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INFORMAL GROUP OF LEGAL EXPERTS ON THE PROCESS FOR A CHANGE IN THE NATURE OF A STATUTORY BODY UNDER ARTICLE XIV OF THE FAO CONSTITUTION INTO A BODY OUTSIDE THE FRAMEWORK OF FAO (POSSIBLE CHANGE IN STATUS OF THE INDIAN OCEAN TUNA COMMISSION)

Rome, 23-24 October 2007

SUPPLEMENTARY OBSERVATIONS ON THE PROPOSALS FOR A CHANGE IN THE STATUS OF THE INDIAN OCEAN TUNA COMMISSION

I. SUMMARY

1. This document provides supplementary information on the proposals for a change in the status of the Indian Ocean Tuna Commission (IOTC) following the review of the matter by the Committee on Constitutional and Legal Matters in April 2007, the IOTC at its 11th Session in May 2007 and the Council at its 132nd Session in June 2007 and must be read in conjunction with other documents and reports on this matter. It clarifies further the position in the light of relevant developments which have occurred since the Director-General referred the issue to the CCLM and addresses some specific queries raised concerning the proposals made. In particular, this document restates and clarifies further the proposals for the change of IOTC as a statutory body of FAO into a body outside the framework of FAO, including the position that the removal of IOTC from the framework of FAO cannot be achieved through an amendment procedure, *a fortiori*, a simplified amendment procedure for routine, technical matters.

II. REVIEW OF THE MATTER BY THE FAO COUNCIL

2. At its 132nd Session, held in June 2007, the Council was informed that when examining the matter, the CCLM had taken note of a detailed presentation of document CCLM 81/3 entitled "*Process for a change in the nature of a statutory body established under Article XIV of the Constitution into a body outside the framework of FAO (change in statues of the Indian Ocean Tuna Commission)"* and, in particular, of the reasons for which the Director-General had decided to refer the matter to the CCLM at its 81st Session. The Council was also informed that a presentation of the proposal to remove IOTC from the framework of

FAO, and the underlying reasons for that, had been made by the Chairperson of the CCLM speaking as representative of Belgium. The Council also took note of information on developments subsequent to the CCLM Session, including on the deliberations of the 11th Session of the IOTC held in May 2007[1].

3. The Council considered a number of statements reflecting a range of views, including on the need to improve the efficiency and the effectiveness of IOTC. Many Members recalled that the main IOTC objective was the sustainable management of the Indian Ocean tuna and tuna-like species and that it required a pragmatic and, more importantly, timely solution in order to guarantee the participation of all stakeholders in the fishing activities in the area of competence of the IOTC. They also asked for the full support of FAO in facilitating the process of strengthening IOTC in order to safeguard the tuna and tuna-like resources in the area which, under current conditions, were subject to a serious threat of depletion with negative consequences primarily for the coastal States in the area. They also emphasized that it was the consensus view of the members of the IOTC in Goa (22-26 May 2006) that the separation of the IOTC from FAO was necessary to make the IOTC a more effective and efficient body. However, most Members of the Council were of the view that such separation was not necessary, and recalled that some IOTC Members present at the 11th Session of the IOTC held in Mauritius (13-18 May 2007) were not in favour of a change in status of IOTC as a body of FAO.

> *"The Council endorsed the conclusions of the CCLM that the situation which had arisen was complex and unprecedented and, therefore, that it was essential to make a complete review of the matter, keeping in mind all the implications of any possible option including the fact that any decision in that respect would set a precedent in international law impacting upon other organizations of the United Nations System. The Council endorsed the CCLM request that an informal group of legal experts of all the IOTC Members, CCLM Members, as well as representatives of relevant organizations of the United Nations system as appropriate, should examine the matter. The CCLM would subsequently review the work of the informal group and provide its advice to the Council.*
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> *The Council noted the concerns voiced during the debates regarding the efficiency and effectiveness of IOTC which were the stated reasons for the process under way. The Council concluded that such concerns and reasons should be addressed, as a matter of priority, through discussions between the FAO Secretariat and concerned IOTC Members, and that the Secretariat would report on the outcome of such discussions to the CCLM and any other appropriate body"*[2].

III. PURPOSE OF DOCUMENT

4. As mentioned above, the purpose of this document is to clarify further the position in the light of all relevant developments which have occurred since the Director-General referred the issue to the CCLM and address some specific queries raised regarding the proposals which had been made. In expanding the proposals particular account is taken of the deliberations of IOTC at its 11th Session held in May 2007 in Mauritius and the outcome of

[1] Cf. CL 132/LIM/4.
[2] Cf. CL 132/REP, paragraphs 120-121.

the 132nd Session of the Council of FAO. In addition, the document should be seen in the light of all documents prepared so far.

5. The Organization will continue to take a pro-active approach towards the change in the nature of IOTC, as a statutory body of FAO, established under Article XIV of the Constitution, into a body outside the framework of FAO, provided that all IOTC Members were in favour of such initiative. As reflected in the various submissions made, especially the submission to the CCLM, the Organization continues to hold the view that the proposals which it has made reflect the only legally correct approach to the issue at hand. The proposals involve the convening of a Conference of Plenipotentiaries for the adoption of a new agreement; (ii) the implementation of a concomitant process of withdrawal and termination of the existing agreement and the entry into force of a new agreement as well as (iii) the implementation of such transitional arrangements as required. Furthermore, this approach would seem to be one responding to concerns arising from the fact that IOTC is currently a statutory body of an organization of the United Nations system. **In particular, it is essential that every sovereign Member of IOTC, irrespective of its size, status, stage of development or nature, as coastal or non coastal State, should be able to make a determination as to the course of action that it wishes to take in response to the latest developments. In this connection, it should be stressed, at the outset, that FAO is prepared to implement such transitional arrangements as may be required in order to allow for the implementation of its proposed approach.**

6. The Organization has undertaken additional research into the possibility put forward by a few IOTC Members that IOTC could be established as a body outside the framework of FAO under simplified amendments procedures provided for in the IOTC Agreement. **Such additional research into the origin of these procedures and related criteria, as well as past practice of the Organization, would seem to confirm that such an approach would be legally incorrect and constitute, indeed, the use of a procedure, or rather its misuse, for purposes other than those for which it was established**. Again, it is important to underline that any inconveniences arising from the process of termination of the old IOTC Agreement and the bringing into force of a new agreement would be obviated by the fact that the Organization is prepared to implement such transitional measures as might be required in a pragmatic and flexible manner.

7. Finally, this document reports on the informal consultations held to date by the Organization, in response to the concerns, as noted by the Council, which were voiced during the debates regarding the efficiency and effectiveness of IOTC which were the stated reasons for the process under way. The Council concluded that such concerns and reasons should be addressed, as a matter of priority, through discussions between the FAO Secretariat and concerned IOTC Members, and that the Secretariat would report on the outcome of such discussions to the CCLM and any other appropriate body. It is not clear, however, whether the issue of the efficiency and effectiveness of the IOTC is a matter within the purview of the informal group of legal experts.

IV. PROPOSED PROCESS FOR THE CHANGE IN THE STATUS OF IOTC AS A STATUTORY BODY OF FAO INTO A BODY OUTSIDE THE FRAMEWORK OF FAO

8. At the recently concluded session of the Council, while most Members were of the view that the separation of IOTC from FAO was not necessary, "*many Members asked for the full support of the FAO in facilitating the process of strengthening the IOTC in order to safeguard the tuna and tuna-like resources in the area which, under current conditions, were subject to a serious menace of depletion with negative consequences primarily for the coastal States in the area*". These Members considered that the matter required a "*pragmatic*" and "*timely solution*"[3]. It is precisely for these reasons that the proposals put forward might respond fully to the concerns expressed by such Members which hold the view that the removal of IOTC from the framework of FAO is necessary. The proposals involve, in addition to the convening of a Conference of Plenipotentiaries for the adoption of a new agreement and the implementation of a concomitant process of withdrawal and termination of the existing agreement and the entry into force of a new agreement, the implementation of such transitional arrangements as may be required. These proposals, seen together, should satisfy all IOTC Members.

9. As explained in earlier submissions, the IOTC Agreement was prepared, negotiated and concluded within FAO, following its adoption by the Council in 1993[4]. The Organization's submission to the 81st Session of the CCLM in April 2007 developed this position and explained in detail the extent to which the IOTC Agreement is enshrined in FAO, including in the light of the provisions of the Vienna Convention on the Law of Treaties, and its "*travaux préparatoires*". This is demonstrated, in the clearest possible manner, in Article XXI, paragraph 3 of the Agreement whereby "*any Member of the Commission that gives notice of withdrawal from FAO shall be deemed to have simultaneously withdrawn from the Commission*".

10. Thus, IOTC functions and operates within the framework of FAO and through the legal personality of FAO. Therefore, in order to set up a new entity distinct from FAO it would seem essential to terminate this particular agreement adopted in 1993 and establish a new legal entity. The new entity would have its own legal personality and not that of FAO, it would have its own staff, its own rights and obligations, its own assets and liabilities, and its

[3] Cf. CL 132/REP, paragraphs 120-121.

[4] The close link between agreements concluded within FAO and the authority of the Governing Bodies has been stressed at the early stages in the life of the Organization. A number of Members considered it fundamental that any agreement, even if it were of a regional nature and concerning a limited number of Members, had to be referred for approval by the Conference which only had authority to approve such agreements. When the Agreement for the Establishment of the Indo Pacific Fisheries Council was formulated at a Conference held in February 1948 in Baguio, Philippines, a proposal was made that the Agreement could enter into force in respect of the countries having accepted it after a particular threshold of acceptances was reached. At the time of the conclusion of the Agreement, the Government of the United States of America made a statement whereby it reserved its position as to the possibility that the Agreement could enter into force without referral to the Conference of FAO. This reservation was recorded in the report of the FAO Fisheries Meeting, Baguio, Philippines, 25-28 February 1948, P48/Co.1/27, page 5. This reservation was restated in a communication dated 2 September 1948 of Secretary of State J. Marshall to the Director-General of FAO emphasizing that the Government of the United States of America adhered to the position that arrangements establishing regional or specialized bodies related to FAO had to be referred to the Conference for approval. All agreements concluded at the early stages of FAO were referred to the Conference for approval. Subsequently the Constitution of FAO was amended and made provision for the submission of "*regional*" agreements to the Council for approval.

own capacity to sue and to be sued in accordance with international law and such national laws as may apply, and would have all other attributes attached to the legal personality.

11. In the course of earlier discussions, it was argued that Article XV, paragraph 1 of the IOTC Agreement confers upon the Commission legal personality, insofar as it may enter into "*appropriate arrangements*" with other intergovernmental organizations or institutions dealing with tuna in the area[5].

12. The Organization is of the view that such limited capacities of action do not mean, in any possible way, that the Commission is entrusted with legal personality and that it can act on its own and exercise all rights and obligations attached thereto. In fact, in negotiating and concluding the IOTC Agreement it was never the intention of the negotiating States or the Governing Bodies that IOTC would have legal personality and that it would act in any way autonomously except through FAO. For this reason, they did not make any such provision to that effect in the Agreement. It cannot be said that the Governing Bodies had any intention, even in an implicit manner, to confer upon IOTC the rights and obligations attached to the legal personality and any functional capacity of action related thereto. The question never arose and was never envisaged. This is confirmed by the fact if IOTC were to consider itself outside the framework of FAO it would be unable to fulfil a number of fundamental legal, material and practical acts that FAO performs at present on its behalf[6]. This is acknowledged even by the proponents of the immediate separation of IOTC from FAO[7], which have been urging FAO to continue to manage and operate IOTC, all its assets and staff.

13. Both the CCLM and the Council of FAO at its 127th Session in November 2004 examined the issue of the "*legal status of bodies established under Article XIV of the FAO Constitution"*. The Council agreed with the approach taken by the CCLM that insofar as "*the constituent instruments of bodies under Article XIV of the FAO Constitution do not entrust them with legal personality, i.e. capacity to hold rights and obligations of their own, and, therefore, have to act through FAO or drawing on the legal capacity of FAO"*[8]. The Council approved criteria aimed at reconciling the functional autonomy of bodies under Article XIV of the Constitution with the fact that they are placed under the framework of FAO and function through FAO.

14. The termination of the existing IOTC Agreement within FAO would allow for any risk of potential liabilities for the Organization and its Members in future to be dispelled. This would respond to the concern expressed by the Conference of FAO that there is a fundamental need for clarity in the status of conventions and agreements concluded under

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[5] Cf. CL 132/5, paragraph 8.

[6] The developments of the International Court of Justice in the Advisory Opinion "*Reparation of injuries suffered in the service of the United Nations*" do not seem to apply to IOTC. It cannot be said that "*under international law, (IOTC) must be deemed to have those powers which, though not expressly provided in the (Agreement) are conferred upon it by necessary implication as being essential for the performance of its duties*". It cannot be said either that it becomes clear that the capacity of (IOTC) (...) to act internationally in an autonomous manner "*arises by necessary intendment out of the (IOTC Agreement)*" (Advisory Opinion: I.C.J. Reports 1949, page 174). IOTC has always acted through FAO and it was never the intention of the Governing Bodies and the FAO Members which approved the IOTC Agreement that IOTC should operate outside FAO.

[7] At the 11th Session of the IOTC a scenario was considered by a few Members – but not by the Commission - whereby the Commission would have approved the amendments which would have entered into force immediately. However, upon adoption they would have been immediately suspended and FAO would have continued to operate the Commission for a transitional period.

[8] Cf. CL 127/REP, paragraphs 89 to 96.

Article XIV of the Constitution[9]. The IOTC would also have to conclude its own Headquarters Agreement with the host country and such other agreements with other countries as necessary which would provide for privileges and immunities and would allow it to operate effectively in those countries. The new commission would also have to conclude arrangements with host countries prior to the convening of any meeting providing for the necessary privileges, immunities and facilities.

15. While noting that this observation combines considerations of a legal and of a policy nature, **it is important to stress that a body within the United Nations System is fundamentally different from a body outside the system**. In his opening statement to the 11th Session of the Commission, the Chairperson laid particular emphasis on the fact that it was essential for the Commission to be removed from the framework of an organization of the United Nations, in order for it to be able to include among its Members entities that are not States and in order for it to be able to operate differently. Indeed a Commission outside the United Nations system is of course open to entities other than those that are recognized by or within the United Nations. Principles, such as sovereign equality among all Members - which condition the *modus operandi* of any body functioning within the United Nations system - may not carry the same weight in a body outside the United Nations system. This argues for any change in the status of IOTC to be referred to the sovereign authority of its Members, as such a change in status amounts to setting up a fundamentally distinct body, and each Member should be able to express its position through appropriate national acceptance and ratification procedures.

16. There has never been in the constitutional practice of FAO a situation where a body established by international treaty was removed from the framework of the Organization. However, the reverse has occurred twice in the life of the Organization. It is notable that such reverse situations were handled exactly in the same manner as is being proposed to handle the issue of the removal of IOTC from the framework of FAO.

17. Thus, in 1949 an initiative was launched which resulted in the revision of the International Plant Protection Convention of 1929 which had been concluded under the aegis of the International Institute of Agriculture. This resulted in a revised Convention that was approved by the Conference of FAO at its 6th Session in 1951 and placed within the framework of FAO. The Convention was opened for signature by all Governments and subsequently to ratification. It was also, after entry into force, open for adherence by non-signatory Governments[10]. **Insofar as a convention outside FAO was brought within the framework of FAO it was approved by the Conference and referred for acceptance by Governments in accordance with their respective constitutional procedures**.

18. The same approach was taken by the Conference of FAO in 1959 with regard to the International Poplar Commission. This Commission had been established outside FAO as a result of an initiative by the French Government in 1947. In 1959 the Conference negotiated and approved the Convention placing it within the framework of Article XIV of FAO. The Conference approved the Convention which was submitted to Member Nations with a view to their acceptance in conformity with its relevant provisions. The new constituent instrument came into force on 26 September 1961, the date of receipt of the twelfth instrument of

[9] This was affirmed sometimes in emphatic terms in a number of resolutions, such as Resolutions 46/57 and 47/57 and 61/59.
[10] Report of the Sixth Session of the Conference, 19 November-6 December 1951, paragraphs 372-374.

acceptance[11]. Both the report of the Conference and the resolution approving the Convention stressed in emphatic terms the need for clarity in the future status of the Commission.

19. There do not seem to be any procedural or legal reasons for which the removal of a statutory body established by agreement concluded within the framework of FAO should be handled differently, or through more informal procedures than the establishment of a statutory body by agreement within FAO. Therefore, it is considered that the current IOTC Agreement should be terminated and a new Agreement concluded and brought into force, in accordance with the relevant provisions of the IOTC Agreement.

20. Article XXI (withdrawal), paragraph 1 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".*

21. For its part, Article XXII (termination) reads 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".*

22. These provisions reflect principles and procedures governing conventions and agreements concluded under article XIV of the Constitution that the Conference of FAO adopted at its 9th Session in 1957. At that time, the Conference decided that all conventions and agreements had to contain a withdrawal or denunciation clause and established detailed procedures to that effect. The Conference also decided that all conventions and agreements had to contain a termination clause which would, *inter alia*, provide for automatic termination if and when the number of participants drops below the number required to bring it into force, unless the remaining participants decided otherwise. At that time, the Conference also decided that any system of termination by a qualified majority of the participants had to be discontinued and that there was a need for the parties to withdraw from a particular agreement in the event that they wished the agreement to be terminated[12]. These decisions are reflected in the above Articles of the IOTC Agreement.

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[11] Report of the Tenth Session of the Conference, 31 October-20 November 1959, paragraphs 578-581.

[12] In 1953, the Conference of FAO at its 7th Session adopted the Constitution of the European Commission for the Control of Foot-and-Mouth Disease. The Constitution came into force on 12 June 1954 following the receipt by the Director-General of the required number of notifications of acceptance. At the time of the negotiation of the Constitution, doubts were expressed as to whether there was a permanent need for the Commission. For this reason Article XVIII, paragraph 1 made provision for the termination of the Constitution by a decision of the Commission taken by a three-fourths majority of the membership of the Commission. Provision was also made for its termination should membership, as a result of withdrawals, drop below a given number. Another provision established rules for the liquidation of the Commission in such cases. Subsequently, acting of the basis of a set of recommendations of the Council, which, itself, had examined the matter with the assistance of a Special Committee, the Conference adopted the Principles set out in Part R of the Basic Texts. It was

23. **In order to expedite the operation of Articles XXI, paragraph 1, and XXII and taking into due account the fact that under Article XXII of the Agreement a number of countries could decided to maintain the existing IOTC Agreement, the Organization has suggested an inclusive, "participatory" process to facilitate the termination of the existing IOTC Agreement, the parallel process of bringing the new Agreement into force, a smooth transition to such new Agreement and more generally continuity in the operations of IOTC**[13]. This would involve the convening of a Conference of Plenipotentiaries for the adoption of a new agreement; the implementation of a concomitant process of withdrawal and termination of the existing agreement and the entry into force of the new one as well as the implementation by FAO of such transitional arrangements as might be required.

24. The submission which was made to the CCLM in April 2007 provided information on this proposal which it may be useful to recall at this stage.

25. The termination of the existing IOTC Agreement would be carried out under Article XXI, paragraph 1 of the IOTC Agreement. The Conference of Plenipotentiaries could adopt 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. A suitable threshold for the number of Parties required for the entry into force of the new agreement would have to be set. 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 agreements of this type and are essentially intended to preserve the interests of the other Members and minimize the negative effect of the withdrawal on the other parties and the body in question. But the concerns underlying this provision do not arise in this case and it would be open to the Members to agree that, in this particular situation, the notices of termination would take effect at the time of their deposit with the Director-General. Indeed, the matter cannot be seen in isolation from the transitional measures that FAO would be prepared to implement should all Members so wish and which would facilitate a smooth transition from one agreement to another.

26. An approach along these lines seems to be the correct one from a legal point of view. In addition, this process is also the only one which would safeguard the sovereign right of each IOTC Member which has accepted to be bound by the IOTC Agreement as reflected in the instrument of acceptance to make a determination as to whether it wishes to cease to be bound by the old agreement and, instead, decide that it wishes to abide by the provisions of the new agreement. As an organization of the United Nations system adhering to the cardinal principles of the system, in particular the principle of sovereign equality among States, it is incumbent upon FAO to insist on such a process.

27. Concerns could be raised that, notwithstanding efforts to expedite the process, once the new agreement has come into force, not all current Members of IOTC would have

considered, in emphatic terms, that any system of termination of an international treaty by a decision of the Commission would not be appropriate.

[13] At the 27th Session of the Committee on Fisheries (Rome, 5-9 March 2007), "*several Members requested that FAO should cooperate with IOTC members to develop a solution ensuring the efficiency and continuity of the activities of the Indian Ocean Tuna Commission (IOTC)*" Cf. CL 132/7, paragraph 89.

deposited the instruments of acceptance of the new agreement. Therefore, there could be some uncertainty as to their situation vis-à-vis the new agreement.

28. This ought not to present any particular difficulties for the following reasons:

28.1. First, FAO would be prepared to implement such transitional arrangements as would be necessary in order to facilitate the overall process of termination of the IOTC Agreement and the entry into force of the new agreement. Such transitional arrangements, carried out in a pragmatic and flexible manner, would mitigate any potential inconveniences. Transitional arrangements could be implemented not only until the new agreement came into force but also until all current Members of IOTC became Members of the new Commission. It is important in this connection to note that even the Members of IOTC that are staunch supporters of an immediate removal of IOTC from the framework of FAO are much in favour of the implementation by FAO of transitional measures and have asked insistently FAO to do so[14].

28.2. Second, insofar as there was unanimity on the need to remove IOTC from the framework of FAO, the termination of the existing agreement and entry into force of the new one could be completed expeditiously. The fact that FAO would have to implement transitional arrangements would be a secondary issue. Undoubtedly, all Members would reduce to a minimum the period during which FAO's assistance would be required by depositing the required instruments. If, on the contrary, as voiced by Members during the recently concluded 132nd Session of the Council, there were reservations as to whether IOTC should be removed from the framework of FAO, then there would be additional justification to consider the procedure being proposed by FAO as a quite correct one on legal terms.. It is the a procedure which allows the Members of IOTC which are also Members of FAO, an organization of the United Nations system, to determine whether they wish IOTC to be removed from the framework of FAO. This would be the appropriate procedure on legal grounds befitting the status of IOTC as a body within the United Nations system.

29. Consequently, it is proposed to convene a Conference of Plenipotentiaries for the adoption of a new agreement and to implement a concomitant process of withdrawal and termination of the existing agreement and the entry into force of the new one. In parallel, FAO would implement such transitional arrangements as might be required in a pragmatic and flexible manner.

[14] Such Members went as far as proposing a contrived expedient whereby the Commission would adopt the proposed set of amendments under the simplified amendment procedure Such amendments would enter into force immediately, but would also be immediately suspended and FAO would continue to operate IOTC for a while. The fact that FAO would continue to implement transitional measures would facilitate the transition process.

V. THE REMOVAL OF IOTC FROM THE FRAMEWORK OF FAO CANNOT BE ACHIEVED THROUGH AN AMENDMENT PROCEDURE

30. At its 3rd Special Session held in Goa in 2006, IOTC had proposed to adopt a comprehensive set of amendments to the IOTC Agreement aimed at removing all references to FAO in the IOTC Agreement which were an expression of the IOTC's nature as a statutory body of FAO placed within and operating from the framework of FAO. Under the proposal, once the amendments were adopted by IOTC, it would automatically and immediately cease to be a body operating under Article XIV of the FAO Constitution. Some Members of IOTC expressed reservations about this proposed procedure during the Special Session.

31. In earlier submissions, the Organization explained that the situation at hand has to be addressed under Articles XXI, paragraph 1 and XXII of the IOTC Agreement. It maintains that it would be legally improper to address the matter under the provisions of Article XX on the amendment of the IOTC Agreement.

32. Under Article XX, the Agreement may be amended by a three quarters majority of the Members of IOTC. Proposals for amendments may be made by any Member of the Commission or by the Director-General. Proposals made by a Member of the Commission are addressed to both the Chairperson of the Commission and the Director-General of FAO and those made by the Director-General of FAO are addressed to the Chairperson of the Commission, not later than 120 days before the Session of IOTC at which the proposal is to be considered. The Director-General informs immediately all Members of the Commission of all proposals for amendments. According to Article XX, paragraph 3, amendments to the Agreement must be reported to the Council of FAO which may disallow an amendment which is clearly inconsistent with the objectives and purposes of FAO or the provisions of the Constitution of FAO.

33. Under Article XX, paragraph 4

> "*Amendments not involving new obligations for Members of the Commission shall take effect for all Members from the date of their adoption by the Commission subject to paragraph 3 above"*.

34. Under Article XX, paragraph 5

> "*Amendments involving new obligations for Members of the Commission shall, after adoption by the Commission, subject to paragraph 3 above, come into force in respect of each Member only upon its acceptance thereof. The instruments of acceptance of amendments involving new obligations shall be deposited with the Director-General. The Director-General shall inform all Members of the Commission and the Secretary-General of the United Nations of such acceptance. The rights and obligations of any Member of the Commission that has not accepted an amendment involving new obligations shall continue to be governed by the provisions of this Agreement in force prior to the amendment*".

35. In its earlier submission to the CCLM and in a statement delivered to the Commission at its 11th Session, the representatives of FAO held the view that the proposal at hand could not be carried out as an amendment to the Agreement. Indeed, seen in the overall context of the legal system of FAO and the status of agreements under Article XIV of the Constitution,

the procedure set forth in Article XX of the Agreement would seem to have an inherent limitation, 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 procedure 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 and set up a new legal entity distinct from FAO.

36. *A fortiori*, it would seem legally incorrect that a simplified amendment procedure intended to deal with "*routine*", purely technical matters be used to adopt and establish a new international agreement and a new entity. This would seem to be a particular form of error of law, a procedural flaw, i.e. the use of a procedure for a purpose other than that for which it was designed, what is referred to in French as a "*détournement de procedure*". It was underlined that the criteria formulated by the Governing Bodies of FAO for the determination of whether or not particular amendments involve new obligations were applied out of context, since they were never formulated for a situation such as the one at hand. The proposed amendments seem to involve indeed new obligations, as confirmed by the need for internal ratification procedures that some countries have to follow. These are incompatible with, and defeat the purpose of the process under way.

37. Subsequent to the 11th Session of IOTC and the 132nd Session of the Council, additional research into the matter was carried out which confirms the position presented by the Organization.

38. The concept of amendments involving new obligations and amendments not involving new obligations is one that seems to be peculiar to FAO and its own practice and consequently should not be seen outside the context in which it was developed and in which it has been applied. A review of the discussions in IOTC shows that the Commission may not have been aware of that practice and on the advisable way to approach the concept of amendments involving or not new obligations when, at its 3rd Special Session in Goa, it envisaged the possibility of adopting the comprehensive set of amendments under Article XX, paragraph 4 of the IOTC Agreement that had been submitted to its consideration.

39. The first appearance of these concepts seems to have been in the Agreement for United Nations Relief and Administration (UNRRA) signed on 9 November 1943. UNRRA was an organization intended to provide relief to liberated areas towards the end and after World War II, mainly to displaced persons camps in Europe in 1947 and in Asia in 1949. In 1949 this organization was liquidated as its functions had been transferred progressively to various agencies of the United Nations. Article VIII established a complex system for the amendment of the Agreement. In particular, "*amendments involving new obligations for member governments shall require the approval of the Council by a two-thirds vote and shall take effect for each member government upon acceptance of it*". This concept was introduced with some variations in the constituent instruments of a few organizations established at the time, with particular reference to FAO and UNESCO[15] in 1945 and the World Meteorological Organization (WMO) in 1950. But not all constituent instruments included this concept. There is reason to believe that there was awareness that these concepts were somewhat

[15] In the case of UNESCO it was subject to a number of important qualifications both of substance and of a procedural nature.

unclear[16] which was confirmed subsequently in a lengthy legal opinion of the Legal Counsel of the United Nations of 1967 on the WMO Convention[17].

40. In FAO's practice, the concept of amendments involving new obligations and amendments not involving new obligations was extensively used in agreements concluded under Article XIV of the FAO Constitution in the context of amendment procedures. In the context of such procedures, amendments involving new obligations are binding upon individual parties only upon their individual acceptance of such amendments whereas amendments not involving new obligations would come into force in respect of all parties, either upon adoption or upon adoption and subsequent acceptance by a qualified majority of parties thereto. But between 1975 and 1979 the issue arose within FAO and was extensively debated.

41. In 1975 an Advisory Committee of Specialists proposed to amend a number of definitions of the International Plant Protection Convention. During the discussions of the proposed amendments, the delegation of one country pointed out that insofar as it would have to enact national legislation to give effect to the new definitions, the proposed amendments did involve new obligations. This led to a lengthy process of review of the concept of "new obligations" and its meaning. It appeared also that some governments had voiced concerns about the actual meaning of that concept in the context of other agreements since the early life of FAO[18].

42. A detailed review of the matter, taking into consideration the various conventions and agreements concluded under Article XIV of the Constitution was carried out by the secretariat of FAO in 1976. The review concluded that there were two procedural alternatives for the determination of the content of amendments involving new obligations which echoed the legal opinion of the United Nations Legal Counsel: either the competent assembly of the parties could take an obligatory decision that a particular amendment did not involve new obligations; or the government of an objecting State must be persuaded to drop a reservation to a qualification that particular amendments did not involve new obligations. In other words, either there was a possibility for an appropriate plenary body to take a decision binding upon all parties that a particular amendment did not involve new obligations; or the fact that a government objected to the qualification of an amendment as not involving new obligations prevented the implementation of the accelerated procedure for this type of amendments[19].

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[16] As it would seem that only the three above mentioned organizations introduced the concept. Then, in 1945 the Commission of the Conference for the establishing of Unesco concluded that there could have been a need to make a determination as to the nature of the amendment and this would have to be done through a decision by the Conference of Unesco. Cf. *United Nations Juridical Yearbook*, 1967, page. 366. This concept is also singled out in reference studies by eminent scholars.

[17] Procedures for amending the Convention of the World Meteorological Organization – Opinion addressed by the Legal Counsel of the United Nations to the Secretary-General of the World Meteorological Organization, 10 April 1967, *United Nations Juridical Yearbook*, 1967, pages 338-371.

[18] Thus in a communication to the Director-General of FAO, dated 2 September 1948, Secretary of State J. Marshall stressed that it was the understanding of the United States Government that the Agreement for the Establishment of the Indo-Pacific Fisheries Council of 1948 did not involve any new obligations for his Government. A similar communication was received from the Department of State on 25 February 1949 regarding the Constitution of the International Rice Commission.

[19] The above mentioned legal opinion of the Legal Counsel of the United Nations concluded "*In the absence of specific criteria in the text of the Convention or elsewhere, the criteria to be observed in making the determination whether or not a proposed amendment involves a new obligation for Members are those chosen by Members in their individual capacities and advanced by them in the proceedings of the Organization*", Ibid. page 371. This reflects debates held within WMO where various delegations affirmed in emphatic terms that it

43. Subsequently, efforts were made by the secretariat of the Organization in consultation with Member Nations to determine whether it was possible to formulate and agree on criteria upon which a decision acceptable to all parties could be based. Eventually the matter was referred to the CCLM on the basis of a detailed submission by the secretariat in connection with the revision of the International Plant Protection Convention of 1951[20]. The CCLM emphasized the importance of the issue both for the IPPC and for the other agreements concluded under Article XIV of the Constitution. The CCLM proposed the following criteria for consideration by the Conference of FAO with a view to avoiding an undesirable "*dual system under which some contracting parties would be bound by one text of the Convention and others by the other text*"[21].

> *"If as a result of the amendments, the overall burden to be borne by contracting parties in the implementation of their existing obligations would remain substantially the same, the amendments would not involve new obligations. If that burden would be transformed in such a way that the tasks to be performed were different in character from those entailed under existing obligations, the amendments causing such a transformation could be said to involve new obligations. Any extension of an existing obligation could not be considered per se as a new obligation; there might however be cases where such an extension could be considered as tantamount to a new obligation – where, for example, it was bound to have substantial financial implications for the contracting parties or the burden entailed was disproportionate to the existing burden on contracting parties*"[22].

44. The Council forwarded the conclusions to the Conference at its session of November 1977. The Conference examined the matter in great detail in the course of several days of discussion. It examined the proposed amendments to determine which of them were deemed to place an additional burden on the parties. The purpose of this complex exercise was to respond to the concerns of the delegations, especially in connection with the issuance of an export certificate and the modalities for inspections. The records of eight meetings of the Conference show that intensive inter-action among and inside delegations allowed for a number of compromises to be reached. Notwithstanding considerable work carried out, the Conference decided to postpone consideration and final approval of the revised version of the International Plant Protection Convention until its Session of 1979. The Conference requested that the revised Convention be circulated to all parties together with a note highlighting a few legal matters. It also requested that the revised Convention be further referred to the Committee on Agriculture, the Committee on Commodity Problems and the CCLM in the light of comments which might have been received[23].

45. The particular question whether the amendments involved new obligations was much debated inconclusively and was the main reason for which the proposal was submitted to the

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was up to a sovereign State to determine whether or not a particular amendment involved new obligations. Thus the delegate of the United States of America stated "*My government takes the view that a Sovereign State has the exclusive right to decide for itself whether an amendment to a convention to which the State is a party involves for that State a new obligation or not*". *Proceedings of the Third Congress of WMO*, 1959, page 73.

[20] CCLM 35/5.

[21] CL 75, paragraph 45.

[22] CL 72/5, paragraph 46. The CCLM also considered that the possibility of placing restrictions or "opting out" from some obligations was a consideration to be borne in mind.

[23] C 77, paragraph 328.

next Conference Session. Many parties expressed reservations[24], at times strong reservations and criticism, as to the criteria proposed by the CCLM. In November 1979, following review of the revised Convention during the inter-sessional period, the Conference was able to approve the revised Convention[25]. However, again the text was much debated in the course of several meetings. Various delegations confirmed that, as a result of the changes that had been meanwhile made to the proposed revised text and national review, they could accept the position that the amendments did not involve new obligations[26]. Of particular importance to the possibility of reaching progressively a compromise was the fact that the IPPC had operated and would continue to operate within FAO and there was a consensus on the need to improve its provisions[27].

46. The Governing Bodies of FAO examined on other occasions amendments to conventions and agreements concluded under Article XIV of the FAO Constitution, such as amendments to the Agreement for the Establishment of a Regional Animal Production and Health Commission for Asia, the Far East and the South West Pacific in 1979, the Agreement establishing the General Fisheries Commission for the Mediterranean in 1997, the International Plant Protection Convention again in 1997, the Plant Protection Agreement for Asia and Pacific Region in 1999 and the Agreement for Controlling the Desert Locust in South West Asia in 2001. In many cases, the proposed amendments were of a routine nature and did not involve substantial changes to the agreements. In none of these cases was a commission proposed to leave the framework of FAO.

47. The CCLM laid particular emphasis on the fact that, insofar as the conventions and agreements concluded under Article XIV of the Constitution were concerned, in general terms, a reasonably restrictive interpretation of the concept of new obligations was necessary in order to ensure, as far as possible, uniformity in the application of the Convention as well

[24] The representative of Brazil stated, *inter alia*, "*I must say that my delegation is inclined – I underline the word inclined – not to agree with the comments made by the CCLM to the effect that there are no new obligations (...) We would therefore also be inclined to agree with Australia also on the point that the procedure for the entry into force for the country concerned should follow the specific procedures envisaged when there are new obligations. That means only entry into force by acceptance by the contracting party in question. We feel that it is absolutely correct and we do not agree, to put it more mildly, we are inclined not to agree with the CCLM on his judgment of this particular issue*"(C 77/III/PV/6, 26 November 1977, page 104). The representative of the USA stated *inter alia*: "*He (*the delegate of Australia*) said that some of the amendments will cause his Government and other governments some difficulty. It poses the same problem for us and we fully concur with his views (...) quite honestly, the interpretation which the CCLM has reached we cannot concur in*" (C 77/III/PV/6, 26 November 1977, page 102). The representative of Australia was particularly emphatic in criticizing the conclusions of the CCLM and in requesting throughout several days successive amendments to the Convention: "*The CCLM report now concludes, by some unspecified formula, that the 'overall burden' – whatever that means – would not change substantially. We are quite unable to accept the CCLM's opinion that only two amendments are significant in the 'new obligations' sense. The words of Article XIII.4 (containing a reference to new amendments involving new obligations) seemed clear to us and the burden of costs and practical difficulties which might flow from a changed inspection pattern illustrate the new obligations to be assumed. The CCLM has now cast doubts on the rights which we and others attached to our signing of the original, the existing Convention. We are certainly of the view that the rights of contracting parties should not be in any way diminished because of administrative convenience*" (C 77/III/PV/6, 26 November 1977, page 101). The representative of Japan maintained the position that various proposed amendments did imply new obligations (C 77/III/PV/6, 26 November 1977, page 102). In 1979, the Government of Japan concluded that the revised Convention as amended would not involve new obligations for its Government.

[25] Cf. C 79/REP paragraphs 450-456.

[26] Cf. C 79/III/PV, pp 90-69.

[27] Each Party was able to determine for itself whether the amendments involved new obligations and introduce in the Convention such amendments as where required to ensure that they could accept the proposed lighter amendment procedure.

as its meaningful adaptation to new technology and experience gained. In other words, the CCLM did not want to prevent conventions and agreements which were placed and of course remained within the framework of FAO from reacting to new developments, by requiring the more laborious consent procedure. This restrictive interpretation was subsequently reflected in the practice of the CCLM and the Governing Bodies of FAO when examining amendments to instruments concluded under Article XIV of the Constitution and remaining under the framework of FAO[28].

48. From the foregoing, three main points emerge concerning FAO's practice in connection with the determination of whether particular amendments involve new obligations:

48.1. The first is that, under longstanding FAO practice, the question of whether a particular set of amendments involves new obligations and, consequently, requires particular acceptance or ratification procedures is a matter for individual States to determine in their individual capacities. This is illustrated by the past practice of the Organization where an objection by individual States and the need for those States to implement ratification procedures has been considered incompatible with the possibility of qualifying amendments as not involving new obligations.

48.2. The second is that in the past, mainly in connection with the revision of the International Plant Protection Convention, there was a process of review of specific provisions in the light of national requirements and changes to the proposed amendments to reflect such requirements. Only in this way could a collective determination of whether a particular set of amendments did not involve new obligations be made.

48.3. The third is that the Governing Bodies of FAO have consistently followed a restrictive interpretation of the concept of new obligations with respect to amendments to agreements placed under the framework of FAO which would retain that character. In the case of such agreements placed and remaining within the framework of FAO it has been possible to apply restrictive criteria and consider that some amendments, which otherwise would require ratification procedures, are of a minor, routine, instrumental nature[29]. In such case the parties have the possibility of looking only very generally to the "*overall burden of their obligations*" and take an extremely narrow view of what are "*new obligations*". This is so because FAO continues to exercise all obligations attached to its own legal personality which the bodies established under Article XIV of the Constitution do not possess; it continues to operate the bodies in question; it continues to manage their assets; it continues to manage the staff under its own Staff Regulations and Rules; it continues to be the respondent organization in the event of appeals or complaints before the ILO Administrative Tribunal; it continues to represent the bodies in question in any arbitration proceedings; it continues to extend to all the staff the benefit of its pension and medical insurance schemes; it continues to extend to the bodies in question the

[28] Cf. CL 113/5.

[29] Cf. *Bowettt's Law of International Institutions*, 5th Edition, by Philippe Sands and Pierre Klein, London, Sweet and Maxwell, 2001, pages 451-453. This reference book on the law of international organizations explains that under the procedures for the amendment of constituent instruments of international organizations there is at times a differentiation between minor amendments carried out under the "legislative" principle (i.e. allowing a majority to amend an instrument that becomes binding upon the minority) while major amendments are made by the "consent" principle (i.e. with unanimity and specific national acceptance, the more established principle).

privileges and immunities that it has negotiated with or that otherwise apply with respect to its relations with virtually all countries of the world. And, where applicable, it continues to extend to the bodies in question the benefit of the regime established in Headquarters Agreements. **The restrictive criteria that the Governing Bodies have formulated were designed to apply in the context of amendments of a routine nature to conventions and agreements within the framework of FAO which remained and continued to operate within the context of FAO.** The Governing Bodies of FAO, i.e. the CCLM, the Council and the Conference, never formulated nor applied criteria for the determination of whether a comprehensive set of amendments aimed at removing a particular agreement from the framework of FAO did involve or not any new obligations.

49. Therefore, **it would seem that the participants to the 3rd Special Session of IOTC in Goa could have disregarded the fact that the criteria issued by the Governing Bodies of FAO for the determination of whether particular amendments involved new obligations were used out of context, since they were formulated and designed to apply to a situation totally different from that which arose in the case of IOTC[30]**.

50. This may also explain a number of circumstances involved in the proposed process. Thus a number of countries indicated that they needed to refer the proposed amendments for internal ratification procedures, whereas the need for such internal ratification procedures (the outcome of which cannot be prejudged) is incompatible with the procedure established in Article XX, paragraph 4[31]. Then, the fact that FAO is asked to continue to operate IOTC is hardly compatible with this procedure. In fact, either the amendments are of a technical, routine nature, enter into force immediately and all IOTC Members will bear immediately all their obligations; or then the amendments do involve new obligations which IOTC and its Members are unable to assume upon adoption when they come into force and FAO needs to continue to implement transitional arrangements.

51. In conclusion, it is considered that the matter cannot be handled under the terms of Article XX of the IOTC Agreement which seems to have an inherent limitation, 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 procedure 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 and set up a new legal entity distinct from FAO. More importantly, it would be legally incorrect that a simplified amendment procedure intended to deal with "*routine*" and technical matters could be used to adopt and establish a new international agreement and a new entity. This is a particular form of error of law, a major procedural flaw, i.e. the use of a procedure for a purpose other than that for which it was designed, what is referred to in French as a "*détournement de procedure*". The criteria formulated by the Governing Bodies of FAO for the determination of whether or not

[30] This would seem to indicate means that the principles embodied in Article 5 of the Vienna Convention on the Law of Treaties regarding the treaties adopted within international organizations were not followed.

[31] The ratification of a treaty is the final confirmation by a State that it accepts to be bound by a treaty. Its function is to make the treaty binding in respect of that State; if it is refused, the treaty falls to the ground in consequence in the case of a bilateral treaty or, in the case of a multilateral treaty, does not bind that State. See e.g. ***International Law***, L. Oppenheim, 7th Ed. edited by Lauterpacht, 1953, paragraph 510. See also the commentaries of the International Law Commission on the expression of consent to be bound by treaties (Cf. ***Yearbook of the International Law Commission***, 1966, Vol. II, pages 195- 202). It is obvious that the fact for a State to have to follow ratification procedures is incompatible with Article XX, paragraph 4 of the IOTC Agreement.

particular amendments involve new obligations were applied out of context, since they were never formulated for a situation such as the one at hand. The proposed amendments seem to involve indeed new obligations, as confirmed by the need for internal ratification procedures that some countries have to follow and the expectancy if not the need for FAO to continue to manage IOTC after the proposed adoption of the amendments.

52. In view of the above, the Organization considers it essential that a proper legal procedure be followed for the adoption of a new agreement. It would consist in the convening of a Conference of Plenipotentiaries for the adoption of a new agreement and the implementation of a concomitant process of withdrawal and termination of the existing agreement and the entry into force of a new agreement. For the sake of convenience, the draft Council resolution outlining this course of action which had been referred to the CCLM, and does not reflect any developments which occurred subsequently, is reproduced in the Appendix hereto.

53. As reflected in the report of the 132nd Session of the Council, it is noted that some IOTC Members wish that the solution to be followed should be a timely and expeditious one. This is why the Organization is prepared to implement actively any transitional arrangements as might be required. If all IOTC Members agreed that the Commission should be removed from the framework of FAO in accordance with a legally correct procedure, and if the Organization were required to implement transitional arrangements, considerable latitude would be afforded to all parties concerned - in the context of such arrangements - to respond to any functional requirements and accommodate efficiently and in a timely manner to any particular concerns. Therefore, the wishes of some Members for a timely and expeditious solution, would not, in any possible way, prevent that a proper, parallel legal process for the change in status of IOTC be followed.

VI. STATUS OF CONSULTATIONS REGARDING THE CONCERNS AND REASONS REGARDING THE EFFICIENCY AND EFFECTIVENESS OF IOTC

54. At the recently concluded 132nd Session of the Council a number of concerned were voiced during the debates regarding the efficiency and effectiveness of IOTC. These concerns were the reasons for which IOTC considered, at a certain point, that it might need to change from being a statutory body established under Article XIV of the Constitution into a body outside the framework of FAO. The proponents of this initiative have presented the issue not as a fundamental change in the nature of IOTC and the establishment of a new entity under international law, but as a means of improving the efficiency and effectiveness of IOTC.

55. Having noted such concerns and taking into consideration the fact that most Members were not in favour of a removal of IOTC from the framework of FAO, the Council concluded that such concerns and reasons should be addressed, as a matter of priority, through discussions between the FAO Secretariat and concerned IOTC Members. Thereafter, the Secretariat would report on the outcome of such discussions to the CCLM and any other appropriate body.

56. Immediately after the conclusion of the session of the Council the FAO Secretariat initiated a process of informal meetings aimed at the review by and between the IOTC

Members of any specific practical difficulties which would arise indeed and which would need to be addressed in the context of the current framework of IOTC. It was felt in that respect that a necessary first step should consist in the identification of any such practical difficulties and subsequently to measure the readiness of Members concerned to address any such practical difficulties through appropriate practical solutions within the current framework.

57. However, at the time of completion of this document, such consultations with IOTC Members and the FAO Secretariat have not yet actually taken place. In any case, although the Council examined the various issues together, it is unclear whether such consultations fall within the ambit of the Informal Group of Legal Experts.

VII. EXPECTED ACTION BY THE INFORMAL GROUP OF LEGAL EXPERTS

58. The Informal Group of Legal Experts is invited to review this document and, in the light of the considerations developed therein, to advise on the procedure to be followed in the event that IOTC should wish to be removed from the framework of FAO.

APPENDIX
Extract from document CCLM 81/3

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 an 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.