

## **AGENDA ITEM 5 — NEW PROPOSALS**

**From: New Proposals, WCPFC Summary Report, Thirteenth Regular Session of the Commission, Denarau Island, Fiji, 5-9 December 2016, Issued 2 March 2017, Page 14 of Summary Report**

**Attachment F – Conservation and Management Measure (CCM) for the Protection of WCPFC Regional Observer Programme Observers – 2016-03  
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### **Full report of the WCPFC13 Meeting**

**<https://www.wcpfc.int/system/files/WCPFC13%20Summary%20Report%20final%20issued%2020%20March%202017%20complete.pdf>**

78. CCMs were asked to present their proposals to WCPFC13, noting that proposals addressing matters best covered under other agenda items would be presented there. Proposals requiring additional work before their adoption were given the benefit of informal discussion time throughout the meeting in small groups.

### ***Observer safety***

79. The **USA** proposal relating to observer safety (WCPFC13-2016-DP21) was worked on by a large number of CCMs and observers – over 100 – in an informal small working group which met four times in the margins of the meeting, including one session which went late into the night. On 8 December USA reported that one of the sticking points was the legally binding nature of the agreement, and noted that Japan has provided legal advice.
80. **China** noted that observer safety was paramount, and recalled the clear decision made last year that the Commission would put time into crafting an agreement. China recognised the sticking points around the legal mechanism to be used for the agreement and asked the Commission to think laterally about the issue. While it was not ideal to have something that is not binding, China commented that there may be other ways to meet the paramount objective of ensuring the safety of observers.
81. **USA** brought the draft measure to plenary for adoption on 9 December for the Commission's consideration, noting that through much effort in the working group discussions the text no longer had any square brackets.
82. **Japan** thanked the informal small working group chair, Alexa Cole (USA) for her hard work but noted legal difficulties it had in implementing the provisions in the measure. This CCM expressed sincere thanks for the special consideration for Japan through the footnotes in the measure, giving it some exemptions from the obligation to implement the provisions. Japan noted the efforts it had made to consult with Tokyo on the language which had been formulated by the Japanese delegates at WCPFC13 but considered it highly unlikely that they would receive

clear instructions before WCPFC13 closed. Japan apologised if this would undermine the Commission's efforts but there was no option but for Japan to oppose the adoption of the measure as they did not have instructions to support it.

83. **Chinese Taipei** recognised the importance of observers and supported the adoption of the measure, though noting that during discussions in the informal small working group it had expressed deep concern about definition of "harassment" and "harass". This CCM advised that the informal small working group had agreed that each CCM has the right to interpret these words with their own laws.
84. **WWF** decried the inability of the Commission to adopt the measure. Noting that this observer had hoped to be able to express admiration for the work of all involvement in getting it adopted, WWF regretted that it could not now do that. WWF stated that the Commission had abdicated its duty to the people that serve in its fisheries, gathering the critical data it uses to manage stocks. The Commission was responsible for these observers and if the Commission was really treating them as of paramount importance it should approve this measure. In six years, five observers had died doing their work. WWF had heard a lot during the informal small working group sessions about domestic legal constraints making a CCM unable to implement the measure. WWF stated that that there should be a burden of proof for this; information should be provided to the Commission as evidence of this constraint. In addition, the burden should be on CCMs to prove an observer complaint was untrue. WWF felt strongly that these issues were not esoteric; observers are human beings and the Commission owed them its protection.
85. **PNG** commented that it had the biggest observer programme in the region and it hurt when observers disappear. PNG sacrifices budget to ensure the families of those who have gone missing are taken care of. PNG expressed its gratitude to participants of the informal small working group but noted its disappointment that the measure did not have consensus as observers were human beings, not objects.
86. **RMI** supported the comments by PNG and WWF and noted that despite the push on this issue it had missed what it had hoped to achieve on observer safety. Legal constraints aside, this CCM noted that as an observer provider RMI will go out of its way to ensure observer safety.
87. **Australia** acknowledged the foregoing comments and the USA for the extraordinary effort it had put into crafting the measure. An observer safety measure would form part of the rights and responsibilities of vessel operators and captains outlined in CMM 2007-01, which already requires that ROP observers not be assaulted, obstructed, resisted, delayed, intimidated, interfered with, influenced bribed, or attempted to be bribed in the performance of their duties. The duty to render assistance and protect human life is required by UNCLOS. The International Convention on Maritime Search and Rescue outlines responsibilities

of governments related to search and rescue. Australia noted that experience has shown that these are not enough, with five deaths in six years. Observers play a critical role in meeting the Commission's responsibilities for fisheries management and are essential to ensuring the integrity of management measures. Australia considered them to be like diplomats: they must be able to conduct their jobs unimpeded and in a safe environment, free of threats and intimidation. Their personal safety is paramount. In addition, this is about human life and safety; the seas are a dangerous place. People doing work on the Commission's behalf should be able to go to their jobs and come home to their families at the end of a trip knowing that everything that can reasonably be done is being done to keep them safe. Preventative actions and education are important to ensuring observers remain safe –including providing observers with the right to refuse to board without recrimination or loss of pay if the vessel does not meet standard safety requirements; protecting them from intimidation, threats and assaults; entitling them to respect; providing access to medical care if sick or injured; immediate action and cooperation on search and rescue if an observer goes missing; prompt arrangements for the return of the body to the observer's family in the unfortunate event an observer dies. Australia considered that flag states have a responsibility to ensure regular industry education on the importance of accurate data and providing a safe environment for observers under national laws. Observer training and adequate observer insurance are also important issues, but should not stop the Commission taking action on observer safety.

88. **FSM** noted that many observers from its own observer program are placed on WCPFC vessels. This CCM was not sure how it was going to be able to place its observers on vessels without this measure, commenting that FSM needs to make sure they come back to their families.
89. **Vanuatu** voiced its concern and requested observer providers to advise what the implications were if the Commission could not get the measure through. **It asked if there would be penalties for not putting observers on vessels.**
90. **Nauru**, one of the smallest observer providers, expressed disappointment. This CCM noted the long discussions in the informal small working group, including comments from some participants that observers were just like crew. **However, Nauru stated that observers are not crew, and are not covered by the ILO Convention which is why CCMs fight for them within the Commission.** This CCM also noted the insurance issue Australia had mentioned. If Nauru did not put observers on CCMs' boats, **there was an outstanding question of whether those boats could fish.** From 1 January 2017, Nauru would be implementing this in its EEZ. This CCM questioned why Japan needed to talk with capital about the language in the measure, **noting that all CCMs come to WCPFC with a mandate and brought credentials to this effect. Nauru suggested taking the matter of adopting the measure to a vote.**

91. **Kiribati** noted that if safety of observers was not guaranteed, it could not put them on boats. This CCM supported the recommendation to put the matter to a vote.
92. **EU** noted its support for the measure and expressed disappointed that consensus could not be reached. **While EU did not think there should be exemptions, the text had taken Japan's concerns into account.** This CCM preferred consensus, not a vote, and invited Japan to reconsider its position.
93. **PNG** noted WWF's impassioned statement at WCPFC12 and how hard the Commission had worked to get the measure across the line at WCPFC13. This CCM noted that observers in the Pacific are a close knit group of people and, as an observer provider, PNG deals with them daily. PNG came to WCPFC13 with a mandate to agree this measure and asked how the Commission could value the lives of fish and not uphold the sanctity of human life.
94. **Samoa** expressed its disappointment in the delaying tactics it had observed. **This CCM wished participants had seen how observers are sometimes treated on boats.** These observers are from small island nations and go full-hearted to their work. Samoa noted there were other **international obligations** that need to be met by CCMs on observer safety.
95. **Tuvalu** expressed disappointment that **one CCM was blocking the measure after receiving exemptions.** This CCM stated that all reasonable attempts to reach consensus had been exhausted and it would not accept deferral for another year. Supporting the proposal to put the matter to a vote, Tuvalu noted it had 80 observers in its program and considered the matter one of human life and death.
96. Also supporting the proposal to put the matter to a vote, **New Zealand** noted the many participants who worked every available hour on this measure and made passionate and emotional statements supporting the need to take action.
97. **Fiji** noted that it had come to WCPFC13 to adopt this issue. It saw no option but to support the suggestion to put it to a vote.
98. **USA** thanked the TCC Chair for her efforts in leading the informal small working group and to WWF for reminding participants of their humanity. This CCM recognised that until the Commission acted, they are just words.
99. The Cook Islands respected and recognised the views put forward. Its preference was for consensus but would support a vote if that was the path taken.
100. **Korea** recognised the importance of the safety of observers at sea, which no CCM questioned, including fishing nations. Korea had focused mainly on the drafting and noted that no elements of the original draft had been taken out through negotiations.

Korea recognised the frustration but was uncomfortable putting the matter to a vote rather than adopting by consensus.

101. China thanked the TCC Chair for her efforts and noted the importance of the issue. China had no difficulties with the provisions of the draft measure and could implement it. China noted that search and rescue continuing for 72 hours was a common practice in its national jurisdiction. It also noted that when China's fishers went missing in Japanese waters, Japan does it too. China was uncomfortable going to a vote and hoped the measure could be adopted by consensus.
102. **Tokelau** considered all avenues to address this at TCC12, intersessionally, and at WCPFC13 were exhausted. FFA Ministers had stressed the importance of the work of observers in collecting data for compliance purposes. Tokelau noted that the Convention allows for a time for a vote to be fixed if it appeared "that all efforts to reach a decision by consensus have been exhausted".
103. **RMI** supported EU's request to hear from Japan before considering the options exhausted.
104. **Japan** explained that it had received the proposal intersessionally from USA and after analysing it in detail concluded that **not all of the provisions could be implemented within Japan's current legal framework**. The Japanese delegation had discussed these issues with other delegations and **began the process of consulting with Tokyo**. Japan's head of delegation noted that he had limited flexibility and unless a clear instruction was received from Tokyo, **Japan could not support the document**. Japan's head of delegation recognised the situation was far from satisfactory and **offered a number of commitments** in a personal capacity. **Japan could support making the document a non-binding resolution. This CCM noted that footnote one contained language obliging Japan to explain to TCC and WCPFC the reason for any non-implementation of provisions. Even with this, the measure becomes non-binding, a similar obligation should apply and Japan would submit a detailed legal analysis to TCC13 on why it could not implement the provisions.** This CCM also noted that Japan would come to WCPFC14 with a better position, **at least for a non-binding resolution**. Japan did not want the matter to go to a vote and noted that if that course was taken Japan would have to oppose. **Japan's head of delegation apologised to observers who have suffered and may suffer from the lack of a measure but stressed that this was the most he could offer.**
105. **The FFA Secretariat** noted that as an observer provider, they knew they put individuals at risk each time they sent observers out to sea. If adopted, there would be an immediate improvement in observers' conditions. The FFA Secretariat noted the amount of time and effort that had been devoted to the draft measure both within and outside the WCPFC processes. A meeting of coordinators had taken place. The FFA Fisheries Ministers had discussed the matter. TCC had discussed the draft. The USA had put in vast intersessional work. This work had been put in because of the preference for consensus. The FFA Secretariat took the view that there was no other

way forward – the discussions had taken place and the drafting had been done. The Commission was urged to pick up the suggestion to take the matter to a vote.

106. **The Chair** enquired whether the alternative offered by Japan would offer CCMs any comfort. While China noted that it could go along with Japan's suggestion, **Tonga asked that a time be fixed for a vote**. With the lack of possibility of reaching consensus on the draft measure for observer safety and the calls for a vote, **the Chair fixed time for the vote to take place one hour later**. However, just prior to the vote taking place, Japan advised that in the intervening period it had been able to consult with Tokyo and could join the consensus to adopt the measure.

107. **The Commission** agreed to adopt CMM 2016-03 Conservation and Management Measure for the Protection of WCPFC Regional Observer Programme Observers (**Attachment F**).

### **WCPFC13 Attachment F (page 146 of the Summary Report)**

#### **COMMISSION THIRTEENTH REGULAR SESSION**

Denarau Island, Fiji  
5 – 9 December, 2016

#### **CONSERVATION AND MANAGEMENT MEASURE FOR THE PROTECTION OF WCPFC REGIONAL OBSERVER PROGRAMME OBSERVERS**

##### **Conservation and Management Measure 2016-03**

*The Western and Central Pacific Fisheries Commission (WCPFC):*

*In accordance with the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the Convention);*

**Recalling** Article 28(7) of the WCPF Convention, which requires the Commission to develop procedures and guidelines for the operation of the Regional Observer Programme (ROP);

**Further recalling** that Annex III, article 3 of the Convention expressly requires that the vessel operator and each member of the crew shall allow and assist any person identified as an observer under the ROP to carry out all duties safely and that the operator or any crew member shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with observers in the performance of their duties;

**Committing to** the implementation of conservation and management measure (CMM) 2007-01, which clearly states the rights of observers shall include, *inter alia*, the freedom to carry out their duties without being assaulted, obstructed, resisted, delayed, intimidated or interfered with in the performance of their duties;

**Recognizing** that observers play a critical role in supporting effective management outcomes and therefore it is critical that measures are in place to ensure their safety while undertaking their duties;

**Noting** that CMM 2007-01 specifies that the responsibilities of vessel operators and captains shall include, *inter alia*, ensuring that ROP observers are not assaulted, obstructed, resisted, delayed, intimidated, interfered with, influenced, bribed or attempted to be bribed in the performance of their duties;

**Further Recognizing** the commitments in Articles 98 and 146 of the United Nations Convention on the Law of the Sea (UNCLOS), to render assistance and protect human life, and the International Convention on Maritime Search and Rescue, as amended and overseen by the International Maritime Organization, which outlines the responsibilities of governments related to search procedures including the organization and coordination of actions, cooperation between States, and operating procedures for vessel operators and crew;

**Further Noting** the commitment in Article 94(7) of UNCLOS, regarding the duty of a flag State to cause an inquiry to be held into any loss of life or serious injury to nationals of another State which has been caused by a marine casualty or incident of navigation and involved a ship flying its flag;

*Adopts the following conservation and management measure in accordance with the Article 10 of the Convention:*

1. This CMM applies to WCPFC ROP observers on fishing trips operating under the WCPFC ROP<sup>1</sup>.
2. Nothing in this measure shall prejudice the rights of relevant CCMs to enforce their laws with respect to the safety of observers consistent with international law.
3. In the event that a WCPFC ROP observer dies, is missing or presumed fallen overboard, the CCM to which the fishing vessel is flagged shall ensure that the fishing vessel:
  - a. immediately ceases all fishing operations;
  - b. immediately commences search and rescue if the observer is missing or presumed fallen overboard, and searches for at least 72 hours, unless the

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<sup>1</sup> It is recognized that Japan is subject to domestic legal constraints, such that it is not able to meet all of the obligations contained in this CMM until such constraints are overcome. Until such constraints are overcome, Japan shall make utmost effort to implement all the provisions. If Japan has not implemented a provision contained in this CMM, such non-implementation shall not constitute non-compliance with this provision. However, Japan is obliged to explain at TCC which specific obligations are not being implemented and explain to TCC and WCPFC the reason for such non-implementation, as well as steps being taken to overcome these constraints. Notwithstanding these constraints Japan considers the issue of observer safety to be of paramount importance and will work to prevent incidents affecting observer safety.

observer is found sooner, or unless instructed by the flag CCM to continue searching<sup>2</sup>;

- c. immediately notifies the flag CCM;
- d. immediately alerts other vessels in the vicinity by using all available means of communication;
- e. cooperates fully in any search and rescue operation;
- f. whether or not the search is successful, return the vessels for further investigation to the nearest port, as agreed by the flag CCM and the observer provider;
- g. provides the report to the observer provider and appropriate authorities on the incident; and
- h. cooperates fully in any and all official investigations, and preserves any potential evidence and the personal effects and quarters of the deceased or missing observer.

4. Paragraphs 3(a), (c) and (h) apply in the event that an observer dies. In addition, the flag CCM shall require that the fishing vessel ensure that the body is well-preserved for the purposes of an autopsy and investigation.

5. In the event that a WCPFC ROP observer suffers from a serious illness or injury that threatens his or her health or safety, the CCM to which the fishing vessel is flagged shall ensure that the fishing vessel:

- a. immediately ceases fishing operations
- b. immediately notifies the flag CCM
- c. takes all reasonable actions to care for the observer and provide any medical treatment available and possible on board the vessel;
- d. where directed by the observer provider, if not already directed by the flag CCM, facilitates the disembarkation and transport of the observer to a medical facility equipped to provide the required care, as soon as practicable; and
- e. cooperates fully in any and all official investigations into the cause of the illness or injury.

6. For the purposes of paragraphs 3 through 5, the flag CCM shall ensure that the appropriate Maritime Rescue Coordination Centre<sup>3</sup>, observer provider and Secretariat are immediately notified.

7. In the event that there are reasonable grounds to believe a WCPFC ROP observer has been assaulted, intimidated, threatened, or harassed such that their health or safety is endangered and the observer or the observer provider indicates to the CCM to which the

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<sup>2</sup> In the event of force majeure, flag CCMs may allow their vessels to cease search and rescue operations before 72 hours have elapsed.

<sup>3</sup> <http://sarcontacts.info/>

fishing vessel is flagged that they wish for the observer to be removed from the fishing vessel, the CCM to which the fishing vessel is flagged shall ensure that the fishing vessel:

- a. immediately takes action to preserve the safety of the observer and mitigate and resolve the situation on board;
- b. notifies the flag CCM and the observer provider of the situation, including the status and location of the observer, as soon as possible;
- c. facilitates the safe disembarkation of the observer in a manner and place, as agreed by the flag CCM and the observer provider, that facilitates access to any needed medical treatment; and
- d. cooperates fully in any and all official investigations into the incident.

8. In the event that there are reasonable grounds to believe that a WCPFC ROP observer has been assaulted, intimidated, threatened, or harassed but neither the observer nor the observer provider wishes that the observer be removed from the fishing vessel, the CCM to which the fishing vessel is flagged shall ensure that the fishing vessel:

- a. takes action to preserve the safety of the observer and mitigate and resolve the situation on board as soon as possible;
- b. notifies the flag CCM and the observer provider of the situation as soon as possible; and
- c. cooperates fully in all official investigations into the incident.

9. If any of the events in paragraphs 3-7 occur, port CCMs, shall facilitate entry of the fishing vessel to allow disembarkation of the WCPFC ROP observer and, to the extent possible, assist in any investigations if so requested by the flag CCM.

10. In the event that, after disembarkation from a fishing vessel of a WCPFC ROP observer, an observer provider identifies—such as during the course of debriefing the observer—a possible violation involving assault or harassment of the observer while on board the fishing vessel, the observer provider shall notify, in writing, the flag CCM and the Secretariat, and the flag CCM shall:

- a. investigate the event based on the information provided by the observer provider and take any appropriate action in response to the results of the investigation;
- b. cooperate fully in any investigation conducted by the observer provider, including providing the report to the observer provider and appropriate authorities of the incident; and
- c. notify the observer provider and the Secretariat of the results of its investigation and any actions taken.

11. CCMs shall ensure that their national observer providers:

- a. immediately notify the flag CCM in the event that a WCPFC ROP observer dies, is missing or presumed fallen overboard in the course of observer duties;
- b. cooperate fully in any search and rescue operation;

- c. cooperate fully in any and all official investigations into any incident involving an WCPFC ROP observer;
- d. facilitate the disembarkation and replacement of a WCPFC ROP observer in a situation involving the serious illness or injury of that observer as soon as possible;
- e. facilitate the disembarkation of a WCPFC ROP observer in any situation involving the assault, intimidation, threats to, or harassment of that observer to such an extent that the observer wishes to be removed from the vessel, as soon as possible; and
- f. provide the flag CCM with a copy of the observer report on alleged violations involving that provider's observer upon request, pursuant to the WCPFC Rules and Procedures for Protection, Access to, and Dissemination of Data Compiled by the Commission and Rules and Procedures for the Protection, Access to, and Dissemination of High Seas Non-Public Domain Data and Information Compiled by the Commission for the Purpose of Monitoring, Control or Surveillance (MCS) Activities and the Access to and Dissemination of High Seas VMS Data for Scientific Purposes.

12. Notwithstanding paragraph 1 CCMs shall ensure that any authorized High Seas Boarding and Inspection vessels flying their flag cooperate, to the greatest extent possible, in any search and rescue operation involving an observer. CCMs shall also encourage any other vessels flying their flag to participate, to the greatest extent possible, in any search and rescue operations involving a WCPFC ROP observer.

13. Where requested relevant observer providers, and CCMs shall cooperate in each other's investigations including providing their incident reports for any incidents indicated in paragraphs 3 through 8 to facilitate any investigations as appropriate.

14. The Technical and Compliance Committee and the Commission will review this conservation and management measure no later than 2019 and periodically thereafter. Notwithstanding this provision CCMs may submit a proposal to amend this CMM at any time.