

TECHNICAL AND COMPLIANCE COMMITTEE
Fifth Regular Session
1-6 October 2009
Pohnpei, Federated States of Micronesia

Summary Report by the United States

Observers and ROP-IWG3

1. TCC5 accepted the recommendations of the ROP-IWG3 (see WCPFC-TCC5-2009/IP-03). The recommendations include 5 new interim minimum standards: vessel safety checklist; observer trainer qualifications; liability and insurance; standardized procedures for deployment of ROP observers; and authorization of de-briefers.
2. TCC5 also accepted agreements reached by ROP-IWG3 on observer placement costs, fisheries to be monitored, coverage levels, cadre of observers, ROP workbooks, and data fields for purse seine FAD monitoring. Agreement also was reached on adding a section to the Annual Report part 2 to provide an update on actions taken to reach 5% coverage by June 2012.
3. TCC5 agreed in principle to create a Technical Operational and Advisory Group (TOAG) to assist the ROP coordinator in implementing the ROP. TCC5 could not reach agreement on the Terms of Reference for the TOAG and no final action was taken. The ROP Coordinator was asked to see if progress on this matter could be made before the Commission meeting in Tahiti.
4. Definitions for the *Hybrid Approach*, *principally*, *occasionally*, *impartial*, *independent*, and *longline trip*, and the minimum size of vessels for observer placement were not discussed. TCC5 recommended that ROP implementation continue without resolving these issues.
5. TCC5 agreed on two of the several options for managing data gathered through the observer program. The Secretariat was directed to prepare budget proposals for both and to draft a transition plan for consideration of financial and other aspects by the Finance and Administration Committee.
6. TCC5 encouraged the Secretariat to continue to work with IATTC to develop an agreement for cross endorsement of observers between the two RFMOs. There is a concern about the differences between the two organizations with regard to the use of observer data for MCS purposes. TCC5 indicated that the WCPFC rules should prevail in this aspect of any agreement.
7. The ROP Coordinator provided the first annual report of program activities. The report included a number of incidents related to the FAD closure.

Vessel Monitoring Systems

8. The VMS Manager presented the first annual report on the Commission VMS program. There have been a very large number of vessel reports made to the Commission's VMS. Relatively few vessels were not reporting (<1%), which suggests that the program is working well in this early stage. The Secretariat indicated that it may be necessary to consider cost recovery. This led into a discussion of using the Commission's Record of Vessels for the purpose of cost recovery. A number of CCMs pointed out that many of the vessels that they submitted for inclusion on the Record have not been active in the Convention Area and should not be used in any cost recovery efforts. Others noted that CCMs are required to indicate which of their vessels on the Record

have been active in the Convention Area and that such information should be provided to the Secretariat.

9. TCC5 clarified that the Commission's VMS requirements apply only when vessels are in the high seas waters of the Convention Area and not within CCM's waters.
10. There was no resolution to the matter of what should be required when a vessel's ALC is not operating. The U.S. and RMI have indicated that they would work to develop some promising concepts that the two CCMs discussed in a side bar meeting. Other CCMs indicated that they would like to be included in any such discussions.
11. TCC5 indicated its preference not to make changes to the VMS until the system has been in operation for a period of time. The issues of Electronic Vessel Registration and establishing a redundancy capacity, however, were agreed upon by TCC5.
12. The Secretariat requested that VMS units report prior to entering the high seas of the Convention Area, indicating that in some cases there would not be any report on a vessel for as many as four hours. CCMs did not agree to this change and requested the Secretariat to report on the issue at WCPFC6.

Transshipment

13. Using the Marshall Islands' latest proposal, the TCC made quite a bit of progress on the issue of monitoring and regulating transshipment in the Convention Area. It produced a draft measure with only a couple issues unresolved. One was the scope of the measure, with Korea opposing the idea of applying it to transshipments in the Convention Area of HMS caught outside the Convention Area. The second regarded observer coverage – the original proposal would call for 100% observer coverage on all vessels that receive fish at sea. The US has been resistant, arguing that that level of coverage would be overkill, specifically for transshipments from troll, pole-and-line, and fresh-fish longline vessels, which we believe pose little IUU risk. The TCC members agreed to work together to produce a proposal for the Commission meeting in December. Towards that end, comments to the Marshall Islands and Nauru are due by October 26, 2009.

Non-member carriers and bunkers

14. The issue of how to deal with the operation of non-member carriers and bunkers in the Convention Area has been moving more or less in parallel with transshipment over the last couple years. The Marshall Islands and the US each offered a proposal. Both proposals would allow – through different mechanisms – non-member carriers and bunkers to operate in the Convention Area, but under the Marshall Islands proposal they would be phased out, and eventually allowed to operate in the Convention Area only if chartered to a CCM.
15. The TCC produced a draft measure that uses the US-proposed mechanism from 2010 until 2013, at which point the RMI-proposed solution would go into effect, with the important qualifier that non-member carriers and bunkers could operate under charter only in national zones – in other words, starting in 2013, non-member carriers and bunkers would no longer be authorized to be used on the high seas in the Convention Area. There remain only a few – apparently relatively minor – outstanding issues, which TCC members are to comment on by October 26, 2009 (to the RMI and Nauru).

Seabirds

16. New Zealand proposed that the Commission's existing technical specifications for seabird mitigation measures be replaced with those recently adopted by the IOTC. Predictably, Japan resisted this idea (its "light tori line" specifications, which it fought hard – against the US, among others - to be accepted two years ago, would have disappeared). The US was sympathetic with Japan's view, in part because research results may soon be available that shed light on the effectiveness of light tori lines relative to more commonly accepted designs, like those in the IOTC specifications.

Record of Fishing Vessels

17. The TCC continued to express tepid support for the idea of establishing a unique vessel identifier for vessels on the WCPFC Record, which is linked to the concept of developing a global record of fishing vessels and which is being pushed through the joint t-RFMO process. Establishing UVIs would require that CCMs provide a number of additional pieces of information about each of their vessels, including about the entities that own, charter, manage, and operate them, which may be difficult for some CCMs, possibly including the US.
18. An issue that came up in several agenda items, including IUU vessel listing, was the relationship between the WCPFC Record and authorization to fish in the Convention Area. CMM 2004-01 says that a vessel not on the Record shall be deemed not to be authorized to fish in the Convention Area. That goes beyond the Convention, which establishes the Record merely to reflect the fishing authorizations granted by flag States. In other words, CMM 2004-01 effectively turns the record into a registry. The IUU listing measure goes even further, saying that failure to be on the Record is grounds for being placed on the IUU vessel list. The US and a few other CCMs have a problem with these provisions, in part because placement on the Record is dependent on merely administrative actions, both by the flag State (providing information about the vessel to the Secretariat) and the Secretariat (placing the vessel and that information on the Record). Even more troubling is that the Secretariat has exercised what appears to be questionable authority in declining to place some vessels on the Record in cases where incomplete vessel information was provided by the flag State. See the IUU listing agenda item for the meeting outcomes in that context. The US may want to consider proposing changes to CMM 2004-01 and the IUU vessel listing procedures to either turn the Record back into a record or to ensure that if it is to be treated as a Register, that the system is designed such that vessel owners are not unduly penalized for merely administrative errors made by their flag States or the Secretariat.

Port State Measures

19. TCC5 considered the recently finalized FAO Port State Measures Agreement which is expected to be approved by the FAO Conference and opened for signature in November, and discussed the future development of port State measures for the WCPFC. FFA Members expressed support for the PSM Agreement and noted the vital role effective port State measures play in combating IUU fishing. Regarding a future WCPFC port State measures scheme, the FFA identified four principles: (1) the scheme must not affect CCM's sovereignty over their ports; (2) that the PSM Agreement provides for minimum standards, and so States and the WCPFC can adopt more stringent measures; (3) existing measures in the region and that port States have the discretion to apply terms to vessels in their national waters must be recognized; and (4) any scheme cannot place a disproportionate burden on small island States and capacity building must be provided for such States. TCC5 recommended that the development of a WCPFC port State measures scheme

be identified as a priority issue for TCC6. As with the CDS/SDS discussion, the U.S. noted that if the Commission was going to progress these issues as a priority, then it must provide an opportunity for the detailed discussion that will be needed to advance them, such as through an intersessional process.

Work Program and Budget 2010-2014

20. TCC5 considered a draft Work Program and Budget prepared by the Secretariat that included priorities for the next 5 years, a time line for achieving these priorities, and estimated budget for the work program elements. The U.S. provided a series of comments on both the Work Program and the estimated budget, as did other CCMs. The Secretariat will provide a revised draft to the Finance and Administration Committee at WCPFC6 for its consideration.

Charter Arrangements

21. TCC5 reviewed a Secretariat paper on options for developing a Charter Arrangement Scheme. Participants supported "Option C" that was contained in the paper, which outlined the need for a notification mechanism whereby CCMs who engage in chartering arrangements would be required to provide certain data to the Commission. The developed CCMs raised the issue of flag State responsibility and consent, a contentious issue that has caused the adoption of a chartering scheme to be deferred for the last three years. After further discussion in the margins, including in a small working group led by Fiji, a draft measure was tabled that calls for those CCMs who charter vessels to provide information on those charters to the Commission. The measure is a Charter Notification Scheme and does not address the still contentious issues of flag State vs chartering host State responsibilities, including the need for flag State consent, nor does it address any issues related to attribution of catch by chartered vessels. The US supported the draft measure and provided drafting suggestions, which were largely accepted and incorporated into the final draft proposal. TCC5 recommended that the draft measure on a Charter Notification Scheme be adopted by WCPFC6.

Compliance with Conservation and Management Measures

22. TCC5 reviewed a paper developed by the Secretariat that summarized CCM's compliance with conservation and management measures. Some CCMs commented on the need for the Secretariat to clarify in future summaries which measures are applicable for reporting through Annual Report Part 2. In addition, SIDS expressed the need to clarify which measures they are not subject to, such as catch limits for certain species and certain reporting requirements. There was also some discussion on the Part 2 template and the need for greater specification of information to be reported, as well as incorporation of the new CMM for bigeye and yellowfin tuna for the 2009 reporting year. The final issue under this agenda item related to the Compliance with Conservation and Management Measures Working Group, initiated in 2008 by Australia. A Draft Terms of Reference for this working group was developed by Australia and CCMs were invited to provide comments. The US will provide its comments in the coming weeks prior to the annual meeting of the Commission in December.

Cooperating Non-Member Application Process

23. Seven countries applied for WCPFC Cooperating non-Member (CNM) status for 2010: Belize, Ecuador, El Salvador, Indonesia, Mexico, Senegal and Vietnam. TCC5 convened a working group to evaluate the applications and develop recommendations for the Executive Director and Commission to consider. Of the seven applications, only Vietnam's was considered complete.

The remaining applicants will be advised, through the Executive Director, to provide additional data on their current and historical fishing effort in the Convention Area. El Salvador, Mexico and Senegal did not provide an explicit commitment to accept WCPFC high seas boarding and inspections on their vessels and will be required to do so in advance of the next Commission meeting.

24. TCC5 forwarded the applications to the Commission and recommended their consideration, subject to the outstanding information being submitted and accepted. TCC5 also recommended that the Executive Director provide, in advance of the next Commission meeting, an analysis of Ecuador's and the current CNMs' compliance with the commitments and any specific limits on fishing activities undertaken as a condition of their 2009 status.

Ad Hoc Task Group – Data

25. The Ad Hoc Task Group [Data] met in a working session for two full days prior to the commencement of TCC5. During this time, the group reviewed the fourth draft of the Rules and Procedures for the Protection of, Access to, and Dissemination of Non-Public Domain Data for MCS Purposes (RAPs). Through the work of the group, a fifth and sixth drafts of the RAPs were produced. By the end of the two day working group, all items were agreed to with the exception of one paragraph inserted by the U.S. to ensure that flag states had unfettered access to data from vessels flying its flag. The Pacific Islands Countries (PICs) believed that this language conferred a benefit to flag States, particularly the United States, which needed to be counterbalanced by a similar benefit to coastal States. As a result they proposed that coastal States should have unfettered access to data from vessels licensed to fish in their waters, transshipping in their waters or landing in their ports. The Asian-DWFNs objected to such a broad grant of access to data.
26. After several days of negotiating these points, language was proposed that was accepted by all members. This language allows coastal States to receive data for vessels that fish in waters under their jurisdiction and vessels applying to fish in their national waters, unload in their ports or transship within waters their jurisdiction. The new language also, in addition to not restricting a flag State's access to data from vessels flying its flag, does not restrict a coastal State from receiving data from a vessel that is alleged to have or has engaged in fishing activities in areas under that Member's national jurisdiction in violation of that Member's domestic laws and regulations, for the purpose of an investigation, judicial or administrative proceeding related to that violation.
27. Despite negotiating positions, the end result is particularly satisfying to the United States as it has multiple roles and interests in the region including flag State, coastal State and port State. The final draft of the RAPs was recommended by TCC5 for adoption by WCPFC6. However, two FFA member countries have indicated that because they missed an opportunity to clarify some last minute amendments from Chinese-Taipei, they may wish to revisit those last amendments at WCPFC6. It is likely, even if minor tinkering is necessary, that the RAPs will be adopted at WCPFC6 and will go into effect 60 days later.
28. The provisions for VMS data for scientific purposes that have essentially been the same in the last 4 drafts of the document were adopted as recommended. The only modification was that Japan indicated that to get the data in the Northwest quadrant requires the permission of the flag State.

Data Buoys

29. The US put forward a proposal on Damage to Data Buoys by Fishing Vessels for consideration by TCC5. This proposal was designed to try and protect critical data buoys in the western and central Pacific Ocean from destruction and damage through fishing activities. This proposal underwent significant revisions due to comments received from other CCMs that were supportive of a more stringent measure. The current revision now requires CCMs to prohibit fishing vessels from fishing within one NM of or interacting with a data buoy in the high seas of the Convention Area. It also requires CCMs to prohibit vessels from taking buoys on board and keep watch for moored buoys to avoid entanglement. There was general support for the intent of this measure and several supportive comments across the floor. One CCM requested that we add a scientific research exemption. Other CCMs identified other changes that they would like to see. Comments will be provided to the US intersessionally and the draft measure will move forward for further consideration at WCPFC6.

IUU List and Procedures (Para 3j, Stateless Vessels and Control of Nationals)

WCPFC Provisional IUU Vessel List

30. There were 15 vessels included on the WCPFC Draft IUU Vessel List at the beginning of TCC5 – four of them proposed by the United States. At the conclusion of TCC5, 13 of those vessels were included on the Provisional IUU Vessel List. There were two vessels on the 2008 WCPFC IUU Vessel List – the *Jinn Feng Tsair No. 1* and *Daniela F* – and TCC5 recommended that both remain on the WCPFC IUU Vessel List.
31. The US proposed four vessels for inclusion in the WCPFC Provisional IUU Vessel List – *Chia Shun Hsing No. 6*, *Jin Ha Fu No. 10*, *Maan Feng Yu No. 36*, and *Lina*. The *Lina* was also proposed for listing by France. The *Lina* was recommended for listing on the WCPFC Provisional IUU Vessel List by consensus of TCC5.
32. At the beginning of TCC5, the US had a settlement in principle with the three remaining vessels, all flagged to Chinese-Taipei. With the consent of the chair, the US presented the case for each vessel, but asked that the decision on all three vessels be postponed to the end of the meeting in order to provide time for the settlements to be finalized. At the conclusion of the meeting, the US was able to report that the settlement had been finalized for the *Jin Ha Fu No. 10* and therefore the US withdrew its recommendation that the vessel be included on the WCPFC Provisional IUU Vessel List. Unfortunately, the settlements with the two other vessels could not be finalized in time to remove them from consideration, so the TCC5 recommended that they be included on the WCPFC Provisional IUU Vessel List until such time as the matter was settled to the satisfaction of the US. The US will likely request that both vessels be removed from the Provisional List prior to WCPFC6.
33. New Zealand proposed seven vessels for inclusion on the WCPFC Provisional IUU Vessel List – *Rong Yuan Yu 86*, *Rong Yuan Yu 87*, *Rong Da Yang No. 6*, *Rong Da Yang No. 7*, *Rong Da Yang No. 8*, *Rong Da Yang No. 9*, and *Yuh Chang No. 3*. Their proposals garnered a fair amount of discussion and controversy because each vessel was proposed for listing as a result of fishing on the high seas of the Convention Area will not on the WCPFC Record of Fishing Vessels (RFV). The first six boats were flagged to China and China asserted that it attempted to include the vessels on the RFV, but due to a variety of technical problems was unable to do so. New Zealand, and much of FFA, supported the listing of these vessels, even though responsibility may lie with the flag state and not the vessel. Their position was that the flag state should not

authorize vessels to fish on the high seas of the Convention unless and until the vessel is included in the WCPFC RFV. New Zealand also stressed that IUU Listing was the only available course of action to send a message to the flag State.

34. The US, EC and Asian-DWFNs expressed their discomfort with punishing individual vessels for failures on the part of the flag State. In addition, the US and others stressed that the RFV is not what authorizes a vessel to fish on the high seas of the Convention Area, but rather it is the flag State that makes that authorization. Therefore, so long as the flag State authorizes the activity, technical problems with the WCPFC Secretariat are not a sufficient basis for IUU listing of a vessel. A majority of TCC5, however, supported inclusion of this vessel on the WCPFC Provisional IUU Vessel List. A minority did not support inclusion. While the US expressed its concerns with the general principle, it did not actively support or oppose the listing.
35. The seventh vessel proposed for listing was flagged to Chinese-Taipei. This vessel also fished on the high seas of the Convention Area while not included in the RFV. However, it quickly became clear that Chinese-Taipei had attempted to include this vessel in the RFV, but the WCPFC Secretariat refused to include it due to what it considered insufficient information. However, the Commission has not established any minimum standards for required information before a vessel is included in the RFV. The US, and several others, believes that the Secretariat erred by not including the vessel in the RFV. Therefore, the US, EC and Asian-DWFNs opposed the inclusion of this vessel on the WCPFC Provisional IUU Vessel List. However, a majority, composed primarily of FFA members, supported inclusion and the vessel was included.
36. France recommended four vessels for inclusion on the WCPFC Provisional IUU Vessel List – *Taiho Maru*, *Lina*, *Senta*, and *Minako*. These listings involved two sets of carrier vessels receiving fish from fishing vessels not registered on the WCPFC RFV. As discussed above, the *Lina* was included on the list. After further negotiations with Japan, France withdrew its proposal to list the *Taiho Maru*. These listings also generated some discussion as there was confusion as to whether such activities were ripe for IUU listing. By the end of the discussion, it was generally understood that paragraph 3(i) of CMM 2007-03 (IUU Listing CMM) operates essentially as a catchall provision for violations of CMMs not specifically identified in the remainder of paragraph 3. Despite that, support for these listings remained fairly tepid however, eventually a majority of CMMs supported inclusion of these vessels on the WCPFC Provisional IUU Vessel List. The US did not actively support or oppose these listings.
37. The final vessel under consideration was the Chinese-Taipei flagged vessel *Yu Fong 168* proposed for inclusion by RMI. The vessel was documented fishing illegally inside the RMI EEZ. Despite efforts by both RMI and FSM to apprehend the vessel, it was able to get away, after ramming a patrol vessel. There was overwhelming support by almost every member of TCC5, including Chinese-Taipei, to include the vessel on the WCPFC Provisional IUU Vessel List. While RMI appreciated the support, it made the key point that IUU listings are a reflection of failure, not success, and that IUU listing does nothing to make the RMI whole for the violation occurring in its waters.

CMM 2007-03

a) paragraph 3(j)

38. At its last meeting, based on a recommendation from TCC4, the Commission agreed to suspend the application of paragraph 3(j) of the WCPFC's IUU Vessel List measure given concerns that were raised by Korea over issues of due process and the potential serious economic implications

of its use. Paragraph 3(j) permits a vessel to be ripe for listing on the WCPFC IUU Vessel List by virtue of being under the control of the owner of any vessel that is on the WCPFC List, even if it itself has not engaged in IUU activities. The application of 3(j) was suspended until TCC5 pending the development of procedures to guide its use. No progress was made on this issue intersessionally other than the production of a legal consultant's paper on the subject. TCC5 briefly considered the consultant's paper on this issue, but did not discuss the issue in any detail.

39. Given the complexity of the issue, and the various issues raised, most CCMs wished for more time to study the paper and its proposals for addressing it (such as through amending CMM 2007-03 to create a separate procedure for so-called "3(j)" vessels). TCC5 recommended that issue be discussed in detail at TCC6 and that in the interim the application of 3(j) be suspended again. A majority of CCMs wished for it to be clear that this be the final time 3(j) would be suspended but a minority held a different view, and so there was no consensus recommendation of the TCC on this point. The U.S. expressed that the Commission needed to identify how this complex issue would be progressed intersessionally in 2010 so that TCC6 would be prepared to make specific recommendations to address the various concerns in a practical and fair manner, and which did not undermine the utility of the WCPFC IUU Vessel List.

b) paragraph 15

40. Tonga introduced a proposed to amend paragraph 15 of CMM 2007-03. Paragraph 15 identifies the three reasons why a vessel would *not* be included on the WCPFC Provisional IUU Vessel List. The third reason, in paragraph 15(c), currently states that the vessel will not be included on the provisional list if it has been resolved to the satisfaction of the listing State and the flag State. Many coastal States agreed that the satisfaction of the flag State is not an appropriate consideration, but that the focus should be on the satisfaction of the coastal State. Therefore, Tonga proposed to revise paragraph (c) so that when the violation at issue occurred inside the EEZ of CCM, flag State satisfaction was eliminated as a consideration. The majority of CCMs at TCC5 supported Tonga's proposal, however a minority needed additional time to review the document. Therefore, it will be moved forward for final consideration and adoption, if possible, at WCPFC6. The US supported Tonga's proposal.

Control of Nationals

41. New Zealand proposed a new CMM on Control of Nationals in order to ensure that flag states are taking appropriate action against their nationals who own, control, command or operate fishing vessels alleged to have engaged in IUU activities or serious violations under the Convention in the high seas of the Convention Area. The US had several proposed changes to the draft CMM which were accepted by New Zealand. Despite some support for the measure, there were some CCMs that needed more time to review and consult with legal counsel before they could agree to the measure. Therefore, comments will be received intersessionally and the draft measure will move forward for further consideration at WCPFC6. The US is generally supportive of the measure, and said so at TCC5, but will be interested to see how the measure evolves at WCPFC6 before giving finally acceptance.

Vessels without Nationality

42. The US put forward a proposal for a new CMM on vessels without nationality. This CMM states that vessels without nationality that fishing in the high seas of the Convention Area are presumed to be undermining the WCPF Convention and its conservation and management measures. It encourages CCMs to take all necessary measures, including enacting domestic legislation, to

prevent vessels without nationality from undermining the CMMs adopted by the Commission. It also encourages CCMs to board, inspect and when the evidence warrants, take such action as may be appropriate. Should the Commission adopt this measure, it will give the US additional tools to take effective enforcement action against stateless vessels using existing legislation. It will also allow other member countries that have enacted laws similar to our Lacey Act to take enforcement action. There was no opposition to our proposed measure and some support from other CCMs, however FFA members requested additional time to review the measure. Comments will be provided to the US intersessionally and the draft measure will move forward for further consideration at WCPFC6.

Catch Documentation Scheme

43. Despite the development and implementation of a catch documentation scheme being identified as a priority item for TCC5 – the matter actually received relatively little attention during the meeting. This issue, which the Commission has grappled with in various fits and starts since 2004, has some priority for members given the implementation of an EC regulation that is to be implemented on January 1, 2010. The TCC recommended to the Commission that the matter be taken up as a priority matter in 2010 (again!) and despite the US attempting to get the chair to provide some procedural rigor to the TCC's recommendation – absent a push in Tahiti – the matter may languish for yet another year.

Sea Turtles

44. The TCC accepted and endorsed the suggestions of the SC5 with regard to the sea turtles CMM adopted in 2008. Australia provided both a revised management plan for its Eastern Longline fishery (which takes turtles in the Convention area), as well as a table that breaks down the by-catch of the various species of turtles between the deep and shallow set components of that fishery. These data seem to suggest that they may have to implement the circle hooks or fish bait provisions for the shallow set component of their fishery in the next two or three years.