

## ToR to conduct a legal scrubbing of the IOTC Resolutions

PREPARED BY: IOTC SECRETARIAT<sup>1</sup>, 03 DECEMBER 2018

### PURPOSE

To provide participants at the Working Party on The Implementation of Conservation and Management Measures (WPICMM) with the opportunity to review the Terms of Reference (ToR) for the purpose to conduct a legal scrubbing of the IOTC Resolutions.

### BACKGROUND

Component 17 / sub-component 17.2 of the work Plan of the WPICMM comprise the following activities:

17	<b>Review of the glossary of definitions and key terms used in IOTC Resolutions</b>
17.1	<i>Glossary of definitions and terms</i>
17.2	<i>Legal scrubbing of IOTC active Resolutions</i>
17.2.1	Submission of the recommendations to the Compliance Committee to conduct a Legal scrubbing of IOTC active Resolutions and draft a ToR
17.2.2	WPICMM to finalise the ToR for the purpose to conduct a legal scrubbing of the IOTC Resolutions

### DISCUSSION

In accordance with the activity 17.2.2, the IOTC Secretariat is pleased to provide, in Appendix A, the draft ToR for the purpose to conduct a legal scrubbing of the IOTC Resolutions. The production of the draft ToR has been supported by WWF.

We would like to invite the WPCIMM02 to provide comments/observations on the ToR in order to finalise it.

### RECOMMENDATION

That the WPICMM02:

- 1) **NOTE** paper IOTC–2019–WPICMM02–12,
- 2) **NOTE** Appendix A.
- 3) **AGREE** on a finalised version of the ToR during WPICMM02.
- 4) **CONSIDER** what further actions are required to progress this work.

### APPENDICES

**Appendix A:** *Draft ToR for the purpose to conduct a legal scrubbing of the IOTC Resolutions*

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## APPENDIX A

### DRAFT TERMS OF REFERENCE TO CONDUCT A LEGAL SCRUBBING OF THE IOTC RESOLUTIONS

#### Background and context

It is fundamental to the common understanding and effective implementation of multilateral legal instruments – whether voluntary or legally binding – that they are clear, consistent and well defined. Otherwise, situations may occur in which parties have different interpretations of legal instruments and implement them unevenly. This gives rise to misunderstandings, conflicts and ineffective or no implementation of the instrument and its objectives.

The Indian Ocean Tuna Commission (IOTC) is an intergovernmental organization established under Article XIV of the FAO Constitution. Its objective is to ensure through appropriate management, the conservation and optimum utilization of the tuna and tuna-like species in the Indian Ocean and adjacent seas, and to encourage their sustainable development. To achieve this objective, the Contracting Parties and Cooperating non-Contracting Parties (CPCs) adopt legally binding resolutions which contain conservation and management measures (CMMs) which parties are obligated to implement. CMMs have been adopted at annual IOTC Sessions since 1999, and as of October, 2018, there are 57 active CMMs, comprised of 54 Resolutions and 3 Recommendations.

To strengthen understanding of, and compliance with the CMMs, IOTC publishes an annual Compendium of Active Conservation and Management Measures for the Indian Ocean, pursuant to *Resolution 13/01 On the Removal of Obsolete Conservation and Management Measures*. This was a significant for clarifying the interrelated nature of the CMMs and strengthening implementation and compliance.

A special fund for capacity building to ensure compliance with CMMs, and a work program of capacity building activities was established under Resolution 12/10, *To promote implementation of Conservation and Management Measures already adopted by IOTC*. This was superseded by Resolution 16/10 which recognized the desirability of improving the coherence, interpretation and accessibility of its CMMs. Both Resolutions drew attention to challenges in implementation and compliance based on confusions caused, among others, by: frequent addition of new such measures and modifications to existing ones; complicated structure; and duplication of CMMs on one subject.

The special fund supported a project in the IOTC work program to review fisheries law and regulations of CPCs. Assistance was provided to certain CPCs to translate the relevant obligations in IOTC Resolutions into binding national legal requirements in order to enhance the effective of implementation of and compliance with CMMs. The activity included a review of active IOTC Resolutions and preparation of draft provisions for incorporation of their requirements into national legislation, and then provided tailored guidance to certain CPCs on implementing the provisions at national level.

The review of active Resolutions<sup>2</sup> drew attention to a range of concerns with the use of terms in the Resolutions that hampered harmonized implementation, including the absence of an approved set of definitions of key terms, inconsistent use and formatting of terms and conflicting definitions/no implementation of terms defined in international instruments and best practices. The absence of an approved set of definitions of key terms combined with the lack of rigor in the terminology used within and throughout CMMs affects the clear and common understanding of these measures, which, in turn, is also likely to undermine the effectiveness of their implementation. It was recommended that a glossary of terms be adopted for use in implementation of and compliance with Resolutions, and the need for general legal technical consistency among CMMs was noted.

In 2016, the 13th session of the Compliance Committee (CoC 13) considered that the adoption of a set of key terms along with their definitions should be seen as the first step in the process of strengthening the global coherence of IOTC CMMs. To be effective, it was proposed that the terms and definitions should be supplemented by additional measures, including on a process for their use in preparing new Resolutions and Recommendations. The CoC noted that the Scientific Committee already had a set of terms and definitions and recommended that further work be undertaken in the future to ensure a harmonized set of Terms and Definitions is developed for the Commission and its subsidiary bodies.

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<sup>2</sup> The report, prepared in 2015, is available at: <http://www.iotc.org/compliance/capacity-building-compliance>.

The 1st Session of the IOTC Working Party on Implementation of Conservation and Management Measures (WPICMM), held in March 2018, noted two papers in this regard.<sup>3</sup> One identified weaknesses in IOTC CMMs due to inconsistent use of terms, lack of definition of key terms and use of terms that are not “terms of legal art”, and provided a summary of IOTC Resolutions that require particular attention and amendments. The WPICMM agreed that a number of Resolutions:

- use inconsistent, weak or confusing definitions;
- use terms that are not terms of legal art;
- lack definitions of terms; and
- require amendments to include terms and definitions that are terms of legal art.

It acknowledged that such amendments will improve the understanding of Resolutions, hence improve implementation at national level and further strengthen compliance by CPCs.

The WPICMM noted that the list of Resolutions described in the paper was not exhaustive, and recommended that the 15th session of the Compliance Committee (CoC15) consider putting the list of active IOTC CMMs through a legal “scrub”, to improve legal soundness, harmonise terms and definitions and to use terms that are terms of legal art.

The second paper reviewed and updated the IOTC Terms and Definitions and proposed a draft glossary of terms and definitions which should be used by Members while drafting proposals for CMMs for consideration by the Commission. The WPICMM noted the significance of this document and recommended that CPCs be allowed six months to provide comments and observations on each of the definitions listed in the paper. It recommended that CoC15 provide clarifications on what will be the use of the glossary of terms and definitions.

Both recommendations were noted by CoC15, and the Commission endorsed the report of CoC15 at its 22<sup>nd</sup> Session held in May, 2018.

The legal scrub is a standard part of the treaty-making process that takes place after a final text has been agreed. It is normally carried out by a group of lawyers of the negotiating States and aims to focus on technical legal irregularities, including use of terms, formatting, inconsistencies and other without changing the substance of the text. It can result in minor changes to the text in the interests of clarity and harmonized implementation.

Legal scrubs take into account relevant international and regional law and instruments (voluntary or legally binding), best practices (including among RFMOs) and legal “terms of art”. Many IOTC Resolutions refer to relevant international instruments in the preamble, including the 1982 UN Convention on the Law of the Sea, the 1995 UN Fish Stocks Agreement, the 1995 FAO Compliance Agreement, the 2009 FAO Agreement on Port State Measures and various General Assembly Resolutions, and consistency with these instruments – as well as more general law, instruments and practices – should be ensured.

Mechanisms and procedures for ensuring the implementation of the same standards for the preparation of future Resolutions and Recommendations should be considered.

It is expected that the consultant’s work will lead to the formulation of recommendations on the legal technical amendment of IOTC Resolutions and Recommendations to ensure consistency and clarity for implementation and compliance, and on a mechanism and process to ensure this standard is applied in the future.

#### **Assignment title**

Legal assistance to the IOTC on matters related to strengthening the harmonized implementation of and compliance with the Resolutions and Recommendations adopted by the Indian Ocean Tuna Commission through a legal scrub and guidance as appropriate in relation to technical legal drafting of future Resolutions and Recommendations.

#### **Purpose of this assignment**

The purpose of this assignment is to provide legal assistance to the IOTC on matters related to strengthening the harmonized implementation of and compliance with the Conservation and Management Measures (Resolutions) adopted by the Indian Ocean Tuna Commission by conducting a technical legal scrubbing of all active IOTC Resolutions and Recommendations and to provide guidance as appropriate in relation to mechanisms

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<sup>3</sup> The papers are, respectively, IOTC–2018–WPICMM–03 and IOTC–2018–WPICMM–04 and are at <http://www.iotc.org/meetings/1st-meeting-iotc-working-party-implementation-conservation-and-management-measures-wpicmm01>.

and procedures for technical legal drafting in the preparation of proposals for future Resolutions and Recommendations.

The consultancy work shall address the following:

- Undertake a review and legal scrub of all active IOTC Resolutions and Recommendations, ensuring consistency both within the Resolutions and Recommendations and with relevant international and regional instruments (voluntary and legally binding) and practices of other RFMOs, best practices, relevant glossaries (including the FAO Fisheries and Scientific Glossaries) and use of “terms of legal art” in legal drafting, including ensuring consistency in:
  - the definition and use of terms, noting the papers and glossary considered by WPICMM01 together with subsequent comments by members, and updating/elaborating as appropriate terms: considered at CoC 13; that appear in the Scientific Glossary but where the definitions are erroneous or difficult to understand; that have not yet been defined; that should be renamed.
  - formatting and substantive provisions among all Resolutions and Recommendations.
- Recommend a mechanism and process that provides for the technical legal standards on a continuing basis in relation to the preparation of proposals for future Resolutions and Recommendations.

### Methodology

Under the supervision of the IOTC Secretariat, the consultant will undertake the following activities:

1. Review active IOTC Resolutions and Recommendations for inconsistencies, errors and omissions, taking into account relevant international and regional instruments (voluntary and legally binding), best practices, legal “terms of art” and relevant glossaries. The review should include the glossary under development by WPICMM, and the paper it considered on the inconsistent use of terms in CMMs.<sup>4</sup>
2. Prepare a preliminary draft report for review and guidance by IOTC that identifies (a) Resolutions and Recommendations that will require a scrub and briefly summarizes the reasons for each (e.g. inconsistencies, errors and omissions) and (b) any issues where IOTC technical guidance may be needed, taking into account *inter alia*:
  - a) the use of terms and provisions both within the Resolutions and Recommendations and with relevant international and regional instruments (voluntary and legally binding), best practices (including of other RFMOs as appropriate, relevant glossaries (including those in IOTC and FAO) and use of “terms of legal art” in legal drafting;
  - b) any need for technical legal formatting including structure, paragraph numbering, use of punctuation, proper legal terms, etc.;
  - c) any need for further legal references;
  - d) any need for amendment of the IOTC Scientific Glossary;
  - e) any comments on input received from members on the draft glossary considered at WPICMM 1.

If any provisions show major substantive inconsistencies, errors or omissions with applicable international or regional instruments, this should be raised with IOTC and as appropriate flagged as a substantive matter for further consideration outside the technical legal scrub.

The preliminary report should include the following parts: (a) an overview that summarizes the types of amendments and issues to be addressed; (b) a part that identifies each Resolution/ Recommendation to be amended together with a draft amendment and a brief reason(s) (e.g. inconsistency, error, omission etc).

<sup>4</sup> See note 2: IOTC–2018–WPICMM–03. <http://www.iotc.org/meetings/1st-meeting-iotc-working-party-implementation-conservation-and-management-measures-wpicmm01>.

As appropriate, the report may also identify indicative substantive issues, not of a legal technical nature subject to the scrub, that should be considered separately by the IOTC CPCs.

3. Taking into account comments from IOTC, prepare a final report that includes:
  - an introduction and background;
  - a summary of the overarching issues addressed;
  - the legal scrub, including elements described in (a) – (e) of paragraph 2 above, with proposed amendments to be submitted in track changes;
  - explanatory notes for the proposed amendments, shown as a comment for each;
  - as needed, recommendations to update the glossary that was presented at WPICMM01 and as appropriate a review of members' comments received since that meeting and recommendations to update the IOTC Scientific Glossary;
  - as appropriate, substantive issues, not of a legal technical nature subject to the scrub, that should be considered separately by the IOTC CPCs;
  - recommendations on a mechanism or process that provides for the implementation of the outcome of the legal scrub on a continuing basis in relation to the preparation of proposals for future Resolutions and Recommendations.

### **Deliverables**

The deliverables are:

1. The final report and recommendations of the Legal Scrub of IOTC Resolutions for consideration by the WPICMM that includes:
  - an introduction and background;
  - a summary of the overarching issues addressed;
  - the legal scrub, including elements described in (a) – (e) of paragraph 2 above, with proposed amendments to be submitted in track changes;
  - explanatory notes for the proposed amendments, shown as a comment for each;
  - as needed, recommendations to update the glossary that was presented at WPICMM01 and as appropriate a review of members' comments received since that meeting and recommendations to update the IOTC Scientific Glossary;
  - as appropriate, substantive issues, not of a legal technical nature subject to the scrub, that should be considered separately by the IOTC CPCs;
  - recommendations on a mechanism or process that provides for the implementation of the outcome of the legal scrub on a continuing basis in relation to the preparation of proposals for future Resolutions and Recommendations.
2. The consultant will attend a meeting of the WPICMM to present the report.

### **Qualifications and Experience**

The consultant should be able to demonstrate a successful history of consultancy engagements related to these Terms of Reference.

#### *Qualifications and skills*

- A post graduate degree (LL.M. or equivalent in international law with expertise in law of the sea or equivalent)
- Excellent communication, legal drafting skills
- A high level of proficiency in written and spoken English

#### *Experience*

- Knowledge of and working experience in IOTC
- Experience in the region/countries of the IOTC
- Demonstrated work experience in RFMOs, including in fisheries law and management
- Minimum 15 years of professional experience in international law and areas of law closely related to RFMOs and fisheries management
- Demonstrated knowledge of international and regional fisheries instruments related to IOTC Resolutions
- Experience in legal drafting of international fisheries instruments, RFMO instruments and national fisheries legislation
- Ability to work under pressure and meet tight deadlines

**Beneficiaries**

The beneficiaries of the project are the CPCs of the IOTC.

**Technical supervisor**

The technical supervisor of the expert will be the Secretariat of the Indian Ocean Tuna Commission.

**Location, travel and expected starting date**

The preparation of the paper is home based, and consultant will attend the meeting of the WPICMM to present the work.

**Indicative number of working days**

The assignment duration is 25 days, including attendance at the WPICMM.