



**WCPFC  
HARVEST STRATEGY WORKSHOP**

Stones Hotel  
Kuta, Bali  
30 November – 1 December 2015

---

**Links between Harvest Strategies and CMMs**

---

**HSW-WP/07  
22 November 2015**

**WWF**

# Links between Harvest Strategies and CMMs

---



## Table of Contents

<b>Introduction</b> .....	<b>3</b>
<b>Implementation of the Harvest Strategy Approach</b> .....	<b>3</b>
CMMs and Resolutions .....	3
Application of CMMs or Other Instruments .....	5
<i>The Definition of the “Convention Area”</i> .....	5
<i>The Scope of the Commission’s Authority</i> .....	6
<i>Compatibility of Measures in Areas under National Jurisdiction</i> .....	7
Compatibility with Subregional Measures and Agreements .....	8
CMM 2014-06 Harvest Strategy Measure: A CMM for Each Element or an Overarching CMM?.....	10
Giving Effect to the Elements of the Proposed Harvest Strategies.....	11
Potential for Consolidating and Simplifying CMMs .....	11
<b>Recommendations for Implementing the Harvest Strategy Approach</b> .....	<b>13</b>

## Introduction

This paper constitutes a brief analysis regarding the relationship between a Harvest Strategy and CMM and how the Western and Central Pacific Fisheries Commission (WCPFC) may apply a Harvest Strategy Approach through Conservation and Management Measures (CMMs). CMM 2014-06, *Conservation and Management Measures to develop and implement a harvest strategy approach for key fisheries and stocks in the WCPO*, contemplates the development of harvest strategies for specific stocks or fisheries. The objective of this analysis is to review the basic components of the WCPFC process and suggest the best possible procedure to implement a Harvest Strategy approach effectively and consistent with CMM 2014-06.

As explained further below, the Commission would best give effect to the elements of a Harvest Strategy by adopting it as a CMM. This analysis also provides some suggestions and recommendations on how those elements may be incorporated into a CMM structure in such a way to allow meaningful flexibility while ensuring a clear and consistent approach.

## Implementation of the Harvest Strategy Approach

### CMMs and Resolutions

Under Article 20(5) of the WCPF Convention, a “decision” adopted by the Commission shall become binding 60 days after the date of its adoption.<sup>1</sup> WCPF Convention does not define “decision.” A strict interpretation of Article 20(5), including a broad interpretation of “decision,” would render any decision binding, but only after 60 days. However, that interpretation would result in absurd results, which the International Court has directed treaty interpreters to avoid.<sup>2</sup> For example, decisions to establish working groups or adjourn the meeting would be considered binding 60 days after adoption.

---

<sup>1</sup> 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. 20(5) (entered into force June 19, 2004) [hereinafter WCPF Convention].

<sup>2</sup> The International Court of Justice has said, “When the Court can give effect to a provision of a treaty by giving the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.” Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3). Others have phrased the rule as a prohibition against seeking alternative meanings where the ordinary meaning does not lead to absurd conclusions: “When a deed is worded in clear and precise terms—when the meaning is evident, and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents.” VATTEL, THE LAW OF NATIONS, Vol. II, § 263 (1758 edition, translated by C.G. Fenwick, 1916). See also Shabtai Rosenne, *The Election of Five Members of the International Court of Justice in 1981*, 76 AM. J. INT’L L. 364, 365 (1982) (“It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable.”).

To avoid such results, the Commission adopted a *Nomenclature for Commission Decisions* that defines which decisions are binding and which are not.<sup>3</sup> That nomenclature provides that CMMs are binding decisions.<sup>4</sup> In contrast, decisions of the Commission directed at Members, Cooperating Non-members, participating territories, or non-Parties “are not legally binding, but can serve a wider political or diplomatic purpose or provide the basis for future binding measures.”<sup>5</sup> However, the Commission left a third category of decisions—decisions relating to financial and budgetary issues, staffing, the annual work programme and other related administrative matters—ambiguous; these decisions are not labeled as either binding or non-binding.

In addition, the *Nomenclature for Commission Decisions* does not mention a fourth category of decision: decisions that produce documents arising out of the WCPFC Convention and CMMs. An example would be the *Scientific Data to Be Provided to the Commission (Scientific Data Document)*.<sup>6</sup> The CCMs have adopted the *Scientific Data Document* on several occasions, most recently in 2012,<sup>7</sup> and they appear to consider the document to be legally binding. In fact, some CCMs have questioned the legal status of the document at meetings of the Technical and Compliance Committee (TCC). At the TCC’s Ninth Regular Session, for example, the WCPFC’s legal advisor, Martin Tsamenyi, stated that the rules for the provision of data found in the *Scientific Data Document* “derive from the Convention and are clearly binding.”<sup>8</sup> Similarly, the Forum Fisheries Agency (FFA), during a TCC meeting, stated that the “Rules for Scientific Data to be Provided to the Commission are binding, and specify that operational-level catch and effort data should be provided to the Commission by all CCMs for their flagged vessels or by chartering CCMs for their chartered vessels.”<sup>9</sup> No member objected to that view.<sup>10</sup>

A binding obligation is exactly that: an obligation with which the CCMs must comply. Similarly, non-binding documents include responsibilities with which CCMs, subsidiary bodies, and others are not required to comply. Nonetheless, resolutions, decisions, and other non-binding

---

<sup>3</sup> WCPFC Secretariat, *Nomenclature for Commission Decisions*, WCPFC, SUMMARY REPORT: SECOND REGULAR SESSION OF THE COMMISSION FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN, 63, Attachment M (2005), available at [https://www.wcpfc.int/system/files/WCPFC2\\_Records\\_Summary.pdf](https://www.wcpfc.int/system/files/WCPFC2_Records_Summary.pdf).

<sup>4</sup> *Id.* at ¶ 5.

<sup>5</sup> *Id.* at ¶ 6.

<sup>6</sup> WCPFC, *Scientific Data to be Provided to the Commission* (revised at WCPFC4, 6, 7, 9, and 10) [hereinafter *Scientific Data Document*] at <https://www.wcpfc.int/doc/data-01/scientific-data-be-provided-commission-revised-wcpfc4-6-7-and-9>.

<sup>7</sup> WCPFC, SUMMARY REPORT: NINTH REGULAR SESSION OF THE COMMISSION FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN ¶¶ 270–71 (2012) (adopting the recommendations of the Scientific Committee, which included revisions to the *Scientific Data Document*).

<sup>8</sup> TECHNICAL & COMPLIANCE COMM., WCPFC, SUMMARY REPORT: TECHNICAL & COMPLIANCE COMMITTEE NINTH REGULAR SESSION, ¶ 288 (2013) [hereinafter TECHNICAL & COMPLIANCE COMM., NINTH REGULAR SESSION SUMMARY REPORT]. The Legal Advisor also noted that “[t]he rules provide a mechanism for restricting access to non-public domain data if compliance with the rules is not achieved.” *Id.*

<sup>9</sup> TECHNICAL & COMPLIANCE COMM., WCPFC, SUMMARY REPORT: TECHNICAL & COMPLIANCE COMMITTEE SIXTH REGULAR SESSION, ¶ 191 (2011) [hereinafter TECHNICAL & COMPLIANCE COMM., SIXTH REGULAR SESSION SUMMARY REPORT].

<sup>10</sup> *See id.*

instruments are highly persuasive, and CCMs are expected to perform the responsibilities included in them. The International Court of Justice recently stated that parties to a multilateral environmental agreement (MEA) must give “due regard” to non-binding resolutions and guidelines.<sup>11</sup> While the Court did not explain precisely when the obligation to give “due regard” is discharged, it indicated that a party must provide a reasoned explanation to explain why it is not fulfilling the responsibilities included in resolutions or guidelines.<sup>12</sup>

More importantly, the distinction between a CMM and a non-binding resolution or guideline should *not* have relevance for whether the Technical and Compliance Committee (TCC) may provide recommendations with respect to compliance with the responsibilities included in those documents. The TCC’s mandate is very broad<sup>13</sup> and expressly allows the TCC to make recommendations with respect to compliance with CMMs,<sup>14</sup> investigate compliance with “cooperative measures” for monitoring, control, surveillance and enforcement,<sup>15</sup> make recommendations on technical matters such as fishing vessel and gear markings,<sup>16</sup> and “consider and investigate such other matters as may be referred to it by the Commission, including developing and reviewing measures to provide for the verification and validation of fisheries data.”<sup>17</sup> In other words, the TCC’s functions are not limited by the type of document at issue; the TCC’s functions are described in terms of the substance of the document.

## Application of CMMs or Other Instruments

Whether CMMs apply to the high seas, EEZs, territorial seas, and archipelagic waters is based on three issues: 1) the definition of the “Convention Area,” 2) the scope of the Commission’s authority, and 3) the requirement of coastal States to adopt compatible measures in areas under national jurisdiction. As described below, while the provisions of the WCPF Convention create some ambiguity, the best answer to this question is that CMMs apply to discrete areas as the Commission so decides.

### The Definition of the “Convention Area”

The WCPF Convention defines the Convention Area in relation to specific latitudinal and longitudinal coordinates.<sup>18</sup> Article 3 then provides that the Commission’s area of competence

---

<sup>11</sup> Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), 2014 I.C.J. Rep. \_\_, ¶¶ 137, 144 (Mar. 31, 2014). In that dispute, the Court wrote that “IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods. Japan has accepted that it is under an obligation to give due regard to such recommendations.” *Id.* at ¶ 137.

<sup>12</sup> *Id.* at ¶ 144.

<sup>13</sup> WCPF Convention, *supra* note 1, at art. 14.

<sup>14</sup> *Id.* at art. 14(1)(a)–(b).

<sup>15</sup> *Id.* at art. 14(1)(c).

<sup>16</sup> *Id.* at art. 14(2)(e).

<sup>17</sup> *Id.* at art. 14(2)(d).

<sup>18</sup> Specifically, the Convention’s jurisdiction ranges

[f]rom the south coast of Australia due south along the 141° meridian of east longitude to its intersection with the 55° parallel of south latitude; thence due east along the 55° parallel of south latitude to its intersection with the 150° meridian of east longitude; thence due south along the 150° meridian of east longitude to its intersection with the 60° parallel of south latitude; thence

includes *all waters* of the Pacific Ocean within those lines of latitude and longitude. It does not make any exceptions for territorial seas, archipelagic waters, or any other waters.

From a treaty interpretation perspective, the unambiguous nature of the description of “Convention Area” and the Commission’s competence, as stated in Article 3, should be decisive. The Vienna Convention on the Law of Treaties (Vienna Convention)<sup>19</sup> provides the fundamental rules of treaty interpretation. The most fundamental of all rules of treaty interpretation is the principle that a treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.”<sup>20</sup> Beyond question, this rule is customary international law<sup>21</sup> and will thus apply to interpretation of the WCPF Convention. The ordinary meaning of Article 3 clearly provides that the Commission’s competence extends to all waters within the Convention Area. This would imply that, unless a CMM specifically excludes certain types of waters, a CMM should be interpreted as including *all waters within the Convention Area*.

However, while this interpretation is consistent with Article 3(3) of the WCPF Convention, which states that the Convention applies to “all stocks of highly migratory fish stocks within the Convention Area, except sauries” and that CMMs are applied throughout the range of the stocks “*or to specific areas within the Convention Area, as determined by the Commission*”<sup>22</sup>, there is a specific exemption for the “territorial sea, archipelagic waters and internal waters” that will be explained further below.

#### The Scope of the Commission’s Authority

The scope of the Commission’s authority creates additional ambiguity. Article 10, which establishes the Commission’s functions, specifies that these functions are “[w]ithout prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks within areas under national jurisdiction.” The phrase “without prejudice” is typically used to preserve rights; in this context, the functions of the Commission, as articulated in Article 10, could be interpreted as not altering the sovereign rights

---

due east along the 60° parallel of south latitude to its intersection with the 130° meridian of west longitude; thence due north along the 130° meridian of west longitude to its intersection with the 4° parallel of south latitude; thence due west along the 4° parallel of south latitude to its intersection with the 150° meridian of west longitude; thence due north along the 150° meridian of west longitude.”

WCPF Convention, *supra* note 1, at art. 3(1). A map of the convention area can be found at WCPFC, Convention Area Map, at <http://www.wcpfc.int/convention-area-map>.

<sup>19</sup> Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>20</sup> Vienna Convention, *supra* note 20, at art. 31(1).

<sup>21</sup> The International Court of Justice has made many statements declaring this rule of treaty interpretation to be customary international law. *See, e.g.*, Second Admissions Case, Advisory Opinion, 1950 I.C.J. 4, at 8, note 11 (stating that “The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.”) (Mar. 3); Certain Expenses of the United Nations Case, 1962 I.C.J. Rep. 151, at 158–59 (July 20); Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. Reports 6 (Feb. 3).

<sup>22</sup> WCPF Convention, *supra* note 1, at art. 3(3).

of coastal States to exploit and manage highly migratory fish stocks within areas under their national jurisdiction.

The phrase “without prejudice,” however, does not prohibit the Commission from managing fish stocks in the exclusive economic zone, where coastal States have sovereign rights.<sup>23</sup> First, Article 10(1)(a) specifically directs the Commission to determine the total allowable catch or total fishing effort “*within the Convention Area*” for highly migratory fish stocks. It does not limit that authority to the Convention Area beyond the national jurisdiction of sovereign rights of coastal States. Article 10 should be read as confirming the authority of coastal States to *exercise* their sovereignty to develop total allowable catches and other CMMs that apply to their areas of national jurisdiction.<sup>24</sup> Nonetheless, the application of this approach within the Convention Area has generally been executed such that it allows drafting of CMMs in a way that accepts and ensures coastal States apply those measures within the exercise of their sovereign rights over their EEZs.

### Compatibility of Measures in Areas under National Jurisdiction

The reference to “areas under national jurisdiction” in Article 10 also invites a discussion of the duty of coastal States to apply the principles of the WCPF Convention and the Commission’s conservation and management measures in “areas under national jurisdiction.”<sup>25</sup> However, the duty of coastal States is qualified by Articles 4 and 7, which state that coastal States shall apply these in areas under national jurisdiction pursuant to their sovereign rights.<sup>26</sup> If CMMs are binding and cover the entire Convention Area, including EEZs, territorial seas, and archipelagic waters, then a provision that requires CCMs to apply the Convention’s principles and the Commission’s CMMs should not be necessary. This suggests that coastal States have the right to adopt measures within their areas under national jurisdiction provided they are compatible with the Commission’s CMMs.<sup>27</sup>

Article 8, which includes the “compatibility” language, does not specifically provide that coastal States have authority to regulate in their areas under national jurisdiction, so long as those measures are compatible. Instead, it says that

---

<sup>23</sup> U.N. Convention on the Law of the Sea, art. 56(1)(a), Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994).

<sup>24</sup> Article V(1) provides:

Nothing in this Convention shall prejudice or undermine the sovereignty or sovereign rights of coastal States related to the exploration and exploitation, conservation and management of the living marine resources within areas under their sovereignty or national jurisdiction as provided for in UNCLOS, or the right of all States for their nationals to engage in fishing on the high seas in accordance with UNCLOS.

Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1049 Convention between the United States of America and the Republic of Costa Rica, art. V(1), signed Nov. 13, 2003, (entered into force on August 27, 2010).

<sup>25</sup> WCPF Convention, *supra* note 1, at arts. 7, 8.

<sup>26</sup> *Id.* at arts. 4, 7

<sup>27</sup> *Id.* at art. 8(1).

Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of highly migratory fish stocks in their entirety. To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.<sup>28</sup>

The language does not identify which entity—the coastal State or the Commission—is responsible for adopting compatible measures. Instead, it directs the members, the CCMs, to “cooperate for the purpose of achieving compatible measures.” Due to the ambiguous language of Article 8, more than one interpretation is possible.

Unfortunately, the phrase “areas under national jurisdiction” introduces yet additional ambiguity. According to an FAO analysis, the phrase “areas under national jurisdiction” in the context of the UN Fish Stocks Agreement, while “quite ambiguous,” “is capable of embracing the territorial sea, archipelagic waters and internal waters,” as well as EEZs.<sup>29</sup> In contrast, Martin Tsamenyi and Quentin Hanich believe that the phrase includes only EEZs.<sup>30</sup> From this, they conclude that the WCPF Convention only applies to the EEZ and high seas unless specifically agreed by the CCMs.<sup>31</sup> Nonetheless, exploration of these possible interpretations requires a more comprehensive analysis separate from the time and space allowed here. The current accepted interpretation by Tsamenyi and Hanich suggests that coastal States retain the authority to implement CMMs within their “territorial sea, archipelagic waters and internal waters.”

In brief, Article 3(3) provides that CMMs “shall be applied throughout the range of the stocks, or to specific areas within the Convention Area, as determined by the Commission. Moreover, the Commission’s authority to adopt total allowable catches applies to the entire Convention Area. Therefore, for the purposes of implementing a Harvest Strategy CMM, CCMs should presume the Convention Area as comprising “*all waters*” bounded by the identified lines of latitude and longitude in Article 3(1) of the WCPF Convention, as qualified by Article 4 and 7, which state that coastal States shall apply these measures in areas under national jurisdiction pursuant to their sovereign rights over the territorial sea, archipelagic waters and internal waters.

## Compatibility with Subregional Measures and Agreements

The UN Fish Stocks Agreement and the WCPF Convention share the goal of establishing compatible conservation and management measures both inside and outside areas of national jurisdiction. In fact, Article 8(1) of the WCPF Convention provides that:

---

<sup>28</sup> *Id.*

<sup>29</sup> W.R. Edelson, *Legal Aspects of the Collection of Fisheries Data*, FIDI/C953, at 1, note 1 (FAO Fisheries Circular No. 953, 1999).

<sup>30</sup> Martin Tsamenyi & Quentin Hanich, *Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States*, in 27 INT’L J. MARINE & COASTAL L. 783, 790–91 (2012).

<sup>31</sup> *Id.* at 791–92.

Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of highly migratory fish stocks in their entirety. To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.

If the PNA and FFA have adopted measures for stocks managed by the WCPFC, the WCPFC must take those measures into account. Article 8(2)(c) directs the WCPFC to “take into account” previously agreed measures established and applied by a subregional or regional fisheries management organization or arrangement. Both the PNA and the FFA are properly described as subregional fisheries management organizations.<sup>32</sup> Even if not, Article 8(2)(b) directs the Commission to take into account the CMMs adopted and applied within areas under national jurisdiction by coastal States, as well as “previously agreed measures established and applied in respect of the same stocks for the high seas which form part of the Convention Area by relevant coastal States and States fishing on the high seas in accordance with the 1982 Convention and the Agreement.” The measures implemented by the member States of the PNA and FFA concerning high seas fishing closures to fishing, controls on Fish Aggregating Devices (FADs), and requirements for the use of observers on purse seine fishing vessels would be among the measures that the Commission must take into account.

The duty to “take into account” those national or subregional CMMs, however, is not a substantive obligation to *incorporate* them into the Commission’s CMM. The English Oxford Dictionary defines “take into account” as meaning “to take into consideration, esp[ecially] as a contributory factor; to notice.”<sup>33</sup> In disputes relating to various agreements administered by the World Trade Organization (WTO), dispute settlement panels have agreed that phrases like “consider,” “take into account,” and “take account of” do not establish substantive obligations to conform a rule or behavior to the thing that must be “taken into account.”<sup>34</sup> Nonetheless, they have noted that a WTO member bound by these terms “needs to accord active and meaningful consideration to certain factors.”<sup>35</sup>

---

<sup>32</sup> The FFA “strengthens national capacity and regional solidarity so its 17 members can manage, control and develop their tuna fisheries now and in the future.” FFA, Welcome to the Pacific Islands Forum Fisheries Agency, <https://www.ffa.int/about>. The PNA focuses its efforts on sustainably managing tuna. PNA, About Us, <http://www.pnatuna.com/About-Us>.

<sup>33</sup> Oxford English Dictionary, at <http://www.oed.com.lawpx.lclark.edu/view/Entry/1194?redirectedFrom=take+into+account#eid210258391>.

<sup>34</sup> United States–Certain Country of Origin Labelling (COOL) Requirement, Panel Report, WT/DS384/R, WT/DS386/R, at para. 7.776 (published Nov. 18, 2011) (concluding that obligations “to take account of” and “to take into account” mean “to consider, but not necessarily to act in line with the specific need, view or position under consideration.”).

<sup>35</sup> *Id.* at para. 7.786.

## CMM 2014-06 Harvest Strategy Measure: A CMM for Each Element or an Overarching CMM?

A harvest strategy includes the basic guidelines for setting harvest levels. Limit and target reference points influence the harvest strategy.<sup>36</sup> Each stock will have a unique harvest strategy with different limit and target reference points based on the life history of that stock, among other factors. In other words, limit and target reference points can be assessed independently of each other with respect to the same stock and for different stocks. Consequently, the question arises as to whether the harvest strategies for different stocks or fisheries should be incorporated into a single CMM (or other document) or as separate CMMs (or other documents).

CMM 2014–06 on Establishing a Harvest Strategy for Key Fisheries and Stocks in the Western and Central Pacific Ocean (CMM 2014–06 Harvest Strategy Measure) clearly contemplates individual harvest strategies for specific fisheries or stocks that include proactive and adaptive measures for applying an evidence and risk-based approach to setting harvest levels. Despite the call for “individual” harvest strategies, the CCMs could adopt such plans in separate CMMs or in a single CMM.

The adoption of a single CMM that includes all individual fisheries harvest strategies may have some advantages. For example, provisions on the use of the best available information or the application of the precautionary approach of Article 6 of the WCPF Convention would not need to be repeated, as they would in individual CMMs. Nonetheless, implementing a harvest strategy for all species in a single, comprehensive CMM could be less desirable from a process perspective. For example, if all stocks were included in a comprehensive CMM it could mean that every time a harvest strategy is reviewed or the Commission amends a particular element of the harvest strategy it would risk reopening the entire measure and decisions for all stocks. Thus, it could lead to the very result that managers try to avoid by implementing a harvest strategy approach – a protracted negotiation on the various fixed terms of the CMM on a sporadic basis.

The use of individual CMMs for individual fisheries or stocks also has advantages. For example, managers will be able to address each stock or fisheries individually. The CCMs can adopt the new fisheries harvest strategy for a specific stock as soon as it is completed. Its adoption will not be contingent on completing the work on other fisheries or stocks. The approach of “nothing is completed until everything is completed” has stalled work relating to climate change. It should not be repeated. However, there are also disadvantages with this approach in that each time a CMM is developed for an individual fishery or stock it would require unnecessarily repeating information that may be common among all the fisheries and stocks.

A third approach may combine the advantages of the two approaches mentioned above: in a single CMM, provide elements that will be common to all harvest strategies in the main body of the CMM and then include the elements of harvest strategies that are unique to specific stocks or fisheries in individual annexes. In this way, repetition is avoided, individual harvest

---

<sup>36</sup> WWF Smart Fishing Initiative, Fact Sheet, Fishing within Limits, 2 (2014)

strategies can be adopted as they are completed, all harvest strategies can be found in a single document, and all aspects of the harvest strategy will be binding.

## Giving Effect to the Elements of the Proposed Harvest Strategies

The Commission would best give effect to the elements of a fisheries harvest strategy by adopting the strategy as a CMM. In this way, the harvest strategy will be binding and not subject to dispute concerning its legal status. As such, the pre-agreed harvest control rules can be implemented in a swift and predictable manner.

In the climate change context, the question of whether any new measures to mitigate greenhouse gas emissions should be binding (in a new treaty) or non-binding (adopted as a decision of the Parties) has plagued the negotiations since at least 2009. Some negotiators have insisted on binding commitments as a means to hold Parties accountable for their commitments to reduce greenhouse gas emissions. Other negotiators say that non-binding contributions may offer an opportunity achieve consensus more quickly and allow Parties to accept more stringent mitigation targets.

In the context of the Commission, as in the climate change context, parties are seeking access to a scarce shared resource (valuable fish on the one hand and an atmosphere with levels of carbon that keep global average temperatures below 2°C on the other hand). As a consequence, reaching consensus on reference points and harvest control rules may be difficult and time-consuming. However, the Commission has one difference that sets it apart from the climate negotiations: the ability to vote. While recognizing the Commission's unwillingness to vote, it can in fact vote to adopt a CMM relating to harvest strategies by a three-fourths majority vote of those present and voting.<sup>37</sup> When a vote is taken, the three-fourths majority must include both a three-fourths majority of the members of the FFA and a three-fourth majority of non-FFA members that are present and voting.<sup>38</sup> In addition, a proposal may not be defeated by two or fewer votes of either voting bloc.<sup>39</sup>

## Potential for Consolidating and Simplifying CMMs

The question of integrating and consolidating CMMs could differ from simplifying CMMs. Integrating and consolidating CMMs refers to the process of bringing different CMMs together into a single, more effective or coherent CMM without changing the text of the relevant CMMs. That process, which might remove redundant or obsolete language or provisions, could have the effect of simplifying the CMMs because the CMMs are less confusing and easier to understand because the CMMs are now linked in a coherent manner. Simplifying CMMs could also suggest changing the text in a way that, for example, makes them less technical and more

---

<sup>37</sup> WCPF Convention, *supra* note 1, at art. 20(2); WCPFC, Rules of Procedure, Annex I, ¶ 2 (2004), available at <https://www.wcpfc.int/doc/commission-01/rules-procedure>. Although some “substantive” decisions require consensus, for example, adoption of the budget and amendments to the Convention, among others, a harvest strategy would not be among the issues requiring a decision by consensus. *Id.* at Rule 23; WCPF Convention, *supra* note 1, at art. 18(1).

<sup>38</sup> WCPF Convention, *supra* note 1, at art. 20(2).

<sup>39</sup> *Id.*

readable but which may also remove some of the technical details needed for effective fisheries management.

At least one multilateral environmental agreement—the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)—has consolidated its resolutions to remove redundant or obsolete language or provisions; the process also brought resolutions on related issues into a single document. The process was clearly targeted at improving implementation of the resolutions. In describing the process of consolidation of resolutions, one CITES document states that “[t]he main purpose of this review is to make the Resolutions easier to understand and to implement, and to make them a more practical tool for the Parties.”<sup>40</sup> The review was also intended to ensure that resolutions “do not again become more difficult to understand and implement than they need to be,” taking into account “the need to avoid a proliferation of Resolutions on the same subject and the need to ensure that Resolutions, as the ‘soft law’ of CITES, contain what they need to contain and nothing more.”<sup>41</sup> The review took several years to complete, but it is generally considered a success. Due to its success, the Convention on the Conservation of Migratory Species has initiated a similar review.<sup>42</sup>

In the context of the WCPFC, a number of CMMs could be consolidated into a single CMM. This is the approach that the North East Atlantic Fisheries Commission (NEAFC) has taken with CMMs relating to monitoring, control, and surveillance in its *NEAFC Scheme of Control and Enforcement*.<sup>43</sup> That document includes all of the NEAFC’s provisions relating to control measures, including requirements for notification of fishing vessels, marking of gear, and labelling of frozen fish. It also includes NEAFC’s requirements for recording and reporting of catch and fishing effort, vessel monitoring system, transshipment and inspections, among many other requirements relating to monitoring, control, and surveillance. The language used in the *NEAFC Scheme of Control and Enforcement* does not differ significantly from WCPFC CMMs in terms of the technical language. The *NEAFC Scheme of Control and Enforcement* may be more readable and understandable because it omits preambular paragraphs. Preambular paragraphs to a CMM, as with preambular paragraphs to a convention or domestic implementing legislation, provide important history and context. Those paragraphs may, at the same time, add language that diverts focus from the binding, operating provisions of the CMM.

The Commission has taken one step forward by publishing all CMMs as a single document. At 223 pages, it is not that much longer than 168 pages of the *NEAFC Scheme of Control and Enforcement*, a document which does not include stock specific conservation measures. The Commission’s compilation reproduces the CMMs chronologically; if the CMMs were organized by subject, the compilation might be more accessible and useful.

---

<sup>40</sup> CITES, Review of the Resolutions of the Conference of the Parties, Doc. 9.19, ¶ 2 (1997), available at <https://cites.org/sites/default/files/eng/cop/09/doc/E9-Doc-19.pdf>.

<sup>41</sup> *Id.* at ¶ 3.

<sup>42</sup> Convention on the Conservation of Migratory Species, Review of Decisions UNEP/CMS Resolution 11.6 (2014), available at [http://www.cms.int/sites/default/files/document/Res\\_11\\_06\\_Review\\_of\\_Decisions\\_En.pdf](http://www.cms.int/sites/default/files/document/Res_11_06_Review_of_Decisions_En.pdf).

<sup>43</sup> NEAFC Scheme of Control and Enforcement, available at <http://www.neafc.org/scheme/2015/downloads>.

## Recommendations for Implementing the Harvest Strategy Approach

This paper recommends that the Commission implement CMM 2014-06, *Conservation and Management Measures to develop and implement a harvest strategy approach for key fisheries and stocks in the WCPO*, by adopting a single, binding CMM. This CMM would adopt provisions common to different fisheries and stocks in the main body of the CMM. The individual harvest strategies for individual fisheries or stocks, including reference points and harvest control rules for those fisheries or stocks, would be included in annexes. The CCMs could adopt a schedule for developing fisheries strategies for the specific fisheries or stocks, which could then be added to the CMM on a rolling basis.

In this way, and as noted above, repetition is avoided by adopting similar core provisions that will be common to all harvest strategies. Also, challenges in negotiating a harvest strategy for one stock or fishery will not delay implementation and adopting of harvest strategies for other fisheries or stocks. Moreover, all harvest strategies can be found in a single document, which may help fisheries managers implement the CMM. Lastly, because the harvest strategies would be included in a CMM, all aspects of the harvest strategy will be binding.

In addition, it may be useful for the Commission to consider consolidating CMMs relating to monitoring, control, and surveillance. In this way, only one document (even if longer than any single CMM) must be consulted to find all the relevant provisions relating to monitoring, control, and surveillance. This consolidated document could retain a few preambular paragraphs that are most critical for understanding the history and context of the individual issues covered by the individual CMMs. If CCMs believe that the preambles of the individual CMMs are valuable, they could be retained and archived.