



**WCPFC10**  
**Tenth Regular Session**  
2<sup>th</sup> December – 6<sup>th</sup> December 2013  
Cairns, AUSTRALIA

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**FFA MEMBERS: DISCUSSION PAPER ON AVOIDING DISPROPORTIONATE  
BURDEN**

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**WCPFC10-2013-DP01**  
**5 November 2013**

**BY FFA MEMBERS**



1 November 2013

Glenn Hurry  
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PO Box 2356 Kolonia  
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Dear Glenn,

I write in my capacity as the Chair of the Forum Fisheries Committee on behalf of the 17 members of the Forum Fisheries Agency. Please find attached a delegation paper prepared by FFA members to gain additional discussion and understanding on the important issue of Disproportionate Burden.

We look forward to discussing this issue under the agenda item on Special Requirements of Small Island Developing States, noting that it is also a key theme in discussions on tropical tuna management.

Yours Sincerely

Mr Sylvester Diake  
Chairman  
Forum Fisheries Committee

## **Discussion Paper on Avoiding Disproportionate Burden**

### **Introduction**

The WCPFC Convention focusses strongly on the fact that unlike most other oceans, tuna fishing in the WCPO occurs very heavily in the EEZs of coastal States, and in particular of Small Island Developing States and Territories (SIDS).

Within that broad area of focus, there is particular attention to the development aspirations and special requirements of SIDS. Article 30 is the most direct reference to this issue and has formed the basis of most discussion in the past. The WCPFC Rules of Procedure provide that this issue must be a standing agenda item for each session of the Commission and its subsidiary bodies.

Notwithstanding, the Commission has not given adequate attention to actively considering and resolving these issues when developing and implementing conservation and management measures. Discussions on this issue really only began in earnest at WCPFC 9 in 2012 in the context of the Tropical Tuna measure. Since then, the Tropical Tuna Working Group and the TCC have both considered the issue. Several non-SIDS members of the Commission have sought out side discussions on the matter and while common understanding remains elusive, this effort is highly appreciated and represents excellent progress.

At TCC, some CCMs requested additional information on the subject to guide and inform further consideration.

This paper provides an explanation of Article 30 and maps out a process for the Commission to ensure that it is meeting its obligations. Generic short and long term options are provided as examples of avoiding or dealing with disproportionate burden, although these will obviously depend on the circumstance. Attachment 1 relates these general concepts to the Commission's efforts to implement measures to conserve and manage bigeye.

This paper is provided to engender common understanding amongst the Commission membership. It also seeks to secure better commitment from CCMs to the principles espoused in the Convention and Resolution 2008-01.

### **Explanation of Article 30**

It is fair to say that there is not a common understanding about the application of Article 30, and reports provided by developed members of the Commission in response to requests from SIDS as to how they have addressed Article 30 have focussed very heavily on the provision of development assistance funding within and outside of the fisheries sector.

Such assistance is critical to the continued development of SIDS and is highly appreciated. It is, however, only one component of Article 30.

FFA members have previously suggested that assistance in terms of Article 30 is far more specific and includes direct assistance to developing States to participate in tuna fisheries, develop capacity and participate on the work of the Commission. All of these issues are of fundamental importance to the achievement of Article 30. Other aspects of the Convention, such as the recognition in the preamble of *smaller* island developing States that are even more highly reliant on fisheries resources and the provisions of article 10 that recognise the needs of SIDS also drive the way in which the Commission operates.

However, for the purposes of this discussion, specific focus is required on Article 30 (2) (c):

*2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for highly migratory fish stocks, the Commission shall take into account the special requirements of developing States Parties, in particular small island developing States, and of territories and possessions, in particular:...*  
*(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States Parties, and territories and possessions.*

30(2)(c) in particular obliges the Commission to ensure that developing States do not bear a disproportionate burden. Essentially this means that the Commission cannot put in place a measure unless there is agreement that it does not transfer a disproportionate burden. The Commission has a poor record in this regard. There have been no Commission-wide assessments of any measure from this perspective and the general approach has been to place an onus on the developing States themselves to make a case that a measure has had or will have such a burden. The need to prove such a case is a disproportionate burden in itself, and one that should not be placed onto SIDS in order to ensure that the Commission meets its obligations.

This practice is not in keeping with the Commission wide obligation that is set out in Article 30 and poses a risk to the decision-making ability of the Commission. In fairness, part of the failure to respect Article 30 to date stems from the lack of a process by which the Commission would assess a proposal or measure against Article 30.

### **What is a “disproportionate burden” and what is “proportionality” assessed as?**

In formal and informal discussions to date, there have been two possible interpretations of the phrase offered. The first is that proportionality is an assessment of the relationship between the costs borne by SIDS and the benefits they accrue from the conservation action. The second is that proportionality should be assessed in terms of the relative costs borne by individual or groups of CCMs.

Both suggestions have merit, and it is probably the case that proportionality should be assessed differently on a subject specific basis. For example, in case of a CMM on Port State measures, it may be useful to look at the costs to SIDS as the major port States in the region compared to that of non-SIDS.

However, in most cases, it is more appropriate to assess the flow of costs and benefits to SIDS to determine whether there is an overall burden, and if so, whether it is disproportionate. This conclusion is reached on the basis that it is implausible to contemplate a pro-developing State convention condoning a measure that applies a cost to SIDS for conservation action that benefits non-SIDS. Such an outcome would have to be viewed as an anomaly under any circumstance, but in the context of a convention that obliges the avoidance of “disproportionate burden” on SIDS, it is inconceivable.

As such, the relative “burden” of a conservation and management measure is best assessed through examining the flow of costs and benefits to individual or groups of CCMs.

### **A simple process for assessing whether burden is disproportionate**

Overall burden must be an assessment of costs and benefits. There is a growing body of literature regarding the mix of interests that each CCM has in the Commission (see for example WCPFC-SC8-2012-MI-WP12) and these tools can provide a useful guide for identifying potential beneficiaries and cost bearers. It is also important to conduct this assessment at the CCM level. That is, the wording in the Convention refers to the burden borne by developing **States** rather than a particular fleet or type of vessel. This can be a subtle distinction but is an important one and relates back to the nature of this Convention that recognises the overwhelming importance of fisheries to the economies of the developing States in the region. In that regard, while benefits may be attributed to stakeholders outside of CCM level, costs must be attributed to CCMs.

#### Step 1 – who are the beneficiaries?

The expected outcomes of a particular conservation action are identifiable and it is therefore possible to assign these outcomes to CCMs. For example, in 2009, WCPFC adopted CMM 2009-05 on the protection of data buoys. The beneficiaries of this measure are, in the first instance the CCMs that are owners of such buoys, and secondly the CCMs that are users of data that they generate.

#### Step 2 – Who bears the costs?

Costs of a conservation and management measure may be direct or indirect, so an assessment at both levels is required. Costs borne by a CCM could come in any of the following forms:

- Decreased value of fishing in EEZs resulting in decreased profitability and therefore decreased access revenue
- Decreased use of ports
- Decreased landings and therefore throughput for domestic plants
- Increased financial costs of implementing measures
- Increased financial costs for implementation and monitoring

### **Addressing the disproportionate burden**

The range of options available to WCPFC to mitigate and avoid this disproportionate burden is very large. There are both short term and long term options that will be available to the Commission to avoid, mitigate or compensate for a disproportionate burden. The following sections describe some of these options, but the application of these concepts is obviously heavily dependent on the case at hand.

#### Short Term

*SIDS Exemptions* have featured in many CMMs to date. These have been implemented for a range of reasons including to mitigate the burden on SIDS themselves and to create practicality for existing domestic fleets. For example, the SIDS exemption in CMM 2005-03 on North Pacific Albacore is recognition of the fact that it would be anomalous to expect SIDS to forgo their rights under international law to participate in fisheries for the benefit of other CCMs in the form of security for their own fleets.

SIDS exemptions can only be viewed as short term measures because by their nature they are open ended and therefore contrary to the overarching requirement to deliver sustainable fish stocks.

*Transfer Payments* – In some cases the disproportionate burden is directly quantifiable. In such cases, and if the proposed conservation action is of sufficient urgency, it might be necessary for the Commission to identify specific funding mechanisms to adequately mitigate the burden. This would only be necessary where the Commission is unable to identify alternate arrangements (such as those identified below) that would mitigate or avoid the disproportionate burden.

As with the SIDS exemptions, this can only ever be considered a short term or “urgency” option. The concept of simply “compensating” SIDS for action that is inconsistent with the Convention is unsustainable and inconsistent with the spirit of the Convention.

## Long Term

As a general principle, long term solutions lie in the recognition of fishery based rights in ways that promote enhanced control for, or benefits to developing States. The exact mechanisms to achieve this will depend on the particular circumstance, and in reality it is likely to need a combination of several mechanisms to truly avoid disproportionate burden. Some examples are:

*Increasing benefits to developing States* – This can be achieved in any number of ways, and both at the operational or strategic level. For example, if there is a need to increase the benefits to SIDS from the albacore fishery, it could be achieved at the:

- strategic level through the articulation of formal rights in the fishery and the establishment of regimes that provide SIDS rights that adequately account for both the fishing opportunities that exist in respect of their EEZs and to facilitate their participation in high seas; or
- operational level through relatively straightforward measures that provide new benefits to SIDS. Depending on the case at hand, a ban on high seas transshipment might fit this category in that it encourages vessels to use developing State ports and therefore provides benefits that are currently not available.

The selection of the measure required to increase benefit to SIDS will depend on the nature of the measure under consideration, but it is fair to say that rights based approaches provide a more enduring and substantial benefit to developing States and are therefore likely to be more suitable to addressing cases of disproportionate burden.

In the tropical tuna fishery for example, rights based approaches for the both the longline fishery, the high seas purse seine fishery and FAD sets in EEZs are likely to be required to ensure the appropriate flow of benefits from bigeye management to SIDS.

Implementation of zonal rights will allow the Commission to remove problematic provisions such as SIDS exemptions from many measures. These measures also address the concerns raised by some CCMs about the role of chartering to avoid limits under the current measures.

*Decreasing the relative cost to SIDS* – It is also possible to design management arrangements that reduce the flow of costs to developing States in order to create balance. Again, there are options to achieve this but spatial or fishery specific approaches are likely to provide a useful way forward in many cases. As described in Attachment 1, the primary imbalance in the tropical tuna measure is an over reliance on purse seine measures in EEZs (and the cost that therefore applies to SIDS). Targeting management measures at other aspects of the fishery can therefore reduce the disproportionate burden by decreasing the costs borne by SIDS.

Additional longline reductions would deliver this outcome, as would the proposed high seas FAD closure as they contribute to bigeye conservation in a way that does not come at such cost to SIDS as a whole.

### **Conclusion**

There are relatively straightforward ways for the Commission to assess the costs and benefits of certain management actions to developing States. There are also many options available to the Commission to avoid, mitigate or otherwise cater for cases where a disproportionate burden may otherwise occur.

## **Attachment 1 – Brief Summary of these principles as they relate to tropical tuna**

### *General Assessment of the proposals/measures*

As a general summary, the proposals that are currently on the table place an over reliance on the EEZ purse seine fishery to achieve bigeye conservation through FAD measures. Even in the joint proposal the longline reductions do not match the purse seine measures in severity or effectiveness, and other proposals that allow increases in the longline fishery exacerbate this.

At the CCM level this therefore places a disproportionate burden on developing States because, as a whole, they benefit far more from the purse seine fishery than from longline. The measure therefore results in substantial cost to SIDS, while the benefits of the conservation action will flow to others (in the form of increased profitability and security for the longline fishery).

### *Identification of measures to mitigate the disproportionate burden*

As described above, there are a number of short term and long term avenues to address the issue that have already been discussed and proposed:

#### Transfer Payments

The proposal includes a transfer payment of \$15 million per month to offset the burden that is being borne for the benefit of others. The pre-existing 3 month closure has come at a cost of \$20 million per month to the fishery as a whole calculated based on the observed decrease in catch rates during a FAD closure (offset slightly by the increased per unit price of free school caught fish). The proposal “discounts” this amount by 25% to cater for the fact that there are some benefits to SIDS from the conservation action.

This payment is critical to see the immediate implementation of more stringent measures that will conserve bigeye. However, it must be made clear that such payments can only ever be a short term solution, and that in the meantime, the Commission needs to put dedicated effort into implementing a management regime that does not impose the disproportionate burden in the first place as follows.

#### Increasing the benefits to SIDS from the Longline Fishery

The very low level of benefit to SIDS from the longline fishery as a result of the predominance of high seas fishing and vessels that exist solely on the high seas is at the heart of this issue.

Strategically, the answer lies in the development and formalisation of rights in the longline fishery, and the transfer from the current system of inferred flag State holding, to rights controlled and leveraged by SIDS.

The longline VDS being developed by PNA, and similar measures being considered for albacore will assist to deliver such transformation, but will always rely on WCPFC ensuring that its own arrangements for the high seas are compatible and embrace rights transfer as a means to addressing a Commission-wide problem.

#### Strengthening FAD use rights in EEZs

Since agreement on the “alternative measure” in CMM 2012-01, the control and influence of coastal States over fishing in their EEZs has been diminished. The alternative measure provides flexibility and authority to flag States to determine how and when they will fish in an EEZ. These points are not made to undermine the alternate measure, which is a useful exercise to test the wider concept of FAD limitation rather than FAD closures, but to point out a real opportunity.

If FAD set limits could be recognised as a zone based right and integrated to the VDS, the position of SIDS to avoid the current disproportionate burden is strengthened. If each coastal State had a certain number of FAD sets to sell for each year, they are better placed to offset the cost of the total FAD reduction (by selling the more profitable FAD sets for higher amounts than free school sets).

This concept also deals with two other issues related to FAD reduction measures, these being catering for small domestic vessels (by allowing them preferential access to available EEZ FAD sets) and dealing with those EEZs that have a higher reliance on FADs than others (by accounting for this in the allocation process).

#### Reducing the direct cost to EEZ purse seine fishing

The joint proposal includes a call for a complete ban on high seas FAD usage. This achieves two outcomes that will be fundamental to the prospects for agreement on a future measure.

From a conservation perspective, a 12 month FAD closure on the high seas is approximately equivalent to a one month FAD closure in the entire fishery. A FAD closure in the Eastern high seas areas, results in a fishing mortality decrease that is substantially higher than the proportion of overall effort that is effected because of the substantially higher bigeye catch rates in that area.

From a SIDS perspective, this measure achieves a decrease in fishing mortality without further devaluing purse seine fishing in EEZs. It therefore avoids placing greater disproportionate burden on SIDS. For other Commission members, the measure therefore reduces the strength of measures that are needed to mitigate the burden, including in the short term reducing the necessary transfer payment from \$45 million to \$30 million.

### Increasing the contribution of the longline fishery

It is essential that in any measure, the longline fishery must contribute significantly. SPC modelling shows that without substantial reductions in longline catch, the magnitude of purse seine measures required is so large that the chances of WCPFC agreeing to them are practically non-existent. Flag States, and particularly those that have large catches, must embrace this reality and agree to reduction, otherwise, the disproportionate burden borne by SIDS is exacerbated because the longline fishery would still gain benefits through the purse seine measures while not bearing any of the cost at all.

The joint proposal also proposes to complement the catch reductions with effort reductions. The effort reduction proposed as a starting point was a closure to “high seas only” longliners of equal duration to the FAD closure. This was intended to achieve a number of objectives:

- From a conservation perspective – to ensure that any catch reductions are management driven rather an artefact of CPUE decline;
- From a conservation perspective – to avoid transfer of effort to other fisheries;
- From a fairness perspective to minimise disruption on key domestic fleets such as elements of the US and Japanese fleet; and
- From a disproportionate burden perspective – to further incentivise EEZ fishing and/or port usage so that a greater proportion of the conservation benefit of protecting bigeye flows to SIDS.