

Objection to the certification of Northeastern Tropical Pacific Purse Seine Yellowfin and Skipjack Tuna fishery

Further Decision

1. I am appointed as the Independent Adjudicator in relation to a Marine Stewardship Council ("MSC") objection, that is, to the proposed certification of the Northeastern Tropical Pacific Purse Seine Yellowfin and Skipjack Tuna Fishery. The objection was lodged by WWF ("the objector"). The Conformity Assessment Body in this assessment is SCS Global ("CAB") and the client fishery, the Pacific Alliance for Sustainable Tuna. On 22 June 2017 after an oral hearing on 22 and 23 May 2017, I issued a decision remanding the matter back to the CAB for reconsideration. The CAB responded on 14 July 2017.

Objection Procedure

2. Under the Objections Procedure, CD 2.8.4 The Independent Adjudicator shall, at this stage, either:

CD2.8.4.1 Accept the [CAB] response [to the remand decision] as adequate to meet the matters raised in the remand and confirm the original or amended Determination, as the case may be, by the CAB. [or]

CD2.8.4.2 After reviewing the response of the CAB, determine that the objection shall be upheld on one or more of the grounds specified in CD2.7.2.

The Objections Procedure further provides that:

CD2.8.6 A decision by the Independent Adjudicator under CD2.8.4 is final. No additional objections may be lodged under these procedures in respect of such decision. The certification decision of the CAB shall be made with reference to the decision of the Independent Adjudicator and assessed for adequacy by the Independent Adjudicator as per CD2.8.8

CD2.8.7 In the event that the Independent Adjudicator confirms the amended determination, the CAB shall make such amendments to its final report and determination as may be necessary in the light of the findings of the Independent Adjudicator and shall proceed to issue a Public Certification Report in accordance with 27.19.1 which shall be assessed for adequacy by the Independent Adjudicator as per CD2.8.8

CD2.8.8 The Independent Adjudicator shall determine whether the amendments to the Final Report and Determination or the Public Certification Report adequately address the findings of the Independent Adjudicator by assessing whether the amendments are adequately supported with evidence and therefore reasonable.

a. If the Independent Adjudicator determines that the amendments are supported by evidence and therefore reasonable, the MSC shall publish the Public Certification Report in accordance with 27.19.1.

b. If the Independent Adjudicator determines that the amendments are not supported by evidence and therefore unreasonable, the Public Certification Report shall not be published and the Independent Adjudicator shall remand the Public Certification Report back to the CAB for further amendments to be made and then to be considered by the Independent Adjudicator as per CD2.8.8.

Admissibility of stakeholder submissions

3. As a preliminary matter, I received submissions from three stakeholder organisations, U.S. Marine Mammal Commission, Earth Island Institute and the Humane Society International, following the CAB response. The client fishery and CAB have objected to their being taken into account as the Objection Procedure, CD 2.8.2 only provides for “parties to the objection” at this stage to provide comments on the CAB’s response. I agree with the analysis (the primary procedural matter addressed) set out in the letter of 26 July 2017 from the CAB. On this basis, I have not taken the submissions of the stakeholders into account. It has come to my attention that the MSC gave an incorrect steer on this issue which encouraged those entities to put comments in. Whilst this is unfortunate, I cannot go beyond the Procedure in this respect and must therefore put these to one side.

Responses to the remand

4. The CAB’s response to the remand decision was in the following terms:
 - a) It did not accept my conclusions with regard to how Performance Indicator 2.3.1a and b were to be interpreted (in effect seeking a reconsideration of the remand decision);
 - b) In the alternative and seeking to apply the interpretation of the PI 2.3.1b as set out in the remand decision, the CAB reconsidered the scoring for the guidepost and came to the same score of 60.
5. The objector provided comments on 24 July 2017 arguing that the CAB response was wrong with regard to a) and inadequate with regard to b). It was essentially argued first that my decision as to the interpretation of the Schemes requirements was correct and second that the available evidence did not support a score of 60 for PI 2.3.1b. In particular the objectors reviewed the available scientific literature in support of their arguments to show that the impact of the fishery, with particular regard to the stress related effects on reproduction, was likely to be hindering recovery of the dolphin population. It was asserted that there was no evidence that the populations are increasing (ie: are either stable or decreasing). The objectors have cited various experts including Cramer et al (2008) that “decline in reproductive output is the proximate cause or one of the proximate causes of the failure of dolphin populations to recover at rates expected after reduction of observed reported mortality levels.” The objectors state that:

*“The existing science does not support **any** potential that the fishery is unlikely to hinder recovery. Just the opposite. It overwhelmingly **establishes** that the fishery **is** hindering the ability of the ETP dolphin species to recover from depletion.”*

6. The fishery wrote to me by the same date, supporting the arguments raised by the CAB both with regard to my interpretation of the Scheme's requirements being wrong and also, in the alternative that the CAB was correct to assess the scoring guidepost b in the light of my remand decision, to still score 60. The client fishery reviewed certain of the available evidence and in particular reports from IATTC.

Decision

7. I have given very careful consideration to the further submissions raised and evidence cited by all parties. This stage of the procedure cannot amount to a re-consideration of points of dispute or arguments made at the original hearing and cannot entertain arguments that go beyond the remand, particularly given the lack of any further scope for a hearing or replies to each others' submissions. It must be limited to my assessing whether the CAB's response to the remand decision is adequate.
8. It seems to me that whether or not I was correct in relation to the purposive interpretation I placed upon PI 2.3.1b, if the reconsidered scoring as set out and explained in pages 24-31 of the response by the CAB is adequate to address the issues raised in the remand decision, then I must uphold the Determination. In light of my findings below, I have not considered it necessary to address the extensive and comprehensive critique of my conclusions with regard to the interpretation of PI 2.3.1b. I stand by that interpretation, but do not need to set out my thinking for this here, given my conclusions on the CAB's reconsideration of scoring for PI 2.3.1b further to the remand decision.
9. I would point out however that my finding of an arbitrary or unreasonable score was inevitable on the basis that the CAB had in my view incorrectly interpreted the requirements of the Scheme and therefore expressly left out of account a material factor (one which the CAB expressly stated was irrelevant to PI 2.3.1b and to be scored elsewhere). I am satisfied that this issue was raised in the Notice of Objection (see pages 14-16 in the Notice of Objection, express challenge to the scoring guidepost in question, underlined extracts from the Final Report and references to recovery and reproduction) and that therefore this fell within my jurisdiction.
10. I note the submission with regard to the MSC Interpretation that was taken into account during the objection hearing and that this was likely referring to V2.0 insofar as it refers to the need to have regard to the "does not hinder" language in relation to scoring guidepost b. I accept now that this appears to refer to the wording of the scoring guidepost in v.2.0. It does not however change my overall views given that what I sought to achieve was a purposive interpretation in light of the ambiguity in the provisions (there being no requirements for rebuilding) and therefore by reference to the outcome for this PI, that is that the Unit of Assessment "does not hinder recovery of ETP species".
11. The CAB has assessed the fishery against PI 2.3.1b in light of my remand decision. Whilst not accepting the correctness of my interpretation, the CAB has, in the alternative, set out the evidence which leads it nevertheless to reach a score of 60 on a revised understanding of the Scheme's requirements. Specifically, the CAB was asked to reconsider its decision in light of the following summary paragraph in the remand decision:

“76. The question is whether the certification body can, without the work to be undertaken further to the proposed conditions, be satisfied as to the SG60 score for scoring guidepost b, this requiring an assessment of whether there is some evidence that the fishery is unlikely to hinder recovery (with particular reference to the stress related effects on reproduction).”

12. The CAB accepted that stress-related impacts may have diminished reproductive output and that this could be hindering recovery. Nevertheless, whilst the international mortality limits in relation to this fishery do not constitute a plan for formal rebuilding, the CAB remained satisfied that the SMLs were sufficiently precautionary to manage for uncertainty. The scientific literature was assessed as only leading to “tentative conclusions about stress impacts” and that there was “no clear evidence” although the negative impacts on population were theoretically possible. It was submitted moreover that there was evidence in fact of the two main species improving, although critically evidence of rebuilding is not required to conclude that a fishery is not hindering recovery.
13. I agree that any relevant impacts for the purposes of the MSC standard must be at a population level and viewed in terms of population trends. At pages 27-30 of the response, the CAB sets out the basis for its conclusions on dolphin population trends. The CAB relies on scientific literature relied upon previously in these proceedings, in particular Maunder (2012) (which I am informed is publically available on request) and some additional consideration of three indicators as to which might be expected to show evidence of population decline (number or proportion of dolphin sets, distributional range of observed dolphin herds, number of dolphins in observed herds).
14. Without addressing the detailed critique of the weight to be given to the evidence cited, it is apparent that there is a body of scientific evidence both for and against the assertion that the dolphin stocks are not recovering and also that the fishery’s impact is likely to be hindering recovery. That these are matters of balance is reflected in the following paragraph on page 89 of the Final Report:

“While these effects have been observed on an individual level, it is still unclear how widespread these effects are and whether they are significant enough to hinder population recovery. Since it is highly likely that dolphins face more than one chase during the year, it is also possible that they become gradually accustomed to the situation and possibly reduce the levels of stress through a process of habituation (St Aubin et al., 2013). Alternatively, accumulation of stressor events may result in a chronic stress condition that reduces reproductive success in the long term, as may be the case for the more vulnerable eastern spinner dolphin (Larese and Chivers, 2009). While the potential for these impacts is generally understood, they are yet to be quantitatively explored or proved.”

And on page 231:

*“DMLs are therefore considered to be one measure in a currently incomplete strategy that does not collect data on or measure trends in the status of affected dolphin populations even though there is a **plausible argument** that unobserved effects, such as stress-related impacts, may have diminished reproductive output and could be hindering recovery”. [emphasis supplied]*

The words in bold reflect that these are matters of argument as to the weight to be given to scientific evidence, as indeed do most of the quotes on page 13 and 14 of the objectors response (“there is a belief”, “is thought”, “hypothesized” and “may result”).

15. The following is further stated in the rationale for PI 2.3.3:

*“As noted under 2.3.1, however, there are also uncertainties concerning a range of matters, including the potential for unobserved mortalities and stress effects on reproductive output, which result in **divergent scientific** views about the reliability of current quantitative estimates of fishery impacts. The assessment team has considered these **to be credible concerns, supported by some evidence** and therefore formed the view that the full impact of fishing is currently not able to be estimated quantitatively.”*
[emphasis supplied]

16. The CAB has concluded that there are “credible concerns, supported by some evidence”. This however does not equate, on its own, to a clear view that an SG60 test of impact of the fishery likelihood to hinder recovery (per the interpretation set on remand) is met: the same paragraph acknowledges the “divergent scientific views” and ultimately it is a matter of scientifically weighing up of the evidence for and against. In my view, one can accept that concerns are credible and supported by some evidence, but be faced by a situation in which there is some contradictory evidence, sufficient in the CAB’s view to conclude that there is at least a 60% likelihood that the fishery is not hindering recovery (taking into account evidence on population trends and the specific impacts on reproduction).

17. The CAB has concluded there is insufficient certainty to meet the SG80 test such that the obtaining of the quantitative evidence that would be required for this threshold is, as I understand it, one of the main aims of the conditions that have been set (ie: to obtain estimates of population size allowing population growth rates also to be estimated).

18. It is really important for all parties to understand that, once evidence for a particular conclusion has been identified, and in the light of all the evidence put forward by the CAB and the fishery, I cannot accept WWF’s assertion that there is “no” evidence to support the CAB or indeed that the contrary evidence to the CAB’s conclusions is “overwhelming”, it is not for me to go beyond that task and to seek to determine what is effectively a scientific dispute on the evidence. It does appear that there is considerable dispute amongst experts as to almost all points under consideration and that it is a mischaracterisation to say that there is any kind of scientific consensus. As the CAB has emphasised it is clear from the Objection Procedure that it is not for me to substitute my views or findings of fact for those of the CAB in relation to scoring and it is well understood by all Independent Adjudicators that there is considerable deference to be accorded to the views and findings of fact of the CAB in assessing the fishery’s compliance with the Scheme’s requirements.

19. What does fall squarely within my jurisdiction is the interpretation of the Scheme’s requirements, procedural matters and scoring decisions which are arbitrary or unreasonable. It is the CAB’s views and findings of fact as to the fishery’s compliance against the Certification Requirements, that Independent Adjudicators may not override (other than where the scoring decision is one that no CAB could have reached on the evidence). The remand decision in this case was based on an error of interpretation of the Scheme’s requirements. Having reassessed according to a corrected interpretation, I may only intervene further if the resultant

score still remains arbitrary or unreasonable in the sense that no CAB could have reached it on the evidence.

20. A similar situation arose in the Edgebaster objection and I quote here from the Remand Decision in that objection:

“4. I appreciate that the CAB is a competent, professional body and that the assessment team was composed of well-regarded fishery experts. My decision was not intended to call into question the competence or expertise of the assessors and is not a reflection in any way on the professionalism with which they approached their duties as regards the subject fishery. I further can understand that the CAB (and the fishery client) considered that the scoring decision for PI 1.2.2 reflected the exercise of reasonable judgment. However, the essence of the Objections Procedure is to provide for “independent” review of CAB decisions. More importantly, this not a case where what is at issue is the weighing of technical evidence or deference to expert technical judgments. Rather, it involves what are more closely akin to questions of law related to the meaning of the Certification Requirements (the “CR”), and my decision is not just about quibbling over “reasonable” judgments.⁷ It remains my conclusion, based upon the language of the CR, that the CAB’s reading of that provision is arbitrary and unreasonable. No amount of deference warrants changing that decision.

Footnote 7 - Contrary to the assertion of the Foundation, Foundation Response, ¶ 29, I do not believe that my decision in this case involves “substituting my judgment” for that of the CAB in contravention of CD 2.6.6 of the Objections Procedure. “

21. I would adopt the reasoning in the above quote, noting that my remand decision was in relation to the interpretation of the Scheme requirements, as put above, akin to a point of law. What remains, now that the CAB has assessed the fishery further to the revised interpretation, is in essence a question of “*weighing of technical evidence [and] deference to expert technical judgments*”.
22. That said, the CAB and the fishery are wrong to say that the IA has absolutely no jurisdiction with regard to the rationality of scoring based on the available evidence as otherwise the head of objection that scoring is “arbitrary or unreasonable” would be partially redundant and restricted beyond the interpretation commonly attributed by the IAs. It is well understood that this allows for the IA to identify scoring that is irrational in the sense that no CAB could have reached the same score. That does allow, in certain rare cases this being a high threshold, for the IA to assess the evidence and to conclude that the CAB has come to a score that is beyond the boundaries of reasonableness. The IA would not substitute his or her view for the appropriate score and this would be assessed by the CAB post-remand. Thus, the WWF has been acting appropriately in pursuing its arguments on the weight of the evidence as they have consistently argued that the scoring for PI 2.3.1 was arbitrary or unreasonable.
23. I have considered the WWF’s detailed further submissions in this regard and its assertions that there is no evidence to support a score of 60 for this scoring guidepost and that the existing evidence is a compelling case for the fishery to fail. As will be recalled from the remand decision, I did state that I was satisfied that the CAB had taken into account all the evidence referred to by WWF in its earlier stages of carrying out the assessment. As noted above, what is apparent is that there is

considerable disagreement as to the import of the available scientific evidence – it is not a case of there being no evidence upon which the CAB might form its view on whether impacts are likely or unlikely to hinder recovery, rather intense debate and uncertainty as to what the evidence means.

24. I am satisfied that the outcome of this objection has been an assessment in accordance with the revised interpretation of PI 2.3.1b and that the CAB's response to the remand decision is adequate. I am also satisfied on the basis set out above, that the scoring for this PI, in light of the revised assessment, is not "arbitrary or unreasonable" in the sense that no CAB could have reached this score on the available evidence. Whilst this approach and outcome will be a disappointment to the objectors and various of the stakeholders, it is the logical conclusion of a n Objection Procedure which restricts the role of the Independent Adjudicators in this way.

Conclusion

25. In these circumstances, I confirm the original Determination and await sight of the amended rationale for scoring guidepost PI 2.3.1b. On receipt of this I will assess the revised text for adequacy per CD 2.8.8. Save for this last stage (which on the assumption the amendments to the Final Report are in accordance with the CAB's response), this decision is final (there being no appeal process).
26. I would like again to thank all those engaged in this long objection procedure and for their input to the determination on these complex and important issues.

Melanie Carter
Independent Adjudicator
4 August 2017