

October 2007



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COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Eighty-second Session

Rome, 25-26 October 2007

REPORT OF THE 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)

1. A meeting of the Informal Group of Legal Experts on the process of 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 the status of the Indian Ocean Tuna Commission), hereinafter referred to as the Informal Group, was held in Rome on 23 and 24 October.
2. The list of participants is given in Appendix II hereto.
3. The Informal Group elected Mr. M. K. Rao (India) as Chairperson.
4. The Informal Group was convened in accordance with a decision of the Council of FAO at its Hundred and Thirty-second Session held in Rome from 18 to 22 June 2007. The Council examined the report of the Committee on Constitutional and Legal Matters which, at its Eighty-first Session in April 2007 had examined a document entitled "*process for a change in the nature of a statutory body of FAO established under Article XIV of the*

Constitution into a body outside the framework of FAO (change in status of the Indian Ocean Tuna Commission". The CCLM could not reach a conclusion on options under discussion. 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.

5. The Council noted the concerns voiced during the debates regarding the efficiency and the 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.

6. The Informal Group had before it various documents and reports, including document CCLM/81/2, the report of the Eighty-first Session of the CCLM, the Report of the Hundred and Thirty-second Session of the Council, document CL132/LIM/4 providing information on developments subsequent to the CCLM session, including on the deliberations of the Eleventh Session of IOTC held in May 2007 in Mauritius.

7. The Group of 77 and China submitted to the Meeting a position paper (Appendix I forming an integral part of this Report), according to which they hold their view that if the IOTC Members could reach consensus on the withdrawal of IOTC from FAO, the below solution proposed by FAO is the only legally correct option in solving the issue of delinkage. They reiterated that the withdrawal procedure shall be in conformity with FAO Constitution and shall give each Member of IOTC the right to determine its course of action through national ratification procedures.

8. The Informal Group discussed the document prepared by the FAO Secretariat entitled "Supplementary Observations on the proposals for a change in the nature of the Indian Ocean Tuna Commission".

9. The FAO Secretariat reiterated its legal advice on the procedure for the removal of IOTC from the framework of FAO involving the convening of a conference of plenipotentiaries for the adoption of a new agreement, the implementation of a

simultaneous process of withdrawal and termination of the existing agreement and acceptance of a new agreement, as well as the implementation by FAO of such transitional arrangements as required if the Members so wished. While the process could take some time, inconveniences would be minimized by the operation of IOTC by FAO during the interim period and the implementation of transitional measures. If there was indeed consensus as to the removal of IOTC from the framework of FAO there was no reason to consider that the process of entry into force of the new agreement would be a lengthy one.

10. In presenting its legal advice, the FAO Secretariat recalled that the IOTC Agreement was not a "stand alone" agreement. It had been concluded by the Council of FAO and placed by the Members within the framework of FAO, an organization of the United Nations System. It was operated under that framework and through FAO. The change in status of the IOTC concerned FAO as a whole and had to be handled as the establishment of a new entity. No procedure had been foreseen, either in the constituent agreement or in the Basic Texts to handle the situation, and the matter could concern potentially other agreements not only within FAO, but also within other organizations of the system. It was essential that the matter be addressed in a proper legal manner, also in order to ensure clarity in the future situation of IOTC in the interest of all concerned parties. Through the proposed procedure every sovereign Member of IOTC, irrespective of its status, would be able to make a determination as to the course of action that it wished to take and this would be materialized through an instrument of withdrawal of the existing agreement and acceptance of the new one. Furthermore, the FAO Secretariat stressed that this procedure was based exactly on the same principles as were followed when agreements outside FAO were brought within the framework of FAO under Article XIV of its Constitution.

11. The FAO Secretariat also recalled that the amendment procedure of Article XX of the IOTC Agreement had an inherent limitation as it could only concern amendments to an agreement within the framework of FAO and retaining that character, and an amendment procedure designed to allow for the modification of an agreement within FAO could not be used to establish a new agreement outside the framework of FAO and set up a distinct legal entity. This was the use of a procedure for a purpose other than that for which it was designed.

12. Subsidiarily, the FAO Secretariat pointed out that it was proposed to follow a simplified amendment procedure applicable to routine, technical amendments not involving new obligations. It recalled, in this connection, that the criteria formulated by its Governing Bodies for determining whether or not amendments involved new obligations had been applied out of context, since they were never formulated for a situation as the one at hand. The proposed amendments seemed to involve indeed new obligations, as confirmed, inter alia, by the need for internal ratification

procedures that some countries have to follow and which defeated the very purpose of the process under way.

13. The legal experts of the European Community stated that the following option could be considered:

14. Under this option the IOTC was free to amend the IOTC Agreement under Article XX (4) of that Agreement in order to move the organization out of the FAO framework. This view emphasized the sovereign right of Contracting Parties to an international agreement to interpret, apply and amend the agreement within the limits laid down therein. Therefore, it is the sole right of the Contracting Parties to IOTC to interpret the meaning of Article XX of the IOTC Convention and in particular of the notion "amendments not involving new obligations". There is nothing in the IOTC Agreement or in the FAO Constitution or Rules which would impair the IOTC members' rights to amend the IOTC Agreement under Article XX (4) in order to delink the IOTC from FAO considering that such amendment does not involve new obligations.

15. Furthermore, no legal texts contain provisions which limit the use of the simplified amendment procedure to routine, technical amendments. Finally, ratification requirements under domestic law have no bearing on the interpretation of provisions of the IOTC Agreement.

16. The fact that IOTC has administrative links with FAO does not prevent the change of status through an amendment of the IOTC Agreement. However, the existence of those links necessitates the involvement of FAO in the process, in particular through the conclusion of an agreement between FAO and IOTC in which transitional administrative arrangements in relation to the change of status are made.

17. The advantage of this procedure is that no new agreement has to be concluded nor a new legal body to be established. Therefore, it avoids a lengthy negotiating and ratification procedure with grave risks for the effective conservation of tuna species in the Indian Ocean.

18. The Group of 77 and China considered that the above, presented from paragraphs 14 to 17, did not constitute a valid option.

19. The Informal Group took note of the position paper the Group of 77 and China States Members of IOTC declaring, inter alia, their commitment to address actively the issue of the efficiency and effectiveness of IOTC within the framework of FAO. The Informal Group also noted that many participants had made repeated statements that this should be done as a matter of urgency. The Informal Group noted that the FAO Secretariat will be holding discussions with all concerned IOTC Members in order

to devise an appropriate formula for improving the efficiency and effectiveness of IOTC for consideration by the IOTC at its forthcoming session.

Appendix I

**Informal Group of Legal Experts on 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 the status
of the Indian Ocean Tuna Commission)**

Position of the G-77 and China States Members of IOTC

1. The Group of 77 and China, Rome Chapter (G-77) Members of IOTC support the proposal of the FAO secretariat to the 81st Session of the Committee on Constitutional and Legal Matters regarding the process for a change in the status of the Indian Ocean Tuna Commission should the Members wish that IOTC be removed from the framework of FAO. They note that there is clearly no consensus as to whether IOTC should be removed from the framework of FAO.
2. For the G-77 Members of IOTC the change in the nature of IOTC as a statutory body of FAO into a body outside FAO cannot be treated as a mere amendment to the existing IOTC Agreement. It should involve the convening of a conference of plenipotentiaries for the adoption of a new IOTC agreement; the implementation of a concomitant process of withdrawal and termination of the existing agreement and, more importantly, the entry into force of the new agreement through the deposit of instruments to that effect by each Member. The G-77 Members of IOTC emphasize that a process along such lines safeguards the right of each sovereign State, irrespective with its size, status, stage of development or nature, as coastal or non coastal State, and in accordance with the principle of sovereign equality of the United Nations, to make a determination as to the course of action that it wishes to take. They note that under this scheme FAO could implement such transitional arrangements as required thus allowing IOTC to operate smoothly during the interim period.
3. The G-77 Members of IOTC also hold the view that a qualification of the proposed amendments as not involving new obligations is erroneous and not in accordance with the criteria established by the Governing Bodies of FAO, which are being used out of context, as confirmed by additional research. They hold the view that obligations of the legal

personality of FAO will have to be borne by the members. The G-77 Members of IOTC note, furthermore, that a number of Members have indicated that the proposed amendments need to be referred for internal ratification procedures which are incompatible with the process of adoption of amendments not involving new obligations.

4. **In conclusion, the G-77 Members of IOTC support the approach which gives each Member the right to determine its course of action through national termination and ratification procedures. This is a legally correct approach, based on applicable principles of international law, past practice of FAO and is consistent with the status of IOTC as a statutory body of FAO. It is furthermore a solution that will avoid setting a negative precedent for the United Nations System.**

5. The G-77 Members of IOTC are mindful that the meeting of the Informal Group deals with legal issues only regarding the process for the change in nature of IOTC. They cannot lose sight of the policy implications of the process under way and, in this context, wish to emphasize three points.
 - 5.1. The Council at its session of June 2007 took note of the concerns voiced 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 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. The G-77 Members of IOTC note that because of constraints associated with this particular period of a Conference year, it has not been possible to hold such discussions, **but urge the Secretariat and all IOTC Members concerned to initiate them as soon as possible.** They note that informal arrangements within IOTC were developed a few years ago and believe that there might be room for improvement of such arrangements.

 - 5.2. The G-77 Members of IOTC view with concern a proposal which, although presented as a means of improving the efficiency and effectiveness of IOTC, would in fact place the high value Indian Ocean Tuna stock under the direct control of a limited number of Members carrying out large-scale operations in the region. They note that a commission outside the United Nations System would not offer the same guarantees of sovereign equality of all Members, independence, impartiality, objectivity and multilateralism.

5.3. The G-77 Members of IOTC consider that their participation in the meeting of the Informal Group, as well as their proposals regarding the process to be followed, are without any prejudice to their position of principle that they do not wish IOTC to be removed from the framework of FAO and that any concerns regarding the efficiency and effectiveness of IOTC must be addressed under its current status.