

Legal scrubbing of the IOTC Resolutions

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PURPOSE

To assist participants at the Working Party on the Implementation of Conservation and Management Measures (WPICMM) to review the consultant report on the legal scrubbing of IOTC Resolutions.

BACKGROUND

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

17	Review of the glossary of definitions and key terms used in IOTC Resolutions
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

This paper presents the result of the legal scrubbing of IOTC Resolutions, as extracted from the consultant's report, IOTC-2020-WPICMM03-Legal scrubbing of IOTC Resolutions (pages 7 to 10), on the legal scrubbing of IOTC Resolutions.

“INTRODUCTION AND OBJECTIVE

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 Sessions of the Commission since 1998, and as of December, 2019, there are 59 active CMMs, comprised of 56 Resolutions and 3 Recommendations.

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. 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.

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A special fund for capacity building² supported a project in the IOTC work program to review fisheries laws and regulations of CPCs and provide assistance 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.³

The activity involved a review of active Resolutions and 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 affected the clear and common understanding of these measures, which, in turn, was 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.

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.⁴ 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 22nd Session held in May, 2018.

The 2nd meeting of the WPICMM held in February, 2019 (WPICMM02) considering the draft glossary, noted the revised definitions and comments made by seven CPCs, agreed on 10 definition and recommended that the remaining 32 definitions be deferred to further work or be considered under the “legal scrubbing”, as appropriate.⁵

Some inconsistencies between the definition of terms in the Resolutions and their definition in the IOTC scientific glossary⁶ have been noted during the review.

² Resolution 12/10, *To promote implementation of Conservation and Management Measures already adopted by IOTC*.

³ The report, prepared in 2015, is available at: <http://www.iotc.org/compliance/capacity-building-compliance>.

⁴ 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>.

⁵ IOTC–2019–WPICMM02–R[E]

⁶ IOTC–2013–WPEB09–INF17.

WPICMM02 also considered improvement of the IOTC Monitoring, Control and Surveillance (MCS) Scheme, and noted in this regard reports on the MCS CDS study and VMS study. It noted that 17 Resolutions required actions to improve the IOTC MCS Scheme; many of these actions are consistent with recommendations in this report. In order to integrate initiatives and facilitate action, the discussions and recommendations are summarised in the Explanatory Notes of relevant Resolutions.

The terms of reference for this legal scrub, approved at WPICMM02,⁷ appear in ANNEX 5. 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”.

The **objective** of this study is to support IOTC on matters related to strengthening the harmonised implementation of and compliance with the Resolutions adopted by the Commission by conducting a technical legal scrubbing of all active Resolutions and Recommendations. IOTC Resolutions and Recommendations in this study appear in the 2019 IOTC Compendium of Active Resolutions.

To support the legal scrubbing, this study also:

- provides guidance on technical legal drafting of future Resolutions and Recommendations;
- reviews the comments on the draft Glossary made by CPCs at WPICMM02 and propose definitions accordingly;
- reviews the IOTC Scientific Glossary and proposes updates; and
- makes 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.

TECHNICAL LEGAL SCRUB

The legal scrub conducted for each Resolution and Recommendation is in **Annex 1**. Recommended amendments appear in track changes but the comprehensive formatting changes – proposed to provide standard formatting - are not shown due to limitations of space.

In general, extensive scrubbing was required. It underlined the vital necessity of this scrub and the need for adopting guidelines, glossaries and procedures for the future.

Explanatory notes are given at the beginning of each Resolution/Recommendation. They focus on the preamble, the operative paragraphs, any Annexes and for MCS Resolutions/Recommendations they summarise the relevant discussions and recommendations of WPICMM02 in considering improvements to the IOTC MCS Scheme.

The explanatory notes generally indicate troublesome technical legal deficiencies, but they may also flag substantive issues that may be discussed separately by CPCs, for example where the correction of contradictions, inconsistencies or errors would result in a different application or legal interpretation of the instrument.

Proposed amendments of a strictly technical nature are too plentiful to be summarised in this text or addressed separately in the explanatory notes. Instead, common errors and inconsistencies were noted during the scrub and appear in the report on *Guidance and Recommendations* in relation to technical legal drafting of future Resolutions and Recommendations, in **Annex 2**.

The Guidance and Recommendations report is consistent with the IOTC Agreement, international best practices and the FAO style guide. It details the inconsistencies and inaccuracies in existing Resolutions and Recommendations concerning (a) IOTC-related matters, (b) legal responsibilities, (c) references/use of terms and (d) formatting, and recommends for a range of items under each of these four headings the proper approach and language. It clearly sets out the errors and approaches found in existing Resolutions that must be avoided in future.

The comments on the draft glossary made by the CPCs at WPICMM02 were reviewed, and definitions were amended accordingly. Explanations for the proposed definitions draw on the comments and appear in footnotes, together with any recommendations for further review or agreement. The *revised draft Glossary* is in **Annex 3**.

⁷ IOTC–2019–WPICMM02–R[E] Appendix 4.

The terms appearing in the draft Glossary that also appear in the IOTC Scientific Glossary, or which do not properly take into account legal aspects, were reviewed for consistency and legal correctness. Those terms, together with the proposed draft Glossary definitions, *IOTC Scientific Glossary* definitions and recommendations, are in **Annex 4**. They are: bycatch, continental shelf, discards, exclusive economic zone, fish aggregating device, fishing logbook, flag State, harvest control rule, limit reference points, target reference points and vessel monitoring system. In most cases, it is recommended that the scientific term should be aligned with the term in the draft Glossary; however, this should be subject to technical scientific confirmation.

RECOMMENDATIONS ON A PROCESS FOR THE PREPARATION OF PROPOSALS FOR FUTURE IOTC RESOLUTIONS AND RECOMMENDATIONS

This report indicates a need for an agreed approach to the preparation and adoption of Resolutions and Recommendations to ensure they are clear and consistent. Most importantly, mindful of the legally binding nature of Resolutions and the need for all CPCs to uniformly implement their provisions into national legislation and procedures, they should be legally robust. In this regard, they should accurately reflect relevant international instruments, the IOTC Agreement, legal responsibilities, proper terminology, consistent formatting and legal best practices.

It is understood that the process for preparation of proposed Resolutions and Recommendations, or amendments, requires that they be submitted to the Secretariat in advance of the Sessions, and before distribution to CPCs.

The process for their adoption Sessions can be unpredictable due to the need for negotiation, and that agreement may only be reached as time runs out for further discussion or revision. There are added challenges where: legal advice may not be available or legal experts may not be familiar with the wide range of IOTC Resolutions, other relevant international instruments, IOTC Agreement, terminology or any legal drafting guidelines that may be agreed; and the mother tongue of many CPCs is not English or French.

Mindful of this situation, a three-step process for the preparation and adoption of Resolutions and Recommendations is recommended for consideration.

- (1) CPCs should use guidelines, based on those in Annex 2, to prepare its proposed draft or amendments.
- (2) A brief time period should be designated after receipt of the draft and prior to distribution to CPCs for the Secretariat to arrange a preliminary “legal scrub” of the proposal.
- (3) Final legal input should be given at the Session, if possible, in the form of advice during discussions, a brief legal vetting (“scrub”) after negotiation and prior to adoption, or other as may be agreed.

The legal advice for all steps should take into account the need for consistency within the Resolution or Recommendation, the legal applicability to CPCs, consistency with other Resolutions or Recommendations, the IOTC Agreement, international instruments and as appropriate other RFMOs, terminology, any legal drafting guidelines that may be agreed and terminology based on the draft Glossary and the Scientific Glossary.”

RECOMMENDATION

That the WPICMM03:

- 1) **NOTE** paper IOTC–2020–WPICMM03–07, which present the legal scrubbing of IOTC Resolutions.
- 2) **NOTE** the consultant’s report, IOTC-2020-WPICMM03-Legal scrubbing of IOTC Resolutions.
- 3) **RECOMMEND** the legal scrubbing and propose an implementation process to the Compliance Committee for its consideration and potential endorsement.