



منظمة الأغذية  
والزراعة  
للأمم المتحدة

联合国  
粮食及  
农业组织

Food  
and  
Agriculture  
Organization  
of  
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United  
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Organisation  
des  
Nations  
Unies  
pour  
l'alimentation  
et  
l'agriculture

Organización  
de las  
Naciones  
Unidas  
para la  
Agricultura  
y la  
Alimentación

## COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

### Eighty-first Session

Rome, 4-5 April 2007

### 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)

#### I. INTRODUCTION

1. The Director-General is referring to the Committee on Constitutional and Legal Matters (CCLM), under the terms of Rule XXXIV, paragraph 4 of the General Rules of the Organization, the issue of the process for a change in the status of a body established by agreement concluded under Article XIV of the FAO Constitution, into a body outside the framework of FAO. This document provides detailed information on the context in which the issue has arisen, in connection with the Indian Ocean Tuna Commission (IOTC).

2. In submitting the matter to the CCLM, the Director-General wishes to underscore, at the outset, as will be clear from subsequent developments in this document, that in the event that the Members of a particular statutory body established by international agreement under Article XIV of the FAO Constitution should express clearly the desire that such body be removed from the framework of FAO, the wishes of the Members should prevail and, subject to the views of its Governing Bodies, the Organization should take a pro-active approach towards the matter as far as possible under the rules governing the operations of the Organization. It is in this spirit that this submission, involving a number of complex and unprecedented issues, is being made to the CCLM.

3. This submission reflects also two additional, more specific, concerns that it is important to underline at the outset.

3.1. First, given the process of preparation, negotiation and conclusion of conventions and agreements involving the Governing Bodies and, through them, all FAO membership, as a general rule the matter appears to be necessarily one which concerns the Organization

as a whole, through its relevant Governing Bodies, and not only the members of the concerned body under Article XIV of the Constitution.

3.2. Second, no procedure for the removal of a statutory body of FAO from the framework of FAO to outside the Organization was foreseen explicitly, either in the Basic Texts, or in policies or procedures established by the Conference or the Council, despite a number of indications referred to in this document. It is therefore necessary that guidance be provided on a subject matter which may concern potentially sixteen (16) conventions and agreements concluded under Article XIV of the Constitution.

4. The issues covered in this document are of a fairly complex nature. It is, therefore, essential that a comprehensive presentation of the matter, in all its dimensions, be made and that the structure of the present document, notwithstanding its length, should facilitate the review of the matter by the CCLM. This presentation includes:

- (a) a detailed presentation of the background to the issue under review concerning the Indian Ocean Tuna Commission (IOTC), deemed to be essential for a correct understanding of the matter;
- (b) a presentation of the legal provisions regarding bodies established by conventions and agreements under article XIV of the FAO Constitution and related issues;
- (c) the situation under consideration seen in the light of applicable principles of international law;
- (d) the suggested course of action to deal with the situation under review, involving (i) the convening of a Conference of Plenipotentiaries for the adoption of a new IOTC Agreement; (ii) a concomitant process of withdrawal from, and termination of the existing IOTC Agreement and acceptance and entry into force of a new IOTC Agreement; and (iii) the implementation of such transitional arrangements as may be required.

## **II. BACKGROUND TO THE ISSUE UNDER REVIEW**

### **A. The Indian Ocean Tuna Commission**

5. The Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC) was approved by the Council of FAO at its 105<sup>th</sup> Session in November 1993 following a process of negotiation of the agreement within FAO which had lasted for some seven years. The Agreement was concluded under Article XIV of the FAO Constitution. Under Paragraph 1 of Article IV of the Agreement, membership in the Commission is open to Members and Associate Members of FAO that are: (a)(i) coastal States or Associate Members situated wholly or partly within the Area; (ii) States or Associate Members whose vessels engage in fishing in the Area for stocks covered by the Agreement; or (iii) regional economic integration organizations of which any State referred to in subparagraphs (i) or (ii) is a member and to which that State has transferred

competence over matters within the purview of the Agreement; and (b) that accept the Agreement in accordance with the provisions of paragraph 1 of Article XVII of the Agreement.

6. The Commission may also, in accordance with a special procedure, admit to membership any other States that are not Members of FAO, but are Members of the United Nations or of any of its Specialized Agencies, or of the International Atomic Energy Agency. In accordance with Article XVII, paragraph 1, acceptance of the Agreement by any Member or Associate Member of FAO is effected by the deposit of an instrument of acceptance with the Director-General. As provided for in Article XVIII, the Agreement entered into force on 27 March 1996, date of deposit of the tenth instrument of acceptance. At present there are 24 Parties to the IOTC Agreement<sup>1</sup>.

7. IOTC enjoys very considerable functional autonomy but retains a number of links with FAO as described later in this document.

#### **B. The 3<sup>rd</sup> Special Session of IOTC, Goa, India, 17-19 May 2006**

8. Issues related to the status of IOTC, and its relationship with FAO, were under discussion in the Commission at a few past sessions. As a result of a specific request by the Commission, at its 8<sup>th</sup> Session, in December 2003, for clarification of the relationship between IOTC and FAO, the issue of the legal status of bodies established under Article XIV of the FAO Constitution was referred to the CCLM and the Council and the outcome of this review was reported to the Commission. The Commission was also provided with a paper on the procedures for amendments to the Agreement in the light of the issue of whether particular amendments involved new obligations for Members. At its 9<sup>th</sup> Session, in May-June 2005, the Commission agreed to convene a Special Session to explore ways to achieve a more effective and efficient organization.

9. At the 3<sup>rd</sup> Special Session of IOTC, the Commission recalled that, at the 9<sup>th</sup> Session, it had agreed to explore ways to achieve effectiveness and efficiency, notably through a change in the relationship between IOTC and FAO, by an amendment to the Agreement. The report of the 3<sup>rd</sup> Special Session of the Commission<sup>2</sup> indicates that the Members present at that session reached consensus on a comprehensive set of amendments. These amendments are presented in **Appendix I** to this document. The purpose of this comprehensive set of amendments is, *inter alia*, to remove all references to FAO in the IOTC Agreement, which are an expression of its nature as a statutory body of FAO, placed within the framework of FAO. Once adopted by IOTC, the Commission would automatically cease to be a body operating under Article XIV of the FAO Constitution. On that occasion, FAO provided a note outlining the procedures which in its view should be followed in order to remove the Commission from the framework of FAO. The substance of the papers submitted by FAO to IOTC is incorporated and expanded in this document<sup>3</sup>.

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<sup>1</sup> Australia, China, Comoros, Eritrea, European Community, France, Guinea, India, Iran (Islamic Republic of), Japan, Kenya, Korea, Republic of, Madagascar, Malaysia, Mauritius, Oman, Pakistan, Philippines, Seychelles, Sri Lanka, Sudan, Thailand, United Kingdom and Vanuatu.

<sup>2</sup> Report of the Third Special Session of the Indian Ocean Tuna Commission, Goa, India, 17-19 May 2006, IOTC-2006-SS3-R[E].

<sup>3</sup> These papers are made available to the CCLM in the languages of the Commission.

10. Subsequent to this, on 22 December 2006, the Chairperson of the Commission sent a number of letters to the Director-General. One of these letters requested the Director-General, under Article XX of the IOTC Agreement, to circulate to the Parties to the Agreement a comprehensive set of amendments aimed at changing the nature of the Agreement as one concluded under Article XIV of the FAO Constitution, into an agreement outside the framework of FAO, with a view to their formal adoption at the forthcoming 11<sup>th</sup> Session to be held from 14 to 18 May 2007. Another letter of the same date requested the Director-General to extend the contract of the Executive Secretary, due to expire on 28 February 2007, for an additional period of three years. As with the other staff of the Commission, the Executive Secretary of IOTC is an FAO staff member.

### C. Considerations regarding the proposed procedure

11. In considering the terms of the above request, two series of concerns were raised. These concerns reflect misgivings expressed informally, both orally and in writing, by various Members to FAO, including key Members of IOTC and which are the underlying reason for the referral of the matter to the CCLM. While responding to the wishes of Members of IOTC, it is the duty of the Director-General to ensure that an unobjectionable procedure be followed, allowing for full clarification of the future status of IOTC *vis-à-vis* FAO and avoiding legal uncertainty and any possible liabilities for FAO and its Members. Concerns expressed relate both to the **procedure being followed for the proposed change in the nature of IOTC** as an FAO statutory body into one outside the framework of FAO and to **the nature of the amendments being proposed**.

#### (i) On the proposed procedure for the adoption of the amendments

12. The IOTC Agreement was under negotiation for many years and concluded eventually under Article XIV of the Constitution and all supplementary rules related thereto. The existing Agreement is consequently the direct result of that process. While not all Members of FAO had obviously the same interest in the process of establishment of the Commission, and only some of them participated in preparatory meetings, in view of the status of the agreement as one under the framework of FAO, the process of negotiation involved to various degrees all FAO membership, through its Governing Bodies with particular reference to the Council and the CCLM. This was all the more so since a few complex issues arose during the negotiations and these had to be referred several times to the CCLM and the Council. Therefore, it would seem that a fundamental legal question arises as to whether the procedure which IOTC is following, on its own, is appropriate for a change in its status as an FAO body under Article XIV into a body outside FAO. This particular issue was brought specifically to the attention of FAO officials by a number of Members. Seen in this light, the change in the nature of IOTC as a statutory body of FAO into a body outside FAO is not merely a matter for decision by IOTC Members but a matter for FAO, as a whole, which must be referred to the Governing Bodies where the agreement was negotiated and approved.

13. In addition, the procedure set out in Article XX of the IOTC Agreement is intended to allow for amendments to an Agreement concluded under Article XIV of the FAO Constitution and would seem to have inherent limitations, i.e. that it may only concern amendments to an Agreement within the framework of FAO which retains that character. It is questionable to consider that an amendment intended to allow for the modification of an agreement within the framework of FAO, could be used to establish a new agreement outside the framework of FAO. In this connection, it is also noted that there are at present 16 agreements concluded under Article XIV of the Constitution and it is appropriate to define a position for similar situations.

(ii) **On the nature of the proposed amendments**

14. As mentioned above, the IOTC Agreement establishes a procedure for the adoption of amendments, involving a decision by the Commission by a three-quarters majority of its Members, depending on whether or not such amendments involve new obligations for IOTC Members. If the amendments do not involve new obligations, they enter into force for all Members from the date of their adoption by the Commission. On the contrary, if they involve new obligations for IOTC Members the amendments, after adoption of the Commission, come into force in respect of each Member only upon its acceptance thereof, through an instrument of acceptance deposited with the Director-General. Rights and obligations of Members which did not accept the amendments involving new obligations continue to be governed by the provisions of the Agreement, as in force prior to the amendments. In background notes to 9<sup>th</sup> Session of the Commission and to the 3<sup>rd</sup> Special Session of the Commission, the Legal Office of FAO indicated that amendments aimed at removing IOTC from the framework of FAO might involve inherently new obligations for the Members, insofar as rights and obligations currently enjoyed or borne by FAO as a result of its status, such as FAO legal personality, pre-existing privileges and immunities within the territories of most, if not all FAO Members, availability of social security and pension schemes for staff, legal liability in respect of all activities of the Commission would have to be borne or negotiated by the Commission and its Members once the Commission was placed outside FAO.

15. The position of the Members of the Commission which participated in the 3<sup>rd</sup> Special Session does not appear clearly from the report, which did not address the issues raised. Thus, *“the Members confirmed that a declaration will be adopted at the same time as the adoption of the amendments to the Agreement, stating that the amendments do not, in themselves, increase the financial contributions payable by each Member of the Commission<sup>4</sup>”*. In addition, one Member of the Commission *“showed concern regarding the procedure followed”* and indicated that according to its Constitution the amendments need to obtain parliamentary approval<sup>5</sup>. Another Member expressed a similar need for approval<sup>6</sup>. In fact, these views would seem to be incompatible with, and indeed defeat the very purpose of the approach which the Commission is following whereby amendments which do not involve new obligations for the Members come into force upon adoption by the Commission. This procedure, whereby amendments come into force with respect to all Members from the date of their adoption, seems to imply necessarily that there should not be any need for any individual Member to refer the proposals for internal processes of approval. The procedure that the Commission is following could therefore be a source of considerable legal uncertainty.

16. The above being stated it is nevertheless recognized that whether or not a particular set of amendments involves new obligations remains primarily a matter for the IOTC Members. Still the above concerns regarding the correctness of the approach which the Commission is following, seen together with the current uncertainty of the Members as to whether or not the amendments involve new obligations, may be a source of future difficulties for FAO and its Members, as well as for IOTC Members. This is all the more so as precisely at the same time as the Chairperson requests the Director-General to circulate the proposed amendments with a view to their approval at the 11<sup>th</sup> Session of the Commission in May 2007 - thus severing all institutional links with FAO – the Chairperson is also requesting the Director-General to extend the contract of the Executive

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<sup>4</sup> Cf. Report of the Third Special Session of the Indian Ocean Tuna Commission, Goa, India, 17-19 May 2006, IOTC-2006-SS3-R[E], paragraph 11.

<sup>5</sup> Cf. Ibid., paragraph 13.

<sup>6</sup> Cf. Ibid., paragraph 14.

Secretary for a period of three years, which could be justified only if IOTC were to continue to be under the framework of FAO.

17. In view of the foregoing considerations, the Director-General felt that prior to circulating the proposed amendments, and in view of his functions as depositary of an Agreement concluded under Article XIV of the FAO Constitution providing for the establishment of an FAO statutory body and his accountability vis-à-vis the Governing Bodies where the IOTC Agreement was negotiated and adopted, it was incumbent upon him to seek guidance from the CCLM and the Council as to the legally correct course of action that he should take. An alternative to this course of action was tentatively envisaged. It consisted for the Director-General in circulating the amendments together with his observations. However, it was concluded that it would be inappropriate for the Director-General to circulate a comprehensive set of amendments to an Agreement concluded under Article XIV of the FAO Constitution while, at the same time, articulating substantial reservations of a legal nature as to the appropriateness of the approach being followed. It is further believed that such prudent approach to the matter is in the interest of FAO, all its Members and IOTC Members.

18. In the same vein, the Organization wishes to stress that it is unreservedly committed to abiding by the wishes of IOTC Members that the Commission be placed outside the framework of FAO in accordance with a proper legal procedure complying with applicable principles of international law and the interests of various parties involved, i.e. FAO and its Members, the Governing Bodies of FAO and IOTC and its Members. Furthermore, the Organization is determined to facilitate such process, as far as possible under the authority and the guidance of its Governing Bodies and in accordance with its rules and procedures. This should normally involve the adoption of a new IOTC Agreement, as well as the concomitant termination of the IOTC Agreement and the entry into force of a new IOTC Agreement. Should there be a need for any transitional arrangements – which should be reduced to the shortest period of time possible – the Organization would be prepared to implement any such arrangements.

### **III. LEGAL PROVISIONS REGARDING BODIES ESTABLISHED BY CONVENTIONS AND AGREEMENTS UNDER ARTICLE XIV OF THE FAO CONSTITUTION**

19. It is useful to recall the relevant legal framework and to take into account a few related observations.

#### **A. Relevant legal framework**

20. Article XIV of the FAO Constitution reads as follows:

*“1. The Conference may, by a two-thirds majority of the votes cast and in conformity with rules adopted by the Conference, approve and submit to Member Nations conventions and agreements concerning questions relating to food and agriculture.*

2. *The Council, under rules to be adopted by the Conference, may, by a vote concurred in by at least two thirds of the membership of the Council, approve and submit to Member Nations:*

(a) *agreements concerning questions relating to food and agriculture which are of particular interest to Member Nations of geographical areas specified in such agreements and are designed to apply only to such areas;*

(b) *supplementary conventions or agreements designed to implement any convention or agreement which has come into force under paragraphs 1 or 2 (a).*

3. *Conventions, agreements and supplementary conventions and agreements shall:*

(a) *be submitted to the Conference or Council through the Director-General on behalf of a technical meeting or conference comprising Member Nations, which has assisted in drafting the convention or agreement and has suggested that it be submitted to Member Nations concerned for acceptance;*

(b) *contain provisions concerning the Member Nations of the Organization and such non-member States as are members of the United Nations, any of its specialized agencies or the International Atomic Energy Agency, and regional economic integration organizations, including Member Organizations, to which their Member States have transferred competence over matters within the purview of the conventions, agreements, supplementary conventions and agreements, including the power to enter into treaties in respect thereto, which may become parties thereto and the number of acceptances by Member Nations necessary to bring such convention, agreement, supplementary convention or agreement into force, and thus ensure that it will constitute a real contribution to the achievement of its objectives. In the case of conventions, agreements, supplementary conventions and agreements establishing commissions or committees, participation by non-member States of the Organization that are members of the United Nations, any of its specialized agencies or the International Atomic Energy Agency or by regional economic integration organizations other than Member Organizations, shall in addition be subject to prior approval by at least two-thirds of the membership of such commissions or committees. Where any convention, agreement, supplementary convention or agreement provides that a Member Organization or a regional economic integration organization that is not a Member Organization may become a party thereto, the voting rights to be exercised by such organizations and the other terms of participation shall be defined therein. Any such convention, agreement, supplementary convention or agreement shall, where the Member States of the organization do not participate in that convention, agreement, supplementary convention or agreement, and where other parties exercise one vote only, provide that the organization shall exercise only one vote in any body established by such convention, agreement, supplementary convention or agreement, but shall enjoy equal rights of participation with Member Nations parties to such convention, agreement, supplementary convention or agreement;*

(c) *not entail any financial obligations for Member Nations not parties to it other than their contributions to the Organization provided for in Article XVIII, paragraph 2 of this Constitution.*

4. *Any convention, agreement, supplementary convention or agreement approved by the Conference or Council for submission to Member Nations shall come into force for each contracting party as the convention, agreement, supplementary convention or agreement may prescribe.*

5. *As regards an Associate Member, conventions, agreements, supplementary conventions and agreements shall be submitted to the authority having responsibility for the international relations of the Associate Member.*

6. *The Conference shall make rules laying down the procedure to be followed to secure proper consultation with governments and adequate technical preparations prior to consideration by the Conference or the Council of proposed conventions, agreements, supplementary conventions and agreements”.*

21. Rule XXI of the General Rules of the Organization established detailed additional procedures for the implementation of the above framework for the negotiation and conclusion of conventions and agreements under Article XIV of the Constitution, including notification of all Member Nations of any proposal for a convention or agreement. Such notification is to be accompanied by:

*“(i) any reports on the matter by the Director-General, including a report on the technical, administrative and financial implications, if any, of such convention, agreement, supplementary convention or agreement; and*

*(ii) a request for comments and information on the matter and for such representations as Member Nations or Associate Members may wish to make”.*

22. In addition, Rule XXI of the General Rules of the Organization provides that the Director-General is to consult all interest parties in connection with any proposed convention or agreement or supplementary convention or agreement, including the United Nations and other specialized agencies and, at his discretion, other international organizations in respect of any provision of the proposed convention, agreement, supplementary convention or agreement which relates to the activities of such organizations or agencies. *“The Conference or the Council, after having considered any representations that have been made to it or comments submitted by Member Nations and Associate Members, and any comments from the United Nations, any specialized agency, or other international organization, may approve only such conventions, agreements, supplementary conventions or agreements as contain provisions to the effect that:*

*(i) any international body or machinery to be set up or any machinery to be undertaken under such convention, agreement, supplementary convention or agreement is within the framework of the Organization;*

*(ii) recommendations adopted and reports on activities carried out by any such body shall be transmitted to the Director-General of the Organization”.*

23. The same rule deals with a number of other related matters, including the full powers of a government representative to sign, accede or accept any instrument. Finally, the rule provides that “*the Director-General shall report to the Conference whenever a convention, agreement, supplementary convention or agreement has, in accordance with its terms, come into force or ceased to be in force, or has been amended and the amendments come into force*”.

24. In 1955, at the request of the United States of America the item “*Constitutions, Conventions and Agreements Sponsored by FAO*” was placed on the agenda of the Council<sup>7</sup>. The representative of the United States explained that there had been inconsistencies in the practice followed until then in the Organization and the purpose of the proposed review was to establish standards concerning the terminology to be used in the basic documents, as well as the procedure to be followed in connection with the establishment, under FAO auspices, of subsidiary regional or technical bodies. The Council, after having considered a working paper on the matter<sup>8</sup>, adopted Resolution N° 7/25. The Resolution requested the Director-General, with the assistance of a Special Committee which had been created, to draw up a statement of principles to govern in the future the drafting of basic texts and of the rules of the bodies established under the aegis of FAO<sup>9</sup>. The Council recommended that the statement of principles should bear on the constitutional and organizational aspects of such bodies and govern, in particular such matters as the conditions and procedures for membership, procedure for reporting to the FAO Conference and Council, matters having budgetary and financial implications, approval of the rules of procedure of these bodies and the method to be followed for amending the basic texts and in general all matters concerning the relationship between these bodies and the FAO Conference and Council<sup>10</sup>. The Conference at its Ninth Session in 1957 adopted the “*Principles and Procedures which should govern conventions and agreements concluded under Articles XIV and XV of the Constitution and Commissions and Committees established under Article VI of the Constitution*”<sup>11</sup>. These principles are now set out in Part R of the Basic Texts of the Organization. The Conference emphasized that its intention was not to lay down too rigid rules since obviously the text of the various conventions and agreements must be drafted in the light of the desired objectives, but to establish a framework allowing for consistency in preparing and negotiating future agreements. The Conference laid particular emphasis on “*desirability of avoiding any ambiguity regarding the legal status of bodies promoted by the Organization*” and decided that in “*future bodies utilizing the Secretariat services of the Organization shall be set up either:*

- (a) *under Article VI or Article XIV of the Constitution and the relevant Rules;*
- (b) *under Article XV of the Constitution in which case the relationship of such bodies to the Organization shall in each instance be clearly defined; or*
- (c) *entirely outside the framework of the Organization and as such completely independent, any cooperation or coordination to be developed through a relationship agreement to be approved by the Council and Conference under Rule XXIV.4(c) of the General Rules of the Organization and Article XIII of the Constitution, which agreement shall make any servicing by the Organization subject to the programme, financial procedures and operations of such bodies being consistent with and in furtherance of the objectives of the Organization”.*

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<sup>7</sup> Cf. Report of the Twenty-third Session of the Council, 26 November 1955.

<sup>8</sup> Cf. Review of certain provisions of Constitutions, Conventions and Agreements sponsored by FAO, CL 25/12.

<sup>9</sup> Cf. Report of the Twenty-fifth Session of the Council, 3-19 September 1956.

<sup>10</sup> Cf. Report of the Twenty-sixth Session of the Council, 3-7 June 1957, paragraphs 57-60.

<sup>11</sup> Cf. Report of the Ninth Session of the Conference, 2-23 November 1957, paragraphs 503-510.

25. In 1991, at its Twenty-sixth Session (9-27 November 1991), the Conference adopted a few amendments to the Principles with the aim of introducing more flexibility, in order to take account of a number of developments that had occurred both within the Organization and, more generally, on the world scene.

26. In 1993, at its Twenty-seventh Session (6-24 November 1993) the Conference revised the principles further, in order to bring them into line with the provisions of the Vienna Convention on the Law of Treaties on the admissibility of reservations.

27. There are at present 16 conventions and agreements concluded under Article XIV of the FAO Constitution; except for one, all of them establish bodies in charge of implementing their provisions. There are a number of organizations that were established by conventions and agreements, prepared with the assistance of FAO, but which are independent from FAO and are therefore not statutory bodies of the Organization. In a number of cases, FAO has entered into a relationship agreement with other organizations under the terms of Article XIII of the Constitution, as provided for under operative paragraph (c) of Conference Resolution N 47/57. At present, there are no bodies established under Article XV of the FAO Constitution.

#### **B. Considerations regarding the origin of Article XIV of the FAO Constitution**

28. The origin of the provisions of the FAO Constitution regarding the possibility for its Governing Bodies to implement activities of the Organization through the negotiation and adoption of conventions and agreements seems to be related to the procedures and practices of the International Labour Organization. The International Labour Organization was created as an autonomous body of the League of Nations by a special Part of the Treaty of Versailles in 1919 and of the other Peace Treaties concluded at the end of the First World War. When the League of Nations was dissolved, the ILO amended its Constitution and became a Specialized Agency of the United Nations. In carrying out its activities of a regulatory nature, the General Conference of ILO adopts recommendations in cases where a particular subject matter or some aspects of it is not considered suitable or appropriate for a Convention. By 1939, many international labour conventions - almost 70 - had been adopted within ILO. And it was expected that the other organizations which were instituted as part of the new world order would also fulfil their statutory objectives through the negotiation and adoption of international conventions or the adoption of recommendations where it was not possible to propose for negotiation and adoption of conventions.

29. This was the case with FAO, whose Constitution was adopted on 16 October 1945, and made provision for the adoption of recommendations and conventions. Article IV of the Constitution, as it stood at the time, made provision for the adoption by the Conference by a two-thirds majority of the votes cast of "*recommendations concerning questions relating to food and agriculture to Member Nations for consideration with a view to implementation by national action*" (article IV, paragraph 2). The Conference could also, "*by a two-thirds majority of the votes cast submit conventions concerning questions relating to food and agriculture to Member Nations for consideration with a view to their acceptance by the appropriate constitutional procedure*". These provisions were comparable to those of the ILO Constitution. They were considerably amended in 1957, and took then the form as presented earlier in this document and were moved to Article XIV of the Constitution.

30. When various other specialized agencies were instituted, their constituent instruments also made provision for the adoption of recommendations to Members and the adoption of

conventions, depending on whether or not this was possible. Hence, the Constitution of the World Health Organization contains provisions analogous to those of ILO and FAO regarding the possibility for the World Health Assembly to adopt recommendations and conventions as well as regulations concerning sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease and related matters. The Constitution of UNESCO also made provision for the adoption of recommendations and conventions in very revealing terms. Article IV, paragraph B.4 of its Constitution provides that “*the Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. In the former case a majority vote shall suffice; in the latter case a two-thirds majority shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Assembly at which they were adopted*”. The constituent instruments of other organizations which were set up subsequently also made provision for the adoption of conventions. For instance, the Convention on the International Maritime Organization adopted in 1948, which came into force in 1958 thus setting up this organization, made provision for the adoption of conventions by the organization. The World Intellectual Property Organization whose Convention was adopted in 1967 and came into force in 1970 also contained similar provisions. There are also organizations outside the United Nations system such as the Council of Europe the constituent instrument of which makes provision for the conclusion of conventions.

31. The above organizations have all adopted a substantial number of conventions or agreements, in accordance with their internal procedures and policies. It is of course difficult, perhaps impossible, to present the common characteristics of the conventions. For the purpose of this document it may be said, however, that these conventions have “*a life of their own*” and that they usually provide for obligations extending beyond those set out in the constituent instrument of the parent organization. Where the conventions establish any institutions usually these enjoy a variable measure of functional autonomy. However, these conventions and any institutional machinery which they set up act through the parent organization and in most, if not all cases, retain close links with the organizations where they were negotiated and concluded. This is the case with a large number of conventions concluded by the General Conference of ILO (about 100 labour conventions) or by the Conference of UNESCO (28 conventions) or IMCO (29 conventions) or WIPO. In almost all cases, the follow-up mechanisms are pre-existing bodies of the organizations or statutory bodies of the organizations which function within them and the secretariat is that of the organization headed by their respective Directors-General. As a general rule, these institutional structures do not have legal capacity to act on their own and they act through or draw on the legal personality of the parent organization. Amendments of these conventions and agreements, placed under the framework of the concerned organizations, are done through their statutory bodies.

32. FAO, for its part, went very far in defining in great detail a number of procedures designed to allow the institutional mechanisms established by agreement under the FAO Constitution to enjoy a very substantial measure of functional autonomy, while retaining essential administrative links with the Organization consistent with their nature of bodies established by the Organization and all its membership through its Governing Bodies. There are many manifestations of this situation. Membership is open only to Members of FAO or of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency. The bodies may adopt and amend their rules of procedure, but these cannot be inconsistent with the FAO Constitution and the constituent agreement. The bodies may adopt and amend their own financial regulations provided that such regulations are consistent with the principles embodied in the financial regulations of the Organization. These regulations are to be reported to the Finance Committee which may disallow them, or any amendments thereto, if they are inconsistent with the principles of the Financial Regulations of FAO. Contributions, either to the budget or for any other activities, are to be paid into a trust fund to be managed by the Organization and in

accordance with applicable rules. Then, as mentioned above, the constituent instruments do not entrust them with legal personality, i.e. capacity to hold rights and obligations of their own and therefore they have to act through FAO or drawing on its legal capacity as confirmed by the Council of FAO. The secretary and the staff of these bodies are officials of FAO, appointed by the Director-General and subject to the Staff Regulations and Rules of the Organization. Their work relationship is with the Organization, which is the respondent party should any staff member decide to file a complaint arising from their working relationship. The Director-General, as the legal representative of FAO, may have to respond for any liabilities arising from the functioning of the bodies. The bodies benefit from a comprehensive set of facilities, privileges and immunities, but also of inherent obligations, that are attached to the status of FAO embodied in a number of multilateral and bilateral instruments with particular reference to the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, as well as a whole network of bilateral agreements between FAO and countries which have supplemented the rights and obligations established in that Convention in the concerned countries.

33. The above considerations were highlighted by the CCLM at its 77<sup>th</sup> Session in 2004 following close review of the matter. The Council, at its 127<sup>th</sup> Session in November 2004 examined the conclusions of the CCLM in detail and confirmed the above in very clear terms<sup>12</sup>.

34. The particular status of these conventions and agreements negotiated and adopted within international organizations is recognized by a number of rules of international law which it may be of some interest to recall at this stage.

#### **IV. RELEVANT RULES OF INTERNATIONAL LAW**

35. Statutory bodies established by convention and agreement under Article XIV of the Constitution enjoy a measure of autonomy, which varies according to their constituent agreements and operating mechanisms. Still the conventions and agreements in question have been prepared, negotiated and adopted by or within the Governing Bodies and the nature of these bodies as statutory bodies of FAO cannot be seen in isolation from the status of FAO as a whole. In particular, any process of change in their status is a matter for the Organization as a whole. This position is in fact confirmed by various principles of international law, with particular reference to the Vienna Convention on the Law of the Treaties and its preparatory work.

36. The Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969, which entered into force on 27 January 1980, and to which a very large number of States are parties, contains a clause which expressly confirms the applicability of the rules of an international organization to the negotiation and conclusion of agreements adopted within such international organization. Article 5 of the Convention is entitled "*Treaties constituting international organizations and treaties adopted within an international organization*", which reads as follows:

*"The present convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization".*

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<sup>12</sup> CL 127/REP, paragraphs 90-98.

37. The letter, the background to, and the history of this clause confirms that the intent of the Vienna Convention on the Law of the Treaties is to preserve in full the integrity of all rules and procedures regarding treaty making processes within international organizations, with particular reference to the organizations of the United Nations system.

38. Indeed, during the preparatory work on the draft articles on the Law of Treaties by the International Law Commission considerable emphasis was laid on the need to take into account the particular situation of treaties concluded within international organizations. Many draft articles contained, therefore, specific reservations or provisions regarding such treaties, since it was generally considered that such treaties should be regarded as subject to the impact of the rules of an international organization and to that extent excepted from the application of many provisions. There were many special clauses applicable to a whole range of matters such as conclusion of treaties and entry into force, including adoption of the treaty, applicability, acceptance of reservations, interpretation of treaties, effects upon third parties, amendment, modification and suspension of the operation of treaties. The various reports of the Special Rapporteur contain an impressive number of observations and commentaries showing that the agreements concluded within international organizations had, to a large extent, to be considered a category of their own and that, while the freedom of the negotiating States should be preserved, the main stages of the life of such treaties were matters for the organizations, as a whole, since the treaties in question were generally the result of the work of the organization<sup>13</sup>. In the same vein, the observations from Governments reflected a clear desire to preserve the decision making processes in force within the organizations and the applicability of the relevant rules. Of course, this does not concern treaties which were merely concluded within an international organization because of the convenience of using conference facilities or which were simply concluded under the auspices of a particular organization. As discussions and work progressed it was considered, however, that rather than having in a substantial number of places in the draft articles a reservation regarding the application of the procedures and rules of the organization, it was preferable to insert in the convention a general clause reserving the specific procedures and rules of the organizations in respect of treaties adopted within that organization.

39. Consistent with the above it is essential that the Governing Bodies of the Organization which prepared, negotiated and adopted the IOTC Agreement within FAO should deal with the issue of the removal of that Commission from the framework of FAO and that any process to that effect should be carried out with the full involvement of the Governing Bodies.

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<sup>13</sup> See, *inter alia*, Document A/CN.4/144 and Add. 1 First Report on the Law of the Treaties by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1962, vol. II; Document A/CN.4/156 and Add.1-3, Second report on the Law of the Treaties by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1963, vol. II; Document A/CN.4/167 and Add.1-3, Third Report on the Law of the Treaties by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1964, vol. III; Document A/CN.4/177 and Add. 1 & 2, Fourth Report of the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, 1965, vol. II; Document A/CN.4/183 and Add.1-4, Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, 1966, vol. II; Document A/CN.4/186 and Add.1, 2/Rev.1.,3-7, Sixth Report on the Law of Treaties by Sir Humphrey Waldock, Yearbook of the International Law Commission, 1966, vol. II. See also Draft Articles on the Law of Treaties with commentaries, 1966, Text adopted by the International Law Commission in 1966 and submitted to the General Assembly as a part of the Commission's report covering the work of that session, Yearbook of the International Law Commission, 1966, vol. II, page 191.

**V. SUGGESTED PROCESS FOR THE CHANGE IN THE STATUS OF IOTC AS A STATUTORY BODY OF FAO INTO A BODY OUTSIDE THE FRAMEWORK OF FAO**

40. A suggested process for the separation of IOTC from the framework of FAO would involve the convening of a Conference of Plenipotentiaries for the adoption of a new IOTC Agreement; a concomitant process of withdrawal and termination of the existing IOTC Agreement and the entry into force of a new IOTC Agreement and the implementation of transitional arrangements as may be required.

**A. Convening of a Conference of Plenipotentiaries for the adoption of a new IOTC Agreement**

41. As explained above, the IOTC Agreement was prepared, negotiated and concluded within FAO, following the adoption of the Agreement by the Council of the Organization in 1993. IOTC functions and operates within the framework of FAO, and through the legal personality of FAO. It would therefore seem essential to terminate this particular Agreement adopted in 1993 and conclude a new Agreement and consequently, establish a new legal entity. This new entity will have its own legal personality and not that of FAO, its own staff, its own rights and obligations, its own 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 may be applicable. Any risk of potential liabilities for the Organization and its Members in future would thus be dispelled.

42. In order for such a new entity to be established it is necessary that the current IOTC Agreement be terminated and that a new Agreement be concluded. Two questions arise in this connection. The first concerns the substantive content of a new IOTC Agreement. The second is the procedure to be followed to that effect.

43. As regards the substantive content of the new Agreement, it could correspond to the existing IOTC Agreement incorporating comprehensive amendments thereto, which were proposed at the 3<sup>rd</sup> Special Session of the Commission. Current Members of IOTC could also decide to incorporate into the new draft IOTC Agreement such new rules as have been under review in international fora in recent years, intended to improve its effectiveness and efficiency with respect to its management and conservation objectives, in order for it to become “*a modern, effective and efficient organization fully capable of achieving its mandate*”, in line with the wishes expressed by Members at the 3<sup>rd</sup> Special Session<sup>14</sup>. Some final clauses of the Agreement, regarding deposit of instruments of acceptance and entry into force might need to be reconsidered.

44. As regards the procedure for the adoption of the new Agreement, the normal course of action to be followed to this effect would be a Conference of Plenipotentiaries open to the States which would wish to become Parties to the new Agreement in accordance with the relevant criteria of the existing Agreement and in line with the provisions set out in Section 1 of Part II of the Vienna Convention on the Law of Treaties. The participants in the Conference would have to have “full powers” for the adoption of the new Agreement, i.e. a document emanating from the

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<sup>14</sup> Cf. *Ibid.*, paragraph 7.

competent authority of a State designating a person to represent the State for negotiating and adopting the text of a treaty.

45. The Director-General could convene the Conference of Plenipotentiaries for the negotiation and conclusion of the new IOTC Agreement. The Director-General of FAO has convened in the past many Conferences of Plenipotentiaries. Thus, in addition to the agreements concluded under Article XIV of the FAO Constitution, the Director-General is depositary of 19 international treaties. Most of these treaties were adopted by Conferences of Plenipotentiaries convened by the Director-General of FAO. In this connection it may be of some interest to mention that one of the reasons adduced by Members of IOTC for it to cease to be a statutory body of FAO and be placed outside FAO is that IOTC should emulate other Commissions, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT). The Convention which established this Commission was prepared by FAO and the Conference of Plenipotentiaries where the Convention was adopted was convened by the Director-General and entirely organized by FAO. Two other Conferences of Plenipotentiaries for the adoption of Protocols in 1984 and 1992 respectively, amending the Convention, were also convened by FAO.

46. A Conference of Plenipotentiaries convened by FAO would be open to the current Members of IOTC, and possibly other interested States meeting the criteria for membership as set out in the current IOTC Agreement, provided that they should be Members of FAO or Members of the United Nations, or of any of its Specialized Agencies or of the International Atomic Energy Agency.

47. While expressing its readiness to convene the Conference of Plenipotentiaries, and observing that this would facilitate the concomitant process of withdrawal and termination of the existing IOTC Agreement and the entry into force of a new Agreement, the Organization notes that it would be open to the Members of FAO to decide that any other Party should convene such Conference.

**B. Concomitant process of withdrawal and termination of the existing IOTC Agreement and entry into force of a new IOTC Agreement**

48. It is further proposed that a concomitant process of withdrawal and termination of the existing IOTC Agreement and entry into force of a new IOTC Agreement, be implemented. Prior to examining this suggested course of action, it is important to recall relevant provisions of articles XXI, XXII and XXIV.

49. Article XXI, paragraphs 1 and 2 entitled “*withdrawal*” reads as follows:

*“1. Any Member of the Commission may withdraw from this Agreement at any time after the expiry of two years from the date upon which the Agreement entered into force with respect to that Member, by giving written notice of such withdrawal to the Director-General who shall immediately inform all the Members of the Commission and the Members and Associate Members of FAO and the Secretary-General of the United Nations of such withdrawal. Withdrawal shall become effective at the end of the calendar year following that in which the notice of withdrawal has been received by the Director-General.*”

2. *A Member of the Commission may give notice of withdrawal with respect to one or more of the territories for the international relations of which it is responsible. When a Member gives notice of its own withdrawal from the Commission, it shall state to which territory or territories the withdrawal is to apply. In the absence of such a statement, the withdrawal shall be deemed to apply to all the territories for the international relations of which the Member of the Commission is responsible, with the exception of territories belonging to an Associate Member which is a Member of the Commission in its own right*<sup>15</sup>.

50. Article XXII, entitled “*termination*” provides as follows:

*“This Agreement shall be automatically terminated if and when, as a result of withdrawals, the number of Members of the Commission drops below ten, unless the remaining Members of the Commission unanimously decided otherwise”.*

51. The Director-General performs depositary functions under the terms of Article XXIV of the Agreement. As such, the Director-General is *inter alia* required to inform each Member and Associate Member of FAO and any non-Member States as may become parties to the Agreement, of withdrawals from the Agreement pursuant to Article XXI and of termination of the Agreement in accordance with Article XXII.

52. The termination of the current IOTC Agreement would have to be conducted in accordance with the above provisions. In order to ensure, as far as practicable, a smooth transition between the IOTC Agreement under the framework of FAO and the Agreement establishing a new commission for Indian Ocean tuna fishing, 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 constitute at the same time an instrument of acceptance of the new Agreement. The threshold of ratifications or acceptances for the entry into force of the new Agreement could remain at ten. Taking into account the current number of Members of the IOTC Agreement (24) it could be set at 15 which would allow for the new IOTC Agreement to come into force as the old Agreement would be automatically terminated under Article XXII.

53. It should be noted that under Article XXI, paragraph 1 of the IOTC Agreement, notifications of withdrawal become effective at the end of the calendar year following that in which the notice of withdrawal has been received by the Director-General. Provisions of this nature are found in other instruments of this type and are essentially intended to preserve the interests of the other Members and minimize the negative effect of the withdrawal over the other parties and the body in question. In this context, the concerns which underlie this provision do not arise in the present case. It is therefore felt that it is open to the States to agree that in this

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<sup>15</sup> Under paragraph 15 of the “*Principles and Procedures which should govern Conventions and Agreements concluded under Articles XIV and XV of the Constitution and commissions and committees established under Article VI of the Constitution*” : *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*”.

particular situation the notices of termination would take effect at the time of their deposit with the Director-General. In any case the issue cannot be seen in isolation from the transitional measures which might be put in place in order to ensure a smooth transition from one agreement, hence one commission, to another agreement and another commission.

54. An approach along the above lines – a process of concomitant withdrawal from one agreement and the entry into force of a new agreement and the convening of a Conference of Plenipotentiaries - is a correct one from a legal point of view, which would allow for the situation to be clarified in accordance with the provisions of the Agreement. There could be an inconvenience in this solution and this is that notwithstanding efforts to expedite the process, once the new Agreement would come into force, not all current Members of IOTC would have deposited instruments of acceptance of the new Agreement and, therefore, there could be some uncertainty as to their situation *vis-à-vis* the new Agreement. However, this would necessarily concern a limited number of Members. Their own uncertainty as to the status of the new Commission, in itself, should induce them to expedite their internal procedures to become parties to the new Agreement. The Conference of Plenipotentiaries could adopt a resolution calling upon the Parties to the current IOTC Agreement to expedite the relevant internal process so as to minimize any possible disruption during the interim period. Such transitional arrangements would necessarily have to be framed in a flexible and pragmatic manner, so as to facilitate the period the operation of the new commission during the period when some of the current Members of IOTC would not yet be Members of the new Commission. These Members could be invited to consider continuing to contribute on the basis of the scale of contributions of the new Commission.

55. The new Commission could adopt a suitable resolution validating all management measures adopted by the old Commission, as was done in comparable situations in other organizations, and urge all the Members which had not yet accepted the new Agreement to consider applying them. This could already be reflected in a resolution of the Conference of Plenipotentiaries.

56. It is important to emphasize that any practical inconvenience arising from the transitional period could be mitigated if FAO were to implement transitional arrangements until such time as the new Agreement came into force, or even during a limited period afterwards until all Members of the existing IOTC would have become Members of the new Commission.

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

57. During an interim period, subject to the views of the CCLM and the Council, and the IOTC Members, FAO could implement a number of transitional arrangements until the new Agreement would come into force and, if necessary, for a short period of time afterwards as could be negotiated with the new Commission. Such arrangements could include, inter alia, the continuation of the existing trust fund for some time, the appointment of staff as FAO staff members until such time as the Commission would have been able to hire them directly, and provide for the transfer of physical and financial assets.

58. Any such transitional arrangements would have to be carried out in agreement with, and would be limited to, the specific issues as would be identified and requested by the new Commission.

## VI. SUGGESTED COURSE OF ACTION BY THE COMMITTEE

59. The CCLM is invited to examine this document and, in the light of the developments and legal considerations presented therein, to present such views as appropriate on the procedure to be followed in order to respond to the wishes of IOTC Members that the Commission should no longer be an FAO statutory body established by Agreement under Article XIV of the FAO Constitution and, instead, should be placed outside the framework of FAO. In this particular context, the CCLM is invited to confirm the need for a legally correct procedure for the proposed separation of IOTC from FAO along the lines set out in this document.

60. In this context, the CCLM is invited:

- (a) to endorse the suggested course of action, with particular reference to the proposal that the Director-General should convene a Conference of Plenipotentiaries for the adoption of a new Agreement for a new Indian Ocean Tuna Commission, distinct from the existing Agreement as indicated in paragraphs 41 to 47;
- (b) to endorse the suggestion that in order to ensure continuity between the existing commission and the new commission a concomitant process of withdrawal and termination of the existing IOTC Agreement and the entry into force of a new IOTC Agreement be initiated, as indicated in paragraphs 48 to 56 of this document;
- (c) to recommend to the Council that in order to facilitate the transition process and subject to the views of the prospective Members of the new Commission FAO should agree to implement such provisional measures as may be agreed upon with the new Commission once a new Agreement comes into force as indicated in paragraphs 57 to 58 of this document;
- (e) to review and recommend to the Council the approval of the draft resolution concerning the process for the termination of the IOTC Agreement and the conclusion of a new Agreement set out in **Appendix II** hereto ;

## APPENDIX I

**PROPOSED AMENDMENTS TO THE IOTC AGREEMENT  
PROPOSED BY THE 3<sup>RD</sup> SPECIAL SESSION OF IOTC**

The Commission,

In conformity with Article XX, paragraphs 1 and 4, of the Agreement for the Establishment of the Indian Ocean Tuna Commission,

Agrees to amend the Agreement for the Establishment of the Indian Ocean Tuna Commission as follows:

- 1) In the last paragraph of the Preamble, the word “Considering” is replaced by the words “Previously considering”.
- 2) The following is inserted as the last paragraph of the Preamble:

“Now conscious that since the establishment of the Indian Ocean Tuna Commission, and taking account of the evolution of the fishing activities in the Area of competence of the Commission, it is appropriate to change the relationship between the Indian Ocean Tuna Commission and the Food and Agriculture Organization of the United Nations, to make the Indian Ocean Tuna Commission more efficient and effective in accomplishing its conservation and management objectives,”
- 3) In Article I, the words “within the framework of the Food and Agriculture Organization of the United Nations (hereinafter referred to as “FAO”)” are deleted.
- 4) In Article IV paragraph 1, the word “FAO” is replaced by the words “the Food and Agriculture Organization of the United Nations (hereinafter referred to as “FAO”)”.
- 5) In Article V paragraph 2 (e), the word “autonomous” is deleted.
- 6) Article V paragraph 2 (f) is deleted.
- 7) In Article VI paragraph 3, the words “or with the Constitution of FAO” are deleted.
- 8) In Article VI paragraph 7 is replaced by the following:

“The Commission may adopt and amend, as required, the Financial Regulations of the Commission by a two-thirds majority of its Members.”

9) Article VI paragraph 8 is replaced by the following:

“To establish a working relationship between the Commission and FAO, the Commission shall enter into negotiations with this Organization with a view to concluding a cooperation agreement. Such agreement should provide, inter alia, for the Director-General of FAO (hereinafter referred to as the “Director-General”) to appoint a Representative who would participate in all meetings of the Commission and its subsidiary bodies, but without the right to vote.”

10) Article VII paragraph 1 is deleted.

11) Article VII paragraph 2 is replaced by the following:

“States which, while not Members of the Commission, are Members of the United Nations, any of its Specialized Agencies or the International Atomic Energy Agency may, upon request and subject to the concurrence of the Commission through its Chairperson, be invited to attend sessions of the Commission as observers.”

12) Article VIII paragraph 1 is replaced by the following:

“The Executive Secretary of the Commission (hereinafter referred to as the “Executive Secretary”) shall be appointed by the Commission, or in the event of appointment between regular sessions of the Commission, with the approval of the Members of the Commission. The staff of the Commission shall be appointed by the Executive Secretary and shall be under the Executive Secretary’s direct supervision. The Executive Secretary and staff of the Commission shall be appointed under terms and conditions as determined by the Commission.”

13) Article VIII paragraph 2 is replaced by the following:

“The Executive Secretary shall be responsible for implementing the policies and activities of the Commission and shall report thereon to the Commission. The Executive Secretary shall also act as Executive Secretary to other subsidiary bodies established by the Commission, as required.”

13) Article VIII paragraph 3 is replaced by the following:

“The expenses of the Commission shall be paid out of its budget.”

- 14) In Article IX paragraphs 3, 4 and 7 the word “Secretary” is replaced by “Executive Secretary” wherever occurring.
- 15) Article XII paragraph 6 is replaced by the following:

“The establishment by the Commission of any sub-commission which requires funding by the Commission, and of any committee, working party or other subsidiary body shall be subject to the availability of the necessary funds in the approved budget of the Commission. Before taking any decision involving expenditure in connection with the establishment of subsidiary bodies, the Commission shall have before it a report from the Executive Secretary on the administrative and financial implications.”
- 16) In Article XIII paragraphs 1 and 2 the word “autonomous” is deleted.
- 17) Article XIII paragraph 4 is deleted.
- 18) In Article XIII paragraph 5 the words “with the concurrence of the Director-General” are deleted.
- 19) Article XIII paragraph 7 is replaced by the following:

“Contributions and donations and other forms of assistance received shall be administered by the Executive Secretary in conformity with the Financial Regulations of the Commission.”
- 20) In Article XIV, the words “, after consultation with the Director-General,” are deleted.
- 21) The following Article is inserted after Article XIV:

“Article XIV bis

“The Commission may enter into agreements with Members of the Commission concerning privileges and immunities necessary for the functioning of the Commission.”
- 22) In Article XVII paragraph 3, the words “, all Members of FAO” are deleted.
- 23) Article XX paragraph 2 is replaced by the following:

“Proposals for amendments may be made by any Member of the Commission and shall be addressed to both the Executive Secretary and the Director-General, not later than 120 days before the Session of the Commission at which the proposal is to be considered. The Director-General shall immediately inform all Members of the Commission of all proposals for amendments.”

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- 24) Article XX paragraph 3 is deleted.
- 25) In Article XX paragraph 4, the words “, subject to paragraph 3 above” are deleted.
- 26) In Article XX paragraph 5, the words “, subject to paragraph 3 above,” are deleted.
- 27) In Article XX paragraph 7, the words “, all members and Associate Members of FAO” are deleted.
- 28) In Article XXI paragraph 1, the words “and the members and Associate Members of FAO” are deleted.
- 29) Article XXI paragraph 3 is deleted.
- 30) In Article XXIV subparagraph (a), the words “and Associate Member of FAO and to such non-Member States as may become party to this Agreement” are replaced by the words “of the Commission”.
- 31) Article XXIV subparagraph (c) is replaced by the following:
- “(c) inform each Member of the Commission of:
- (i) any application for membership in the Commission;
- (ii) proposals for the amendment of this Agreement or of the Annexes thereto.”
- 32) In Article XXIV subparagraph (d), the words “and Associate Member of FAO and any non-Member States as may become party to this Agreement” are replaced by the words “of the Commission”.

## APPENDIX II

**DRAFT COUNCIL RESOLUTION**  
**TERMINATION OF THE IOTC AGREEMENT AND CONVENING**  
**OF A CONFERENCE OF PLENIPOTENTIARIES FOR THE ADOPTION**  
**OF AN AGREEMENT ON TUNA FISHING IN THE INDIAN OCEAN**  
**COUNCIL RESOLUTION .../...**

**The Council,**

**Having considered** that, at its Hundred and fifth Session in November 1993, following a process of negotiation within FAO which had lasted for several years, it approved the Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC) under Article XIV of the FAO Constitution and that such Agreement came into force on 27 March 1996 following the deposit with the Director-General of the required number of instruments of acceptance,

**Noting** that IOTC is a statutory body of FAO which, as such, retains a large number of organic and operational links with FAO, and does not possess autonomous capacity to hold rights and obligations of its own and, therefore, has to act through FAO or drawing on its legal capacity,

**Having considered** that, at its Third Special Session, held in Goa, India, from 17 to 19 May 2006, IOTC Members examined a comprehensive set of amendments aimed at changing the nature of the Agreement as one concluded under Article XIV of the FAO Constitution, into an Agreement outside the framework of FAO,

**Underlining** that, in view of the nature of the Indian Ocean Tuna Commission as a statutory body of FAO enjoying substantial functional autonomy and responding to the specific needs of the Parties to the Agreement, full account should be taken of the wishes of IOTC Members,

**Considering** that, in the light of all pertinent circumstances, a suitable legally correct process should be followed for the termination of the current Agreement under the framework of FAO and the establishment of a new Agreement outside the framework of FAO, and that such process should be guided by the overarching principles that it is essential to preserve fully the wishes and interests of all concerned parties, including FAO and all its membership, as well as current Members of IOTC, while avoiding any future risks of legal uncertainty for all those concerned parties,

**Expressing the view** that FAO should support actively the process of establishment of new Agreement on Tuna Fishing in the Indian Ocean and take all such related practical steps which may be required to that effect in accordance with the wishes and the requirements of IOTC Members,

**Having considered** the Report of the Eighty-first session of the Committee on Constitutional and Legal Matters held in Rome on 4 and 5 April 2007,

1. **Requests** the Director-General to convene a Conference of Plenipotentiaries for the adoption of a new Agreement on Tuna Fishing in the Indian Ocean, distinct from the existing Agreement and incorporating the amendments proposed by the Commission at its Third Special Session held in Goa, India, from 17 to 19 May 2006, and such other amendments as the Conference of Plenipotentiaries may agree to propose, in accordance with the guidance provided by the Committee on Constitutional and Legal Matters at its Eighty-first session in April 2007;
2. **Endorses** the recommendation that in order to ensure continuity between the existing Commission and the new Commission a concomitant process of withdrawal and termination of the existing IOTC Agreement and the entry into force of a new Agreement be initiated;
3. **Requests** the Director-General, subject to the views and requirements of the prospective Members of the new Commission, to implement such transitional measures as may be required to ensure continuity between the existing Commission and the new Commission and to facilitate the operations of the new Commission;
4. **Requests** the Director-General, without prejudice to the foregoing, to take such additional measures as may be required to facilitate the process.