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## MATTERS RELATING TO PUTTING A NEW IOTC AGREEMENT IN PLACE – A DISCUSSION DOCUMENT

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### **Purpose**

The processes required to develop and adopt a new IOTC Agreement are complex. This paper provides the TCPR with an opportunity to recall some of the elements associated with drafting, negotiating and implementing a new IOTC Agreement, and also consider whether further guidance is required from the Commission on the TCPRs role in the process overall.

### **Background**

In 2016, the Commission formed the Technical Committee on Performance Review. The Terms of reference of the TCPR included, inter alia, to develop a new text of the IOTC Agreement. The TCPR met in February 2018 and agreed to convene a drafting group to develop proposed language for the IOTC Agreement that takes into account modern principles of fisheries management.

The TCPR is will deliver a draft text to the Commission in June 2019 and the Commission is expected to decide whether the IOTC should remain within the FAO framework or become a separate legal entity. The TCPR will then adapt the agreement text accordingly for a second review by the Commission in 2020.

However, the processes required to develop and adopt a new IOTC Agreement, for either scenario, are complex and will require the implementation of a range of activities, beyond putting a version of an agreement before the Commission in 2020 (as the commission has tasked to the TCPR to do).

The following information is provided to highlight some of the elements, issues and tasks that might need to be considered for a future road map should the Commission require one.

### **Modernising the IOTC Agreement**

#### ***Ratification and special meetings of the Commission***

Modernising Agreement text is a relatively quick task. However, ratification of a new agreement can be a lengthy process — recently it took IATTC about 6 years to adopt the Antigua Convention (to replace the old convention). Relitigating elements such as the species list could also add to the duration of the process.

Also, the ratification process needs to be implemented in parallel with the normal work of the Commission. In the ICCAT ratification process, the Working Group on Convention Amendment met six times with additional ad hoc meetings on the periphery of the Commission meetings.

#### ***Need for a Working Group to guide the process***

Such a working group may include current serving officers of both the FAO and the IOTC staff and members. However current serving officers have a full-time job and while this group will be charged with guiding the process and will be able to do some of the work there will need to be additional people added to the Secretariat to undertake this work. The workload of working group would likely expand greatly if the Commission elected to establish IOTC as an independent body outside FAO.

## Remaining inside the FAO framework

If IOTC decides to remain inside the FAO Framework, most, if not all, of the legal, financial and administrative changes (related to leaving FAO) described below would not be required and the changeover to the agreement should be a relatively straight forward process.

Notwithstanding this, IOTC will also have to decide whether to remain in FAO under the same conditions of the 1993 Agreement, or remain and seek increased autonomy.

**Remaining in FAO under the same conditions of the 1993 IOTC Agreement** would be an expedient option. Currently IOTC has some bilateral arrangements with FAO whereby it receives some reduction in costs imposed by FAO; however, overall, FAOs rules and accountabilities are applied to IOTC via Articles VI.3 and VI.7 of the IOTC Agreement.

*IOTC Agreement ArtVI.3. The Commission may adopt and amend, as required, its own Rules of Procedure by a two-thirds majority of its Members, which Rules shall not be inconsistent with this Agreement or with the Constitution of FAO.*

*IOTC Agreement ArtVI.7. The Commission may adopt and amend, as required, the Financial Regulations of the Commission by a two- thirds majority of its Members, which Financial Regulations shall be consistent with the principles embodied in the Financial Regulations of FAO. The Financial Regulations and amendments thereto shall be reported to the Finance Committee of FAO which shall have the power to disallow them if it finds that they are inconsistent with the principles embodied in the Financial Regulations of FAO.*

These articles also override some of the more explicitly stated elements of the IOTC Agreement e.g. Art VII.1 "... the staff of the Commission shall be appointed by the Secretary...".

**Remaining in FAO and seeking increased autonomy** would entail an additional process of consultation, and given the recent example where IOTC has sought to amended the IOTC Rules of Procedure related to the recruitment of the Executive Secretary, such consultations could be protracted.

In October 2018, the FAO Committee on Constitutional and Legal Matters submitted document CCLM 107 to the FAO Council. In this document the CCLM noted that bodies that wish to significantly depart from the rules and policies of FAO have the option of leaving FAO.

*Para 18. Statutory Bodies established under Article XIV of the FAO Constitution, while enjoying a measure of functional autonomy, have been negotiated and adopted by or within the FAO Governing Bodies. These treaties cannot be seen in isolation from FAO as a whole. Indeed, this is clarified in the Principles<sup>1</sup>. Therefore, the rules and policies of FAO must apply to Article XIV Bodies, including those related to staff selection procedures.*

*Para 19. Consequently, should the Members of an Article XIV Body wish to significantly depart from the rules and policies of FAO (and those of the United Nations System), there is the option of terminating the existence of that Body under the FAO framework and establishing an independent organization outside the framework of FAO.*

[\(click here for the complete document\)](#)

<sup>1</sup> Thus, for example, para. 5 of the Principles establishes that: "The preamble shall always specify that the convention or agreement is established within the framework of the Organization. It shall in addition clearly state the purposes and objectives of the convention or agreement, which purposes and objectives must be in line with those of the Organization".

## **Establishing IOTC as an independent body outside FAO**

From the consultant report: *Cost and benefit of the Indian Ocean Tuna Commission (IOTC) within and outside of the Food and Agriculture Organisation (FAO)* IOTC-2016-S20-05 ([click here](#)): if a decision was taken to establish the IOTC outside of the FAO it will need to be a decision that fits comfortably with both parties as the process of separation will only happen with good will and cooperation on both sides. In reality if agreement is reached to separate it will be a 12 to 24 month process and during that process the IOTC will still need to operate a “business as usual” approach and meet its commitments to the FAO and to its members.

The first step in this process will be to decide on a timeframe and to establish a working group of both FAO and IOTC staff and members to shepherd the process through. There are a number of legal/financial and administrative documents and process that will need to be amended and accepted before any changes can be made. The issues discussed below are not an exhaustive list of the work that will need to be progressed to make sure the IOTC can become an independent organisation; however, they are probably the main issues. Much of the documentation that is needed will be available from other tRFMOs but it will still need to be developed and modified for the IOTC situation before it will be accepted by the members.

### ***Legal issues***

The following is an indicative list of the legal issues that will need to be addressed;

- A new modernized convention will need to be drafted and accepted then ratified by members
- New Rules of Procedures, staff regulations and financial regulations will need to be drafted and accepted by members.
- The Headquarters Agreement will need to be re-negotiated with the Seychelles government.
- Legal processes for separation from the current agreement will need to be agreed with the FAO and arrangements commenced.
- A country or body (such as FAO in the case of ICCAT) will need to accept responsibility as the repository for the new Agreement, verifying the new conditions of eligibility for members and if necessary managing any issues of outstanding debts.

### ***Financial Arrangements***

Changes to current financial arrangements will include the following activities, however it should be noted that new financial rules and regulations were developed for the IOTC in 2006:

- Drafting and acceptance of new financial regulations and procedures
- Establishment of bank accounts
- Auditing procedures
- Acquisition and implementation of financial management systems
- Transfer the assets and bank accounts to the new organisation

There may be an issue with how the IOTC deals with the outstanding contributions under the current IOTC Convention.

### ***Administrative arrangement***

The administrative changes will include:

- Drafting and acceptance of the Staff regulations and conditions of service
- Implementing new staff contracts, perhaps adding staff to cover services previously provided by FAO
- Develop staff recruitment procedures
- Find and implement new arrangements for pensions and health and medical coverage
- Purchase computer software and licenses
- Reviewing and upgrading IT if required

***Possible mechanisms to establish entities outside the FAO Framework in 2018***

The FAO Committee on Constitutional and Legal Matters outlined possible mechanisms to establish entities outside the FAO Framework in 2018. These include convening a conference of plenipotentiaries to adopt a new treaty establishing an autonomous entity; parallel processes of withdrawal and termination of the existing treaty and entry into force of the new treaty; and implementation of transitional arrangements.

From CCLM 107/03 ([click here for the complete document](#))

**IV. Mechanisms to Establish Entities Outside the FAO Framework**

18. Statutory Bodies established under Article XIV of the FAO Constitution, while enjoying a measure of functional autonomy, have been negotiated and adopted by or within the FAO Governing Bodies. These treaties cannot be seen in isolation from FAO as a whole. Indeed, this is clarified in the Principles<sup>2</sup>. Therefore, the rules and policies of FAO must apply to Article XIV Bodies, including those related to staff selection procedures.

19. Consequently, should the Members of an Article XIV Body wish to significantly depart from the rules and policies of FAO (and those of the United Nations System), there is the option of terminating the existence of that Body under the FAO framework and establishing an independent organization outside the framework of FAO.

20. A new treaty establishing an entity outside FAO would need to be adopted. This new entity would have its own legal personality, rights and obligations, assets and liabilities, as well as its own capacity to sue and to be sued in accordance with international law and such national laws as might be applicable. All obligations currently borne by FAO would be transferred to, and borne entirely by, the new entity and its Members. It would have to negotiate agreements providing for its status (including its privileges and immunities) in the territories of its Members and a headquarters agreement with its host country.

21. The procedures to be followed to achieve this outcome were considered in the past with respect to the IOTC. They were addressed, in particular, by the CCLM at its 81<sup>st</sup> Session from 4 to 5 April 2007<sup>3</sup> and, subsequently, by the Council at its 132<sup>nd</sup> Session from 18 to 22 June 2007<sup>4</sup>.

22. If the Members of an Article XIV Body decide that it should be moved outside the framework

<sup>2</sup> Thus, for example, para. 5 of the Principles establishes that: “The preamble shall always specify that the convention or agreement is established within the framework of the Organization. It shall in addition clearly state the purposes and objectives of the convention or agreement, which purposes and objectives must be in line with those of the Organization”.

<sup>3</sup> CCLM 81/3: “Process for a change in the nature of a statutory body of FAO established under Article XIV of the Constitution into a body outside the framework of FAO (Change in status of the Indian Ocean Tuna Commission)”.

<sup>4</sup> Report of the 81<sup>st</sup> Session of the Committee on Constitutional and Legal Matters (CL 131/5) and document CCLM 81/3.

of FAO, FAO would take a proactive approach towards the process. Such a process would have to be compatible with FAO's own rules, as well as with the rules of international law and the practices of the United Nations System. Such a change could not be effected solely through amendment of the provisions of the relevant treaty. A possible process for such a transformation is set out below.

#### **A. Convening of a Conference of Plenipotentiaries to adopt a new treaty establishing an autonomous entity**

23. The Members of the relevant Article XIV Body would develop the text of the new treaty. This could correspond to the substantive content of the existing treaty, but Members would also be free to introduce new substantive content.

24. Once a text is developed, a Conference of Plenipotentiaries open to the States wishing to become Parties to the new treaty would normally be convened in line with Section 1 of Part II of the Vienna Convention on the Law of Treaties. The participants would have to have "full powers" for the adoption of the new treaty, i.e. a document emanating from the competent national authority designating a person to represent the State in the negotiation and adoption of the new treaty.

25. The Director-General of FAO could be requested to convene the Conference of Plenipotentiaries<sup>5</sup>. Such a request would normally be issued by the FAO Council and, thus, it would be open to the Members of FAO to decide if a different entity should convene the Conference.

#### **B. Parallel process of withdrawal and termination of the existing treaty and entry into force of the new treaty**

26. A process of withdrawal and termination of the existing Article XIV treaty, in accordance with its provisions<sup>6</sup>, and entry into force of a new treaty could be implemented in parallel.

27. In order to ensure a smooth transition, the Conference of Plenipotentiaries could adopt, through a suitable resolution, a model instrument of withdrawal which could be framed in such a manner as to also constitute an instrument of acceptance of the new treaty<sup>7</sup>. The Conference of Plenipotentiaries could also call upon the Parties to the existing treaty to expedite their internal processes for withdrawing from the existing treaty and acceding to the new one so as to minimize

<sup>5</sup> In addition to the agreements concluded under Article XIV of the FAO Constitution, the Director-General of FAO is depositary for 19 international treaties most of which were adopted by Conferences of Plenipotentiaries convened by the Director-General. A Conference of Plenipotentiaries convened by FAO would be open to the current Members of the existing treaty and other interested States which are Members of FAO or Members of the United Nations, or of any of its Specialized Agencies or of the International Atomic Energy Agency.

<sup>6</sup> Under para. 15 of the Principles: "All conventions and agreements shall contain a termination clause. This clause shall inter alia provide for automatic termination if and when the number of participants drops below that required to bring it into force, unless the remaining participants unanimously decide otherwise. The system of termination by a qualified majority decision of the participants shall be discontinued. It is understood that, after a convention or agreement has been in force for a given number of years, the participants thereto should, upon recommendation of the Conference or Council of the Organization as appropriate, consider the desirability either of maintaining the convention or agreements or of terminating it by withdrawal".

<sup>7</sup> Under the relevant treaties, notifications of withdrawal become effective after a specified period following receipt of the notice of withdrawal by the Director-General. Whether this period could be reduced could be considered, taking into account in the framework established by any transitional measures which might be put in place to ensure a smooth transition.

any possible disruption during the interim period (particularly with respect to maintaining operations and meeting related costs).

### **C. Implementation of transitional arrangements**

28. Subject to the views of the CCLM and the Council, as well as those of the Members of the relevant Article XIV Body, FAO could support a number of transitional arrangements until the new treaty enters into force.

29. Thereafter, if and to the extent necessary, short-term interim arrangements could be requested by the new organization and negotiated with FAO. These transitional arrangements could include, inter alia, the continuation of existing trust funds, the appointment of staff until the new entity could directly hire its own staff, and the transfer of physical and financial assets.

### **RECOMMENDATION/S**

That the TCPR:

1) **NOTE** paper IOTC–2019-TCPR02-04 which provides the TCPR with opportunity to recall some of the logistical elements associated with drafting and putting in place a new IOTC Agreement.