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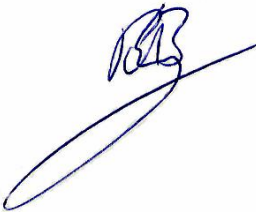
Dear Madam / Sir

COMMUNICATIONS FROM THE CHAIR OF THE TCAC

Please find attached communications from the Chair of the TCAC, Mr Quentin Hanich, regarding the advice received from the FAO Legal Department (as requested in 2023) as well as the scheduling of consultation meetings with Members.

In addition, please note that the Secretariat has been informed, that due to logistical issues, the TCAC meeting due to be held in October 2024 will **no longer be held in Oman**. The Secretariat is working to procure an alternate location and members will be informed as soon as this has been finalised.

Yours sincerely



Paul de Bruyn
Executive Secretary

Attachment:

- Letter from the TCAC chair on the FAO Legal Advice
- The Note from the FAO Legal Department
- Letter from the TCAC Chair on Consultations with Delegations.

Distribution

IOTC Contracting Parties: Australia, Bangladesh, China, Comoros, European Union, France (Territories), India, Indonesia, Iran (Islamic Rep of), Japan, Kenya, Rep. of Korea, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Seychelles, Somalia, South Africa, Sri Lanka, Sudan, United Rep. of Tanzania, Thailand, United Kingdom, Yemen. **Cooperating Non-Contracting Parties:** Liberia. **Intergovernmental Organisations, Non-Governmental Organisations. Chairperson IOTC. Copy to:** FAO Headquarters, FAO Representatives to CPCs.

This message has been transmitted by email only

Letter from the TCAC chair on the FAO Legal Advice

Dear colleagues,

The Legal Office of the Food and Agriculture Organization of the United Nations (FAO) has provided an advisory note on the scope of the competence of the Indian Ocean Tuna Commission (IOTC), pursuant to the request by the previous TCAC Chair in early 2023. I have attached it for your consideration.

As you will see, the note does not provide definitive advice on whether these waters are within IOTC's competence, but does provide useful background and context on this matter. Ultimately, the note concludes that this is a matter for the Commission to decide, noting (among other things):

... whatever the interpretation that the Commission decides to apply, for the purposes of establishing certain CMMs consistent with the functions and responsibilities of the IOTC, including CMMs establishing an allocation regime, the IOTC Agreement, expressly and implicitly requires a nuanced approach and the application and implementation of such CMMs in the Area of Competence of the IOTC. Not only should CMMs be established and applied in a way that does not undermine sovereignty and sovereign rights of coastal States under the LOSC and UNFSA; such CMMs must also ensure that Members of the Commission meet their obligations to implement the precautionary approach and compatibility and the special requirements of developing States, as well as their obligation to cooperate in the conservation and sustainable utilization of straddling and highly migratory fish stocks...

... Ultimately the CMM on allocation that should be established must make the Agreement effective, and able to achieve its object and purpose. Based on the Commission's and Contracting Parties' practice to date, this concern could be addressed by the action a member takes in respect of each CMM that the Commission adopts. The fact that the IOTC Agreement makes it possible for Members to object to Resolutions adopted by the IOTC is an inherent recognition that the IOTC must strive to achieve effective yet balanced Resolutions in terms of their objectives, substantive measures and scope but achieving such a balance may not always be possible, thus the right provided to Members to object when this is unavoidable.

The FAO Note re-affirms the need for dialogue, cooperation and compromise necessary to achieve a consensus. The forthcoming TCAC will need to consider the jurisdictional and development issues referred to in the FAO Note, as well as other priorities and concerns that have been raised through previous TCAC discussions.

I will soon begin to schedule individual consultations with IOTC members to hear your interests, priorities, concerns and aspirations. It is critical that I understand your views on the future of the IOTC tuna fisheries and the allocation criteria, and these jurisdictional and development questions. As noted previously, I will then prepare a brief report for the TCAC that identifies common elements, discusses areas for priority discussion, and identifies potential opportunities for compromise. Based on the consultations, I will provide options for a way forward. My intention is to promote commonalities and cooperation, and explore options for TCAC to consider that will allow consensus to emerge.

I will soon provide further guidance on these consultations and look forward to meeting with you all individually, and then collectively in October.

Best wishes,

Q.

Professor Quentin Hanich

IOTC TCAC Chair

NOTE

from the Legal Office of the Food and Agriculture Organization of the United Nations (“FAO”) in relation to the question of the scope of the competence of the Indian Ocean Tuna Commission (IOTC) pursuant to a request by the IOTC Chairperson

I. Introduction

1. On 30 January 2023, during the 11th session of the Technical Committee on Allocation Criteria (TCAC) of the Indian Ocean Tuna Commission (IOTC or the Commission), the members of the TCAC “asked the Chair and the Secretariat to seek clarification from the FAO Legal Office, in respect of the definition of the Area of Competence of the IOTC defined to be FAO Statistical Areas 51 and 57.” Specifically, the TCAC asked “whether the Area of Competence of the IOTC comprise the Territorial Seas and the Archipelagic waters of the IOTC Parties that are coastal States to the IOTC Area of Competence.”
2. Linked to the above questions raised in the request for legal advice from are the related issues of:
 - Whether the allocation regime developed by the TCAC for IOTC applies to fisheries in the entire Area of Competence of the IOTC, as defined by Article II of the Agreement for the Establishment of the Indian Ocean Tuna Commission¹ (IOTC Agreement) and set out in Annex A to the Agreement, as amended pursuant to the decision of the 4th Session of the Commission to modify the western boundary of the IOTC Area of Competence from 30°E to 20°E; and
 - Whether “the allocation regime ... appl[ies] to all species subject to the jurisdiction of the IOTC throughout their range within [the IOTC’s] Area of Competence”.
3. In requesting the legal advice, the TCAC Chair and the IOTC Secretariat also made the following observations:
 - If the territorial seas and archipelagic waters of respective IOTC Members are considered part of the Area of Competence of the IOTC, and in recognizing the sovereignty of coastal States in these waters, whether any distinction needs to be made in respect of the application of IOTC conservation and management measures (CMMs), including an eventual allocation regime, to these waters;
 - “[w]hile the above question[s] [are] being sought in the context of development of an allocation regime for the IOTC, the response could have significant implications for the effectiveness of the work of the IOTC to conserve and manage tuna and tuna-like species throughout their range and ecosystems.”

II. Preliminary considerations and scope

4. At the outset, it should be emphasized that it is the prerogative of the Commission and its Members (and not FAO’s) to interpret the IOTC Agreement and to act on such interpretation as appropriate. Like previous notes issued by the FAO Legal Office in relation to requests from the Commission, this Note (hereinafter referred to as “analysis”), sets out various considerations to aid the Commission and its Members in interpreting the IOTC Agreement.
5. In particular, the Commission normally enjoys functional autonomy on the substantive matter at stake in this legal analysis.

III. Interpretation of the relevant provisions of the IOTC Agreement

6. Article II of the IOTC Agreement provides that “[t]he area of competence of the Commission (hereinafter referred to as the “Area”) shall be the Indian Ocean (defined for the purpose of this Agreement as being FAO statistical areas 51 and 57 as shown on the map set out in Annex A to this Agreement) 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.” Annex A to the IOTC Agreement is an illustration of the Area of Competence of the IOTC which is essentially FAO Statistical Areas 51 and 57 and the seas south of these statistical areas extending to the north of the Antarctic Convergence.

¹ Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement) (adopted 25 November 1993, entered into force 27 March 1996) (1927 UNTS 329).

7. The Area of Competence of IOTC described above was amended pursuant to the decision held at the 4th Session of the Commission in 1999² to modify the western boundary of the Area of Competence of the IOTC from 30°E to 20°E and that the southern boundary be extended southward to the Antarctic convergence. The only real change or extension of the Area of Competence of the IOTC is the modification of the western boundary of the Area from 30°E to 20°E. The so-called “*extension of the southern boundary of Area to the Arctic Convergence*” does not appear to be real change but a different and clearer way of stating or reading the latter part of article II of the IOTC Agreement that refers to the Area of Competence of the IOTC, which includes “*adjacent seas, north of the Antarctic Convergence*”. The geographical Area of Competence of the IOTC is complemented by article III, which provides that the “*species covered by the Agreement shall be those set out in Annex B.*”
8. The available records of the discussion (*travaux préparatoires*) of the IOTC Agreement³ do not seem to offer substantive guidance that could clarify the question of whether the Area of Competence of the Commission includes “*the Territorial Seas and the Archipelagic waters of the IOTC Members that are coastal States to the IOTC Area of Competence.*”
9. A mere textual interpretation of the IOTC Agreement, which gives the ordinary meaning to the terms of Article II of the IOTC Agreement and Annex A to the exclusion of other considerations, could lead to the conclusion that the geographical Area of Competence of the IOTC includes all areas within FAO Statistical Areas 51 and 57 with the modified western boundary of 20°E and the seas below the southern boundary extending to Antarctic Convergence.
10. Such an interpretation would mean that the Area of Competence of the IOTC includes the territorial seas and archipelagic waters of coastal States located within the Area described under Article II and Annex A. It is noted in this regard that none of the current Members expressed reservations regarding the inclusion of their territorial seas and/or archipelagic waters in the Area of Competence of the IOTC in their instruments of acceptance of the IOTC Agreement.
11. It follows from such a reading that it would be possible for the IOTC to develop a CMM, including a regime for allocation that applies to populations of species listed in Annex B as are located in the Area of Competence of the IOTC (i.e. throughout the range of the species within the Area of Competence of the IOTC).

i) Reference, in the IOTC Agreement, to the 1982 United Nations Convention on the Law of the Sea

12. However, it should be noted that preambular paragraph 5 of the IOTC Agreement, refers to the 1982 United Nations Convention on the Law of the Sea⁴ (LOSC or the Convention). The Convention sets out the different marine areas and the jurisdiction of States therein. It also establishes rights and obligations of States to cooperate in the conservation and sustainable utilization of living marine resources of the high seas, including straddling and highly migratory fish stocks, as well as regarding stocks in their Exclusive Economic Zones. Preambular paragraph 5 of the IOTC Agreement particularly “*considers*” Articles 56 (“*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*”), 64 (“*Highly migratory species*”), and 116 to 119 in Section 2 (on “*Conservation and management of the living resources of the High Seas*”) of the Convention.
13. Article V(2) of the IOTC Agreement, moreover, stipulates that the Commission shall “*have functions and responsibilities, in accordance with the principles expressed in the relevant provisions of the United Nations Convention on the Law of the Sea (...)*”. This provision requires that the IOTC operates in a manner that is consistent with the LOSC, including the preservation and protection of the sovereignty of IOTC Contracting Parties that are coastal states in their territorial sea and archipelagic waters pursuant to Articles 2 and 49 of the LOSC, respectively. The discharge of functions and responsibilities under the IOTC Agreement shall not prejudice such rights.
14. A different interpretation of Articles II and III of the IOTC Agreement (with regard to the Commission’s competence vis-à-vis the territorial and archipelagic waters of its Contracting Parties) emerges if they are read in conjunction with the preamble’s reference to the LOSC and Article V(2) of the IOTC Agreement. The need, by

² IOTC. Report of the Fourth Session of the Indian Ocean Tuna Commission. Kyoto, Japan 13-16 December 1999. IOTC/S/04/99/R[E]. Victoria, IOTC. 2000. 56 pp.

³ For an overview of the process that led to the establishment of the IOTC, and related negotiating history, see FAO Fisheries Circular No. 913 FIPL/C913 and the records of consideration of the issue by the FAO Committee on Constitutional and Legal Matters, the FAO Council and FAO Conference.

⁴ United Nations Convention on the Law of the Sea (LOSC) (adopted 10 December 1982, entered into force 16 November 1994) (1883 UNTS 397).

reference to the LOSC, to preserve the sovereignty of Contracting coastal States in their territorial seas and archipelagic waters could be interpreted as excluding those areas from the Commission's competence. In this connection, the fact that, as mentioned in paragraph 10 above, none of the current IOTC Contracting Parties has expressed reservations regarding the inclusion of their territorial seas and/or archipelagic waters in the IOTC Area of Competence could also be interpreted in the sense that as the IOTC Agreement does not cover those areas by virtue of the Agreement's reference to and the obligation for ensuring consistency with the LOSC, Contracting Parties did not find it necessary to reserve their rights in those areas upon expressing their consent to be bound by the IOTC Agreement.

15. Consistent with this line of reasoning, Article XVI of the IOTC Agreement ("*Coastal States' Rights*") could be understood as to confirm the above reading as it explicitly states that "[the IOTC] *Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction*". This preservation of sovereign rights of the coastal State under Article XVI of the IOTC Agreement is consistent with the provisions of the LOSC under Part V relating to the rights of the coastal State in the EEZ, in particular the rights contained in Article 56(1)(a) of the LOSC ("*exploring and exploiting, conserving and managing the living resources, including the highly migratory species*"). Therefore Article XVI seems to preserve the sovereign rights of coastal States in the EEZ.⁵ By implication, the territorial seas and archipelagic waters which are under the sovereignty of coastal States are also preserved but did not have to be expressly stated.
16. In any case, it should be noted that sovereignty over territorial seas and archipelagic waters, as well as sovereign rights in the EEZ pursuant to the LOSC are not absolute, but subject to other provisions under the LOSC that generally apply to any maritime zone, notably Article 192 on States' general obligation to protect and preserve the marine environment and Article 197 which requires States to cooperate on a global and regional basis, directly or through competent international organizations for the protection and preservation of the marine environment. Articles 62, 63 and 64 of the LOSC (with the latter being specifically referred to in the preamble of the IOTC Agreement) establish rights and elaborates the obligation of States to cooperate in the conservation and sustainable utilization of straddling and highly migratory fish stocks. Articles 116 to 119 (which are also specifically mentioned in the IOTC preamble) provide for the duties of States relating to the conservation and management of living resources of the high seas.
17. Consequently, the Commission, irrespective of what appears at first glance to be a broad scope of its competence described under Articles II and III of the IOTC Agreement, in adopting CMMs "*to ensure the conservation of the stocks covered by [the IOTC] Agreement and to promote the objective of their optimum utilization throughout the Area*" (Article V(2)(c)), shall have due regard to and shall not prejudice the sovereignty of coastal States within their territorial sea and archipelagic waters, as well as their sovereign rights within their EEZ. Moreover, such CMMs, including a regime for the allocation of catch, shall be developed with inherent elements and indeed applied proactively in a way that accommodates and allows for the continued exercise of sovereignty and sovereign rights in the relevant areas under national jurisdiction of coastal States in the Area of Competence of the IOTC. This is in addition to other objectives that are set out, for example in Article V of the IOTC Agreement including: i) having due regard to ensuring the equitable participation of Members in the fisheries and the special interests and needs of Members in the region that are developing countries; ii) adopting CMMs in accordance with Article IX and on the basis of scientific evidence to ensure the conservation of the stocks covered by this IOTC Agreement and to promote the objective of their optimum utilization throughout the Area of Competence of the IOTC; and iii) keeping under review the economic and social aspects of the relevant fisheries bearing in mind the interests of developing coastal States.

IV. The 1995 Agreement for the Implementation of the Provisions of the LOSC relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) and other instruments that are existing between the Parties

⁵ During the negotiations on the IOTC Agreement, Japan drew attention to the matter of the extent of coastal states' sovereign rights regarding the management of highly migratory species. It argued that "*the coastal States should cooperate with the other States concerned directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone*". Japan then proposed the addition of a reference in Article XVI to the "*appropriate international law of the sea*" in order to ensure consistency with that law (CCLM 61/1 (1993), paragraph 10 of Annex I) The text of this provisions remained under discussion thereafter, until the FAO Conference at its 27th session decided to adopt the current wording of Article XVI (C-1993, paragraphs 276-277).

18. Articles 3(1), 5(c), 6 and 7 of the UNFSA (or UN Fish Stocks Agreement)⁶ require the application of the precautionary approach,⁷ and compatibility of conservation and management measures for straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, including the territorial seas and archipelagic waters of coastal States. In particular, paragraph 2 of Article 7 provides that CMMs “*established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks (...)*.” Indeed, the concept of achieving compatible conservation and management measures rests heavily on the requirement for states to cooperate. Accordingly, the duty to cooperate, set out in UNFSA Article 8, is an essential ingredient throughout the 1995 Agreement and a range of obligations for States to cooperate apply to straddling fish stocks and highly migratory fish stocks.
19. The UNSFA precautionary principle has been embodied in IOTC Resolution 12/01 “*On the implementation of the precautionary approach*”, which calls on the Commission to implement and apply the precautionary approach, in accordance with Article 6 of the UNFSA.
20. Indeed, given that a number of the IOTC’s coastal State members are also developing states, moreover, it is also important to note the various references to the special needs of developing States in the IOTC Agreement (e.g. Preambular text, as well as Article V(2)(b)). Such references are directly supported by article 24(2) of UNFSA which specifically highlights that “*in giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling fish stocks and highly migratory fish stocks,*” States must recognize the vulnerability of developing States which are dependent on fishery resources; and the need to avoid transferring a disproportionate burden of conservation action to developing States. In meeting this obligation under UNFSA article 24(2), States must also take into account the need to avoid adverse impacts on and ensure access to fisheries by subsistence, small-scale and artisanal fishers and women fish workers, Indigenous Peoples in developing States.⁸ Accordingly, references to UNFSA in IOTC Resolutions are also often in relation to recognizing the special requirements of developing States, particularly Small Island Developing States (e.g. IOTC Resolution 22/03 on a Management Procedure for Bigeye Tuna in the Area of Competence of the IOTC).
21. It follows from the above that the provisions of the IOTC Agreement relating to the Area of Competence of the IOTC and the discharge of functions and responsibilities including the adoption and application of a CMM on allocation must take into account the considerations referred to above, namely the need to preserve the sovereignty and sovereign rights of coastal States under the LOSC and UNFSA, as well as the obligations to implement the precautionary approach and compatibility, to respect the special requirements of developing States as well as their obligation to cooperate in the conservation and sustainable utilization of straddling and highly migratory fish stocks.

V. IOTC Practice

⁶ Adopted 4 December 1995, entered into force 11 December 2001 (2167 UNTS 3).

⁷ Notably, the IOTC has specifically incorporated the precautionary approach into their regular practice through the establishment of Resolution 12/01 on Implementation of the Precautionary Approach.

⁸ In addition to the LOSC and UNFSA, which are referred to in the IOTC Agreement, there are other relevant international legal instruments, both binding and non-binding which set the standards for States regarding responsible fishery management, compliance, and enforcement, including within territorial sea and archipelagic waters and to which relevant IOTC CMM refer. These include *inter alia* the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement, adopted 29 November 1993, entered into force 24 April 2003) (2221 UNTS 91), the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) (adopted 22 November 2009, entered into force on 5 June 2016) (Appendix E to FAO Doc C 2009/REP), the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU), and the FAO Code of Conduct for Responsible Fisheries. It is also worth highlighting that one of the guidelines adopted under the auspices of FAO, the “Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication” (SSF Guidelines, adopted at the 31st Session of the Committee on Fisheries, Rome, 9-13 June 2014), recommend in paragraph 5.19 that “[w]here transboundary and other similar issues exist, e.g. shared waters and fishery resources, States should work together to ensure that the tenure rights of small-scale fishing communities that are granted are protected”. Relevant resolutions of the UN General Assembly are referred to in IOTC resolutions too. See for example references in: IOTC Resolution 12/01 to the FAO Guidelines for the Eco-labelling of Fish and Fishery Products from Marine Capture Fisheries, revision 1, 2009; IOTC Resolution 12/04 to the 2005 Guidelines to Reduce Sea Turtle Mortality in Fishing Operations; IOTC Resolution 1903 to the FAO Guidelines for the routine collection of capture fishery data; IOTC Resolution 17/07 to UNGA Resolution 46/215 and IOTC Resolution 12/12 to UNGA Resolution 46/12 which call for a global moratorium on large-scale high seas driftnet fishing; and, IOTC Resolution 11/02 to UNGA resolution A/Res/64/72, paragraph 109, which “*Calls upon States and regional fisheries management organisations or arrangements, working in cooperation with other relevant organisations, including the Food and Agriculture Organization of the United Nations, the Intergovernmental Oceanographic Commission and the World Meteorological Organization, to adopt, as appropriate, measures to protect ocean data buoy systems moored in areas beyond national jurisdiction from actions that impair their operation*”.

22. The practice of the Members to date in implementing the IOTC Agreement, particularly in relation to the development of CMMs, seem to support the above approach.

i) Nature of past CMMs and the Area of Competence of the IOTC

23. Through article IX of the IOTC Agreement, which states, in its paragraph 1, that the IOTC "...may, by a two-thirds majority of its Members present and voting, adopt conservation and management measures binding on Members of the Commission (...)",⁹ the IOTC has consistently established CMMs which apply throughout the entirety of its Area of Competence. However, in various resolutions, exceptions, or limitations to CMMs have been incorporated by the IOTC.

24. In this regard it should first be noted that there seems to be no record of explicit mention, in active IOTC CCMs to the exclusion or inclusion of any particular areas of the seas, in particular archipelagic waters or territorial seas of the Contracting Parties, from their application.¹⁰ Resolution 19/03 on the conservation of mobulid rays (a non-target species) caught in association with Fisheries in the IOTC Area of Competence, while referring to IOTC Resolution 12/01 and calling on IOTC Contracting Parties and Cooperating Non-Contracting Parties to apply the precautionary approach when managing tuna and tuna-like species in accordance with Article 5 of the UNFA, also recalls, by reference to that provision, that "*for sound fisheries management, such an approach applies also within areas under national jurisdiction*". Resolution 23/01 "On the management of anchored fish aggregating devices (AFADs)", states that it is "*without prejudice or undermining the sovereign right of the coastal States and its existing national regulation*" (paragraph 2). No other IOTC CMMs seems to make reference to sovereign rights as such. Some IOTC CMMs refer to port states' rights, e.g. Resolution 05/03 "Relating to the establishment of an IOTC programme of inspection in Port", which provides that nothing in it "*affects the exercise by States of their sovereignty over ports in their territory in accordance with international law*" (paragraph 6).

25. Certain IOTC Resolutions contain provisions exempting the application of the CCMs (in full or partially) to "*artisanal fisheries operating exclusively in their respective EEZ*"¹¹; fishing vessels "*carrying out subsistence fishery*"¹² or in "*artisanal fishing for subsistence*".¹³

26. Exceptions have been included regarding the application of a resolution to certain developing Contracting Parties, or allowed for differences in the way the resolution is to be applied or implemented depending on the status of a Contracting Party. Resolution 21/01 "On an Interim Plan for Rebuilding the Indian Ocean Yellowfin Tuna Stock in the Area of Competence of the IOTC", which supersedes several other similarly patterned resolutions on the same topic, provides an illustrative example. The resolution specifically states its application to all Members within the Area of Competence of IOTC. In setting specific catch limits however, the resolution sets different (less stringent) levels for coastal developing State CPCs, Small Island Developing State CPCs or Least Developing state CPCs.

ii) Member or CPC Practice Regarding Resolutions

27. Article IX(5) of the IOTC Agreement allows any Member of the Commission to "*object to a conservation and management measure (...) A Member of the Commission which has objected to a measure shall not be bound thereby*". Contracting Parties have made use of this right. Such objections generally relate the need to the manage relevant species, address the sovereign rights of coastal States to utilize their fisheries, and recognize the special needs of developing States.

28. Various Contracting Parties, for example, have objected to Resolution 21/01 on several grounds including *inter alia*: i) the CCM's incompatibility with States' rights to adopt fisheries management measures in their EEZ,¹⁴ ii) that

⁹ The IOTC refers to binding CMMs as resolutions, and non-binding CMMs as recommendations.

¹⁰ Resolution 16/07 on the use of artificial lights to attract fish, refers to territorial waters in paragraph 1, prohibition fishing vessels and other vessels flying the flag of an IOTC Contracting Party or Cooperating Non-Contracting Party (collectively CPCs) "*from using, installing or operating surface or submerged artificial lights for the purpose of aggregating tuna and tuna-like species beyond territorial waters.*" Territorial waters are also referred to in paragraph 5 of Annex I (on "Guidelines for Preparation of Drifting Fish Aggregating Device (DFAD) Management Plans") to resolution 19/02 on Procedures on a Fish Aggregating Devices (FADs) Management Plan. This is however in connection with obligations in respect of the DFAD Management Plan (DFAD-MP) to be submitted to the IOTC Secretariat by CPCs with fleets fishing in the IOTC Area of Competence, associated inter alia to DFADs, DFAD-MP, which should include applicable areas, particularly details of any closed areas or periods e.g. territorial waters, shipping lanes, proximity to artisanal fisheries, etc.

¹¹ IOTC Resolution 13/05, paragraph 1; IOTC Resolution 13/06, paragraph 3. See also IOTC Resolution 23/06 on the conservation of cetaceans, paragraph 1.

¹² IOTC Resolution 19/03, paragraphs 4 and 5.

¹³ IOTC Resolution 16/01, paragraph 3.1(a) (supersede by Resolution 17/01, then by Resolution 18/01, then by Resolution 19/01). Resolution 23/01 on the management of anchored fish aggregating devices (AFADs) excludes from its application "*recreational fisheries*" (paragraph 2).

¹⁴ See, e.g., objection by India to IOTC Resolution 21/01 (IOTC Circular 2021-45 of 20 August 2021). See objection by Iran to IOTC Resolution 21/01 (IOTC Circular 2021-55 dated 4 October 2021).

the allocation of catch structure must be based on the needs of fisheries, particularly small-scale and artisanal fisheries by the coastal states and not (only) on historical catch;¹⁵ iii) that it is directly detrimental to development goals;¹⁶ and iv) that the use of re-estimated data as the basis of adjustment of the catch as negatively impacts on small-scale artisanal fisheries.¹⁷

29. Similarly on the grounds of setting catch limit exclusively based on catch history, Australia objected to Resolution 21/03 “On harvest control rules for skipjack tuna in the IOTC area of competence”, stressing that a new scheme of allocation “*must be consistent with the sovereign rights of coastal states in respect of the resources in their exclusive economic zones*”.¹⁸ Oman also objected to that Resolution on that same basis.¹⁹ Various objections were also raised in relation to IOTC Resolution 23/02, which is not active. Objections were raised *inter alia* on grounds that the proposed CMM created a disproportionate burden particularly on and did not protect the interest of developing coastal States,²⁰ while concerns were also raised that the Resolution had been adopted “*without taking into account the cooperative and collaborative approach of the Commission as provided for in the Agreement and other international law*”.²¹
30. The approaches reflected in IOTC resolutions, and the objections of the Contracting Parties seem to be in line with the arguments stated above i.e. that irrespective of the general competence of the Commission, specific CMMs must be formulated and applied in a manner that does not undermine the sovereign rights of coastal States to utilize their fisheries in their EEZ and the sovereignty of such States over their territorial seas and archipelagic waters. In addition, such CMMs must recognize the special needs of developing States and ensure effective international and regional cooperation, as well as ensuring consistency with the broader international legal framework.

VI. Final considerations

31. The above analysis of the IOTC Agreement, in light of the relevant provisions of the LOSC, the UNFSA and other relevant international instruments, leads to the following conclusions and options:
- The geographical Area of Competence of the IOTC as defined in article II of the IOTC Agreement is FAO Statistical Area 51 and 57 and the waters and adjacent areas extending south to the Antarctic Convergence, with the western boundary of the Area of Competence extending to 20°E (as modified). This could be interpreted to include all territorial seas, archipelagic waters and the EEZ of coastal States located within the Area of Competence of the IOTC.
 - However, the IOTC Agreement and functions of the Commission have to be implemented in a manner that is consistent with the 1982 LOSC and the 1995 UN Fish Stocks Agreement. The LOSC protects and preserves the sovereignty of coastal States over their territorial seas and the sovereignty of archipelagic States in their archipelagic waters. Additionally, Article xvi of the IOTC Agreement refers to the sovereign rights of coastal States (including archipelagic States) in their EEZs and provides that the Agreement shall not prejudice the exercise of such rights. This implies that the IOTC Agreement could be interpreted in the way that allows the Commission to exercise its competence and functions subject to the coastal State Members’ exercise of their full sovereignty in their territorial seas and archipelagic waters and sovereign rights in their EEZs respectively.
 - In any case, whatever the interpretation that the Commission decides to apply, for the purposes of establishing certain CMMs consistent with the functions and responsibilities of the IOTC, including CMMs establishing an allocation regime, the IOTC Agreement, expressly and implicitly requires a nuanced approach and the application and implementation of such CMMs in the Area of Competence of the IOTC. Not only should CMMs be established and applied in a way that does not undermine sovereignty and sovereign rights of coastal States under the LOSC and UNFSA; such CMMs must also ensure that Members of the Commission meet their obligations to implement the precautionary approach and compatibility and the special requirements of

¹⁵ Objection by the Federal Government of Somalia to IOTC Resolution 21/01 (IOTC Circular 2021-46, dated 1 September 2021).

¹⁶ Objection by Madagascar to IOTC Resolution 21/01 (IOTC Circular 2021-50 dated 27 September 2021).

¹⁷ Objection by Indonesia to IOTC Resolution 21/01 (IOTC Circular 2021-35, dated 30 June 2021).

¹⁸ Objection by Australia to IOTC Resolution 21/03, superseding Resolution 16/02 to which Australia had also objected on the same grounds (IOTC Circular 2021-64, dated 15 October 2021).

¹⁹ Objection by Oman to Resolution 21/03 (IOTC Circular 2021-72, dated 26 October 2021).

²⁰ Objection to Resolution 23/02 by United Republic of Tanzania (IOTC Circular 23-35 dated 24 May 2023) and by Seychelles (IOTC Circular 2023-19, dated 17 March 2023).

²¹ Objection to Resolution 23/02 by Seychelles (IOTC Circular 23-35 dated 24 May 2023).

developing States, as well as their obligation to cooperate in the conservation and sustainable utilization of straddling and highly migratory fish stocks.

- The fact that a majority of the IOTC Members are also parties to the LOSC and the UNFSA (see Annex) makes it all the more pressing for the Commission, in conducting its affairs, in particular in establishing CMMs, to always keep in mind and apply relevant international law, in particular the LOSC and the UNFSA

32. Ultimately, regardless of whether the Commission decides that the scope of its competence on the Area covers both the high seas and the EEZ, as well as their territorial seas and archipelagic waters, or excludes the latter, the critical issue to be addressed is the nature or type of CMM on allocation to establish and how such CMM should be applied having due regard to the sovereignty and sovereign rights of coastal States in the area of competence and the other requirements referred to above. Ultimately the CMM on allocation that should be established must make the Agreement effective, and able to achieve its object and purpose. Based on the Commission's and Contracting Parties' practice to date, this concern could be addressed by the action a member takes in respect of each CMM that the Commission adopts. The fact that the IOTC Agreement makes it possible for Members to object to Resolutions adopted by the IOTC is an inherent recognition that the IOTC must strive to achieve effective yet balanced Resolutions in terms of their objectives, substantive measures and scope but achieving such a balance may not always be possible, thus the right provided to Members to object when this is unavoidable.

Annex*

IOTC Member	LOSC Ratification/ Acceptance/Accession	UNFSA Ratification/ Acceptance/ Accession	FAO COMPLIANCE AGREEMENT Ratification/ Acceptance/ Accession	FAO PSMA Ratification/ Acceptance / Accession
Australia	Y	Y	Y	Y
Bangladesh	Y	Y	N	Y
China	Y	N	N	N
Comoros	Y	N	N	N
Eritrea	N	N	N	Y
EU	Y (formal confirmation)	Y	Y	Y
France (OT)	Y	Y	N	Y
India	Y	Y	N	N
Indonesia	Y	Y	N	Y
Iran	N (only signature)	Y	N	N
Japan	Y	Y	Y	Y
Kenya	Y	Y	N	Y
Korea, Republic of	Y	Y	N	N
Madagascar	Y	N	Y	Y
Malaysia	Y	N	N	N
Maldives	Y	Y	N	Y
Mauritius	Y	Y	N	Y
Mozambique	Y	Y	Y	Y
Oman	Y	Y	Y	Y
Pakistan	Y	N	Y	N
Philippines	Y	Y	Y	Y
Seychelles	Y	Y	Y	Y
Somalia	Y	N	N	Y
Sri Lanka	Y	Y	Y	Y
South Africa	Y	Y	N	Y
Sudan	Y	N		Y
Tanzania	N	N	N	N
Thailand	Y	Y	N	Y
UK (of Great Britain/N. Ireland)	Y	Y	Y	Y
Yemen	Y	N	Y	N
IOTC	LOSC Ratification/ Acceptance/Accession	UNFSA Ratification/ Acceptance/ Accession	FAO COMPLIANCE AGREEMENT Ratification/ Acceptance/ Accession	FAO PSMA Ratification/ Acceptance / Accession
Cooperating Non-Member				
Liberia	Y	Y	N	Y

* As at May 2023

Letter from the TCAC Chair on Consultations with Delegations

Dear colleagues,

I hope this finds you well. I would like to schedule an individual meeting with each delegation to discuss your interests, priorities, concerns and aspirations. I believe it is critical that I understand your views on the future of the IOTC tuna fisheries and the allocation criteria in order to successfully chair the TCAC negotiations. I have asked the secretariat to assist with the organisation of these consultations. Could you please email IOTC-Secretariat@fao.org with your availability between 8am – 12pm Seychelles time on any of the following dates:

- 1 – 5 July
- 8 – 11 July
- 5 – 9 August
- 19 – 23 August

The secretariat will then organise a virtual meeting link and calendar invite.

During these consultations, I will ask broad questions relating to fisheries management and allocation. I am keen to understand how members domestically manage their fisheries as this is critical to the implementation of any subsequent allocation, and may also indicate priorities for subsequent transition plans and capacity building. Questions for discussion include:

1. What interests do you have in IOTC fisheries (i.e coastal fisheries, distant water fisheries, port landings, processing, markets, crewing, charters, services etc that are related to IOTC mandated species)?
2. Do you have any tuna fisheries development policies or aspirations?
 - a. How do these policies and aspirations consider sustainability limits, ecosystem and biodiversity concerns?
 - b. What is needed from the IOTC to enable your vision for future tuna fisheries?
3. What are your priority concerns for the Chair's allocation draft?
 - a. Do you have any questions or uncertainties regarding the current draft?
4. Are there alternative allocation pathways that should be considered?
 - a. Can we simplify the allocation criteria?
5. How do you currently monitor, assess, manage, limit and report tuna fisheries;
 - a. within your EEZ (artisanal, industrial and foreign)
 - b. by your flagged vessels when outside your EEZ
6. Do you have sufficient data and capacity to effectively manage your coastal/DWF fisheries and limit species or fleet catches to sustainable levels?
 - a. If not, what assistance do you require to develop effective management and implement sustainable limits?

In September, I will then prepare a brief report for the TCAC that identifies common elements, discusses areas for priority discussion, and identifies potential opportunities for progress. Based on the consultations, I will provide options for a way forward.

I look forward to meeting with you all individually during July and August, and then collectively in October.

Best wishes,

Q.

Professor Quentin Hanich
IOTC TCAC Chair