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## **STREAMLINING IMPLEMENTATION ARRANGEMENTS FOR IN-COUNTRY ACTIVITIES**

**PREPARED BY: FAO**

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### **PURPOSE**

In accordance with FAO requirements, there is a need to establish a legal framework for project-funded activities of IOTC in the territory of member countries of IOTC, in order to manage the risk of activities and protect the budget of IOTC. This document invites the SCAF to consider whether a decision of the Commission should be pursued to the effect of adopting a set of standard conditions for IOTC in-country activities. Such a decision could significantly streamline the legal coverage of IOTC activities by setting out a number of standard Government commitments that could apply to all IOTC in-country activities.

### **INTRODUCTION AND BACKGROUND**

This document draws attention of the Standing Committee on Administration and Finance to some implementation issues in connection with the legal framework for project-funded activities of IOTC in the territory of member countries of IOTC. More specifically, the implementation of IOTC projects normally requires the signature, on behalf of the government and FAO, of a Project Document that sets out the planned activities. In addition, the Project Document includes a number of Government commitments of a legal nature that establish a legal framework for the IOTC project activities, which is necessary, inter alia, to manage the risk of activities and protect the budget of IOTC.

The issue for IOTC arises because of the requirement that the Project Document must be in place, and signed separately, for each project in order to ensure full legal coverage of IOTC project activities. Under rules of the Organization, project activities may not start unless a signed Project Document, inclusive of the legal commitments, is signed by the government hosting IOTC activities. The administrative burden placed on the IOTC secretariat can, at times, be significant, considering the efforts needed to secure the signature of a host Government.

On a number of occasions, this has led to delays in the signature of IOTC Project Documents and consequential delays in the start of project activities. On other occasions, no Project Documents have been signed, with a consequential lack of legal coverage and an absence of protection of liabilities and unforeseen charges to the budget of IOTC.

In view of the above issues, this document invites the Standing Committee to consider whether a decision of the Commission should be pursued to the effect of adopting a set of standard conditions for IOTC in-country activities. Such a decision could significantly streamline the legal coverage of IOTC activities by setting out a number of standard Government commitments that could apply to all IOTC in-country activities. The members of the Committee may wish to present their views, if any.

### **THE LEGAL FRAMEWORK FOR UNITED NATIONS AND FAO PROJECT ACTIVITIES**

For the implementation of projects, it is necessary to conclude Project Documents with host Governments. One of the main functions of the Project Documents is to express agreement between FAO and the host Government that the agreed activities will take place in the territory of the country. FAO cannot commence activities in the territory of a country on its own initiative, as this would sidestep the fundamental sovereignty of states<sup>1</sup>. The Project Document serves to confirm the necessary acceptance of in-country activities.

A further function of Project Documents is to establish a legal framework for project implementation. At present, the standard approach of FAO is to attach a standard Annex entitled “FAO and Government Obligations”, which sets out the basic conditions and respective obligations of FAO and the Government for the purpose of the project. This requirement applies to all extra-budgetary activities of FAO, including activities of Article XIV bodies of the Organization. The legal framework that is proposed for IOTC activities in this document is a short version of this

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<sup>1</sup> *Emergency activities on the basis of United Nations Security Council resolutions are an exception to this basic rule.*

standard document.

From a legal perspective, the purpose of the legal framework has a legal and a financial dimension. From a legal point of view, the provisions contain a number of essential provisions, including a confirmation that the Government will apply privileges and immunities to FAO, its staff and assets, for the purpose of the project, and a set of operational facilities, including commitments to exempt FAO from taxes and custom duties, grant visas as required for the project, grant any necessary permits, etcetera. These provisions ensure that the independence and legal status of FAO is guaranteed, essentially, that it is immune from legal process, that the assets of the Organization, including donor funds, are protected from attachment or other forms of enforcement measures, and that the Organization is exempt from taxation.

In respect of staff and consultants of the Organization, the privileges and immunities serve to ensure that the staff are able to operate independently, i.e. on the basis of instructions solely from the Organization, and that word written and spoken in the performance of official duties are protected from judicial or administrative interference. It should also be noted that any privileges and immunities related to staff are functional rather than personal in nature, meaning that staff enjoy privileges and immunities only insofar as they are directly related to the performance of official duties for the Organization.

Privileges and immunities of this nature are fully standardized for all UN agencies through the widespread adherence of nations to the two relevant conventions on privileges and immunities, i.e. the Convention on the Privileges and Immunities of the Specialized Agencies, and its ‘twin sister’ convention for the United Nations.

A further important provision is the so-called ‘hold-harmless’ clause, i.e. an obligation of the Government to deal with any third-party claim that might arise from activities of IOTC. In general terms, the concept reflected in this clause has a few elements. It expresses that activities of the Organization are in general developed specifically for the benefit of host governments rather than the membership as a whole. The risk for such jointly agreed-activities should thus be carried by the host government. Secondly, the privileges and immunities of the Organization prevent it from dealing effectively with any third-party claims as it cannot enter into courts, and it could not otherwise invoke national legislation to handle claims. It is therefore necessary that the Government intervenes in the event of any such claims.

The financial dimension of the hold-harmless provision is that it acts as a protection of the budget of projects, and more generally the Regular Programme budget of the Organization. Liabilities that might arise from third-party claims would not burden the project budget. In respect of the budget of the Organization, reference must be made to Regulation 6.7 of the Organization’s Financial Regulations; it establishes that trust funds accepted by the Director-General may not lead to additional charges to the Regular Programme, unless such additional charges are explicitly approved by the FAO Conference.<sup>2</sup> This Regulation reflects the strict separation between the Regular Programme budget of the Organization on the one hand, and donor-funded extra-budgetary activities on the other. The hold-harmless provisions serves to avoid unforeseen additional charges to project budgets at the expense of the Regular Programme, and in contravention of Financial Regulation 6.7.

It is also in light of Financial Regulation 6.7 that any unforeseen charges to IOTC projects would fall to the IOTC budget rather than the FAO Regular Programme. As such, the provisions for the implementation of IOTC activities, either in agreements for each project or, possibly, through the application of the provisions set out in Annex 1 to this document, directly protect the budget of IOTC.

Finally, it should be noted that the hold-harmless obligation would only be invoked in the case of claims that are not covered by the normal insurance arrangements of the Organization, including motor vehicle insurance and liability insurance. Furthermore, claims of this nature are relatively rare.

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<sup>2</sup> “6.7 Voluntary contributions, whether or not in cash, may be accepted by the Director-General, and Trust and Special Funds may be established by him to cover moneys made available to the Organization for special purposes, provided that the purposes of such contributions and moneys are consistent with the policies, aims and activities of the Organization. The purposes and limits of any Trust and Special Funds shall be clearly defined. The acceptance of any such contributions and moneys which directly or indirectly involves additional financial obligations for Member Nations and Associate Members shall require the consent of the Conference. Trust and Special Funds and voluntary contributions shall be administered in accordance with the Financial Regulations of the Organization, unless otherwise provided for by the Conference. Trust and Special Funds shall be reported to the Finance Committee.”

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## **PRACTICE IN THE UN SYSTEM**

It is important to note that the legal framework described above applies to all in-country activities of the agencies and entities of the United Nations system, and it is not specific to FAO or IOTC. Such legal frameworks vary between agencies in terms of scope and detail, and vary in terms of their tangible expression, i.e. either through a framework agreement covering all agreed activities, or agreements on a per-project basis. However, all provisions proposed in the Annex to this document are reflected in the legal framework of UN operations.

The United Nations Development Programme (UNDP), for example, operates on the basis of a broad network of so-called Standard Basic Assistance Agreements (SBAA), which it has in place in almost all countries where it operates. The SBAA provides, among other things, for the application of privileges and immunities to UNDP, its staff and assets, it sets out operational facilities in relation to visas and exemptions from taxes and customs duties, consistent with the privileges, immunities and legal status of UNDP. The SBAA also includes the hold-harmless provision described earlier. The mechanism to apply the SBAA to UNDP activities is through the signature of a Project Document; such signature automatically activates the SBAA in respect of the activities foreseen in the Project Document. A number of funds and programmes of the United Nations also rely on the SBAA for its in-country activities.

Other agencies, including UNICEF and WHO, have their own specific framework agreements in place, similar to the SBAA and including all provisions proposed in this document. For the implementation of multi-agency UN development programmes in the context of UNDAF, an agreement with host Governments has been developed to establish a similar legal framework, specifically the application of privileges and immunities to the participating UN agencies, and an obligation to hold such agencies harmless from third-party claims.

In the case of FAO, and with it IOTC, the situation is somewhat different. FAO, too, has a large number of agreements in place with host governments. However, the scope of such agreements is more limited as they cover the establishment, status and operation of the FAO representations. Contrary to the SBAA of UNDP, the Host Country Agreements of FAO do not provide a legal framework for FAO activities in-country, which creates the need to sign separate operational agreements on a project-by-project basis.

## **LEGAL FRAMEWORK FOR IOTC ACTIVITIES**

In the specific case of IOTC, it is relevant that the Commission approves the workplan and activities of the Secretariat. Such approval expresses acceptance and endorsement of the members of the planned activities of IOTC, including in-country activities. A specific Project Document for IOTC activities is therefore not, strictly speaking, required as it would duplicate the Commission's approval of activities.

In fact, on this basis, it has not been the practice of IOTC in all cases to secure the signature of Project Documents with host Governments for in-country activities. This presents no particular issue, with the express exception of legal risk of FAO and IOTC, since no legal framework is agreed with host Government in respect of in-country activities of IOTC.

One option to address this issue is to establish the conditions contained in Annex 1 to this document as the standard framework for in-country activities of IOTC. Such conditions would obviate the need to sign specific Project Documents for activities in each country, and would thus secure significant efficiency gains. In addition, any legal risks, particularly of third-party claims involved in the implementation of activities would be covered with a view to protecting the IOTC budget.

## **SUGGESTED ACTION BY THE STANDING COMMITTEE ON ADMINISTRATION AND FINANCE**

The Standing Committee is invited to review this document, and consider whether a decision of the Commission should be pursued to adopt the conditions set out in Annex 1 as the standard framework applicable to in-country activities of IOTC.

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**ANNEX 1: BASIC CONDITIONS FOR IN-COUNTRY ACTIVITIES OF IOTC**

- 1)
  - (a) This Annex sets out the basic conditions under which the Indian Ocean Tuna Commission (IOTC) will implement activities, which have been approved by the Commission, in the territory of members of the Commission.
  - (b) IOTC will be responsible for the provision, with due diligence and efficiency, of assistance as provided in the IOTC workplan. IOTC and the Government will consult closely with respect to all aspects of the activities.
  - (c) Activities of IOTC will be implemented (i) in accordance with relevant decisions of the Governing Bodies of FAO, and with its constitutional and budgetary provisions, and (ii) subject to the receipt by IOTC of the necessary contribution from Resource Partners. IOTC will disburse the funds received from the Resource Partner in accordance with the regulations, rules and policies of FAO. All financial accounts and statements will be expressed in United States Dollars and will be subject exclusively to the internal and external auditing procedures laid down in the financial regulations, rules and directives of FAO.
- 2) With a view to the rapid and efficient implementation of the activities, the Government shall grant to FAO, including IOTC, its staff, and all other persons performing services on behalf of FAO, the necessary facilities including:
  - i) the prompt issuance, free of charge, of any visas or permits required;
  - ii) any permits necessary for the importation and, where appropriate, the subsequent exportation, of equipment, materials and supplies required for use in connection with the Project and exemption from the payment of all customs duties or other levies or charges relating to such importation or exportation;
  - iii) exemption from the payment of any sales or other tax on local purchases of equipment, materials and supplies for use in connection with the project;
  - iv) prompt customs clearance of the equipment, materials, supplies and property referred to in subparagraphs (ii) above.
- 3) The Government will apply to FAO, its property, funds and assets, its officials and all the persons performing services on its behalf in connection with the activities: (i) the provisions of the Convention on Privileges and Immunities of the Specialized Agencies; and (ii) the United Nations currency exchange rate. The persons performing services on behalf of FAO will include any organization, firm or other entity, which FAO may designate to take part in the execution of the Project.
- 4) The Government will be responsible for dealing with any claims which may be brought by third parties against FAO, its personnel or other persons performing services on its behalf, in connection with the Project, and will hold them harmless in respect to any claim or liability arising in connection with the Project, except when it is agreed by FAO and the Government that such claims arise from gross negligence or wilful misconduct of such persons.