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Bringing Pacific Bluefin Tuna Back from the Brink: Ensuring the Submission of Operational Data to the Western and Central Pacific Fisheries Commission


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BRINGING PACIFIC BLUEFIN TUNA BACK FROM THE BRINK: ENSURING THE SUBMISSION OF OPERATIONAL DATA TO THE WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION

Chris Wold, Mitsuhiro Takahashi,** Siwon Park,***
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ABSTRACT

The Commission of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Pacific Ocean (WCPFC) manages fish stocks of significant financial and ecological value across an area of the Pacific Ocean comprising 20% of Earth. WCPFC members, however, have disagreed sharply over management measures for tuna, sharks, and other species, in part because some WCPFC members have refused to provide the WCPFC with vessel-specific data, known as operational data, which is needed to manage the stocks sustainably. Despite a legal requirement to submit operational data to the WCPFC, these members, including Japan and Korea, have claimed that “domestic legal constraints,” in particular prohibitions against disclosure of “personal information,” prevent them from complying with their international obligation to submit operational data. This Article assesses those claims and concludes that Japan and Korea either do not have current domestic legal constraints preventing them from submitting operational data or they have readily available options to remedy those constraints. Consequently, they are in violation of their obligations to submit operational data to the WCPFC.

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I. INTRODUCTION

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Pacific Ocean (WCPF Convention)¹ establishes the Western and Central Pacific Fisheries Commission (WCPFC) to manage and conserve tuna and other fish stocks of significant value across a huge swath of the Pacific Ocean—an area covering about twenty percent of Earth’s surface.² Despite the enormous \$3.8 billion per

1. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 2275 U.N.T.S. 40532 [hereinafter WCPF Convention], <https://www.wcpfc.int/system/files/text.pdf>.

2. W. & Cent. Pac. Fisheries Comm’n [WCPFC], *Frequently Asked Questions and Brochures*, ABOUT WCPFC, <https://www.wcpfc.int/frequently-asked-questions-and-brochures> (last updated Mar. 3, 2010).

year value of the fisheries resources managed by the WCPFC,³ the efforts of the WCPFC to manage the fisheries sustainably have been undermined by the competing interests of distant water fishing nations and Pacific island states, where the majority of tuna are caught,⁴ and institutional rivalries that hamper the scientific decision-making process.⁵ In addition, several members have not provided operational level catch and effort data (operational data), which includes the number and type of fish caught per set by a specific vessel.⁶ Operational data helps fisheries scientists accu-

3. Quentin Hanich et al., *Oceans of Opportunity? The Limits of Maritime Claims in the Western and Central Pacific Region*, in *NAVIGATING PACIFIC FISHERIES: LEGAL AND POLICY TRENDS IN THE IMPLEMENTATION OF INTERNATIONAL FISHERIES INSTRUMENTS IN THE WESTERN AND CENTRAL PACIFIC OCEAN REGION* 21, 25 (Quentin Hanich & Martin Tsamenyi eds. 2009). “[I]n 2007, the tuna catch in the WCPO was estimated at 2,396,915 tonnes and worth approximately US\$3,895 million. These tuna fisheries represent the primary economic opportunity for many of the region’s small island developing States.” *Id.* at 25–26; see also Pepe Clarke, *Management of Tuna Fisheries in the Western and Central Pacific*, in *SHARED RESOURCES: ISSUES OF GOVERNANCE* 199, 203 (Sharelle Hart ed., 2008) (presenting a separate estimate valuing the fishery at \$2.2 billion per year); OCEANIC FISHERIES PROGRAMME OF THE SECRETARIAT OF THE PACIFIC COMMUNITY, *POLICY BRIEF 25/2014: SUSTAINABILITY OF PACIFIC TUNA FISHERIES* (2014) (discussing another estimate placing the value of the landed catch at \$5 to 7 billion per year). The “landed value” of fish is “the value of the fish as they first leave the boat.” A.J. Dyck & U.R. Sumalia, *Marine Fisheries and the World Economy*, in *OCEAN SCIENCE SERIES* (Pew Environment Group 2010).

4. See, e.g., Clarke, *supra* note 3, at 203–04 (describing how Japan, Taiwan, South Korea, and the United States—all distant water fishing nations—caught approximately ninety percent of the total tuna catch in the Western and Central Pacific Ocean, and that, whereas the Pacific island developing states wanted greater economic benefits from their tuna fisheries, the distant water fishing nations wanted the fish for commercial sale at large profit margins).

5. Sci. Comm., WCPFC, *Scientific Committee Ninth Regular Session Summary Report*, ¶¶ 197–201 (2013) [hereinafter Sci. Comm., *Ninth Regular Session Summary Report*], <https://www.wcpfc.int/meetings/9th-regular-session-scientific-committee> (describing the different views of the members concerning which scientific body had the authority to provide advice to the WCPFC); see also Chris Wold, Emi Kondo & Erika Hamilton, *A Review of the Provision of Scientific Advice in the Western and Central Pacific Fisheries Commission*, at 14, WCPFC-SC10-2014/ MI-IP-03 (2014), <https://www.wcpfc.int/system/files/SC10-MI-IP-03%20Review%20of%20Provision%20of%20Scientific%20Advice%20in%20WCPFC.pdf>; Chris Wold, Emi Kondo & Erika Hamilton, *Bringing Southern Bluefin Tuna Back from the Brink: Enhancing Understanding of the Scientific Process in the Western and Central Pacific Fisheries Commission*, 42 B.C. ENVTL AFF. L. REV. 347, 368 (2015) (the authors acknowledge that the title of this article should refer to Pacific bluefin tuna (*Thunnus orientalis*), which is a separate species from southern bluefin tuna (*Thunnus maccoyii*)).

6. WCPFC, *Scientific Data to be Provided to the Commission*, § 3 (2012) [hereinafter *Scientific Data Document*], <https://www.wcpfc.int/system/files/Scientific%20Data%20to%20be%20Provided%20to%20the%20Commission%20-%20decision%20made%20by%20WCPFC%2010%2028clean%29.pdf>. As described in more detail in Section III, *infra*, the precise definition of “operational level catch and effort data” remains unclear, as does the legal status of certain documents that provide content to the phrase.

rately estimate the status of fish populations and determine sustainable catch limits.⁷ WCPFC members that refuse to provide operational data instead provide aggregate data, which groups catches from a number of vessels over a larger geographic area and longer period of time.⁸ The lack of operational data adversely affects fisheries management because fisheries managers are unable to accurately assess the status of fish stocks; data aggregated from several vessels spread out geographically does not allow fisheries managers to accurately assess catch effort, and thus the status of fish stocks, over a smaller geographic area.⁹ The inability to manage fisheries resources most effectively in turn adversely affects the economies and food security of many countries in the region.¹⁰

7. See, e.g., Food and Agric. Org. of the U.N. [FAO], *Technical Guidelines for Responsible Fisheries 4: Fisheries Management*, § 2 (1997) [hereinafter *Technical Guidelines for Responsible Fisheries*], <http://www.fao.org/3/a-w4230e/w4230e06.htm#bm06.2>; Peter Williams, WCPFC, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, ¶ 34, WCPFC-SC10-2014/ST WP-1 (2014) [hereinafter *Data Gaps 2014*], <http://www.wcpfc.int/system/files/SC10-ST-WP-01%20Data%20Gaps.pdf>.

8. *Scientific Data Document*, *supra* note 6, § 3. When operational catch and effort data cannot be provided to the WCPFC, then members must submit

catch and effort data aggregated by time period and geographic area that have been raised to represent the total catch and effort shall be provided. Longline catch and effort data shall be aggregated by periods of month and areas of 5° longitude and 5° latitude. Purse-seine and ringnet catch and effort data shall be aggregated by periods of month, areas of 1° longitude and 1° latitude, and type of school association. Catch and effort data for other surface fisheries targeting tuna shall be aggregated by periods of month and areas of 1° longitude and 1° latitude.

Id. § 3–4.

9. The Oceanic Fisheries Programme of the Secretariat of the Pacific Community (SPC) has noted that operational data “are required for the development of indices of abundance used in WCPFC stock assessments” and “to determine the spatial distribution of the catch in relation to [exclusive economic zones], the high seas areas and other management-related areas.” Peter Williams, WCPFC, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, ¶ 29, WCPFC-SC9-2013/ST WP-1 (2013) [hereinafter *Data Gaps 2013*], <https://www.wcpfc.int/system/files/ST-WP-01-Data-Gaps.pdf>.

10. According to Tuvalu’s Minister for Natural Resources, “[f]isheries, and particularly tuna, have been identified as Tuvalu’s most important natural resource for many years.” DEVELOPMENT OF TUNA FISHERIES IN THE PACIFIC (DEVFISH), A FAIRER SLICE FOR PACIFIC PEOPLES 8 (2009). In Kiribati, “fishing, aquaculture, processing and trade activities provide a range of employment, income, revenue and educational benefits for I-Kiribati, as well as food security benefits through the consumption of Kiribati fisheries resources. Its oceanic fisheries provide most of the government revenue and economic livelihood benefits and its coastal fisheries provide valuable social and food security resource benefits.” BROOKE CAMPBELL & QUENTIN HANICH, FISH FOR THE FUTURE: FISHERIES DEVELOPMENT AND FOOD SECURITY FOR KIRIBATI IN AN ERA OF GLOBAL CLIMATE CHANGE 4 (2014), http://pubs.iclarm.net/resource_centre/2014-47.pdf; see also HENRIKE SEIDEL & PADMA N. LAL, ECONOMIC VALUE OF THE PACIFIC OCEAN TO THE PACIFIC ISLAND COUNTRIES AND TERRITORIES § 4.2.2.2 (2010) (“Coastal or inshore fishing for

The WCPFC members that have not submitted operational data claim that domestic legal constraints prevent them from providing such data.¹¹ Japan, for example, alleges that its Act on the Protection of Personal Information (APPI)¹² prevents it from providing information that could be used to identify a particular person, and to reveal operational data would violate this law.¹³ While Japan asserts that the APPI prevents it from disclosing such data, the APPI, in fact, only applies to business operators handling personal information and expressly excludes governmental agencies from its rules relating to disclosure of personal information.¹⁴ Instead, a different law, the Act on the Protection of Personal Information held by Administrative Organs (APPIHAO), applies to governmental agencies, including Japan's Ministry of Agriculture, Forestry and Fisheries (MAFF), the agency that implements the WCPF Convention for Japan.¹⁵ Nonetheless, Japan either already has the authority to submit operational data to the WCPFC or has readily available options for submitting such information despite the APPIHAO's general prohibition against the disclosure of personal information.¹⁶

Korea has not provided the WCPFC with information about the domestic legal constraints that prevent it from providing operational data.

home consumption plays a vital role in Pacific islanders' lifestyles and provides food security throughout the [Pacific island countries and territories].")

11. *Scientific Data Document*, *supra* note 6, § 3. The document, describing what constitutes "operational level catch and effort data," provides the following:

It is recognized that certain members and cooperating non-members of the Commission may be subject to domestic legal constraints, such that they may not be able to provide operational data to the Commission until such constraints are overcome. Until such constraints are overcome, aggregated catch and effort data and size composition data, as described in (4) and (5) below, shall be provided.

Id.

12. Kojinjoho no hogo ni kansuru horitsu [Act on the Protection of Personal Information], Act No. 57 of 2003, as amended through Act No. 49 of 2009 [hereinafter APPI], *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=act+on+the+protection+of+personal+information&x=50&y=3&ia=03&ky=&page=2> (Japan).

13. Japan has not provided this specific legal analysis. It must be inferred from its statement that the APPI prevents it from submitting operational level catch and effort data.

14. APPI, *supra* note 12, art. 2(3).

15. Gyōseikikan no hoyūsuru kojinjōhō no hogo ni kansuru hōritsu [Act on the Protection of Personal Information Held by Administrative Organs], Act No. 58 of 2003, as amended through Act No. 69 of 2014 [hereinafter APPIHAO], *translated in* (JLT DS), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=38&y=22&co=01&ia=03&ky=act+on+the+protection+of+personal+information+held+by+administrative+organs&page=10> (Japan).

16. See *infra* Section IV.A. (discussing Japan and Korea's operational data collection, submission and gaps).

With Korea remaining silent, we have assumed that Korea also believes that its privacy laws prevent it from submitting operational data due to the similarities between Korean and Japanese privacy laws and the allied positions frequently taken by Korea and Japan on fisheries issues. While Korea's most relevant privacy law, the Personal Information Protection Act (PIPA),¹⁷ prevents the disclosure of certain personal information, it does not provide a persuasive legal basis for Korea to avoid its obligation to provide operational data to the WCPFC. First, the submission of operational data likely does not constitute "personal information" under PIPA.¹⁸ Second, Korea can submit operational data collected from Korean vessels to the WCPFC with the consent of ocean fishery operators, such as vessel owners and captains.¹⁹ Third, even without fishery operators' consent, Korea can submit operational data to an international organization such as the WCPFC, as long as the submission would not unduly infringe the interest of vessel owners and captains.²⁰ Fourth, even if there is a conflict between the requirements for submission of data under the WCPF Convention and Korean privacy law, the Korean government agrees that the treaty prevails in such a situation.²¹ Moreover, in 2015 Korea submitted operational data for the 2014 season,²² so perhaps Korea believes that it does not have a legal basis for not disclosing operational data to the WCPFC.

This Article reviews the requirements for submission of operational data to the WCPFC with the goal of providing guidance to members that have not submitted operational data. It reviews the specific claims and legislation of Japan and Korea, not to target them for shame or sanctions, but rather due to the importance of these two countries to the global fishing economy based on the size of their total catches.²³ The goal is to assist all

17. Personal Information Protection Act, Act No. 10465, Mar. 29, 2011, amended by Act. No. 13423, July 24, 2015 (S. Kor.) [hereinafter PIPA], translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=32442&lang=ENG.

18. See *infra* Section V.B.

19. See *infra* Section IV.A. (discussing Japan and Korea's operational data collection, submission, and gaps).

20. See *infra* Section V.B.

21. See *infra* Section V.B.

22. Peter Williams, WCPFC, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, ¶ 24, WCPFC-SC11-2015-IPO4 (2015) [hereinafter *Data Gaps 2015*], <https://www.wcpfc.int/system/files/ST-WP-01%20Data%20Gaps%20Rev1.pdf> (stating that Korea providing operational data for its longline and purse seine fleets for 2014).

23. Japan and Korea frequently are in the top three for total catches among those WCPFC members not reporting operational level data, with Indonesia also making the top three. WCPFC, *Tuna Fishery Y.B. 2014*, 123–27 tbl.84 (2014).

WCPFC members and the WCPFC itself to obtain the data necessary to ensure the sustainability of tuna and other stocks.

Part II describes the importance of operational data to fisheries management. Part III introduces the requirements for data submission in the WCPF Convention and the WCPFC. Part IV briefly discusses the data actually submitted by Japan and Korea and describes the WCPFC's attempts to obtain operational data from WCPFC members, including Japan and Korea. Part V analyzes the potential privacy claims Japan and Korea could make in defense of their failures to submit their operational data and concludes that these claims are not valid. It also describes ways in which Japan and Korea could bring their legislation into conformity with the WCPFC's requirements for submission of operational data and explains how the United States revised its legislation to overcome its domestic legal constraints. Part VI concludes that the culture of shielding operational data from review by scientists must change if the WCPFC is to ensure the sustainability of Pacific fisheries.

II. THE IMPORTANCE OF PROVIDING OPERATIONAL DATA

Sustainable fisheries are critical to maintaining the long-term survival of target species, to ensure a long-term food supply, and to protect a valuable economic resource.²⁴ This is particularly true for developing countries where fish may be the major source of animal protein and fisheries generate significant economic benefits for both local and national economies.²⁵ To ensure sustainable fisheries, fisheries managers need timely, complete, and reliable statistics on catch and fishing effort.²⁶ In addition, the data neces-

24. See FAO, *Code of Conduct for Responsible Fisheries* (1995) [hereinafter *Code of Conduct for Responsible Fisheries*]. The Code of Conduct for Responsible Fisheries emphasizes the importance of sustainable fisheries and provides that “[t]he right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of living aquatic resources.” *Id.* art. 6.1. With this in mind, the FAO has written that “[t]he aim of many data collection programmes is to monitor and assess the status of the stocks that are being exploited.” FAO, *Guidelines for the Routine Collection of Capture Fishery Data* § 3.2.1 (1998) [hereinafter *Guidelines for the Routine Collection of Capture Fishery Data*].

25. SEIDEL & LAL, *supra* note 10; *Guidelines for the Routine Collection of Capture Fishery Data*, *supra* note 24, § 2.1.1.

26. The Code of Conduct for Responsible Fisheries provides that:

States should ensure that timely, complete and reliable statistics on catch and fishing effort are collected and maintained in accordance with applicable international standards and practices and in sufficient detail to allow sound statistical analysis. Such data should be updated regularly and verified through an appropriate system.

Code of Conduct for Responsible Fisheries, *supra* note 24, art. 7.4.4.

sary for informed decision-making must be broad, vessel-specific, and collected over a period of time.²⁷

A broad range of data is needed because the sustainability or unsustainability of the catch can be determined in different ways. As the Food and Agriculture Organization of the U.N. (FAO) explains:

Increasing overexploitation of resources may often be detected by a combination of falling catch per unit effort, falling total landings, decreasing mean weight of fish or changes in the fish population age structure or species composition. By maintaining a time series of catch per unit effort and total landings by fleets (e.g. gear or boat category), by commercial species group, fishing area and fishing season, overfishing should be detectable. . . .

Sophisticated methods, such as cohort analysis, based on more detailed biological data may also be used. Data for these methods usually comprise size, age, sex and maturity of fish sampled from the catch. These data, routinely collected over a long period, together with other scientific information on fish growth and mortality, can produce accurate estimates of the current state of the stock. Results from such stock assessments should form the scientific foundation for advice on conservation measures.

. . . Monitoring species, age and size composition, mean lengths of species caught, habitat, by-catches (in particular discards) allows management to assess the wider impacts of fishing on the ecosystem.²⁸

In particular, vessel-specific “catch and effort data are critical to construct the most important indicators in most fisheries.”²⁹ In fact, FAO explains that:

data should always be collected at the level of the most detailed stratum, as it is always possible to aggregate, but impossible to disaggregate data. For example, if fish length-frequency data were collected aggregated over each landing day instead of trip, it may turn out later that on different trips vessels were exploiting different stocks. As the length frequency cannot be linked to particular trips, it would no longer be possible to know from which stock they

27. See *Technical Guidelines for Responsible Fisheries*, *supra* note 7, § 2(i) (“The collection of data is not an end in itself, but is essential for informed decision-making.”).

28. *Guidelines for the Routine Collection of Capture Fishery Data*, *supra* note 24, § 3.2.1.

29. *Id.* § 4.2.2.

originated and stock assessment work using these data would be unreliable.³⁰

These vessel-specific operational data are absolutely essential for effective fisheries management to develop indices of abundance for stock assessments and determine more precisely the spatial distribution of the catch.³¹

Lastly, fisheries managers have long recognized the importance to sustainable fisheries management of having data collected consistently and routinely over a long period of time.³² With such data, for example, WCPFC would have a better understanding of declines in longline bigeye tuna.³³

FAO concludes that without these data, fisheries stakeholders are forced to make assessments of fish stocks “based on subjective judgment and anecdotal information.”³⁴ This leads stakeholders to disagree about management strategies.³⁵ For all these reasons, the failure of several WCPFC members to provide operational data is problematic for managing tuna and other fish stocks in the WCPFC Convention Area.

III. REQUIREMENTS FOR PROVIDING DATA

While the FAO and others have described in detail the types of information that States should provide to assess stocks adequately and ensure total allowable catches are set at maximum sustainable yield, they have been reluctant to define “operational data” and contrast it with “aggregate data.” There is a general understanding, however, that “[o]perational level catch and effort data is detailed fishing activity data usually collected on log-

30. *Id.* § 4.2.5.

31. The Oceanic Fisheries Programme of the Secretariat of the Pacific Community (SPC) has noted that operational data “are required for the development of indices of abundance used in WCPFC stock assessments” and “to determine the spatial distribution of the catch in relation to [exclusive economic zones], the high seas areas and other management-related areas.” *Data Gaps 2013*, *supra* note 9, ¶ 29. The SPC is the WCPFC’s scientific service provider. The WCPFC’s Memorandum of Understanding (“MoU”) with the SPC calls on the SPC to provide scientific services, including data management services, to the WCPFC. Revised Memorandum of Understanding Between the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and the Secretariat of the Pacific Community 2–3, Mar. 28, 2013, <https://www.wcpfc.int/system/files/Revised%20MOU%20template%20with%20SPC.pdf>.

32. *See Guidelines for the Routine Collection of Capture Fishery Data*, *supra* note 24, § 4.1 (“[I]t is imperative to have long time series of data collected consistently and routinely in order to evaluate trends in the behaviour of a variable.”).

33. *Data Gaps 2013*, *supra* note 9, ¶ 34.

34. *Guidelines for the Routine Collection of Capture Fishery Data*, *supra* note 24, § 3.2.1.

35. *See id.* § 3.2. In addition, enforcement of fisheries conservation measures is more difficult without these data. *Id.* § 3.2.3 (“Enforcement may be assisted by using data collected as an audit trail, from harvesting through processing to export or consumption.”).

sheets. These data include information regarding vessel identifiers, trip information and operational information for different gear types.”³⁶ Another fisheries document describes “operational data” as derived “from logbooks and observers” and which are “the most important of all the scientific data since they provide, *inter alia*, the only data collected at the fishing operation level and have allowed scientists to identify trends (such as vessel effects, gear configuration effects, etc.) not evident in other types of data.”³⁷ In contrast, aggregate data are compiled from more than one vessel or encompass weight or catch numbers in totality rather than by species.³⁸

To gain an understanding of what operational data means in the context of the WCPFC, this section explores the numerous provisions of the WCPF Convention that require WCPFC members to collect and provide data to the WCPFC.³⁹ Members have also adopted many Conservation and Management Measures (CMMs) that require data to be provided.⁴⁰ However, neither the WCPF Convention nor the WCPFC in its CMMs has defined the phrase “operational data” or contrasted “operational data” with “aggregate data.”

Regardless of any formal definition of data types, both the WCPF Convention and the WCPFC have established frameworks for the types of information that members must submit that are vessel specific. In particular, the WCPFC adopted the document *Scientific Data to Be Provided to the Commission*, which includes “Standards for the Provision of Operational Level Catch and Effort Data.”⁴¹ In these documents, the WCPFC has made clear that operational data is something much more specific than ag-

36. WCPFC, *Consultancy Report: Causes of Data Gaps*, at 7, WCPFC5-2008/IP05 (Nov. 8, 2008), <https://www.wcpfc.int/system/files/WCPFC5-2008-IP05%20%5BCauses%20of%20Data%20Gaps%20Consultancy%20Report%5D.pdf>.

37. Secretariat of the Pac. Cmty. - Oceanic Fisheries Programme [SPC-OPC], *A Tier Scoring System for Compliance with the Provision of Scientific Data to the Commission*, ¶ 4, WCPFC11-2014-19b (Nov. 20, 2014), [https://www.wcpfc.int/system/files/WCPFC11-2014-19b%20%20Working%20Paper%20on%20SCIDATA%20-%20compliance%20tier%20evaluation%20\(Final\).pdf](https://www.wcpfc.int/system/files/WCPFC11-2014-19b%20%20Working%20Paper%20on%20SCIDATA%20-%20compliance%20tier%20evaluation%20(Final).pdf).

38. See WCPFC, *Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission*, at 15 (2007) [hereinafter WCPFC, *Rules and Procedures*], <https://www.wcpfc.int/system/files/Rules%20and%20Procedures%20%5BData%5D%20%5Bas%20revised%20at%20WCPFC4%20December%202007%5D.pdf>.

39. See, e.g., WCPF Convention, *supra* note 1, arts. 5(i), 23(2)(a); see also *infra* Section III.A.1.

40. See *infra* Section III.A.2.

41. *Scientific Data Document*, *supra* note 6.

gregate data, with operational data referencing data specific to an individual vessel and specific sets.⁴²

A. Data Required by the WCPF Convention

Article 5(i) of the WCPF Convention provides that, “to conserve and manage highly migratory fish stocks in the Convention Area,” each member must “collect and share, in a timely manner, complete and accurate data concerning fishing activities on, *inter alia*, vessel position, catch of target and non-target species and fishing effort.”⁴³ While this provision does not use the phrase “operational data,” the provision is written broadly. The term “complete” suggests that Article 5(i) relates to all types of data “concerning fishing activities,” including fishing effort, and the phrase “*inter alia*” signals that the enumerated types of data that are required to be collected and shared are non-exhaustive. In addition, by referencing “vessel position,” Article 5(i) indicates that information should be provided for each vessel and not aggregated from multiple vessels.

Article 23(2)(a) provides a broader and more specific list of the types of data that each member must submit to the WCPFC. First, it requires members to provide the WCPFC each year with “statistical, biological and other data and information in accordance with Annex I of the [U.N. Fish Stocks] Agreement.”⁴⁴ Second, it grants the WCPFC broad discretion to require members to submit “such data and information as the Commission may require.”⁴⁵

1. Data Required “In Accordance with [the Fish Stocks] Agreement”

Annex I of the Fish Stocks Agreement describes a broad range of “statistical, biological and other data and information” that members “should” or

42. *See id.* (requiring, for example, reporting of the number of hooks per set from operation of longliners, the number of fish for specific species caught each day from trollers, and other data more specific than aggregate data).

43. WCPF Convention, *supra* note 1, art. 5(i).

44. *Id.* art. 23(2)(a). The WCPF Convention defines “Agreement” as the “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,” WCPF Convention, *supra* note 1, art. 1(b). This agreement is more commonly referred to as the “Fish Stocks Agreement.” Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. I-37924 [hereinafter Fish Stocks Agreement], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement>.

45. WCPF Convention, *supra* note 1, art. 23(2)(a).

“shall” collect, depending on the provision.⁴⁶ Pursuant to Annex I of the Fish Stocks Agreement, WCPFC members should, as a general principle, collect data from vessels flying their flag “on fishing activities according to the operational characteristics of each fishing method (e.g., *each* individual tow for trawl, *each* set for long-line and purse-seine, *each* school fished for pole-and-line and *each* day fished for troll) and in sufficient detail to facilitate effective stock assessment.”⁴⁷ The focus on “each” set establishes the basic principle that data should be specific to a vessel and set. The data should not be aggregated over space, time, or multiple vessels.

Annex I then describes mandatory obligations for collecting data that support the vessel-specific focus of the general principles. Article 3(1) of Annex I identifies the following specific types of data that members “shall” collect and submit

in sufficient detail to facilitate effective stock assessment . . . :

- (a) time series of catch and effort statistics by fishery and fleet;
- (b) total catch in number, nominal weight, or both, by species (both target and non-target) as is appropriate to each fishery;
- (c) discard statistics, including estimates where necessary, reported as number or nominal weight by species as is appropriate to each fishery;
- (d) effort statistics appropriate to each fishing method; and
- (e) fishing location, date and time fished and other statistics on fishing operations as appropriate.⁴⁸

46. Article 23(2)(a) specifically provides that “[e]ach member of the Commission *shall*: (a) provide annually to the Commission statistical, biological and other data and information *in accordance with* Annex I of the [Fish Stocks] Agreement.” *Id.* art. 23(2)(a) (emphasis added). One could argue that the use of “shall” in Article 23(2)(a) transforms the discretionary data provisions (“should”) of the Fish Stocks Agreement into mandatory ones. This analysis, however, focuses on the phrase “in accordance with” to conclude that the discretionary data provisions of the Fish Stocks Agreement remain discretionary.

47. Fish Stocks Agreement, *supra* note 44, at Annex I, art. 2(a) (emphasis added).

48. *Id.* at Annex I, art. 3(1). This provision is supported by Article 5 of Annex III of the WCPFC Convention which states: “[t]he operator [of a vessel] shall record and report vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with the standards for collection of such data set out in Annex I of the Agreement.” WCPFC Convention, *supra* note 1, at Annex III, art. 5. While this provision applies to operators of vessels, it underscores the importance of collecting and submitting vessel-specific data. *Id.*

By focusing on fishing location, date, and time fished, subparagraph (e), like Article 2, focuses on vessel-specific information, rather than information aggregated across multiple vessels.

Article 3(2) further requires States to collect, “where appropriate,” and submit information to relevant regional fisheries management organizations to support stock assessment, including “(a) composition of the catch according to length, weight and sex; [and] (b) other biological information supporting stock assessments, such as information on age, growth, recruitment, distribution and stock identity.”⁴⁹ Even though qualified by the phrase “where appropriate,” Article 3(2) and Article 3 as a whole outline the type of vessel-specific and species-specific data that WCPFC members must collect and submit.

Article 4(1) further provides that States “should” collect the following non-exhaustive list of vessel-related data and information: vessel identification, specification, flag, and port registry, as well as fishing gear descriptions.⁵⁰ Article 4(1) indicates a level of specificity—i.e., vessel-specific information—needed for “standardizing fleet composition and vessel fishing power and for converting between different measures of effort in the analysis of catch and effort data.”⁵¹

Article 5 also expressly provides that WCPFC members “shall” collect “logbook data on catch and effort, including data on fishing operations on the high seas” from vessels flying their flag.⁵² The requirement to collect logbook data also demonstrates a specific intent to gather information concerning individual vessels.

Together, these provisions of the WCPF Convention and the Fish Stocks Agreement describe data and information that members must record and report that are vessel- and set-specific, rather than aggregated from multiple vessels. While neither the WCPF Convention nor the Fish Stocks Agreement defines operational data as vessel- or set-specific data, the WCPFC Rules and Procedures relating to data state that operational level catch effort data is “[c]ollected on fishing vessel logbooks and by observers.”⁵³ In other words, not only are WCPFC members directed to report vessel-specific data, but the meaning of operational catch and effort data is intended to mean vessel- and set-specific logbook data.

49. Fish Stocks Agreement, *supra* note 44, at Annex I, art. 3(2).

50. *Id.* at Annex I, art. 4(1).

51. *Id.*

52. *Id.* at Annex I, art. 5.

53. WCPFC, *Rules and Procedures*, *supra* note 38, at 7.

2. Data Required by the WCPFC

Article 23(2) requires members to submit specified information to the WCPFC annually and submit other information relating to fishing activities “at such intervals” as may be required.⁵⁴ The WCPF Convention requires its members to submit, on an annual basis, statistical, biological, and other data and information provided in Annex I of the Fish Stocks Agreement as well as other data and information that the WCPFC mandates.⁵⁵ That requirement provides the foundation for the WCPFC’s rules for submission of annual reports.

The instructions for completing annual reports provide further insight into the specificity with which members are to report fisheries data.⁵⁶ Those instructions direct the members to submit data by gear type, species, vessel, and transshipment.⁵⁷ As compliance with this document is mandatory,⁵⁸ members must separate data into those categories. Consistent with the Convention’s provisions for data submission, the annual report is designed to provide vessel-specific information.

The WCPFC has also used its authority under Article 23(2) to adopt requirements for the submission of data pursuant to legally-binding CMMs.⁵⁹ Although the WCPFC has adopted a large number of specific reporting requirements relating to an array of subjects in CMMs, these

54. WCPF Convention, *supra* note 1, art. 23(2)(b).

55. *Id.* art. 23(2)(a).

56. At the Second Regular Session of the Commission in 2005, the Commission established that members must provide a two-part Annual Report to the Commission to satisfy their reporting obligations regarding Article 23(2). Part 1 of the Annual Report should contain a summary of each member’s “information on fisheries, research, and statistics during the preceding calendar year.” Members are also required to include some information required by CMMs in Part 1. Part 2 of the Annual Report must include information on Members’ management and compliance in the preceding calendar year. Tech. & Compliance Comm., WCPFC, *Summary of Submissions of Annual Report Part 1 and Annual Report Part 2*, ¶ 2, WCPFC-TCC9-2013-IP01_rev3 (2013), http://www.wcpfc.int/system/files/WCPFC-TC9-2013-IP01_rev3%20Summary%20AR%20Pt%201%20and%20AR%20Pt%202%20submissions.pdf.

57. Sci. Comm., WCPFC, *Scientific Committee Fourth Regular Session Summary Report*, Attachment N (2008), http://www.wcpfc.int/system/files/0_SC4%20Summary%20Report%20%5BEdited%20Version%5D.pdf. The WCPFC adopted this document at its Fifth Regular Session. WCPFC, *Fifth Regular Session Summary Report*, ¶ 131 (2008), <https://www.wcpfc.int/system/files/WCPFC%20%5BSummary%20Report%20-%20Final%204May2009%5D.pdf>.

58. WCPFC Secretariat, *Summary of Annual Reports (Part 1 and 2) to the Commission*, WCPFC5-2008-IP02 (Rev.1) (2008) (“All CCMs are required to use the newly adopted Part 1 Report template in 2009.”).

59. Under the Convention, a decision adopted by the Commission shall become binding 60 days after the date of its adoption. WCPF Convention, *supra* note 1, art. 20(5). The Commission has previously adopted accepted nomenclature for Commission decisions, which provides that CMMs are binding decisions. WCPFC, *Second Regular Session Summary Report*,

CMMs do not necessarily provide guidance on the specificity of data and information that members must submit and, consequently, on the meaning of operational data. For example, some CMMs require members to report information outside of their annual reports that is consistent with the members' understanding of the meaning of operational data.⁶⁰ At other times, however, the CMMs are unclear with respect to the specificity of information required,⁶¹ while other CMMs specifically direct members to submit data different from operational data.⁶²

at Attachment M (2005), https://www.wcpfc.int/system/files/WCPFC2_Records_Summary.pdf.

60. For example, every month, members must provide information submitted by captains of purse seine vessels regarding the number of sets in which fish aggregation devices are used, the total number of sets, and the estimated bigeye catch in the previous week. WCPFC, *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean*, ¶ 19(a)–(b), CMM 2014-01 (2014) [hereinafter WCPFC, *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna*], <https://www.wcpfc.int/system/files/CMM%202014-01%20Conservation%20and%20Management%20Measure%20for%20Bigeye,%20Yellowfin%20and%20Skipjack%20Tuna.pdf>. They must also report any sea turtle incident, such as entanglement in a net, recorded by the operator of a purse seine vessel. *Id.* ¶ 44. China, Indonesia, Japan, Korea, Chinese Taipei, and the United States are the CMMs with bigeye longline catches. *Id.* at Attachment F. In addition, the CMM designed to reduce seabird mortality in fisheries requires members to report on the total number of hooks, number of hooks observed, percentage of hooks observed, number of captures, rates of captures, and number species in geographic locations by each type of vessel. WCPFC, *Conservation and Management Measure for Mitigating Impacts of Fishing on Seabirds*, ¶ 9, Annex 2, CMM 2012-07 (2012), https://www.wcpfc.int/system/files/CMM%202012-07%20Conservation%20and%20Management%20Measure%20for%20Mitigating%20Impacts%20of%20Fishing%20on%20Seabirds_rev.pdf. This information is very precise and more aligned with the vessel-specific information considered to be “operational data.”

61. For example, the CMM for striped marlin directs members to report annually to the Commission “the catch levels of *their fishing vessels*” that have taken striped marlin as bycatch as well as the number and catch levels of vessels fishing for striped marlin in the Convention Area south of 15°S. WCPFC, *Conservation and Management Measure for Striped Marlin in the Southwest Pacific*, ¶ 4, CMM 2006-04 (2006), <https://www.wcpfc.int/system/files/Conservation%20and%20Management%20Measure-2006-04%205BStriped%20Marlin%205D.pdf> (emphasis added). Similarly, the CMM for albacore requires members to report “all catches” of North Pacific albacore to the WCPFC every six months, except for small coastal fisheries which shall be reported on an annual basis. WCPFC, *Conservation and Management Measure for North Pacific Albacore*, ¶ 3, CMM 2005-03 (2005), https://www.wcpfc.int/system/files/WCPFC2_Records_F.pdf.

62. For example, members are directed to report their fishing effort for bluefin tuna “by fishery.” WCPFC, *Conservation and Management Measure to Establish a Multi-annual Rebuilding Plan for Pacific Bluefin Tuna*, ¶ 5, CMM 2014-04 (2014), <https://www.wcpfc.int/system/files/CMM%202014-04%20Conservation%20and%20Management%20Measure%20to%20establish%20a%20multi-annual%20rebuilding%20plan%20for%20Pacific%20Bluefin.pdf>. The CMM for North Pacific albacore requires catches to be reported in terms of weight and fishing effort “in terms of the most relevant measures for a given gear type, including at a

B. Data Required by the WCPFC Document *Scientific Data to Be Provided to the Commission*

The WCPFC also requires members to provide data in accordance with the Scientific Committee's document *Scientific Data to Be Provided to the Commission (Scientific Data Document)*.⁶³ The *Scientific Data Document* details, among other things, the requirements for data submission and specifically refers to "operational level catch and effort data" that "shall" be provided to the Commission.⁶⁴ As discussed in Parts IV and VI of this paper, the *Scientific Data Document* includes an exception to the submission of operational data for those members and cooperating non-members that have "domestic legal constraints" that prevent them from submitting operational data.⁶⁵

Consistent with the type of vessel-specific information indicated in the WCPF Convention itself, the *Scientific Data Document* defines "operational level catch and effort data" by way of the following parenthetical: "e.g., individual sets by longliners and purse seiners, and individual days fished by pole-and-line vessels and trollers."⁶⁶ It further requires members to submit their data in accordance with the "Standards for the Provision of Operational Level Catch and Effort Data" adopted by the WCPFC in Annex 1 of the *Scientific Data Document*.⁶⁷

The "Standards for the Provision of Operational Level Catch and Effort Data" (Standards) clearly identify the specificity with which Parties "shall" report to the WCPFC.⁶⁸ For example, members must report trip information that includes the time a vessel leaves port to transit to a fishing area or recommences fishing after transshipping part or all of the catch at sea.⁶⁹ Members must also report the port and date of departure.⁷⁰

With respect to longliners, members must report information for each set, including the date and time the set started, and days on which no sets were made.⁷¹ They must also report the number of hooks used per set and

minimum for all gear types, the number of vessel-days fished." WCPFC, *Conservation and Management Measure for North Pacific Albacore*, *supra* note 61, ¶ 4.

63. *Scientific Data Document*, *supra* note 6.

64. *Id.* § 3.

65. *Id.*

66. *Id.*

67. *Id.* at Annex 1.

68. *Id.* at Annex 1, § 1.

69. *Id.* at Annex 1, § 1.2.

70. *Id.*

71. *Id.* at Annex 1, § 1.3.

the number of fish caught per set for a variety of species,⁷² as well as the total weight of the catch by set or by species.⁷³

For pole-and-line vessels, members must report operational level catch and effort data that similarly focuses on specific vessels and specific stocks. For example, members must report information for each vessel each day, “from the start of the trip to the end of the trip,” the weight of fish caught each day for a variety of species, and even the vessel’s noon position.⁷⁴ Members must report similar information for trollers and purse seiners,⁷⁵ as well as report any association between purse seine catches and baitfish, whale sharks, debris, or other things.⁷⁶

In other words, the *Scientific Data Document* and accompanying Standards associate operational level catch and effort data with vessel-specific information for individual sets and specific stocks. Indeed, members must even report whether a vessel did not fish due to bad weather or a gear breakdown.⁷⁷ Thus, the *Scientific Data Document* strongly indicates that operational data must be specific enough to provide details like the catches’ weight; the location, time, and date of the catch; and the fishing gear used.⁷⁸ All of this information, incidentally, should be included in a vessel’s

72. The provision reads:

Number of fish caught per set, for the following species: albacore (*Thunnus alalunga*), bigeye (*Thunnus obesus*), skipjack (*Katsuwonus pelamis*), yellowfin (*Thunnus albacares*), striped marlin (*Tetrapturus audax*), blue marlin (*Makaira mazara*), black marlin (*Makaira indica*) and swordfish (*Xiphias gladius*), blue shark, silky shark, oceanic whitetip shark, mako sharks, thresher sharks, porbeagle shark (south of 20°S, until biological data shows this or another geographic limit to be appropriate), hammerhead sharks (winghead, scalloped, great, and smooth), whale shark, and other species as determined by the Commission.

Id.

73. The provision reads:

If the total weight or average weight of fish caught per set has been recorded, then the total weight or average weight of fish caught per set, by species, should also be reported. If the total weight or average weight of fish caught per set has not been recorded, then the total weight or average weight of fish caught per set, by species, should be estimated and the estimates reported. The total weight or average weight shall refer to whole weights, rather than processed weights.

Id.

74. *Id.* at Annex 1, § 1.4. Members must report the weight of fish caught each day for the following species: for the following species: albacore, bigeye, skipjack, yellowfin, blue shark, silky shark, oceanic whitetip shark, mako sharks, thresher sharks, porbeagle shark (south of 20°S, until biological data shows this or another geographic limit to be appropriate), hammerhead sharks (winghead, scalloped, great, and smooth), whale shark, and other species as determined by the Commission. *Id.*

75. See *id.* at Annex 1, §§ 1.5–1.6.

76. *Id.* at Annex 1, § 1.5.

77. *Id.* at Annex 1, §§ 1.3–1.6.

78. *Id.*

logbook, which a vessel is typically required to submit to its national authorities.⁷⁹

The WCPFC's *Rules and Procedures for the Protection, Access to, and Dissemination of Data Compiled by the Commission (Rules and Procedures)*⁸⁰ further support a definition of operational data to mean vessel-specific data. These Rules distinguish operational data from aggregate data by presenting examples of each. According to these *Rules and Procedures*, operational data "includes catch and effort (including by-catch . . .), observer, unloading, transshipment and port inspection data."⁸¹ In contrast, *Rules and Procedures* characterize aggregate data as observer data aggregated from a minimum of three vessels or data aggregated across a geographic area for different gear types.⁸²

IV. WCPFC ATTEMPTS TO OBTAIN DATA

The WCPFC has adopted the *Scientific Data Document* on several occasions, most recently in 2012,⁸³ and considers the document to be legally binding. However, some members have questioned the legal status of the document. In response, the WCPFC's legal advisor, Martin Tsamenyi, stated that the rules for the provision of data found in the *Scientific Data Document* "derive from the Convention and are clearly binding."⁸⁴ Similarly, the 17 members of the Forum Fisheries Agency,⁸⁵ during a meeting of

79. See, e.g., FAO Coordinating Working Party on Fishery Statistics, *Handbook of Fishery Statistical Standards: Logbooks*, <http://www.fao.org/fishery/cwp/handbook/O/en> (last visited Sept. 26, 2016) ("Logbooks are widely used as a method of collecting statistical information on commercial activities.").

80. WCPFC, *Rules and Procedures*, *supra* note 38.

81. *Id.* at App. 4, ¶ 1.

82. *Id.* at App. 4, ¶ 2.

83. See WCPFC, *Ninth Regular Session Summary Report*, ¶¶ 270–71 (2012), <https://www.wcpfc.int/system/files/WCPFC9-Summary-Report-final.pdf> (adopting the recommendations of the Scientific Committee, which included revisions to the *Scientific Data Document*).

84. Tech. & Compliance Comm., WCPFC, *Technical and Compliance Committee Ninth Regular Session Summary Report*, ¶ 288 (2013) [hereinafter Technical & Compliance Comm., *Ninth Regular Session Summary Report*], <https://www.wcpfc.int/system/files/FinalTCC9%20summary%20report.pdf>. The Legal Advisor also noted that "[t]he rules provide a mechanism for restricting access to non-public domain data if compliance with the rules is not achieved." *Id.*

85. The members of the Foreign Fisheries Agency are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu. Pac. Islands Forum Fisheries Agency, *FFA Members, WHO WE ARE*, <https://www.ffa.int/members> (last visited Sept. 26, 2016).

the WCPFC's Technical and Compliance Committee,⁸⁶ stated that the "Rules for Scientific Data to be Provided to the Commission are binding, and specify that operational-level catch and effort data should be provided to the Commission by all CCMs for their flagged vessels or by chartering CCMs for their chartered vessels."⁸⁷ No members objected to that view.⁸⁸

Despite the legally-binding character of the *Scientific Data Document*, Japan, Korea, and other WCPFC members have failed to submit operational data. They rely on an alternative method for reporting data provided by the *Scientific Data Document*, which states that:

It is recognized that certain members and cooperating non-members of the Commission may be subject to domestic legal constraints, such that they may not be able to provide operational data to the Commission until such constraints are overcome. Until such constraints are overcome, aggregated catch and effort data and size composition data, as described in (4) and (5) [of the *Scientific Data Document*] shall be provided.⁸⁹

Consequently, certain members and cooperating non-members of the Commission [collectively called CCMs] may provide aggregate data in lieu of operational data, but only if they have "domestic legal constraints." However, by using the phrase "[u]ntil such constraints are overcome," the paragraph also suggests that CCMs have an ongoing duty to remove the domestic legal constraints. If the CCM does not actually have a domestic legal constraint, it must provide operational data. In addition, if the CCM is not actively seeking to overcome the legal constraint, it should be considered in violation of the rules for the submission of data.⁹⁰

86. The Technical and Compliance Committee provides the WCPFC with technical advice on implementation of CMMs. WCPF Convention, *supra* note 1, art. 14(1). In particular, it ensures implementation of CMMs by WCPFC members by monitoring compliance, and it makes additional recommendations to the WCPFC if further cooperative measures are necessary. *Id.* Significantly, the Technical and Compliance Committee does not have independent authority to sanction members for non-compliance; instead, if it concludes that a member is in non-compliance with a CMM, it can make recommendations to the WCPFC for addressing that non-compliance. *Id.* art. 14(1)–(2).

87. Tech. & Compliance Comm., WCPFC, *Technical & Compliance Committee Sixth Regular Session Summary Report*, ¶ 191 (2011) [hereinafter *Technical & Compliance Comm., Sixth Regular Session Summary Report*], <https://www.wcpfc.int/system/files/TCC6%20Report%20Master%20%28final%2026%20Mar%29%20REV%2011.pdf>.

88. *See id.*

89. *Scientific Data Document*, *supra* note 6, § 3.

90. On at least one occasion, Japan has noted that "not providing operational catch and effort data itself does not constitute non-compliance as long as aggregated catch and effort data had been provided." Technical & Compliance Comm., *Ninth Regular Session Summary*

A. Data Provided by Japan & Korea

By relying on the exception to the submission of operational data for domestic legal constraints, Japan, Korea, and four other CCMs have refused to provide operational level catch and effort data to the WCPFC. For example, Japan has not provided operational level catch and effort data between 2007 and 2013.⁹¹ Korea, likewise, has consistently not submitted operational level catch and effort data,⁹² although it did so for its longline and purse seine fleets for the 2014 season.⁹³ That does not mean that Japan and Korea submit no data. As the *Data Gaps* papers reveal, Japan and Korea have supplied aggregate and other forms of data.

1. Japan

Based on an analysis of summary data reports for 2007 through 2014 and the 2014 and 2015 *Data Gaps* papers, as of August 2015 Japan has the following significant data gaps and has provided the following information:⁹⁴

- Japan has not provided historical operational catch and effort data for its longline and pole-and-line fleets. It has provided this information for its purse seine fleet for 2002 through 2004 only.⁹⁵
- Japan has never provided any operational catch and effort data or size composition data for its coastal fleet.⁹⁶ In 2013, it did submit aggregate catch data for its coastal longline fleet for the years 1994 through 2013.⁹⁷

Report, *supra* note 84, ¶ 285. Japan is correct only if a member has a domestic legal constraint and is seeking to overcome it.

91. *Data Gaps 2014*, *supra* note 7, ¶ 59, tbl.2 (showing that Japan has failed to provide operational level catch and effort data for its purse seine, longline, and pole and line fleets in 2013); WCPFC, *Status of Data Provision*, SCIENCE & DATA, <http://www.wcpfc.int/status-data-provision> (last visited Oct. 12, 2016) (the summary reports summarize the status of each CCM's annual data provision to the WCPFC).

92. *Id.* ¶¶ 29, 57, tbl.4.

93. *Data Gaps 2015*, *supra* note 22, ¶ 24.

94. These data gaps conclusions are taken from summary information extracted from *Data Gaps 2014*. A review of available data summary reports available on the WCPFC website verifies these conclusions. Japan's obligations to provide the stated data is derived from Japan's obligations under Articles 5(i) and 23(2)(a) of the Convention which, among other things, requires Members to provide data in relation to different fishing gear type by all vessels flying their flag. Further, the Scientific Data Document outlines specific data requirements (for example, by fleet, gear type, and geographical area) which, at present, Japan is not in full compliance with.

95. *Data Gaps 2014*, *supra* note 7, at tbl.6; *Data Gaps 2015*, *supra* note 22, at tbl.5.

96. *Data Gaps 2014*, *supra* note 7, ¶ 18; *Data Gaps 2015*, *supra* note 22, ¶ 11.

97. *Data Gaps 2014*, *supra* note 7, ¶ 19; *Data Gaps 2015*, *supra* note 22, ¶ 11.

- Japan has not provided any operational or aggregated catch and effort data, nor size composition data, prior to 1972 for its pole-and-line fleet;⁹⁸
- Japan has not provided any annual catch estimates by exclusive economic zones (EEZs)—those areas up to 200 nautical miles from a coastal State’s coastline in which it has sovereign rights to manage natural resources⁹⁹—and high seas areas prior to 2008. Japan has only provided this type of data for the period between 2008 and 2014.¹⁰⁰
- Japan has not provided operational catch and effort data for its fleets operating outside the EEZs of Pacific Islands Forum Fisheries Agency members.¹⁰¹

Japan has provided some types of data to the Commission, although complete historical data is lacking.¹⁰² In 2013, Japan also submitted aggregate data for its longline, pole-and-line, and purse seine fleets for the period 2008 through 2013,¹⁰³ and it also provided aggregated data for 2014.¹⁰⁴ Thus, not only has Japan failed to submit operational catch and effort data, but its submission of aggregate data remains incomplete because it does not cover the period prior to 2008. Moreover, the Japanese government appears to have this data. Japanese vessels have been required to submit logbook data since the 1960s.¹⁰⁵ And, Japan has long submitted operational data to the WCPFC for catches within the EEZs of FFA members.¹⁰⁶

98. *Data Gaps 2014*, *supra* note 7, ¶ 18; *Data Gaps 2015*, *supra* note 22, ¶ 11.

99. The United Nations Convention on the Law of the Sea, arts. 56, 57, Dec. 10, 1982, 1833 U.N.T.S. 3, U.N. Doc. A/CONF.62/122, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

100. *Data Gaps 2014*, *supra* note 7, ¶ 27; *Data Gaps 2015*, *supra* note 22, at tbl.2.

101. *Data Gaps 2014*, *supra* note 7, ¶ 29; *Data Gaps 2015*, *supra* note 22, ¶ 21.

102. In relation to required data time periods, section 7 of the *Scientific Data Document* provides that Members should provide the Commission with annual or seasonal catch estimates from 1950 onwards (or from the year the fleet began operating if after 1950). Section 7 also specifies that Members should provide operational catch and effort data, and size composition data, “for all years, starting with the first year for which the data are available.” *Scientific Data Document*, *supra* note 6.

103. *Data Gaps 2014*, *supra* note 7, ¶ 45.

104. *Data Gaps 2015*, *supra* note 22, at tbl.4.

105. NAOZUMI MIYABE & HIROAKI OKAMOTO, DOCUMENTATION OF DATA PROVISION AND PROCESSING FOR THE JAPANESE TUNA FISHERIES IN THE EASTERN PACIFIC OCEAN Sec. 1 (2005), <https://www.iattc.org/PDFFiles2/DC-1-02a.pdf> (“The submission of logbook became mandatory for the larger boats (>20 GRT) in the early 1960s and this was the time when the statistical data processing for catch and effort data from the tuna fisheries were started.”).

106. *Data Gaps 2014*, *supra* note 7, ¶ 29 (“Operational catch and effort data are not available outside the EEZs of FFA member countries for Japanese fleets.”).

2. Korea

As of August 2014, Korea has the following significant data gaps and has provided the following information:

- Korea has not provided operational catch and effort data for its distant-water longline fleet operating outside the EEZs of Forum Fisheries Agency members.¹⁰⁷
- Korea has not provided historical operational catch and effort data through 2013.¹⁰⁸
- Korea has provided some aggregated catch and effort data but it has omitted significant amounts of data for 2012 and 2013, such as annual catch and effort estimates (1) by EEZ and high seas areas and (2) for albacore, swordfish, and striped marlin in some parts of the Pacific Ocean.¹⁰⁹
- Korea has not provided information on the number of vessels per stratum with their aggregate longline data.¹¹⁰

Korea has taken some initial steps to provide operational data. For example, Korea has provided operational data for its longline and purse seine fleets for 2014.¹¹¹ Nonetheless, Korea has not provided the WCPFC with historical operational catch and effort data, and it has not submitted all relevant aggregate data.

B. *Attempts to Close the Data Gaps*

The WCPFC has long recognized the problems associated with the failure of Japan and other members to submit operational data. As early as 2007, just three years after the WCPF Convention entered into force, the Scientific Committee recommended that the WCPFC undertake a study to identify the causes of data gaps.¹¹² The “Data Gaps” paper has since become an annual feature of meetings of the Scientific Committee, the Technical and Compliance Committee, and the WCPFC itself.¹¹³ In addition, the

107. *Data Gaps 2014*, *supra* note 7, ¶ 29; *Data Gaps 2015*, *supra* note 22, ¶ 21.

108. *Data Gaps 2014*, *supra* note 7, ¶ 59.

109. *Id.* ¶ 57, tbl.4.

110. *Data Gaps 2014*, *supra* note 7, ¶ 45; *see also Data Gaps 2015*, *supra* note 22, ¶ 32.

111. *Id.* ¶ 24.

112. WCPFC, *Fourth Regular Session Summary Report*, ¶ 103 (2007), <https://www.wcpfc.int/system/files/WCPF4%20Summary%20Report%20and%20Attachments.pdf>; *see also* Sci. Comm., *Scientific Committee Fourth Regular Session Summary Report*, *supra* note 57, ¶¶ 249–57 (discussing the development of a data gaps website and a review of data gaps entitled “A Study to Identify Causes of Data Gaps in the Work of the WCPFC”).

113. A Data Gaps paper has been produced each year since 2006. *See* Oceanic Fisheries Programme Secretariat of the S. Pac. Comm’n, WCPFC, *Scientific Data Available to the West-*

WCPFC commissioned a separate report to investigate the causes of the data gaps.¹¹⁴

Because of the problems associated with assessing stocks without complete operational data,¹¹⁵ in 2011 the WCPFC became more aggressive in its efforts to obtain such data. At that time, six CCMs—Belize,¹¹⁶ China, Indonesia, Japan, Korea, and Chinese Taipei—still had not provided the WCPFC with operational level catch and effort data.¹¹⁷ Consequently, at its 2011 meeting, the WCPFC requested each of these CCMs to submit a draft plan to the Technical and Compliance Committee describing how they would resolve the failure to submit such data.¹¹⁸ Despite that request, the six CCMs did not generate any plans or provide operational catch and effort data.¹¹⁹

In 2013, the WCPFC adopted the recommendation of the Scientific Committee¹²⁰ to seek information from the six CCMs that explains why

ern and Central Pacific Fisheries Commission, WCPFC-SC2-2006/ST IP-2 (2006), https://www.wcpfc.int/system/files/SC2_ST_IP2.pdf.

114. WCPFC, *Consultancy Report: Causes of Data Gaps*, *supra* note 36.

115. See, e.g., Peter Williams, WCPFC, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, § 3.1.4, WCPFC-SC7-2011/ST WP-1 (2011), [https://www.wcpfc.int/system/files/ST-WP-01%20%5BData%20Gaps%20\(final\)%5D.pdf](https://www.wcpfc.int/system/files/ST-WP-01%20%5BData%20Gaps%20(final)%5D.pdf) (“Operational catch and effort data are not available outside the EEZs of FFA member countries for Japanese fleets, the Korean distant-water longline fleet, and the Chinese and Chinese Taipei distant-water longline fleets that target bigeye and yellowfin.”).

116. In 2014, Belize had advised the WCPFC that it did not wish to be considered for Cooperating non-Member status for 2015. WCPFC, *Eleventh Regular Session Summary Report*, ¶ 22 (2014), https://www.wcpfc.int/system/files/WCPFC11%20summary%20report%20_FINAL_1.pdf.

117. See *Data Gaps 2014*, *supra* note 7, ¶ 38; see also Peter Williams, WCPFC, *Scientific Data Available to the Western and Central Pacific Fisheries Commission*, §§ 2.1.4, 2.4, WCPFC-SC8-2012/ST WP-1 Rev. 1 (2012), <https://www.wcpfc.int/system/files/ST-WP-01-Scientific-Data-Availabel-WCPO-Commission-Rev-1.pdf>.

118. At its Seventh Annual meeting in 2010, the WCPFC

acknowledged the importance of providing complete and accurate data in a timely way and urged CCMs to improve the provision of data to the Commission. WCPFC7 requested that CCMs that have issues in providing accurate and complete data in a timely manner should identify those issues clearly to the Commission. At TCC7 CCMs should provide a draft plan of how impairments to the provision of data will be dealt with as rapidly as possible. CCMs are encouraged to assist others as they are able to do so and the Commission should continue to evaluate methods to assist in this matter.

WCPFC, *Seventh Regular Session Summary Report*, ¶ 173 (2011), http://www.wcpfc.int/system/files/WCPFC7_Summary_Report_%28Final_12_April%29-from%20website%20on%2016June2011_ISBN.pdf.

119. By December 2014, the six CCMs that have failed to provide operational catch and effort data had still failed to submit these plans. *Data Gaps 2014*, *supra* note 7, ¶ 32.

120. The Scientific Committee recommended the following:

they are unable to submit operational catch and effort data.¹²¹ Only three of these CCMs (Belize, Japan, and Chinese Taipei) acknowledged receipt of the Secretariat's letter; only Japan and Chinese Taipei sent a formal response to the Secretariat.¹²² Chinese Taipei simply stated that it could not provide such data "due to the constraint of [its] domestic legislation" without identifying its domestic legal constraints or describing actions to address the issue.¹²³ Japan was more forthcoming, stating that Japanese privacy law did not allow it to disclose personal information that would be included in operational data.¹²⁴

In 2014, CCMs tried alternative strategies to obtain operational data and close the data gaps. American Samoa¹²⁵ and the Forum Fisheries Agency¹²⁶ stated that eliminating loopholes for the non-provision of operational data was a key priority for the WCPFC.¹²⁷ The members of the Forum Fisheries Agency also proposed a CMM that required all CCMs to submit operational catch and effort data to the WCPFC and eliminated the "exception" to the requirement to submit operational data for those CCMs with "domestic legal constraints."¹²⁸ The Parties to the Nauru Agreement¹²⁹

The WCPFC Secretariat formally contact each of the CCMs identified as either 1) not providing operational data, and/or ii) not providing the number of vessels for each spatial unit in their aggregate data, and request the following:

- (i) That they provide these data to the Commission in order to meet their obligations of Scientific Data to be Provided to the Commission.
- (ii) That information is provided on what constraints hinder their ability to provide operational data to the Commission, and actions being taken to address this issue.
- (iii) That CCMs confirm whether their aggregate data, as provided, can be included into the WCPFC public domain data.

Sci. Comm., *Ninth Regular Session Summary Report*, *supra* note 5, ¶ 77(d).

121. WCPFC, *Tenth Regular Session Summary Report*, ¶ 183 (2013), https://www.wcpfc.int/system/files/WCPFC%2010%20FINAL%20RECORD_1.pdf.

122. *Data Gaps 2014*, *supra* note 7, at 36.

123. *Id.* at 38.

124. *Id.* at 37. See *infra* Section VIII for a more complete discussion of this issue.

125. WCPFC, *Eleventh Regular Session Summary Report*, *supra* note 116, ¶ 162.

126. *Id.* ¶ 229.

127. *Id.* ¶ 162.

128. Pac. Islands Forum Fisheries Agency Member Nations, *Proposal on a Conservation and Mgmt. Measure on Provision of Operational Data*, WCPFC11-2014-DP06, 7 (Nov. 3, 2014), <https://www.wcpfc.int/system/files/WCPFC11-2014-DP06%20FFA%20Members%20Propo-sal%20CMM%20for%20Provision%20of%20Operational%20level%20catch%20and%20effort%20data.pdf>.

129. The Parties to the Nauru Agreement are Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu. Nauru Agreement, Feb. 11, 1982, http://www.pnatuna.com/sites/default/files/Nauru%20Agreement_0.pdf. The Nauru Agreement is a subregional agreement on terms and conditions for tuna purse seine fishing licenses in the region with a goal to manage tuna sustainably and increase

proposed a prohibition on fishing for bigeye, yellowfin, and skipjack tuna by vessels flagged in countries that have not provided operational catch and effort data.¹³⁰ The WCPFC did not adopt either proposal.¹³¹

The WCPFC did, however, adopt a modified version of the proposal submitted by the Parties to the Nauru Agreement as part of CMM 2014–1 for bigeye, yellowfin, and skipjack tuna.¹³² In that compromise, China, Indonesia, Japan, Korea, Philippines, and Chinese Taipei agreed to submit operational catch and effort data for bigeye, yellowfin, and skipjack tuna in accordance with the *Standards for the Provision of Operational Level Catch and Effort Data* for catches in EEZs and high seas.¹³³

However, the compromise includes significant limitations. For example, it applies only to fishing in EEZs and high seas south of 20 degrees north latitude¹³⁴ and to the future provision of operational level catch and effort data, not to historical data.¹³⁵ Two footnotes further limit application of the measure. The first grants these members a grace period of three years if they have “a practical difficulty in providing operational data from 2015.”¹³⁶ In addition, Indonesia was granted an exception to the provision for ten years.¹³⁷

The WCPFC is implementing other strategies to encourage the submission of operational level catch and effort data. In 2014, the WCPFC adopted a tiered scoring system for evaluating compliance with the provision of scientific data to the Commission.¹³⁸ Under this system, CCMs will be placed into one of the following three categories: (i) data have not been

economic benefits for their peoples. *Id.* Many of the Parties to the Nauru Agreement are also WCPFC members and control huge areas within the WCPFC Convention Area. Consequently, they play a significant role in the WCPFC.

130. PNA Members & Tokelau, *Proposal for a Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean, and Explanatory Note*, ¶ 42bis, <http://www.wcpfc.int/system/files/WCPFC11-2014-DP11%20PNA%20%2B%20Tokelau%20Proposal%20for%20CMM%20for%20BET%20YFT%20SKJ%20in%20WCP%20O.pdf>.

131. WCPFC, *Eleventh Regular Session Summary Report*, *supra* note 116, ¶¶ 292–311, 602–08.

132. See WCPFC, *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna*, *supra* note 60, ¶ 56–60 (requiring some CCMs to provide aggregated data north of 20 degrees north latitude).

133. *Id.* ¶ 56–57.

134. *Id.* ¶ 57.

135. WCPFC, *Eleventh Regular Session Summary Report*, *supra* note 116, ¶ 294.

136. WCPFC, *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna*, *supra* note 60, ¶ 57 n.12.

137. *Id.* ¶ 57 n.13 (stating that Indonesia is exempted from these provisions “until it changes its national laws so that it can provide such data . . . but in any event no later than 31 December 2025”).

138. WCPFC, *Eleventh Regular Session Summary Report*, *supra* note 116, ¶ 478.

provided at all; (ii) data have been provided but are incomplete either because not all data fields have been provided or minimum coverage levels have not been met; and (iii) complete data have been provided at or above the minimum level of coverage.¹³⁹

Whether this system will improve submission of operational catch and effort data is too early to tell. As Japan has reminded the WCPFC, the requirement to submit operational data is qualified: if a member has domestic legal constraints, then it may submit aggregated data “until such constraints are overcome.”¹⁴⁰ According to Japan, if aggregate data is submitted, then that member “should be regarded as being in full compliance.”¹⁴¹ While Japan is only partially correct—a member may avail itself of the exception only if it actually has a domestic legal constraint *and* it is attempting to remove the constraint—Japan and other WCPFC members continue to withhold operational data.

V. JAPANESE AND KOREAN LEGAL CONSTRAINTS PREVENTING THE SUBMISSION OF OPERATIONAL DATA

The exemptions in the *Scientific Data Document* and in the *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna* that allow CCMs to provide aggregate data in lieu of operational data make it likely that some CCMs will continue to submit aggregate data instead of operational data. The CCMs failing to provide operational data will continue to claim that “practical difficulties,” which presumably include the domestic legal constraints identified in the *Scientific Data Document*, prevent them from submitting such data to the WCPFC. Do these CCMs actually have domestic legal constraints or practical difficulties preventing them from providing operational data? This Article concludes that they do not. As described below, Japan’s explanation is inadequate and cannot be considered a domestic legal constraint sufficient to warrant its noncompliance. Likewise, Korea did not formally respond and does not appear to have a domestic legal constraint that would warrant its noncompliance.

A. Japan’s Domestic Legal Constraints

In a letter to the Secretariat, Japan reported that its Act on the Protection of Personal Information (APPI) prohibits government agencies from

139. *Id.* ¶ 472 (noting that for category (ii), a compliance score will be “computed based on a multiplication of the percentage of the data fields provided and the percentage of the minimum coverage level achieved” and no data filed will be given greater importance than others because “they are all required and important”).

140. *Id.* ¶ 474 (referring to Section 3 of the *Scientific Data Document*, *supra* note 6).

141. *Id.* ¶ 478.

disclosing personal information that can identify personal activities.¹⁴² Japan argues that operational data qualifies as personal information that it is prohibited from disclosing to the WCPFC under its domestic law.¹⁴³ Analysis of the APPI shows that it does not apply to the handling of personal information by government agencies. For government agencies, only the APPI's general principles of protection of personal information apply; the binding obligations do not. While a different Japanese law addressing privacy, the Act on the Protection of Personal Information held by Administrative Organs (APPIHAO),¹⁴⁴ directly applies to the handling of personal information by government agencies, any obstacles posed by this law can be easily overcome. Notwithstanding this law, Japan has submitted personal information regarding each vessel and vessel captain when it registered vessels pursuant to the WCPF Convention.¹⁴⁵ Thus, Japan's argument that the law applies to the vessel-specific information is undermined by its own actions; Japan has already revealed some of the personal information that it supposedly seeks to protect.

1. The Act of Protection of Personal Information

The APPI was created to protect the personal information of Japanese citizens and to prescribe rules for entities handling personal information.¹⁴⁶ The APPI defines personal information as "information about a living individual which can identify the specific individual by name, date of birth, or other description contained in such information (including such information as will allow easy reference to other information and will thereby enable the identification of the specific individual)."¹⁴⁷ Chapters I, II, and III

142. *Data Gaps 2014*, *supra* note 7, at App. 3; *see also* APPI, *supra* note 12.

143. *Id.* Japan's letter reads, in relevant part, as follows, with the grammatical errors in the original letter:

Japan's domestic law, "Act of the Protection of Personal Information," prohibits government administrations to release personal information which can be identified personal activities. Operational data is categorized as such personal information prohibited to release.

Id. It may be worth noting that the Japanese government has been criticized for using personal information protection laws as a shield to deliberately conceal unfavorable information. *See, e.g.,* Nihon Shinbun Kyokai, *NSK Seeks Prompt Revision of Personal Information Protection Law*, NSK NEWS BULLETIN ONLINE (Apr. 2009), <http://www.pressnet.or.jp/newsb/0904b.html>.

144. APPIHAO, *supra* note 15.

145. WCPF Convention, *supra* note 1, art. 24(4)–(7), Annex IV; *see also* WCPFC, *Conservation and Management Measure on WCPFC Record of Fishing Vessels and Authorization to Fish*, CMM 2013–10 (2013), <https://www.wcpfc.int/system/files/CMM%202013-10%20CMM%20to%20revise%20CMM%202009-01%20WCPFC%20RFV.pdf> (establishing the WCPFC Record of Fishing Vessels).

146. APPI, *supra* note 12, art. 1.

147. *Id.* art. 2(1).

of the APPI establish the basic law for personal protection.¹⁴⁸ Basic law (*kihon ho*) in Japan “sets forth principles, administrative structures, general methods of implementation, responsibility of various parties (central government, local governments, businesses, and citizens), and a framework for future legislation.”¹⁴⁹ However, basic law does not contain specific legally binding provisions.¹⁵⁰ Specific legally binding provisions and regulations are prescribed in other parts of the law, which are defined as *kobetsu ho* (specific law) or *ippan ho* (ordinary law). Basic law and *kobetsu ho* are usually promulgated by a different Act of the Diet;¹⁵¹ however, in the case of the APPI, they can be found in the same act.

The basic law part of the APPI provides the general principles for the protection of personal information and is applied to government and private institutions alike.¹⁵² As a general principle, the APPI states that “[t]he proper handling of Personal Information must be pursued in view of the fact that Personal Information should be handled cautiously based on the philosophy of respecting the autonomy of the individual.”¹⁵³ The APPI also requires the government to establish a basic policy on the protection of personal information.¹⁵⁴

As *kobetsu ho* to implement the general principles established by the APPI’s basic law provisions, Chapters IV, V, and VI of the APPI establish specific legally binding provisions and regulations for handling personal information that are applicable to private institutions, defined as “Business Operator[s] Handling Personal Information” (business operator).¹⁵⁵ A business operator must, among other things, specify the purpose of using personal information (purpose of utilization).¹⁵⁶ If the disclosure of personal information is consistent with the purpose of utilization, then the business operator may disclose the information.¹⁵⁷ The APPI also prohibits such a business operator from providing personal data to a third party without

148. *Id.* arts. 1–14.

149. For a summary of Japanese basic law, KENNETH E. WILKENING, *ACID RAIN SCIENCE AND POLITICS IN JAPAN: A HISTORY OF KNOWLEDGE AND ACTION TOWARD SUSTAINABILITY* 127 (2004).

150. *Id.*

151. The Diet is Japan’s legislative body. *Diet*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Diet-Japanese-government> (last visited Oct. 12, 2016).

152. APPI *supra* note 12, art. 1; *see also* OKAMURA HISAMICHI, *KOJIN JOHO HOGO HO NO CHISHIKI* 40 (2d ed. 2010) (providing information on the APPI).

153. APPI, *supra* note 12, art. 3.

154. *Id.* art. 6.

155. *Id.* art. 2(3).

156. *Id.* arts. 15–16.

157. The APPI provides:

A business operator handling personal information must not handle Personal Information beyond the scope necessary for achieving of the Purpose of Use speci-

obtaining prior consent in some circumstances.¹⁵⁸ However, a business operator may disclose information without consent if it is based on laws and regulations or necessary for cooperating with governmental agencies, improving public health, or protecting life or property, among other reasons.¹⁵⁹

Importantly, the APPI's *kobetsu ho* part does not apply to the handling of personal information by state agencies, including the Ministry for Agriculture, Forestry and Fisheries (MAFF) and the Fisheries Agency, which implement fisheries laws in Japan.¹⁶⁰ The APPI expressly excludes governmental agencies like MAFF and the Fishery Agency from its definition of business operator.¹⁶¹ As a consequence, MAFF and the Fishery Agency, as state agencies, are not covered by the APPI. However, they are covered by the APPIHAO, as discussed below.¹⁶²

2. The Act of Protection of Personal Information Held by Administrative Organs

Although Japan has stated that the APPI prevents it from providing operational data to the WCPFC, the APPIHAO, not the APPI, directly regulates how MAFF and the Fisheries Agency handle personal information.¹⁶³ The APPIHAO establishes rules for the retention, use, and disclo-

fed pursuant to the provision of the preceding Article without in advance obtaining the Person's consent to do so.

Id. art. 16(1).

158. *Id.* art. 23. "[P]ersonal Data" is defined as "Personal Information compiled in a Database, etc. of Personal Information." *Id.* art. 2(4).

159. *Id.* art. 16(3).

160. The Ministry of Agriculture, Forestry and Fisheries (MAFF) is the government agency that "ensures stable food supplies for the nation, land and environment preservation, regional redevelopment, consumer protection, and technological advance." Cabinet Secretariat (Government of Japan), *Government Offices' Functions & Website Contents*, <http://japan.kantei.go.jp/link/link4.html> (last visited Oct. 12, 2016). The Fisheries Agency is a subsidiary agency within MAFF. See generally MITSUTAKU MAKINO, FISHERIES MANAGEMENT IN JAPAN: ITS INSTITUTIONAL FEATURES AND CASE STUDIES 10 (2011) (describing the organization of the Fisheries Agency).

161. APPI, *supra* note 12, art. 2(3) (expressly excluding state organs (i.e., agencies), local governments, incorporated administrative agencies, and local incorporated agencies). An incorporated administrative agency is able to act independently of the state and to conduct operations that need to be implemented more efficiently and effectively. Dokuritsu-gyōsei-hōjin tsūsoku hō [Act on General Rules for Incorporated Administrative Agencies], Act No. 103 of 1999, art. 2(1), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=Act+on+General+Rules+for+Incorporated+Administrative+Agencies&x=0&y=0&cia=03&ky=&page=1> (Japan).

162. In other words, the APPIHAO works as *kobetsu ho* on the handling of personal information by administrative agencies.

163. APPIHAO, *supra* note 15, arts. 1, 2(1)(iii).

sure of personal information held by administrative agencies,¹⁶⁴ including rules for disclosing personal information requested by third parties.¹⁶⁵

The APPIHAO defines personal information the same as the APPI does.¹⁶⁶ When an administrative agency directly acquires personal information, the personal information becomes known as “Retained Personal Information.”¹⁶⁷ When obtaining personal information, the administrative agency must clearly indicate the purpose of utilization to the individual concerned.¹⁶⁸ The head of an administrative agency “shall not, except as otherwise provided by laws and regulations, use by himself or herself or provide another person with Retained Personal Information for purposes other than the Purpose of Use.”¹⁶⁹ Similarly, no current or former employee of an administrative agency may disclose personal information.¹⁷⁰

Operational data with the vessel’s name are not likely to be personal information because vessel names do not contain information about or the name of a living individual. Japan has already provided the personal names of each ship’s captain to the WCPFC with the vessel’s information and those names have been disclosed to the public on the WCPFC’s website.¹⁷¹ Japan may claim that the operational data with the vessel’s name may become personal information because one can identify the captain of the ship, a specific individual, by referencing vessel registration information and know his or her whereabouts and activities. However, even if that argument is persuasive, MAFF likely already has authority to submit operational data from Japanese vessels to the WCPFC, just as it has authority to submit detailed vessel information, which includes the names of the owner of the vessel and the captain, to the WCPFC. The head of an administrative agency, such as the Minister of MAFF, may provide retained personal information to another person if consistent with the purpose of utilization.¹⁷²

164. *Id.* arts. 1, 3–9.

165. *Id.* art. 8.

166. *Id.* art. 2(2) (defining “Personal Information” as “information about a living individual, which can identify the specific individual by name, date of birth or other description contained in such information (including information that can be compared with other information and thereby identify the specific individual)”).

167. *Id.* art. 2(3).

168. *Id.* art. 4.

169. *Id.* art. 8.

170. *Id.* art. 7.

171. *See infra* Section V.A.3.

172. The APPIHAO provides that:

The head of an Administrative Organ shall not, except as otherwise provided by laws and regulations, use by himself or herself or provide another person with Retained Personal Information for purposes *other than the Purpose of Use*.

APPIHAO, *supra* note 15, art. 8(1) (emphasis added).

Presumably, the purpose of collecting operational data from vessels fishing in the WCPF Convention Area is to fulfill Japan's obligations under the WCPF Convention and to manage the fisheries resources of the Convention Area effectively and sustainably. Therefore, the submission of operational data collected from Japanese vessels is arguably within the purpose of utilization. Japan may claim that it collects this data for purposes unrelated to the WCPF Convention, but that claim is obviously unpersuasive on its face. In fact, Japan has breached its own position regarding its privacy laws as applied to WCPFC compliance. In a public comment process administered by the Fisheries Agency¹⁷³ to designate the area in which a fishing vessel is required to report its position by satellite,¹⁷⁴ the Fishery Agency explained that satellite data collection was imposed as an obligation by the WCPFC'S Technical and Compliance Committee.¹⁷⁵

Japan may also be able to submit operational data to the WCPFC pursuant to the APPIHAO's provision that allows the disclosure of retained personal information "for executing the affairs under its jurisdiction provided by laws and regulations."¹⁷⁶ Under Japanese law, the WCPF Convention constitutes "laws and regulations" because the phrase "laws and regulations" is generally construed to mean international treaties to which Japan is a party.¹⁷⁷

If one insists that Japan may not presently submit operational data to the WCPFC consistently with the APPIHAO, MAFF could include in a regulation (or the Japanese Diet could include in legislation) a notice that MAFF will submit information provided by fishing vessels to the WCPFC

173. Suisan-cho paburikku komento 550001836 [Fishery Agency Public Comment Announcement No. 550001836], Nov. 21, 2013, <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=550001836> (Japan) (designating sea area and method for obligation, etc. to report the position by a satellite-based ship positioning transmitter). No comments, including objections, were submitted. *Public Comment: The Results Published Proposal Detail*, e-gov.go.jp, <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=550001836&Mode=2> (last visited Oct. 12, 2016).

174. Siteigyogyō no kyōka oyobi torishimari ni kansuru syōrei [Ministerial Ordinance on the Permission, Regulation, Etc. of Designated Fisheries], Ordinance of the Ministry of Agriculture and Forestry No. 5 of 1963, as amended through Ordinance of the Ministry of Agriculture and Forestry No. 38 of 2016, art. 24-2, *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&la=01&ia=03&x=63&y=78&ky=%E6%8C%87%E5%AE%9A%E6%BC%81%E6%A5%AD%E3%81%AE%E8%A8%B1%E5%8F%AF%E5%8F%8A%E3%81%B3%E5%8F%96%E7%B7%A0%E3%82%8A%E7%AD%89%E3%81%AB%E9%96%A2%E3%81%99%E3%82%8B%E7%9C%81%E4%BB%A4&page=2>. (Japan)

175. Suisan-chō paburikku komento 550001836, *supra* note 173.

176. APPIHAO, *supra* note 15, art. 8(2)(ii).

177. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 98, para. 2 (Japan) ("The treaties concluded by Japan and established laws of nations shall be faithfully observed.").

when requested under its authority provided by the WCPF Convention and the Fish Stocks Agreement. Such a notice would make submission of operational data consistent with the APPIHAO's provision allowing disclosure of personal information that is "provided by laws and regulations" or otherwise consistent with the purpose of utilization.¹⁷⁸

MAFF could also seek the consent of vessel owners and captains. Under the APPIHAO, an administrative agency may disclose personal information for purposes other than the purpose of utilization with the consent of the individual concerned.¹⁷⁹ To the extent that the provision of operational data to the WCPFC may be challenged as not consistent with the purpose of utilization, Japan could require that consent as a condition of flagging a vessel or licensing a vessel to fish in the WCPF Convention Area.

Alternatively, an administrative agency may disclose personal information for purposes other than the purpose of utilization when the retained personal information is provided "exclusively for statistical purposes or academic research purposes [and] provision of the information to other persons is obviously beneficial to the Individual Concerned."¹⁸⁰ The submission of operational data to the WCPFC could be considered "exclusively for statistical purposes" because scientists will use the information to determine stock biomass and other measures of abundance. Whether the use of stock biomass for establishing catch limits expands the scope of the purpose beyond "statistical purposes" is not clear. In any event, the submission of operational data should be considered "obviously beneficial" to the individual concerned as a more accurate assessment of stock biomass that will help ensure the sustainability of the fishery and thus allow that individual to participate in the fishery.

Moreover, MAFF may be able to provide operational data to the WCPFC consistent with the APPIHAO's provision for disclosure of personal information when "there are other special grounds for providing the Retained Personal Information."¹⁸¹ In a commentary edited under the supervision of the Administrative Management Bureau of the Ministry of Internal Affairs and Communications, "other special purposes" to enable administrative agencies to provide information to an outside institution includes the following circumstances: (1) the business of the outside institution serves high public benefit, (2) it is very difficult for the outside institution to collect the information by itself, and (3) it will be difficult for

178. APPIHAO, *supra* note 15, art. 8(2)(ii).

179. *Id.* art. 8(2)(i).

180. *Id.* art. 8(2)(iv).

181. *Id.*

the outside institution to fulfill the aim of its business without the information.¹⁸² The commentary explicitly lists as one “other special purpose” the provision of “personal information to foreign governments and/or international organizations for the purpose of international cooperation.”¹⁸³

3. Japan’s Claim is Moot

Although Japan claims that the APPI prevents it from submitting operational data—apparently because it could reveal personal information of vessel owners, captains, or individuals who work on the vessel—Japan has already submitted its vessels’ names along with each vessel’s flag, registration number, authorization period, vessel type and more to the WCPFC.¹⁸⁴ By clicking on a vessel on the list, the website links to a webpage detailing the owner’s name and address, master name, port, country of vessel construction, year the vessel was built, size and capacity information, previous names and flags, and the authorization information from the MAFF which includes a picture of the vessel.¹⁸⁵ Because Japan has already submitted this information to the WCPFC, its use of privacy laws to shield it from providing operational data is not compelling.

B. Korea’s Domestic Legal Constraints

Korea has not provided the WCPFC with information describing any specific domestic legal constraints that prevent it from submitting operational data to the WCPFC. Nonetheless, the privacy laws of Korea and Japan are very similar and Korea and Japan are frequently allied on fisheries issues. Consequently, we have assumed that Korea alleges obstacles similar to Japan’s—that is, that Korean privacy law prevents Korea from submitting operational data to the WCPFC.

Korea’s privacy laws, however, do not prevent Korea from submitting operational data to the WCPFC. Operational data likely does not constitute “personal information” as that term is defined by Korea’s Personal Information Protection Act (PIPA).¹⁸⁶ Even if it does, PIPA specifically requires the government to disclose personal information to the relevant international institution when necessary to implement Korea’s international obligations. As described below, the government even explains that a treaty

182. Gyōseikikan to kojinkyōhō hogohō no kaisetsu 41 (Gyōsei Jōhō Sistemu Kenkyūjo ed., 2005) (providing commentary on the APPIHAO).

183. *Id.*

184. WCPFC, *WCPFC Record of Fishing Vessels*, VESSELS, <https://www.wcpfc.int/record-fishing-vessel-database> (last visited Oct. 12, 2016).

185. *E.g.*, WCPFC, *Aichi Maru*, WCPFC RECORD OF FISHING VESSELS, <https://www.wcpfc.int/node/17355> (last visited Oct. 12, 2015).

186. PIPA, *supra* note 17, art. 2.

prevails over domestic privacy law when the two conflict. At best, Korea could argue that the government cannot reveal personal information to a third party, but this argument can be overcome by obtaining consent from ocean fishery operators to transfer the information to the WCPFC or ensuring protection of confidentiality by the WCPFC.

1. Privacy-Related Laws

Before PIPA was enacted, several individual laws included provisions regarding protection and management of personal information.¹⁸⁷ Korea's national legislature enacted PIPA due to the rising demand for coordination of different individual laws, the need to close loopholes in those laws, and the desire for higher protection of personal information in general.¹⁸⁸

PIPA regulates matters concerning the management of personal information to protect the rights and interests of Korean citizens.¹⁸⁹ PIPA defines personal information as "information that pertains to a living person, including the full name, resident registration number, images, etc., by which the individual in question can be identified, (including information by which the individual in question cannot be identified but can be identified through simple combination with other information)."¹⁹⁰ PIPA establishes general principles for protecting personal information,¹⁹¹ procedures for the collection and use of personal information,¹⁹² restrictions on the management of personal information,¹⁹³ rules for the safe management of personal information,¹⁹⁴ rules to guarantee the rights of the subjects of informa-

187. *Gainjungbo Bohobupryung Mit Jichimgosi Haeseol* [Commentary on Personal Information Protection Act, Enforcement Decree, Regulations] 37–46 (Dec. 2011) (S. Kor.) [hereinafter Commentary on PIPA]. According to Commentary on PIPA, 17 central government agencies regulated 38 laws containing protection and management of personal information at the time of enactment of PIPA. Korean text of the Commentary is available at http://www.privacy.go.kr/inf/gdl/selectBoardArticle.do?nttId=1772&bbsId=BBSMSTR_000000000044&pageIndex=2&bbsTyCode=BBST01&bbsAttrbCode=BBSA03&authFlag=Y&searchCnd=0&searchWrd=&nttSj=개인정보 보호법령 및 지침 고시 해설서.

188. Joon-Bok Lee, *Tonghap Gainjungbobohobup Sihangeui Hameuiwa Sisajum* [Meaning and Implication of the Enforcement of Integrated Personal Information Protection Act], 15 *JUNGBOBUPHAK* [INFO. L.] 147, 149–50 (S. Kor.).

189. PIPA, *supra* note 17, art. 1.

190. *Id.* art. 2(1).

191. *Id.* art. 3.

192. *Id.* Ch. III, Section 1 (arts. 15–22).

193. *Id.* Ch. III, Section 2 (arts. 23–28). "Management" is defined broadly to mean "to collect, create, link, interwork, record, save, hold, process, edit, search, output, correct, recover, use, provide, disclose, destroy personal information, and other acts similar thereto." *Id.* art. 2(2).

194. *Id.* Ch. IV (arts. 29–34-2).

tion,¹⁹⁵ and dispute settlement procedures for the infringement of rights established by PIPA.¹⁹⁶

PIPA applies to any “personal information manager,” which is defined as “a public institution, corporate body, organization, individual, etc. who manages personal information directly or via another person to administer personal information files as part of his/her duties.”¹⁹⁷ PIPA, thus, clearly applies to public institutions, including the Ministry of Oceans and Fisheries (MOF), the central administrative agency that governs fisheries laws and policies in Korea.¹⁹⁸

Under PIPA, personal information managers (including MOF) must clearly identify the purpose of collection when obtaining personal information.¹⁹⁹ The personal information manager “shall . . . not use [the personal information] for the purposes other than intended ones.”²⁰⁰ The personal information manager must use personal information “in such a manner that

195. *Id.* Ch. V (arts. 35–39).

196. *Id.* Ch. VI (arts. 40–50).

197. *Id.* art. 2(5).

198. *See generally* MINISTRY OF OCEANS AND FISHERIES, <http://www.mof.go.kr/eng/index.do> (last visited Oct. 12, 2016). Before the enactment of PIPA, the protection of personal information held by government entities was regulated by the Act on the Protection of Personal Information Maintained by Public Institutions [hereinafter APPIMPI]. However, with the enactment of PIPA, APPIMPI was repealed. PIPA, *supra* note 17, Addenda art. 2. At present, PIPA applies to any entities, either public or private. Commentary on PIPA, *supra* note 187. In addition, Article 6 of PIPA declares that:

Unless otherwise provided for in other Acts including the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., and the Act on Use and Protection of Credit Information, the protection of personal information shall be governed by this Act.

PIPA, *supra* note 17, art. 6. Commentary on PIPA explains that the integral approach of private and public entities was influenced by the European Union Directive on Protection of Personal Information. Commentary on PIPA, *supra* note 187, at 71. Commentary on PIPA also states that the co-existing of integral PIPA and other specific laws may create confusion and possibly double regulation. *Id.* at 37. If Korea argues that its privacy law prevented it from providing operational data to the WCPFC, PIPA is the law which directly regulates the handling of personal information by MOF. The Official Information Disclosure Act [OIDA] also prevents the government from disclosing to the public such information that is likely to infringe on business and operational confidentiality of a corporation. However, OIDA only applies to information requested by a Korean citizen and some foreigners. It does not apply to the disclosure of information requested by international organization or foreign nations according to treaties. Gonggongkigwaneui jungbogonggae gwanhhan beoprul [Official Information Disclosure Act], Act No. 5242, Dec. 31, 1996, *amended* by Act No. 12844, Nov. 19, 2014, art. 9(7) (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=38361&lang=ENG.

199. PIPA, *supra* note 17, art. 3(1).

200. *Id.* art. 3(2).

the privacy infringement of a subject of information is minimized.”²⁰¹ Similarly, the personal information manager must “ensure that personal information is managed anonymously whenever such management is possible.”²⁰²

Similar to the application of Japanese laws, operational data with the vessel’s name are not likely to be “personal information” because a vessel name does not identify a living person or otherwise allow a living person to be identified. However, because Korea has provided the personal names of the ship captains to the WCPFC with the vessel’s information, and those names have been disclosed to the public,²⁰³ Korea may claim that the operational data with the vessel’s name may become “personal information” because the captain’s information “can be identified through simple combination with other information.”²⁰⁴

Even if Korea successfully argues that operational data can be combined with other information to be considered “personal information,” MOF likely already has authority to submit such personal information to the WCPFC. Article 17 of PIPA allows a personal information manager to provide a third person with personal information.²⁰⁵ Under Article 17(1)(2) of PIPA, a personal information manager (including MOF) may transfer personal information to a third person for its intended purpose “where it is inevitable for a public institution to perform its affairs” under its jurisdiction provided by laws and regulations,²⁰⁶ or “where there exists special provisions in any Act or it is inevitable to fulfill an obligation imposed by or under statute.”²⁰⁷

In either case, Korea’s submission of operational data to the WCPFC should fall within the scope of Article 17(1)(2) for either of two reasons. First, the transfer of personal information is within the intended purpose of its collection. Presumably, the purpose of collecting operational data from vessels fishing in the WCPF Convention Area is to fulfill Korea’s obligation under the WCPF Convention and to manage the fisheries resources of the Convention Area effectively and sustainably. Therefore, the submission of operational data collected from Korean vessels is arguably within the in-

201. *Id.* art. 3(6).

202. *Id.* art. 3(7).

203. WCPFC Record of Fishing Vessels, *supra* note 184. For example, Korea has submitted relevant information including the vessel owner, for the Geum Hae. WCPFC, *101 Geum Hae*, WCPFC RECORD OF FISHING VESSELS, <https://www.wcpfc.int/node/13132> (last visited Oct. 12, 2016).

204. PIPA, *supra* note 17, art. 2(1).

205. *Id.* art. 17.

206. *Id.* arts. 17(1)(2), 15(1)(3).

207. *Id.* arts. 17(1)(2), 15(1)(2).

tended purpose. Second, the submission of operational data to the WCPFC is required for MOF to “perform its affairs” or to “fulfill an obligation” relating to implementation of the WCPF Convention. Under Korean law, the WCPF Convention constitutes “laws and regulations” because international treaties to which Korea is a party have the same effect as domestic laws and regulations.²⁰⁸

Nonetheless, PIPA may require MOF to obtain consent from fishery operators before submitting operational data to WCPFC. Article 17(3) of PIPA appears to require notice to and consent from the subject of information for cross-border transfer of personal information.²⁰⁹ Submission of operational data to the WCPFC likely constitutes the provision of information to “a third person at [an] overseas location.”²¹⁰

To meet this requirement of notice and consent, Korea could amend the Distant Water Fisheries Development Act (DWFDA),²¹¹ particularly its reporting requirement. Under the DWFDA, all licensed ocean industry operators must report the number of fish caught and the amount of fish unloaded or sales results.²¹² The DWFDA also requires ocean fishery operators fishing in waters managed by international fisheries organizations to prepare and submit statistical documents faithfully and prohibits illegal, unreported, and unregulated fishing, which includes fishing in violation of relevant international rules and failing to submit reports consistent with the rules of international fisheries organizations. The DWFDA defines serious non-compliance as including the failure to “maintain and report the number of fish caught and detailed record (including data from fishing vessel monitoring system) requested by international fishery organizations.”²¹³ It further demands ocean industry operators to comply with “resolutions made by international fisheries organizations for the conservation of resources and international standards regarding fisheries in high seas.”²¹⁴ These reporting and other requirements of the DWFDA are similar to those of the

208. DAEGHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6 (S. Kor.).

209. PIPA, *supra* note 17, art. 17(3) (requiring a personal information manager to notify and receive consent from a person prior to providing personal information to a third person at any overseas location).

210. *Id.*

211. Distant Water Fisheries Development Act, Act. No. 8626, Aug. 3, 2007, *amended* by Act. No. 11982, July 30, 2013, art. 16 (S. Kor.) [hereinafter DWFDA], *translated* in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=29061&lang=ENG.

212. *Id.* art. 16(1).

213. *Id.* arts. 13(2)(1), 13(2)(7); *see id.* art. 2(7) (defining “illegal, unreported, and unregulated fishing”).

214. *Id.* art. 13(1).

WCPFC; however, the DWFDA does not require MOF to report operational data to the WCPFC.

Article 13(5) clearly authorizes MOF to adopt regulations necessary to implement measures to submit operational data taken by international fisheries organizations.²¹⁵ Consent to submit the data to the WCPFC could be obtained as a condition of flagging a vessel or licensing a vessel to fish in the WCPF Convention Area because the DWFDA authorizes MOF to adopt restrictions on the grant of permission to fish.²¹⁶

2. Use of PIPA's Exceptions to Justify Submission of Operational Data

If operational data is found to be "personal information" and the provisions of Article 17 of PIPA are deemed not to apply, then Article 18 of PIPA provides two exceptions that may allow MOF to submit information to the WCPFC. Article 18 allows a personal information manager to provide personal information to a third person if the interests of a subject of information or a third person are not likely to be unduly infringed and one of the specific exceptions applies.²¹⁷

The first exception allows a personal information manager to use personal information for any purpose other than the intended ones or provide such information to a third person if "necessary for providing a foreign government or international organization with personal information in order to implement a treaty or any other international agreement."²¹⁸ This exception directly applies to the submission of operational data to the WCPFC. As mentioned above, the Korean Constitution stipulates that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws" of Korea.²¹⁹ The Commentary on PIPA prepared by the Ministry of Interior explains that if a domestic law and a treaty with the same effect as the domestic law conflict with each other, the treaty prevails by the principle of prevalence of special law over general law.²²⁰ The Commentary further states that a treaty can be considered a special law because nations reach an agreement to apply the treaty domestically: "Therefore, if a treaty requires a use or transmission of personal information outside the purpose of collection, a public institution may use or transfer personal in-

215. See *id.* art. 13(5).

216. *Id.* art. 7.

217. PIPA, *supra* note 17, art. 18(2).

218. *Id.* art. 18(2)(6).

219. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6 (S. Kor.).

220. Commentary on PIPA, *supra* note 187, at 109.

formation outside the purpose of collection *without the consent* from the subject of information to implement the treaty.”²²¹ Based on the Commentary, it is clear that PIPA anticipated a conflict between Korea’s domestic privacy law and its international treaty obligations, and that the government would provide personal information to an international organization according to the treaty’s requirement.

The second exception allows a personal information manager to use personal information for any purpose other than the intended ones or provide such information to a third person if the personal information is “necessary for compiling statistics, or scientific research purposes” and “the personal information is provided in a form by which a specific individual cannot be identified.”²²² The submission of operational data to the WCPFC could be considered necessary for compiling statistics or for scientific research purposes. However, WCPFC rules require operational data to be submitted with the vessel’s name.²²³ For MOF to use this exception, it would need to ensure that the vessel’s name was not included or that the information was aggregated. As such, it does not provide the best option to overcome Korea’s legal constraints because it would still not be acting consistently with the *Scientific Data Document*.

As mentioned above, the use of these two exceptions in Article 18 requires that the provision of personal information to a third person does not “unduly infringe” on the interests of the subject of information.²²⁴ In other words, as long as the submission of operational data to the WCPFC does not unduly infringe on the interests of vessel owners and/or captains, MOF may provide operational data to the WCPFC without obtaining their consent. Undue infringement of the interests of ocean fishery operators has not yet been defined. Vessel owners and captains may argue that operational catch and effort data would reveal vessel-specific data with the number and type of fish caught per set, thereby disclosing their know-how on where, when, and how to fish, which is confidential, business beneficial information. This argument cannot prevail, however, because the right to fish is limited by international fishery agreements such as WCPFC, and the ability to fish is dependent on the sustainability of fishery resources. The submission of operational data is critical to ensuring sustainable fisheries. Moreover, the DWFDA already contemplates the submission of fisheries

221. *Id.* (emphasis added).

222. PIPA, *supra* note 17, art. 18(2)(4).

223. *Scientific Data Document*, *supra* note 6, at Annex 1, § 1.1; *see also id.* § 3 (“Operational level catch and effort data . . . shall be provided to the Commission, in accordance with the standards These are listed in Annex 1.”).

224. PIPA, *supra* note 17, art. 18(2).

data to the WCPFC.²²⁵ In any event, the WCPFC has a strict policy on confidentiality of information that prohibits the public disclosure of the individual activities of a specific vessel, as well as annual catch estimates and aggregated catch and effort data of a vessel.²²⁶

Alternatively, to make Korean law more compatible with the WCPFC requirement to submit operational data, Korea could amend the DWFDA to include a confidentiality clause relating to data submitted to the WCPFC. Currently, the DWFDA does not have any provision addressing confidentiality of information reported to MOF by fishery operators. It only states that all licensed ocean industry operators should report operational results to MOF.²²⁷ The regulations to implement the DWFDA state that MOF should use the operational results to write an annual “comprehensive assessment report” of distant ocean vessels, which can be used “only for the purpose of assessing fisheries resources and information regarding fisheries policy, and not for any other purposes.”²²⁸ This language does not clearly state whether MOF’s submission of operational data to the WCPFC could be construed as the use of information regarding “assessment of fisheries resources and information regarding fisheries policy.” Therefore, Korea should amend the DWFDA to clarify that providing operational data to WCPFC does not collide with PIPA.

C. The United States as an Example

The United States exemplifies how a WCPFC member can ensure that it has the legal authority to provide operational data to the WCPFC. Prior to 2007, the U.S. Magnuson-Stevens Fishery Conservation and Manage-

225. DWFDA, *supra* note 211, art. 13(2)(7) (“No distant water fishery operator shall engage in any of the following activities in international waters: . . . Faithful preparation and submission of statistical documents.”)

226. WCPFC, *Rules and Procedures*, *supra* note 38, ¶¶ 9–11. Nonetheless, Korea seems concerned with confidentiality of operational data. At the 11th regular session of WCPFC held in 2014, Korea, with Japan, successfully argued for confidentiality in providing the limited operational data for tropical tuna. Japan, *Proposal on SKJ TRP*, WCPFC11-2014-DP-25 Rev. 1 (Dec. 4, 2014), <https://www.wcpfc.int/system/files/WCPFC11-2014-DP-25%20Rev1%20Agreed%20text%20on%20Operational%20data%20in%20CMM2013-01%20-%20Ver.2.pdf>; WCPFC, *Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna*, *supra* note 60, ¶ 58.

227. DWFDA, *supra* note 211, art. 16(1) (“A person who has obtained permission for distant water fishing . . . shall report the current status of operations of the relevant fisheries, the results of catches, and the amount of landing or sales results to the Minister of Oceans and Fisheries.”).

228. Implementation Regulation of DWFDA, art. 25.2(2), MOF Regulation No. 155, last amended on Aug. 4, 2015 (S. Kor.), www.law.go.kr/lsInfoP.do?lsiSeq=173791&efYd=20150804#0000 (an official English translation is not available).

ment Act (MSA)²²⁹ provided that “[a]ny information submitted to the Secretary [of Commerce], a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this chapter shall be confidential and shall not be disclosed except” under limited circumstances, which did not include submission of data to international fisheries commissions.²³⁰ The Department of Commerce, the agency responsible for fisheries management in the United States, thus applies the “Rule of Three,” wherein data disclosed to the public must be aggregated from at least three fishermen.²³¹ In this way, it is very difficult to trace commercially valuable information to the individual who reported it.²³²

To ensure compliance with the data requirements of WCPF Convention and the WCPFC, the U.S. Congress amended the confidentiality rules of the MSA as they relate to the WCPF Convention in the Western and Central Pacific Fisheries Convention Implementation Act (Act).²³³ The Act specifically allows the Secretary of Commerce to disclose information “to the Commission, in accordance with requirements in the Convention and decisions of the Commission, and, insofar as possible, in accordance with an agreement with the Commission that prevents public disclosure of the identity or business of any person.”²³⁴

The Secretary of Commerce later promulgated regulations to implement this statutory provision. The regulations allow the Secretary to disclose confidential information if required by the WCPF Convention and its decisions, provided that such disclosure is consistent with WCPFC decisions, policies, and practices.²³⁵ In addition, such disclosure must be consistent with any agreement between the United States and the WCPFC to prevent public disclosure of the identity of the person or business.²³⁶

229. See 16 U.S.C. §§ 1801–1884 (2015).

230. 16 U.S.C. § 1881a(b)(1) (2015).

231. Nat’l Marine Fisheries Serv., *Commercial Data*, ABOUT FISHERIES DATA, <http://www.st.nmfs.noaa.gov/data/fis/about/commercial-data> (last visited Oct. 12, 2016).

232. *Id.*

233. 16 U.S.C. §§ 6901–6910 (2015).

234. 16 U.S.C. § 6905(d)(1). Congress enacted the Western and Central Pacific Fisheries Convention Implementation Act, as well as other amendments pertaining to the WCPF Convention, as part of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Public L. No. 109-479, 12 Stat. 3575.

235. 50 C.F.R. § 300.220(c)(3)(A)–(B).

236. 50 C.F.R. § 300.220(c)(3)(C). The full text of the relevant provisions relating to disclosure of information to the SCPFC reads as follows:

(3) *Commission.* (i) Confidential information will be subject to disclosure to the Commission, but only if:

(A) The information is required to be submitted to the Commission under the requirements of the WCPF Convention or the decisions of the Commission;

Quite clearly, the United States may now submit operational data to the WCPFC,²³⁷ although legislative changes do not allow for the provision of operational data prior to 2004.²³⁸ At the same time, the regulations seek to ensure that information is not disclosed to other persons or used for other reasons. In fact, the regulations provide that “[p]ersons having access to confidential information may be subject to criminal and civil penalties for unauthorized use or disclosure of confidential information.”²³⁹ A violator may be assessed a civil penalty up to \$100,000 for each violation.²⁴⁰ As a consequence of these rules, the United States has enacted legislation that allows it to provide the WCPFC with operational data while at the same time ensuring that confidential information is not disclosed to the public.

D. *Appropriate and Scalable Penalties*

As noted in Section IV, the failure to provide operational data does not constitute non-compliance, provided that a member has a domestic legal constraint and submits aggregate data instead. Even if such a legal constraint exists, members have an ongoing duty to remove the legal constraint and provide aggregate data. Japan either does not have a domestic legal constraint or it is failing to overcome whatever domestic legal obstacle it may have. In addition, Japan is failing to provide aggregate data consistently with the *Scientific Data Document*, as Section IV.A shows. As a consequence, Japan is in violation of the rules for submission of data as mandated by the *Scientific Data Document*.

The issue, then, is whether the WCPFC has the tools to impose adequate penalties for non-compliance with the rules for submitting operational data. The Technical and Compliance Committee may only make

(B) The provision of such information is in accord with the requirements of the Act, the WCPF Convention, and the decisions of the Commission, including any procedures, policies, or practices adopted by the Commission relating to the receipt, maintenance, protection or dissemination of information by the Commission; and

(C) The provision of such information is in accord with any agreement between the United States and the Commission that includes provisions to prevent public disclosure of the identity or business of any person.

Id.

237. The regulations also allow for the disclosure of information to state employees, Marine Fisheries Commission employees, observers, and others provided certain conditions are met. See 50 C.F.R. § 300.220(c)(4)–(7) (2010).

238. See *Data Gaps 2014*, *supra* note 7, at tbl.6 (stating that the United States has provided historical data “since enactment of the WCPFC Implementation Act (January 17, 2007)”).

239. 50 C.F.R. § 300.220(c)(8) (2016).

240. 16 U.S.C. § 1858(a) (2015).

recommendations to the WCPFC and, given the consensus-based model of decision-making in the WCPFC, Japan or any other WCPFC member could object to any recommended penalty.

To improve compliance, the WCPFC is developing a Compliance Monitoring Scheme (CMS) to, *inter alia*, assess CCMs' compliance with their obligations and respond to non-compliance through remedial options.²⁴¹ Through the CMS, the WCPFC will specifically review compliance with the provision of scientific data through Part 1 of the Annual Report and the *Scientific Data Document*.²⁴²

Remedial options may include capacity-building initiatives, as well as "penalties and other actions as may be necessary and appropriate to promote compliance with CMMs and other Commission obligations."²⁴³ One way the WCPFC intends to implement the concept of "necessary and appropriate" is through a "graduated response" that takes into account "the type, severity, degree and cause of the non-compliance in question."²⁴⁴ This "graduated response" model, while having different names, is also found in compliance mechanisms of multilateral environmental agreements,²⁴⁵ the use of force in self-defense,²⁴⁶ the conduct of war,²⁴⁷ maritime boundary

241. WCPFC, *Conservation and Management Measure for Compliance Monitoring Scheme*, ¶ 1, CMM 2014-07 (2014), <https://ctools.umich.edu/access/content/group/b62d4296-63e6-4788-9bf7-8edd65e98fea/CC%20Forms/FN235.pdf>.

242. *Id.* ¶ 3(vi).

243. *Id.* ¶ 1(iv).

244. *Id.* ¶ 23. These aspects of the CMS embody two common elements of compliance regimes: proportionality and a step-wise approach to non-compliance.

245. The compliance regime of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for example, directs the Standing Committee, which is responsible for recommending measures to facilitate compliance, to take into account:

- a) the capacity of the Party concerned, especially developing countries, and in particular the least developed and small island developing States and Parties with economies in transition;
- b) such factors as the cause, type, degree and frequency of the compliance matters;
- c) the appropriateness of the measures so that they are commensurate with the gravity of the compliance matter; and
- d) the possible impact on conservation and sustainable use with a view to avoiding negative results.

Convention on International Trade in Endangered Species of Wild Fauna and Flora Conference of the Parties Res. 14.3-5, ¶ 32, CITES Compliance Procedures (2007).

246. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 237 (June 27).

247. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 43 (July 8).

delimitation,²⁴⁸ international trade law,²⁴⁹ as well as European law generally.²⁵⁰

In the context of the failure to submit data, it is difficult to know just where along the spectrum of proportionality specific failures would fall. For example, Japan has never provided any operational catch and effort data, nor size composition data, for its coastal fleet, although it has submitted aggregate catch data for this fleet for the years 1994 through 2014.²⁵¹ Japan has not provided any annual catch estimates by EEZs and high seas areas prior to 2008.²⁵² In the abstract, it is difficult to determine which failures are more significant than others and would require steeper penalties. The implications of such data failures, and thus the corresponding response measures, should be accompanied by an analysis from fisheries scientists, most likely those from the SPC who are charged with providing scientific advice to the WCPFC.

VI. CONCLUSION

For the past decade, the WCPFC has attempted to obtain operational data from WCPFC members so that fisheries scientists can accurately estimate the abundance of fish stocks, set total allowable catches based on an accurate assessment of the stocks, and manage fish stocks sustainably. While the vast majority of members submit operational data, a small number continue to claim that domestic legal constraints prevent them from submitting operational data.

The WCPFC's rules for the submission of data allow members to submit aggregate data instead of operational data if they have "domestic legal constraints," but only "until such constraints are overcome."²⁵³ A review of

248. North Sea Continental Shelf, 1969 I.C.J. Rep. 3, ¶ 101 (Feb. 20).

249. In the context of the Agreement on Subsidies and Countervailing Measures, "appropriate" countermeasures are the remedy for the use of prohibited subsidies. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, arts. 4.10–4.11. Footnotes 9 and 10 of this Agreement explain that the use of "appropriate" "is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited." *Id.* at nn.9–10. For an application of these provisions and footnotes, see Recourse to Arbitration by Brazil, *Brazil - Export Financing Programme for Aircraft*, ¶ 3.51, WTO Doc. WT/DS46/ARB (adopted Aug. 28, 2000).

250. In European law, the concept of proportionality "implies a means-ends relationship between the aims pursued by a specific action of the government and the means employed to achieve this end." NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 23–24 (1996).

251. See *supra* Section IV.A.

252. See *Data Gaps 2014*, *supra* note 7, ¶ 27.

253. *Scientific Data Document*, *supra* note 6, § 3.

the legislation of Japan and Korea indicates that they either do not have domestic legal constraints or that those constraints could be overcome easily.

Japan, for example, relies on privacy—the protection of personal information—to claim that it may not submit operational data to the WCPFC. Japan’s legislation, however, suggests that operational data does not constitute personal information—information that can identify a person within the meaning of the Act on the Protection of Personal Information Held by Administrative Organs.²⁵⁴ Even if it does (because operational data includes the vessel’s name, which could be used to identify the captain), Japan has already submitted vessel names and captain’s names as part of the Record of Fishing Vessels.²⁵⁵ Moreover, Japan’s fisheries agency—the Ministry for Agriculture, Forestry and Fisheries (MAFF)—likely already has statutory authority to submit operational data just as it has authority to submit vessel names and captain’s names for the Record of Fishing Vessels, because submission of operational data to the WCPFC would be consistent with the “purpose of utilization” for obtaining operational data from Japanese vessels. MAFF also may be able to submit operational data to the WCPFC under its duty to “execut[e] the affairs under its jurisdiction provided by laws and regulations,” including international treaties such as the WCPF Convention.²⁵⁶

Similarly, operational data likely does not constitute “personal information” within the meaning of Korea’s privacy law, the Personal Information Protection Act (PIPA).²⁵⁷ Even if it does, the Ministry of Oceans and Fisheries (MOF) may provide operational data to the WCPFC with the consent of vessel operators. Even without the consent, MOF would be able to submit operational data to an international organization such as WCPFC, as long as the submission would not unduly infringe the interest of ocean industry operators. The Korean government even takes the position that treaty law prevails when there is a conflict with domestic privacy law.²⁵⁸

254. APPIHAO, *supra* note 15.

255. WCPFC, *WCPFC Record of Fishing Vessels: Japan*, VESSELS, <https://www.wcpfc.int/record-fishing-vessel-database> (select “Japan” under “Flag” pull down tab, and click “Apply”) (last visited Oct. 12, 2016).

256. See *supra* Section V.A.2 (stating that the MAFF may be able to submit operational data to the WCPFC under its duty to “execut[e] the affairs under its jurisdiction provided by laws and regulations”).

257. PIPA, *supra* note 17.

258. See *supra* Section V.B. (stating that Korea’s privacy laws do not prevent Korea from submitting operational data to WCPFC).

If operational data is considered personal information, then both Japan and Korea could overcome privacy concerns by obtaining the consent of vessel owners or captains. Both the Japanese and the Korean fisheries agencies have the legal authority to amend their regulations. The regulations could be amended to put vessel owners and captains on notice that operational data will be submitted to the WCPFC. Consent could be conditioned on the receipt of a license to fish in the WCPF Convention Area.

Because both Japan and Korea either 1) do not have domestic legal constraints or 2) have authority to promulgate regulations to provide operational to the WCPFC and are not actively trying to overcome any legal constraint, they are acting inconsistently with the *Scientific Data Document*. Nonetheless, imposing a penalty on them may be difficult given the WCPFC's culture of taking decisions by consensus.²⁵⁹

Korea has taken important, positive steps by submitting operational data for 2014. If Korea submits historical operational data and Japan takes similar steps, then the "culture of protecting catch data and disinformation [that] is common"²⁶⁰ in fisheries can be broken. If this culture can change, then the WCPFC can ensure that it is managing valuable fish stocks sustainably.

259. See *supra* Section V.D.

260. AMOS BARKAI & GUY MEREDITH, OLFISH ELECTRONIC LOGBOOK: BRIDGING THE GAP BETWEEN FISHER, MANAGER AND SCIENTIST THROUGH COHESIVE DATA-LOGGING 1 (2010).