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SAFR/DM/SWIO2/04/ 3 E

**FOURTH INTER-GOVERNMENTAL CONSULTATION ON THE
ESTABLISHMENT OF THE SOUTH WEST INDIAN OCEAN FISHERIES
COMMISSION**

Mahe, Seychelles, 13-16 July 2004

DRAFT OF THE SOUTHERN INDIAN OCEAN FISHERIES AGREEMENT

NOTE TO THE INTER GOVERNMENTAL CONSULTATION

Attached is a working document I have drafted following the conclusions of the 3rd Inter-Governmental Conference held in Nairobi, 27 to 30 January 2004. I would like to present here the criteria and methods used in the preparation of this working document.

The text contained in the working document is a draft of a possible international Agreement establishing the High Seas body decided by the 3rd IGC. The title chosen, the "Southern Indian Ocean Fisheries Agreement" (SIOFA), takes into account the so far agreed Area of Application, which roughly covers both FAO Statistical Areas 51 and 57.

In preparing the base material for discussion first by a drafting committee then by the Consultation, I relied extensively on language used in the Draft Agreement for the Establishment of the South West Indian Ocean Fisheries Commission, as contained in Document ref. SAFR/DM/SWIO/04/5E prepared by the FAO Secretariat for the 3rd IGC. References in footnotes in the text to "Draft SWIOC Agreement" are to this text.

When selecting text from the Draft SWIOC Agreement, I kept to the "Elements of a Draft Agreement for the High Seas" identified by Participants to the 3rd IGC and summarised as bullet points by the Chair. I have also included proposed language for bullet points contained in the document presented by New Zealand to the Nairobi Consultation. On occasion, language from other international fisheries agreement has also been used. Footnotes indicate the source language.

Prior to the 3rd IGC, Australia circulated to Participants (by e-mail dated 19 January 2004) a document with comments and amendment proposals to the Draft SWIOC Agreement. When selecting language for the working document Draft Agreement, I have taken these comments into account as deemed appropriate, and noted reservations expressed by Australia to certain provisions used as source.

A first working document was thus circulated by the Secretariat, in accordance with what was agreed at the Nairobi Meeting, to the members of the drafting committee: Australia, The European Community, France, Mauritius, Seychelles and New Zealand, as well as to the Legal Counsel. Comments were received from Australia, New Zealand and the Legal Counsel with drafting suggestions. Comments by the European Community were also issued, but these are of a more general nature, expressing reservations as to the nature of the exercise underway. I am most grateful for all these very valuable contributions.

Where contributions from the drafting Committee represented an editorial amendment, I gladly accepted these, except where I felt it necessary to choose other terms to ensure consistency throughout the text. When the proposals from the drafting committee contained new text altogether, I have generally introduced it at the

location intended by the proponent or at the location I though best fitted the structure of the Agreement, and marked it with a footnote to identify the proponent.

Text has been formatted bold when it significantly departs from that in the Draft SWIOC Agreement source, or when the language is new altogether. Where text taken from the Draft SWIOC Agreement contained parts in brackets, these have been kept unchanged. I also kept brackets on terms or sentences which, in my opinion, do not appear to reflect the consensus of participants at this stage of our work. I certainly stand to be corrected!

I believe it is useful to draw attention to the briefness with which the application of the precautionary approach is dealt with in the proposed text. The language has been carefully chosen when saying, in Article 4, that this principle shall be applied in accordance with the code of Conduct and the UN Fish Stocks Agreement of 1995. Such provisions become thus applicable in the framework of the SIOFA Agreement. Although many other existing Fisheries Agreements and Conventions contain precise provisions on the Precautionary Approach, I believe that a cross reference to the essential international provisions and standards contained in the Code of Conduct and the 1995 Agreement represents, actually, a simpler method and a stronger solution than partially transposing such provisions and standards in a SIOFA Article.

In respect of the possible establishment of a secretariat, it had been my initial intention to propose various alternatives in the text for the different hypotheses (contracted out, rotating or volunteered by one Party). Eventually, however, I have included simpler language devised with good help from the drafting committee, both for the secretariat and for the budget issue, that provides a basis for a decision on both matters by the Parties if the need arises, fix what could be considered the essential principles that should apply in that case, and leave the details to be determined at the time that decision is taken. I believe this is a flexible solution that responds to the concerns expressed by Participants without unnecessarily overloading the text. In line with this approach, the text does not contain language pertaining to matters that can be dealt with at a later stage e.g. the election of chairpersons of meetings and the appointment of Party representatives, which can be resolved in the future rules of procedure, or the specific rules governing the deposit of commitment documents by fishing entities.

Finally, I have included some notes concerning the Interim Arrangements at the end of the text. These relate, in essence, to a set of preliminary “measures” essentially on fishery data reporting and collection to be developed on the basis of suitable scientific and technical advice. It is my understanding that co-operative work towards the definition of the Interim Agreements should become a task of the Inter-Governmental Consultation, on the basis of the work already carried out by scientific experts meetings on the High-Seas Demersal Fisheries Resources of the Southern Indian Ocean held in Swakopmund (2001) and Fremantle (2002), and any such meetings that should take place in the future.

I am fully satisfied that the drafting committee exercise was frank and open, and that it has allowed us to cover all the essential elements identified in the bullet points elaborated during the Nairobi meeting in the proposed draft text.

I would like every delegation to take full conscience of our need to focus on establishing a reliable state of play of these fisheries, and the paramount role that Interim Arrangements must play in this regard. I would further suggest that the development of such Interim Arrangements be given its due place in the agenda of the upcoming IGC.

I hope the 4th Inter Governmental Consultation will make good progress and I thank all of you in advance for your contributions, as well as the Secretariat for its excellent offices.

With best regards,

“Signed”

Fuensanta CANDELA CASTILLO
Chairperson

**DRAFT AGREEMENT
SOUTHERN INDIAN OCEAN FISHERIES AGREEMENT
(SIOFA)**

The Contracting Parties¹

HAVING A MUTUAL INTEREST in the proper management, long-term conservation and sustainable use of fishery resources in the Southern Indian Ocean, and desiring to further the attainment of their objectives through international cooperation;

TAKING INTO CONSIDERATION that the coastal States have waters under national jurisdiction in accordance with the United Nations Convention on the Law of the Sea, 1982 and general principles of international law, within which they exercise their sovereign rights for the purpose of exploring and exploiting, conserving and managing fisheries resources and conserving living marine resources upon which fishing has an impact;²

*[NOTING the principles stated in Chapter 17 of Agenda 21 adopted by the United Nations Conference on Environment and Development in 1992;]*³

RECALLING THE RELEVANT PROVISIONS of the United Nations Convention on the Law of the Sea of 10 December 1982; the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993 and taking into account the Code of Conduct for Responsible Fisheries adopted by the 28th Session of the Conference of the Food and Agriculture Organization of the United Nations in October 1995;

RECALLING FURTHER⁴ Article 17 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, and the need for States not Party to this Southern Indian Ocean Fisheries Agreement to apply the conservation and management measures adopted hereunder and not to authorise vessels flying their flag to engage in fishing activities inconsistent with the conservation and sustainable use of the fisheries resources to which it applies.

¹ The preamble language source was the corresponding section of the draft SWIOC Agreement. Paragraphs relating to FAO background omitted.

² With proposed editing by Australia.

³ Australia expresses a reservation on the need for this language.

⁴ Text proposed by Australia with editorial suggestions by New Zealand and the Chair.

RECOGNIZING economic and geographical considerations and the special requirements of developing States and their coastal communities, for equitable benefit from fishery resources;

DESIRING cooperation between the Coastal States and with all other States, Organisations and Fishing Entities having a **real** interest in the fishery resources of the Southern Indian Ocean to ensure compatible conservation and management measures;

BEARING IN MIND that the achievements of the above will contribute to the realization of a just and equitable economic order in the interests of all humankind, and in particular the special interests and needs of developing States;

CONVINCED that the conclusion of a multi-lateral agreement for the long-term conservation and sustainable use of fishery resources **beyond waters under national jurisdiction** in the Southern Indian Ocean would best serve these objectives;

Agree as follows:

ARTICLE 1 – DEFINITIONS⁵

For the purposes of this Agreement:

- (a) “1993 Compliance Agreement” means the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the Food and Agriculture Organisation Conference in 1993;
- (b) “1982 Convention” means the United Nations Convention on the Law of the Sea of 10 December 1982
- (c) “1995 Agreement” means the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995;
- (d) **“Code of Conduct” means the Code of Conduct for Responsible Fisheries adopted by the 28th Session of the Conference of the Food and Agriculture Organization of the United Nations in October 1995;**
- (e) **“Contracting Party” means any State or regional economic integration organisation which has consented to be bound by this Agreement and for which the Agreement is in force;**
- (f) **“Regional economic integration organisation” means a regional economic integration organisation to which all its member States have transferred competence over matters covered by this Agreement, including the authority to make decisions binding on its member States in respect of those matters;**
- (g) “Fishing” means:
 - (i) the actual or attempted searching for, catching, taking or harvesting of fishery resources;
 - (ii) engaging in any activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fishery resources for any purpose including scientific research;
 - (iii) placing, searching for or recovering any aggregating device for fishery resources or associated equipment including radio beacons;

⁵ Source – draft SWIOC Agreement, Article 1.

- (iv) any operation at sea in support of, or in preparation for, any activity described in this definition, except for any operation in emergencies involving the health and safety of crew members or the safety of a vessel; or
- (v) the use of an aircraft in relation to any activity described in this definition except for flights in emergencies involving the health or safety of crew members or the safety of a vessel;
- (h) “Fishing vessel” means any vessel used or intended for fishing, including a mother ship, any other vessel directly engaged in such fishing operations, and any vessel engaged in transshipment;
- (i) **“Fishery resources” means resources of fish, molluscs, crustaceans and other sedentary species within the Area, but excluding:**
 - (i) **sedentary species subject to the fishery jurisdiction of coastal States pursuant to article 77 paragraph 4 of the 1982 Convention; and**
 - (ii) **highly migratory species listed in Annex I of the 1982 Convention;**
- (j) **“Area” means the area to which this Agreement applies, as prescribed in Article 3;**
- (k) “Transshipment” means unloading of all or any of the fishery resources on board a fishing vessel to another vessel whether at sea or in port.

ARTICLE 2 – OBJECTIVES⁶

The objectives of this Agreement are to ensure the long term conservation and sustainable use of the fishery resources in the Area through cooperation among the Contracting Parties, and to promote the sustainable development of fisheries in the Area, taking account of the needs of developing States [of the region] that are party to this Agreement.

ARTICLE 3 – AREA OF APPLICATION⁷

1. This Agreement applies to the Area bounded by a line joining the following points along parallels of latitude and meridians of longitude, **excluding waters under national jurisdiction**⁸:

Commencing at the landfall on the continent of Africa of the parallel of 30° East; from there north-north-east along the coast of Africa to its intersection with the parallel of 10° North; from there east along that parallel to its intersection with the meridian of 65° East; from there south along that meridian to its intersection with the equator; from there east along the equator to its intersection with the meridian of 80° East; from there south along that meridian to its intersection with the parallel of 20° South; from there east along that parallel to its landfall on the continent of Australia; from there south and then east along the coast of Australia to its intersection with the meridian of 120° East; from there south along that meridian to its intersection with the parallel of 55° South; from there west along that parallel to its intersection with the meridian of 80° East; from there north along that meridian to its intersection with the parallel of 45° South; from there west along that parallel to its

⁶ Source – Draft SWIOC Agreement, Article 2.

⁷ Source – Draft SWIOC Agreement, Article 4.

⁸ Text in bold introduced by suggestion of the legal Counsel for clarity. Australia proposes inserting a footnote in the official text of the Agreement stating, for the avoidance of doubt, the interpretation of these terms along these lines: *« the definition of the Area is intended to exclude the exclusive economic zone claimed by States in accordance with international law »*.

intersection with the meridian of 30° East; from there north along that meridian to the point where the line began as shown in the map in the Annex 1 to this Agreement.

2. Where for the purpose of this Agreement it is necessary to determine the position on the surface of the Earth of a point, line or area, that position shall be determined by reference to the International Terrestrial Reference System maintained by the International Earth Rotation Service, which for most practical purposes is equivalent to the World Geodetic System 1984 (WGS84).

ARTICLE 4 – GENERAL PRINCIPLES⁹

In giving effect to the duty to cooperate in accordance with the 1982 Convention and international law, the Contracting Parties shall, **individually and jointly**, apply [in particular] the following principles:

- a) adopt measures based on the best scientific evidence available to ensure the long term conservation of fishery resources, taking into account the sustainable use of such resources **and implementing an ecosystem approach to their management;**
- b) **take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;**
- c) apply the precautionary approach in accordance with **the Code of Conduct and the 1995 Agreement, noting that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures;**
- d) **maintain stocks at levels that are capable of producing the maximum sustainable yield, and rebuild depleted stocks to the said levels;**
- e) ensure that fishing practices and management measures take due account of the need to minimize the harmful impact of fishing activities on the marine environment;
- f) **protect biodiversity in the marine environment;**
- g) give full recognition to the special requirements of developing States [of the region]¹⁰.

ARTICLE 5 – MEETING OF THE PARTIES¹¹

1. **The Contracting Parties shall meet periodically to consider matters pertaining to the implementation of this Agreement and to make all decisions relevant thereto.**

⁹ Source – Draft SWIOC Agreement, Article 6, modified to include elements proposed by New Zealand.

¹⁰ Insertion of the language in brackets proposed by New Zealand. Brackets have been inserted in light of reservations to the same language in other provisions of this draft.

¹¹ Source – Article VII of the AIDCP Agreement and Article 6 Draft SWIOC Agreement.

2. **The ordinary Meeting of the Parties shall take place [at least once a year / every two years], and to the extent practicable, back-to-back with meetings of the Commission for the Management and Development of the Coastal Fisheries of the South West Indian Ocean. The Contracting Parties may also hold extraordinary meetings when deemed necessary.**
3. **A majority of the Contracting Parties shall constitute a quorum for the Meeting of the Parties and subsidiary bodies established under this Agreement.**
4. **The Meeting of the Parties may adopt and amend its own Rules of Procedure and those of its subsidiary bodies.**
5. **The Meeting of the Parties may decide upon, and amend as occasion may require, financial regulations for the establishment of a budget to fund the conduct of the Meeting of the Parties and the exercise of its functions. Such regulations shall set out:**
 - a) **the criteria governing the determination of the amount of each Contracting Party's contribution to the budget, giving due consideration to the economic status of Contracting Parties which are developing States and ensuring that an adequate share of the budget is borne by Contracting Parties that benefit from fishing in the Area;**
 - b) **the procedures according to which each Contracting Party shall pay a contribution to the budget; and**
 - c) **the criteria and procedures according to which the Meeting of the Parties may accept voluntary contributions, donations or other forms of assistance from organizations, individuals and other sources generally or in connection with specific projects or activities relevant to the implementation of this Agreement.**

ARTICLE 6 – FUNCTIONS OF THE MEETING OF THE PARTIES¹²

The Meeting of the Parties shall:

- a) review the state of fishery resources, including their abundance and the level of their exploitation;
- b) promote and co-ordinate research activities as required, on the fishery resources occurring in the Area and in contiguous areas, including discarded catch and the impact of fishing on the marine environment;
- c) **evaluate the impact of fishing, taking into account the environmental and oceanographic characteristics of the Area, other human activities and environmental factors, on the fish resources and on the marine environment;¹³**
- d) formulate and adopt conservation and management measures necessary for ensuring the long term sustainability of the fishery resources based on the best scientific evidence available;

¹² Source – Draft SWIOC Agreement, Article 7, modified – The areas cited in the “bullet points” identified by the Chair and New Zealand at the 3rd IGC-Nairobi have been preserved in this draft.

¹³ Text proposed by New Zealand.

- e) adopt generally recommended international minimum standards for the responsible conduct of fishing operations;
- f) develop rules for the collection and verification of scientific and statistical data, as well as for the submission, publication, dissemination and use of such data;
- g) promote co-operation and co-ordination among Contracting Parties to ensure that conservation and management measures for straddling fish stocks in waters under national jurisdiction and measures **adopted under this Agreement** are compatible;
- h) *Alternative A*: [as required,] develop, rules and procedures for the monitoring, control and surveillance of fishery activities in order to ensure compliance with conservation and management measures adopted on the basis of the present Agreement including, where appropriate, a system of verification incorporating **vessel monitoring**, observation and inspection;
- i) *Alternative B*¹⁴: establish procedures, such as an observer programme and an inspection scheme, for the monitoring, control and surveillance of fishing activities in the Area. Such procedures shall:
 - (i) foster cooperation among Contracting Parties to ensure the effective implementation and compliance with conservation and management measures agreed by the Meeting of the Parties;
 - (ii) be impartial and non-discriminatory in nature;
 - (iii) take into account the principles contained in articles 21 and 22 of the 1995 Agreement when developing rules concerning the boarding and inspection of vessels operating in the Area
- j) [as required,] develop and monitor measures to prevent, deter and eliminate illegal, unreported and unregulated, fishing (IUU fishing);
- k) in accordance with international law and any applicable instruments, draw the attention of any State that is not a Contracting Party, to any activities which undermine the **attainment of the objectives of this Agreement**;
- l) **[as required,] establish the criteria for and rules governing participation in fishing;**¹⁵
- m) **carry out any other tasks and functions necessary to achieve the objectives of this Agreement.**

ARTICLE 7 – SUBSIDIARY BODIES¹⁶

¹⁴ Text proposed by New Zealand.

¹⁵ A relatively similar provision was included in paragraph 14 of Article 7 of the Draft SWIOC Agreement. This language reflects New Zealand proposal for this function.

¹⁶ Source – Draft SWIOC Agreement, Article 14, modified.

1. The Meeting of the Parties shall establish a permanent Scientific Committee, which shall meet at the same frequency of, and preferably prior to, the Meeting of the Parties.¹⁷
 - a) The functions of the **Scientific** Committee shall be:
 - (i) to conduct the scientific assessment of the fishery resources stocks covered by this Agreement **and the impact of fishing on the marine environment, taking into account the environmental and oceanographic characteristics of the Area**¹⁸;
 - (ii) to encourage and promote co-operation in scientific research in order to improve knowledge of the state of the fishery resources;
 - (iii) to provide scientific advice and recommendations to the Meeting of the Parties for the formulation of the conservation and management measures referred to in Article 6.1.d);
 - (iv) to provide scientific advice and recommendations to the Meeting of the Parties for the formulation of measures regarding the monitoring of fishing activities;
 - (v) to provide scientific advice and recommendations to the Meeting of the Parties on appropriate standards and format for fishery data collection and exchange;
 - (vi) any other function that the Meeting of the Parties may decide.
 - b) **In developing advice and recommendations the Science Committee will take into consideration the work of the Commission for the Management and Development of the Coastal Fisheries of the South West Indian Ocean as well as that of other relevant regional fisheries management organizations.**
2. The Meeting of the Parties may also establish such temporary, special or standing committees to study and report on matters pertaining to the implementation of the objectives of this Agreement, and working groups to study and recommend on specific technical problems.

ARTICLE 8 – DECISION MAKING¹⁹

1. **Unless otherwise provided in this Agreement,**²⁰ decisions of the Meeting of the Parties and its subsidiary bodies on matters of substance shall be taken by the consensus of the Contracting Parties present, **where consensus means the absence of any formal objection made at the time a decision is taken.** The question of whether a matter is one of substance shall be treated as a matter of substance.

¹⁷ Proposal by Australia to set the establishment of the Scientific Committee as a possibility and not an obligation as follows: “*The Meeting of the Parties should as required establish a Scientific Committee*”. Then delete the rest of the sentence.

¹⁸ Text in bold proposed by Australia.

¹⁹ Source – Draft SWIOC Agreement, Article 11, modified.

²⁰ It is proposed in Article 21 that amendments to the Agreement and annexes are adopted by Consensus of all Contracting Parties. That would be the only exception to the general “consensus of the present” rule under this draft.

- [2. If efforts to reach a decision by consensus have been exhausted, as identified by the Chairperson, decisions shall be taken by a majority of four-fifths of the Contracting Parties present and voting.]²¹**
3. Decisions on matters other than those referred to in paragraph 1 shall be taken by a simple majority of the Members present and voting.
- 4. Decisions adopted by the Meeting of the Parties are binding on all Contracting Parties.²²**
- 5. A Contracting Party that has not paid its contribution, as may be applicable, for [two consecutive contribution cycles] shall not enjoy the right to participate in the decision-making process in the Meeting of Parties until it has fulfilled its obligations, unless the Meeting of Parties decides otherwise.**

ARTICLE 9 – SECRETARIAT

The Meeting of Parties may decide on arrangements for the operation, or the establishment, of a Secretariat to perform the following functions, should the need arise:

- a) implementing and coordinating the administrative provisions of this Agreement, including the compilation and distribution of the official report of the Meeting of the Parties;**
- b) maintaining a complete record of the proceedings of the Meeting of the Parties and its subsidiary bodies, as well as a complete archive of any other official documents pertaining to the implementation of this Agreement;**
- c) any other function that the Meeting of the Parties may decide.**

ARTICLE 10 – CONTRACTING PARTY DUTIES²³

1. Each Contracting Party shall, in respect of its activities within the Area:
- a) promptly implement this Agreement and any conservation, management and other measures or matters which may be agreed by the Meeting of the Parties;
 - b) take appropriate measures in order to ensure the effectiveness of the measures adopted in accordance with this Agreement;
 - c) collect and exchange scientific, technical and statistical data with respect to fisheries resources covered by this Agreement and ensure that;

²¹ As proposed by Australia in comments to Draft SWIOC Agreement. In case of majority voting, the EC would require an objection procedure, such as the provisions foreseen in the Draft SWIOC Agreement, Article 12, paragraphs 4 to 9).

²² Proposal by Australia.

²³ Source – Article 21 of the Draft SWIOC Agreement. Only items relating to essential elements identified by the Chair and New Zealand have been retained.

- (i) data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements set forth in the rules adopted by the Meeting of the Parties;
 - (ii) appropriate measures are taken to verify the accuracy of such data;
 - (iii) such statistical, biological and other data and information as the Meeting of the Parties may decide is provided annually; and
 - (iv) information on steps taken to implement the conservation and management measures adopted by the Meeting of the Parties is timely provided.
2. Each Contracting Party shall make available to the Meeting of the Parties a statement of implementing and compliance measures, including imposition of sanctions for any violations, it has taken in accordance with this article and, in the case of Coastal States that are Contracting Parties to this Agreement, as regards the conservation and management measures for relevant straddling fish stocks in waters under their jurisdiction adjacent to the Area.
 3. Without prejudice to the primacy of the responsibility of the flag State, each Contracting Party shall, to the greatest extent possible, take measures, or cooperate, to ensure that its nationals and fishing vessels owned or operated by it nationals, fishing in the Area comply with the provisions of this Agreement.
 4. Each Contracting Party shall, to the greatest extent possible, at the request of any other Contracting Party, and when provided with the relevant information, investigate any alleged violation by its nationals, or fishing vessels owned or operated by its nationals, of the provisions of this Agreement or any conservation and management measure adopted pursuant hereto. A report on the progress of the investigation, [including details of any action taken or proposed to be taken in relation to the alleged violation,] shall be provided to the Contracting Party making the request and to the Meeting of the Parties as soon as practicable [and in any case within two months of such request] and a report on the outcome of the investigation shall be provided to the Meeting of the Parties when the investigation is completed. For the purpose of this Article, a national includes a natural or a legal person.²⁴

Article 11 – FLAG STATE DUTIES²⁵

1. Each Contracting Party shall take such measures as may be necessary to ensure that:
 - a) fishing vessels flying its flag operating in the Area comply with the provisions of this Agreement and the conservation and management measures adopted by the Meeting of the Parties and that such vessels do not engage in any activity which undermines the effectiveness of such measures; and
 - b) fishing vessels flying its flag do not conduct unauthorized fishing within waters under the national jurisdiction of any Contracting Party. **And**
 - c) **fishing vessels flying its flag operating in the Area carry and operate near real-time position-fixing transmitters.**²⁶

²⁴ Bracketed section as appearing in the Draft SWIOC Agreement.

²⁵ Source – Draft SWIOC Agreement, Article 22, modified. Some comments by Australia incorporated.

²⁶ Text proposed by New Zealand.

2. No Contracting Party shall allow any fishing vessel entitled to fly its flag to be used for fishing in the Area unless it has been authorised to do so by the appropriate authority or authorities of that Contracting Party.
3. Each Contracting Party shall:
 - a) authorize the use of vessels flying its flag for fishing beyond waters of national jurisdiction only where it is able to exercise effectively its responsibilities in respect of such vessels under this Agreement and in accordance with international law;
 - b) maintain a record of fishing vessels entitled to fly its flag and authorized to fish in the Area for fishery resources to which this Agreement applies, and shall ensure that the information for all such vessels specified in Annex I is entered in that record. Contracting Parties shall exchange this information in accordance with such procedures as may be agreed by the Meeting of the Parties;**
 - c) make available to each annual Meeting of the Parties a report on its fishing activities in the Area in conformity with the requirements determined by the Meeting of the Parties;**
 - d) collect and share in a timely manner, complete and accurate data concerning fishing activities by vessels flying its flag operating in the Area, in particular on vessel position, retained catch, discarded catch and fishing effort, while maintaining confidentiality, where appropriate;**
 - e) at the request of any other Contracting Party, and when provided with the relevant information, investigate any alleged violation by fishing vessels flying its flag of the provisions of this Agreement or any conservation and management measure adopted pursuant thereto. To this end a Contracting Party shall:**
 - (i) provide a report on the progress of an investigation, [including details of any action taken or proposed to be taken in relation to the alleged violation,] to the Contracting Party making the request and to the Meeting of the Parties as soon as practicable [and in any case within two months of such request] and provide a report on the outcome of the investigation when the investigation is completed;**
 - (ii) carry out all investigations and judicial proceedings expeditiously and apply sanctions applicable in respect of violations which are adequate in severity to be effective in securing compliance and to discourage violations wherever they occur which shall deprive offenders of the benefits accruing from their illegal activities;**
 - (iii) apply measures in respect of masters and other officers of fishing vessels, including provisions that may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.²⁷**

ARTICLE 12 – PORT STATE DUTIES

1. Measures taken by a Port State Contracting Party in accordance with this Agreement shall take full account of the right and the duty of a Port State to take measures, in accordance with

²⁷ Text of items ii) and iii) proposed by New Zealand.

international law to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures, a Port State shall not discriminate in form or in fact against the fishing vessels of any State.

2. Each Port State Contracting Party shall:
 - a) in accordance with measures agreed by the Meeting of the Parties, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals;
 - b) not permit landings, transshipment, or supply services in relation to vessels unless they are satisfied that fish on board the vessel have been caught in a manner consistent with the measures adopted pursuant to this Agreement; and
 - c) provide assistance to Flag State Contracting Parties, as reasonably practical and in accordance with its national law and international law, when a fishing vessel is voluntarily in a port or at an offshore terminal under its jurisdiction and the Flag State of the vessel requests it to provide assistance in ensuring compliance with the provisions of this Agreement.
3. In the event that a Port Contracting Party considers that a vessel of another Contracting Party making use of its ports or offshore facilities has violated a conservation and management measure adopted pursuant to this Agreement, it shall draw this to the attention of the flag State concerned and of the Meeting of the Parties. The port State Contracting Party shall provide the Flag State and the Meeting of the Parties with full documentation of the matter, including any record of inspection.
4. Nothing in this article affects the exercise by Contracting Parties of their sovereignty over ports in their territory in accordance with international law.

ARTICLE 13 – SPECIAL REQUIREMENTS OF DEVELOPING STATES²⁸

1. The Contracting Parties shall give full recognition to the special requirements of developing States [in the region] in relation to the conservation and management of fishery resources and the sustainable development of such resources.
2. The Contracting Parties recognize, in particular:
 - a) the vulnerability of developing States [in the region] that are dependent on the exploitation of fishery resources, including for meeting the nutritional requirements of their populations or parts thereof;
 - b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers; and
 - c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States [in the region]

²⁸ Source – Draft SWIOC Agreement, Article 20, modified. All comments by Australia incorporated. Proposal by New Zealand to reconsider this Article in light of the establishment of the Coastal fisheries body and links with the High Seas Arrangement: possibility to cross-refer to Articles 25 and 26 of the UN Agreement. This could be done in Article 4(g).

3. Cooperation by the Contracting Parties under the provisions of this Agreement and through other subregional or regional organizations involved in the management of fisheries resources **may** include action for the purposes of:
 - a) enhancing the ability of developing States [in the region] to conserve and manage fishery resources and to develop their own fisheries for such resources; and
 - b) assisting developing States [in the region] to enable them to participate in fisheries for such resources, including facilitating access in accordance with this Agreement.
4. Cooperation with developing States [in the region] for the purposes set out in this article **may** include the provision of financial assistance, assistance relating to human resources development, technical assistance, transfer of technology, and activities directed specifically towards:
 - a) improved conservation and management of the fishery resources, which can include the collection, reporting, verification, exchange and analysis of fisheries data and related information;
 - b) improved information collection and management of the impact of fishing activities on the marine environment;
 - c) stock assessment and scientific research; and
 - d) monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level, development and funding of national and regional observer programmes and access to technology.

ARTICLE 14 – TRANSPARENCY²⁹

1. The Contracting Parties shall promote transparency in decision-making processes and other activities carried out under this Agreement.
2. **Coastal States with waters or seabed under national jurisdiction adjacent to or surrounded by the Area that are not Contracting Parties to this Agreement shall be entitled to participate as observers in the Meetings of the Parties and meetings of its subsidiary bodies.**
3. **Non-Parties to this Agreement shall be entitled to participate as observers in the Meetings of the Parties and meetings of its subsidiary bodies.³⁰**
4. **Intergovernmental organisations concerned with matters relevant to the implementation of this Agreement, in particular the Food and Agriculture Organisation of the United Nations, the Commission for the Management and Development of the Coastal Fisheries of the South West Indian Ocean, and Regional Fisheries Organisations with competence over areas of the high seas bordering the Area, shall be entitled to participate as observers in the Meetings of the Parties and of its subsidiary bodies.**

²⁹ Source – Draft SWIOC Agreement, Article 16, modified.

³⁰ Text proposed by New Zealand.

5. Representatives from non-governmental organizations concerned with matters relevant to the implementation of this Agreement shall be afforded the opportunity to participate in the Meetings of the Parties and of its subsidiary bodies as observers or otherwise as determined by the Meeting of the Parties. The rules of procedure of the Meeting of the Parties and its subsidiary bodies shall provide for such participation. The procedures shall not be unduly restrictive in this respect.
4. Observers shall be given timely access to pertinent information subject to the rules and procedures, including those concerning confidentiality requirements, which the Meeting of the Parties may adopt.

ARTICLE 15 – FISHING ENTITIES

1. After the entry into force of this Agreement, any fishing entity whose vessels fish or intend to fish for fishery resources in the Area, may, by a written instrument delivered to the Depositary, express its firm commitment to be bound by the terms of this Agreement. Such commitment shall become effective thirty days following the delivery of the instrument. Any such fishing entity may withdraw such commitment by written notification addressed to the Depositary. Notice of withdrawal shall become effective **ninety (90) days** from the date of its receipt by the Depositary.³¹
2. **A fishing entity which has committed to be bound by the terms of this Agreement, may participate in the Meeting of the Parties and its subsidiary bodies, and partake in decision-making. Articles 4, 10, 11, 12, 13, (14), 16 (16bis) and 17 apply, mutatis mutandis, to such a fishing entity.**

ARTICLE 16 – COOPERATION WITH OTHER ORGANISATIONS³²

The Contracting Parties, acting jointly under this Agreement, shall cooperate closely with other international fisheries and related organizations in matters of mutual interest, in particular with the Commission for the Management and Development of the Coastal Fisheries of the South West Indian Ocean and any other Regional Fisheries Organisation with competence over high seas waters bordering the Area.

ARTICLE 16BIS – NON-PARTIES³³

1. **Contracting Parties shall take measures consistent with this Agreement, the 1995 Agreement and international law to deter the activities of vessels flying the flags of non-parties to this Agreement which undermine the effectiveness of conservation and**

³¹ Source: Paragraph 1 of Annex I, MHLC Convention, adapted. SIOFA signatories or Contracting Parties will need to agree on precise commitment procedures (eg commitment instruments) upon a fishing Entity's manifestation of interest, either during the interim period or after entry into force of the Agreement, through a decision of the Meeting of the Parties.

³² Source – Draft SWIOC Agreement, Article 15, slightly modified

³³ Text proposed by New Zealand. Inclusion of a non-parties provision supported by Australia. Note that Article 6.k) sets among the functions of the Meeting of the Parties the same activity – albeit carried out on a collective basis.

management measures adopted by the Meeting of the Parties (the attainment of the objectives of this Agreement).

2. Contracting Parties shall exchange information on the activities of fishing vessels flying the flags of non-parties to this Agreement which are engaged in fishing operations in the Area.
3. Contracting Parties shall draw the attention of any State not a Party to this Agreement to any activity undertaken by its nationals or vessels flying its flag which, in the opinion of the Contracting Party [or the Meeting of the Parties], affects the implementation of the objectives of this Agreement.
4. Contracting Parties shall, individually or jointly, request non-parties to this Agreement whose vessels fish in the Area to cooperate fully in the implementation of conservation and management measures adopted by the Meeting of the Parties with a view to ensuring that such measures are applied to all fishing activities in the Area. Such cooperating non-parties to this Agreement shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with, and their record of compliance with, conservation and management measures in respect of the relevant stocks.

ARTICLE 17 – GOOD FAITH AND ABUSE OF RIGHTS³⁴

Each Contracting Party shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of rights.

ARTICLE 18 – RELATION TO OTHER AGREEMENTS³⁵

Nothing in this Agreement shall prejudice the rights and obligations of States under the 1982 Convention or the 1995 Agreement.

ARTICLE 19 – INTERPRETATION AND SETTLEMENT OF DISPUTES

1. Contracting Parties shall [attempt / use their best endeavours] to resolve their disputes by amicable means. At the request of any Contracting Party a dispute may be submitted for binding decision in accordance with the procedures for the settlement of disputes provided in Section II of Part XV of the 1982 Convention or, where the dispute concerns one or more Straddling Stocks, the procedures set out in Part VIII of the 1995 Agreement. The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to these instruments.³⁶

³⁴ Source – Draft SWIOC Agreement, Article 27.

³⁵ Text proposed by Australia, supported by New Zealand.

³⁶ Text proposed by Australia. Similar language as in Article 33.3 of the Draft SWIOC Agreement.

2. **If a dispute involves a fishing entity which has committed to be bound by the terms of this Agreement and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.**

ARTICLE 20 – AMENDMENTS³⁷

1. **Any Contracting Party may propose an amendment to the Agreement by providing to the Depositary³⁸ the text of a proposed amendment at least sixty (60) days in advance of a Meeting of the Parties. The Depositary shall circulate a copy of this text to all other Contracting Parties promptly.**
2. **Amendments to the Agreement shall be adopted by consensus of all Contracting Parties. The provisions of Article 8(5) shall not apply in respect of decisions under this paragraph.**
3. **Amendments to the Agreement shall enter into force ninety (90) days after all Contracting Parties which held this status at the time the amendments were approved have deposited their instruments of ratification, acceptance, or approval of such amendments with the Depositary.**
4. **For each Contracting Party acceding to amendments to the Agreement after their entry into force, the amendments shall enter into force for that Party (30) days after the deposit of its instrument of accession to such amendments.]³⁹**

ARTICLE 21 - ANNEXES⁴⁰

1. **The Annexes to this Agreement form an integral part thereof and, unless expressly provided otherwise, a reference to this Agreement includes a reference to the Annexes thereto.**
2. **Any Contracting Party may propose an amendment to an Annex to the Agreement by providing to the Depositary the text of a proposed amendment at least sixty (60) days in advance of a Meeting of the Parties. The Depositary shall provide a copy of this text to all other Contracting Parties promptly.**
4. **Unless otherwise agreed, amendments to an Annex shall enter into force for all Contracting Parties ninety (90) days after their adoption by the Meeting of the Parties.⁴¹**

³⁷ Source – Article XXXIV of the Antigua (IATTC) Convention.

³⁸ This role for the Depositary has a precedent in the CCAMLR Convention.

³⁹ Text proposed by New Zealand. The Chair, however, believes that any acceding Party would indeed accede to the text as amended if indeed these amendments are in force. In my opinion, this language could result in amendments not being simultaneously in force for all Parties, contrary to the objective sought in paragraph 3.

⁴⁰ Source – Article XXXV of the Antigua (IATTC) Convention

⁴¹ Australia proposes to delete paragraphs 2 and 3.

ARTICLE 22 – SIGNATURE RATIFICATION, ACCEPTANCE AND APPROVAL⁴²

1. **This Agreement shall be open for signature by**
 - a) *(the Participants in the Inter-Governmental Consultation on the Southern Indian Ocean Fisheries Agreement. – LIST)* and
 - b) **by any other State having jurisdiction over waters bordering or enclosed by the Area, and shall remain open for signature for twelve months from the (date of opening for signature).**
2. **This Agreement is subject to ratification, acceptance or approval by the signatories.**
3. **The instruments of ratification, acceptance or approval shall be deposited with the Depository.**
4. **For each signatory which ratifies, accepts or approves this Agreement after its entry into force, this Agreement shall enter into force for that signatory thirty (30) days after the deposit of its instrument of ratification, acceptance or approval.⁴³**

ARTICLE 23 – ENTRY INTO FORCE⁴⁴

This Agreement shall enter into force **ninety (90) days** as from the date of receipt by the Depository of the **(fourth)** instrument of ratification, acceptance of approval.

ARTICLE 24 – ACCESSION⁴⁵

1. **This Agreement shall be open for accession by any State or Regional Economic Integration Organisation interested in fishing activities in relation to the fishery resources to which this Agreement applies.**
2. **Instruments of accession shall be deposited with the Depository.**
3. **For each State or regional economic integration organization which accedes to this Agreement after its entry into force, this Agreement shall enter into force for that State or regional economic integration organization thirty (30) days after the deposit of its instrument of accession.**

ARTICLE 25 – THE DEPOSITARY⁴⁶

⁴² Source – Article 34 WCPFC Convention.

⁴³ Text proposed by New Zealand.

⁴⁴ Source : Draft SWIOC Agreement, Article 31. Terms in bold proposed by New Zealand.

⁴⁵ Source, CCAMLR Convention, Article XXIX, amended.

1. **The Director-General of the Food and Agriculture Organisation of the United Nations shall be the Depositary of this Agreement and of any amendments thereto. The Depositary shall transmit certified copies of this Agreement to all signatories and shall register this Agreement with the Secretary-General of the United Nations pursuant to Article 102 of the Charter of the United Nations.**
2. **The Depositary shall inform all signatories of this Agreement and Fishing Entities referred to in Article [15] of signatures, ratifications and instruments deposited under Articles [22 and 24] and of the date of entry into force of the Agreement under Article [23].**

ARTICLE 26 – WITHDRAWAL⁴⁷

Any Contracting Party may withdraw from this Agreement at any time after the expiration of two years from the date upon which the Agreement entered into force with respect to that Party, by giving written notice of such withdrawal to the Depositary who shall immediately inform all the Contracting Parties of such withdrawal. Notice of withdrawal shall become effective three months from the date of its receipt by the Depositary.

ARTICLE 27 – TERMINATION⁴⁸

This Agreement shall be automatically terminated if and when, as the result of withdrawals, the number of Contracting Parties drops below three.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, having been duly authorized by their respective Governments, have signed this Agreement.

DONE at (place) on this --th day of (month), (year), in English and French, both texts being equally authentic.

⁴⁶ Source – Australian proposal to Draft SWIOC Agreement.

⁴⁷ Draft SWIOC Agreement, Article 32.

⁴⁸ Draft SWIOC Agreement, Article 34.

ANNEX I - INFORMATION REQUIREMENTS⁴⁹

1. The following information shall be provided to the Meeting of the Parties in respect of each fishing vessel referred to in Article 11, paragraph 3:
 - a) Name of fishing vessel, registration number, previous names (if known), and port of registry;
 - b) Name and address of owner or owners;
 - c) Name and nationality of master;
 - d) Previous flag (if any);
 - e) International Radio Call Sign;
 - f) Vessel communication types and numbers (INMARSAT A, B and C numbers and satellite telephone number);
 - g) Colour photograph of vessel;
 - h) Where and when built;
 - i) Type of vessel;
 - j) Normal crew complement;
 - k) Type of fishing method or methods;
 - l) Length;
 - m) Moulded depth;
 - n) Beam;
 - o) Gross register tonnage;
 - p) Power of main engine or engines;
 - q) The nature of the authorization to fish granted by the flag State;
 - r) Carrying capacity, including freezer type, capacity and number and fish hold capacity.
2. The following information shall also be promptly notified to the Secretariat⁵⁰:
 - a) any additions to the record;
 - b) deletions from the record by reason of:
 - i. the voluntary relinquishment or non-renewal of the fishing authorization by the owner of the vessel;

⁴⁹ Source – Annex IV WCPFC Convention

⁵⁰ Source – Annex 1 of the Antigua (IATTC) Convention.

- ii. the withdrawal of the fishing authorization issued to the vessel in accordance with Article 11, paragraph 2;
- iii. the fact that the vessel is no longer entitled to fly its flag;
- iv. the scrapping, decommissioning or loss of the vessel; and
- v. any other reason, specifying which of the reasons listed above are applicable.

Chair notes on Interim Arrangements

The inclusion of interim arrangements (IR) in an Annex to the Agreement was considered by the 3rd IGC and is foreseen in the essential elements bullet list proposed by New Zealand. Identified areas are:

- Format and standards for data collection
- Mechanism and timeframe for exchange and storage of data
- Reporting : fishery data collection and co-operation
- Limitation to experimental fisheries / moratorium – This last item was subject to reservation by some participants.

The Chair considers that the inclusion of the IR in an Annex poses some problems in light of the SEAFO experience, to which the attention of the Inter-Governmental Consultation should be drawn: being an integral part of the SEAFO Convention, the IR became applicable only upon entry into force of the Convention itself. No obligations could be enforced during the period between the adoption and signature of the Convention and its entry into force. Upon entry into force, only SEAFO Contracting Parties at that time (3) were under an obligation to abide by the arrangements, not the remaining signatories.

In order to ensure that all signatories or participants may start implementing any IR as soon as possible, it would be preferable to adopt them through a separate instrument, possibly a Resolution of the Inter-Governmental Consultation taken at the time the Agreement itself is adopted. The arrangements should then contain provisions for “secretariat” management of the implementation.

The contents of the different items should be developed co-operatively by IGC participants on the basis of scientific and technical advice.