

# MARINE STEWARDSHIP COUNCIL

## INDEPENDENT ADJUDICATION

### IN THE MATTER OF

#### Echebatar Indian Ocean Skipjack Tuna Purse Seine Fishery

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### DECISION OF THE INDEPENDENT ADJUDICATOR

#### PURSUANT TO FCR PD 2.4

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1. Three Notices of Objection have been received by the Marine Stewardship Council objecting to the report and recommendation of Acoura Marine Ltd, the Conformity Assessment Body (CAB) to propose to certify Echebatar Indian Ocean Skipjack Tuna Purse Seine Fishery (“Echebatar”).
2. Acoura produced a final revised report on 1 February 2018 (“the Report”) (the first Final Report was published on 11 January 2018, but the further report was produced after MSC oversight). It runs to 469 pages. I have read the report carefully. Their salient conclusion is that:

The assessment team contracted by Acoura Marine has concluded that the UoA meets the MSC standards, and the draft determination is to certify the fishery.

3. The Shark Project (“SP”) filed a Notice of Objection on 22 February 2018. The Shark Project was founded in 2002 and has offices in Germany, Switzerland and Austria. SP campaigns for the protection of sharks and the marine ecosystem. They filed observations

with Acoura during the assessment of Echebatar. These can be found at pages 282 to 297 of the Report, with Acoura's responses. SP raises objections in all four categories of objections: i. serious procedural error (1 objection); ii. the setting of conditions (4 objections); iii. the scoring (12 objections, all related to Principle 2); iv. additional information (1 objection). That makes 18 objections in total.

4. The International Pole and Line Foundation ("the IPNLF") describe themselves as: "*IPNLF promotes the environmental and social benefits of one-by-one tuna fisheries by working on improvements with the fisheries and promoting these benefits to market partners. IPNLF also works closely with other organisations and market partners to promote improved regional management of tuna fisheries at the RFMO level.*" They provided detailed responses to Acoura. These can be found at pages 247 to 281, with Acoura's responses. IPNLF objects in all four categories of objection. Their Notice lists 65 objections. It does not consistently seek to break down the objections into the four categories of challenge, but it appears some of the individual 65 objections straddle different categories of objection. Their Notice was filed on 22 February 2018.
5. A third Notice of Objection was received from WWF UK with a covering letter dated 22 February 2018 from WWF UK, WWF DE and WWF Spain. WWF states: "*WWF actively engages with key governments in the Indian Ocean as well as tuna processors, producer organisations and their fishing vessels, and local and international NGOs. This engagement aims to support improvement in the practice and management of tuna fisheries in the Indian Ocean so that consumers in the future be assured that the tuna they purchase has been harvested sustainably.*" Their comments, with the Acoura responses, are set out in the Report at pages 298 to 306. WWF objects pursuant to PD 2.7.2.3, i.e. the CAB's scoring. They have made six scoring objections. All of these relate to Principle 2 of the MSC Standards.
6. There are 89 objections in total.
7. The Fishery Client is Echebatar S.A. They are based in the Kingdom of Spain.
8. Echebatar has been assessed pursuant to the MSC Streamlining Pilot 2017. This provides, as the name suggests, for a simplified assessment process. The Streamlining Pilot amends

Fisheries Certification Requirement (FCR) v 2.0, Annex PD. The Streamlining Pilot in Annex D, requires a mediation phase. The parties to the Objection in these proceedings were unable to agree the name of a mediator. Billy Hynes, of Acoura, therefore, requested a variation of the Certification Requirements (the FCR as amended by the Streamlining Pilot) on 21 March 2018. The MSC acceded to this variation request in a written letter sent by email on 22 March 2018. The MSC varied the requirements by extending the period of time to agree a mediator from 10 to 20 and directed that in the absence of agreement, then the Objections Procedure shall revert from the FCR, as amended by the Streamlining Pilot, to the FCR version 2.0 and Annex PD. The variation letter directed the Independent Adjudicator to exercise jurisdiction at Annex PD 2.36 and PD 2.4 and to follow Annex PD thereafter, with document names matching the Streamlining Pilot and not the original FCR version 2.0.

9. The result of the acceptance of the variation request is that the validity of the Notices of Objection is partly determined by the Streamlining Pilot. The only part of the original PD 2.3 that I am directed to apply is 2.3.6. The relevant parts of the Streamlining Pilot state:

2.1.1. PD2.3.1 - 2.3.2 applies here.

2.1.2. A Notice of Objection must be submitted using the 'Pilot Notice of Objection Template'. It shall be sent to [objections@msc.org](mailto:objections@msc.org).

2.1.3. The Notice of Objection must set out clearly and precisely the basis upon which FCR PD2.7.2 is said to apply. It must:

2.1.3.1. Identify the alleged errors in the Final Report and Determination.

2.1.3.1.1. Only topics that were raised by stakeholders in the written feedback submitted during the announcement of fishery assessment phase (1.8.1.4 of this pilot procedure), at site visit, or second draft report, can be the subject of an objection (see also 1.8.1.4.2 and 1.9.2.1). This is to ensure that stakeholders provide all evidence/ information to the team at the outset of the assessment.

2.1.3.1.2. Where the fishery has adopted the Principle 1 from a first mover (see Annex B for exact cases where this applies), Principle 1 can only be objected to on the "first mover" assessment and its subsequent re - assessments. Any subsequent

fisheries adopting the scores from the first mover shall not have an objection on Principle 1 accepted.

2.1.3.2. Explain in sufficient detail why it is claimed that the alleged errors were material to the determination or the fairness of the assessment.

2.1.3.3. Include a summary of the evidence to be relied on in support of the objection.

2.1.3.4. Include only information that existed in final (not draft) form in the public domain at the time the stakeholder feedback was published on the MSC website. Information that came into existence after that date cannot be used as a basis for objection.

2.1.4. If it is asserted that the determination should be remanded for the reasons set out in PD2.7.3, the Notice of Objection must specify, in sufficient detail, the:

2.1.4.1. Nature of the additional information that it is asserted should reasonably have been made available to the CAB, and

2.1.4.2. Reasons why it is considered that the information, if considered, could have been material to the determination or the fairness of the assessment.

2.1.5. Upon receipt of a Notice of Objection , the MSC shall determine if the Notice of Objection is in the form required and whether it covers topics outside those raised during the announcement (Annex D 2.1.3.1.1) or pertains to Principle 1 where scores and rationales from a 'first mover' have been adopted (Annex D 2.1.3.1.2) .

2.1.5.1. A Notice of Objection that is not in the correct format, shall be returned to the objector requesting that they re-submit in the correct format within 5 days.

10. Each of the Notices of Objection are set out on the MSC Streamlining Pilot amended Notice of Objection Form. The Notices were received by the MSC on 22 February 2018.

11. FCR Streamline amended Annex D 2.1.3 and 2.1.4 sets out the requirements to determine the essential validity of a Notice of Objection and I must apply FCR PD 2.4.1, which requires me to be satisfied that the Notice of Objection submitted meets the mandatory requirements of the Streamlining Pilot Annex D.

12. The Notices clearly and reasonably precisely set out the basis upon which FCR PD 2.7.2 applies.
13. The Streamlining Pilot introduces the concept that an Objection can only cover topics previously raised by a stakeholder during the assessment process (at the announcement of the fishery assessment, a site visit or the second draft report stage). To determine whether each of the Objectors has complied with this requirement, I have carefully read their Notices of Objection and the Report, in particular Appendix 4, the relevant stakeholder comments. Shark Project and WWF confined themselves to participation only by way of written stakeholder submissions, IPNLF, however, state they participated during a site visit by telephone with Acoura. I cannot find a reference to that in the report under the section related to site visits, but this does not affect by determination.
14. Answering the question whether or not each of the 89 grounds of objection covers issues that were raised as topics in an earlier stage of the Echebstar assessment is a time consuming process. Untrammled by the FCR and the Annex PD, as modified, I may have directed that the CAB and the Fishery Client be given permission to file and serve submissions as to whether or not this requirement is met (with an opportunity for the Objectors to respond). However, PD 24.1 does not provide for that option and whilst it is reasonable to imply case management powers where these are not expressly set out, PD 2.4.1 appears to confine the IA to seeking clarification from the Objector only.
15. I note the terms upon which I can reject an Objection pursuant to PD 2.4.1 are limited to: “that the notice of objection is not in the form required by these procedures or has no reasonable prospect of success.” It is reasonable to interpret that the term “form” here is used as shorthand for the requirements set out in Annex D of the Streamlining Pilot at 2.1.3 (albeit not all of this was contemplated when the original PD 2.4.1 was drafted). Therefore it is open to the IA to reject an Objection on the basis the “form” requirements are not met because an Objection covers a topic that was not raised, as is required, by a stakeholder at one of the earlier stages in the fishery assessment. Such an exercise is not a black and white assessment. There may be much argument over the extent to which a topic raised covers or is implied or is related to a ground of objection. If the CAB or Fishery Client were to be

invited to make submissions on the issue of whether or not the 89 grounds of Objection were all covered by topics in the Echebatar assessment, then much argument could ensue and perhaps parties would seek a hearing. This seems inimical to the purposes behind the Streamlining Pilot.

16. The end result is that I have taken a broad brush to the assessment of whether each of the 89 grounds were covered by earlier topics. I am not prepared to provide reasons for each ground. I have concluded that looked in the matter overall, the grounds of Objection were directly or indirectly raised. I note of course that an Objector can make a ground of objection based upon a topic raised by a different objector or a body who made stakeholder comments but chose not to object. It is clear many of the stakeholders, including those who have not objected, raised a number of inter-related issues in respect of the scoring of the Principle 2 requirements. IPNLF separately raised issues in respect of Principle 3 and in respect of the procedural and non-procedural grounds of objection. In coming to my decision on this ground, I also place reliance on the fact the MSC were required to carry out the same exercise pursuant to Streamlined Annex D at 2.1.5, and were satisfied in respect of the same test and therefore moved the process forward to the mediation stage. This decision by the MSC supports my assessment of the topics covered by the Objectors.
17. Turning to the second substantive issue, FCR PD 2.4.1 requires me to satisfy myself that the Notice of Objection submitted has reasonable prospects of success. This is defined at PD 2.4.2.
18. I have carefully considered the Notices of Objection and they meet the reasonable prospects of success test. Each Objector has set out clear and detailed grounds with reasons at each stage. At one stage I was minded to require the Shark Project to re-submit its objections to the conditions at PI 2.5.1, 2.4.2 and 2.4.3. These grounds appear to raise questions and seek to impose greater particulars in the conditions, as opposed to a clear challenge. However, enough is set out to explain why the Shark Project does not believe the conditions can be met.
19. Therefore I am satisfied all the grounds and all three Objections may proceed.

20. Pursuant to the FCR, the Fishery Client and the non-objecting other stakeholders may submit responses within 15 days and the CAB must respond within 20 days. I have given some thought to the number of grounds of Objection and the fact there are three Objectors raising three different cases. I have also considered how long it has taken me to read and analyse the Report and the Notices of Objection. Whilst I am coming at this assessment cold and the Fishery Client, stakeholders and the CAB are not, I am easily satisfied the 15 and 20 day extensions should be extended pursuant to PD 2.10.1.5. and find that the number and complexity of the grounds of objection are exceptional.

21. Therefore, I direct that:

- a. Pursuant to PD 2.4.8 the period of time is extended to 20 days; and
- b. Pursuant to PD 2.5.1.1 the period of time is extended to 25 days.

22. Given the Objectors, stakeholders and the fishery client are in different jurisdictions, I have not calculated the dates upon which each person may or must respond, but I would be grateful if anyone who wishes to or is required to respond and is affected by non English or Scottish bank holidays to inform Ms Gage, the MSC paralegal, of those statutory holidays and when the submission will be filed in accordance with this decision and PD 2.10.1.4.

**John McKendrick QC**  
**Independent Adjudicator**  
**1 May 2018**