
- (b) provide such other information, technical advice and recommendations as it considers appropriate or as may be requested by the Commission relating to the implementation and compliance with provisions of this Convention and the conservation and management measures adopted by the Commission;

- (c) review the implementation of any cooperative measures for monitoring, control and surveillance and enforcement adopted by the Commission and provide advice and recommendations to the Commission in this regard;
- (d) monitor, review and analyse information pertaining to fishing and fishing related activities of non-Contracting Parties and their vessels that are presumed to undermine the objectives of this Convention, and recommend actions to be taken by the Commission to combat such activities; and
- (e) undertake other functions or responsibilities as may be conferred on it by the Commission.

COMMENTS
<p>Australia:</p> <p>Australia suggests that subparagraph (a) should begin: ‘review compliance with the provisions of this Convention and conservation and management measures...’</p>
<p>Japan: no comments.</p>

Article 12

The Committee on Administration and Finance

The Committee on Administration and Finance shall:

- (a) review administrative matters relating to the Secretariat and make appropriate recommendations to the Commission;
- (b) review compliance with the Rules of Procedure and the Financial Regulations and make recommendations to the Commission, including as appropriate for amendment of those rules and regulations;
- (c) review the implementation of the previous programme of work and budget, and analyse and make recommendations to the Commission on the draft programme of work and budget; and
- (d) undertake other functions or responsibilities as may be conferred on it by the Commission.

COMMENTS
<p>Australia:</p> <p>Australia suggests that subparagraph (a) begin: ‘advise the Commission on the time and place of meetings of the Commission, on publications of the Commission and on administrative matters...’</p>
<p>Japan: no comments.</p>

Article 13

Secretariat

1 The Secretariat shall consist of the Executive Secretary, and such staff as may be appointed by him or her and under his or her supervision unless otherwise provided in the Rules of Procedure.

2 The Executive Secretary shall be appointed for a term of (x) years and may be re-appointed for a further term of (x) years.

- 3 The Executive Secretary functions shall include the following:
- (a) be responsible for the receipt, collection, circulation, drafting and presentation of documents for the Commission sessions and subsidiary bodies;
 - (b) maintain contacts with relevant governments, international organizations and institutions;
 - (c) provide services to the Commission and its subsidiary bodies to facilitate the execution of their functions; and
 - (d) undertake other functions or responsibilities as may be conferred on him or her by the Commission.

COMMENTS
<p>Australia:</p> <p>Consistent with the balance achieved in other RFMOs, the appointment of the Executive Secretary is a function that should be reserved for States, and so be a function of the Contracting Parties, not members (a term which includes fishing entities). Australia suggests that paragraph 2 should begin ‘The Executive Secretary shall be appointed by the Contracting Parties for a term...’</p> <p>Australia also suggests that a new paragraph be included dealing with cost effectiveness (as is done in SPRFMO and WCPFC). Australia suggests:</p> <p style="padding-left: 40px;">4. The Secretariat to be established under this Convention shall be cost effective. The setting up and the functioning of the Secretariat shall, where appropriate, take into account the capacity of existing regional institutions to perform certain technical secretariat functions and more specifically the availability of services under contractual arrangement.</p> <p>Japan: no comments.</p>

Article 14

Financial arrangements

1 At each regular meeting, the Commission shall adopt, by consensus, an annual budget for each of the next two years. The Executive Secretary shall transmit draft budgets for each of those years to the members. In the event that the Commission cannot reach consensus on the adoption of an annual budget for any given year, the budget for the previous year shall be carried forward for that year.

2 Each member shall undertake to contribute annually its share of the budget in accordance with a scale of contributions determined in accordance with a scheme, which the Commission shall adopt or amend by consensus. The scheme shall be set out in the Financial Regulations.

3 The Executive Secretary shall notify each member of the amount of its contribution. Contributions shall be paid not later than (x) months after the date of that notification.

3 The Commission may also accept donations and other forms of assistance from organizations, individuals and other sources for purposes connected with the fulfillment of any of its functions.

4 A member of the Commission that has not paid its contribution in full for two consecutive years shall not be entitled to participate in the making of decisions by the Commission until it has discharged its financial obligations to the Commission.

5 The financial affairs of the Commission shall be audited annually by external auditors to be selected by the Commission.

COMMENTS
<p>Australia: Australia suggests that paragraph 4 should refer to ‘the taking of decisions’ rather than ‘the making of decisions’, to make it clear that members in arrears may participate in discussions, but not vote.</p>
<p>Japan: no comments.</p>

Article 15

Decision-making

1 As a general rule, decisions by the Commission shall be taken by consensus. For the purposes of the Article, “consensus” means the absence of any formal objection made at the time the decision was taken.

2 If the Chairperson considers that all efforts to take decisions by consensus have been exhausted, the Commission shall take decisions by a simple majority of its member present and voting, with the exception of binding decisions provided in paragraphs 3 to 8, or unless otherwise provided in this Convention.

3 The Commission may take decisions that are binding on members relating to conservation and management measures, which shall be taken by two-thirds majority of the votes of all members present and casting affirmative or negative votes, provided that no vote shall be taken unless there is a quorum of at least two-thirds of the members. Each member shall have one vote.

4 Decisions by the Commission shall become binding on members in the following manner:

- (a) the Executive Secretary shall without delay notify the members of decisions taken by the Commission; and
- (b) subject to paragraph 3, the decision shall become binding upon all members (xx) days from the date specified in that notification.

5 A member may present to the Executive Secretary an objection to a decision within (xx) days from the date specified under sub-paragraph 4(b). In that event the decision shall not become binding on that member.

6 A member which objects shall at the same time provide a written explanation of reasons for objecting, and where appropriate, its proposals for alternative measures which the member is going to implement. The explanation shall specify *inter alia* whether the basis for the objection is that the member considers that the measure is inconsistent with this Convention, the member cannot practicably comply with the measure, the measure unjustifiably discriminates in form or in fact against the member or other special circumstances apply.

7 In the event that objections to a decision are made by more than one-third of the members, the other members shall not be bound by the decision, but shall not preclude any or all of them from giving effect thereto.

8 A member may withdraw an objection at any time and the decision shall then become binding in accordance with sub-paragraph 4(b).

9 The Executive Secretary shall promptly notify all members of:

- (a) the receipt and withdrawal of any objection; and
- (b) the reasoning for the objection and alternative measures pursuant to paragraph 6.

10 Any member that is bound by a decision in accordance with this Article has a duty to implement such decision in its national laws and procedures upon the entry into force of such decision.

11 In exceptional circumstances as determined by the Executive Secretary in consultation with the Chairperson, when urgent matters require members to take decisions between sessions of the Commission, any rapid means of communication may be used for decision-making with respect to procedural and administrative matters of the Commission, including any of its subsidiary bodies or working parties, other than matters relating to the interpretation of and the adoption of amendments to the Statute of the Commission or its Rules.

COMMENTS

Australia:

Noting that ‘consensus’ is used elsewhere in the Convention, Australia suggests that the second sentence of paragraph 1 should begin ‘For the purposes of this Convention,’ rather than ‘For the purposes of the Article’.

Australia notes that there is a need to carve out from the general rule about simple majority voting the circumstances in which the Convention provides for consensus decision making, or decision making by a 2/3 majority. Australia suggests that it would be clearer if paragraph 2 began ‘Except where this Convention expressly provides that a decision shall be taken by consensus or by a specified majority...’ and the words ‘with the exception of binding decisions provided in paragraphs 3 to 8, or unless otherwise provided in this Convention’ were deleted. Australia could not accept any suggestion to reduce the decision-making threshold for any matter of substance to a simple majority

Australia notes that both SPRFMO and WCPFC distinguish between questions of substance and other matters and that questions of substance require a higher threshold than a simple majority. Australia suggests the addition of the following to paragraph 2:

Decisions on questions of substance shall be taken by a two thirds majority of those present and voting. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

In paragraph 3, Australia suggests

- the deletion of that ‘Each member shall have one vote’ as it duplicates article 7(2);
- The addition of a sentence to clarify the application of CMMs to EEZs within the Area:

Subject to paragraphs 5 to 8, and unless the Commission decides otherwise, conservation and management measures adopted by the Commission shall apply to the whole of the Convention Area, including waters under the jurisdiction of Members.

Regarding paragraph 5, Australia suggests that the ‘default’ rule should be (x) days from the date the ES transmits notification, rather than (x) days from a date specified by the ES:

3. Subject to paragraphs 5 to 8, the decision shall become binding on Members [x] days after the date of transmittal specified in the notification made by the Executive Secretary pursuant to sub-paragraph (a) or on such other date as may be specified by the Commission.

Australia suggests that it would be preferable if, as is the case in SPRFMO, it were possible to partially opt-out of measures. Australia suggests that paragraph 5 end with 'to the extent of the objection, except in accordance with paragraph 8'.

Australia considers that it is important to require Members that object to measures to inform the Commission of the alternative means by which they will achieve the objectives of a measure to which they object. Australia suggests that the third sentence in paragraph 6 read: '...its proposals for alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application which the Member is going to implement'. The text proposed is adapted from that in SPRFMO.

If our Australia's earlier suggestion of requiring a three fourths majority is accepted, then Australia suggests that paragraph 7 be amended to refer to 'one fourth', rather than 'one third'.

Regarding paragraph 10, Australia notes that not all decisions will require implementation through national laws. Accordingly, Australia suggests that paragraph 10 refer to 'national laws or procedures'.

Australia also suggests replacing paragraph 11 with: 'The Commission may adopt rules of procedure for taking and recording decisions intersessionally'. Alternatively, if a version of this paragraph is retained, Australia suggests that the paragraph should refer to 'amendments to the Convention'. Australia also queries why amendments to the Rules of Procedure should not be able to be made intersessionally if the need arises.

Japan:

4b. The minimum days should be specified and depending on the decision, the Commission should have some flexibility to adjust the duration (longer period).

6. (...) the member cannot practicably comply with the measure,(...) — This reason is too broad and could be abused.

Article 16

Obligations of Contracting Parties

1 Each Contracting Party shall provide such information to the Commission and its subsidiary bodies in such a way as to enable the Commission to meet the objective of this Convention and to enable its subsidiary bodies to fulfil their responsibilities.

2 Each Contracting Party shall:

- (a) implement this Convention and conservation and management measures adopted by the Commission, and take all necessary measures to ensure their effectiveness;
- (b) cooperate in furthering the objective of this Convention;

- (c) take all necessary measures to support efforts to prevent, deter and eliminate illegal, unreported and unregulated fishing within the Convention Area; and
- (d) collect, verify and report scientific, technical and statistical data and information required pursuant to this Convention in conformity with standards, rules and procedures established by the Commission.

3 Each Contracting Party shall report annually to the Commission indicating how it has implemented the decisions by the Commission, including providing such relevant legislative and administrative documents as may be required by the Commission.

4 Each Contracting shall, to the greatest extent possible, take measures and cooperate to ensure compliance with decisions by the Commission by its nationals and vessels owned, operated or controlled by its nationals.

COMMENTS
<p>Australia: Australia suggests that this article should refer to Members rather than Contracting Parties.</p>
<p>Japan: 4. Should read “Each Contracting Party shall...” 4. Re. the use of the word “Nationals”. Is this talking about nationals outside the Contracting Party? If not, “to the extent possible” should be deleted. If so, it should be specified.</p>

Article 17

Duties of the flag State

- 1 Each Contracting Party shall take all necessary measures to ensure that vessels entitled to fly its flag:
- (a) comply with the provisions of this Convention and conservation and management measures adopted by the Commission; and
 - (b) do not conduct unauthorized fishing or fishing related activities within waters under national jurisdiction of any member.
- 2 Each Contracting Party shall:
- (a) authorize the use of vessels entitled to fly its flag only where it is able to exercise effectively its responsibilities in respect of the vessels under this Convention and in accordance with international law;
 - (b) maintain a register of vessels entitled to fly its flag and authorized for fishing or fishing related activities, ensure that such information as may be specified by the Commission is entered into that register, and exchange the information in accordance with such procedures as may be specified by the Commission;
 - (c) in accordance with procedures adopted by the Commission, investigate immediately and report fully on actions taken in response to any alleged violation by vessels entitled to fly its flag of provisions of this Convention or any conservation and management measures adopted by the Commission; and

- (d) ensure that penalties applicable for such violations are of an appropriate severity to secure compliance, discourage further violations and deprive offenders of the benefits accruing from such activities.

COMMENTS

<p>Australia:</p>

<p>Australia suggests:</p>

- | |
|---|
| <ul style="list-style-type: none"> • that each reference to ‘Contracting Party’ in this article should be to ‘Member’ • that the following be added after the word ‘Commission’ in paragraph 1(a): ‘and do not engage in any activity which would undermine the effectiveness of such measures’. A similar requirement is included in SPRFMO, WCPFC, SIOFA and article 18(1) of UNFSA. • the addition of two new sub-paragraphs to paragraph 1 (adapted from SPRFMO): <ul style="list-style-type: none"> (c) carry and operate equipment sufficient to comply with vessel monitoring system standards and procedures adopted by the Commission; and (d) land or tranship fishery resources caught in the Area in accordance with standards and procedures adopted by the Commission. • The addition of two new sub-paragraphs to paragraph 2 (adapted from SPRFMO and WCPFC): <ul style="list-style-type: none"> (a) not allow any fishing vessel entitled to fly its flag to be used for fishing in the Area unless it has been authorised to do so by the appropriate authority or authorities of that member of the Commission ... (f) ensure in particular that, where it has been established, in accordance with its laws, that a fishing vessel flying its flag has been involved in the commission of a serious violation of the provisions of this Convention or of any conservation and management measures adopted by the Commission, the vessel concerned ceases fishing and does not fish in the Convention Area until it has complied with all outstanding sanctions imposed by the member of the Commission in respect of the violation. • The addition of a new paragraph 3 (adapted from SPRFMO): <ul style="list-style-type: none"> 3. Each member of the Commission is encouraged to ensure that fishing vessels flying its flag operate in the Convention Area in accordance with applicable international obligations, and with regard to relevant recommendations and guidelines, regarding safety at sea for vessels, their crews and other persons onboard. |
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<p>Japan: no comments.</p>

Article 18

Duties of the port State

Each Contracting Party shall take all measures and actions, to the extent possible, necessary to implement port State measures in accordance with international instruments and decisions by the Commission

COMMENTS

<p>Australia:</p>

<p>Australia suggests that:</p>

- | |
|--|
| <ul style="list-style-type: none"> • the reference to ‘Contracting Party’ should be to ‘Member’ |
|--|

- the article be added to, noting that SPRFMO, WCPFC and SIOFA all include much more expansive provisions on port state duties. Specifically, these other agreements include::
 - An affirmation of the right and duty of port State Members to take measures to promote the effectiveness of subregional, regional and global CMMs.
 - A requirement that such measure not discriminate in form or fact against any State
 - A requirement that Members give effect to Commission CMMs related to entry into and use of ports
 - A requirement that Members provide appropriate assistance when a foreign vessel is in its port and the flag State requests assistance with ensuring the vessel's compliance with CMMs
 - A requirement that port State members notify flag States, the Commission and other international orgs when violations are identified and provide inspection reports.
 - A savings provision that nothing in the article affects Members' sovereignty over their ports.
- Australia suggests that the current draft article be replaced with the following:
 1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures, a port State shall not discriminate in form or in fact against the fishing vessels of any State.
 2. Each Member shall:
 - (a) in accordance with the conservation and management measures adopted by the Commission, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals;
 - (b) not permit landings, transshipment, or supply services in relation to fishing vessels unless they are satisfied that fishery resources on board the vessel have been caught in a manner consistent with the conservation and management measures adopted by the Commission; and
 - (c) provide assistance to flag States, as reasonably practical and in accordance with its national law and international law, when a fishing vessel is voluntarily in its ports or at its offshore terminals and the flag State of the vessel requests it to provide assistance in ensuring compliance with the provisions of this Convention and with the conservation and management measures adopted by the Commission.
 3. In the event that a Member considers that a vessel making use of its ports or offshore terminals has violated a provision of this Convention or a conservation and management measure adopted by the Commission, it shall draw this to the attention of the flag State concerned, the Commission and other relevant States and appropriate international organisations. The Member shall provide the flag State and, as appropriate, the Commission with full documentation of the matter, including any record of inspection.
 4. Nothing in this Article affects the exercise by Contracting Parties of their sovereignty over ports in their territory in accordance with international law.

Japan:

This description is vaguer than that of other RFMOs. Need more discussion.

Article 19***Monitoring, compliance and enforcement***

The Commission shall establish appropriate cooperative mechanisms for effective monitoring, control and surveillance of fishing and fishing related activities and to ensure compliance with this Convention and the adopted conservation and management measures including, *inter alia*:

- (a) a record of vessels authorised to conduct fishing and fishing related activities in the Convention Area;
- (b) requirements for the reporting of vessel movements and activities by a satellite vessel monitoring system or other means that shall be designed to ensure the integrity and security of near real time transmissions, and such other systems as may be agreed by the Commission from time to time;
- (c) inspection programmes both at sea and in port, including joint or reciprocal boarding and inspection schemes;
- (d) reporting obligations on violations detected, progress and outcomes of investigations, and enforcement actions taken;
- (e) lists of vessels having engaged in illegal, unreported and unregulated fishing, including actions to be taken against vessels on such lists;
- (f) a process, including through the Compliance Committee, to examine cases of non-compliance with any recommendation adopted by the Commission and, as appropriate, determine sanctions;
- (g) sanctions consistent with international law to be applied by the Commission in cases of non-compliance with recommendations of the Commission as determined pursuant to paragraph (f) of this Article, including non-discriminatory market-related measures; and
- (h) guidelines for penalties and/or sanctions to be applied by the Commission and/or its members.

COMMENTS**Australia:**

Australia suggests:

- The chapeau should refer to ‘conservation and management measures adopted by the Commission’
- The addition of a new sub-paragraph: ‘(b bis) regulation and supervision of transshipment’
- Sub-paragraph (e) be amended to read: ‘lists of vessels having engaged in illegal, unreported or unregulated fishing, and actions to be taken against vessels on such lists’
- Sub-paragraph (f) (and (g), if retained) refer to ‘cases of non-compliance with the provisions of this Convention and conservation and management measures adopted by the Commission’ rather than to ‘cases of non-compliance with any recommendations adopted by the Commission’.
- That it is not appropriate to refer to the Commission as ‘determining’ sanctions. It is more appropriate, as is already done in art 6(1)(i) and 17(2)(e), to indicate that sanctions imposed by Members must be of sufficient severity to deter violations. Australia suggests:
 - The words ‘and, as appropriate, determine sanctions’ be deleted from sub-paragraph (f).
 - The deletion of sub-paragraph (g). The reference to non-discriminatory market related measures could be retained if tied more closely to IUU – such as in SPRFMO: ‘non discriminatory market-related measures, consistent with international law, to monitor transshipment, landings, and trade to prevent, deter and eliminate IUU fishing including, where appropriate, catch documentation schemes’.

- Sub-paragraph (h) refer to ‘sanctions to be recommended by the Commission and applied by its members’.
- The addition of a new paragraph on the sharing of evidence:
 2. Each member of the Commission shall, to the extent permitted by its national laws and regulations, establish arrangements for making available to prosecuting authorities of other members evidence relating to alleged violations.
- The addition of a new paragraph on high seas boarding and inspection. The suggestions is made as an example of best-practice drafting incorporated into a range of contemporary RFMOs:

If, within three years of the entry into force of this Convention, the Commission has not adopted at sea inspection procedures as outlined in paragraph 1(b), or an alternative mechanism which effectively discharges the obligations of the members of the Commission under the 1995 Agreement and this Convention to ensure compliance with the conservation and management measures adopted by the Commission, Articles 21 and 22 of the 1995 Agreement shall apply among Contracting Parties as if those Articles were part of this Convention, and boarding and inspection of fishing vessels in the Convention Area, as well as any subsequent enforcement action, shall be conducted in accordance with Articles 21 and 22 of the 1995 Agreement and such additional practical procedures as the Commission may decide are necessary for the implementation of those Articles.

Japan:

(h) - This is too much. Article 17.2 (d) is enough

Article 20**Transparency**

1 The Commission shall promote transparency in decision-making processes and other activities carried out under this Convention.

2 The Commission may invite intergovernmental or, on request, non-governmental organizations to participate as observers having special competence in the field of activity of the Commission, including its subsidiary bodies, to attend such of its meetings as the Commission may specify.

3 Unless the Commission expressly determines otherwise, observers may attend the plenary sessions of the Commission and participate in the discussions at any subsidiary body sessions which they may be invited to attend upon request. They may submit memoranda but in no case will they be entitled to vote.

COMMENTS**Australia:**

Australia notes that the current drafting in paragraph 3 suggests that the right of observers to participate in discussions is limited to sessions of subsidiary bodies.

Consistent with the best-practice transparency principles embedded in the SPRFMO and SIOFA agreements, Australia suggests that text be added to paragraph 3, providing that the Commission’s Rules of Procedure shall provide for the participation of observers, that the rules should not be unduly restrictive, and that observers shall be given timely access to pertinent information.

To address both of these points, Australia suggests that paragraph 3 read as follows:

Unless the Commission expressly determines otherwise, observers may attend and participate in the plenary sessions of the Commission and, if invited, subsidiary body sessions. They may submit memoranda but in no case will they be entitled to vote. The rules of procedure of the Commission shall provide for such participation and shall not be unduly restrictive in this respect. The rules of procedure shall also provide for such observer representatives to have timely access to all relevant information.

Japan:

3. It is not clear whether they can attend closed sessions of the plenary or subsidiary bodies.

Article 21

Cooperation with other organizations and institutions

1 The Commission shall cooperate with other international organizations and institutions in matters of mutual interest.

2 The Commission shall seek to make suitable arrangements for consultation, cooperation and collaboration with other relevant organizations and institutions, including entering into memoranda of understanding and partnership agreements.

COMMENTS

Australia: no comments.

Japan:

Not necessary including FAO?

Article 22

Recognition of the special requirements of developing State Contracting Parties

1 The Commission shall give full recognition to the special requirements of developing States Contracting Parties to this Convention in relation to conservation and management of fishery resources and to the development of fishing and fishing related activities.

2 In giving effect to the duty to cooperate in the establishment of conservation and management measures, the Commission shall take into account the special requirements of developing State Contracting Parties, in particular:

- (a) the vulnerability of such developing States Contracting Parties which are dependent on the exploitation of fishery resources, including for meeting the nutritional requirements of their populations or part thereof;
- (b) the need to avoid adverse impacts on, and ensure access to fisheries by subsistence, and artisanal fishers small-scale and fish workers; and
- (c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto such developing States Contracting Parties.

3 The Contracting Parties shall cooperate either directly or through the Commission for the purposes set out in this Article, which may include provision of financial assistance, assistance to human resource development, technical assistance, transfer of technology, including joint venture arrangements, and advisory and consultative services. Such assistance shall, *inter alia*, be directed towards:

- (a) improved conservation and management of fishery resources through collection, submission, verification, storing and dissemination of data;
- (c) stock assessment and scientific research;
- (d) development of fishing activities; and
- (c) monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level and access to technology and equipment.

COMMENTS

Australia:

Australia strongly supports the retention of sub-paragraph 2(c), which replicates article 24(2)(c) of UNFSA. Similar language is included in WCPFC (article 30(2)(c)), SIOFA (article 13(2)(c)) and SPRFMO (article 19(2)(c)).

Australia suggests that:

- the words ‘,in particular small island developing States,’ be inserted after ‘this Convention’ in paragraph 1. Australia also suggests that paragraph 1 should refer to ‘the development of fisheries for such resources’ rather than to the development of fishing.
- Sub-paragraph 2(b) would be clearer if it read: ‘...fisheries by subsistence, small-scale and artisanal fishers and fish workers’
- The word ‘such’ be deleted from sub-paragraph 2(c).
- Paragraph 3 refer to Members rather than Contracting Parties.
- Rewording paragraph 3 to avoid the suggestion that the activities listed in the first sentence are the purposes of the Article: ‘...set out in this Article. Such cooperation may include...’.

Sub-paragraph 3(c) refer to ‘fishing and fishing related activities’.

Japan:

2(a) - In this draft, there are the descriptions “fishery resources” (here, 2(a)) and “marine living resources”. Explain how distinguishes the description.

2(b) a comma is missing after fishers?

Article 23

Non-Contracting Parties

1 The Contracting Parties shall exchange information with respect to vessels engaged in fishing or fishing related activities in the Convention Area that are flying the flags of non-contracting parties to this Convention.

2 The Contracting Parties shall, individually or collectively, take measures consistent with this Convention and international law to deter the activities of such vessels, which undermine the effectiveness of applicable conservation

and management measures, and shall report to the Commission any action taken in response to fishing or fishing related activities in the Convention Area by non-contracting parties.

3 The Contracting Parties shall, individually or collectively, draw the attention of any non-contracting party to this Convention to any activity, which in the opinion of the Contracting Party or the Contracting Parties negatively affects the implementation of the objective of this Convention.

4 The Contracting Parties shall, individually or collectively, request non-contracting parties to this Convention whose vessels are engaged in fishing or fishing related activities in the Convention Area to become parties to this Convention or to cooperate fully in the implementation of conservation and management measures adopted by the Commission. Such cooperating non-contracting parties may enjoy benefits from participation in fishing or fishing related activities commensurate with their commitments to comply with conservation and management measures established under this Convention.

COMMENTS
<p>Australia:</p> <p>Australia suggests that this article should refer to Members rather than Contracting Parties.</p> <p>Australia also suggests that paragraph 1 should read: ‘Members shall exchange information with respect to vessels engaged in fishing or fishing related activities in the Convention Area that are not flying the flag of a Member of the Commission.’ This phrasing would enable the exchange of information on stateless vessels not flying a flag.</p> <p>Australia suggests that paragraph 4 begin: ‘Members shall, individually or collectively, request and encourage...’</p>
<p>Japan: no comments.</p>

Article 24

Dispute settlement

1 The Contracting Parties shall cooperate in order to prevent disputes.

2 If any dispute arises between two or more Contracting Parties concerning the interpretation of this Convention, those Contracting Parties shall consult among themselves with a view to resolving the dispute, or to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. Where a dispute is of technical nature, any party to the dispute may refer the dispute to an ad hoc expert panel established in accordance with the Rules of Procedure adopted by the Commission.

3 Where a dispute is not resolved through the means set out in paragraph 2, such dispute shall, at the request of any party to the dispute, be referred to procedures for settlement of disputes provided in Part XV of the 1982 Convention or in Part VII of the 1995 Agreement.

4 Paragraph 3 shall not affect the status of any Contracting Party in relation to the 1982 Convention or the 1995 Agreement.

COMMENTS

Australia:

Australia suggests that the reference in paragraph 3 to ‘Part VII’ should be to ‘Part VIII’.

Australia also suggests that it would be preferable for paragraph 3 to provide, either:

- ‘...at the request of any party to the dispute, be submitted for binding decision in accordance with the procedures for the settlement of disputes provided in Section II of Part XV of the 1982 Convention or the procedures set out in Part VIII of the 1995 Agreement’ (adapted from the SIOFA construction), or
- ‘...is not resolved through the means set out in paragraph 2, the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, *mutatis mutandis*, to the dispute’ (adapted from the SPRFMO and WCPFC constructions).

Australia further suggests the addition of a sentence to paragraph 3 to clarify that the UNCLOS/UNFSA dispute resolution provisions shall apply whether or not the disputants are parties to those agreements:

- *If both UNCLOS and UNFSA are referred to in para 3:* The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to either of these instruments.
- *If only UNFSA is referred to:* The relevant part of the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to that instrument.

Japan:

3. Part VII should be Part VIII?

Article 25***Relation to other international instruments***

1 Nothing in this Convention shall prejudice the rights, jurisdiction and duties of the Contracting Parties under the 1982 Convention or the 1995 Agreement.

2 This Convention shall not alter the rights and obligations of Contracting Parties that arise from other international instruments compatible with this Convention and which do not affect the enjoyment by other Contracting Parties of their rights or performance of their obligations under this Convention.

COMMENTS

Australia: no comments.

Japan: no comments.

Article 26***Amendments***

1 Any proposal to amend this Convention shall be provided to the Executive Secretary at least (x) days prior to the meeting at which it is proposed to be considered. The Executive Secretary shall promptly transmit the proposal to all members of the Commission.

2 Amendments to this Convention shall be adopted by (x). The text of any adopted amendment shall be transmitted promptly to all Contracting Parties by the Depositary.

3 An amendment shall take effect for all Contracting Parties (x) days after the date of transmittal specified in the notification by the Depositary of receipt of written notification of approval by all Contracting Parties.

4. States or regional economic integration organizations that become Contracting Parties to this Convention after the entry into force of amendments to this Convention shall be considered to be Contracting Party to the Convention as amended.

COMMENTS
<p>Australia:</p> <p>Australia considers that amendments to the Convention should be made by Contracting Parties, not by the broader Commission membership (which may include fishing entities). Accordingly, Australia suggests that the first sentence in paragraph 2 read: ‘Amendments to this Convention shall be adopted by (x) of the Contracting Parties present and voting’.</p>
<p>Japan:</p> <p>Why the proposal shall be provided to the Executive Secretary, not Chairperson?</p>

Article 27

Signature

- 1 This Convention shall be open for (x) months for signature by:
 - (a) Contracting Parties to the 1993 Agreement;
 - (b) States not Contracting Party to the 1993 Agreement with a coastline bordering the Convention Area; and
 - (c) States and regional economic integration organization that are not Contracting Parties to the 1993 Agreement and whose vessels have fished for fishery resources at any time during the (x) years preceding the adoption of this Convention and that participated in the negotiation of this Convention.

COMMENTS
<p>Australia: no comments.</p>
<p>Japan:</p> <p>3. This will virtually exclude new participation of a distant water fishing country, which is inconsistent with UNFSA.</p>

Article 28

Ratification, Acceptance and Approval

This Convention is subject to ratification, acceptance or approval in accordance with their domestic laws and procedures.

COMMENTS
Australia: no comments.
Japan: no comments.

Article 29

Accession

This Convention shall be open for accession, after its closure for signature, by any State, regional economic integration organization...

COMMENTS
Australia: Australia suggests finishing this sentence with ‘having an interest in fishery resources’ (adapted from SPRFMO).
Japan: no comments.

Article 30

Entry into force

1. This Convention shall enter into force (x) months after the deposit with the Depository of the (x) instrument of ratification, acceptance, approval or accession of the Contracting Parties to the 1993 Agreement that were Contracting Parties to that Agreement on the date this Convention was opened for signature.
2. After the date of entry into force of this Convention, with respect to each State or regional economic integration organization that meets the requirements of Article 25, this Convention shall enter into force for the said State or regional economic integration organization on the (x) day following the deposit of its instrument of ratification, acceptance, approval, or accession.
3. Upon entry into force of this Convention, this Convention shall prevail, as between Contracting Parties to this Convention and the 1993 Agreement, over the 1993 Agreement.
4. Upon entry into force of this Convention, conservation and management measures and other arrangements adopted by the Commission under the 1993 Agreement shall remain in force until such time as they expire, are terminated by a decision of the Commission, or are replaced by other measures or arrangements adopted pursuant to this Convention.
5. Upon entry into force of this Convention, a Contracting Party to the 1993 Agreement that has not yet consented to be bound by this Convention shall be deemed to remain a member of the Commission unless such Contracting Party decides not to remain a member of the Commission by notifying the Depository in writing prior to the entry into force of this Convention.

6. Upon entry into force of this Convention for all Contracting Parties to the 1993 Agreement, the 1993 Agreement shall be considered as terminated in accordance with relevant rules of international law as reflected in Article 59 of the Vienna Convention on the Law of Treaties.

COMMENTS

Australia:

Australia notes that paragraph 4 of this article is adapted from the equivalent provision in the IATTC Convention. Australia notes further that the provision purports to govern the legal status of instruments adopted under the 1993 Agreement. This is not legally possible where not all of the parties to the 1993 Agreement are also all parties to the new Convention. Further, it will likely be necessary for the new Commission to provide guidance on how to interpret/apply/comply with the legacy CMMs. For example, questions will arise as to how to interpret the legacy CMMs, which rely on definitions in the 1993 Agreement. Different definitions appear in this draft Convention which, for Contracting Parties to the new Convention, 'shall prevail' over the 1993 Agreement. Interpreting the legacy CMMs in light of the definitions of the new definitions in the Convention may affect the scope of the obligations in the legacy CMMs. Accordingly, Australia suggests that some general rules may need to be developed by the new Commission to guide interpretation in the transition period.

Australia suggests that it would be more appropriate for paragraph 4 to provide:

Members shall comply with the conservation and management measures and other arrangements adopted under the 1993 Agreement, subject to such modifications and until such time as the Commission may decide.

Australia suggests that the need for transitional provisions needs to be considered further. For example, paragraph 5 would 'deem' non-parties to this Convention to be members of the new Commission, a status which, under the terms of the Convention, generates legal and financial obligations. However, it is not permissible for a treaty to generate such obligations for non-parties.

Japan:

Cannot find similar article in other agreement and treaties. Hope to provide explanation about this article.

1. This should be all Contracting Parties. Otherwise, x in para 2 should be more than one year..

2. Art 27? In any case, this para is strange. It should say, "that are the Members to the 1993 Agreement but have not yet ratified this Convention."

Article 31

Reservations and Exceptions

No reservations or exceptions may be made to this Convention.

COMMENTS

Australia:

Australia notes that the existing Agreement permits reservations and queries the consultant's rationale for departing from this position.

Japan: no comments.

Article 32

Annex

The Annex shall form an integral part of this Convention and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Annex.

COMMENTS

Australia:

Australia notes that this article will need to be revised to refer to ‘Annexes’ plural if Australia’s suggestion that Annex B to the 1993 Agreement be reproduced in this Convention is taken up.

Japan: no comments.

Article 33

Withdrawal

Any Contracting Party may withdraw from this Convention by giving notice to the Depositary that shall transmit copies of the notice to the other Contracting Parties. The withdrawal shall become effective (x) months after receipt of such a notice by the Depositary.

COMMENTS

Australia: no comments.

Japan: no comments.

Article 34

Depositary

The original text of this Convention shall be deposited with....

COMMENTS

Australia: no comments.

Japan: no comments.

ANNEX

Fishing Entities

1 After the entry into force of this Convention, any fishing entity whose vessels have fished or intend to fish for fishery resources or undertake fishing related activities may, by a written instrument delivered to the Depositary, express a firm commitment to abide by the terms of this Convention and comply with any conservation and management measures adopted pursuant to this Convention. Such commitment shall become effective (x) days from the receipt of the instrument. Any such fishing entity may withdraw such commitment by written notification addressed to the Depositary. The withdrawal shall become effective (x) after the date of its receipt, unless the notification specifies a later date.

2 Any fishing entity referred to in paragraph 1 may, by written instrument delivered to the Depositary, express its firm commitment to abide the terms of the Convention as it may be amended pursuant to Article (x). This commitment shall be effective from the dates referred to in Article (x) or on the date of receipt of the written communication referred to in this paragraph, whichever is later.

3 A fishing entity that has expressed its firm commitment to abide by the terms of this Convention and comply with conservation and management measures adopted pursuant to this Convention in accordance with paragraph 1 must abide by the obligations of members of the Commission and may participate in the work, including decision-making, of the Commission in accordance with the provisions of this Convention. For the purposes of this Convention, references to the Commission or members of the Commission include such fishing entity.

4 If a dispute involves a fishing entity that has expressed its commitment to be bound by terms of this Convention in accordance with this Annex and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted to final and binding arbitration in accordance with relevant rules of the Permanent Court of Arbitration

5 The provisions of this Annex relating to the participation of a fishing entity are only for the purposes of this Convention.

COMMENTS**Australia:**

Australia notes the suggestion in paragraph 25 of CCLM 107/03 that the Director-General of the FAO could convene a Conference of Plenipotentiaries for a new treaty and act as depositary. Australia notes that if the FAO is selected as the depositary, then paragraphs 1 and 2 will need to be amended as the FAO will not accept instruments from fishing entities.

Japan:

3, last sentence. Not consistent with Article 1(j). To avoid this, it should say, “are deemed to include”.