



**COMMISSION
THIRTEENTH REGULAR SESSION**
Denarau Island, Fiji
5 – 9 December, 2016

REVIEW OF OBSERVER PARTICIPATION IN THE WCPFC

**WCPFC13-2016-33
2 November 2016**

Paper by Secretariat

A. Purpose

1. The participation of observers in the work of the WCPFC was discussed at the 12th Annual Regular Session of the WCPFC in Bali, Indonesia in December, 2015.¹ While the contributions of observers were appreciated,² there was concern expressed over the escalating costs of the meetings due to the high numbers of attendees, and over the transparency of meetings and access to documents. WCPFC12 tasked the Secretariat to review and report back to WCPFC13 on the participation of observers at Commission meetings.³

2. This paper responds to the request from WCPFC12 and covers the following elements requested by WCPFC12:

- a. number of observers which have attended meetings;
- b. whether it is appropriate to limit the numbers on observers' delegations;
- c. whether it is appropriate for observers to pay an annual contribution towards the meeting costs and if so how to determine the fee level for observers;
- d. whether it is appropriate to provide for special participating rights for observer IGOs that provide direct support to SIDS participation in the Commission in particular FFA, PNA and SPC; and if so what should those arrangements be;
- e. whether it is appropriate to provide for special participating rights for observers that are considered direct stakeholders, such as harvest groups; and
- f. the rights of observers to access meeting documents and participate in Commission meetings and activities to enhance transparency in the work of the Commission.

¹ WCPFC12 Summary Report, paras. 55-60.

² The term "observers" refers to those States or organizations that are permitted to attend WCPFC meetings. There are of course a number of organizations, both intergovernmental and non-governmental, which play a significant and ongoing role in the conservation and management of tuna in the Western and Central Pacific.

³ WCPFC12 Summary Report, para. 61.

3. The issue of transparency was also raised at TCC12 following the decision to hold the review of the draft Compliance Monitoring Reports in closed session. This paper also provides additional information to assist the Commission in responding to that issue.

4. The approach adopted in the paper is to consider the framework for the participation of observers in WCPFC and to compare the attendance and status of observers in WCPFC with the tuna RFMOs (IATTC,⁴ ICCAT,⁵ IOTC⁶ and CCSBT⁷), as well as with selected other RFMOs which are active and to which a number of WCPFC Members are also members (CCAMLR,⁸ SEAFO,⁹ SPRFMO,¹⁰ and NAFO).¹¹ These RFMOs may provide a useful comparison of the treatment of observers in other RFMOs, particularly the tuna RFMOs.¹² Where appropriate, consideration of the procedures and practice of these RFMOs relating to observers is included as a relevant comparison.

5. WCPFC13 is invited to consider the issues raised in this paper and its recommendations.

B. Background: WCPFC Framework for Observer Participation

6. Article 21 of the WCPF Convention promotes the objective of transparency in decision-making and other activities of the Commission. Representatives from intergovernmental organizations and non-governmental organizations concerned with matters relevant to the Convention are to be permitted to participate in meetings of the Commission and subsidiary bodies as observers. Such observers “shall be given timely access to pertinent information subject to the rules and procedures which the Commission may adopt”. The rules of procedure providing for such participation are not to be “unduly restrictive”.

7. Article 22 accords a special status to certain intergovernmental organizations with whom the Commission is to cooperate. In particular, Article 22 sets out that the Commission is to cooperate with the FAO, and other United Nations specialized agencies, and to make suitable arrangements for consultation, cooperation and collaboration with relevant intergovernmental organizations which have related objectives and can contribute to the work of the Commission (and specifically cites IATTC, CCSBT, IOTC and CCAMLR). Article 22 also provides that the Commission may enter into arrangements with other organizations, such as the Secretariat of the Pacific Community (SPC), or Forum Fisheries Agency (FFA) with a view to obtaining information to further the objectives of the Convention. Paragraph 6 of Article 22 provides for these intergovernmental organizations to designate representatives to attend meetings of the Commission as observers in accordance with the rules of procedure, and to the establishment of procedures “for obtaining the views of such organizations in appropriate cases”. The WCPFC

⁴ Inter-American Tropical Tuna Commission.

⁵ International Commission for the Conservation of Atlantic Tuna.

⁶ Indian Ocean Tuna Commission.

⁷ Commission for the Conservation of Southern Bluefin Tuna.

⁸ Commission for the Conservation of Antarctic Marine Living Resources.

⁹ South East Atlantic Fisheries Commission.

¹⁰ South Pacific Regional Fisheries Management Organization.

¹¹ Northwest Atlantic Fisheries Commission.

¹² Appreciation is expressed to the Secretariats of the RFMOs for the useful information they provided to assist in the preparation of this paper.

has also engaged SPC's Oceanic Fisheries Programme to provide scientific services to the Commission in accordance with Article 13 of the Convention.¹³

8. Non-parties to the Convention are addressed separately in Article 32, and they may upon request and subject to the concurrence of the Commission and the rules of procedure, be invited to attend meetings of the Commission as observers.

9. The WCPFC Rules of Procedure follow the approach in the Convention of drawing a distinction between observers which are non-parties, intergovernmental organizations (IGOs), or non-governmental organizations (NGOs). There is no distinction made in the Convention or the Rules of Procedure between different NGOs, whether environmental NGOs, direct stakeholders such as harvest groups, or academic or research institutions.¹⁴

10. Rule 36 of the Rules of Procedure provides for participatory rights dependent upon the category of observer. Non-parties may participate in the deliberations of the Commission and subsidiary bodies (but not in decision making). Similarly, the FAO and relevant intergovernmental organizations and South Pacific regional organizations invited by the Commission (IGOs) may participate in deliberations within their competence upon the invitation of the Chair. NGOs on the other hand must notify in writing their desire to participate in sessions and are invited to participate as observers unless a majority of members of the Commission object. The NGO observer status that is granted remains in effect for future sessions. NGO observers "may sit at meetings" of the Commission and subsidiary bodies (compared with non-parties and IGOs which "may participate in the deliberations") and, upon the invitation of the Chair and subject to approval of the Commission or subsidiary body, may make statements within the scope of their activities.

11. The Rules of Procedure also deal with open and closed meetings. Rule 15 provides that meetings of the Commission and subsidiary bodies are to be open, unless the Commission or subsidiary body concerned "decides that exceptional circumstances require that the meetings be held in closed session".

12. While under Article 21 of the Convention observers are to be given timely access to pertinent information, the Commission also has data rules relating to public and non-public data that affect access by observers to non-public domain data and information, including the draft and Provisional Compliance Monitoring Reports. The Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission adopted in 2007 and 2009 set out the types of data which are public domain and non-public domain data, and the general rules for access to and dissemination of non-public domain data.¹⁵ The issue of access to non-

¹³ As a consequence of its role as the science services provider, the SPC has access to meetings and non-public domain data in order to enable it to carry out its functions.

¹⁴ The failure to specifically address academic or research institutions in the Rules of Procedures was noted in the 2012 Review of the Performance of WCPFC, which further noted that allowing such participation would enhance the expertise, information and external resources available to support the Commission's work (WCPFC8-2011/12 of 28th February 2012, Section 4.1.6). However, a number of academic and research institutions have been admitted as NGO observers to WCPFC.

¹⁵ Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission, DATA-02, adopted at WCPFC4 in 2007 and Rules and Procedures for the Protection, Access to, and Dissemination

public domain data, including for the purposes of consideration by the Technical and Compliance Committee (TCC) of the draft Compliance Monitoring Report (dCMR), and consideration by the Commission of the provisional Compliance Monitoring Report (CMR), is examined in the final section of this paper.

C. Attendance by Observers

Attendance by Observers at WCPFC Meetings

13. WCPFC has approved the admittance of 57 non-State observers – 16 IGOs and 41 NGOs. Since WCPFC11, six new observers were admitted in accordance with the procedures in the Rules of Procedure.¹⁶ Table 1 sets out the number of accredited non-State observers to WCPFC since March 2012.¹⁷ The number of accredited observers to WCPFC is relatively large compared to some other tuna RFMOs. For example, IOTC has 11 pre-approved IGO observers, and 22 pre-approved NGO observers which are permitted to attend IOTC meetings. There are currently 31 accredited NGO observers in IATTC.¹⁸ In the case of CCSBT, five IGOs and four NGOs have been granted long-term observer status. The 2012 Performance Review of WCPFC noted the challenge of the increase in the number of accredited observers and making the participation of observers meaningful.¹⁹

Table 1: Observers Accredited to WCPFC

WCPFC Meeting	IGOs	NGOs
WCPFC12, December 2015	16	41
WCPFC11, December 2014	16	35
WCPFC10, December 2013	15	30
WCPFC8, March 2012	14	25

14. The number of observers accredited to WCPFC can be distinguished from the number of observers attending meetings of the Commission and subsidiary bodies. These have also increased in recent years, particularly attendance by NGOs at meetings of the Commission. Table 2 sets out the participation of non-Parties, intergovernmental organizations (IGOs) and non-governmental organizations (NGOs) at meetings of the Commission, according to the number of observer delegations, and the total number of participants in those delegations.

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, adopted at WCPFC6 in 2009.

¹⁶ Observers, Paper by Secretariat, WCPFC12-2015-07, 15 November 2015.

¹⁷ No paper was prepared by the Secretariat on Observers for WCPFC9.

¹⁸ Personal communication, IATTC Secretariat, 30 September, 2016.

¹⁹ 2012 Review of the Performance of WCPFC, WCPFC8-2011/12 of 28th February 2012, Section 7.1.1.

Table 2: Attendance by Observers at Meetings of the WCPFC Commission

WCPFC Meeting	No. CCM & observer attendees*	Number of Non-Parties	Non-Party Attendees	Number of IGOs	IGO Attendees	Number of NGOs	NGO Attendees
WCPFC12 Dec 2015 Bali	536	7	10	9	27	23	91
WCPFC11 Dec 2014 Apia	496	7	10	7	30	17	44
WCPFC10 Dec 2013 Cairns	431	5	8	10	24	17	44
WCPFC9 Dec 2012 Manila	585	8**	31	10	23	14	63

** Figures taken from List of Participants, WCPFC Summary Reports.

** Includes Indonesia prior to it becoming a WCPFC Contracting Party.

15. The number of NGO delegates attending WCPFC12 may well be influenced by the location. There were 536 participants from CCMs and observers at Bali. NGO observers constituted 17% of the total number of participants. By way of comparison, at WCPFC11 in Apia, NGO observers constituted 9% of the total number of CCMs and observer participants. In addition to the increase in the number of NGO attendees, noticeable has been the size of some NGO delegations participating in WCPFC Commission meetings. For example, at WCPFC12, two global environmental NGOs had over 10 participants on their delegations, and another two such observer delegations had seven participants. On the other hand, about half of NGO observers (11 of 23 observers) had only one or two participants in their delegations.

16. The number of observers attending meetings of the Commission can be contrasted with the number attending meetings of the Scientific Committee and TCC (Table 3). The highest number of NGO observer participants over the last 3 years was at the 2016 Scientific Committee meeting with a total of 21 participants from 11 NGOs. This can be contrasted with attendance by NGOs at TCC meetings: at TCC12 there were 5 NGO participants. This may well be related to their ability to participate fully at TCC meetings, which is considered in the final Section of this paper.

Table 3: Attendance at Meetings of WCPFC Subsidiary Bodies

Year	No. of CCM and observer attendees*		Non-Parties		No. of Non-Party attendees		No. of IGOs		No. of IGO attendees		No. of NGOs		No. of NGO attendees	
	SC**	TCC	SC	TCC	SC	TCC	SC*	TCC	SC*	TCC	SC	TCC	SC	TCC
2016	154	157	1	4	1	5	5	3	13	12	11	3	21	5
2015	108	149	1	4	2	6	4	3	9	9	9	6	11	9
2014	127	150	-	4	-	6	6	3	17	12	5	7	8	8
2013	110	159	-	5	-	7	6	4	14	14	6	6	12	8

* Figures taken from List of Participants, SC and TCC Summary Reports.

** Excludes the SPC as the Science Services Provider which provides advice to the Scientific Committee.

Comparison with RFMOs

17. Table 4 sets out, by way of comparison, the IGO and NGO attendance at the 2015 Commission meetings of the other tuna RFMOs. IATTC had 35 NGO participants from 21 NGO delegations attending its annual meeting in 2015. ICCAT, which has a greater number of Members than WCPFC, had 43 participants from 24 NGO delegations participating at its annual meeting in 2015. More than double this number attended the WCPFC Commission meeting in 2015.

Table 4: Attendance at Commission Meetings of Tuna RFMOs in 2015

	Number of Non-Parties	Non-Party attendees	Number of IGOs	No. of IGO attendees	Number of NGOs	No. of NGO attendees
WCPFC ²⁰	7	10	9	27	23	91
IATTC ²¹	5	8	4	4	21	35
ICCAT ²²	2	18	6	10	24	43
IOTC ²³	5	6	3	3	7	20
CCSBT ²⁴	3	6	1	1	2	2

Appropriateness of limiting attendance

18. There is general acceptance that RFMOs benefit from observer participation, especially in terms of the research that observers may undertake, the dissemination of information to delegates, and seminars and other mechanisms which assists in enhancing knowledge, and the

²⁰ WCPFC12, December 2015.

²¹ 89th Meeting, July 2015. IATTC categorises its observers in the list of participants as IGOs, NGOs and “Other Observers” which includes industry groups.

²² 24th Regular Meeting November 2015.

²³ 19th Session of IOTC, May 2015. Excludes the FAO.

²⁴ 22nd Annual Meeting, October 2015.

support that is provided to delegates at meetings. The WCPFC is liberal in its approach to the accreditation of observers at WCPFC meetings, consistent with Article 21 of the Convention. This approach to transparency was commended in the 2012 Performance Review of WCPFC.²⁵ The WCPFC Rules permit participation by eligible IGO observers, and by NGO observers unless a majority of Members object. Once observer status is granted, it applies to future meetings. While many RFMOs adopt a similar approach, some others are more cautious in their approach to observer participation. For example, in CCSBT all Members must agree to the accreditation of an NGO observer.²⁶ In IOTC and NAFO a Member may object to the participation of an NGO, in which case a decision is taken by majority vote.²⁷ In 2015, CCAMLR decided not to accept an application for to attend the following year's annual meeting from a harvest organization.²⁸

19. It would not be consistent with the WCPFC Convention's promotion of transparency to restrict the accreditation of observers or to limit further their participation at WCPFC. Neither would it be consistent with the promotion of transparency in the United Nations Fish Stocks Agreement and the FAO Code of Conduct for Responsible Fisheries. However, there is a separate question of the number of attendees at WCPFC meetings, particularly due to the additional administrative costs for the Secretariat, the constraints that large meetings place on Members wishing to host Commission meetings, and the strain placed on hosting facilities.²⁹

20. In contrast with Commission meetings, Table 3 shows the number of attendees at meetings of the WCPFC Scientific Committee and TCC. Any appropriateness of limiting attendance at meetings of these subsidiary bodies is therefore less clear and needs to be balanced against the benefits of observer participation in the Commission and its subsidiary bodies and any restrictions on the ability of observers to effectively participate in meetings.

D. Observer Participation Fee

Practice Regarding Charging Participation Fees for Observers in RFMOs

21. One option which may address the number of observer attendees, adopted by some other RFMOs, is to institute a reasonable charge for observer participation. Of the other tuna RFMOs, IATTC and ICCAT set a fee for observer participation and IOTC has the ability to do so under its Rules of Procedure. Some other RFMOs, such as NAFO, also charge observers a small fee to cover costs of participation.³⁰ The Executive Secretary of ICCAT may also limit the size of observer delegations due to space limitations (eg of the conference venue).

22. The Executive Director of IATTC and Executive Secretary of ICCAT have established a fee for observer participation in meetings of US \$500, for 1 or 2 delegates from an observer

²⁵ 2012 Review of the Performance of WCPFC, WCPFC8-2011/12 of 28th February 2012, Section 7.1.1.

²⁶ Rule 3.6 CCSBT Rules of Procedure.

²⁷ IOTC Rules of Procedure, Rule XIV:5; See NAFO procedures for observers at <http://www.nafo.int/meetings/frames/meetings-observers.html>

²⁸ See CCAMLR, Report of the Thirty-Fourth Meeting of the Commission, para. 13.8.

²⁹ WCPFC12 Summary Report, para. 55.

³⁰ Personal communication, NAFO Secretariat, 11 August 2016.

delegation, and US \$350 for each additional delegate.³¹ In the case of IATTC, the charge is imposed on all meetings of the Commission, AIDCP³², and meetings of subsidiary bodies, but not for participation in technical meetings. ICCAT applies the charge to all Commission and subsidiary body meetings. As an additional constraint, the ICCAT Secretariat may limit the number of delegates from observer's delegations, whenever there are burdens or limited space to accommodate all delegates in the venue.

23. The IOTC Rules of Procedure provide for the possibility of requesting a contribution towards the costs of observer attendance, however this has not been implemented in practice.

24. NAFO charges NGO accredited observer a fee to cover the additional expenses generated by their participation at the meetings for such items as additional seating, coffee breaks and paper. The participation fee has been \$10.00/day for each representative attending the meeting. The fee is paid prior to the meeting or at registration.³³

25. CCAMLR considered the possibility of charging an observer participation fee 3 years ago, but this was not agreed.³⁴ CCSBT, SPRFMO and SEAFO do not charge observers to attend meetings. However, the number of observer delegates attending meetings of those organizations is relatively small.

26. Requesting the payment of a fee for participation at an international meeting also has some precedent. For example, CITES has a standard participation charge for all observer organizations other than the United Nations and its specialized agencies (i.e. for intergovernmental organizations, non-governmental organizations and private sector) of US \$600 for the first participant and US \$300 for each additional participant. Payments must be made before the beginning of the meeting.³⁵ In a review of charging NGO for participation, the CITES Secretariat identified that a few other multilateral environmental organizations charge a fee for participation.³⁶

Appropriateness of charging a fee for participation

27. Neither the WCPFC Convention text nor the Rules of Procedure specifically provide for the payment of fees by observers. During the Preparatory Commission process for WCPFC the first four versions of the draft Rules of Procedure included a provision enabling the Executive Secretary to request a contribution towards the additional administrative costs arising from the attendance of NGO observers at its meetings. However, this provision was removed in the final draft of the Rules of Procedure.³⁷

³¹ Personal communication with IATTC and ICCAT Secretariats, 10 August 2016 and 8 August 2016.

³² Agreement on the International Dolphin Conservation Programme.

³³ Personal communication, NAFO Secretariat, 11 August 2016.

³⁴ Personal communication with CCAMLR Executive Secretary, 8 August, 2016.

³⁵ See CITES Notification to the Parties No 2016-020 of 16 March 2016.

³⁶ In particular, the International Whaling Commission, the World Conservation Union (IUCN), and the International Tropical Timber Organization, see CITES, Financial Reports for 2014 and 2015, SC66 Doc. 10.1, at 7-8, Tbl. 3 (2015), available at: <https://cites.org/com/sc/66/index.php>.

³⁷ See Draft Rules of Procedure WCPFC/PreCon/WP.1: Rule 57.6, and WCPFC/PreCon/WP.1/Rev.4, Rule 35.6 which provided for the Executive Director to charge NGO observers a reasonable fee to pay for administrative costs

28. WCPFC has periodically considered the issue of charging observers for participation in meetings. At WCPFC8 the issue of costs for participation of observers was raised in the context of cost recovery for the Commission's operations.³⁸ It has also been raised by CCMs in reviewing the appropriate annual budgetary allocation for WCPFC meetings and the requirements for hosting meetings of the Commission.³⁹

29. In assessing the appropriateness of charging observers for their participation at WCPFC, the paper considers whether WCPFC should agree in principle to charge observers a participation fee, and if so, how should the fee be determined and implemented. There are separate questions of which observers might be asked to pay a participation fee, and to which meetings might a participation fee apply. These questions are addressed later in Sections E and F respectively.

The principle of charging a participation fee

30. The fact that other tuna RFMOs charge observers to participate in meetings suggests that there is a basis for the WCPFC to potentially follow suit. However, it is important to ensure that charging observer participants does not adversely impact on the ability of observers, particularly NGO observers, to contribute to the work of the organization. This suggests that a reasonable fee for participation by observers which covers the additional costs arising from their attendance may be effective in achieving a balance between the number of attendees at meetings and ensuring that observer organizations have a voice at those meetings. This would not be inconsistent with Article 21 of the WCPF Convention, especially if accompanied by other efforts to promote transparency and openness at WCPFC meetings. It is therefore suggested that the principle of charging a participation fee be accepted.

31. An alternative option adopted by ICCAT for limiting the number of attendees, applied together with a participation fee, is to request observers to limit the size of their delegations. If, for example, NGO observer delegations to WCPFC12 had been limited to no more than 3 participants, the number of NGO attendees may have reduced from 91 to 51 participants. However, this alternative option does not address cost recovery for observer participation. It may be seen as the Commission imposing an arbitrary limitation on numbers. The advantage of addressing numbers through charging a participation fee alone would enable the observer organization to determine for itself how many delegates should attend a meeting. This paper therefore does not recommend the option of requesting NGOs to limit the number of attendees. The Commission might, however, wish to consider on a case by case basis limits on all delegation sizes if, for example, the expected number of participants in a particular year had the potential to exceed the capacity of a meeting venue in a small island developing CCM.

due to their attendance at meetings, and compare with WCPFC/PrepCon/WP.1/Rev.5, where this provision was removed.

³⁸ Cost Recovery and Optimization of Commission Services Costs, WCPFC8-2011/13 (Rev 1).

³⁹ Since WCPFC8, the Secretariat has tabled a paper to FAC that sets out the Recommended Requirements for Hosting the Scientific Committee or Annual Commission Meetings (see WCPFC8-2011-FAC11, and WCPFC12-2015-FAC9-7).

Establishing the fee

32. The approach adopted in both the WCPFC PrepCon draft Rules of Procedure and in RFMOs is that the Commission takes a decision that observers are required to pay a fee to cover the additional expenses arising from attendance, and the level of that fee is set annually by the head of the Secretariat. For example, the Director of IATTC may require non-Party and NGO observers to pay a reasonable fee, and to cover the costs of their attendance.⁴⁰ In ICCAT, observers are required to pay a fee for their participation which will contribute to the additional expenses arising from their participation, as determined annually by the Executive Secretary.⁴¹ The IOTC Commission, on proposal of its Executive Secretary, may decide to request a contribution towards the additional administrative costs arising from the attendance of observers at its Sessions.⁴²

33. There are different methods that might be used for determining the level of any participation fee. One method is to calculate the direct and indirect costs arising out of observer participation at a meeting. NAFO charges NGOs a nominal fee for some direct costs. However, it is difficult to calculate direct costs of observer participation since these may vary depending on the meeting and its location. This method also does not take into account the additional costs to a Member which hosts a meeting, nor does it address any issues relating to the size of observer delegations. Other methods, such as attempting to determine a fee based upon the contribution of the observer to the WCPFC, are unlikely to be equitable or consistent with the promotion of transparency set out in Article 21 of the WCPF Convention.

34. An alternative approach is to determine the level of fee taking into account the practice followed in other RFMOs, as qualified by the circumstances in WCPFC. This suggests that a fee of US\$500 for up to 2 participants from an observer, with a fee of US\$350 for each additional observer participant would be consistent with the approach taken in IATTC and ICCAT. Subsequent adjustments could be made taking into account the how such a fee is implemented in practice and the need to avoid discouraging or hampering participation of observers in meetings.

35. A factor to take into account is the transaction costs of collecting a participation fee. In general, RFMOs that charge a participation fee request that payment is made in advance of the meeting, or on registration at the meeting.⁴³ If, by way of example, 24 NGO observer organizations attended a meeting and sent not more than 2 delegates, a participation fee set at the same level as IATTC and ICCAT would total approximately US\$12,000 (approximately 7% of the current WCPFC budgeted costs for an Annual Meeting). If the request for a payment is included as part of the registration process, transaction costs would be minimal.

36. The Secretariat therefore suggests that if the Commission decides to establish a participation fee for Commission meetings, the approach in the other tuna RFMOs be adopted whereby the Commission agrees that the Executive Director is able to set a reasonable fee for

⁴⁰ Antigua Convention, Annex 2, para. 10.

⁴¹ ICCAT Guidelines and Criteria for Granting Observer Status at ICCAT Meetings, para. 6.

⁴² IOTC Rules of Procedure, Rule XIV:6.

⁴³ Personal communication, IATTC Secretariat, 10 August 2016; Personal communication, NAFO Secretariat, 10 August 2016.

participation of observers. By way of guidance to the Executive Director, the fees set in other tuna RFMOs should be used where appropriate. The fee could be included as part of the registration process for a meeting, and collected either in advance or on registration for the meeting.

E. Application of a Participation Fee

37. If it is agreed in principle to charge observers a participation fee, it is necessary to determine to which observers the fee would apply. As noted above, WCPFC has the following three categories of observers: non-Parties, intergovernmental organizations (IGOs) and non-governmental organizations (NGOs). As noted in the background section, the participatory rights of these observers at WCPFC meetings differ. It is nevertheless illustrative to examine the practice of those RFMOs which charge participants for attendance, and compare this to the situation of observers in WCPFC.

38. Both IATTC and ICCAT charge for the participation of observers from non-Parties and NGOs, however they do not impose the charge on intergovernmental organizations (IGOs). The IOTC Rules of Procedure enable the organization to charge all observers for participation, including IGOs, but in the case of IGOs this is on the basis of reciprocity.⁴⁴ IATTC requests payment of the participation fee from Cooperating Non-Members (CNMs) which are non-Parties, but CNMs are not required to contribute to the regular budget of the Commission. In both IATTC and ICCAT non-Parties may make voluntary contributions to the budget of the RFMO. In general, RFMOs do not make a distinction between different types of NGOs in requiring payment of the participation fee. However, IATTC does exempt the six NGOs that are elected non-governmental members of the International Review Panel of the AIDCP.⁴⁵

39. WCPFC may decide to follow the practice of IATTC and ICCAT and not impose the charge on IGOs. The WCPFC practice, consistent with Rule 36 of the Commission's Rules of Procedure and based on the recommendation of the Chair and with agreement of the meeting, has been to include the sub-regional bodies - the SPC, in its capacity as science services provider, FFA and the Office of the Parties to the Nauru Agreement (PNAO) - as observers in Heads of Delegation meetings, small group discussions, and discussions on draft and provisional CCM Compliance Monitoring Reports.⁴⁶ This recognizes the support these regional organizations provide to SIDS' participation in WCPFC meetings and is consistent with Article 22 of the Convention which refers to the establishment of procedures for obtaining views of such organizations, and Article 30 of the Convention which recognizes the Special Requirements of Developing States. While there is a basis for recognizing the particular role of these regional organizations, there are other intergovernmental organizations which are also referenced in Article 22 of the Convention, such as FAO, IATTC and other RFMOs. This suggests that for the

⁴⁴ In other words, if IOTC representatives are charged a fee to attend a meeting of an intergovernmental organization, the representatives of that organization would be similarly charged a fee. However, in practice intergovernmental organizations do not impose a participation fee on other intergovernmental organizations.

⁴⁵ Personal communication, IATTC Secretariat, 10 August 2016.

⁴⁶ WCPFC8 Summary Report, para. 203. CMM 2015-07 on the Compliance Monitoring Scheme specifically provides for the participation of "inter-governmental sub-regional agencies which provide advice and assistance" to developing State CCMs, particularly SIDS Members and Participating Territories (para. 21(i) of CMM 2015-07).

purposes of a participation fee, all IGOs should be treated in a similar manner, as is the case in IATTC and ICCAT.

40. With respect to Cooperating Non-Members (CNMs), they must make an explicit commitment to make financial contributions to the budget of WCPFC.⁴⁷ Whether CNMs have made their contributions tends to be taken into account in the assessment of whether a continuation of their status is approved.⁴⁸ This can be contrasted with other tuna RFMOs which generally do not request CNMs to provide contributions to the budget (although they may be “invited” to do so).⁴⁹ This suggests that it would be unreasonable to seek cost recovery for attendance at meetings from CNMs as they already contribute to the budget of WCPFC. In the past there have been few non-Parties which are not CNMs. Given their lack of attendance at WCPFC meetings, it may be difficult to find a strong rationale for charging a participation fee for non-Party observers that are not CNMs. This was also the approach adopted in the WCPFC PrepCon draft Rules of Procedure which initially considered this issue.

41. The WCPFC framework for observers makes no distinction between different NGO observers. Neither does the WCPF Convention specifically identify the importance of participation of observers from the tuna fishing fleet or harvest groups. In WCPFC such observers are treated no different from other NGO observers. It would not be consistent with the WCPFC framework for observer participation and with the participatory rights of observers in WCPFC to draw a distinction between different categories of NGO observers.

42. The Secretariat therefore invites the Commission to consider whether, if a participation fee is accepted, it should be applied to NGO observers, but not to IGO or non-Party observers.

F. Transparency, Participation in Meetings, and Access to Documents and Non-Public Domain Information

43. Related to this is the issue of transparency, which is broader than observership and includes the participation of civil society in meetings, participation in working groups, and access to documents. As noted above, IATTC and ICCAT apply the participation fee to all meetings of the Commission and subsidiary bodies, but not technical meetings. However, in WCPFC there are more observer participants in Commission meetings, than in meetings of the Scientific Committee or the TCC, where parts of the meeting are closed to observers. It is necessary, therefore, to address transparency, particularly with respect to access to meetings and access to documents and non-public domain information.

⁴⁷ CMM 2009-11 on Cooperating Non-Members, para. 2(g).

⁴⁸ See WCPFC12 Summary Report_final_rev2, paras. 62-115.

⁴⁹ The other tuna RFMOs do not require that CNMs make financial contributions to the budget. See IATTC Resolution C-07-02 and H. Koehler, Promoting Compliance in Tuna RFMOs: A Survey of the Current Mechanics of Reviewing, Assessing and Addressing Compliance with RFMO Obligations and Measures, and Identification of Best Practices, ISSF Technical Report 2016-06, International Seafood Sustainability Foundation, Washington DC, paras. 21, 27, and 32. This is a revision of an earlier paper provided to WCPFC, see WCPFC-TCC9-2013-OP03.

General Framework for Transparency

44. The push for transparency and public participation in international environmental agreements can be traced to the United Nations Conference on Environment and Development, in particular the Rio Declaration and Agenda 21.⁵⁰ The importance of transparency in fisheries management has also been recognized internationally.⁵¹ The FAO Code of Conduct for Responsible Fisheries indicates that States and RFMOs should ensure transparency in decision-making and management of fisheries.⁵² Article 12 of the United Nations Fish Stocks Agreement, which is followed in the WCPFC Convention, promotes the objective of transparency. There is, however, a suggestion that RFMOs are slow to embrace a more transparent approach.⁵³

45. Transparency in environmental matters is also the subject of the Aarhus Convention, developed by the Economic Commission for Europe.⁵⁴ Its approach to transparency is generally adopted and the hallmarks of transparency are seen from three perspectives: access to information; the ability of the public to participate in decision-making processes; and access to justice in environmental matters. Its focus is on national environmental matters, but it has influenced to some extent considerations of transparency in the international environmental context.

46. The Recommended Best Practices for RFMOs developed by the Organization for Economic Cooperation and Development (OECD) includes the following best practices on transparency:

- representatives of IGOs and NGOs should be afforded an opportunity to participate on reasonable terms;
- there should be a stream-lined process for applications for observer status which minimizes lead times and clearly states the information that is required;
- the procedures should provide for long-term approval of observer status, instead of an annual approval process;
- observers should have access to official documents at the same time as Members and reasons of confidentiality should not be used to unduly restrict access to documents; and
- the rules of procedure should minimize the capacity for RFMOs to selectively close meetings to observers.⁵⁵

47. WCPFC appears to meet or exceed the first three of these best practices. As demonstrated by the number of IGOs and NGOs with observer status, WCPFC approves through

⁵⁰ United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/4 (1992), para. 27.3.

⁵¹ The future we want, 27 July 2012, Sections 172 and 173; UNGA Res 66.288.

⁵² Articles 6.13 and 7.1.9.

⁵³ Lodge M. et al, "Recommended best practices for RFMOs: report of an independent panel to develop a model for improved governance by FRMOs", London UK, Chatham House, The Royal Institute of International Affairs, 2007.

⁵⁴ See 5. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 (entered into force on 30 October 2001) (Aarhus Convention), Articles 1, 3.

⁵⁵ Recommended Best Practices for Regional Fisheries Management Organizations: Executive Summary, p. 17-18 <http://www.oecd.org/sd-roundtable/papersandpublications/39374762.pdf>

a stream-lined process and on a long-term basis a large number of observers. Further, it does not allow a minority of members to block an NGO's application for observer status, unlike some other RFMOs. In a study of transparency in RFMOs, WCPFC was the only organization examined to score above average for all transparency indicators examined and had the third highest ranking of the 11 RFMOs considered.⁵⁶ As noted above, the 2012 Performance Review "commended" WCPFC on its efforts to engage with a wide range of observers.⁵⁷

48. However, another study which examined transparency gaps in WCPFC, in particular in relation to compliance, found that WCPFC was fully transparency for only 28% of the elements of its transparency standard.⁵⁸ Issues have been raised over access to documents and the closure of certain WCPFC meetings to observers. Concerns in particular have been raised by NGOs attending WCPFC over the closure of discussions on the Compliance Monitoring Scheme to observers, and this has been perceived as a failure to promote transparency in the work and decisions of WCPFC. Of particular concern has been that compliance concerns have been at the heart of discussions among Members, yet lack transparency, inconsistent with the responsibility of the Commission under the Convention to promote transparency in its work and decision-making.⁵⁹

Access to meetings and documents

49. The WCPFC Rules of Procedure provide for meetings to be open, unless a decision is taken that "exceptional circumstances require that meetings be held in closed session". Representatives from SPC often attend closed sessions in their capacity as the science services provider to the Commission. While discussions on the draft and provisional Compliance Monitoring Report have been closed to NGO observers, CNMs and sub-regional IGOs (FFA and PNAO) are permitted to attend. Likewise, it has been a common practice that when the regular Heads of Delegation meetings are held immediately prior to a session of the Commission or a subsidiary body, a representative from the sub-regional organizations (FFA and PNAO) are also able to attend so as to provide advice and assistance to SIDS CCMs with a view to enhancing effective SIDS' participation. NGO observers do not participate in Heads of Delegation meetings. NGO participation in small working groups established for particular purposes, such as negotiation of the tropical tuna measure, has also be restricted in the past.⁶⁰

50. Based on communications with the Secretariats of other RFMOs, it is common practice in RFMOs to close Heads of Delegation meetings to observers. SEAFO also closes its budget discussions to observers.⁶¹ A number of RFMOs, including CCSBT, may also decide to hold

⁵⁶ Nichola A. Clark, Jeff A. Ardon & Linwood H. Pendleton, "Evaluating the basic elements of transparency of regional fisheries management organizations" *Marine Policy* 57 (2015) 158-166 at p. 162.

⁵⁷ Review of the Performance of WCPFC, WCPFC8-2011/12, 28 February 2012, pp. 32, 220.

⁵⁸ Gilman E, Kingma E, "Standard for assessing transparency in information on compliance with obligations of Regional Fisheries Management Organizations: validation through assessment of the Western and Central Pacific Fisheries Commission" *Ocean and Coastal Management* 84 (2013) 31-39.

⁵⁹ See WCPFC-2014-OP13.

⁶⁰ This has been the subject of complaints to the Executive Director from NGOs, see observer paper WCPFC10-2013-OP07.

⁶¹ Personal communication, SEAFO Executive Secretary, 8 August 2016.

small working group meetings in closed session.⁶² The justification for doing so is to enable discussions on sensitive issues to take place in a smaller group and to provide room for negotiations to reach consensus among those most crucially involved in an issue.

51. In addition to access to meetings, there have been concerns raised in WCPFC over access to documents. Article 21 of the WCPF Convention provides for IGOs and NGOs to be provided timely access to pertinent information, subject to the rules and procedures which may be adopted. The rules of some RFMOs more explicitly provide for documents to be available to Members and observers simultaneously, subject to the need to protect confidential information from disclosure.⁶³

52. The practice in WCPFC is not to provide papers and other documents containing non-public domain information to observers.⁶⁴ Papers are posted on the secure side of the website or during the meeting on the secure meeting server, which makes them unavailable to most accredited organizations.⁶⁵ In the past this practice also extended to all WCPFC Circulars, but in 2016 the Secretariat implemented a classification system so that accredited observers now receive most circulars, unless they specifically contain non-public domain information. There have been instances, where some intersessional working group's activities and revisions of documents which are under negotiation have not been made available to observers.⁶⁶ Other RFMOs are cognizant of the need to protect the confidentiality of information, and some, such as IATTC, also may post negotiation texts on the secure side of the website. Nevertheless, it would enhance transparency for Members to consider posting revisions of proposals on the public side of the WCPFC website.

53. WCPFC is not significantly different from the approach of other RFMOs to access to meetings and access to documents, except with respect to access to compliance discussions, where WCPFC is alone among the tuna RFMOs in closing its compliance discussions to observers. This issue therefore merits further consideration.

Meetings of TCC and the Commission on the Compliance Monitoring Report

54. The justification for closing WCPFC's discussions on compliance is based upon the WCPFC's data confidentiality rules and the fact that some CCMs have not agreed to have non-public domain data presented in an open session.⁶⁷

⁶² Personal communication, CCSBT Executive Secretary, 8 August 2016.

⁶³ IATTC, Rule 14, ICCAT Guidelines for Observer Participation, para. 8; NAFO Rule 6(a).

⁶⁴ There are, however, exceptions: the SPC is able to have access to data and information necessary to perform their role as the Commission's science services provider, in accordance with paragraph 18 of the Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission, DATA-02, 2007; and the FFA and PNAO are provided access to papers and other documents containing non-public domain information that are necessary for them to provide advice and assistance to SIDS CCMs with a view to enhancing effective SIDS' participation.

⁶⁵ This includes Annual Report Part 2, Cooperating Non-Member Requests and associated correspondence, IUU vessel related correspondence, EHSP-SMA live list and HSP1-SMA information, official contacts and authorized MCS contacts, Reports of review of Integrity of Secretariats' VMS data, and IMS and RFV.

⁶⁶ See Greenpeace Briefing, WCPFC10-2013-OP02.

⁶⁷ TCC12 draft Summary Report, Agenda 5.1 "discussion regarding closed session", paragraph 56.

55. The Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission set out what data is public domain data, and what data is non-public domain data.⁶⁸ Paragraph 14 of the 2007 Data Rules and Procedures provides that: “Subject to the decisions of the Commission, all types of data not described in paragraph 11 [which defines public domain data] shall be referred to as non-public domain data”. In addition, paragraph 17 of CMM 2015-07 specifies that the dCMR and provisional CMR are also to be considered non-public domain data.⁶⁹ The Secretariat’s understanding is that this classification of the dCMR and provisional CMR took into account that draft CMRs are developed based on the relevant submissions made by CCMs in Part 2 of the Annual Report, and may contain other non-public domain data such as information related to violation and infringements listed in Appendix 2 to the 2007 Data Rules and Procedures.⁷⁰

56. The Secretariat notes that the Commission’s data confidentiality rules apply to discussions on the dCMR and provisional CMR. These rules provide for CCMs to have access to non-public domain data to serve the purposes of the Convention,⁷¹ and for maintaining the confidentiality and security of non-public domain data.⁷² Non-public domain data may also be made available to others, such as universities, researchers, NGOs or industry on request, with the authorisation of the CCM which provided the data, and subject to signing a confidentiality agreement and maintaining the confidentiality of the information provided.⁷³ It can be implied from CMM 2015-07 that CCMs have effectively provided authorization for the release of non-public domain data to those participating in the discussions on the dCMR and provisional CMR.⁷⁴ Given their particular functions, the SPC, FFA, and PNAO have access to the dCMR and provisional CMR,⁷⁵ whereas in respect of other observers, including other IGO and NGO representatives, some CCMs have not provided permission for the non-public domain information in the dCMR or provisional CMR to be considered in an open session. The WCPFC’s data rules on confidentiality would continue to apply to CCMs and those intergovernmental organizations that have access to the information. These rules include the

⁶⁸ Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission, DATA-02, 2007. A list of public domain data is provided in Appendix 1 to the 2007 Data Rules and Procedures and a list of non-public domain data is provided in Appendix 2.

⁶⁹ CMM 2015-07, paragraph 17: “The preparation, distribution and discussion of compliance information pursuant to the CMS shall be in accordance with all relevant rules and procedures relating to the protection and dissemination of, and access to, public and non-public domain data and information compiled by the Commission. In this regard, Draft and Provisional Compliance Monitoring Reports shall constitute non-public domain data, and the Final Compliance Monitoring Report shall constitute public domain data.”

⁷⁰ Appendix 2 to the 2007 Data Rules and Procedures provides a list of examples of non-public domain data, which include data and information that can be referenced in the dCMR and provisional CMR such as the Annual Report Part 2; data that reveals the individual activities of any vessel, company or person; details of violations and infringements; details of boarding and inspection reported activities; and details of ROP reported activities.

⁷¹ Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission, DATA-02, 2007, para. 19.

⁷² *Ibid*, para. 21.

⁷³ *Ibid*, para. 30.

⁷⁴ This is consistent with paragraph 34 of the 2007 Data Rules and Procedures which provide that the Rules and Procedures “do not prevent a CCM from authorizing the release of any data it has provided to the WCPFC”.

⁷⁵ The SPC has access to the dCMR and provisional CMR stemming from paragraph 18 of the 2007 Data Rules and Procedures. Access by FFA and PNAO is specifically authorized by paragraph 21(i) of CMM 2015-07.

requirement that the information can only be used for the purpose intended and the information must be maintained in a manner consistent with the WCPFC Data Security Standards.⁷⁶

57. In light of the calls for greater transparency in TCC meetings, consistent with the WCPF Convention, the Commission could consider maintaining the closed session of TCC which considers the dCMR or the Commission working group sessions that consider the provisional CMR, but permitting the participation of other IGO and NGO representatives at the closed meeting, subject to their meeting the WCPFC's data protection requirements, including maintaining the confidentiality of the discussions, not using the information provided for any other purpose, and not commenting publicly on any information obtained through access to the meetings. Sanctions for non-compliance with the requirements could also be imposed, including the ability of the presiding Chair to withdraw permission to attend the meeting. Consideration could also be given to the Commission withdrawing the organization's accreditation as an observer.⁷⁷

58. There is some precedent in RFMOs for such an approach. In CCSBT, which has very similar data confidentiality rules as WCPFC, observers are not given access to non-public information, except that they are provided with the relevant documents if they observe a meeting, including of the Compliance Committee. Although observers are not required to sign confidentiality agreements, they must follow CCSBT's confidentiality requirements in relation to documents that they are given access to.⁷⁸ ICCAT posts official papers in advance of its meetings on the password protected part of its website. While in the past accredited observers were not provided with meeting papers until the meeting, since 2015 accredited observers have been provided with a password to access the documents in advance of the meeting.⁷⁹ The NAFO Rules of Procedure provide that observers are not to use film, video, and audio recording devices to record meeting proceedings, may not issue press releases or other information to the media on agenda items, and must comply with all rules and procedures applicable to other participants in the meeting. Failure to conform to these rules or any other rules that NAFO may adopt for the conduct of observers may result in removal from the meeting by the presiding officer and revocation of their observer accreditation status.⁸⁰ ICCAT Guidelines also provide for the withdrawal of observer accreditation status if the rules for observer participation are not complied with,⁸¹ while IATTC's Antigua Convention provides for the exclusion from further participation in meetings if an observer fails to comply with such rules.⁸²

59. It would be consistent with the WCPF Convention to permit greater transparency in the work of TCC. Guidelines could be developed providing specifically for participation of NGO observers and other IGO observers at TCC meetings or WCPFC meetings that are otherwise closed sessions along the following lines:

⁷⁶ 2007 Data Rules and Procedures, para. 30.

⁷⁷ This sanction is not currently provided in the Rules of Procedure, but could be included as a sanction for breach of a confidentiality agreement.

⁷⁸ Personal communication, CCSBT Executive Secretary, 29 September, 2016.

⁷⁹ H. Koehler, *op cit*, para. 26.

⁸⁰ See <http://www.nafo.int/meetings/observers.html>

⁸¹ ICCAT, Guidelines and Criteria for Granting Observer Status at ICCAT Meetings, para. 9.

⁸² Antigua Convention, Annex 2, para. 12.

- a. When accredited observers register for the annual session of the Technical and Compliance Committee, the observer participant may request to observe the meetings of TCC which consider the draft Compliance Monitoring Report and develops the provisional Compliance Monitoring Report.
- b. At registration of the observer participant, the participant will sign a confidentiality agreement, not to disclose any information obtained during the dCMR or provisional CMR discussions.
- c. Documentation for the meeting will be provided in electronic format to the observers at the meeting.
- d. No observer participant will make public comments, including issuing press releases or releasing information to the media, on any compliance matters which are discussed in the dCMR or provisional CMR process.
- e. All observers admitted to a meeting will comply with all rules and procedures applicable to their attendance in the meeting. Failure to conform to these rules or any other rules that WCPFC may adopt for the conduct of observers will result in the withdrawal of permission to attend the meeting by the presiding Chair of the meeting. The WCPFC Commission may also decide whether to withdraw accreditation of the observer organization at future WCPFC meetings.
- f. The meetings of TCC which consider the dCMR or the working group of the Commission which considers the provisional CMR will otherwise be closed sessions.

G. Recommendation

60. It is recommended that the Commission:

- i) Recognize Article 21 of the WCPFC Convention which provides for the Commission to promote transparency in its decision-making processes and other activities;
- ii) Agree that observers from non-governmental organizations will be required to pay a reasonable fee for participation at meetings of the Commission to contribute to the additional expenses generated by their participation, as determined annually by the Executive Director taking into account international practice;
- iii) Agree that the fee would be charged on registration and would be charged only for participation at Commission meetings, unless otherwise decided by the Commission.
- iv) Agree to develop guidelines to enable the participation of NGO observers at closed meetings of the Technical and Compliance Committee and the Commission under conditions which would ensure the confidentiality and non-disclosure of any information obtained as a result of that participation, and sanctions for failure to comply with the rules and procedures relating to participation.