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# COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

**Hundred and Seventh Session**

**Rome, 22-24 October 2018**

**Procedures for the appointment of Secretaries of bodies under Article XIV  
of the Constitution**

## I. Background

1. This document addresses the procedure for the selection and appointment of Secretaries of Statutory Bodies established under Article XIV of the FAO Constitution. This issue primarily concerns three treaties, namely: the Agreement for the Establishment of a General Fisheries Commission for the Mediterranean (“GFCM”); the Agreement for the Establishment of the Indian Ocean Tuna Commission (“IOTC” or “the Commission”); and the International Treaty on Plant Genetic Resources for Food and Agriculture (“ITPGRFA” or “the Treaty”). These treaties provide that the Secretaries “*are appointed by the Director-General with the approval of...*”<sup>1</sup>

2. A practice had developed by which the selection of candidates for positions of Secretary was being undertaken through voting or elections by the Members of the Body concerned, with no, or very limited, involvement of the FAO Secretariat. The candidate identified in this manner would, under this practice, be subsequently referred to the Director-General for appointment.

3. A request was made in 2016 to the Governing Bodies to reassess this practice as it did not seem to be consistent with the ordinary meaning of the provisions of the treaties, nor conform with the procedures in the United Nations System for staff selection in respect of similar bodies in other organizations. The concerns related to this practice are summarized at Section II below and are addressed in detail in a number of papers previously presented to the Governing Bodies, the Commission and the Governing Body of the ITPGRFA.<sup>2</sup>

<sup>1</sup> Basic Texts, Volume 2, Part O, page 187, paragraph 32 iii. See also ITPGRFA, Article 20; IOTC Agreement, Article VIII; GFCM Agreement, Article 10 (Article XI of Amended version approved by the FAO Council at its 113th Session (November 1997).

<sup>2</sup> See CCLM 106/5, IT/GB-7/17/30, IOTC Circular 2017–078, JM 2016.2/6, CCLM 103/2, IOTC Circular 2016–049, IT/GB-1/06/11.

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4. In October and November 2016, the Committee on Constitutional and Legal Matters (“CCLM”) at its 103<sup>rd</sup> Session, the Joint Meeting of the 120<sup>th</sup> Session of the Programme Committee and the 164<sup>th</sup> Session of the Finance Committee (“the Joint Meeting”) examined this matter. The CCLM acknowledged the need to balance the functional autonomy of Article XIV Bodies with legal and administrative responsibilities borne by the Organization for such Bodies.<sup>3</sup> The Joint Meeting stressed the urgency of filling vacant positions of Executive Secretaries of two Article XIV Bodies, namely the IOTC and the Treaty.<sup>4</sup>

5. At its 155<sup>th</sup> Session, the Council reviewed the reports of the CCLM and the Joint Meeting and noted that, under the *Principles and Procedures which should Govern Conventions and Agreements concluded under Article XIV and XV of the Constitution, and Commissions and Committees Established under Article VI of the Constitution* (“the Principles”) established by the Conference,<sup>5</sup> and the provisions of the treaties concerned, the Secretaries were appointed by the Director-General with the approval of the Bodies concerned. While acknowledging the need to balance the functional autonomy of Article XIV Bodies with the responsibilities borne by the Organization for such Bodies, it stressed the urgency of filling vacant positions of Secretaries of two Article XIV Bodies, the IOTC and the Treaty.<sup>6</sup>

6. The Council decided that the following process should be followed:

- a. with immediate effect, the Independent Chairperson of the Council (“ICC”) and the FAO Secretariat will consult with the concerned Article XIV Bodies with a view to developing a proposal on procedures for the appointment of Secretaries of concerned Article XIV Bodies acceptable to the Bodies and to be submitted to the FAO Council by the end of 2018;
- b. also immediately, on an exceptional basis and without setting any precedent, the Director-General will issue Vacancy Announcements for the appointment of two Secretaries (IOTC and ITPGRFA). This will follow standard procedures for the appointment of FAO Senior Staff, with inclusion of two representatives of Members, to be decided by the Bodies, in interview panels and subsequent referral by the Director-General of one candidate to the Bodies for approval at their next session; and
- c. the Secretaries referred to in sub-para (b) will be appointed for two years subject to confirmation by the concerned Body of the appointment at the end of that period.<sup>7</sup>

7. Consistent with guidance of the Council, selection procedures were held for Secretaries of the IOTC and the Treaty. Applications were reviewed on the basis of the requirements and competencies set out in the vacancy announcements. Interview Panels were established and the following steps were taken:

- a. IOTC: The Interview Panel was chaired by the Assistant Director-General of the Fisheries Department, and included the FAO Legal Counsel, and the Global Tuna Coordinator and former Secretary of the IOTC. Members of the IOTC were represented in the Interview Panel by the Chairperson of the IOTC and a representative of the European Commission. The Panel interviewed twelve candidates and recommended a shortlist of five candidates to the Director-General. The Director-General identified Dr Christopher O’Brien, whose proposed appointment was referred to the Members of the

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<sup>3</sup> Report of the 103<sup>rd</sup> Session of the Committee on Constitutional and Legal Matters, CL 155/2, para. 8.

<sup>4</sup> Report of the Joint Meeting of the 120<sup>th</sup> Session of the Programme Committee and 164<sup>th</sup> Session of the Finance Committee, CL 155/7, para. 12.

<sup>5</sup> Basic Texts, Volume 2, Part O, page 181.

<sup>6</sup> Report of the Council of FAO, 155<sup>th</sup> Session, CL 155/REP, paras 26 and 27.

<sup>7</sup> *Id.*

Commission for approval.<sup>8</sup> The appointment was approved by the 21<sup>st</sup> Session of the Commission and Dr O'Brien was subsequently appointed by the Director-General.

- b. ITPGRFA: The Interview Panel was chaired by the Assistant Director-General, Climate, Biodiversity, Land and Water Department, and included the Assistant Director-General, Agriculture and Consumer Protection Department, and a Special Adviser in the Human Resources Division. Members of the Treaty were represented in the Interview Panel by the Chairperson of the Governing Body of the Treaty and a member of the Bureau of the Treaty. The Panel interviewed twelve candidates and recommended a shortlist of five candidates to the Director-General. The Director-General identified Mr Kent Nnadozie, whose proposed appointment was communicated to the Chairperson of the Governing Body of the Treaty.<sup>9</sup> The appointment of Mr Nnadozie was approved by the Seventh Session of the Governing Body and Mr Nnadozie was subsequently appointed by the Director-General.

8. In the intervening period, the IOTC and the Governing Body of the Treaty have considered the proposed long-term procedures for the selection and appointment of Secretaries.

9. In the case of the IOTC, a small drafting group was established at the 21<sup>st</sup> Session of the Commission to develop a proposal for a permanent procedure to select the Executive Secretary of the Commission.<sup>10</sup> The small drafting group revised Appendix II of the Commission's Rules of Procedure ("RoP") regarding the selection and recruitment of the IOTC Executive Secretary. These proposed revisions were transmitted to the ICC by the IOTC Vice-Chairperson on 7 March 2018 for submission to the upcoming Session of the CCLM and for feedback and advice from FAO by 12 March 2018 in order to meet the deadline for consideration at the 22<sup>nd</sup> Session of the Commission to be held in May 2018. In light of the short deadline, the ICC replied that FAO would not be able to meet the deadline but would provide comments in time for consideration by the Commission at its next Session. The ICC also advised that it would not be possible to transmit the document to the CCLM, in light of the time needed to prepare documents for consideration by the Governing Bodies and bearing in mind that the 106<sup>th</sup> Session of the CCLM would be taking place from 12 to 14 March 2018; the week after receipt of the IOTC's communication.

10. At its 106<sup>th</sup> Session, the CCLM was informed of the communication received from the IOTC. The CCLM noted the consultations undertaken by the ICC, the ongoing processes, as well as the views of the FAO Secretariat. The CCLM, following an exchange of views amongst its members, requested the Secretariat to submit the matter to the CCLM at its next Session.<sup>11</sup>

11. Under cover of a Circular State Letter to Members of the IOTC on 6 April 2018,<sup>12</sup> the FAO Secretariat presented its view that the proposed revisions did not offer viable solutions to the issues it had previously raised and seemed to reverse the roles clearly expressed in Article VIII(1) of the IOTC Agreement. It also considered that the proposals would introduce a cumbersome selection procedure.

12. The issue was further considered at the 22<sup>nd</sup> Session of the IOTC in May 2018.<sup>13</sup> The Commission noted the need to revise the RoP to secure a flexible recruitment process for the Commission and to do this in a manner that is consistent with the requirements of the FAO Constitution. The Commission recommended consultations in order to ascertain an acceptable solution be held in the margins of the next Session of the Committee on Fisheries in July 2018. It also

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<sup>8</sup> IOTC Circular 2017-050 on the Selection of the Executive Secretary, 28 April 2017.

<sup>9</sup> IT/GB-7/17/29 on the Selection and Appointment of the Secretary of the Governing Body [Kigali, Rwanda, 30 October - 3 November 2017].

<sup>10</sup> Report of the 21<sup>st</sup> Session of the Indian Ocean Tuna Commission, IOTC-2017-S21-R[E], para. 16.

<sup>11</sup> Report of the 106<sup>th</sup> Session of the Committee on Constitutional and Legal Matters, CL 159/2, paras 17 and 18.

<sup>12</sup> IOTC Circular 2018-18 on the Proposed Amendments to the IOTC Rules of Procedure to Select the Executive Secretary.

<sup>13</sup> Report of the 22<sup>nd</sup> Session of the Indian Ocean Tuna Commission, [IOTC-2018-S22-R].

recommended that, depending on the outcome of this consultation, the small drafting group then redraft the proposed RoP text to reflect those consultations and present a revised text at the next Commission meeting, which will take place in 2019.

13. In the case of the Treaty, the Seventh Session of the Governing Body, held in November 2017, noted that the Secretary is appointed by the Director-General with the approval of the Governing Body, and that the Director-General and the Governing Body both have a role to play in the appointment and selection of the Secretary.<sup>14</sup> However, the Governing Body failed to reach a consensus on the proposed procedures due to concerns raised regarding the shared responsibility of the FAO Secretariat and the Governing Body in this context. Therefore, it decided to revisit this issue at its Eighth Session to be held in November 2019, and requested the FAO Secretariat to reconsider, in close consultation with the Bureau of the Treaty, the proposal for the selection and appointment of the Secretary to “*more appropriately reflect the concerns raised at this Seventh Session*”.

14. In addition, consistent with the guidance of the Council, the ICC has led a number of consultations on this issue, which are currently under way.

## **II. Issues related to the Selection of Secretaries through Voting or Elections**

15. The concerns related to the practice of holding elections to identify candidates for appointment as Secretaries to Article XIV Bodies have been set out comprehensively in a number of documents submitted to the FAO Governing Bodies, the IOTC and the Governing Body of the Treaty.<sup>15</sup> The main points are listed below:

- a. The practice of holding elections is inconsistent with the treaties establishing these Bodies. The treaties provide for two parties – the Director-General and the Commission – to have a role in the appointment process: the Director-General appoints the Secretary with the approval of the Body concerned. The referral of the name of an “elected” candidate to the Director-General for appointment does not respect the respective roles set out in the treaties.
- b. These selection practices are unknown in other organizations of the United Nations System. The selection mechanisms for such positions in the United Nations System foresee a phase in which the administration reviews applications received, assesses them against the required qualifications, interviews the candidates and establishes a short-list. Typically, the person vested with appointing authority, for example, the Secretary-General of the United Nations, selects one candidate and consults or seeks confirmation from the body concerned.
- c. Article XIV Bodies are Statutory Bodies of FAO, which rely upon FAO’s legal personality – and its privileges, immunities and exemptions – and act through FAO to discharge their mandates and implement their programmes of work.
- d. While Article XIV Bodies enjoy a measure of functional autonomy in implementing their programmes of work, administratively they are integrated with and in FAO, operate under the framework of FAO, and commit FAO and all of its Members in all their activities, whether or not their programmes of work are funded entirely by their membership.
- e. FAO and the Director-General remain fully responsible and accountable for the performance and conduct of the Secretaries who are officials of FAO.

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<sup>14</sup> Report of the Seventh Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, IT/GB-7/17/Report.

<sup>15</sup> See footnote 2 above.

- f. The selection and appointment of the Secretaries must be primarily seen as a professional selection process, allowing for the verification of the qualifications of the candidates, for proper reference checks, and for an assessment of all the candidates from the perspective of their integrity, conduct and suitability *vis-à-vis* the terms of reference for these positions. These are senior staff members of FAO who exercise powers delegated by the Director-General in accordance with the FAO Constitution and the regulations and rules of FAO.
- g. The practice of holding elections has had the practical consequence of undermining the impartiality, independence and autonomy which should characterize the activities undertaken by FAO, including its Article XIV Bodies, and their multilateral nature. The practice risks politicization of the process of selection and the manner in which candidates for these positions discharge their functions. It may also encourage officials to regulate their conduct in a manner incompatible with their obligations as international civil servants and staff members of FAO.

### **III. Proposed Procedure for Selection and Appointment**

16. The procedure proposed by the FAO Secretariat for the selection and appointment of Secretaries for all Article XIV Bodies would follow those for selection and appointment of FAO senior staff with some adjustments to enable engagement in the process by the Body concerned. This procedure, which was followed in respect of the recent appointments referred to in paragraph 7 above, is set out in Annex I. It directly applies the provisions of the treaties concerned, respecting the respective roles of the Director-General and the Article XIV Bodies, and assures consistency with United Nations System practices. In particular:

- a. The participation of representatives of the Body concerned in the interview process and the determination of the shortlist of candidates recommended as suitable for appointment ensures that the Body is actively involved in identifying the candidate whose name is ultimately presented to the Body for approval.
- b. This process has the benefit of being more likely to ensure that, by the time a candidate is presented for approval/non-approval, the suitability of that candidate for the position will have been confirmed, through the initial verification process, as well as the interview.
- c. The process is not unduly politicized, while also preserving the right of the Body concerned to decide whether or not to confirm the proposed appointment, in accordance with the provisions of the treaties.
- d. This approach reflects United Nations System practice for the appointment of Executive Secretaries and Executive Heads of Programmes, Funds and autonomous bodies administered by the United Nations.

17. The FAO Secretariat considers that alternatives that have been proposed generally fail to fully address the concerns that gave rise to the current consideration on this issue, and/or are inconsistent with the status of Article XIV Bodies in the FAO constitutional and legal framework.

### **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>16</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>17</sup> and, subsequently, by the Council at its 132<sup>nd</sup> Session from 18 to 22 June 2007.<sup>18</sup>

22. If the Members of an Article XIV Body decide that it should be moved outside the framework 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>19</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.

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<sup>16</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>17</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>18</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.

<sup>19</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

## **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>20</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>21</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 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.

## **V. Suggested Action by the Committee**

30. The Committee is invited to review this document and make such observations and comments thereon as it considers appropriate.

31. In particular, the Committee is invited, in light of the considerations set out above, to consider and make recommendations to the Council on the proposal that the long-term procedure for the selection of Executive Secretaries or heads of Bodies established under Article XIV of the FAO Constitution follow the procedures for the appointment of senior staff with adjustments, as set out in Annex I hereto.

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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>20</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>21</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.

**ANNEX I****PROPOSED PROCEDURE FOR THE SELECTION AND APPOINTMENT OF SECRETARIES OF ARTICLE XIV BODIES**

- 1) A Vacancy Announcement is drafted by technical departments with support of the Office for Human Resources (“OHR”) as is done for all senior (D1 and above) staff positions. The draft Vacancy Announcement is shared with the Chairperson of the Body concerned who is invited to provide views thereon.
- 2) The Vacancy Announcement is issued and posted for 46 days.
- 3) A first review and screening of candidates is undertaken by OHR based on the minimum criteria and qualifications set out in the Vacancy Announcement.
- 4) A second review is undertaken by the offices of the relevant Deputy Directors-General and Assistant Directors-General to establish a shortlist of candidates for interview. The interview shortlist must contain at least ten candidates, including at least one female candidate.
- 5) An Interview Panel is established, which is composed of:
  - a) The relevant Deputy Director-General or Assistant Director-General (the Chairperson);
  - b) One Senior FAO officer;
  - c) Two representatives of the Members of the Article XIV Body;
  - d) One external member; and
  - e) One representative of OHR (for process support).
- 6) Interviews of shortlisted candidates are conducted by the Interview Panel which will prepare a report. The Panel Report will identify a minimum of five qualified candidates, including at least one female candidate. If there is no female candidate, the Panel Report must contain a justification for this omission.
- 7) The Panel Report is submitted for consideration by the Director-General.
- 8) Reference checks are undertaken by OHR and the managerial capabilities of the shortlisted candidates are reviewed by an external company.
- 9) The Director-General identifies one proposed candidate for appointment, whose name and curriculum vitae is referred to the relevant Article XIV Body for approval in accordance with the provisions of the treaty concerned.
- 10) Upon approval of the Body, an offer is issued to the candidate. Should there be non-approval, the Director-General will propose to the Body another candidate recommended for appointment.
- 11) Upon acceptance, the Director-General appoints the candidate.