



**COMMISSION
FOURTEENTH REGULAR SESSION**
Manila, Philippines
3 – 7 December 2017

**THE AUTHORITY OF THE COMMISSION TO REVISE RECOMMENDATIONS OF
THE NORTHERN COMMITTEE**

**WCPFC14-2017-OP05
15 November 2017**

Paper by International Environmental Law Project



The Authority of the Commission to Revise Recommendations of the Northern Committee

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November 13, 2017

Discussions at WCPFC13 indicate that confusion exists regarding the authority of the Commission to revise and modify recommendations of the Northern Committee (NC). The report from that meeting suggests that the Commission has only two options: to accept or reject such recommendations. For example, the WCPFC13 Summary Report states that “WCPFC13’s task was to accept the NC recommendations or not accept them and to consider what the Commission wanted to ask the NC to do in its future meeting.”¹ However, Article 11(7) of the WCPF Convention allows the Commission to adopt Conservation and Management Measures (CMM) “based on” the Northern Committee’s recommendation. As described below, this language grants the Commission the authority to revise and modify recommendations of the Northern Committee.

Brief Overview of the Northern Committee’s Mandate

The Northern Committee recommends CMMs to the Commission concerning “stocks which occur mostly” in the area north of twenty degrees north latitude.² The Commission has designated only three stocks—Pacific bluefin tuna, northern albacore, and the northern stock of swordfish—as “northern stocks” within the jurisdiction of the Northern Committee.³ Based on the advice of the Scientific Committee, the WCPFC may add species to the list of northern stocks,⁴ but it has never done so.⁵ The Northern Committee may make recommendations only with respect to these “northern” stocks.⁶

Decision-making Process for Northern Stocks

For northern stocks, the Northern Committee makes recommendations based on scientific information provided by the International Scientific Committee for Tuna and Tuna-Like Species in the North Pacific Ocean (ISC).⁷ Under Article 11(7) of the WCPF Convention, any decision of

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¹ WCPFC, SUMMARY REPORT: THIRTEENTH REGULAR SESSION OF THE COMMISSION FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN ¶ 455 (March 2017).

² Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 2275 U.N.T.S. 40532, art. 11(7) [hereinafter WCPF Convention] (entered into force June 19, 2004).

³ WCPFC, COMMISSION-01, RULES OF PROCEDURE, at Annex I, ¶ 2 (2004) [hereinafter WCPFC, RULES OF PROCEDURE].

⁴ *Id.*

⁵ See N. COMM., WCPFC, SUMMARY REPORT: NORTHERN COMMITTEE NINTH REGULAR SESSION § 2.3 (2013) (summarizing the discussions of the Northern Committee for northern stocks).

⁶ WCPF Convention, *supra* note 2, art. 11(7).

⁷ WCPFC, RULES OF PROCEDURE, *supra* note 3, Annex I, ¶ 2.

the Commission regarding a northern stock “shall be based on any recommendations of the [northern] committee.” If the WCPFC does not accept the Northern Committee’s recommendation, it “shall return the matter to the committee for further consideration” and the Northern Committee “shall reconsider the matter in light of the views expressed by the Commission.”⁸

By using the phrase “based on,” Article 11(7) clearly allows the Commission to do more than simply accept or reject recommendations of the Northern Committee. The question, however, is this one: What is required of the Commission to make a decision “based on” the recommendation of the Northern Committee?

The phrase “based on” does not require the Commission to adopt the Northern Committee’s recommendation *verbatim*. The Appellate Body of the World Trade Organization (the “Appellate Body”)—the leading international forum for interpreting international law over the last twenty years—had the opportunity to interpret the phrase “based on” in the 2008 *Hormones II* dispute.⁹ In that dispute, the Appellate Body stated that the phrase “based on” does not mean “conform to”; instead, the phrase “based on” implies a rational relationship between two things.¹⁰

Applying the Appellate Body’s interpretation to the context of the WCPF Convention, the Commission may not ignore the recommendation of the Northern Committee if it decides to adopt a CMM for a northern stock, but neither must it adopt the recommendation without alteration.¹¹ The Commission, however, must adopt a CMM that bears some rational relationship to the Northern Committee’s recommendation.¹²

It is difficult in the abstract to identify when the Commission’s decision bears a “rational relationship” to the Northern Committee. The information provided by the Northern Committee and the extent of the changes made by the Commission would, of course, be relevant to determine whether a “rational relationship” exists between the Northern Committee’s recommendation and the Commission’s decision.

That said, the Commission would seem to have the authority to change the rate at which a stock is rebuilt by reducing catches, revise the dates of open and closed seasons, and modify gear restrictions. On the other hand, including a provision expressly rejected by the Northern Committee would not.

⁸ This apparently has never happened, although the Commission has asked the Northern Committee to review its advice concerning particular stocks. For example, the WCPFC asked the Northern Committee to review its advice concerning the North Pacific albacore at its second meeting. See WCPFC, THIRD REGULAR SESSION ¶ 57 (2006). After review, the Northern Committee advised that no change in the CMM was needed. *Id.* ¶ 58(a).

⁹ Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 528, WT/DS320/AB/R (adopted Nov. 14, 2008) [hereinafter Appellate Body Report, *Hormones Dispute*]. The Appellate Body was interpreting Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures, known as the SPS Agreement. Article 5.1 of the SPS Agreement requires SPS measures to be “based on” a risk assessment. The WTO Appellate Body noted that,

This does not mean that SPS measure have to “conform to” the risk assessment. Instead, “the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake.” Put differently, there must be a “rational relationship” between the SPS measure and the risk assessment.

Id. (citations omitted).

¹⁰ Appellate Body Report, *Hormones Dispute*, *supra* note 10, ¶ 528.

¹¹ *Id.*

¹² WCPF Convention, *supra* note 2, art. 11(7).