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Dear WCPFC CMS-IWG Members:

On behalf of The Pew Charitable Trusts, I am writing to express our appreciation for the contributions of members of the Pacific Islands Forum Fisheries Agency (FFA) in proposing draft text for a new WCPFC Compliance Monitoring Scheme (CMS) as well as the contributions of other IWG members and the leadership of the Chair. A robust CMS is essential to promote sustainable fisheries. However, an element critical to achieving that goal should be included in the new CMS: provisions to enable access by observers to participate in discussions on draft Compliance Monitoring Reports (CMRs). I would like to explain why the WCPFC should promote transparency in decision-making with respect to the CMRs, and suggest a way forward.

The new CMS must be consistent with the language of the WCPFC Convention and Rules of Procedure. Article 21 of the WCPFC Convention is clear in stating the Commission shall promote transparency in its decision-making processes and representatives from non-governmental organizations are to be afforded the opportunity to participate in meetings of the Commission and subsidiary bodies as observers. The rules of procedure are required to provide for such participation and shall not be unduly restrictive. Members of the WCPFC are obligated to provide for this participation and should not choose which obligations to uphold. In continuing to disregard this obligation, members of the WCPFC have not articulated a problem with allowing such access. The current situation has the effect of changing the intent of the Convention and Rules of Procedure.

Observers represent civil society and share in the common goal of ensuring the Pacific tuna fisheries are sustainably managed. Observer participation would improve the CMS process and enhance the achievement of the Commission's objectives:

- Observers strengthen agreements by monitoring compliance and enhancing the accountability of governments. Experience in other RFMOs has shown that NGOs have detected instances of non-compliance when information compiled by governments and RFMOs is shared.<sup>1</sup> The current WCPFC CMS measure and the FFA proposal both note that the Commission should be made aware of any and all available information to identify and hold accountable instances of non-compliance, implying that information on non-compliance can be considered from observers as well as governments.
- Observers can suggest means to improve compliance and provide targeted funding to address specific needs or gaps. WCPFC allows a CCM to identify when capacity assistance is needed to meet a compliance obligation. Unfortunately, the public compliance report is highly opaque in presenting this information and detailing the type of assistance needed. A more transparent process can ensure NGOs target support where it is most needed.

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<sup>1</sup> Arias, A. and Pressey, R. "Combating Illegal, Unreported, and Unregulated Fishing with Information: A Case of Probable Illegal Fishing in the Tropical Eastern Pacific." *Frontiers in Marine Science*. 2016.

- Observers provide information and ideas that could be applied to improving the design of Conservation and Management Measures, but the WCPFC is not transparent in sharing why some measures work and others cannot be assessed.

Members of the WCPFC share an interest in promoting transparency in WCPFC decision-making. Experience shows a transparent process enhances compliant behavior by the mere fact of its openness; it helps ensure the process is viewed as legitimate and fair.<sup>2</sup> Transparent processes prompt States to deal with each other more fairly, because positions taken in bad faith are more difficult to defend.<sup>3</sup>

### WCPFC is at odds with best practices

To date, WCPFC is out of step with the other tuna RFMOs. WCPFC is unique for closing these discussions and not making related documents available.<sup>4</sup> The independent review prepared for the Commission found the closure of CMS discussions to observers constitutes a “major exception” to the implementation of WCPFC obligations with respect to transparency.<sup>5</sup> The WCPFC legal counsel also concluded: “It would be consistent with the WCPF Convention to permit greater transparency in the work of the TCC.”<sup>6</sup>

The exclusion of observers is at odds with international best practice and commitments made by many WCPFC members in other fora. Although voluntary, these commitments call for the promotion of transparency in governance and decision-making. They include: the Rio Declaration on Environment and Development, which calls on States to make information on environmental issues widely available and provide effective access to judicial and administrative proceedings<sup>7</sup>; the UN Fish Stocks Agreement, which calls on States to provide for transparency in RFMO decision-making processes and afford non-governmental organizations the opportunity to take part as observers, and provide timely access to records and reports, subject to procedural rules on access<sup>8</sup>; and the FAO Code of Conduct For Responsible Fisheries, which calls on States to facilitate effective participation of interested organizations in development of laws and policies related to fisheries management.<sup>9</sup>

The substantial lack of transparency in information on State- and vessel-level compliance in WCPFC results in an insufficient system to deter non-compliance, according to a recent study that found WCPFC fully

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<sup>2</sup> Sutinen, J. and Kuperan, K. “A socio-economic theory of regulatory compliance.” *International Journal of Society Economics*. 1999.

<sup>3</sup> Wisner, G. “Transparency in the 21<sup>st</sup> Century Fisheries Management: Options for Public Participation to Enhance Conservation and Management of International Fish Stocks.” *Journal of International Wildlife Law and Policy*. 2001

<sup>4</sup> Koehler, H. “Tuna RFMO Compliance Assessment Processes: A Comparative Analysis to Identify Best Practices.” ISSF Technical Report 2018-11.

<sup>5</sup> Independent Review of the Compliance Monitoring Scheme: Substantive Progress Report by the Review Panel. A report submitted to WCPFC14, Manila, Philippines, 2017.

<sup>6</sup> Review of Observer Participation in the WCPFC. A paper by the Secretariat submitted to WCPFC13, Denarau, Fiji, 2016.

<sup>7</sup> UNEP. Rio Declaration on Environment and Development, Principle 10. United Nations Conference Environment and Development, 3-14 June 1992, Rio de Janeiro. United Nations Environment Programme, Nairobi.

<sup>8</sup> United Nations. Agreement for the Implementation for 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, Article 12(1). UN General Assembly. Doc. A/CONF.164/37, September 8, 1995.”

<sup>9</sup> FAO. Code of Conduct for Responsible Fisheries, Articles 6.13 and 7.1.9. Food and Agriculture Organization of the United Nations, Rome, 1995.

transparent for only 28% of criteria in a proposed standard with respect to transparency in compliance information.<sup>10</sup>

#### A way forward regarding observer participation in the CMS

As IWG members continue to engage in the process to develop a new CMS, Pew would like to reiterate the way forward suggested in the March 29, 2017 letter to the Commission that was signed on behalf of nine observer organizations. At that time, these organizations were commenting on proposed draft guidelines for observer access. Although the guidelines were not adopted, we are reiterating below the same list of objectives that should inform the Commission's approach to observer participation in the new CMS, along with the attachment listing observer participation guidelines and confidentiality agreement elements for consideration. In this way, the new CMS should:

1. Implement fully Article 21 in that the Commission 'shall promote transparency' and that procedures for Observer participation in the Rules of Procedure 'shall not be unduly restrictive...';
2. Be consistent with the processes and confidentiality procedures already outlined in paragraph 30 and Annex 2 of Appendix 3 to the 2007 Data Rules and Procedure and apply equally to both NGO and IGO Observers;
3. Allow Observers access to all relevant documents to be discussed in meetings and put in place a practice of clearly identifying those documents that are non-public to distinguish them from other documents of a public nature;
4. Ensure that any consequences for breaches of confidentiality are fair, transparent and consistently applied to Member, CNMs and all Observer organizations alike, as is currently outlined in paragraph 28 and Annex 2 of Appendix 3 of the 2007 Data Rules and Procedures and paragraph 8 of the 2010 MSCS Data Rules and Procedures; and
5. Establish a clear and fair process for evaluating any alleged breaches not only by Observers, but also by Members.

Pew shares with WCPFC members the objective of ensuring a robust CMS measure is agreed at WCPFC this year, and looks forward to continuing to work with members to promote sustainable fisheries.

With best regards,



Dave Gershman  
Officer, Global Tuna Conservation Program

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<sup>10</sup> Gilman, E. and Kingma, E. "Standard for assessing transparency in information on compliance with obligations of regional fisheries management organizations: Validation through assessment of the Western and Central Pacific Fisheries Commission." Ocean & Coastal Management, 2013.

**Observer Participation Guideline Elements**  
**March 2017**

Overarching Principles:

Article 21 of the WCPFC Convention: “The Commission shall promote transparency in its decision-making processes and other activities. Representatives from intergovernmental organizations and non-governmental organizations concerned with matters relevant to the implementation of this Convention shall be afforded the opportunity to participate in the meetings of the Commission and its subsidiary bodies as observers or otherwise as appropriate. The rules of procedure of the Commission shall provide for such participation. The procedures shall not be unduly restrictive in this respect. Such intergovernmental organizations and non-governmental organizations shall be given timely access to pertinent information subject to the rules and procedures which the Commission may adopt.”

Observer Participation Guidelines and Confidentiality Agreement Elements:

1. The guidelines must be applicable to all non-CCM organizations in the WCPFC, e.g., not distinguish between IGO, eNGO, industry organizations, CNMS, etc.
2. Regarding a Confidentiality Agreement:
  - a. The guidelines must make clear that the non-disclosure provisions apply only until after the Commission meeting (or adoption of reports, if later), for example, when the final CMR report is adopted by the Commission and is therefore publicly available;
  - b. The guidelines must clearly outline the due process for any alleged breaches and any “sanctions” should not be extraordinary and must apply equally to both observers and CCMs;
  - c. The guidelines must be clear that after signing a confidentiality agreement observers will be explicitly allowed access to all relevant documents in advance of the relevant meeting on the same basis as CCMs;
  - d. The guidelines should not include a requirement to seek the approval of any/all individual CCMs either once or annually for access to the NP domain data included in documents as the adoption of the guidelines and signature of the confidentiality agreement would equal a standing authorization per the existing WCPFC data rules; and
  - e. The guidelines should not include a requirement to delete all documents received after the relevant meeting.
3. The confidentiality agreement itself must clearly outline the following items:
  - a. No disclosure of non-public document or NP data, e.g., documents that include Part 2 Reports or the draft CMR reports for all CCMs; and
  - b. No disclosure of the discussions relating to confidential data on a specific CCM (but it would be acceptable for an observer or CCM to talk in general terms about areas of non-compliance overall), including in press releases, blogs, interviews, published reports.
4. The guidelines must explicitly provide that any allegations of breaches must be evaluated through an established process that is fair and transparent. This process should be the same, or equivalent, to any process applied to CCMs.