

The legal case for an effective GFCM compliance mechanism

The effectiveness of the conservation and management measures adopted by the General Fisheries Commission for the Mediterranean (GFCM) is currently limited by the lack of a compliance mechanism that would enable the Commission to take adequate corrective measures against Contracting Parties (CPC) in cases of confirmed non-compliance. The legal analysis by Professor Tullio Scovazziⁱ and Professor Simone Vezzaniⁱⁱ of the GFCM's legal framework, applicable international law, and existing compliance regimes of other Regional Fisheries Management Organisations (RFMOs) indicates that the reasons for this gap are of a political, not legal, nature. In accordance with international law and GFCM rules, the GFCM has the competence to establish a system that incentivises and ensures compliance through robust corrective measures, including trade-related sanctions. Setting up such a system would also bring the GFCM in line with the practice of several other RFMOs.

At its 46th session in Croatia, the GFCM contracting parties should demonstrate a political commitment to the effective protection of the Mediterranean against continued non-compliance with GFCM measures and the impacts of illegal, unreported and unregulated (IUU) fishing by adopting a long-awaited robust compliance mechanism. This would enable the Commission to act in cases where applicable conservation and management measures adopted by the GFCM are not being transposed, implemented or enforced.

To advance efforts in fisheries conservation and management in the Mediterranean, the GFCM has over the years produced a plethora of decisions, including binding rules in the form of 'recommendations'. However, at present, the GFCM has failed to effectively enforce these rules. The GFCM compliance framework, set through Recommendation 38/2014/2,¹ as well as Resolution 43/2019/5² and Resolution 44/2021/13,³ is primarily focused on the review and assessment of Contracting Parties' (CPC) implementation of, and compliance with, binding obligations. It does not include deterrent actions – such as corrective measures or sanctions – to be applied in cases of non-compliance. This gap in the GFCM compliance system severely limits the effectiveness of the measures adopted to tackle IUU fishing across the Mediterranean.

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The importance of ensuring compliance, including through the adoption of sanctions, was emphasised in the GFCM 2030 Strategy⁴ adopted in 2020. However, recent discussions within the GFCM on setting up an effective compliance mechanism have raised questions about its compatibility with existing Food and Agriculture Organisation of the United Nations (FAO) and applicable World Trade Organisation (WTO) rules.

The legal feasibility of empowering the GFCM to take appropriate corrective measures or sanctions when it has detected non-compliance has been confirmed in a legal opinion⁵ by Professor Tullio Scovazzi and Professor Simone Vezzani. This opinion draws its conclusions from applicable international law and the existing compliance regimes of other RFMOs. The legal opinion addresses, *inter alia*, whether the GFCM has the competence to impose corrective measures in cases of non-compliance, which types of measures could be adopted in accordance with relevant international law obligations, and how to tackle potential conflicts of norms. This policy note summarises the key legal arguments presented in the opinion to support the setting up of an effective GFCM compliance regime aimed at preventing and dissuading infringements of applicable GFCM conservation and management measures.

1. Ensuring compliance with RFMO obligations

To ensure binding measures adopted within RFMO frameworks are correctly implemented and non-compliance is deterred, RFMO conservation and management measures need to be complemented with compliance mechanisms, which comprise compliance assessment processes and follow-up measures to effectively address non-compliance. A compliance assessment identifies areas of non-compliance, but also needs to consider the relevant reasons for such a situation. For example, in some cases the legal ambiguity of an obligation can result in rules not being applied; in other cases, vessels are purposely infringing clear obligations and States lack the political will to take enforcement action.

If it has been established that a given vessel or a State has violated applicable conservation and management measures, the RFMO should be empowered to adopt corrective measures or sanctions, which need to be effective and dissuasive enough to address non-compliance and to ensure IUU fishing is eliminated and that offenders are deprived of the benefits accruing from such illicit activities.

Existing RFMO practices, particularly those of the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the Indian Ocean Tuna Commission (IOTC), indicate the possibility of a wide variety of follow-up measures that would also be permitted under the GFCM Agreement⁶ and applicable international law. While some of these measures are directed against vessels and individuals (e. g., IUU vessel lists or the prohibition of subsidies), others target states, both parties and non-parties to the RFMO (e. g., trade restrictions). Some are designed to encourage compliance, for example by providing technical assistance and capacity building, making records of non-compliance publicly available on RFMO websites, or requiring a catch documentation scheme. Other follow-up measures, such as restricting trade in seafood products or reducing quota allocations, are designed to sanction the IUU fishing activities. Although trade-restrictive measures are considered effective and are legally feasible under the existing legal standards applicable to the GFCM, according to authors of the legal opinion, they should only be considered as a last resort, when other measures have proven to be insufficient. If the GFCM decides to set up a mechanism that foresees the application of trade measures, to ensure they are effective, it is advised that it first establishes a more comprehensive catch documentation scheme – currently adopted by the GFCM only occasionally and provisionally – modelled upon the 2017 FAO Voluntary Guidelines.⁷

According to the legal analysis of Scovazzi and Vezzani there are no legal obstacles in the GFCM legal framework and applicable international law preventing the GFCM to adopt such measures or sanctions, including those aimed at restricting trade.

Box: Trade-related follow-up measures and their compatibility with the World Trade Organization (WTO) rules

Up until now, trade-related measures adopted by RFMOs (or under multilateral environmental agreements) have not been challenged before the WTO. Their consistency with WTO law has been questioned only in cases where a State was adopting unilateral measures, considered a disguised form of protectionism.⁸

As the legal opinion by Scovazzi and Vezzani demonstrates, if certain criteria are fulfilled – namely, (1) trade sanctions are proportionate and non-discriminatory, and (2) the procedure governing their imposition is fair, transparent, and offers an opportunity for due process to the negatively affected State – trade measures agreed upon by an RFMO can be justified under the General Agreement on Tariffs and Trade (GATT)⁹ and the Technical Barriers to Trade Agreement (TBT)¹⁰ of the WTO. Trade-related measures decided by RFMOs to ban the import of products from blacklisted countries or vessels fall within the scope of Art. XX (g) of the GATT, as they aim to protect “exhaustible natural resources,” which marine living resources are. This consistency of trade sanctions with the GATT was carefully considered by ICCAT when it established its sanctioning regime. The WTO Secretariat later appraised ICCAT as a best practice of multilateral environmental agreements providing for WTO consistent trade-related measures.¹¹

The consistency of trade-related measures with WTO law is indirectly supported also by the adoption of the Agreement on Subsidies and Countervailing Measures (SCM),¹² under which a vessel or operator shall be automatically considered to be engaged in IUU fishing if it is included by a competent RFMO in its IUU vessels list.

2. GFCM's competence to impose corrective measures or sanctions against states and/or particular vessels in cases of non-compliance

GFCM's power to impose non-compliance follow-up measures (including trade-restrictive measures) can be justified through three key considerations:

1. The **trend in general fisheries law** post-United Nations Convention on the Law of the Seas (UNCLOS)¹³ indicate the strengthening of the obligation to cooperate for the conservation and sustainable management of living marine resources, with RFMOs being key actors in this context. This strengthening also includes the obligation to prevent undermining the effectiveness of measures adopted by RFMOs, including through deterring IUU fishing by establishing and implementing follow-up measures when non-compliance is identified (including trade-related sanctions). Instruments demonstrating this trajectory are all of global scope of application and include: the 1995 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement);¹⁴ the 1995 FAO's Code of Conduct for Responsible Fisheries,¹⁵ which despite being voluntary, includes provisions that can be considered as belonging to customary international law; the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement);¹⁶ the 2001 FAO Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the IUU Fishing Plan of Action);¹⁷ the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Agreement);¹⁸ and the 2022 WTO's Agreement on Fisheries Subsidies.¹⁹ These instruments mandate fishing to be done in a responsible way. They require flag, port and coastal States, through RFMOs, to put in place appropriate monitoring, control, and surveillance measures; and if violations occur, flag states are obliged to adopt sanctions, and RFMOs are called to set up and implement follow-up measures to deter and prevent IUU fishing.
2. The **existing practice of RFMOs** demonstrates their ability to establish and implement a compliance mechanism, with a set of sanctions, without legal challenges. Examples include the ICCAT and the IOTC, with trade restrictive measures foreseen under ICCAT already being effectively implemented.

3. The **GFCM legal framework** provides for the adoption of a compliance mechanism to address cases of serious and repeated non-compliance. The legal basis is provided through relevant provisions of the GFCM Agreement, its Rules of Procedure, and decisions adopted at GFCM Annual meetings:
- a. **Art. 8 (b) and Art. 14 of the GFCM Agreement**²⁰ grants the Commission the authority to resolve situations of non-compliance and provide it a broad margin of discretion in identifying what kind of measures to adopt when a Party does not comply with binding recommendations in a prolonged and unjustified manner. The GFCM is also called to identify and address sanctions for non-Parties that adversely affect the objectives of the GFCM Agreement (including non-discriminatory trade-related measures).
 - b. **Rule XIX of the present GFCM Rules of Procedure**²¹ enables the Commission, through the Compliance Committee, to take measures to resolve a situation of non-compliance. A set of follow-up measures are provided for, which range from measures of technical assistance for the non-compliant Parties or cooperating non-Parties, to non-discriminatory market-related measures for cooperating non- Parties and other non-Parties.ⁱⁱⁱ
 - c. A binding **Recommendation 38/2014/2**²² further specifies the procedure to address cases of non-compliance by GFCM parties and non-parties, including cooperating non-parties, through the Compliance Committee. It includes a requirement for the Compliance Committee to recommend appropriate measures, including non-discriminatory trade measures, to deter cases of identified non-compliance, and empowers the GFCM to adopt these recommended measures.
 - d. **Resolution 43/2019/5**²³ encouraged the Compliance Committee to provide a list of appropriate measures by the 44th session of the GFCM (2021) to address different situations of non-compliance. **Resolution 44/2021/13**²⁴ reiterates the role of the Compliance Committee to discuss in its 15th Session (2022) the appropriate measures in relation to cases of non-compliance. At present, such a list of appropriate measures has not yet been approved.

It can therefore be concluded that the lack of a compliance mechanism at present is rather a question of political will and not of legal feasibility.

iii This provision of the Rules of Procedure envisages the adoption of market-related measures exclusively against cooperating non-Parties and non-Parties. It is suggested that this provision be amended, because a discriminatory trade-sanctioning mechanism would not be WTO-consistent.

References

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