

THE USE OF DRIFNETS IN THE ACCOBAMS AREA
A REVIEW OF RELEVANT TREATIES AND NATIONAL LEGISLATION



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1. Terms of Reference

On 2 March 2021, the Executive Secretary of the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; ACCOBAMS)¹ sent a letter to the National Focal Points, informing them that cases of cetacean entanglements occurred in 2020 in the Mediterranean due to illegal driftnets and that the ACCOBAMS Scientific Committee pointed out the increasing concern amongst cetacean experts on the persistent use of illegal driftnets in the ACCOBAMS area and their adverse impact on cetaceans². The Executive Secretary asked the Focal Points to provide information on the legal tools and measures applied in their respective countries to enforce the ACCOBAMS provisions on the driftnets ban.

Under the terms of reference, the consultants are requested to prepare a report on:

- the different international treaties related to the use of driftnets in force in the area of application of the ACCOBAMS);
- the replies received from the ACCOBAMS National Focal Points regarding the legal tools and measures applied in their country to enforce the ACCOBAMS provisions on the driftnets ban.

Replies have been received from the Focal Points of sixteen States Parties (Bulgaria, Croatia, Cyprus, France, Georgia, Italy, Malta, Montenegro, Monaco, Morocco, Portugal, Spain, Syria, Tunisia, Türkiye and Ukraine)³.

2. The Prohibition of Driftnets on the World Basis

A number of international instruments adopted at the world level restrict or prohibit the use of driftnets, either explicitly or implicitly. In the case of treaties, they are binding on those ACCOBAMS Parties that have decided to become parties to them.

2.A. The Resolutions of the United Nations General Assembly

The resolutions of the United Nations General Assembly do not have *per se* a binding character. However, if confirmed in States' practice, they can reflect rules of customary international law.

As recalled in United Nations General Assembly Resolution 44/225 of 22 December 1989, fishing with large-scale pelagic driftnets is

“a method of fishing with a net or combination of nets intended to be held in a more or less vertical position by floats and weights, the purpose of which is to enmesh fish by drifting on the surface or in the water”⁴.

This method of fishing, used to catch some highly migratory species of high commercial value, such as tuna and swordfish, is considered highly indiscriminate and wasteful. As recalled in Resolution 44/225,

¹ Twenty-four States are parties to it, namely Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Georgia, Greece, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Syria, Tunisia, Türkiye and Ukraine.

² On present threats for cetaceans in the ACCOBAMS area see NOTARBARTOLO DI SCIARA & TONAY, *Conserving Whales, Dolphins and Porpoises in the Mediterranean Sea, Black Sea and Adjacent Areas*, Monaco, 2021, p. 97.

³ The consultants thank the ACCOBAMS Focal Points who have provided information on the legislation of their countries.

⁴ Preamble. On driftnet fishing see SAVINI, *La réglementation de la pêche en haute mer par l'Assemblée Générale des Nations Unies – A propos de la résolution 44/225 sur les grands filets maillants dérivants*, in *Annuaire Français de Droit International*, 1990, p. 777; SCOVAZZI, *La pesca con reti derivanti nel Mediterraneo*, in *Rivista Giuridica dell'Ambiente*, 1992, p. 523.

“in addition to targeted species of fish, non targeted fish, marine mammals, sea birds and other living marine resources of the oceans and seas can become entangled in large-scale pelagic driftnets, either in those in active use or in those that are lost or discarded, and as a result of such entanglement are often either injured or killed”⁵.

The General Assembly, by Resolution 44/225, affirmed that all States have a duty to co-operate globally and regionally in the conservation and management of living resources on the high seas and a duty to take, or to co-operate with others in taking, such measures for their nationals as may be necessary for the conservation of such resources. It also recommended that all States agree on a moratorium on all large-scale pelagic driftnet fishing by 30 June 1992⁶.

The General Assembly reaffirmed its recommendation by Resolution 45/197 of 21 December 1990, which, *inter alia*, emphasized the impact of large-scale pelagic driftnets also in enclosed or semi-enclosed seas, including the Mediterranean, and by Resolution 46/215 of 20 December 1991, which noted that “the grounds for concerns expressed (...) about the unacceptable impact of of large-scale pelagic driftnet fishing have been confirmed and that evidence has not demonstrated that the impact can be fully prevented”. According to Resolution 46/215, the General Assembly

“Calls upon all members of the international community to implement resolutions 44/225 and 45/197 by, *inter alia*, taking the following actions: (...)

(c) ensure that a global moratorium on all large scale pelagic drift-net fishing is fully implement on the high seas of the world’s oceans and seas, including encloed seas and semi-enclosed seas, by 31 December 1992”⁷.

The moratorium on driftnets has been subsequently reaffirmed several times. For instance, under Resolution 51/36, adopted on 21 January 1997, the General Assembly noted that a growing number of States and other entities, as well as relevant regional and subregional fisheries management organizations and arrangements, had adopted legislation, established regulations or applied other measures to ensure compliance with resolution 46/215 and urged States that had not done so to ensure full compliance with that resolution and to impose appropriate sanctions against acts contrary to its terms⁸.

Sadly, in the last resolution on sustainable fisheries (Resolution 76/71 of 9 December 2021), the General Assembly, while recognizing efforts to implement the moratorium, expresses its concern for the persistent practice of large-scale pelagic driftnet fishing:

“Recognizing the efforts of States, individually and through regional fisheries management organizations and arrangements, to implement its resolution 46/215 of 20 December 1991, in which the General Assembly called for a global moratorium on all large-scale pelagic drift-net fishing, including collaborative fisheries enforcement activities, (...)

Expresses concern that, despite the adoption of General Assembly resolution 46/215, the practice of large-scale pelagic drift-net fishing still exists and remains a threat to living marine resources;

Urges States, individually and through regional fisheries management organizations and arrangements, to adopt effective measures, or strengthen existing measures, to implement and enforce the provisions of resolution 46/215 and subsequent resolutions on large-scale pelagic drift-net fishing in order to

⁵ Preamble.

⁶ Para. 4, *a*.

⁷ Para. 3.

⁸ The Resolution takes note of the report by the United Nations Secretary-General, *Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World’s Oceans and Seas*, doc. A/51/404 of 25 September 1996.

eliminate the use of large-scale pelagic drift-nets in all seas and oceans, which means that efforts to implement resolution 46/215 should not result in the transfer to other parts of the world of drift-nets that contravene the resolution;

Also urges States, individually and through regional fisheries management organizations and arrangements, to adopt effective measures, or strengthen existing measures, to implement and enforce the present global moratorium on the use of large-scale pelagic drift-nets on the high seas, and calls upon States to ensure that vessels flying their flag that are duly authorized to use large-scale drift-nets in waters under their national jurisdiction do not use such gear for fishing while on the high seas”⁹.

The objectives of General Assembly’s resolutions on driftnets are reflected in a number of regional treaties relating to specific marine areas and in several national enactments.

For example, according to the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington, 1989), the parties undertake to prohibit their nationals and vessels from engaging in driftnet fishing activities within the convention area. In particular,

“1. Each Party undertakes:

(a) not to assist or encourage the use of driftnets within the Convention Area; and

(b) to take measures consistent with international law to restrict driftnet fishing activities within the Convention Area, including but not limited to:

(i) prohibiting the use of driftnets within areas under its fisheries jurisdiction; and

(ii) prohibiting the transshipment of driftnet catches within areas under its jurisdiction.

2. Each Party may also take measures consistent with international law to:

(a) prohibit the landing of driftnet catches within its territory;

(b) prohibit the processing of driftnet catches in facilities under its jurisdiction;

(c) prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet;

(d) restrict port access and port servicing facilities for driftnet fishing vessels; and

(e) prohibit the possession of driftnets on board any fishing vessel within areas under its fisheries jurisdiction.

3. Nothing in this Convention shall prevent a Party from taking measures against driftnet fishing activities which are stricter than those required by the Convention”¹⁰.

As regards national legislation, a particular instance is the *High Seas Driftnet Fisheries Act* (United States Public Law 102-582 of 2 November 1992). It aims at affirming the policy of the United States to, *inter alia*, “secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation”. The act entitles the United States Secretary of Commerce to “identify each nation whose nationals or vessels are conducting large-scale fishing beyond the exclusive economic zone of any nation” and, if bilateral consultations on termination of such fishing are unsuccessful, enables the President of the United States to direct the

⁹ Preamble and paras. from 132 to 134.

¹⁰ Art. 3. According to the Convention, driftnet “means a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface of or in the water” (Art. 1).

Secretary of the Treasury to prohibit the importation into the United States of fish and fish products from the identified State¹¹.

2.B. The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS) is a treaty in force today for 167 States and the European Union, including 21 States parties to the ACCOBAMS¹².

The UNCLOS does not address explicitly the use of driftnets¹³. However, it provides in general that

“all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”¹⁴.

In the case of the exclusive economic zone, the UNCLOS grants to the coastal State the right to adopt conservation measures, including those regulating the type of gear¹⁵.

Notably, the UNCLOS includes two specific provisions on marine mammals, applying in the exclusive economic zone, the first, and on the high seas, the second:

“Nothing in this Part [= Part V – Exclusive economic zone] restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study”¹⁶.

“Article 65 also applies to the conservation and management of marine mammals in the high seas”¹⁷.

The two provisions can be understood as enabling UNCLOS States parties to adopt measures ensuring the strict protection of marine mammals, including the prohibition of using fishing gear that can be harmful for them, such as driftnets.

2.C. The Fish Stocks Agreement

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 (New York, 1995; so-called Fish Stocks Agreement) is binding on 90 States and the European Union, including 15 ACCOBAMS States parties¹⁸.

The Fish Stocks Agreement provides, *inter alia*, that

“In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention: (...)”

¹¹ On the consultations held in 1996 between the United States and Italy, due to cases of driftnet fishing in the Mediterranean Sea by vessels flying the Italian flag, see SCOVAZZI, *The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing*, in *Max Planck Yearbook of United Nations Law*, 1998, p. 377.

¹² Namely Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Georgia, Greece, Italy, Lebanon, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Tunisia and Ukraine.

¹³ In fact, the UNCLOS predates the United Nations General Assembly resolutions on driftnets (*supra*, para. 2.A).

¹⁴ Art. 117.

¹⁵ Art. 62, para. 4, c.

¹⁶ Art. 65.

¹⁷ Art. 120.

¹⁸ Namely Bulgaria, Croatia, Cyprus, France, Greece, Italy, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Syria and Ukraine.

(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (...) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques”.

It is easy to infer that the obligation to minimize catch of non-target species implies a prohibition of the use of large-scale driftnets in which cetaceans can become entangled.

The Fish Stock Agreement also provides that

“Measures to be taken by a State in respect of vessels flying its flag shall include: (...)

(b) establishment of regulations: (...)

iv) to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States”¹⁹.

2.D. The FAO Compliance Agreement

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 1993; so-called FAO Compliance Agreement²⁰) is today binding on 44 States and the European Union, including 6 ACCOBAMS States parties²¹.

The preamble of the Agreement recalls that “the failure of flag States to fulfil their responsibility with respect to fishing vessels entitled to fly their flag”, as well as “the practice of flagging or reflagging vessels as a means of avoiding compliance with international conservation and management measures for living marine resources”, “are among the factors that seriously undermine the effectiveness of such measures”. The parties are under the basic obligation to comply with the principle of flag State responsibility and, consequently,

“each Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures”²².

The specific obligations set forth in the FAO Compliance Agreement give a content to the principle of flag State responsibility. For example, parties must not authorize to be used for fishing on the high seas any fishing vessel previously registered in the territory of another party that has undermined the effectiveness of conservation and management measures²³. Parties are under an obligation to apply such sanctions of sufficient gravity as to be effective in securing compliance with the requirements of the Agreement²⁴. Other provisions deal with compulsory authorizations for fishing vessels, records of fishing vessels and transmission of information to the FAO for subsequent circulation to all parties.

The FAO Compliance Agreement is a sign of a new way to understand the regime of fisheries. All States retain their traditional right to grant their flag to fishing vessels. But this right is made conditional to the obligation to exercise flag State responsibility: to allow vessels flying the national flag to undermine the effectiveness of international conservation and management measures is to be considered as a breach of an

¹⁹ Art. 18, para. 3.

²⁰ The Agreement was negotiated and adopted within the framework of the Food and Agriculture Organization of the United Nations (FAO).

²¹ Namely Albania, Cyprus, Egypt, Georgia, Morocco and Syria.

²² Art. III, para. 1, *a*.

²³ Art. III, para. 5.

²⁴ Art. III, para. 8.

international obligation. The general principle of flag State responsibility obviously applies also to compliance with measures adopted to limit or prohibit non-selective fishing gear, such as driftnets.

3. The Prohibition of Driftnets on the Regional Basis in the ACCOBAMS Area

The use of driftnets is limited or prohibited on the regional level as well, in particular in the area where the ACCOBAMS is applicable. A number of treaties relating to fisheries or protection of the environment is relevant in this regard.

3.A. The GFCM Agreement

22 States and the European Union, including 21 States parties to ACCOBAMS²⁵, are parties to the Agreement establishing the General Fisheries Commission for the Mediterranean (Rome, 1949; GFCM²⁶).

The area covered by the GFCM Agreement includes both the high seas and marine waters under national sovereignty or jurisdiction in the Mediterranean and the Black Seas (“all marine waters of the Mediterranean Sea and the Black Sea”²⁷). The objective of the GFCM Agreement is to ensure the conservation and sustainable use, at biological, social, economic and environmental level, of living marine resources.

The GFCM can formulate and recommend appropriate measures for various purposes, such as to minimize impacts for fishing activities on living marine resources and their ecosystems, to establish fisheries restricted areas for the protection of vulnerable marine ecosystems, to prevent, deter and eliminate illegal, unreported and unregulated fishing (so-called IUU fishing) and to resolve situations of non-compliance²⁸. The recommendations referred to in Art. 8, *b*, are adopted by a two-thirds majority of parties present and voting²⁹ and have a binding character. Parties are under an obligation to give effect to such recommendations³⁰, transposing them into national laws, regulations or appropriate legal instruments, unless they cast an objection to them within 120 days from the date of notification³¹.

In 1997, the GFCM adopted Recommendation 22/1997/1 on the limitation of the use of driftnets. Basing itself on the above-mentioned United Nations General Assembly 44/225 and considering that “uncontrolled expansion and growth of driftnetting may entail serious disadvantages in terms of increased fishing effort and increased by-catches of species other than the target species”, the GFCM decided as follows:

- “1. No vessel flying the flag of a Contracting Party of GFCM may keep on board, or use for fishing, one or more driftnets whose individual or total length is more than 2.5 kilometres;
2. Throughout the fishing referred to in paragraph 1, the net must, if it is longer than one kilometre, remain attached to the vessel. However, within the 12 mile coastal band, a vessel may detach itself from the net, provided it keeps it under constant observation”.

More generally, in 2012, the GFCM adopted Recommendation 36/2012/2 on mitigation of incidental catches of cetaceans in the GFCM area. The GFCM noted that “the incidental catch of cetacean species in

²⁵ Namely Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Greece, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Romania, Slovenia, Spain, Syria, Tunisia and Türkiye. Ukraine is a cooperating non-party State.

²⁶ The Agreement was negotiated and adopted within the FAO framework.

²⁷ Art. 3, para. 1.

²⁸ Art. 8, *b*.

²⁹ See Art. 13, para. 1.

³⁰ Art. 14, para. 1.

³¹ Art. 13, para. 3.

relation with fishing activities may seriously affect cetacean populations in the GFCM Area” and recognized that “some fishing operations carried out in the GFCM Area, including the risk of unaccounted catches of cetaceans due to the loss of these gears at sea (so called “ghost fishing”), can adversely affect cetaceans”. It consequently decided that

“1. Contracting Parties and Cooperating non-contracting Parties of the GFCM (hereafter referred to as CPCs) shall take actions to study, monitor, prevent, mitigate and, to the extent possible, eliminate incidental taking of cetaceans during fishing operations.

2. For the purpose of mitigating the by-catch of cetaceans during fishing operations, the CPCs shall:
a) prohibit, not later than 1st January 2015, gillnet fisheries using monofilament greater than 0.5 mm; b) require vessels flying their flag to promptly release alive / unharmed to the extent practicable cetaceans that have been incidentally caught and brought alongside the vessel”.

The problem of incidental catches persists³². Consequently, in 2019 the GFCM adopted Resolution 43/2019/2 on enhancing the conservation of cetaceans in the GFCM area of application. In 2021, the GFCM invited the parties to take the necessary steps to implement existing legislation and mitigation measures to eliminate incidental catch of cetaceans during fishing operations (Recommendation 44/2021/15 on the mitigation of fisheries impacts for the conservation of cetaceans).

3.B. The ICCAT Agreement

51 States and the European Union, including five ACCOBAMS parties³³, are parties to the International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 1966) that established the International Commission for the Conservation of Atlantic Tunas (ICCAT).

ICCAT is responsible for fisheries of tuna and tuna-like fishes in the Convention Area, which includes the whole of the Atlantic, as well as the Mediterranean and Black Seas, as connected seas³⁴.

In 1996, ICCAT adopted Resolution 96-15 on large-scale pelagic driftnets. It is largely based on the relevant United Nations General Assembly resolutions. In particular, ICCAT

“reiterates its serious concern about the potential negative impacts that large-scale pelagic driftnet fishing can have on the marine resources of the Atlantic Ocean and Mediterranean Sea, and its intention to carefully monitor the repercussions of this fishing on these stocks; (...)

appeals to all its Contracting Parties to apply these Resolutions [= General Assembly Resolutions 44/225, 45/197 and 46/215], in their entirety (...);

appeals to all its Contracting Parties to commit themselves immediately as concerns their application, assuring that their nationals and their fishing vessels comply with Resolution 46/215, to provide all the necessary data relative to these fisheries in order that the scientists can study the effects of the utilization of these gears, and imposing adequate sanctions on their nationals and on their fishing vessels that act contrary to the terms of Resolution 46/215”.

In 2003, ICCAT adopted Recommendation 03/04, relating to Mediterranean swordfish. In order to protect small swordfish, ICCAT asked “Contracting Parties, Cooperating non-Contracting Parties, Entities or Fishing Entities” to prohibit “the use of driftnets for fisheries of large pelagics in the Mediterranean”³⁵.

³² See CARPENTIERI, NASTASI, SESSA & SROUR (eds.), *Incidental Catch of Vulnerable Species in Mediterranean and Black Sea Fisheries: A Review*, GFCM Studies and Reviews No. 101, Rome, 2021.

³³ Namely Albania, Algeria, Egypt, Syria and Türkiye.

³⁴ An informal *modus vivendi* is applied by GFCM and ICCAT. GFCM “adopts” the ICCAT decisions relating to tuna and tuna quotas. In this way, there are no inconsistencies between the measures approved by the two organizations.

³⁵ Para. 3.

3.C. The Bern Convention

50 States and the European Union, including 18 ACCOBAMS States parties³⁶, are parties to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979).

In respect of the species listed in Appendix III, the Convention prohibits the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in Appendix IV³⁷. All cetacean species are protected under Appendix III and all nets are specified under Appendix IV, if applied for large scale or non-selective capture or killing.

3.D. The Barcelona Specially Protected Areas Protocol

The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 1995) was concluded within the framework of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976; amended in 1995). 16 States and the European Union, including 16 ACCOBAMS States parties³⁸, are parties to the Protocol.

The parties are bound to ensure the maximum protection and recovery of the species listed in Annex II (List of endangered or threatened species), which includes nineteen species of marine mammals. This objective should be pursued by adopting at the national level a number of measures, such as the control on, and, where appropriate, the prohibition of, taking, possession and killing, including, to the extent possible, also incidental taking, possession and killing³⁹.

3.E. Black Sea Biodiversity and Landscape Conservation Protocol

The Black Sea Biodiversity and Landscape Conservation Protocol (Sofia, 2002) was concluded within the framework of the Convention for the Protection of the Black Sea against Pollution (Bucharest, 1992). The Protocol is today in force for four Black Sea ACCOBAMS States parties⁴⁰.

The Parties are bound to take the necessary measures to ensure that species occurring in the area to which the Protocol applies “are maintained at favourable conservation status and habitats close to undisturbed” and to “ensure that species of economic importance, especially living marine resources, are used sustainably”⁴¹. Three cetacean species are included in Annex II (Provisional list of species of Black Sea Importance) and are considered as endangered species. According to Annex III (Conservation of Species and Management of their habitats), parties are bound “to regulate, and where appropriate, prohibit activities having adverse effects on such species or their habitats and carry out management, planning and other measures to ensure favourable conservation status for such species”⁴².

³⁶ Namely Albania, Bulgaria, Croatia, Cyprus, France, Georgia, Greece, Italy, Malta, Monaco, Montenegro, Morocco, Portugal, Romania, Slovenia, Spain, Türkiye and Ukraine.

³⁷ Art. 8.

³⁸ Namely Albania, Algeria, Croatia, Cyprus, Egypt, France, Italy, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia and Türkiye.

³⁹ Art. 12, para 2, and Art. 11, para. 3.

⁴⁰ Namely Bulgaria, Georgia, Türkiye and Ukraine.

⁴¹ Art. 4, para. 1, *b* and *c*.

⁴² Art. 1, para. 3.

3.F. The ACCOBAMS

The ACCOBAMS applies to all maritime waters located in three areas (the Black Sea, the Mediterranean Sea, the contiguous Atlantic area), as precisely defined in Art. I, para. 1, *a*⁴³.

The ACCOBAMS binds parties to take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans⁴⁴. Such measures apply in waters under the sovereignty or jurisdiction of the parties, as well as on the high seas with respect to vessels flying the flag of the parties or registered within their territory⁴⁵. The use and abandonment of non-selective fishing gear is listed in the ACCOBAMS preamble among the factors adversely affecting the conservation status of cetaceans.

In particular, according to Annex 2, para. 1,

“Parties to this Agreement shall adopt the necessary legislative, regulatory or administrative measures to give full protection to cetaceans in waters under their sovereignty and/or jurisdiction and outside these waters in respect of any vessel under their flag or registered within their territory engaged in activities which may affect the conservation of cetaceans. To this end, Parties shall:

- a) work out and implement measures to minimize the fishing negative effects on the conservation of cetacean. **Most particularly, no vessels will be authorized to keep on board or to use any drift nets;**
- b) introduce or amend regulations with a view to preventing fishing gear from being discarded or left adrift at sea, and to require the immediate release of cetaceans caught incidentally in fishing gear in conditions that assure their survival; (...)⁴⁶.

Sub-para. *a* of Annex 2 was originally formulated in a different and less stringent way (“develop and implement measures to minimize adverse effects of fisheries on the conservation status of cetaceans. In particular, no vessel shall be allowed to keep on board, or use for fishing, one or more drift nets whose individual or total length is more than 2.5 kilometres”). In 2007, the third meeting of the parties amended the provision into the present wording (Resolution A/3.1)⁴⁷,

“Worried by the fact that this device is still under use in the agreement’s area on the contrary of the measures of conservation adopted to an international and regional level;

Reminding the Scientific Committee conclusions pointing out the ban on use of mesh and drift nets which represent serious threats for the cetacean population in the Agreement area;

Bearing in mind that the Scientific Committee recommends to forbid the use of mesh and drift nets whatever can be their size in the Agreement area⁴⁸.

As recorded in the report of the third meeting of the ACCOBAMS parties (Dubrovnik, 2007),

⁴³ “The geographic scope of this Agreement, hereinafter referred to as the ‘Agreement area’, is constituted by all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas, and the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area contiguous to the Mediterranean Sea west of the Straits of Gibraltar. For the purpose of this Agreement: the Black Sea is bounded to the southwest by the line joining Capes Kelaga and Dalyan (Türkiye); the Mediterranean Sea is bounded to the east by the southern limits of the Straits of the Dardanelles between the lighthouses of Mehmetcik and Kumkale (Türkiye) and to the west by the meridian passing through Cape Spartel lighthouse, at the entrance to the Strait of Gibraltar; and the contiguous Atlantic area west of the Strait of Gibraltar is bounded to the east by the meridian passing through Cape Spartel lighthouse and to the west by the line joining the lighthouses of Cape St. Vicente (Portugal) and Casablanca (Morocco)”.

⁴⁴ Art. II, para. 1.

⁴⁵ Art. II, para. 3.

⁴⁶ Para. 1. Heavy-type added by the consultants. “En particulier aucun navire ne sera autorisé à conserver à bord ou à utiliser des filets maillants dérivants” (French official text of the provision).

⁴⁷ Amendments to ACCOBAMS annexes are adopted through a simplified procedure (see Art. X, paras. 4 and 5).

⁴⁸ Preamble of Resolution A/3.1.

“The representative of Tunisia emphasized that his country had proposed the amendment in order to bring the Agreement in line with other international instruments and the recommendations of the Scientific Committee by banning the use of drift nets, regardless of length”⁴⁹.

Notably, the prohibition of driftnets in the ACCOBAMS is now stricter than in other international instruments. It applies to any kind of driftnets, irrespective of their length and of the targeted species of fish. It includes not only the use, but also the mere fact of keeping on board a driftnet.

Accordingly, the annex to Resolution 4.19 (Model measures on conservation of cetaceans)⁵⁰, adopted by the Meeting of the Parties in 2010, prohibits and sanctions the keeping on board or the use of any driftnets⁵¹. The Model measures provide the following definition of driftnets:

“[‘Drift net’ means any gillnet held on the sea surface or at a certain distance below it by floating devices, drifting with the current, either independently or with the boat to which it may be attached. It may be equipped with devices aiming to stabilize the net or to limit its drift]”⁵².

3.G. The Sanctuary Agreement

In 1999 France, Italy and Monaco signed in Rome an Agreement for the establishment of a sanctuary for the protection of marine mammals (so-called Pelagos Sanctuary). The sanctuary covers about 87,500 km² of waters located between the continental coasts of the three countries and the islands of Corsica (France) and Sardinia (Italy)⁵³.

The parties undertake to adopt in the Sanctuary measures to ensure a favourable state of conservation for every species of marine mammal and to protect them and their habitat from negative impacts, both direct and indirect (Art. 4)⁵⁴. In particular, the parties are bound to comply with the relevant international and European Union provisions relating to driftnets:

“Dans le sanctuaire les Parties (...)

b) se conforment à la réglementation internationale et de la Communauté Européenne, en particulier en ce qui concerne l’utilisation et la détention de l’engin de pêche dénommé ‘filet maillant dérivant’”⁵⁵.

4. The Prohibition of Driftnets in the European Union Legislation

The European Union is an international organization that exercises, *inter alia*, an exclusive competence for fisheries management and conservation, as well as shared competences with its twenty-seven member States in the field of protection of the marine environment. According to Art. 288 of the Treaty on the functioning of the European Union, regulations of the European Union have a general application, are binding in their entirety and are directly applicable in all Member States. As regards marine spaces, the European Union legislation is applicable to all vessels operating in waters under the sovereignty or

⁴⁹ Para. 79. The amendment entered into force on 22 March 2008.

⁵⁰ The Model measures were transmitted to ACCOBAMS Parties “for their consideration and comments” (Resolution 4.19, para. 2).

⁵¹ Arts. 4 and 28, paras. 1 and 2.

⁵² Art. 1, para. 8. It may be asked why this definition is in square brackets in the text of the Model measures.

⁵³ The waters of the sanctuary are inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (*Balaenoptera physalus*), the sperm whale (*Physeter catodon*), Cuvier’s beaked whale (*Ziphius cavirostris*), the long-finned pilot whale (*Globicephala melas*), the striped dolphin (*Stenella coeruleoalba*), the common dolphin (*Delphinus delphis*), the bottlenose dolphin (*Tursiops truncatus*) and the Risso’s dolphin (*Grampus griseus*).

⁵⁴ Art. 4.

⁵⁵ Art. 7.

jurisdiction of a Member States, that is in waters having the legal status of maritime internal waters, territorial sea, fishing zone or exclusive economic zone of a Member State, as well as, on the high seas, to vessels registered in a Member State.

4.A. Substantive Provisions

On 22 January 1992 the (then) European Community adopted Regulation No. 345/92 that prohibited the use of driftnets longer than 2.5 km. The prohibition was reaffirmed by Regulation No. 894/97 of 29 April 1997. Subsequently, Regulation No. 1239/98 of 8 June 1998 definitively banned the use of all driftnets for catching tunas, billfish, sharks, dolphinfishes, sea bream, sauries and cephalopods by 1 January 2002 in all waters falling within the jurisdiction of Member States, as well as outside those waters for vessels registered in a Member State.

The most recent European Union regime on driftnets can be found in Regulation 2019/1241 of 20 June 2019 on the conservation of fisheries resources and the protection of the marine ecosystem through technical measures⁵⁶, as amended⁵⁷. It provides the following definition:

“‘Drifnet’ means a net held on the water surface or at a certain distance below it by floating devices and drifting with the current, either independently or with the boat to which it may be attached. It may be equipped with devices aiming to stabilise the net or to limit its drift”⁵⁸.

The technical measures set forth in the instrument expressly intend “to ensure that incidental catches of sensitive marine species (...) that are a result of fishing, are minimized and where possible eliminated so that they do not represent a threat to the conservation status of these species”⁵⁹. Such measures aim at ensuring that “incidental catches of marine mammals (...) do not exceed levels provided for in Union legislation and international agreements that are binding on the Union”⁶⁰.

Art. 9 of Regulation 2019/1241, which specifically applies to driftnets, provides as follows:

“1. It shall be prohibited to have on board or deploy one or more driftnets the individual or total length of which is more than 2,5 km.

2. It shall be prohibited to use driftnets to fish for the species listed in Annex III”.

It thus appears from the European Union regime that driftnets are altogether prohibited, irrespective of their length, if they are used for fishing a certain number of species, as listed in Annex III, namely: albacore, bluefin tuna, bigeye tuna, skipjack, Atlantic bonito, yellowfin tuna, blackfin tuna, little tuna, Southern bluefin tuna, frigate tuna, oceanic sea breams, two species of marlins, sailfish, swordfish, two species of sauries, dolphinfish, seven species of sharks and all species of cephalopods.

Art. 11 is also relevant, insofar as it applies to catches of marine mammals, seabirds and marine reptiles:

“1. The catching, retention on board, transshipment or landing of marine mammals or marine reptiles referred to in Annexes II and IV to Directive 92/4/EC and of species of seabirds covered by Directive 2009/147/EC shall be prohibited.

2. When caught, species referred to in paragraph 1 shall not be harmed and specimens shall be promptly released.

⁵⁶ *Official Journal of the European Union* No. L 198 of 25 July 2019.

⁵⁷ See Commission Delegated Regulation 2020/2013 of 21 August 2020 (*Official Journal of the European Union* No. L 415 of 10 December 2020) and Commission Delegated Regulation (EU) 2021/1160 of 12 May 2021 (*ibidem* No. L 250 of 15 July 2021).

⁵⁸ Art. 6, no. 24.

⁵⁹ Art. 3, para. 1, b.

⁶⁰ Art. 4, para. 1, b.

3. Notwithstanding paragraphs 1 and 2, the retention on board of specimens of marine species referred to in paragraph 1 which have been caught accidentally, shall be permitted as far as this activity is necessary to secure assistance for the recovery of the individual animals and to allow for scientific research on incidentally killed specimens, provided that the competent national authority concerned have been fully informed in advance as soon as possible after the catch and in accordance with applicable Union law.

4. On the basis of the best available scientific advice a Member State may, for vessels flying its flag, put in place mitigation measures or restrictions on the use of certain gear. Such measures shall minimise, and where possible eliminate, the catches of the species referred to in paragraph 1 of this Article and shall be compatible with the objectives set out in Article 2 of Regulation (EU) No. 1380/2013 and be at least as stringent as technical measures applicable under Union law.

5. Measures adopted pursuant to paragraph 4 of this Article shall aim at achieving the target set out in point (b) of Article 4(1). The Member States shall, for control purposes inform the other Member States concerned of provisions adopted under paragraph 4 of this Article. They shall also make publicly available appropriate information concerning such measures”.

Regulation 2019/1241 is based, *inter alia*, on the following considerations:

“In order to restrict the use of driftnets which can fish over large areas and result in significant catches of sensitive species, the existing restrictions on using such fishing gear should be consolidated” (preamble para. 14).

“When developing joint recommendations in relation to the protection of sensitive species and habitats, regional groups of Member States should be allowed to develop additional mitigation measures to reduce the impacts of fishing on such species and habitats. Where scientific evidence shows that there is a serious threat to the conservation status of sensitive species and habitats, Member States should introduce additional restrictions on the construction and operation of certain fishing gear or even the introduction of a total prohibition on their use in a given area. In particular, such restrictions could be applied to the use of driftnets which in certain areas has resulted in significant catches of sensitive species” (preamble para. 31).

It thus appears that Regulation 2019/1241 in principle allows in a given area a stricter restriction on the use of driftnets, including a prohibition, if such use has resulted in significant catches of “sensitive species”. This wording clearly includes cetacean species. Preamble para. 31 may be understood as allowing European Union member States to develop stricter regimes on driftnets, such as the present ACCOBAMS regime.

4.B. Criminal Provisions

As regards the prevention and sanction of illegal fishing activities, the European Union has adopted Council Regulation 1005/2008 of 29 September 2008 establishing a system to prevent, deter and eliminate illegal, unreported and unregulated fishing⁶¹, as amended⁶² (hereafter: IUU Regulation⁶³). It aims at establishing rules for ensuring that an effective system against IUU fishing practices is in place in the national legislations of European Union Member States. It goes without saying that the use of driftnets

⁶¹ *Official Journal of the European Union* No. L 286 of 29 October 2008, p. 1.

⁶² See Commission Regulation (EC) 1010/2009 of 22 October 2009 (*Official Journal of the European Union* No. L 280 of 27 October 2009, p. 5), Commission Regulation (EU) 86/2010 of 29 January 2010 (*Official Journal of the European Union* No. L 26 of 30 January 2010, p. 1) and Commission Regulation (EU) 202/2011 of 1 March 2011 (*Official Journal of the European Union* No. L 57 of 2 March 2011, p. 10).

⁶³ The acronym “IUU” stands for “illegal, unreported and unregulated”.

outside the cases permitted under European Union law constitutes an “illegal fishing” for the purposes of the IUU Regulation.

Under the IUU Regulation, “illegal fishing” means fishing activities: a) conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; b) conducted by fishing vessels flying the flag of States that are contracting parties to a relevant regional fisheries management organization, such as the GFCM, but which operate in contravention of the conservation and management measures adopted by that organization and by which those States are bound, or of relevant provisions of the applicable international law; or c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization⁶⁴. A fishing vessel is presumed to be engaged in IUU fishing if it is shown that it has “used prohibited or non-compliant fishing gear”⁶⁵.

Noteworthy is the fact that IUU fishing practices are addressed by this instrument wherever they are conducted, since “in line with the definition of IUU fishing, the scope of this Regulation should extend to fishing activities carried out on the high seas and in maritime waters under the jurisdiction or sovereignty of coastal countries, including maritime waters under the jurisdiction or sovereignty of the Member States”⁶⁶. Hence, the system laid down by the IUU Regulation applies to all IUU fishing and associated activities carried out within the territory of Member States, within their waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas⁶⁷.

The IUU Regulation includes provisions relating to inspections of third country fishing vessels in Member States ports⁶⁸, catch certification scheme for importation and exportation of fishery products⁶⁹, a system of alert to warn operators and ensure that Member States take appropriate measures in respect of third countries in whose regards there are well-founded doubts of non-compliance⁷⁰, identification of fishing vessels engaged in IUU fishing, including the establishment of an IUU vessel list⁷¹, identification of non-cooperating third countries⁷², measures in respect of fishing vessels and States involved in IUU fishing⁷³, nationals supporting or engaged in IUU fishing⁷⁴, implementation of provisions adopted within certain regional fisheries management organization pertaining to fishing vessel sighting⁷⁵ and mutual assistance among Member States, including with third countries and the European Commission, to ensure compliance with the IUU Regulation⁷⁶. Particularly important to the purpose of effectively preventing, deterring and eliminating the illegal use of driftnets are those provisions that regulate immediate enforcement measures, sanctions and accompanying sanctions. Such measures and sanctions apply in relation to “serious

⁶⁴ Art. 2, para. 2.

⁶⁵ Art. 3, para. 1, e.

⁶⁶ Preamble para. 7.

⁶⁷ Art. 1, para. 3.

⁶⁸ Arts. 4-11.

⁶⁹ Arts. 12-22.

⁷⁰ Arts. 23-24.

⁷¹ Arts. 25-30.

⁷² Arts. 31-36.

⁷³ Arts. 37-38.

⁷⁴ Arts. 39-40.

⁷⁵ Arts. 48-50.

⁷⁶ Art. 51.

infringements” – and fishing with prohibited or non-compliant fishing gear, including driftnets, represents such an infringement. Unlike accompanying sanctions, sanctions for serious infringements are mandatory.

Where a fisherman is suspected of having committed – or is caught in the act while committing – a serious infringement, or a legal person is suspected of being held liable for such an infringement, Member States are required to start a full investigation of the infringement and take immediate enforcement measures in conformity with their national law and depending on the gravity of the infringement. Such immediate enforcement measures may consist of, *inter alia*, the immediate cessation of fishing activities, the rerouting to port of the fishing vessel, the ordering of a bond, the seizure of fishing gear and fisheries products, and the suspension of the authorization to fish. In any case, the measures must be of such nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete the investigation⁷⁷.

In addition to implementing immediate enforcement measures, Member States are required to ensure that anyone who is responsible of a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions. Alternatively, these sanctions may be of criminal nature. In particular, Member States are required to impose “a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement”. It is also provided that “in case of a repeated serious infringement within a five-year period, the Member States shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement”⁷⁸. In applying these sanctions, Member States shall take into account the value of the prejudice to the fishing resources “and the marine environment concerned”. It seems that such account could include considerations on any prejudice caused to cetacean populations that are under protective measures within the ACCOBAMS area, where the State concerned is also a member of ACCOBAMS.

Eventually, accompanying sanctions may include, *inter alia*, the sequestration of the fishing vessel involved in the infringement, the confiscation of prohibited fishing gear or the suspension or withdrawal of authorization to fish. The overall level of sanctions and accompanying sanctions is to be calculated in such way as “to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements without prejudice to the legitimate right to exercise a profession”⁷⁹.

The implementation of the IUU Regulation is strongly linked to the control system for ensuring compliance with the rules of the Common Fisheries Policy set forth in Council Regulation (EC) 1224/2009 of 20 November 2009⁸⁰, amended several times⁸¹ (hereafter: Control Regulation). In fact, both the IUU Regulation and the Control Regulation share the same scope and are committed to the same objective. Considering the subject matter and the circumstances leading to their adoption, it can be affirmed that there is no hierarchy between the two instruments, which are intended to be complementary and do not

⁷⁷ Art. 43.

⁷⁸ Art. 44, para. 2.

⁷⁹ Art. 46.

⁸⁰ *Official Journal of the European Union* No. L 343 of 22 December 2009.

⁸¹ See Regulation (EU) 1379/2013 of 11 December 2013 (*Official Journal of the European Union* No. L 354 of 28 December 2013), Regulation (EU) 1380/2013 of 11 December 2013 (*ibidem* No. L 354 of 28 December 2013, p. 22), Council Regulation (EU) 1385/2013 of 17 December 2013 (*ibidem* No. L 354 of 28 December 2013), Regulation (EU) 508/2014 of 15 May 2014 (*ibidem* No. L 149 of 20 May 2014), Regulation (EU) 2015/812 of 20 May 2015 (*ibidem* No. L 133 of 29 May 2015), Regulation (EU) 2019/473 of 19 March 2019 (*ibidem* No. L 83 of 25 March 2019) and Regulation (EU) 2019/1241 of 20 June 2019 (*ibidem* No. L 198 of 25 July 2019).

present any remarkable contradictions. Consequently, there is no hierarchy among the various measures and sanctions listed in the two regulations, which are complementary.

With the view to ensuring the effective application of the rules of the Common Fisheries Policy, both the IUU and the Control Regulations are basically grounded on the principle that sanctions must remove any economic benefit that may result from IUU fishing and have a sufficient deterrent effect on any potential offender. The thrust of the measures and sanctions to be adopted by Member States, therefore, is to punish illegal operators to the extent that they will not be able to profit from their activities anymore. The provisions on sanctions are to be implemented by Member States and do not interfere with the sanctioning systems in third countries⁸².

The Control Regulation complements the provisions of the IUU Regulation in specifying on what basis a fishing vessel is considered to be engaged in IUU fishing and in deterring the use of illegal fishing gears. Specifically, pursuant to the Control Regulation, the suspension or the withdrawal of the fishing authorization by Member States can be the result of the application of the “point system for serious infringements”⁸³. The point system can ultimately lead to the suspension or the permanent withdrawal of the fishing license of European Union nationals carrying out IUU fishing. Additionally, Member States are to establish a point system under which the master of a vessel is assigned the appropriate number of points as a result of a serious infringement of the rules of the Common Fisheries Policy committed by him. The task to ensure the functioning of the point system is entrusted to the Member States.

Finally, Member States are under the obligation to enter in a “national register” all infringements of the rules of the Common Fisheries Policy committed by vessels flying their flag or by their nationals, including the sanctions they incurred and the number of points assigned under the above-mentioned point systems⁸⁴. Infringements committed by fishing vessels flying the flag of a Member State, as well as infringements by their nationals prosecuted in other Member States have to be entered by the flag Member State in its national register of infringements, upon notification of the definitive ruling by the Member State having jurisdiction on the case.

Under Art. 92, para. 5, of the Control Regulation, detailed rules for the application of the point system had to be adopted at the European Union level according to a procedure involving the European Commission assisted by the Committee for Fisheries and Aquaculture. Accordingly, the rules in question have been laid down in the Commission Implementing Regulation (EU) 404/2011 of 8 April 2011 and the Annexes thereof⁸⁵, as subsequently amended⁸⁶. For the purpose of deterring, *inter alia*, the use of illegal fishing gears, Annex XXX and Annex XXXVII of Regulation 404/2011 are particularly relevant, as they detail the “Points to be assigned for serious infringements” by the Member States⁸⁷ and the “List of minimum information to form the basis for 5 yearly report on the application of the Control Regulation”, respectively.

⁸² See European Commission, *Handbook on the practical application of Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (The IUU Regulation)*, Official Journal of the European Union No. L 286 of 29 October 2008.

⁸³ Art. 90.

⁸⁴ Art. 93.

⁸⁵ Official Journal of the European Union No. L 112 of 30 April 2011.

⁸⁶ See Commission Implementing Regulation (EU) 2015/1962 of 28 October 2015 (Official Journal of the European Union No. L 287 of 31 October 2015), Commission Implementing Regulation (EU) 2020/30 of 14 January 2020 (Official Journal of the European Union No. L 9 of 15 January 2020) and Commission Implementing Regulation (EU) 2020/863 of 22 June 2020 (Official Journal of the European Union No. L 200 of 24 June 2020).

⁸⁷ In this regard, see also Art. 125.

5. National Legislation of Some ACCOBAMS Parties:

5.A. Bulgaria

As a European Union Member State, Bulgaria is bound by relevant European Union legislation, in particular Regulation 2019/1241⁸⁸.

According to the Law on Fisheries and Aquaculture, adopted in 2001, the use of driftnets as fishing gear is prohibited in all marine waters under the sovereignty or jurisdiction of Bulgaria and no derogations can be granted⁸⁹. There are no reported cases of entanglement of cetaceans in driftnets and during the regular field inspections carried out by the Executive Agency of Fisheries and Aquaculture the use of driftnets has not been detected.

5.B. Croatia

As a European Union Member State, Croatia is bound by relevant European Union legislation, in particular Regulation 2019/1241⁹⁰.

Croatia does not allow the use of driftnets for fishing, as these nets are not explicitly listed and described among the allowed fishing gears and techniques in any of the Croatian fishing regulations in force.

5.C Cyprus

As a European Union Member State, Cyprus is bound by relevant European Union legislation, in particular Regulation 2019/1241⁹¹. The national fisheries legislation has been amended several times to comply with European Union legislation, including the legislation on criminal sanctions.

Fishing gear not specifically mentioned in the Fisheries Law or not authorized in the conditions for a professional fishing licence is prohibited. Driftnets are neither mentioned in the Fisheries Law, nor authorized in any licence. The Director of the Department of Fisheries and Marine Research has the power to confiscate fishing gear that is not permitted. No entanglement of cetaceans in driftnets has been reported to or documented by fishing authorities in the waters under the sovereignty or jurisdiction of Cyprus. The national fisheries legislation also prohibits the killing, pursuit, catching, purchase, sale or possession of dolphins.

5.D. France

As a European Union Member State, France is bound by relevant European Union legislation, in particular Regulation 2019/1241⁹².

A decree has been adopted on 11 July 2011, prohibiting fishing with driftnets longer than 2.5 km:

“Sans préjudice des dispositions du règlement (CE) n° 894/97 susvisé, il est interdit de détenir à bord ou d'exercer des activités de pêche avec un ou plusieurs filets maillants dérivants

⁸⁸ *Supra*, para. 4.

⁸⁹ Driftnets are allowed only in Danube River, where a number of individual authorizations are granted.

⁹⁰ *Supra*, para. 4.

⁹¹ *Supra*, para. 4.

⁹² *Supra*, para. 4.

d'une longueur inférieure ou égale à 2,5 kilomètres pour la capture des espèces autres que celles mentionnées dans l'annexe VIII du règlement (CE) n° 894/97⁹³.

Restrictions apply to driftnets shorter than 2.5 km on the basis of target species, length of vessels and distance from the coast:

“Sans préjudice des dispositions du règlement (CE) n° 894/97 susvisé, l'exercice des activités de pêche avec un ou plusieurs filets maillants dérivants d'une longueur inférieure ou égale à 2,5 kilomètres et d'un maillage inférieur ou égal à 50 millimètres est autorisé dans les conditions ci-après :

- seule la capture des espèces autres que celles mentionnées dans l'annexe VIII du règlement (CE) n° 894/97 est autorisée;
- seuls les navires d'une longueur inférieure à 10 mètres battant pavillon français et immatriculés dans l'Union européenne peuvent utiliser ces filets;
- l'usage de ces filets est interdit au-delà de deux milles nautiques de la côte⁹⁴.

“Sans préjudice des dispositions des règlements (CE) n° 894/97 et (CE) n° 1967/2006 susvisés, l'exercice des activités de pêche avec un ou plusieurs filets maillants dérivants d'une longueur inférieure ou égale à 2,5 kilomètres et sans condition de maillage est autorisé dans les conditions ci-après:

- seule la capture des espèces autres que celles mentionnées dans l'annexe VIII du règlement (CE) n° 894/97 est autorisée;
- seuls les navires d'une longueur inférieure à 10 mètres battant pavillon français et immatriculés dans l'Union européenne peuvent utiliser ces filets;
- l'usage de ces filets n'est autorisé que dans la partie maritime des fleuves et des étangs en communication avec la mer⁹⁵.

Sanctions have a criminal and not an administrative nature.

5.E. Georgia

Government Resolution No. 423 of 31 December 2013 approved the technical regulations for fishing and preservation of fish stocks. Art. 5 prohibits the catching, selling and storing of marine mammals. Art. 6 prohibits fishing with certain gear, devices and methods, including floating nets. Art. 17 provides that violations of the requirements specified in the technical regulations will result in responsibility determined under the legislation of Georgia.

5.F. Italy

As a European Union Member State, Italy is bound by relevant European Union legislation, in particular Regulation 2019/1241⁹⁶.

Following the adoption of the Control Regulation in 2009, Law 4 June 2010, No. 96⁹⁷, delegated to the Italian Government the reorganization of the Italian legislation on fisheries and aquaculture. The

⁹³ Art. 2.

⁹⁴ Art. 3.

⁹⁵ Art. 4.

⁹⁶ *Supra*, para. 4.

Government was empowered to compile a single legislative text on fisheries within 18 months from the entry into force of Law 96/2010. Accordingly, Legislative Decree 9 January 2012, No. 4⁹⁸ (so called *Testo unico sulla pesca*; hereafter: Framework Law) is deemed to have transposed the most recent European Union legislation into Italian law. This instrument has been modified by Art. 39 of Law 28 July 2016, No. 154⁹⁹, as regards the system of sanctions against offenders. Hence, the Framework Law, as modified by Art. 39 of Law 154/2016, implements the sanctioning system of the IUU and Control Regulations. It sets forth norms for the reorganization, coordination and integration of the Italian legislation concerning fishing and aquaculture, without prejudice to the competences of the regions, with the purpose of ensuring the correct implementation of the criteria and objectives established by the IUU Regulation (Art. 1).

5.G. Malta

As a European Union Member State, Malta is today bound by relevant European Union legislation, in particular Regulation 2019/1241¹⁰⁰.

Under the Fishery Regulations (Subsidiary Legislation 425.01), the use of five specified fishing tools and methods is permitted without any licence at all times and in all localities¹⁰¹. Driftnet fishing is not listed among the permitted methods. It is consequently subject to licence from the Director of Fisheries, which can only be granted if it is allowed under European Union legislation. In fact, no such licence has been granted by the Maltese authorities. Unlicensed fishing activities could lead to criminal prosecution under Art. 12 of the Fisheries Conservation and Management Act.

5.H. Monaco

Sovereign Order No. 3,232 of 24 June 2011 implemented the amendment to Annex 2, para. 1, of the ACCOBAMS¹⁰². No vessel is consequently authorized to keep on board or to use any driftnets.

5.I. Montenegro

According to the Law on marine fisheries and mariculture, promulgated in 2009 and amended in 2015, driftnets are not on the list of allowed methods and tools for large-scale or small-scale commercial fishing. Fines are imposed for violations.

5.J. Morocco

Driftnets are totally banned in Morocco on the basis of Law 19-07 of 2011 on marine fisheries:

“L’importation, la fabrication, la détention, la mise en vente, la vente au Maroc ainsi que l’utilisation en mer des filets maillants dérivants pour la pêche des poissons et/ou des autres espèces halieutiques sont interdits”¹⁰³.

The implementation decree set forth the application of the prohibition as from 10 April 2012.

⁹⁷ *Gazzetta Ufficiale della Repubblica Italiana* No. 146 of 25 June 2010.

⁹⁸ *Gazzetta Ufficiale della Repubblica Italiana* No. 26 of 1 February 2012. Entered into force on 2 February 2012. Last amendment published on 29 March 2019.

⁹⁹ *Gazzetta Ufficiale della Repubblica Italiana* No. 186 of 10 August 2016.

¹⁰⁰ *Supra*, para. 4.

¹⁰¹ Sec. 2.

¹⁰² *Supra*, para. 3.F.

¹⁰³ Art. 13-1.

In 2012, the Department of marine fisheries established a national programme for the elimination of driftnets which provided for a compensation for the owners of driftnets or the owners of fishing vessels that ceased fishing activities. The plan was financed by the European fund for sectoral support according to the 2007 fisheries agreement between the European Union and Morocco. The programme was achieved in 2014.

5.K. Portugal

In Portugal, according to Regulations No. 1102-H/2000 of 22 November 2000, the use of drifting gillnets is only allowed for nets with mesh sizes between 35-40 mm. The maximum length of single nets cannot exceed 500 m and maximum height is set at 10 m. These nets are used to catch sardine (*Sardina pilchardus*), Mediterranean rainbow wrasse (*Coris julis*) and bogue (*Boops boops*). Gillnets (including drifting gillnets) cannot be used in areas up to ¼ nautical miles from the shore. Gillnets cannot remain in the water for more than twenty-four consecutive hours, unless in cases of duly proven *force majeure*.

5.L. Spain

As a European Union Member State, Spain is today bound by relevant European Union legislation, in particular Regulation 2019/1241¹⁰⁴.

Driftnets of any kind were for the first time prohibited in Spain by Ministerial Order of 22 October 1990 for the fishing for swordfish, sharks and small tunids:

“Se prohíbe el ejercicio de la pesca marítima con artes de deriva, en aguas exteriores, de conformidad con lo establecido en la presente orden”¹⁰⁵.

“Se consideran artes de deriva aquellas redes de enmalle, con al menos uno de sus extremos libres, caladas verticalmente en superficie o a media agua, definidas en el artículo 1 y en el artículo 7 de la orden de 24 de noviembre de 1981, por la que se regula el ejercicio de la actividad pesquera con artes fijos o de deriva en el Mediterráneo”¹⁰⁶.

“La presente orden será de aplicación a todos los buques de pesca que faenen bajo pabellón español. Igualmente se aplicará a los buques extranjeros que practiquen esta modalidad de pesca marítima en aguas jurisdiccionales españolas”¹⁰⁷.

“1. No obstante lo dispuesto en el artículo 1, se concederá autorización para la pesca con artes de deriva en el mediterráneo, cuando además de lo dispuesto en la citada orden de 24 de noviembre de 1981, se cumplan los siguientes requisitos:

a) que los artes destinados a la captura de melva, bonito y afines no superen los 150 milímetros de tamaño de malla, medido diagonalmente y con la red extendida y mojada.

b) que la longitud máxima del arte no supere 30 unidades de captura o 1.500 metros.

c) que los buques autorizados a ejercer esta actividad pesquera no podrán portar más de tres artes a bordo.

2. En ningún caso se podrá autorizar como deriva el empleo de artes mixtos de beta y trasmallo”¹⁰⁸.

¹⁰⁴ *Supra*, para. 4.

¹⁰⁵ Art. 1.

¹⁰⁶ Art. 2.

¹⁰⁷ Art. 3.

¹⁰⁸ Art. 4.

“Las infracciones administrativas serán sancionadas, en su caso, de acuerdo con lo establecido en la ley 53/1982, de 13 de julio, sobre infracciones en materia de pesca marítima”¹⁰⁹.

“Queda expresamente prohibida la captura de pez espada, marrajo, atún y bonito del norte con cualquier tipo de red de enmalle”¹¹⁰.

A programme for providing a compensation for owners of fishing vessels was established.

Ministerial Order of 22 October 1990 was partially modified by Ministerial Order of 12 June 1992.

The Spanish legislation on fisheries is notable because it provides for criminal sanctions also for Spanish nationals who fish illegally on-board vessels flying a flag of convenience (Royal Decree 1134/2002 of 31 October 2002¹¹¹).

5.M. Syria

According to the Fisheries and Aquaculture Law, promulgated on 16 March 2021, the use of floating nets is subject to a number of conditions, namely:

- each fisherman may use one net of no more than 1,000 meters in length;
- the length of the eye side of the net shall not be less than 25 meters;
- the net may not be used at a depth of less than 150 meters;
- the net is allowed to operate from sunrise to sunset;
- flags shall be placed (at least 4 per 1,000 meters) and shall be of the same colour for each grid;
- the net must not be more than 6 meters high and must be tied to the boat.

5.N. Tunisia

Driftnets of any kind are prohibited since 1st January 2002, as a consequence of the Decree of 10 August 1999 by the Minister of Agriculture, modifying the relevant provisions of Decree of 28 September 1995 on fishing activities. Inspections are regularly carried out in charge of controls on fish disembarked and fishing gear.

5.O. Türkiye

Fishing with driftnets is prohibited in Türkiye in line with the provisions of GFCM and ICCAT to which Türkiye is a party. The ban on driftnets has been transposed in Fisheries Law No. 1380 of 1971, for the first time from 1st April 1998 to 31 March 1999. It is periodically renewed by circulars and communiqués published in the Official Gazette¹¹².

5.P. Ukraine

Under the Regulations on fishing in the Black Sea basin (Order of the Ministry of Agrarian Policy and Food No. 217 of 10 April 2022), the use of driftnets is only allowed in the lower reach of Danube and Dnieper rivers to catch herring, shad and herbivorous fishes (bighead carp and grass carp), that is outside

¹⁰⁹ Art. 5.

¹¹⁰ Additional article.

¹¹¹ *Boletín Oficial del Estado* No. 262 of 1st November 2002.

¹¹² The last communiqué covers the period from 1st September 2020 to 31 August 2024.

the common dolphin habitat. According to the State Agency for Melioration and Fishery, driftnets are not used in marine areas of the Black Sea.

Under the above mentioned Regulations, the taking from Black Sea waters of aquatic species listed in the Red Data Book of Ukraine is prohibited. All the Black Sea cetaceans species are listed therein. Illegal taking of cetaceans from the nature is subject to administrative or criminal prosecution, depending on gravity of violation.

6. Conclusions

It appears that there are several international instruments, having either a hortatory or a binding character and adopted at both world or regional level, notably within the European Union, that restrict or prohibit the use of driftnets. This can be done either through specific provisions, referring directly to driftnets, or through more general rules, restricting or prohibiting the use of non-selective fishing gear, that can harm non-targeted species, such as cetaceans.

The restriction on the use of driftnets is so generally accepted by States and international organisations that are granted responsibilities in the field of fisheries that it can be understood as belonging to customary international law. What is still uncertain is whether the customary restriction is conditional on a certain length of the driftnet (for example, if it exceeds 2.5 km) or on the targeted species (for example, tuna).

Among the relevant international instruments, Annex 2 to the ACCOBAMS, as amended in 2007, sets forth the most restrictive regime, that is a total ban on the use or keeping on board of driftnets, irrespective of their length and of the targeted species. This is a treaty obligation that binds ACCOBAMS Parties¹¹³.

ACCOBAMS Parties should accordingly ensure that their national legislation is in full accordance with the ACCOBAMS regime and that the prohibition of driftnets is adequately enforced, especially if violations are reported. A logical consequence of the prohibition is the adoption of sanctions for transgressors by penalties, including accessory measures, which are of sufficient gravity to deter violations. The analysis of national legislation of some ACCOBAMS parties shows that they are progressively proceeding in this direction, despite some inevitable difficulties where traditional driftnet fishing activities have been carried out by local fishers. Programmes of compensation for dismissal of driftnets and reconversion of fishing vessels may be useful in promoting compliance with the prohibition of driftnets.

¹¹³ The annexes to the ACCOBAMS “form an integral part thereof” (Art. I, para. 5).