



WCPFC10
Tenth Regular Session
2nd December – 6th December 2013
Cairns, AUSTRALIA

RESPONDING TO TCC9 SUMMARY REPORT PARAGRAPH 394

WCPFC10-2013-29
26 November 2013

Background

1. The WCPFC Performance Review Report was presented to WCPFC8 (March 2012). WCPFC9 (Dec 2012) considered a matrix prepared by the Executive Director and made the following decision:

429. WCPFC9 agreed that the Secretariat will sort and split the WCPFC Independent Performance Review recommendation matrix by committee, add a column to track progress, and forward each portion to the relevant committee for action.

In response to this tasking, TCC9 received a summary matrix of the recommendations of the Independent Performance Review of the WCPFC which are pertinent to the TCC (WCPFC-TCC9-2013/20).

TCC9 outcomes

393. FFA members noted that decisions on how to handle the number and variety of recommendations arising from the performance review are complicated by the undisciplined nature of the review report but thanked the Executive Director for the matrix. These CCMs considered that nearly all of the high priority items are already on the TCC9 agenda; the only outstanding item is a process for consideration and adoption of CMMs to ensure that they are legally sound and consistent with other measures (WCPFC-TCC9-2013/20, item 3.4.7). This process should include a link to Article 30 of the Convention to ensure that issues such as special requirements and transfers of disproportionate burdens to SIDS are given proper consideration.

394. TCC9 requested that the Executive Director prepare a paper for WCPFC10 proposing a way forward on establishing a process for ensuring that existing and new CMMs are technically sound from a legal point of view and consistent with other CMMs, and highlighting any other items from the Independent Performance Review that require further consideration by TCC.

2 The tasking from TCC is related closely to the Recommendation 3.4.7 of the WCPFC performance review, which says:-

3.4.7. Process for adopting CMMs

There is concern because the CMMs adopted by the Commission are not always legally accurate. For example, there has been discussion in the TCC about the need to define certain terms such as those in the Regional Observer Programme, and there are conflicts in the operation of the RFV and the IUU vessel list as discussed in Section 3.4.4.4, above. Although on the whole the CMMs are technically sound, it could be useful to establish or strengthen a process for consideration and adoption of CMMs to ensure they are technically sound from a legal point of view as well and consistent with other CMMs and instruments of WCPFC. Reviews are carried out by other RFMOs, including GFCM and IOTC, to ensure clarity and consistency in their decisions, also with a view to strengthening transparency.

Panel Assessment and Recommendations

It is recommended that a process be established for consideration and adoption of CMMs to ensure that they are technically sound from a legal point of view and consistent with other CMMs and instruments of WCPFC.

Executive Director's observations on trying to find a way forward on this request.

It is noted that the FFA and the PNA have both tabled papers on disproportionate burden that should facilitate useful discussion on how best to deal with and consider that issue in terms of Commission decisions at WCPFC10. Therefore the Executive Director (ED) has put aside any comment on how to deal with this issue until discussion on these two papers occurs at WCPFC10.

The other issue that is somewhat challenging to resolve is the actual meaning the term "technically sound from a legal point of view." A discussion on this term prior to tasking the writing of this paper would have made the task much easier.

However, in reading the text to the Performance Review recommendation, the task at hand should be about developing a strategy to remove the ambiguity from the CMMs so that in a

technical sense they can be implemented and monitored and that they are legally sound in the sense that they comply with the Convention establishing the Commission.

If it is agreed that this is the task that has been given to the ED to prepare some thought on, then depending on the complexity of the proposed CMM, the approach taken might be quite different.

The final observation is that in bringing a proposed Measure forward there the proposing CCMs should accept a responsibility to ensure the legal clarity, workability and clarity of the proposed text prior to it being presented. If this approach is taken then it will allow for a good debate on the measure and if it requires monitoring and reporting from the Secretariat after implementation then it can be considered and comment provided prior to the meeting.

With those few thoughts on process the following process is suggested and you should note that these are my thoughts only and that there may be a dozen better ways to do this and I would be happy to consider and work with you to refine them, so any comments or suggestion would be welcomed as I think there are real advantages for all of us in getting a process that makes for more accurate, clear and workable CMMs in the Commission.

Therefore this is not just a “legal” issue as such but one of designing a process to eliminate ambiguity and the “legal” element belongs to both the proposing parties in the first instance to consider legality of what they are proposing and for the Commission Secretariat to provide advice or comment on whether it is consistent with the Convention.

Current Process

The CMMs are carefully negotiated by Members, and quite often with deliberate ambiguities to achieve compromise and flexible application. This allows for different interpretation by members, this makes it difficult to determine inconsistency that is intended or unintentional on behalf of all Members. The ED is very conscious of this, and as a result has taken great care in the finalization of the record attachments to ensure that the CMMs are exactly as agreed and negotiated.

Proposed Process for checking CMMs

To have a different process to the one normally followed in the Commission may well require a change in the established process. To do this I have classified CMMs as simple, moderately complex, and difficult. It is proposed that all CCMs accept the responsibility of doing the first check that the proposed CMM is “technically sound from a legal perspective” before it comes to the Commission for consideration. Taking this approach, there appears to be three reasonably logical avenues open to Commission members.

1 Relatively simple CMMs

For CMMs such as 2009-05 on Data Bouys, which is a relatively simple CMM, the draft should be able to be checked as the meeting progresses.

2 Moderately Complex CMMs

For a CMM which is moderately complex and requires some reporting and monitoring it is suggested that the “draft” measure would have to be finalized by members for checking by relevant Commission staff no later than the Wednesday before the end of the meeting.. This would allow adequate time for proper consideration of the measure and to work out how the monitoring and reporting would occur.

If we took this approach then on the Friday there would be sufficient time for Commission members to address any concerns raised and to finalize the measure.

3 Difficult Measures

For measures such as 2008-01 and potentially 2013-01 which are very complex by nature and have numerous monitoring and reporting requirements, if they cannot be checked for application prior to the end of the meeting, by the Commission staff then it is suggested that the Commission design a process to utilize the 60 day window following the annual meeting before the CMMs are applied in the Commission to review the measure for application. ***It should be noted that the Commission staff can not in any way change the text of the CMM agreed by the Commission their sole responsibility is to check all aspects of the CMM for application and to highlight any perceived weakness to the Chair and members.***

This process would be difficult but no more so than having a measure that cannot be applied correctly and has loop holes in it.

It is suggested that in the 2 weeks following the annual meeting any outstanding CMMs that need to be analyzed be checked by Commission staff for application. If there are any perceived loopholes then these should immediately be notified to the Chair and to the members. Members would then have 3 week to respond and the Chair would have the responsibility of suggesting any amendment to deal with the highlighted difficulties. Once these modifications have been made and “marked up” on the CMM the final proposed text would go to members for finalization.

If the Chair cannot achieve consensus agreement on the suggested text, then the CMM would stand as agreed at the Commission meeting and would be listed for discussion and improvement at the following Commission meeting.

Alternative approach.

There has been considerable debate about the utility of the TCC meeting as it is currently constructed. It is now focused largely on compliance and compliance monitoring and this is consistent with Article 14 of the Convention. Article 14 2 (d) would seem to provide some scope for the Commission to task TCC to consider in detail potential conservation and management measure with an emphasis on the management and application and not strictly on monitoring and compliance. If this change was made

the drafted CMMs would come forward to the annual meeting for finalization and this would provide sufficient time for it to be considered and reported on.

The only reservation attached to this proposal is whether the “right” level delegates are or would be in attendance at the TCC meeting, to make decisions on potential CMMs that would then be supported in the annual meeting by new Heads of Delegation.

Conclusion

This paper is submitted for your consideration and direction. There may well be other more workable approaches that members have considered that are not included in this paper that are worthy of discussion.