



COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Ninety-first Session

Rome, 20 – 22 September 2010

CHANGES IN THE TERMS OF REFERENCE OF THE COMMISSION FOR INLAND FISHERIES AND AQUACULTURE OF LATIN AMERICA AND THE CARIBBEAN

I. BACKGROUND

1. The CCLM at its Ninetieth Session, in April 2010, examined document CCLM 90/5 *“Changes in the Terms of Reference of the Commission for Inland Fisheries of Latin America”* containing proposed amendments to the name and Statutes of the Commission. This document is attached hereto as Appendix I.
2. The CCLM endorsed the change of name of the Commission into “Commission for Inland Fisheries and Aquaculture in Latin America and the Caribbean” (COPESCAALC). However, following a debate arising out of references to the Code of Conduct on Responsible Fisheries in the revised Statutes, the CCLM concurred with a proposal that the secretariat should prepare a study on the legal implications of these references for its Ninetieth-first Session. Meanwhile, the CCLM decided to defer consideration of the revised Statutes.
3. The Council at its Hundred and Thirty-ninth Session endorsed the recommendation of the CCLM as regards the change of name of the Commission. However, the Council noted that, following the debate arising out of references to the Code of Conduct on Responsible Fisheries in the revised Statutes of the Commission, the CCLM decided to defer consideration of the amendments to the terms of reference, pending the preparation of a study on the legal implications of those references for its Ninetieth-first Session.
4. The study commissioned by FAO is attached hereto as Appendix II.

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II. SUGGESTED ACTION BY THE COMMITTEE

5. The CCLM is invited to:

- a) review the Council Resolution amending the Statutes of the Commission for Inland Fisheries and Aquaculture in Latin America and the Caribbean (COPESCAALC) in light of the study attached hereto as Appendix II; and
- b) propose such action as appropriate.

APPENDIX I**I. BACKGROUND**

1. In accordance with Article VI of the FAO Constitution, the Conference and the Council may establish commissions, regional commissions, committees and working parties and may convene general, regional, technical or other conferences.
2. Article VI.3 of the Constitution, as amended in 1955, stipulates that, when establishing commissions, committees and working parties, the Conference or the Council shall determine their terms of reference.
3. This document presents the requested changes in the statutes and name of the Commission for Inland Fisheries of Latin America (COPESCAL).

II. CHANGES IN THE STATUTES AND NAME OF THE COMMISSION FOR INLAND FISHERIES OF LATIN AMERICA (COPESCAL)

4. The Commission for Inland Fisheries of Latin America (COPESCAL) was established by the Council at its 70th Session (Resolution 4/70) held in Rome from 29 November to 9 December 1976. COPESCAL was established under Article VI.1 of the FAO Constitution.
5. COPESCAL's original mandate was to help national and regional efforts targeting the development and rational use of inland fishery resources in Latin America. At its 11th Session, held in Manaus, Brazil, from 1 to 4 September 2009, COPESCAL considered that a series of changes were needed in its terms of reference to better reflect the current situation and new challenges. The Commission also recognized the importance of aquaculture to the countries of Latin America and the need for it to be fully involved in this thematic area.
6. COPESCAL also recognized the need to include "Caribbean" in its title so that it embraced the whole region. It therefore unanimously recommended that its title be changed to "Commission for Inland Fisheries and Aquaculture of Latin America and the Caribbean" (COPESCAALC). COPESCAL views this name as a more accurate reflection of its sphere of work and activities.
7. COPESCAL also agreed to introduce a number of changes to its statutes. The new statutes are provided in Annex I of this document.

III. SUGGESTED ACTION BY THE COMMITTEE

8. The CCLM is invited to examine and comment upon this document, as appropriate.
9. More specifically, the CCLM is invited to endorse:
 - c) the proposed change in name of the Commission for Inland Fisheries of Latin America (COPESCAL) and to recommend its approval by the Council at its next session, and
 - d) the new statutes of the Commission for Inland Fisheries of Latin America (COPESCAL) and to recommend their endorsement by the Council in its next session.

RESOLUTION .../..

**COMMISSION FOR INLAND FISHERIES AND AQUACULTURE OF
LATIN AMERICA AND THE CARIBBEAN (COPESCAALC)**

The Council,

Recognizing that the Council at its Seventieth Session, which took place in Rome from 29 November to 9 December 1976, established the Commission for Inland Fisheries of Latin America (COPESCAL), through Resolution 4/70;

Bearing in mind that COPESCAL has operated in an effective manner since its creation in 1976 and that, as a result of the experience it has gained over the years, the need has arisen to introduce a series of changes to its statutes;

Recognizing the proven importance not only of inland fisheries but also of aquaculture for Latin America, and the need to continue activities for the further development of these sectors;

Taking note that the Eleventh Session of COPESCAL, held in Manaus, Brazil, from 1 to 4 September 2009, had agreed to change the name and statutes of COPESCAL to better reflect reality;

“Does hereby, under Article VI.1 of the Constitution, change the name of COPESCAL to “Commission for Inland Fisheries and Aquaculture of Latin America and the Caribbean – COPESCAALC”, hereinafter “the Commission” whose new statutes are provided in Annex to this resolution.”

ANNEX TO RESOLUTION/..

1. **Purpose**

The purpose of the Commission is to promote the management and sustainable development of inland fisheries and aquaculture in accordance with the principles and rules of the Code of Conduct for Responsible Fisheries.

In addition, the Commission shall:

- a) foster the development of inland fisheries and aquaculture as an instrument of support to food security;
- b) pay special attention to subsistence inland fisheries and small-scale aquaculture;
- c) be able to establish coordination and cooperation relations with other international organizations in thematic areas of mutual interest.

Interpretation and application of these statutory provisions shall take place in accordance with the principles and rules of the Code of Conduct for Responsible Fisheries and its related instruments.

2. Membership

The Commission shall be open to all Member Nations and Associate Members of the Organization which are serviced by the Regional Office for Latin America and the Caribbean. It shall be composed of those eligible Member Nations and Associate Members which notify the Director-General of their desire to be considered as Members.

3. Functions

The functions of the Commission are:

- a) to support the formulation of national and regional policies and plans for the management and development of inland fisheries and aquaculture, with due consideration of the social, economic, cultural and environmental aspects of the Member Nations;
- b) to promote and coordinate studies for the management and sustainable development of inland fisheries and aquaculture, as well as national and regional programmes of research and development related to such activities;
- c) to foster the sustainable development of subsistence inland fisheries and small-scale aquaculture;
- d) to promote, at regional level, activities aimed at protecting ecosystems related to aquaculture and inland fisheries, including, as the case may be, appropriate restocking actions;
- e) to promote application of the ecosystems approach and implementation of adequate certification and biosafety measures in inland fisheries and aquaculture;
- f) to identify the social, institutional and economic factors that hold back the development of inland fisheries and aquaculture, and recommend measures that will contribute to improving the quality of life of stakeholders;
- g) to collaborate in the management and the economic and social assessment of recreational inland fishing and its development;
- h) to promote the implementation of good management practices and sustainable technologies in inland fisheries and aquaculture, in accordance with the FAO Code of Conduct for Responsible Fisheries;
- i) to promote good post-catch and post-harvest practices, and good marketing practices for products of inland fisheries and aquaculture, in accordance with internationally accepted sanitary and food safety standards;
- j) to contribute to the building of institutional capacity and to the development of human resources through training, extension and technology transfer in areas of competence of the Commission, in collaboration with national and regional institutions;
- k) to assist in the generation, dissemination and exchange of data, information and statistics on inland fisheries and aquaculture;

- l) to help Member Nations, upon their request, with the management and sustainable use of transboundary stocks under their respective national jurisdictions;
- m) to collaborate with Member Nations in the formulation of national and regional plans and projects to be executed in cooperation with those Member Nations, and with other sources of international cooperation, in order to attain the objectives set out in the previous paragraphs;
- n) to promote the updating and harmonization of national legislations on inland fisheries and aquaculture;
- o) to mobilize monetary and non-monetary resources to facilitate the activities of the Commission and to create, if necessary, one or more trust funds to receive voluntary contributions for that purpose;
- p) to foster collaboration among Member Nations of the Commission, and between the latter and international bodies;
- q) to draw up the Commission's plan of work; and
- r) to perform any other functions related to the management and sustainable development of inland fisheries and aquaculture in the region.

4. Subsidiary bodies

- a) The Commission may establish an Executive Committee and such other subsidiary bodies as may be required for the effective discharge of its functions.
- b) The establishment of any subsidiary body shall be subject to the determination by the Director-General that the necessary funds are available in the relevant chapter of the budget of the Organization. Before taking any decision involving expenditure in connection with the establishment of subsidiary bodies, the Commission must have before it a report from the Director-General on the administrative and financial implications thereof.

5. Reports

The Commission shall submit to the Director-General reports on its activities and recommendations at appropriate intervals so as to enable the Director-General to take them into consideration when preparing the draft Programme of Work and Budget of the Organization or other submissions to the Organization's Governing Bodies. The Director-General shall bring to the attention of the Conference through the Council any recommendations adopted by the Commission which have policy implications or which affect the programme or finances of the Organization. Copies of each report of the Commission will be circulated to Member Nations and Associate Members of the Organization and international organizations for their information as soon as they become available.

6. Secretariat and expenses

- a) The Secretary of the Commission shall be appointed by the Director-General and shall be administratively responsible to him. The expenses of the Secretariat of the Commission shall be determined and paid by the Organization within the limits of the relevant appropriations in the approved budget of the Organization.
- b) With a view to promoting the development of inland fisheries and aquaculture, the Organization may also establish trust funds comprising voluntary contributions from the Members of the Commission or from private or public sources, and the Commission may advise on the use of such funds which shall be administered by the Director-General in accordance with the Financial Regulations of the Organization.
- c) Expenses incurred by representatives of Members of the Commission, their alternates or advisers, when attending sessions of the Commission or its subsidiary bodies, as well as the expenses of observers at sessions, shall be borne by the respective governments or organizations.

7. Observers

- a) Any Member Nation or Associate Member of the Organization that is not a Member of the Commission but has an interest in the development of inland fishery or aquaculture in the region of Latin America and the Caribbean may, upon prior request, be invited by the Director-General to attend meetings of the Commission or its subsidiary bodies in an observer capacity.
- b) States which, while not Member Nations or Associate Members of the Organization, are Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency may, upon their request, and with the approval of the Council of the Organization, be invited to attend meetings of the Commission or its subsidiary bodies in an observer capacity in accordance with the provisions relating to the granting of observer status to nations adopted by the Conference of the Organization.

8. Participation of international organizations

Participation of international organizations in the work of the Commission and relations between the Commission and such organizations shall be governed by the relevant provisions of the Constitution and the General Rules of the Organization, as well as the rules on relations with international organizations adopted by the Conference or Council of the Organization.

9. Rules of Procedure

The Commission may adopt and amend its own rules of procedure which shall be in conformity with the Constitution and the General Rules of the Organization and with the Statement of Principles Governing Commissions and Committees adopted by the Conference. The rules of procedure and amendments thereto shall come into force upon approval by the Director-General.

APPENDIX II**Tullio Treves**

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LEGAL OPINION REQUESTED BY FAO

I have been requested by FAO to prepare a study on the **Legal implications arising from references to the Code of Conduct for Responsible Fisheries in the revised Statutes of the Commission for Inland Fisheries of Latin America (COPESCAL)** for review by the FAO Committee on Constitutional and Legal Matters at its Ninety-first Session to be held from 20 to 22 September 2010. The following is my opinion, which addresses the points set out in FAO's Terms of Reference for the study.

20122 Milan, via Lusardi n. 2

26 July 2010

1. THE FAO CODE OF CONDUCT FOR RESPONSIBLE FISHERIES, IN LIGHT OF ITS NATURE AND SCOPE AS DEFINED IN ARTICLE 1.

1. The Code of Conduct for Responsible Fisheries [hereinafter: “the Code”] was adopted by the FAO Conference at its 28th session on 31 October 1995 through Resolution 4/95. Throughout the various phases of its preparation (spanning between 1992, when the Cancún Declaration was adopted, and 1995) never was the Code envisaged as a binding instrument. It was seen as a self-contained text of reference to be used in order to help in the application of the existing corpus of international law concerning fisheries. The FAO Committee on Fisheries (COFI) considered the Code as an “instrument which could support the implementation of the 1982 United Nations Convention on the Law of the Sea and UNCED” (FAO, International Fisheries, Instruments with Index, p. 53, para 11).

2. It emerges clearly from the non-mandatory language of the Code that it does not establish, nor does it intend to establish, new rights and obligations for States. All provisions addressed to States use the verb “should”. The Introduction to the Code uses clearly non-binding language in stating that “States and all those involved in fisheries are encouraged to apply the Code and give effect to it” (italics added).

3. Moreover, the legal nature of the Code is addressed in article 1, paragraph 1. This provision states clearly in its first sentence, that the “Code is voluntary”. This expression indicates the non-binding nature of the Code, consistently with the fact that it has been adopted by a resolution and not through the formalities necessary for a treaty.

4. The following two sentences of paragraph 1 concern the relationship between the Code and existing rules of international law whose contents correspond to provisions of the Code. The first states that certain parts of the Code “are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982”. The second adds that: “The Code also contains provisions that may be or have already been given binding effect by means of other obligatory instrument between the parties”. The provision gives as an example the FAO Compliance Agreement of 1993, recalling that this Agreement “according to FAO Conference Resolution 15/93 forms an integral part of the Code”.

5. It would seem that these indications have the purpose of avoiding that the “voluntary” (non-binding) nature of the Code could be interpreted as taking away the binding nature of obligations set out in other existing rules of international law whose contents correspond to those of the Code. These obligations maintain their legal nature of customary or treaty rules in the case of the rules on the law of the sea in general (depending on how far the UNCLOS reflects customary law) or of treaty law in the case of the FAO Compliance Agreement. The apparently odd resolution providing that the Compliance Agreement is part of the Code, takes into account the fact that the Agreement as a treaty can bind only the parties thereto and gives to its PROVISIONS the broad scope of the Code, although without making them binding for the States that are not parties to it.

6. Article 3, entitled to the relationship of the Code with “other international law instruments”, aims at ensuring consistency between the provisions of the Code and other rules and instruments, binding and not binding. Article 3 seems nevertheless imply a hierarchy (as noted by W.R. Edeson, “The Code of Conduct for Responsible Fisheries, An Introduction”, The International Journal of Marine and Coastal Law, vol. 11, 1996, 233-238, at 235). At the top of it there are “the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea, 1982”. Paragraph 1 states the Code “is to be applied in conformity” with these rules, and that nothing in it “prejudices the rights, jurisdiction and duties of States under international law as reflected in the Convention”.

7. Lower in the hierarchy are the instruments mentioned in letters a, b and c of paragraph 2 as regards the interpretation and application of the Code. Such interpretation and application shall be effected: (a) “in a manner consistent with” the Fish Stocks Agreement of 1995; (b) “in accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are parties”; (c) “in light of” the Cancún Declaration, the Rio Declaration on Environment and Development, Agenda 21 “and other relevant declarations and international instruments”. It seems clear that the expression “in light of”, referred to non-binding instruments is weaker than “in a manner consistent with” (repeating article 4, second sentence, of the Straddling stocks Agreement) and “in conformity with”, both expressions being used as regards binding instruments. It is also to be noted that letter b, although inspired by article 31, para 2, letter c, of the 1969 Vienna Convention on the Law of Treaties (“There shall be taken into account, together with the context... (c) any relevant rules of international law applicable in the relations between the parties”) gives more weight to the applicable rules of international law, as “in accordance with” is stronger than take into account. This confirms that binding instruments are given particular importance in interpreting the non-binding Code.

8. In conclusion, the Code neither adds nor subtracts binding effect to or from other rules of international law. It is a non-binding (“soft law”) instrument. Consequently, the “principles” it sets out have, as such, no compulsory effect and their violation does not entail State responsibility.

9. Even not being binding, the Code is not devoid of effects, without which there would have been no reason to adopt it. Among these effects the following seem to deserve particular notice.

10. Firstly, it is an instrument whose negotiation has been open to the FAO States and which has been adopted by consensus by their Conference, after a process in which objections and observations could be made and, when made, were discussed and taken into account. It seems that this entails that behaviour in conformity with the Code may be presumed (unless the contrary is proven) as conforming to the law.

11. Secondly, the convergence of the vast majority of the international community on this text, especially if followed, as it was followed, by conforming practice, can contribute, together with other elements, to the formation of customary rules corresponding to its provisions (unless, of course such correspondence already exists).

12. Thirdly, through the fact mentioned above that the Compliance Agreement is part of it, and that the Fish Stocks Agreement is relevant for its interpretation, the Code has the effect that States not parties to these agreements, while not becoming bound by them, face a heavy burden if they want to argue that behaviour in conformity with these Agreements is not conforming with the law.

13. Fourthly, the rich repository of normative formulations set out in the Code is of great help for the development of international and domestic legal texts. As it consists in negotiated formulations, it can be expected to generate texts that will not meet objections.

14. Fifthly, within FAO the Code can serve as, and has served as, a general reference instrument. Firstly, as a source of principles to which reference can be made without need to repeat them as done in the recent “International Guidelines for the Management of Deep-sea Fisheries in the High Seas” (paras 12.1, and 21). Secondly, as a basis for future developments. As it has been remarked, it “basically consists in an agenda for further action in attaining the sustainable development of fisheries” (E. Hey, “Global Fisheries Regulations in the First Half of the 1990s”, The International Journal of Marine and Coastal Law”, vol. 11, 1996, 459-490, at 482). Examples of the usefulness of this “agenda” function of the Code are the various “technical

guidelines” adopted following the invitation set out in operative paragraph 5 of the FAO Conference’s Res. 4/95. Further evidence of the impact of the Code on FAO activities is the International Plan of Action to Prevent and Eliminate Illegal, Unreported and Unregulated Fishing adopted by consensus by COFI and endorsed by the FAO Council’s 120th session in 2001. The Plan of Action was developed within the framework of the Code (para 4). It adopts fully the rules of the Code concerning its interpretation and application and its relationship with other international instruments (para 5) as well as those concerning transparency in its implementation (para 9.5) and provides for specific reporting in the framework of biennial reports on the Code (para 88).

2. THE REFERENCES TO THE CODE IN THE DRAFT REVISED STATUTES OF THE COMMISSION FOR INLAND FISHERIES OF LATIN AMERICA (COPESCAL)

15. The Draft Revised Statutes of COPESCAL submitted at the 11th meeting of COPESCAL, held in Manaos, Brazil, on 1-4 September 2009 (Informe de la décimo primera reunión de la Comisión de Pesca continental para América Latina, Anexo A) contain three references to the Code.

16. The first is in the opening sentence of article 1, on the purposes of the Commission. According to the proposed text:

“The purpose of the Commission is to promote the management and sustainable development of inland fisheries and aquaculture *in accordance with the principles and rules of the Code of Conduct for responsible fisheries* “(italics supplied)

17. The second is in the final sentence of the same article 1:

“Interpretation and application of these statutory provisions shall take place in accordance with the principles and rules of the Code of Conduct for Responsible Fisheries and its related instruments” (italics supplied).

18. The third is in paragraph “d” of article 3 which concerns the functions of the Commission. The function set out in paragraph “h” is:

“to promote the implementation of good management practices and sustainable technologies in inland fisheries and aquaculture, in accordance with the FAO Code of Conduct for Responsible Fisheries” (italics supplied).

19. It may be observed that when the COPESCAL was originally established in 1976 (70th session of the FAO Council, resolution 4/70) no general instruments to which reference could be made were in existence. The situation is obviously different in 2010. The reason why it was considered appropriate to add references only to the Code and not to other instruments, as done for instance in the Plan of Action against IUU Fishing, would seem to be that among general instruments only the Code encompasses in its scope inland fisheries and aquaculture, which are the matters with which COPESCAL deals. Aquaculture is mentioned explicitly in article 1.3 and in detail in article 9. Inland fisheries, although the expression is not used, are included in the reference to “all fisheries” in art. 1.3, in the many provisions that do not give an indication concerning where fisheries are located and by implication in article 10, concerning integration of fisheries into coastal area management.

20. The 11th Meeting of COPESCAL adopted unanimously the proposed Draft Revised Statutes (Informe quoted above, para 28).

21. However, when the Draft Revised Statutes were submitted to the FAO Committee on Constitutional and Legal Matters (CCLM) at its 139th Session held in Rome on 28-29 April 2010, their consideration was deferred. Paragraph 27 of the Report (CL/139/6) gives the following indications as to the background:

“The CCLM endorsed the proposed change in the name of the Commission. However, following a debate arising out of the references to the Code of Conduct on Responsible Fisheries in the revised Statutes, the CCLM concurred with a proposal that the secretariat should prepare a study on the legal implications of these references for its session on September 2010. Meanwhile, the CCLM decided to defer consideration of the revised Statutes”.

22. Even in their brevity, these indications are sufficient to clarify that the concerns raised in the debate at the CCLM have as their object the “legal implications” of the references to the Code that are contained in the Draft Revised Statutes of COPESCAL.

23. It is on these legal implications that I will develop the considerations that follow, as requested by FAO.

3. REFERENCES BETWEEN INTERNATIONAL LEGAL INSTRUMENTS

24. It is a normal occurrence that international instruments refer to other international instruments. We have seen above that the Code itself makes references to other instruments, such as UNCLOS, the Compliance Agreement, the Fish Stocks Agreement, the Cancún Declaration.

25. In order to determine the legal effects of such references, it seems necessary to consider, first, the precise purpose of the reference; and second, the legal status of the referred instrument or provision as a consequence of the reference made to it.

26. A) References can have different purposes and are effected using different formulations.

27. In some cases the purpose of the reference is to incorporate the provisions of the instrument referred to into the instrument that makes the reference. This seems to be the case as regards the reference made in article 1.1 of the Code (through mention of FAO Conference Resolution 15/93) to the FAO Compliance Agreement, which is said to be “an integral part” of the Code.

28. In other cases the referring provision makes applicable, for certain purposes indicated in the instrument that contains the provision, the provisions of some other instrument. This seems to be the case of article 10© of the Fish Stocks Agreement, according to which, in fulfilling their duty of cooperation through subregional, regional and global fisheries management organizations or arrangements, “States shall ... adopt and apply any generally recommended minimum standards for the responsible conduct of fishing operations”.

29. In still other cases the reference to another instrument serves for the purpose of using the rules set out in that other instrument as a criterion on the basis of which certain functions within the scope of the referring instrument are to be performed. This is the case of the various references to other instruments for the purpose of the interpretation and application of the Code set out, as seen according to a hierarchical scale of importance, in article 3 of the Code. It is also the case of paragraph 2b of the Convention for the Sustainable Management of Lake Tanganyika (Dar es Salaam, 12 June 2003, <http://faolex.fao.org/docs/texts/mul45450.doc>) stating that the Parties to the Convention acting separately or jointly shall: “ develop harmonized national fisheries policies based on the relevant principles set out in the Code of Conduct for Responsible Fisheries adopted by the Conference of the Food and Agriculture Organization of the United Nations”. A similar kind of reference is that set out in certain provisions of UNCLOS, such as

article 94, paragraph 5, according to which measures to be taken by flag States must conform to “generally accepted international regulations, procedures and standards”; and as article 210, paragraph 6, providing that national laws regulations and measures to prevent, reduce and control dumping “shall be no less effective...than the global rules and standards”.

30. B) As regards the legal status of the instruments or provisions referred to as a consequence of the reference made to them, the basic criterion to be followed is that while a reference made by a binding instrument to another instrument may, at least in some cases, entail that the rules referred to even when they are not binding or when non-binding for the relevant parties, partake of the binding status of the referring instrument, the opposite cannot happen. References by non-binding instruments to other instruments, binding or not, do not change the legal nature of the instrument or provision referred to. In particular, a reference to a binding instrument or provision, while not taking away the binding nature of that instrument on its own right (in the case of treaties, for the parties thereto) does not make that instrument binding for those states that are not already bound by it.

31. So, on the one hand, it can be argued that the Code, as an instrument setting out “generally recommended international minimum standards for the responsible conduct of fishing operations” becomes binding for States in fulfilling their obligation to cooperate under article 10© of the Fish Stocks Agreement (see J. Friedrich, “Legal Challenges of Non-binding Instruments: the Case of the FAO Code of Conduct for Responsible Fisheries”, in von Bogdandy et al (eds), *The Exercise of Public Authority in International Institutions*, Springer, Heidelberg etc, 2010, 511-540 at 530). On the other hand, for example, the provisions of the FAO Compliance Agreement do not become binding for States that are not parties to it because of their incorporation in the Code. The difference depends on that in the first case the referring provision is part of a binding instrument, while in the second it is not.

32. The above observations, based on general international law, seem relevant in order to assess the legal effects of the references to the Code set out in the Draft Revised Statutes of COPESCAL.

4. THE LEGAL NATURE OF COPESCAL AND OF ITS STATUTES

33. COPESCAL was established in 1976 by the FAO Council under article VI of the FAO Constitution. A procedure based on the same principle applies to the revision of the COPESCAL Statutes. Paragraph 34 of the “Principles and procedures which should govern conventions and agreements concluded under articles XIV and XV of the Constitution, and commissions and committees established under article VI of the Constitution” (section R of the Basic Texts of the Food and Agriculture Organizations of the United Nations, <http://www.fao.org/docrep/003/x8700e/x8700e18.htm>,) specifies that “Bodies established under Article VI may suggest amendments to the basic resolution by which they were set up and which determined their terms of reference. Any proposals for such amendments must be transmitted to the Director-General in time for inclusion in the agenda of the Council or Conference as appropriate”.

34. Article VI of the FAO Constitution states that Commissions to be established under the authority provided therein are intended “to advise on the formulation and implementation of policy and to coordinate the implementation of policy”. This clarifies that the nature of such commissions, including COPESCAL, is advisory and may also include coordination activities. COPESCAL’s functions do not include the adoption of binding rules.

35. The legal nature of the provisions of the Statutes of Commissions established under article VI of the FAO Constitution emerges even more clearly if one considers that commissions and other institutions can be established also by multilateral agreements among member States of

FAO under article XIV of the Constitution. The “Basic Considerations” which appear at the beginning of the “Principles and procedures” quoted above state that:

“...any multilateral agreement between member Governments may undoubtedly provide for the establishment of a Commission or an executive body, but this should not be an end in itself since under Article VI the Conference and the Council are empowered to establish such bodies merely by a decision on their part. Consequently, the setting up of a commission or a committee by a multilateral agreement is justified only when such agreement presupposes the assumption of specific obligations going beyond mere participation to the work of the body thus established” (paragraph 6).

36. As the procedure of article XIV is to be followed when Member governments wish to assume “financial or other obligations going beyond those already assumed under the Constitution of the organization” (para 5), it seems clear that the procedure of article VI does not and cannot entail new obligations for member States.

37. In considering the question of the amendment of its Statutes, COPESCAL was well aware of the difference between proceeding within the framework of article XIV and of Article VI. The report of its 11th meeting in 2009 quoted above states at paragraph 27:

“La Comisión aceptó la conclusión del Grupo de Trabajo acerca de que no sería conveniente por ahora modificar el marco de la COPESCAL para que esta pasara a ser regida por el Artículo XIV de la Constitución de la FAO, por cuanto se consideró que actualmente no había condiciones para recomendar tal modificación” [“The Commission accepted the conclusion of the Working Group that it was not convenient for the time being to modify the framework of COPESCAL in order to have it based on Article XIV of the FAO Constitution as it was considered that at present the conditions for recommending such modification were not satisfied” (transl. of the present author)].

38. In light of the considerations set out in the present and in the preceding paragraphs, it seems clear that the Statutes of COPESCAL, in their original as well as in their amended form, cannot, under the FAO Constitution as well as under general international law, entail legal obligations exceeding those already assumed under the FAO Constitution.

5. THE LEGAL IMPLICATIONS OF THE REFERENCES TO THE CODE IN THE REVISED STATUTES OF COPESCAL

39. The conclusions reached above apply to the legal consequences of the references made to the Code in the Revised Statutes of COPESCAL.

40. As these references are contained in a non-binding international instrument, they cannot give binding force to whatever instrument they refer to. This is particularly true as regards references to the Code because this instrument is not binding. A reference made in a non-binding instrument to another non-binding instrument cannot make the latter binding.

41. In accepting the Revised Statute, States do not accept any new international law obligation. This is the consequence not only of the logic of general international law, but also of the fact that such acceptance has been made within the framework of Article VI, and not of Article XIV, of the FAO Constitution. It applies to all provisions of the revised Statutes including those in which references to the Code are made as well as to the provisions of the Code referred to.

42. These conclusions are confirmed and made more precise by some considerations based on the examination of the Revised Statutes and of its references to the Code.

43. It seems interesting, at the outset, to consider why the proposed revisions to the Statutes contain references only to the Code, and not to other international instruments, binding or not. One part of the answer has already been given. Ratione materiae the Code is the only general instrument covering inland fisheries and aquaculture. It may be added that through references to the Code, indirectly references are made to the instruments the Code refers to. This does not modify the status these instruments have on their own right, but has the advantage of linking the Revised Statutes to the broader context of the Code.

44. Considering now the three proposed references to the Code in the Revised Statutes, the first observation they raise is that they appear in an article on the “purposes” of COPESCAL and in an article on its “functions”. COPESCAL, in light of its Statutes and practice, is a framework for cooperation strengthened by an institutional structure whose main organ is the Secretary, who depends administratively from the FAO Director-General and whose expenses are borne by FAO (art. 5 of the Revised Statutes).

45. The rules set out in the Revised Statutes are formally directed to the Commission. They serve as guidance to the Secretary of the Commission and its staff, and because of their participation in the Commission also to States in their cooperation for the purposes set out in the Statutes. Functions of the Commission are “to support”, “to promote”, “to foster”, “to identity”, “to collaborate”, “to contribute”, “to assist”, “to help”. Even if these functions were set out in a binding instrument, they would not add to obligations already existing because of participation to FAO.

46. References to the Code, although not adding new legal obligations, may serve some useful purpose within a system of non-binding, soft-law, rules. In this light, to add to the stated general purpose of COPESCAL of promoting “the management and sustainable development of inland fisheries and aquaculture” that this is to be done “in accordance with the principles and rules of the Code of Conduct for Responsible Fisheries”, introduces some precision and creates a connection with the context of the non-binding instrument of the broadest scope that FAO has adopted. Similarly, the fact that the interpretation and application of the statutory provisions shall take place in accordance with the Code makes it explicit that the vast reservoir of provisions of the Code can be used in order to determine the meaning of terms used in the much briefer provisions of the Statutes of COPESCAL.

47. It may be wondered whether the provision concerning interpretation in accordance with the Code is necessary. The international law of interpretation of non-binding instruments is not developed in detail. However, since interpreting these instruments has to do with determining the meaning of texts that have been negotiated between States, the rules on treaty interpretation may be used by analogy (A. Aust, *Modern Treaty Law and Practice*, Cambridge, 2000, 39). In particular, article 31, para 2 c, of the Vienna Convention on the Law of Treaties seems relevant in the present context. According to this provision, in interpreting a treaty “there shall be taken into account, together with the context ...any relevant rules of international law applicable in the relations between the parties”. To transpose this rule to the interpretation of a soft law instrument would seem to entail that in such interpretation “shall be taken into account” other instruments including soft-law instruments, applicable in the relationships between the parties. This could be the case of the Code as regards the COPESCAL whose members are member States of FAO, as are the States that have adopted the Code in the FAO Conference. Adopting this point of view, the added value of the reference to the Code for the purpose of interpretation and application would be limited to the difference between interpreting the Revised Statutes “taking into account” the Code on the basis of article 31,2c, of the Vienna Convention and interpreting them “in accordance with” the Code under art. 1 of the Revised Statutes of COPESCAL. It may be argued that to

interpret “taking into account” a text is weaker than to interpret it “in accordance with” such text, but it must be admitted that the difference is slight.

48. As regards the reference in article 3(h) of the Revised Statutes according to which the function of promoting “the implementation of good management practices and sustainable technologies in inland fisheries and aquaculture” must be “in accordance” with the Code, some doubts may be expressed. This reference does not seem to introduce any added value to what is already set out in the reference in article 1, concerning the general purpose of COPESCAL to “promote the management and sustainable development of inland fisheries and aquaculture”. Moreover, probably undesirable negative implications might be drawn from the fact that a reference to the Code is proposed in letter “h” of article 3, and not in other provisions of the same article listing functions of the Commission, where such reference could make as much sense as in “h”. For instance, is there a consequence to be drawn from the fact that letter “i” of article 3, concerning the promotion of “good post-catch and post- harvest practices and good marketing practices” does not contain a reference to the Code in light of the detailed provisions of the latter’s article 11?

49. In conclusion: the references to the Code set out in article 1 the Revised Statutes of COPESCAL do not confer binding effect to the Code or to any rule thereof ; they clarify, however, the definition of the purposes and facilitate the interpretation of the Revised Statutes as a non-binding soft-law instrument. The reference in Art. 3(h) is not necessary and may be counter-productive.

6. THE IMPACT OF THE REVIEW UPON OTHER FAO FISHERIES ADVISORY BODIES AND UPON THE CODE AS A GENERAL REFERENCE INSTRUMENT FOR THE WORK OF FAO IN FISHERIES

50. The proposed revision to the Statutes of COPESCAL seems to be a routine up-dating of an old document, the original COPESCAL Statutes, dating from 1976. It is consistent with recent action taken by the FAO Council in adopting, by resolution 1/131 of November 2006, the amendments to the 1973 Statutes of the Western Central Atlantic Fisheries Commission (WECAFC) and, by resolution 1/127 of 24 November 2004, the Statutes of the South Western Indian Ocean Fisheries Commission (SWIOFC). The FAO Council established both these Commissions, as COPESCAL, under Article VI of the FAO Constitution. Those quoted are, to my knowledge, the most recent decisions concerning Statutes of Article VI Fisheries Commissions, and both contain references to the Code.

51. The Statutes of SWIOFC provide in Article 5, entitled “General principles” that:

“The Commission shall have due regard for and promote the application of the provisions of the FAO Code of Conduct for Responsible Fisheries, including the precautionary approach and the ecosystem approach to fisheries management”.

52. The Statutes of WECAFC, as amended in 2006, contain four references to the Code. The first is in Art. 1, on “General Objective of the Commission”. According to this provision, the Commission:

“shall promote the effective conservation, management and development of the living marine resources or the area of competence of the Commission in accordance with the FAO Code of Conduct on Responsible Fisheries...”

53. The second is in Article 2, on “General Principles”. According to paragraph 2 thereof:

“The Commission shall have due regard for and promote the application of the provisions of the FAO Code of Conduct for Responsible Fisheries and its related instruments, including the precautionary approach and the ecosystem approach to fisheries management”

(repeating article 5 of the SWIOFC Statutes with the added mention of “related instruments”).

54. The third and fourth references are in article 6, listing among the “Functions of the Commission”, under “b”:

“to assist its members in implementing relevant international fisheries instruments, in particular the FAO Code of Conduct for Responsible Fisheries and its related International Plan of Action” and, under “k”:

“to promote and encourage the utilization of the most appropriate fishing craft, gear, fishing techniques and post harvesting technologies in accordance with the FAO Code of Conduct for Responsible Fisheries”.

55. A perusal of these provisions shows that there is a pattern of including references to the Code in the Statutes of Article VI regional fisheries commissions. It also shows that this pattern is not completely uniform: while article 5 of SWIOFC, as seen, almost coincides with article 2 of WECAFC, the references in articles 1 and 6 of the latter Statutes are not included in the former. The proposed changes to the COPESCAL Statutes are consistent with this pattern not only in that they make references to the Code, but also in that these references do not coincide with those adopted in the SWIOFC and in WECAFC Statutes. More specifically, the reference in the first sentence of paragraph 1 is similar, although not identical, to those in article 5 of SWIOFC and of article 2, Paragraph 2, of WECAFC, while the other references do not coincide with those in WECAFC.

56. In light of the above indicated pattern, the most notable, and negative, impact the review of the COPESCAL Statutes could have would happen in case such review would result in omitting references to the Code. This impact would concern other Fisheries Advisory Bodies as well as the status of the Code as an instrument of general reference.

57. The omission of references to the Code in the COPESCAL Revised Statutes would interrupt the pattern and make it more difficult in the future for Fisheries Advisory bodies in the process of being established, or whose Statutes are submitted to amendment, to introduce such references. The omission of these references would make the COPESCAL and other advisory bodies conceptually poorer and lacking a uniform set of reference.

58. As regards the status of the Code within FAO, the omission of references to it in the most recent decision concerning a Statute of an Advisory Body under Article VI would be detrimental. Admittedly, it would not take away the Code’s position as a general text of reference in all matters concerning fisheries. The network of instruments adopted on the basis of it and of references in a variety of binding and non-binding instruments is too strong. The omission of references, notwithstanding the fact that they have been proposed, could nevertheless be invoked as an argument in order to lessen the authority of the Code as guidance for FAO activity and as an element relevant for upholding the emergence of customary rules.

59. While omission of references to the Code would have a negative impact, it does not seem essential, as regards the consequences for other Advisory Fisheries Bodies and for the status of the Code as a general reference instrument, that the proposed references set out in the

COPESCAL Revised Statutes be maintained as they are. A comparison with the references in SWIOFC and in WECAFC shows that other references are possible.

7. RECOMMENDATIONS

60. The first priority should be that the Revised Statutes of COPESCAL contain a reference or references to the Code that would not be read as a step backwards from those in SWIOFC and WECAFC.

61. As regards the contents of such reference or references, the purpose to be pursued should be, in my view, to adopt a formulation that, seen together with those in article 5 of SWIOFC and of article 2, Paragraph 2, of WECAFC, could be read as part of a consistent pattern. Consequently, while the formulation presently set out in the first sentence of article 1 of the Revised COPESCAL Statutes could be adequate, it would nevertheless be preferable that it followed more closely those in the above quoted provisions of SWIOFC or of WECAFC. This would ensure a fuller pattern of uniformity and give due visibility to the precautionary approach that (contrary to the ecosystem approach) is not explicitly mentioned in the COPESCAL Statutes.

62. As regards the other two proposed references:

- a) The reference in paragraph 3 (h) could be advantageously omitted, as argued above.
- b) The reference concerning interpretation and application in the last sentence of article 1, could be maintained in order to make a step forward in giving relevance to the Code. As explained above, its legal added value seems, however, at best minimal.

63. As regards the references set out in article 6(b) and (k) of the WECAFC, they could be omitted in the COPESCAL Statutes for the reasons given for not maintaining the reference in article 3(h) of the Revised COPESCAL Statutes. To include them might – however – be seen as part of a trend to develop references to the Code.

(Tullio Treves)

Milan, 26 July 2010