



**IMPLEMENTATION OF CMM 2013-06 AND DISPROPORTIONATE BURDEN
WORKSHOP**

Faleata Sports Complex, Apia, SAMOA
27 November 2014

WORKING PAPERS FOR WCPFC WORKSHOP ON DISPROPORTIONATE BURDEN

WCPFC11-2014-DBW-05

3 November 2014

Papers submitted by FFA Members

CCMs should note there are three parts to this document:

1. A cover letter from FFC Chair, Mr Feleti Tulafono, on behalf of FFA Members;
2. Attachment 1: Working Paper on conceptual issues on Disproportionate Burden;
3. Attachment 2: Working Paper on Applying CMM 2013-06, with suggested “template” for CCM proposals



1 November 2014

Dr SungKwon Soh
Interim Executive Director
Western and Central Pacific Fisheries Commission
PO Box 2356, Kolonia
Federated States of Micronesia

Dear SungKwon,

Working Papers for WCPFC Workshop on Disproportionate Burden

I am writing on behalf of the 17 members of the Forum Fisheries Agency in my capacity as Chair of the Forum Fisheries Committee.

FFA members offer our thanks to the Secretariat for organising the upcoming WCPFC workshop on Disproportionate Burden. This is an issue of critical importance to SIDS to ensure that the Commission is able to continue its progress of agreeing and implementing management measures that will result in responsible management of the region's tuna stocks while also ensuring that the direct and indirect impacts on SIDS are assessed and managed.

Please find attached two working papers that FFA members have prepared as inputs to the workshop.

Working Paper 1 is a general introduction to the issue and responds to some of the questions that have been raised on this issue in discussions about Disproportionate Burden to date. This follows on from the Delegation Papers that we submitted to WCPFC10 last year (DP-01 and DP-33) and we commend those papers to CCMs as well.

Working Paper 2 is more focussed on CMM 2013-06. It provides FFA views on the questions raised by the Executive Director in Circular 2014/56, as well as a "template" that CCMs could use when submitting proposals.

FFA members would appreciate the opportunity to present these papers to the upcoming workshop as well as to make a more general presentation on the concept of disproportionate burden.

CCMs will note that FFA members have given serious consideration to CMM 2013-06 in all the proposals we have submitted to TCC10 and WCPFC11 and we strongly encourage any CCM submitting proposals to do likewise.

Please circulate this information as appropriate.

Yours Sincerely

A handwritten signature in cursive script, appearing to read "Feleti Tulafono".

Feleti Tulafono

Chair

Forum Fisheries Committee

Attachment 1

Working Paper on conceptual issues on Disproportionate Burden

This working paper has been prepared by FFA members to initiate discussions amongst CCMs at the WCPFC Disproportionate Burden workshop. It is set in the form of question and answer, based on issues that have arisen in discussions to date.

What is the definition of a Disproportionate Burden? Fisheries decisions and measures are so highly contextualised that a high degree of flexibility is required in how any Disproportionate Burden is identified and dealt with. It is possible to identify at least two broad categories of disproportionate burden that can flow from CMMs:

- Administrative burden – where SIDS would need to absorb unreasonable additional costs or administrative burden in order to implement a CCM. This is perhaps the most common form of disproportionate burden. It has become even more important that SIDS ensure that they do not agree to measures that they don't have the capacity to implement since the development of the Compliance Monitoring Scheme. SIDS have small administrations with little additional financial or human capacity, so what may seem like small incremental implementation requirements actually place a heavy burden. Administrative burden in many cases can be mitigated through identification of assistance mechanisms (new or existing).
- Outcome burden – This is where a measure results in direct (lost access revenue or reduced rights) or indirect (extra barriers to increasing participation in the fishery) costs. The magnitude of outcome burden may be difficult to quantify but is usually very high because of the large value of tuna fisheries and the very high reliance of many SIDS on that value. Outcome burden is likely to vary significantly between individual SIDS based on their level of reliance and the fisheries that they do, or could benefit from. Outcome burden is also far more difficult to resolve than administrative burden (further explanation below).

How can Disproportionate Burden be identified? The nature of any assessment will need to be tailored to the case at hand. However, as a general principle, FFA members advocate that an assessment must be conducted of the flow of costs and benefits to each CCM, or group of CCMs. Once that has been done, even at a broad or qualitative level, it is easier to draw a picture of whether the measure will come at a net loss to SIDS, and therefore whether there is a Disproportionate Burden.

What does “disproportionate” mean – or how is proportionality assessed? There are examples of proportionality tests in other aspects of international and domestic law – usually for testing whether a particular regulatory action is worth it for the magnitude of the issue it seeks to resolve. These may provide useful guidance in some situations, but yet again, WCPFC will need to come to terms with using different methods in different contexts. Some examples may include:

- The costs to SIDS compared to the benefits that they reap from the conservation action (proportionality in cost/benefit to SIDS);
- The costs/benefits to SIDS compared to the costs/benefits to non-SIDS (proportionality in WCPFC wide distribution of cost/benefit);
- The net burden borne by SIDS and their total benefit from and reliance on fisheries compared to that for non-SIDS (proportionality in affordability between SIDS and non-SIDS); or
- Numerous other possibilities.

Who are we assessing? As explained above, in order to see whether there is a Disproportionate Burden on SIDS, it will at least sometimes be necessary to have an understanding of the implications to others. The very important distinction here though is that the assessment must be at the CCM level. To date, and particularly in the case of tropical tuna management, discussions have fallen to comparing costs and benefits at the fleet level (purse seine vs longline). While this will sometimes be necessary for quantification purposes, it must be then translated to the impact on CCMs themselves in order to assess whether there is a Disproportionate Burden on SIDS or not.

What are some examples of disproportionate burden?

- FFA members have actively avoided implementation of the FAO Port State Measures Agreement through a WCPFC CMM as it would place a disproportionate administrative burden on SIDS. That is, such a CCM would impose high costs on SIDS to train port inspectors and develop processes and systems to guide inspections and comply with reporting obligations. While there are some benefits to SIDS through reduced IUU fishing, these are largely intangible and are shared by all Commission members, including those who do not face the burden of implementation.
- The FAD restrictions in CMM 2013-01 place a disproportionate outcome burden on SIDS. This is because they impose direct and substantial costs on SIDS by reducing the profitability of purse seine vessels that fish in EEZs and therefore result in decreased ability for SIDS to capture rent. There is also an indirect disproportionate outcome burden through reduced ability to develop domestic fleets in circumstances of management driven inefficiency. In contrast to these costs, most SIDS do not gain commensurate benefits from bigeye conservation, because the majority of the bigeye-targeting fishery is foreign flagged vessels, fishing on the high seas and servicing markets in highly developed countries.

What should be done if there is a Disproportionate Burden? As far as possible, Disproportionate Burden should be removed in the design phase. This is achievable by tailoring the nature of management measures in ways that adjust the flow of costs and benefits to SIDS. Again, this will be very different in each case, but by way of example, FFA members supported strict measures for purse seine vessels and longliners operating on the high seas as part of what is now 2013-01. Those measures would have achieved a dual purpose of contributing to bigeye sustainability while also reducing Disproportionate Burden on SIDS (because high seas restrictions do not come at such a high cost to them).

Alternatively, if the measure itself cannot be tailored to remove the Disproportionate Burden, then mitigation measures may be required – as part of the measure. These could include SIDS exemptions (although these have a very specific application to domestic fleets only whereas Disproportionate Burden is a far wider issue), transfer payments (although this is not a preferred option compared to longer term solutions), technical support and capacity building.

Attachment 2

Working Paper on Applying CMM 2013-06

This working paper has been prepared by FFA members to set out our views on the application of CMM 2013-06. This paper uses the series of questions set out in WCPFC Circular 2014/56 as the basis for consideration. Annex 1 builds on the information herein by providing a “template” that CCMs could use when presenting proposals to WCPFC.

As an overall rider, FFA members note that each and every decision of the Commission is different, meaning that implementation of this measure will need to be flexible, but fair.

Throughout this paper, the term “SIDS” should be taken to include Territories.

Response to specific questions:

1. Who should undertake the assessment? For the most part, proponents of any CMM or other decision should undertake at the very least a preliminary assessment against the criteria in 2013-06. This is consistent with the suggestion from FFA members in WCPFC10-DP01. We fully appreciate that in some cases a proponent will not have the information available to do a comprehensive or quantitative assessment against some of the criteria, and this should not stop them from submitting a proposal. Having said that, Article 1 of CMM 2013-06 specifically requires CCMs to take into account the special requirements of developing states in the development of CMMs. On this basis, proponents should reasonably be expected to have given specific attention to the criteria in CMM 2103-06 in the development of a proposal for a CMM. Once a proposal is under consideration, it becomes the responsibility of the Commission at large to undertake the necessary assessments as decisions can only be taken if all CCMs are satisfied that there is no disproportionate burden.
2. Who does the proposal apply to? At present there are CMMs that apply to all CCMs, port State CCMs, coastal State CCMs, flag State CCMs and the Commission Secretariat. This should be simple for the proponent to identify.
3. What are the impact assessment criteria? In order to assess the relative impact on SIDS, the Commission must also have an indication of the impact on other CCMs, and more importantly of the benefits to each CCM (or each group of CCMs). The assessment criteria will vary widely depending on the nature of the proposal.

FFA and PNA members provided broad-scale assessments of costs and benefits to different groups of CCMs arising from proposals for 2013-01 in WCPFC10-DP01 and –DP33 respectively. In particular, DP33 identifies the CCMs that will be impacted by the measure according to broad groups (EEZ purse seine, high seas purse seine, longline and “other” fisheries). It then follows the suggestion of DP01 and conducts a qualitative assessment of which groups benefit and which groups bear the costs of the proposals.

While more detail and quantification would be very useful (and was possible in DP33), FFA members acknowledge that this will not always be the case and therefore expect that proponents will address the impact assessment in as much detail as possible and in good faith.

4. Reference to “other international organisations”. As stated in the circular, this needs to be determined on a case by case basis, but in general there are many non-fisheries legal instruments that set useful precedents for mitigating cost to developing States. For example, FFA members used the financing mechanism under the *Montreal Protocol* as an example of international cooperation to allow developing States to address a global problem that would have otherwise been unaffordable. Fisheries issues are becoming ever more complex, and innovative solutions, such as adaptation of mechanisms that have worked in other sectors will be essential to allow WCPFC to overcome the growing challenges.
5. Will proponents have sufficient information to assess impacts on domestic development or will it need to be done by a committee? The point is valid, but again, FFA members expect that the proponent should have enough of an idea of potential impacts on the development opportunities of SIDS to be able to provide a broad initial assessment. SIDS and territories are seeking assurance that proponents have given thought to these issues. If no assessment is conducted, even at a broad level, it suggests a lack of commitment to the special requirements of SIDS and territories. Once a proposal is under consideration, it becomes the responsibility of the Commission at large to undertake the necessary assessments as decisions can only be taken if all CCMs are satisfied that there is no disproportionate burden. (This essentially covers 6 and 7 as well)
8. Identification of mitigation measures. The circular is correct that this refers to the mitigation of disproportionate burden and that this should be simple for the proponent to identify. Again, DP01 and DP33 provide examples.
9. Assistance mechanisms. There is a strong linkage between this paragraph and CMM 2013-07, but FFA members also note that individual CMMs will likely need to contain specific mechanisms to remove, avoid or compensate disproportionate burden.
10. Onus of proof for disproportionate burden. The revised text proposed in the circular more appropriately reflects the intention of this paragraph. That interpretation is directly consistent with Article 30(2)(c) of the Convention, and paragraph 3 of CMM 2013-07 that explicitly make this a Commission-wide responsibility.
11. Compensatory mechanism. Discussions on the need for, nature of and arrangements around any such fund would be discussed by the Commission on a case by case basis and would be informed by items 5 to 9 above.
12. Relevance of Paragraphs 361 (“similar considerations to non-SIDS”) and 407. FFA members thank the WCPFC Secretariat for raising this important issue and in particular the concern of FFA members in Paragraph 407. The actual intervention, made by Palau that led to this paragraph was as follows:

"Chair, I would like to make a statement about small island developing States and have it reflected in the record of this meeting. Firstly, in response to a comment by the US about Territories, we acknowledge the need to include them in our terminology. For us, when we say SIDS, we mean SIDS and Territories.

Even though SIDS issues have been of such prominence in our discussions this week, there is a trend emerging that is of grave concern. That trend is flippancy towards SIDS issues. There have been references to others being of a similar nature to SIDS, either geographically, or for some other reason. This is evidenced by the agreement language proposed by Japan in relation to its coastal communities and the insertion of Indonesia in the SIDS exemptions from the capacity measure.

Chair, SIDS have a special legal status under international law, and it is one that should be respected and not trivialised. I say this with the greatest respect to other States and communities and without belittling the economic and social challenges that they face. But the fact of the matter is that our Convention, and many other international legal instruments afford certain protections to SIDS, and these must not be undermined through a practice that places other groups at the same level."

FFA members continue to support this statement, while also reaffirming that we acknowledge that non-SIDS also face challenges. FFA members are prepared to give similar consideration to small coastal communities, but that must not come at the expense of the commitment to SIDS themselves under Article 30 and CMMs 2013-06 and -07. Similar consideration means that the Commission should be mindful of identified impacts on such communities, but does not place the same legal obligation on the Commission, nor on proponents of measures.

Conclusion:

FFA members' view is that the criteria set out in CMM 2013-06 are simple and flexible enough that any proponent of a proposal should be able to use them in an assessment. FFA members commenced doing this in our proposals to TCC¹ and we commend those examples to CCMs as additional guidance.

¹ See TCC10 DP 01, DP06 and DP07 for examples

Annex 1 to Working Paper on Applying CMM 2013-06

“2013-06 Template”

FFA members strongly encourage proponents of new proposals to consult with SIDS, either directly, or through the FFA Secretariat to inform the completion of an initial assessment against the questions in the CMM 2013-06.

a. Who is required to implement the proposal?

Identify here whether the proposal is required to be implemented by flag States, coastal States, all CCMs, the Secretariat or others. Identifying the CCMs that will be involved in implementing the proposal is the first step towards determining whether there is a burden on SIDS.

b. Which CCMs would this proposal impact and in what way(s) and what proportion?

Impacts can flow to CCMs in any number of ways, including direct financial and capacity impacts of having to implement a CMM, and ranging to more substantial impacts that effect Government revenue or impact upon development opportunities. It is equally important in this section to highlight where long term benefits may accrue to CCMs as a result of the proposal.

c. Are there linkages with other proposals or instruments in other regional fisheries management organizations or international organizations that reduce the burden of implementation?

This section is an opportunity to identify whether there are any processes or instruments that have a bearing on the proposal or how it may be implemented. This includes whether there are existing measures in the region that require compatibility, or whether there are instruments or processes in other fisheries (and even non-fisheries applications) that could provide useful perspective on how to manage a particular burden.

d. Does the proposal affect development opportunities for SIDS?

This section is particularly focussed on the development of domestic fleets and processing industries. Proposals that place restrictions on the ability of SIDS to increase their direct participation in fisheries, whether on the high seas or EEZs will have impacts on development opportunities and this needs to be explored here.

e. Does the proposal affect SIDS domestic access to resources and development aspirations?

This is similar to the previous section, but broader. As well as the impacts on existing or potential domestic participation, this section allows for identification of elements of the proposal that may result in decreased ability of SIDS to secure other benefits from the fishery, including access revenue and food security.

f. What resources, including financial and human capacity, are needed by SIDS to implement the proposal?

This section responds directly to any “administrative burden” (see Paper 2) that flows from the proposal. Proponents should seek to identify where proposals will require specific actions, services, reporting, training, systems or procedures that are likely to be new to SIDS.

g. What mitigation measures are included in the proposal?

Proponents should seek to include specific provisions in the measure itself to remove any disproportionate burden. This will include specific provisions to reduce outcome costs or increase outcome benefits to SIDS.

h. What assistance mechanisms and associated timeframe, including training and financial support, are included in the proposal to avoid a disproportionate burden on SIDS?

This section again relates to “administrative burden” as identified in section (f) above. Where there will be costs to SIDS to implement a measure, assistance mechanisms should be identified upfront. This section is vital to ensure that SIDS have the capacity to fully implement agreed measures.