

**FAO LEGAL OFFICE REVIEW**

**IOTC-2013-S17-07 – PROPOSAL TO REVISE THE IOTC RULES OF PROCEDURE**

**PREPARED BY: FAO**

The Legal Office has reviewed the IOTC draft Rules of Procedure (RoP) proposed by Australia to the Compendium Working Group on 6th March 2013 and would like to offer the following considerations and comments.

**The mandate for reviewing the IOTC RoP**

The heading of the proposal to revise IOTC Rules of Procedure refers to the **Compendium Working Group**, which was established by the Commission during its 15th session in 2011 (Resolution 11/01).

In particular, according to the mentioned Resolution, the Working Group is committed to:

*“1. (...) consider the development of a Compendium of IOTC Resolutions and Recommendations.*

*2. (...) consider the structure for such a Compendium as well as any overall issues entailed in reflecting the resolutions and recommendations in a Compendium, including how best to preserve their respective non-binding and binding nature.*

*3. (...) determine if the draft Compendium is an appropriate structure for a future Compendium and whether it accurately reflects the IOTC recommendations and resolutions currently in force. The Working Group should recommend to the Commission alterations of an editorial nature to improve the structure and/or drafting of the text and remove inconsistencies and redundancies.*

*4. (...) identify issues raised by its review where further guidance is required from the Commission and make recommendations to the Commission on how these issues may be addressed.*

*The Working Group should also recommend to the Commission a process for the incorporation of new decisions taken by the Commission into the compiled text.”*

**The structure of the IOTC draft RoP**

LEG noted a change in the structure of the draft IOTC RoP, placing all the Terms of Reference of the Subsidiary Bodies of IOTC as Appendices. LEG has no objections to this approach but would like to point out that any appendices or annexes to the IOTC Rules of Procedure are to be considered as an integral part of the RoP and hence have the same strength and value of the latter. Accordingly, amendments to appendices and annexes require the procedure set out in Rule XVI of the IOTC RoP.

**Specific comments and considerations the proposed amendments to the Rules**

☐ Rule I on Definitions

a) Definition of Conservation and Management Measures (CMM)

The amendment proposed aims to group together IOTC recommendations (binding) and resolutions (not binding) under the same denomination of “*Conservation and Management Measures*” (“CMM”).

Grouping together binding and not-binding decisions under the same denomination would probably conflict with the mandate of the Compendium Working Group to “*preserve their respective non-binding and binding nature*”. Furthermore, the proposed denomination would contrast with the formal denominations used in the IOTC Agreement, where binding decisions and non-binding measures (recommendations) are ruled in different paragraphs of Article IX of the Agreement. On the one hand, Article IX.1 defines the “*conservation and management measures*” as “*binding on Members of the Commission*”. On the other hand, Article IX.8 sets out the competence of the Commission to adopt

“recommendations concerning conservation and management of the stocks for furthering the objectives of [the] Agreement”.

Furthermore, it is clear that the extension of the meaning of CMM would have implications on the mandate of the Compliance Committee (see below the consideration on Appendix V on the Compliance Committee).

#### b) Definition of (Executive) Secretary.

The proposed amendment modifies the formal denomination of the Secretary of the Commission from “Secretary” to “Executive Secretary”. Although – based on the IOTC Reports – the term “Executive Secretary” is used in the practice, Art.VIII.1 of the IOTC Agreement refers to “Secretary” of the Commission. If the amendment is made to the RoP, there will be an inconsistency with the Agreement while the latter prevails on the IOTC RoP.

#### □ Rule III on Credentials

According to the proposed wording, the Letter of Credential of each delegation shall be issued by “*appropriate senior official*”.

Other Article XIV Bodies such as GFCM or RECOFI do not provide details for the authority issuing letters of credentials, but use a general wording like the following: *credentials shall conform to the standard form set by the Secretariat (see for instance Rule III of GFCM RoP, Rule III of RECOFI RoP, Rule III.2 of CACfish RoP)*. In absence of a specific ruling in this regard, the General Rules of the Organization (GRO) apply.

Rule III.2 of the GRO provides that “*credentials of delegates, alternates, associates and advisers shall be issued by, or on behalf of, the head of state, the head of government, the minister for foreign affairs or the minister concerned*”. This rule is consistent with Art.7, paragraph 2, of the Vienna Convention on the Law of Treaties (1969) and with the practice in other organizations in the UN system (see such practice was reported in document CCLM 69/2 for consideration by the FAO Council at its 116th session in 1999). Credentials may be issued by a “*senior official*” on behalf of the head of State or the relevant minister, but the word “*appropriate*” is not correct as it does not imply any competence of the individual to act on behalf of another higher authority. Hence, a more suitable wording could be “*competent authority*” or “*competent senior official*”.

#### □ Rule IV on Agenda

a) The two agenda items, *approval of a Programme of Work and Budget and applications for membership*, are listed as bullet points under the lett. c on “*reports and recommendations of the Commission’s subsidiary bodies*”. For purposes of clarity, it is suggested the two items be referred to as autonomous letters (e.g. lett. d and lett. e).

b) The second bullet point under lett. c reads as follows: “*applications for membership in accordance with Article IV.2 of the Agreement, and for accession to the Cooperating non-Contracting Party status, in accordance with the process agreed to by the Commission, as appropriate*”.

In this paragraph:

- The use of the word “*accession*” – which from a legal viewpoint means adhesion to an international treaty – is not appropriate and correct in this context. It is suggested to replace it as follows: “*applications (...) for acquisition of the Cooperating non-Contracting Party status*”

- The wording “*as appropriate*” suggests some arbitrariness in the process while the latter must conform with “*the process agreed by the Commission*” (as set out in IOTC res. 03/02). The deletion of the formula “*as appropriate*” is hence suggested.

□ Rule V, on the Secretariat

a) The existing Rule V.2, of the RoP currently in force reads as follows:

*“The Secretary of the Commission shall be appointed by the Director-General with the approval of the Commission, in accordance with the procedure set out by the Commission at its First Special Session and annexed hereto”.*

The proposed Rule V. 2 provides for an election procedure in the following terms:

*“The Executive Secretary of the Commission shall be elected by the Commission and appointed by the Director-General, in accordance with the procedure set out in Appendix II”.*

It should be recalled that the existing Rule V.2 was adopted by IOTC in pursuance of the request formulated by the FAO Council at its 127th session in 2004, for the Commission to conform to the legal framework applicable to Article XIV Bodies.

In particular, in considering the legal status of Art. XIV Bodies with specific reference to the *“Procedures for the selection and appointment of secretaries of bodies under Article XIV of the FAO Constitution”*, the FAO Council *“recognized that, in cases where the secretary of a body is appointed by the Director-General with the approval of the body concerned, the need arises to harmonize the requirements inherent in the status of the secretaries of functional autonomy and technical accountability towards the concerned bodies and of administrative accountability towards the Organization, as officials of FAO. The Council noted that the selection and appointment process cannot be seen as one including two parallel and independent segments consisting, on the one hand, in the identification of a candidate by the body and, on the other hand, his or her appointment by the Director-General who would be required merely to appoint the selected candidate, without any form of involvement in the process of identification of qualified candidates (emphasis added). The Council stressed that this would not be consistent with the applicable legal framework, including the constitutional duties of the Director-General in the selection and appointment of staff”*(CL 127Rep/para.93).

On that occasion, the Council *“invited the Indian Ocean Tuna Commission (IOTC) to amend its Rules of Procedure, as far as the selection and appointment procedure of its secretary is concerned, along the lines of the procedure approved by the GFCM, on the understanding that the revised procedure would apply only in future”* (CL 127Rep/para.94).

The appointment of the Secretary of IOTC is currently set forth in general terms in Rule V.2 of the RoP, reading as follows: *“The Secretary of the Commission shall be appointed by the Director-General with the approval of the Commission, in accordance with the procedure set out by the Commission at its First Special Session and annexed hereto”*. During its 15th session in 2011, and based on the foregoing, the Commission adopted a detailed procedure for the selection of the IOTC Secretary. In particular, the *“Selection process for the Executive Secretary of the Commission”* is contained in Appendix XIX of the Report of the 15th session of IOTC.

In view of the Council above deliberations, we strongly suggest to maintain the existing rule even if , unlike other Article XIV bodies (e.g. GFCM, ITPGFA), there does not seem to be at first sight a specific role for the FAO management in the selection process and more specifically the pre-screening process.

- Rule V, paragraph 5, of the draft RoP reads as follows: *“The Executive Secretary shall be responsible for implementing the policies and activities of the Commission and shall report thereon to the Commission. In the exercise of his/her functions, the Executive Secretary will have direct ~~relations~~ contact with all Members of the Commission as well as with FAO at all levels”*. With respect to the relationship with Members of the Commission, LEG would like to refer to the recent deliberations of the CCLM and the FC where the members acknowledged that there may be an objective need for statutory bodies – at least some of them like IOTC, GFCM, ITPGRFA, entrusted with authority to adopt regulatory measures directly binding upon Members – to interact with heads of Governmental departments. These Committees were informed that in practice some relaxation of the current procedures as set forth in MS 602 of the Administrative Manual have taken place on an informal basis and supported that, within parameters to be defined, secretariats could to inter-act with the membership of the bodies to certain level of government authorities. It was also clear that this matter was one for FAO management to deal with. The wording of the paragraph 3 referred to above should reflect the above deliberations and we propose therefore to replace *“will”* by the word *“may”* and *“contact”* with *“relations”*. LEG was wondering what the addition of *“at all levels”* effectively meant and explanations would be appreciated.

□ Rule VIII.1, lett. a on the Functions of the Chairperson and Vice-Chairpersons

Rule VIII.1, lett. a, reads as follows: “*declare the opening and closing of each ~~plenary meeting of the Commission Session~~*”.

There is no objection to substituting *plenary meeting* with *Sessions*. Nevertheless, in light of the deletion of the wording “*of the Commission*”, and while recognizing that this part of the existing RoP (Rules VI and VII) refer to the Commission, it may be worth clarifying whether the proposed deletion aims at *all* sessions, irrespectively Commission or subsidiary bodies sessions. We would suggest to maintain “*of the Commission*”.

☐ Appendix I, Letter of Credentials

Paragraph I of Appendix I reads as follows “*Upon instruction of [the Minister of./appropriate agency]*”.

To the wording “*appropriate agency*”, the same consideration expressed with reference to Rule III on Credentials applies.

☐ Appendix II, Procedure for the selection and appointment of the Executive Secretary of the Commission

a) Some edits are required. For instance paragraph 1 reading “*the vacancy announcement to be advertised...*” should be reformulated as follows: “*the vacancy announcement will be advertised*”.

b) Paragraph 1 mentions in brackets, further to qualifications and terms of reference, also benefits. The benefits/entitlements of the Executive Secretary, a staff member, are set forth in the FAO Administrative Manual. It is therefore suggested to delete the word “*benefits*” in order not to create any expectation with regard to the acquisition of benefits outside the FAO Regulations and Rules.

☐ Appendix III, on Cooperation with Non-Contracting Parties

a) The appendix is constituted by a first part taken from IOTC Resolution 98/05 and the second one taken from IOTC Resolution 03/02. The first part appears to have been inserted and then cut. Therefore, we are wondering whether the draft letter has to be considered part of the draft RoP.

b) In the proposed Appendix III, there is definition/ of Co-operating Non-contracting Party. A “*definition*” was set forth in IOTC Resolution 99/04, providing as follows: “*Any non-contracting party that voluntarily ensures that vessels flying its flag fish in a manner which is in conformity with the conservation measures adopted by IOTC be defined as a non-contracting cooperating party*”. Nevertheless, Resolution 99/04 was substituted by Resolution 03/02 which does not set out any definition or status.

☐ Appendix IV, The Scientific Committee

a) Paragraph 1 sets out that “*Unless otherwise decided by the Commission, this Rule will govern the procedures to be applied to the Scientific Committee*”. Being this an Appendix, the following wording is suggested “*Unless otherwise decided by the Commission, the following procedures will apply to the Scientific Committee*”.

b) Paragraph 2 provides that “*Pursuant to Article XII.1 of the Agreement, the Commission established a permanent Scientific Committee. The Scientific Committee will act as an advisory body to the Commission*”. A more suitable formulation would be: “*Pursuant to Article XII.1 of the Agreement, the Commission establishes a permanent Scientific Committee which shall act as an advisory body to the Commission*”.

□ Appendix V on the Compliance Committee

Paragraph 2 reads as follows: “*The Compliance Committee shall be responsible for reviewing all aspects of CPCs individual compliance with IOTC Conservation and Management Measures resolutions in the IOTC area of competence*”.

As already mentioned with reference to Rule I of the Rules of Procedure on the definition of Conservation and Management Measures (CMM), grouping together resolutions and recommendations under the same denomination is not devoid of consequences. To date, the Compliance Committee has been committed to review the CPC’s individual compliance to IOTC (binding) resolutions. If the proposed draft RoP is adopted and recommendations are included in the definition of CMM, the mandate of the Compliance Committee – on the basis of the proposed para.2 of Appendix V – will include the review on the one hand CPCs individual compliance with IOTC resolutions and, on the other, CPC’s implementation of IOTC recommendations (not binding). As stated above, there is inconsistency with the Agreement in considering the CMM to include non-binding recommendations. Furthermore, they are subject to a different regime as an objection procedure applies to binding decisions adopted by the Commission.

□ Appendix VII, Working Party (Science)

Paragraph 1 – committing the Scientific Committee to develop new or revised Terms of Reference for the working parties at its forthcoming session – is not a rule of procedure. Rather this is a specific mandate conferred by the Commission to the Scientific Committee. Hence, such a mandate should be contained in a resolution and not in the RoP.

□ Appendix VIII, Rules of Procedure for the Administration of the IOTC Meeting Participation Fund

a) In its last part, the paragraph on *Meeting Participation Fund for IOTC Chairpersons and Vice-Chairpersons* (within point 2), states that “*The same rules for document provision shall apply to Chairs and Vice-Chairs funded by the MPF*”. What is meant by “*rules for document provision*”? We suppose this refers to the Annex A, setting out the “*Guidelines for the preparation of papers as part of the meeting participation fund application process*”. If this is the case, the last part the paragraph on Meeting Participation Fund for IOTC Chairpersons and Vice-Chairpersons (within point 2) may read as follows: “*The Guidelines for the preparation of papers as part of the meeting participation fund application process set out in Annex A will apply to Chairs and Vice-Chairs funded by the MPF*”.

b) In case of adoption of the proposed amendments, cross reference to the RoP may need to be updated. E.g. In the first part, the paragraph on *Application for support to attend non-scientific meetings* (point 5) refers to Resolution 10/05, paragraph 7. If the draft RoP are approved, Resolution 10/05 will be incorporated in new Rule XV of the RoP and – more importantly – paragraph 7 will be deleted.