

**Advice from the FAO Legal Office to the  
Compliance Committee of the Indian Ocean Tuna Commission  
6 May 2022**

1. The Compliance Committee of the Indian Ocean Tuna Commission (“IOTC” or “Commission”), at its 18<sup>th</sup> Session held in virtual modality from 30 May to 3 June 2021, “requested the IOTC Secretariat to seek the advice of the FAO (Legal Office) on whether the IOTC Agreement can limit the Commission from adopting a resolution on high seas boarding and inspection scheme, since it predates the UN Fish Stocks Agreement”.<sup>1</sup> This document has been prepared by the FAO Legal Office to respond to such request.
2. This advice sets out:
  - a) Background information on the relevant principles of international law as reflected in the 1982 United Nations Convention on the Law of the Sea (“LOSC” or the “Convention”), the provisions of relevant related international agreements, and the relevant provisions of the Agreement for the Establishment of the IOTC (“IOTC Agreement”);
  - b) The analysis of the applicable principles of international law and relevant international agreements and the relationship between these international agreements and the IOTC Agreement in the context of the advice sought by the IOTC;
  - c) Conclusions as a result of the analysis.

**a) Background**

*The international law of treaties, the LOSC and the UN Fish Stocks Agreement*

3. The Vienna Convention on the Law of Treaties of 1969 (“the Vienna Convention”) governs treaty making and how the rights and duties of States arise from the treaties they negotiate and adopt. A fundamental principle of the law of treaties is *pacta sunt servanda* (agreements must be kept) – which means that States are bound by the treaties to which they are parties. The conventions and agreements discussed in this advice, are considered to be treaties that were adopted in accordance with the Vienna Convention.
4. The LOSC sets out the overarching legal regime for the conservation and management of marine living resources on the high seas and within areas under national jurisdiction. All Members of the IOTC Agreement are parties to the LOSC except Eritrea, who deposited an instrument of withdrawal in 2022 which will become effective on 31 December 2023.<sup>2</sup>
5. Articles 63 and 64 of the LOSC contain provisions relating to the conservation and management of straddling fish stocks and highly migratory fish stocks and sets out the duty of States to cooperate in respect of such stocks.<sup>3</sup> Due to the problems regarding conservation and management of these stocks, in 1993, the UN General Assembly, by Resolution 47/193, convened the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which led to the adoption of the

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<sup>1</sup> Report of the 18th Session of the Compliance Committee, para. 148, IOTC-2021-CoC18-R[E].

<sup>2</sup> The Government of the State of Eritrea submitted its intention to withdraw its membership in the IOTC indefinitely as of the beginning of the year 2022. See, <http://extwprlegs1.fao.org/treaty/docs/csl000269.pdf>

<sup>3</sup> See UNCLOS, Articles 63 and 64.

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 (“UN Fish Stocks Agreement” or “UNFSA”). The UN Fish Stocks Agreement entered into force on 11 November 2001. It currently has 91 Parties, which include 22 Members of the IOTC. The following IOTC Members are not parties to the UNFSA: Comoros, Eritrea<sup>4</sup>, Madagascar, Malaysia, Somalia, Sudan, Tanzania and Yemen.

6. The objective the UNFSA, set out in its Article 2, is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the LOSC. Pursuant to Article 5 of the UNFSA, the conservation and management of such stocks must be based on the best scientific evidence available and on the precautionary approach. The UN Fish Stocks Agreement elaborates the duty of States to cooperate in taking the measures necessary for the conservation of these resources<sup>5</sup> and considers that regional fisheries management organizations and arrangements (“RFMOs”) are the primary vehicle for cooperation between coastal States and high seas fishing States. In this regard, the UNFSA contains detailed rules on the establishment and operation of RFMOs which are to establish conservation and management measures on the high seas. Article 8.3 of the UNFSA provides that States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of RFMOs, or by agreeing to apply the conservation and management measures established by such RFMOs. According to Article 18.4 of the UNFSA, *“only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply”*.
7. Article 20 of the UNFSA further requires States to cooperate, either directly or through subregional organizations or arrangements or RFMOs to ensure compliance with and enforcement of subregional and regional conservation and management measures (“CMMs”) for straddling fish stocks and highly migratory fish stocks. Article 21 of the UNFSA adds to the cooperation on ensuring compliance and enforcement with CMMs by requiring States to establish, procedures for boarding and inspection in the high seas areas covered by the relevant subregional organization or arrangement or RFMO. Article 21 also provides that if, within two years of the adoption of the UNFSA, any organization or arrangement has not established procedures for boarding and inspection for high seas areas covered by the subregional organization or arrangement or RFMO, such boarding and inspection shall, pending the establishment of such procedures, be conducted in accordance with this Article and the basic procedures set out in Article 22.
8. Article 4 of the UNFSA stipulates that nothing in it shall prejudice the rights, jurisdiction and duties of States under the LOSC and that it shall be interpreted and applied in the context of and in a manner consistent with the LOSC.

#### *The IOTC Agreement and its CMMs*

9. The IOTC Agreement was approved by the FAO Council at its 150<sup>th</sup> session held in November 1993, under Article XIV of the FAO Constitution by Resolution No. 1/105. The IOTC Agreement entered into

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<sup>5</sup> See UNFSA, Article 8.1.

force on 27 March 1996. The IOTC Agreement currently has 30 Member Nations, including a regional economic integration organization *i.e.* the European Union.

10. In accordance with Article II of the IOTC Agreement, the area of competence of the Commission shall be *“the Indian Ocean”* and *“and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean”*. Furthermore, the species covered by the IOTC Agreement are those set out in Annex B. *“The term “stocks” means the populations of such species which are located in the Area or migrate into or out of the Area”*.<sup>6</sup>
11. Article V of the IOTC Agreement restates the requirement to cooperate in the implementation of relevant provisions of the LOSC and the UNFSA by providing that *“The Commission shall promote cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and encouraging sustainable development of fisheries based on such stocks”*. In order to achieve its objectives, the Commission has a set of functions and responsibilities in accordance with the principles expressed in the relevant provisions of the LOSC.<sup>7</sup>

## **b) Analysis**

### *Relationship between the IOTC Agreement, LOSC and the UNFSA*

12. The IOTC Agreement and the UNFSA stem from and have their legal basis in the LOSC.
13. Furthermore, while the IOTC Agreement entered into force in 1996, prior to the entry into force of the UNFSA in 2001, both agreements were negotiated concomitantly. Thus, it is highly likely that the IOTC Agreement may have influenced the provisions of the UNFSA or vice versa.
14. Some of the functions and responsibilities attributed to the Commission by the IOTC Agreement are drawn from relevant provisions of LOSC.<sup>8</sup> These include the adoption of CMMs, based on scientific evidence, to ensure the conservation of the stocks covered by the IOTC Agreement and to promote the objective of their optimum utilization throughout the IOTC Agreement area. It is noted that the Commission has to exercise its duties in accordance with the principles expressed in the relevant provisions of the LOSC.<sup>9</sup>
15. The UNFSA, on the other hand, is an agreement implementing the provisions of the LOSC concerning the conservation and management of straddling and highly migratory fish stocks, including thus stocks covered by the IOTC Agreement. It elaborates on the fundamental principle in the LOSC, which requires States to cooperate to ensure conservation and promote the objective of the optimum

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<sup>6</sup> See Article III of the IOTC Agreement. Annex B to the IOTC Agreement covers the following 16 species: Yellowfin tuna, Skipjack, Bigeye tuna, Albacore tuna, Southern Bluefin tuna, Longtail tuna, Kawakawa, Frigate tuna, Bullet tuna, Narrow barred Spanish Mackerel, Indo-Pacific king mackerel, Indo-Pacific Blue Marlin, Black Marlin, Striped Marlin, Indo-Pacific Sailfish and Swordfish.

<sup>7</sup> See Article V.2 of the IOTC Agreement.

<sup>8</sup> These provisions require States to cooperate directly or through appropriate regional or subregional organisations to agree on measure necessary for the conservation and management of straddling and highly migratory fish stocks. See Articles 63 and 64 of the UNCLOS.

<sup>9</sup> See Article V.2 of the IOTC Agreement.

utilization of fisheries resources both within and beyond the Exclusive Economic Zones (“EEZ”).<sup>10</sup> Relevant provisions of the LOSC are restated almost verbatim in Article 7 (1) (a) and (b) of the UNFSA. The UNFSA acknowledges the rights, jurisdiction and duties of States under the Convention and its interpretation and application shall conform to and be consistent with the Convention.<sup>11</sup>

### *Conservation and management measures*

16. Articles 63 (2) and 64 (2) of the LOSC provide that, with regard to the conservation and optimum utilization of highly migratory stocks, other provisions of LOSC part V apply. This means that coastal States, through RFMOs, such as the IOTC, can make use of the provisions of 62 (4) (k) to institute processes and procedures for the enforcement of their conservation and management measures on the high seas, including boarding and inspection.
17. Further, the freedom of fishing by all States on the high seas is subject to their treaty obligations, and to the rights and duties as well as the interests of coastal States provided for, *inter alia*, in Articles 63 (2) and Articles 64 – 67 of the LOSC.<sup>12</sup> This is an acknowledgement of the right of coastal States and other interested States, through RFMOs, to adopt CMMs that apply on the high seas and that such measures have primacy over freedom of fishing. Boarding and inspection are effective enforcement mechanisms or tools to ensure compliance with the CMMs.
18. To this end, and most importantly, the UNFSA obliges States through subregional or regional fisheries management organizations to establish procedures for boarding and inspection in the high seas areas covered by the organization for ensuring compliance with CMMs adopted by that organization.<sup>13</sup> It further provides that if such an organization has not established such procedures within two years of the adoption of the Agreement, then boarding and inspection may, nevertheless, be conducted in accordance with the detailed requirements in the Agreement.<sup>14</sup>
19. Article V (3) of the IOTC Agreement empowers the Commission to adopt decisions and recommendations, as required, with a view to furthering the objectives of this Agreement. Article X of the said Agreement obliges Members of the Commission to cooperate, through the Commission, in the establishment of an appropriate system to keep under review the implementation of conservation and management measures adopted, taking into account appropriate and effective tools and techniques to monitor the fishing activities, among other purposes.
20. In addition, CMMs may include measures relating to monitoring, control and surveillance (“MCS”) and ensuring compliance. Boarding and inspection are considered MCS measures. Therefore, RFMOs may adopt CMMs including those relating to boarding and inspection which are of the nature and have the objective of ensuring compliance with other CMMs. Such CMMs have been established by other RFMOs. For example, even if the North East Atlantic Fisheries Commission (“NEAFC”) predates the UNFSA, it has adopted a CMM relating to high seas boarding and inspection (CMM 2021-09 Conservation and Management Measure for High Seas Boarding and Inspection Procedures). Another example of a CMM adopted by an RFMO on boarding and inspection is the Western and Central Pacific

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<sup>10</sup> See Articles 63 and 64 of the UNCLOS.

<sup>11</sup> UNFSA, Article 4.

<sup>12</sup> UNCLOS, Article 116.

<sup>13</sup> UNFSA, Article 21 (2)

<sup>14</sup> UNFSA, Article 21 (3)

Fisheries Commission (“WCPFC”) (CMM 2006-08 Western and Central Pacific Fisheries Commission boarding and inspection procedures).

### *The effect of the Vienna Convention*

21. The cumulative effect of these provisions is that the IOTC can adopt measures - such as boarding and inspection on the high seas in the area under its competence - as part of the enforcement measures for the conservation and management of stocks covered by the IOTC Agreement. When they do so, either they must be seen, not only to be implementing Articles 63 and 64 of the LOSC directly, or through the UNFSA, where such rights are further elaborated, but also implementing the IOTC Agreement which was negotiated and adopted by the parties in accordance with the Vienna Convention on the Law of Treaties.
22. In this context, a limitation by the IOTC Agreement to the powers of the Commission to adopt a resolution on high seas boarding and inspection scheme, on the sole basis of its date of entry into force, may be inconsistent with the Vienna Convention on the Law of Treaties and the spirit of the LOSC. It is noted that the latter does provide for the establishment of RFMOs and recognizes their right to adopt conservation and management measures for high seas fish stocks.
23. It may be worth noting that, in the same line, the UNFSA recognizes the establishment of RFMOs that predates its existence when it provides that:

“Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement”.<sup>15</sup>

24. Many of the Members of the IOTC are parties to the UNFSA. For such IOTC Members, the duties set out in the UNFSA to establish and apply CMMs including the establishment of boarding and inspection procedures for high seas areas covered by the IOTC Agreement, in addition to those set out under LOSC, are binding. Where some members of the IOTC are not parties to the UNFSA, the IOTC Agreement is a treaty in its own right. Therefore, Members of the IOTC as State parties to the IOTC Agreement can create their own set of rights and duties consistent with international law.

### **c) Conclusion**

25. Based on the foregoing, the FAO Legal Office considers that the IOTC Commission can adopt measures such as boarding and inspection on the high seas in order to enforce its CMMs concerning the stocks described above. The Commission, through its members, derives these rights and duties primarily from the LOSC. The UNFSA did not only restate and elaborate such rights but also recognizes them regardless of when such regional organizations – such as the IOTC – were established. Notwithstanding the fact that the IOTC Agreement predates the UNFSA, the parties to the IOTC

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<sup>15</sup> UNFSA, Article 8 (3).

Agreement - adopted in accordance with the Vienna Convention on the Law of Treaties - have established rights and duties which they can exercise and discharge (in accordance with international law) irrespective of whether or not they are parties to the LOSC and the UNFSA.

26. Where IOTC is desirous of establishing procedures for boarding and inspection as explained above, due regard must be given to the procedures outlined in Articles 21 (more particularly paragraphs 4 – 18) and 22 of the UNFSA.
  
27. Where such boarding and inspection procedures are established, IOTC will join the International Commission for the Conservation of the Atlantic Tunas (ICCAT) as organizations that have established boarding and inspection schemes in the high seas areas covered by their respective constitutive instruments. ICCAT established a scheme of joint international inspection in November 1975, pursuant to Article IX (3) of the Convention, where the Commission recommends the establishment of a scheme of procedures for international control outside the waters under national jurisdiction for the purpose of ensuring the application of the Convention and the measures in force thereunder.<sup>16</sup> Where IOTC decides to refer to its boarding and inspection procedures as a CMM, it will join RFMOs such as NEAFC and WCPFC or the North Pacific Fisheries Commission (NPFC) in establishing CMMs on boarding and inspection procedures for the high seas<sup>17</sup>. Moreover, similar to ICCAT and NEAFC, the IOTC in establishing a CMM on high seas boarding and inspection will become a RFMO which predates the UNFSA to have adopted such CMM.

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<sup>16</sup> Compendium: Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-Like Species. See, [https://www.iccat.int/Documents/Recs/COMPENDIUM\\_ACTIVE\\_ENG.pdf](https://www.iccat.int/Documents/Recs/COMPENDIUM_ACTIVE_ENG.pdf) accessed 6/5/22

<sup>17</sup> NPFC CMM 2017-09 - Conservation and Management Measure for High Seas Boarding and Inspection Procedures for the North Pacific Fisheries Commission (NPFC). See NPFC Compendium of Active CMMs 28 November 2017.pdf. See NPFC Compendium of Active CMMs 28 November 2017.pdf