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A DISCUSSION PAPER TO INFORM FAD MANAGEMENT OPTIONS FOR THE WCPFC

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By Chair - FAD Management Options Inter-sessional Working Group

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1. Introduction

There has been much talk at the Western and Central Pacific Fisheries Commission and indeed, in other regional fisheries management organizations (RFMOs) around the use of fish aggregating devices (FADs) and their impact on fish stocks. This paper represents the Chair's thoughts on progressing the FAD management options discussion. The paper is intended to initiate discussions with respect to the last remaining Term of Reference for the working group. The paper is divided into two sections.

The first section on Management Framework attempts to take a step back and look at the issue of FADs as fishing gear. The intent is to take a different look at the issue and raise key questions relating to the management of FADs, as well as, facilitate discussion on options that may be advanced through any future activities of the working group.

The second section on Current Management Options attempts to look at what is currently available and suggestions on options that may be advanced through any future activities of the working group.

2. Management Considerations

2.1 Management Framework

2.2 1982 United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS established the legal framework for ocean governance. The UNCLOS establishes the basic rights and duties of states in relation to all maritime activities and it is for that reason that it is an important instrument for the purposes of regulating commercial fishing and conservation of marine biological diversity beyond areas of national jurisdiction. Furthermore, many

¹ Informal discussion has been had with a legal advisor in the formulation of this discussion paper.

of the instruments relating to ocean governance make reference to the UNCLOS, either explicitly through their provisions or indirectly through dealing with issues covered by the more general provisions of the UNCLOS. Because the UNCLOS covers almost all aspects of marine activity and has close to universal participation, it remains of constant relevance also for the other instruments covered in this paper.

2.3 Fishing on the High Seas

The water column beyond national jurisdiction is known as the high seas. The high seas are open to all states and they are subject to the so-called freedom of the high seas, including freedom of navigation and freedom of fishing. It follows that all states have a right for their nationals to fish on the high seas. However, this freedom is not unrestricted and it must be exercised subject to the conditions laid down in the Convention and other applicable rules of international law (Article 116).

In particular, the Convention places an obligation on states to cooperate with other states for the purposes of conservation and management of high seas living resources. To this end, they are expected to enter into negotiations on conservation and management measures or cooperate in establishing and participating in a regional or sub-regional fisheries organization (Article 118). States will be obliged to comply with any measures that they agree in this context. Yet, even in the absence of agreed cooperative measures, the UNCLOS requires that individual states must adopt conservation measures in relation to nationals involved in fishing on the high seas. Although it could have a potentially wider scope, a national in this context is largely concerned with vessels flying the flag of a particular state. This obligation to take conservation measures is important because the flag state has exclusive jurisdiction over vessels flying its flag on the high seas (Article 92(1)). The concept of nationals may also be interpreted in a broader manner, however, to include operators or beneficial owners of fishing vessels.

Steps to be taken by states in relation to vessels flying their flag are identified in Article 119 of the UNCLOS and they include the setting of an allowable catch and other conservation measures designed to ensure the long-term sustainability of populations of harvested species, as well as associated or dependent species. The UNCLOS does not specify precisely what measures may be taken by states to achieve this end, although it explicitly says that flag states should take into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards. There is no clear definition of 'generally recommended international minimum standards', but the fisheries instruments discussed below which have been

agreed by consensus would fall into this category. The flag state is also required to exchange catch and fishing effort data with other states.

2.4 UN Fish Stocks Agreement

The objective of UNFSA is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the LOSC. Highly migratory species must be understood by reference to Article 64 of the LOSC and the list in Annex I of that treaty. Straddling stocks is also generally understood to refer to stocks which occur both within the exclusive economic zone and in an area beyond or adjacent to the zone, in accordance with Article 63(2) of the LOSC.

Part II of UNFSA establishes a set of rights and obligations for states for conservation and management, which would apply to fishing vessels as well as the protection of marine biological diversity.

Under Article 5(d), states are required to assess the impact of fishing on target stocks and species belonging to the same ecosystem or associated with or dependent upon target stocks. In addition, measures shall be taken to prevent or eliminate over-fishing and excess capacity and to ensure that levels of fishing effort do not exceed those commensurate with sustainable use of fishery resources. States shall monitor their fishing capacity, and establish adequate schemes or measures to address excess capacity when needed. States are further required to collect, share and complete accurate data concerning fishing activities on, among other things, vessel position, catch and fishing effort, as set out in Annex I to the agreement, as well as information from national and international research programmes.

Article 7 obliges states to develop conservation and management measures that are compatible for the high seas and waters under national jurisdiction. Adoption of compatible conservation and management measures is essential because straddling fish stocks may occur both within and beyond the national waters or may be available outside at one time and inside at another, with the consequence that amounts taken within areas under national jurisdiction may affect the catches beyond and vice versa.

Article 8(3) obliges states to give effect to their duty to cooperate (derived from the LOSC) in conservation and management by applying measures established by RFMOs. Article 8(4) further provides that only those states that participate in RFMOs or abide by the relevant RFMO measures shall have

access to the fishery in the high seas area to which those measures apply. Where an RFMO has competence, states that intend to authorize fishing shall become members of the RFMO or agree to apply the measures the RFMO adopts.

This restricts the concept of freedom of fishing in areas beyond national jurisdiction. This duty should be implemented by requiring that conservation and management measures or equivalent measures are adhered to when vessels operate in an area managed by an RFMO.

Article 18 provides for flag state duties concerning control over fishing vessels. Paragraph 1 imposes the basic obligation for a flag state to ensure that vessels flying its flag comply with RFMO measures and do not undermine the effectiveness of such measures. The measures to comply with would be defined by the relevant RFMO and the flag state would be responsible for transposing those measures into its domestic law in accordance with their due diligence obligations under the LOSC (see above). Paragraph 2 provides that a flag state shall authorize its vessels to fish on the high seas only when able to exercise their duties in accordance with the LOSC and UNFSA.

2.5 Jurisdiction and Control of Vessels on the High Seas

The obligations in relation to high seas fishing are supplemented by more the general obligation in Article 94 requiring flag states to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’ It is through the implementation of this obligation that states fulfill the requirement in Article 91 of the UNCLOS to establish a genuine link with vessels flying their flag.

The obligation under Article 94 includes a duty to ‘maintain a register of ships containing the names and particulars of ships flying its flag’ and ‘assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew.’ In interpreting the obligation, ITLOS has made clear that the flag state must adopt the necessary legislation in order to establish the necessary register and to require registered vessels to comply with relevant regulations. Legislation must also include ‘enforcement mechanisms to monitor and secure compliance with these laws and regulations’ and ‘sanctions applicable to involvement in [Illegal, Unregulated and Unreported (IUU)] fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.’

2.6 Fisheries Access to EEZs and Licensing

In 1982, the United Nations Convention on the Law of the Sea legally recognized the rights of coastal and island states over the marine resources that swim within 200 miles of their shores, an area officially designated as an 'Exclusive Economic Zone' (EEZ). While the Law of the Sea granted coastal states rights over tuna resources within their 200-mile zones, this sovereignty came with two caveats. First, coastal states were required to cooperate (with each other and with foreign fishing interests) to manage the highly migratory species. Second, coastal states were required to allow access to distant- water fleets if they could not adequately harvest the fisheries themselves.

Coastal states have used their rights to limit access and provide authorize foreign flagged fishing vessels to harvest fish in their EEZs in return for the statutory regulatory fees and fisheries economic rents. The limited access and authorizations through a licensing and registration regime was incorporated and utilized controls such as restrictions on vessel numbers, gear type, duration of fishing season, vessel size etc.

2.7 FADs are fishing gear

In consideration of the above and in recognition that FADs are used as part of tuna purse seine fishing operations, by extension FADs become part of the fishing gear onboard or employed by a particular fishing method but acts independently of the fishing vessel that deployed it.

2.8 FADs fishing under assignment of fishing vessel license

With respect to FADs being fishing equipment employed by a particular fishing method that acts independently of the fishing vessel that deployed it, the company that owns or operates the FAD is using a license provided by a coastal state under an access agreement under an assignment from the company that owns the fishing vessel who hold the license.

2.9 Key questions relating to the management of FADs

The questions then posed with respect to FADs as fishing gear become:

Does a FAD in the water constitute fishing?

Is the FAD fishing by assignment of the fishing vessel authorization?

If a FAD is fishing independently of the fishing vessel that deployed it, is it subject to the same considerations as a fishing vessel with respect to Article 94 of UNCLOS regarding the need to maintain a register?

If a FAD is fishing independently of the fishing vessel that deployed it, is it subject to the same considerations as a fishing vessel with respect to Articles 5 and 7 of UNFSA regarding the need to manage capacity of FADs?

3. Current Management Tools

3.1 FAD Management Plans

FAD management should form part of an effective and cooperative fisheries management plan. Governments and fisheries departments should also develop policies and legislation in a participatory manner on FAD ownership, management and rights-based use. This should cover any limits on FAD numbers, permitted fishing gear and techniques, marking of FADs using lights to prevent boat collision and how fishers will be informed about FAD locations. In addition, rules on on-shore FAD disposal, the type of materials that can be used to build them as well as sanctions for not abiding by regulations should also be included.

Pursuant to paragraphs 13 and 19 above of CMM-2008-01, FAD management plans were to be submitted by 1 July 2009, CCMs fishing on the high seas were to submit to the FAD Management Plans for the use of FADs by their vessels on the high seas. These Plans should have include strategies to limit the capture of small bigeye and yellowfin tuna associated with fishing on FADs, including implementation of the FAD closure. The Plans shall at a minimum meet the Suggested Guidelines for Preparation for FAD Management Plans for each CCM (Attachment E).

In 2011, The Pew Charitable Trusts assessed the status of CCMs' submission of Fish Aggregating Device Management Plans to the WCPFC and prepared a paper that analyzed gaps in the plans against minimum criteria recommended by the Commission. That paper is available on the webpage for TCC7 (WCPFC-TCC7-2011-OB-01).

However, an updated gap analysis shows that as an information gathering tool, FAD Management Plans have not been adequate. No CCM has met the minimum criteria for the plans. In addition, the plans range widely in format and in the specificity of information.

3.2 FAD Closures

Time-area closures are a fisheries management tool utilized in several fisheries. The concept of a FAD closure period was initially incorporated as part of CMM-2008-01 and the various iterations of the tropical tuna measure that have been adopted. Initially a two-month closure it has been extended to currently being four months in length.

The application of FAD closures has brought to light a number of issues including the need for better spatial management considerations and distortions to the market for fish supply.

3.3 FAD Registration, Tracking and Monitoring

The PNA has recently commenced a trial under which all FADs deployed by vessels registered on the VDS register are required to be fitted with satellite buoys, and to report their position to PNAO. The new scheme follows a 'proof of concept' research trial undertaken in 2013, which confirmed it was technically feasible to track FADs through FIMS. PEW Charitable Trusts have provided a report on FAD Tracking systems to the working group.² This system will allow fisheries managers and scientists to monitor FAD use in near real time. It will also expand management options.

The scheme was introduced in 2016 with the aim, amongst other things, of facilitating the charging of differential VDS fees for days in which FAD sets were made. Registration of satellite buoy details is undertaken directly by industry through PNA's web-accessible information management system FIMS.

3.4 FAD Charging

² <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2014/09/electronic-tracking-of-fish-aggregating-devices>

PNA Parties have expressed the intention to implement a FAD charge to achieve two equally important shared objectives: (1) to reduce bigeye overfishing, and (2) to begin reducing the disproportionate burden of existing measures for bigeye conservation on PNA Parties.

The FAD day charge is intended to place a disincentive on FAD use. Using this approach, no total FAD day limit or total FAD fishing limits needs to be set for the PNA region or for individual EEZs, or requirements to close FAD fishing when zone or region limits are reached.

3.5 Key question relating to management of FADs

The use of seasonal closures and FAD charging as management tools have been approached with a view towards limiting the number of FAD sets. The Suggested Guidelines for Preparation of FAD Management Plans and the discussions around FAD marking and monitoring have been approached with a view towards limiting the number of FADs deployed.

Whilst we await the activities listed under the FAD research plan and the additional data collection to provide the information for consideration of management options, the questions then become:

Is there value in changing the Suggested Guidelines for Preparation of FAD Management Plans to become the “Requirements for the Preparation of FAD Management Plans”?

Is there value in firmly stating the number of FADs to be deployed per year by a CCM’s flagged fishing vessel through their FAD Management Plans, as an initial step to managing the capacity of FADs?

Is there value in requiring CCMs who shall be utilizing the exemption to fish on FADs in the high seas in 2017, to submit updated management plans to be assessed for completeness against the Guidelines for the Preparation of FAD Management Plans?

3.6 Suggested way forward

4. Change the Suggested Guidelines for Preparation of FAD Management Plans to become the “Requirements for the Preparation of FAD Management Plans”.

5. The completeness of existing FAD management plans to be consistent with the agreed guidelines and specify the number of FADs to be deployed per year per fishing vessel.
6. Consistent with the recommendations with the FAD Marking and Monitoring consultancy report for CCMs to develop an identification and monitoring system for FADs as part of their FAD Management Plans.