

**First International Meeting on the Establishment of the
South Pacific Regional Fisheries Management Organisation**

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PROPOSED ELEMENTS OF A LEGAL FRAMEWORK

Purpose

A gap exists in the international conservation and management of non-highly migratory fisheries and protection of biodiversity in the marine environment in high seas areas of the South Pacific Ocean. The gap extends from the most eastern part of the South Indian Ocean through the Pacific towards the Exclusive Economic Zones (EEZs) of South America. Non-highly migratory fisheries in this area are mainly discrete high seas stocks, although some stocks straddle the high seas and the EEZs of coastal states. While several states have already targeted these species on the high seas and continue to do so, the area is not covered by an organisation with the competence to establish appropriate conservation and management measures.

In order to establish a regional fisheries management organisation (RFMO), there needs to be a legal framework. The legal framework should be a legally binding instrument. For the purposes of this paper the instrument is referred to as an 'Agreement'.

This paper sets out key elements that could be incorporated into an Agreement establishing the South Pacific RFMO and could be used as a starting point for development of the legal framework. The paper draws on the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), 1995 United Nations Fish Stocks Agreement (UNFSA), and recent international best practice. Although the UNFSA applies to straddling and highly migratory fish stocks, its principles could usefully be applied when developing a legal framework to cover the South Pacific Ocean. This approach was taken in the negotiations on the draft Southern Indian Ocean Fisheries Agreement and in the process to establish the South East Atlantic Fisheries Organisation, both of which cover high seas demersal species. Lessons could be learnt from the experience gained in other RFMOs and relevant international agreements. Other instruments containing principles relevant to the establishment of an RFMO could be drawn upon as appropriate.¹

¹ For example, relevant international instruments suggested in Annex III of Information Paper (SP/01/Inf 3) on www.southpacificrfmo.org.

Principles

The principles underpinning the development of the South Pacific RFMO are that the regime should, inter alia:

- Be according to UNCLOS;
- Be according, mutatis mutandis, to the principles of UNFSA;
- Applied to marine areas beyond national jurisdiction;
- Be based on best and improving regional and international practices;
- Include species not already covered by other RFMOs in the South Pacific;
- Include appropriate and effective decision making processes that incorporate appropriate mechanisms recognising the respective interests of coastal states and other participants;
- Recognise the special requirements of developing states;
- Include specific conservation and management regimes for straddling stocks and discrete high seas stocks, bearing in mind their nature and characteristics;
- Develop allocation principles that, inter alia, recognise, as appropriate the fishing history of the stocks;
- Ensure a genuine link between the flag state and its vessels;
- Ensure the establishment of an effective monitoring, control and surveillance (MCS) regime, including relevant roles for port states, flag states and coastal states;
- Allow for the establishment of interim measures, based on the best scientific information available, and mechanisms for the provisional applications of the agreement; and
- Establish a mechanism to review the effectiveness and implementation of the RFMO.

Key Elements of a Legal Framework

Part I: General Provisions of the Agreement

Definitions

This section would set out any legal definitions required in the Agreement.

Objective

A clearly stated overall objective of the Agreement should be considered that promotes the effective conservation and management of living marine resources in the South Pacific region. The overall objective should be sufficiently broad to cover both the conservation and management of relevant target fish stocks and also of associated and dependent species and the wider ecosystem.²

² This approach is consistent with Article 61 of UNCLOS and Article 5 of UNFSA.

Scope of the Agreement: Species coverage and area of application

The scope of the Agreement should be specified clearly, including which species the RFMO will manage and the area of application of the Agreement.³

Consideration should be given to the nature of cooperation required with coastal states where fish stocks straddle the high seas and areas of adjacent coastal state EEZs, to ensure compatibility of measures. To the extent that the scope of a new RFMO will overlap with other RFMOs, cooperation will be required to ensure compatibility of measures.

Principles for conservation and management

This section should include a set of principles founded on the best technical and scientific information, to guide conservation and management of marine living resources.⁴ To this effect, the Agreement should incorporate:

- the best practice on the matter;
- the precautionary approach;
- the ecosystem approach;
- the compatibility of conservation and management measures;
- the need to protect biodiversity in the marine environment; and
- efficient use of marine resources.

Conservation and management standards

Conservation and management standards should be specified consistent with the objective and principles of the Agreement. As well as acting as a benchmark for decision makers, standards will allow the effectiveness of decisions to be monitored and evaluated.

Part II: Establishment of the RFMO

Establishment of the Commission

Consideration should be given to establishment of a Commission that would act as the primary decision making body within the RFMO and be made up of parties to the Agreement. This section should set out the processes and procedures associated with the operation of the Commission.

The principle of cost-effectiveness may also be useful to incorporate into the Agreement in relation to establishment of a Commission.

³ Possible boundaries are listed in the Information Paper (SP/01/Inf 3).

⁴ When developing principles, the following could be drawn on: Part VII, Section 2 of UNCLOS and Articles 5, 6, and 7 of UNFSA.

Functions of the Commission

It is important that the functions of the Commission are clearly specified in the Agreement. Essential functions of the Commission should include agreeing on conservation and management measures to ensure the long-term sustainability of fish stocks, and agreeing on participatory fishing rights such as national allocation of allowable catches.⁵

The membership of the Commission would be linked to those States and entities that could become party to the Agreement.

Criteria for membership of the Commission should be specified. Clear provisions for new Commission members will also be necessary. Articles 8(3) and 11 of UNFSA provide guidance on membership of RFMOs. Participants may also wish to consider establishing specific provisions for cooperating non-parties to the Commission.

If the Agreement is to regulate the fishing activities of entities, a mechanism should be included to enable their participation in the work of the Commission. The approach taken in the Convention on the Conservation and Management of Highly Migratory Fish Stocks on the Western and Central Pacific Ocean could be an appropriate precedent.

Subsidiary bodies

Consideration should be given to the establishment of subsidiary bodies of the Commission. Subsidiary bodies should be established, as the need arises, to provide the advice necessary for the Commission to make effective decisions. The Commission is likely to require advice with respect to, inter alia: science, fisheries management, compliance and enforcement, and finance and administration.

It will be important that the functions and responsibilities of any subsidiary bodies established are clearly set out so that the body can be held accountable for carrying out its appointed functions effectively. Subsidiary bodies should be established in such a way that they can provide accurate, objective, timely, and reliable advice to the Commission.

This section could also include provisions to allow subsidiary bodies to be established with membership of only those interested in a particular fishery. Specific rules of procedure could be developed for subsidiary bodies if required.

Secretariat

Consideration should be given as to how secretarial services are provided to support the Commission. A permanent secretariat could be established, or alternatively secretariat services could be provided by a member or all members on a rotational basis. Final decisions on the Secretariat will depend on the types of services required to support the Commission and the general principle of cost efficiency. If a

⁵ Article 10 of UNFSA sets out a list of functions of RFMOs that may be a useful starting point in developing this section.

Secretariat is established, it will be important that its functions and responsibilities are clearly set out.

Financial arrangements

A process for establishing a budget will be needed. The RFMO should operate in a cost-effective manner while ensuring that each component of the organisation, for example, the Commission, Secretariat and subsidiary bodies, are adequately resourced to carry out its functions effectively.

A formula for determining contributions to the budget should be agreed. A funding formula should take account of the economic status of developing coastal states and give adequate weight to those that benefit from fishing in the RFMO area.

Decision making

An effective decision making process is fundamental to the effective operation of the RFMO. There are a variety of decision making procedures that the RFMO could adopt, each with advantages and disadvantages. Decision making procedures should be considered that allow decisions to be made in an effective, transparent and timely manner and recognise the range of interests of the participants involved. It may be appropriate to establish different decision making procedures for different types of decisions. It may also be appropriate to establish decision making chambers so that decisions in respect of a particular fishery can be made by those with a real interest in the particular fishery.

Transparency

Transparency is an important principle in any organisation to ensure that it develops and maintains its integrity and delivers on its objectives. To ensure transparency, it is important that actions, decisions and decision making processes of an organisation are open to an appropriate level of scrutiny by its members, civil society and, where appropriate, outside institutions. Mechanisms should be considered to ensure transparency within the RFMO.⁶

Accountability

Accountability is an important principle that should be inherent in any organisation seeking to operate efficiently and effectively, maintain its integrity and deliver on its objectives. To ensure accountability, an organisation should be able and willing to show the extent to which its performance, including actions and decisions, is consistent with clearly-defined and agreed-upon objectives. Mechanisms should be considered to ensure accountability within the RFMO.

Cooperation with other organisations

Mechanisms to cooperate with organisations which already have management competencies in or adjacent to the region, for example in respect of management of

⁶ See, for example, Article 12 of UNFSA.

associated and dependent species, should be considered in order to achieve compatibility of conservation and management measures.⁷ It may also be appropriate to consider mechanisms to cooperate with other international fisheries-related organisations such as the FAO.

Part III: Obligations of Members of the RFMO

Responsibilities of Members

To support the effective functioning of the Commission and to ensure that the objective of the Agreement is met, Members of the Commission will have a range of responsibilities. These responsibilities should be set out in the Agreement.

Flag state duties

Members of the Commission whose flag vessels fish in the RFMO area will have a range of specific responsibilities in addition to the responsibilities of Members. These responsibilities should be set out in the Agreement, some of which could be drawn from Article 94 of UNCLOS and Article 18 of UNFSA.

Coastal state duties

Members of the Commission which are coastal states will have a range of specific responsibilities in addition to the responsibilities of Members, for example, to provide catch and effort data on straddling stocks within their jurisdiction, and to ensure compatibility of measures with those taken pursuant to the Agreement.

Port state duties

Members of the Commission which are port states will have a range of specific responsibilities. These responsibilities should be set out in the Agreement, consistent with Article 23 of UNFSA and the FAO Port State Model Scheme

Compliance and enforcement

Consideration should be given to the establishment of compliance and enforcement provisions. These provisions should be consistent with Articles 19 and 20 of UNFSA and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

Consideration could also be given to processes to establish an observer programme, a port inspection scheme, monitoring, control and surveillance (MCS) systems and provisions for vessel monitoring and transshipment. A boarding and inspection regime, consistent with Articles 21 and 22 of UNFSA, should be established.

⁷ Other organisations may include the Western and Central Pacific Fisheries Commission, Commission for the Conservation of Antarctic Marine Living Resources, Commission for the Conservation of Southern Bluefin Tuna, Southern Indian Ocean Fisheries Agreement, and the Inter-American Tropical Tuna Commission.

Part IV: Non-Members

Cooperating Non-Members

Provision for Cooperating Non-Member status, similar to that of other RFMOs such as Western and Central Pacific Fisheries Commission, Commission for the Conservation of Southern Bluefin Tuna and North East Atlantic Fisheries Commission, could be considered.

Part V: Requirements of Developing States

Consideration should be given to the development of provisions in relation to recognition of the special requirements of developing States consistent with UNCLOS and UNFSA.

Part VI: Dispute Settlement

Robust dispute resolution procedures are important to ensure that the RFMO operates efficiently and effectively. Dispute settlement clauses in UNCLOS and UNFSA for compulsory settlement of disputes could be drawn on to develop dispute resolution procedures.

Part VI: Monitoring and Review

Consideration should be given to establishing a mechanism to review the effectiveness and implementation of the Agreement, based on agreed criteria. A review procedure five years after entry into force of the Agreement is one option.

Part VII: Final Provisions

Entry into force, including provisional application, accession and ratification

Amendment

Participation by territories

Consideration should be given to the participation of territories in the region, with the appropriate authorisation of the Contracting Party having responsibility for its international affairs.

Relationship with other Agreements

Withdrawal and termination

Depositary