



06 April 2018

IOTC CIRCULAR

2018-18

Dear Sir/Madam

COMMUNICATION FROM FAO SECRETARIAT - ON THE PROPOSED AMENDMENTS TO THE IOTC RULES OF PROCEDURE TO SELECT THE EXECUTIVE SECRETARY

In March this year, I wrote to the Independent Chairperson of the FAO Council (ICC) presenting the draft Rules of Procedure on the selection and appointment of the Executive Secretary of the Commission developed by the IOTC small working group, for submission to the FAO Committee on Constitutional Legal Matters (CCLM) and for review by the FAO Secretariat.

The CCLM was held 12-14 March. The CCLM noted the consultations undertaken by the Independent Chair of Council on this matter, the ongoing processes, as well as the views of the FAO Secretariat. The CCLM, following an exchange of views amongst its members, requested the FAO Secretariat to submit the matter to the CCLM at its next Session.

In response to my invitation to the FAO Secretariat to present its observations on the proposal, please find the below communication from the FAO Secretariat. This document will be considered by the Commission in May.

Yours sincerely

Riley Jung-re Kim (Ms)
IOTC Vice-Chairperson

Attachments:

- Note to Members

Distribution

IOTC Contracting Parties: Australia, China, Comoros, Eritrea, European Union, France (Territories), Guinea, India, Indonesia, Iran (Islamic Rep of), Japan, Kenya, Rep. of Korea, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Seychelles, Sierra Leone, Somalia, South Africa, Sri Lanka, Sudan, United Rep. of Tanzania, Thailand, United Kingdom (OT), Yemen. **Cooperating Non-Contracting Parties:** Bangladesh, Liberia, Senegal. **Intergovernmental Organisations, Non-Governmental Organisations.** Chairperson IOTC. **Copy to:** FAO Headquarters, FAO Representatives to CPCs.

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PROCEDURES FOR THE SELECTION AND APPOINTMENT OF SECRETARIES OF ARTICLE XIV BODIES

1. Reference is made to the communication dated 7 March 2018 to the Independent Chairperson of the Council from the Vice-Chairperson of the Indian Ocean Tuna Commission (“IOTC” or “the Commission”) transmitting updated draft IOTC Rules of Procedure containing proposals for procedures for the selection and appointment of the Executive Secretary of the Commission (hereinafter “the Draft Proposal”).

I. Background

2. It is recalled that the Council, at its 155th Session, having considered the reports of its subsidiary committees concerning the issue of the appointment of Secretaries of Article XIV Bodies decided, *inter alia*, to initiate a process by which “*with immediate effect, the Independent Chairperson of the Council (ICC) and the FAO Secretariat will consult with the concerned Article XIV Bodies with a view to developing a proposal on procedures for the appointment of Secretaries of concerned Article XIV Bodies acceptable to the Bodies and to be submitted to the FAO Council by the end of 2018*”¹.

3. By the above-mentioned communication from the Vice-Chairperson of the Commission, FAO was requested to provide its feedback and advice on the Draft Proposal, which was prepared by a small drafting group established by the Commission at its 21st Session to develop a proposal for a permanent procedure to select the Executive Secretary of the Commission². The present document sets out the Secretariat’s observations on the Draft Proposal³.

II. Observations on the terms of reference of the small drafting group

4. Before addressing the specific elements of the Draft Proposal, the Secretariat first addresses the terms of reference of the small drafting group established by the Commission to develop the Draft Proposal. The Secretariat considers that the starting point for the work of the small drafting group including the “Principles” which guided its work – as reflected in Appendix 5 of the Report of the 21st Session of the Commission – are erroneous from a legal and constitutional perspective and, therefore, may have somehow hampered the work of the drafting group.

5. At the outset, the Secretariat observes that consistency with the IOTC Rules of Procedure is addressed throughout the Commission’s Report addressing this matter, including in the “Principles” guiding the drafting group set out in Annex 1 to Appendix 5. Thus, for example,

¹ CL 155/REP 9, paragraphs 25-27.

² Report of the 21st Session of the Indian Ocean Tuna Commission, IOTC–2017–S21–R[E], para. 16.

³ In the communication of 8 March 2018, FAO’s feedback and advice was requested by 12 March 2018. By a letter to the Vice-Chairperson of the IOTC, the Independent Chairperson of Council advised that FAO could not submit its views within that timeframe, but would submit these in time for consideration by the Commission at its forthcoming Session.

paragraph 15 of the Report reads: “*The Commission did not agree to the permanent process proposed by the FAO, noting it was inconsistent with the Commission’s Rules of Procedures*”.

6. The Secretariat observes that Article VI(3) of the Agreement for the Establishment of the Indian Ocean Tuna Commission (“the Agreement”) requires that the IOTC Rules of Procedures “*shall not be inconsistent with this Agreement or with the Constitution of FAO*”. This provision, which is nothing more than the concrete expression of the general legal principle of the hierarchy of laws, according to which the lower source of law cannot contradict the higher, has apparently been disregarded by the Commission. Under general principles of law, the IOTC Rules of Procedure do not and cannot prevail over the explicit provisions of the Agreement which established the IOTC. On the contrary, the Rules of Procedure must be informed by the explicit provisions of the Agreement.

7. With this general rule in mind, the Secretariat observes that the “Principles” (“the IOTC Principles”) guiding the work of the drafting group and approved by the Commission are as follows:

1. “*The Commission should have the final say on who is to be appointed as the Executive Secretary*”;
2. “*The FAO Secretariat should have an opportunity to consider candidates for the Executive Secretary position and provide advice or recommendations to the Commission on those candidates*”;
3. “*All Commission members should be able to view all applications received and should be able to take part in the ranking process*”;
4. “*Interviews should take place in conjunction with Annual Sessions of the Commission to ensure all Commission members have the opportunity to participate*”;
5. “*The new Executive Secretary should be selected by Heads of Delegation of Commission members by consensus if possible, or through a voting procedure*”;
6. “*The terms of reference for the Executive Secretary should make it clear that the Executive Secretary’s core responsibility is that owed to the Commission for implementing the Commission’s policies and activities*”.

8. Further elaboration is provided in bullet points under each of the IOTC Principles.

9. Article VIII(1) of the Agreement provides that the Executive Secretary “*shall be appointed by the Director-General with the approval of the Commission*”.

10. The Secretariat considers that the guidance provided to the small drafting group and, therefore, its resulting Draft Proposal, should have been – but were not – guided by the provisions of the Agreement, in particular its Article VIII(1). However, the procedure framed by the IOTC’s Principles and contained in the Draft Proposal clearly, *de facto*, establish FAO and its Director-

General in the limited role of a consulted party, whereby they are primarily responsible for “the formality of technically appointing the Executive Secretary”⁴.

11. It is also noted that the Commission recognized that “because the Executive Secretary is, for administrative purposes, responsible to the FAO Director-General, the FAO bears some responsibility for ensuring the Executive Secretary is suitable for the role”⁵ and that “the Commission might consider whether it would be useful to clarify what this responsibility entails to help avoid any potential conflict with the Executive Secretary’s responsibility to the Commission”⁶. These considerations may flow from the statement that the Commission “operates as an independent, specialised and regionally-focused body”⁷.

12. While the Secretariat acknowledges that the responsibility of the secretaries of Article XIV to the Director-General “for administrative purposes” is to be found in the *Principles and Procedures which should Govern Conventions and Agreements Concluded under Articles XIV and XV of the Constitution, and Commissions and Committees Established under Article VI of the Constitution* (the “*Principles and Procedures*”)⁸, the scope of this accountability must be understood against the background of the relationship between FAO and the Commission.

13. First of all, it should be borne in mind that neither the FAO Constitution, nor the above-mentioned *Principles and Procedures*, nor the Agreement qualify the Commission as an independent body. It is recognized that Article XIV bodies should enjoy a measure of functional and operational autonomy, allowing them to attain their statutory objectives. However, irrespective of their functional characteristics, Article XIV bodies remain very closely associated with FAO, even where they may have autonomous budgets.

14. The Commission is fully incorporated into the FAO administrative and procedural framework as demonstrated, for example, the management of its funds, the implementation of technical assistance activities and its programme of work, and the application of FAO’s regime of privileges and immunities to its activities. In addition, limiting the Director General’s role to the formality of technically appointing the Executive Secretary entirely disregards and contradicts the circumstance that FAO – its Members and the Director General – are fully responsible for the conduct of the Executive Secretary and provide the legal and institutional framework that enables the Article XIV bodies to implement their programmes of work and discharge their mandates. In this respect, the expression “administrative purposes” cannot be given the narrow interpretation reflected in the drafting group’s terms of reference but must, rather, be interpreted in this context.

15. Moreover, and having regard to the hierarchy of laws, a process whereby the Director-General is required to appoint a candidate selected through a voting process by the Commission is inconsistent with the spirit and the letter of the Agreement, as well as the will of the Members of

⁴ Principle 1, point 4.

⁵ Principle 2, point. 1.

⁶ Principle 6, point. 2.

⁷ Principle 1, point. 1 and principle 6, point 1. The drafting group did not elaborate further, limiting itself to stating in the terms of reference of the Executive Secretary that “He/she shall, for administrative purposes, be responsible to the Director-General of FAO”.

⁸ *Basic Texts*, 2017 edition, Volume 2, Part O, paragraph 32 iii.

FAO as expressed at the moment of approving the Agreement. The *Principles and Procedures* provide for three alternative modalities of appointment of Executive Secretaries: “[...] *the basic texts may specify that the Secretary shall be appointed by the Director-General after consultation with, or with the approval or concurrence of, the members of the body concerned*”. The FAO Members chose one of these modalities.

16. It is noted that, by contrast, in the procedure for the selection and appointment of the current Executive Secretary, FAO adhered to, but took an expansive interpretation of, Article VIII(1) of the Agreement by including representatives of the Commission in the selection process, while also fully respecting the Commission’s right to approve the candidate selected. By so doing, FAO ensured engagement of the IOTC membership in the process, as requested by them.

III. Observations on the Draft Proposal

17. With respect to the specific provisions of the Draft Proposal, the Secretariat recalls that it has previously expressed its views on this matter in a number documents submitted to the FAO Governing Bodies, the Commission and the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture⁹. These views are maintained and, for the sake of clarity, the Secretariat highlights the main points, as listed below:

- a) Article XIV bodies are statutory bodies of FAO, which rely upon FAO’s legal personality – and its privileges, immunities and exemptions – and act through FAO to discharge their mandates and implement their programmes of work.
- b) While Article XIV bodies enjoy a measure of functional autonomy in implementing their programmes of work, administratively they are integrated with and in FAO, operate under the framework of FAO, and commit FAO and all of its Members in all their activities, whether or not their programmes of work are funded entirely by their membership.
- c) FAO and the Director-General remain fully responsible and accountable for the performance and conduct of the Secretaries who are officials of FAO.
- d) The appointment of Secretaries of Article XIV bodies must be primarily seen as a professional selection process, allowing for the verification of the qualifications of the candidates, for proper reference checks, and for an assessment of all the candidates from the perspective of their integrity, conduct and suitability vis-à-vis the terms of reference for these positions.
- e) The practice that has developed of holding elections – or voting – to select the Secretaries of some Article XIV bodies has had the practical consequence of undermining the impartiality, independence and autonomy which should characterize the activities undertaken by the Organization, including its Article XIV bodies, and their multilateral nature. This practice may also encourage officials to regulate their

⁹ See documents CCLM 106/5, IT/GB-7/17/30, IOTC Circular 2017–078, JM 2016.2/6, CCLM 103/2, IOTC Circular 2016–049.

conduct in a manner incompatible with their obligations as international civil servants and staff members of the Organization.

- f) The practice of holding elections or voting to select the Executive Secretary of the Commission is inconsistent with the constituent instrument of the IOTC. Moreover, these selection practices are unknown in other organizations of the United Nations System.
- g) The constituent instrument of the IOTC provides for two parties – the Director-General and the Commission – to have a role in the appointment process: the Director-General appoints the Secretary with the approval of the Commission¹⁰.

18. The Secretariat considers that the Draft Proposal does not address any of the elements raised by the Secretariat in its previous documents on this matter, as further explained below.

19. The Draft Proposal – at paragraphs 3 and 7 – maintains a process by which candidates are ranked, and the Executive Secretary ultimately selected, by votes of the members of the Commission.

20. As set out at subparagraphs 17 (e) and (f) above, the application of a voting mechanism is inconsistent with FAO rules and practices and those of the wider UN System, and risks politicization of the process and the discharge of functions by candidates for the position. The Draft Proposal, far from solving this issue, still maintains selection through election by the members of the Commission.

21. Also, the Draft Proposal largely limits the role of FAO and the Director-General in the selection and appointment process to a “*technical formality*”, assisting in circulating the Vacancy Notice prepared by the Commission¹¹, undertaking the verification of candidates¹², attending interviews, but playing no part in the selection itself (see paragraphs 1 to 8 of the Draft Proposal). At most, the Director-General “*may be invited to attend the interviews [conducted by the Heads of Delegation of members of the Commission], may engage in discussions and may veto any applicant that does not meet the FAO principles, but shall not participate in the voting process set out in paragraph [7]*”¹³. Ultimately, “*the new Executive Secretary is to be selected by the Heads of Delegation of Members of the Commission*” and the “*FAO Director-General is to be informed of the decision of the Commission within 14 days and shall proceed with the appointment of the new Executive Secretary as soon as practicable*”.

22. The Secretariat considers that not only is this process fundamentally inconsistent with Article VIII(1) of the Agreement, but it also fails to address any of the fundamental observations listed under paragraph 17 above. It notes that the possibility of vetoing a selected candidate falls undoubtedly within the scope of an action of “approval”; it thus more properly lies – and exists –

¹⁰ IOTC Agreement, Article VIII(1).

¹¹ Paragraph 1.

¹² Paragraph 4. Indeed, members of the Commission may decide to admit candidates whose reference checks are unsatisfactory, which the Secretariat considers is not acceptable for candidates for a senior position in the international civil service.

¹³ Paragraph 6.

in the possible actions that the Commission may take as foreseen in the Agreement, rather than in the actions that the Director-General would properly exercise in the selection and appointment process.

23. The Secretariat also observes that the Draft Proposal establishes “functions” for the IOTC secretariat in the proposed procedure which “*may be outsourced to an independent consultant*” “[i]n order to remove potential conflicts of interest” should staff member of the IOTC secretariat apply for the Executive Secretary position (see paragraphs 10 and 11). In this context, the Secretariat refers, in particular to subparagraphs 17 (a), (b), (c) and (d) above. The Secretariat considers that outsourcing the selection process, either to the IOTC Secretariat or to an external consultant, would not be consistent with the legal framework and practices of FAO nor the practices of the UN System at large. It is recalled that the position in question is that of a senior staff member of FAO, who would exercise powers delegated by the Director-General in accordance with the FAO Constitution and the regulations and rules of FAO. It further observes that any risk of conflict of interest would be excluded under the established FAO procedures for the selection of senior staff.

24. The Draft Proposal not only does not offer viable solutions to the issues previously raised by the Secretariat, but would also serve to introduce a cumbersome selection procedure. The concerns put forward by the Secretariat in several documents appear to have been disregarded. Moreover, the Draft Proposal seems to reverse the roles clearly expressed in Article VIII(1) of the Agreement, according to which the Executive Secretary is appointed by the Director-General with the approval of the Commission.

IV. Conclusion

25. For the reasons set out above, the Secretariat considers that the Draft Proposal does not address the substantive and significant concerns which led to the initiation of the ongoing process to develop a long-term procedure for the selection and appointment of the Executive Secretary of the Commission.

26. The Secretariat continues to recommend that the interim procedure be confirmed as the long-term procedure for the selection and appointment of the Executive Secretary of the Commission, as well as the Secretaries for other Statutory Bodies. The mechanism proposed by FAO reflects the direct application of the Agreement. It respects the respective roles of FAO and the Commission, while assuring the full compliance with UN System practices.

27. Finally, the Secretariat submits that the Draft Proposal – and the terms of reference that informed the development of the Draft Proposal – are inconsistent with the status of the Commission as a statutory body of FAO and, therefore, operating within the FAO and UN System framework.