

March 29, 2018

Mr. Glen Joseph
Chair, CMS-IWG

By email: gjoseph@mimra.com

Dear Mr. Joseph:

On behalf of The Pew Charitable Trusts, I would like to thank you for the opportunity to comment on the Final Report from the Panel to Review the WCPFC Compliance Monitoring Scheme (CMS). We appreciate the work of the panel and strongly support further refinement and development of a robust CMS. As the CMS-IWG reviews the Final Report and develops a proposal for a new Conservation and Management Measure (CMM) for the CMS, we would like to highlight four issues that should be addressed:

1. The proposed CMM should be guided by the language of the WCPFC Convention to specify that all CMS discussions are open without delay to Observer participation.

We were pleased the Review Panel recognized that Observers to the Commission should have the opportunity to participate in all discussions on the CMS. However, contrary to the Review Panel's recommendation, the Convention language is clear that Commission CCMs are obligated to ensure the CMS is open to all Observers without the restrictions imposed by a delay. The Review Panel, citing comments from unnamed CCMs, recommended adoption of a staged approach to gradually provide access to NGO Observers (Section 6.4, Paragraph 33), mindful of CCMs that want other aspects of the process to be dealt with first. However, this approach is not consistent with the language of the WCPFC Convention and Rules of Procedure.

We would call attention to the finding by the Review Panel that the CMS processes constitute a "major exception" with respect to the implementation of WCPFC obligations and that the WCPFC "falls short" of the practices in other RFMOs (Para 29). Specifically, the Panel remarked:

- The "Convention requires, in Article 21, that the Commission shall promote transparency in its decision-making processes and other activities" and that "representatives from ... non-governmental organizations are to be afforded the opportunity to participate in the meetings of the Commission and its subsidiary bodies as observers or otherwise as appropriate" (Para 26);
- The WCPFC "rules of procedure are required to provide for such participation, and the procedures are not to be unduly restrictive in this respect" (Para 27);

- Article 21 is similar to language in the UN Fish Stocks Agreement and the FAO Code of Conduct and “the international requirements are therefore reasonably clear,” (Paras 28 and 29).

Nowhere in those texts are some obligations given greater weight than others. There is no support in those texts to develop a system that holds the promise of fulfilling the obligations of the Convention with respect to transparency only after other aspects of the process proceed satisfactorily to all CCMs.

2. Access to the CMS process should be provided to *all* Observer organizations that are accredited and wish to participate.

We strongly oppose the suggestion from the Review Panel that access begin with “a small representative group of NGOs initially,” which was further qualified by the Review Panel that access be granted “on clearly defined terms and conditions” (Section 6.4, Paragraph 33).

Setting aside the issue of terms and conditions for a moment, we again maintain that access should be guided by the language in the WCPFC Convention, which does not support limiting access to a select few Observer organizations. Such a limitation puts the Commission in the role of potentially favoring some NGOs over others. It also holds one NGO responsible for the actions of an entirely different NGO, because the Review Panel’s suggestion is that access could be expanded past that initial group “to include all NGOs after a certain period if no problems arise” (Para 33). The Commission would not hold one CCM’s access contingent on the actions of a different CCM, and therefore this standard should not apply to NGOs.

3. With respect to “terms and conditions” on Observer access to the CMS process, the new CMM should specify that the same conditions apply to Observers and CCM representatives alike.

We do not support the suggestion to predicate access to the CMS on the *Draft Guidelines to Govern the Participation of Observers in Closed Commission Meetings to Consider the Compliance Monitoring Report (Circular No.: 2017/136; 22 May 2017)*. We are disappointed the draft guidelines provide no semblance of due process to Observers for alleged breaches of confidentiality. A due process clause is a necessary safeguard from the arbitrary denial of access.

In our view, review of non-public domain data should not necessitate closing meetings to Observers. Rule 15 of the Rules of Procedure allows meetings to be closed only in “exceptional circumstances.” The annual discussion of the draft CMRs is not an exceptional circumstance. If the Commission wishes to apply additional procedures to Observers to hold them accountable for maintaining the confidentiality of the CMS process and protect non-public domain data, these procedures should be the same as those governing CCM representatives, with appropriate provisions for due process to resolve alleged infractions.

4. Penalties for non-compliance should be embedded in the new CMM

The new CMM should be developed with penalties already embedded in the measure. A lack of penalties directly impacts the effectiveness of the CMS to deter instances of non-compliance. While we appreciate the Review Panel's suggestions to promote efficiency of operation, i.e. through a Friends of the Chair Working Group (like employed by ICCAT) and the mandatory inclusion of compliance checklists with each new CMM, the lack of penalties should be addressed urgently. Once again, WCPFC should adopt provisions similar to ICCAT's which require CCMs to have submitted data from the previous year in order to be allowed to fish the following year, and WCPFC should also include provisions similar to ICCAT's provisions which allow for sanctions against its own parties for overages of catch, i.e. mandatory repayment of that overage the following year.

With best regards,



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