

# **MARINE STEWARDSHIP COUNCIL**

## **INDEPENDENT ADJUDICATION**

### **IN THE MATTER OF**

### **AN OBJECTION TO THE FINAL DRAFT REPORT AND DETERMINATION ON THE PROPOSED CERTIFICATION OF THE AGAC FOUR OCEANS INTEGRAL PURSE SEINE TUNA FISHERY (INDIAN OCEAN)**

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### **DECISION OF THE INDEPENDENT ADJUDICATOR POST REMAND**

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1. This is the post “remand” decision in respect of the objection to the certification of the AGAC Four Oceans Integral Purse Seine Tropical Tuna Fishery (Indian Ocean). The Objector is the Coalition for Transparent Tuna Fisheries (CTTF). The Conformity Assessment Body is Lloyd’s Register (hereafter the “CAB”). The Fishery Client is AGAC.
2. As set out in the decision of 21 April 2022, all grounds of objection were dismissed with the exception of the AIS related ground against the score for PI 3.2.3. The CAB were required to re-consider the score of 80 for PI 3.2.3 and to consider whether AIS is part of the management strategy, whether legislation applies to AGAC in respect of AIS and whether it should be followed and whether in fact during the period of assessment it was followed.
3. Following the remand decision, I have received the following submissions from the parties:
  - a. Two PDF submissions sent by the CAB on 18 May 2022;
  - b. Two PDF submissions sent by the Fishery Client on 25 May 2022;

- c. One PDF submission sent by the Objector sent on 25 May 2022 (which for the avoidance of doubt was received within the time period required by the Objection scheme);
  - d. An email submissions from the CAB dated 27 May 2022;
  - e. An email submissions in response to the CAB's from the Objector dated 27 May 2022;
  - f. An email from the Fishery Client dated 2 June 2022 with reference to a document entitled "IOTC's 24<sup>th</sup> Working Party on Tropical Tunas (WPTT24): data preparatory meeting."
4. I indicated in an email to the parties, dated 30 May 2022, that I would provisionally consider documents (a) to (e) set out above, unless any party wished to address me further on the issues. The CAB and the Fishery client wrote setting out their agreement to this course and I received no objection from the Objector. I have therefore read and considered documents (a) to (e). I have declined to read and consider document (f). There must be a limit to the number of documents produced, a proportionate approach is called for and the Client noted in their email noted that "...we do understand if you disregard it as it does not concern AIS". That concession was well made.
5. The CAB's post remand consideration led to the following position:
- a) A revision of background supporting information (sections 7.4.5 – 7.4.8), with changes and improvements related to Principle 3 Performance Indicator 3.2.3;
  - b) A revision and rescoring of PI 3.2.3, in particular of SIc (Compliance) and SIId (Systematic non- compliance);
  - c) A proposed new binding condition (no. 8), relating to PI 3.2.3 SIId.
6. The CAB noted in their submission that AIS is clearly part of the fishery specific management strategy as it is part of the EU Common Fisheries Policy. The CAB accepted EU and Seychelles legislation in respect of AIS applied to the AGAC Indian Ocean fleet and should be followed. In terms of whether this legislation was followed the CAB stated:

The CAB sought an extension of time for its remand response in order to fully investigate this issue. This included through conducting interviews with Captains and Observers (separate interviews) who are actively engaged in the Indian Ocean fishery, and to review

of a range of literature and other information, and to seek to verify information gathered in an iterative process (e.g., reviewing multiple AIS manuals after information was first gathered as to 'Silent' or 'Low power' modes, confirming the same directly with both AGAC skippers and Observers).

The issue of piracy and/or commercial reasons for having AIS 'off' was investigated; in summary:

- a. In relation to piracy risk, the CAB is satisfied that there is a significant risk of attack and hijacking for all vessel types in the western Indian Ocean, and that even though this risk has reduced in recent years it has not been eliminated. The CAB notes a specific instance in April 2019 involving an AGAC vessel, and that purse seine vessels employ a fishing operation that is particularly vulnerable to piracy because of being unable to manoeuvre or detach from the net whilst it is deployed; it is therefore understandable that Captains, with responsibility for ensuring vessel and crew safety, remain risk-averse, including through carrying armed security teams aboard each AGAC vessel.
- b. The CABs discussions with the skippers and observers indicated that switching AIS 'off' or to use it in modes other than 'normal' for commercial reasons was not at all likely. It was stated by AGAC fleet Captains that there are no commercial reasons to do so. The interviews highlighted that purse seine vessels regularly operate in relatively close proximity to one another, and that because the radars and radio communication systems are functional, and because the vessels are known to each other, and because vessels within the AGAC fleet also share information, there is good knowledge within the wider fleet on where other vessels are operating. Further, it was noted that purse seine vessels of sufficient size to operate in international waters of the western Indian Ocean region all have abundant data available in making fishing decisions (i.e., weather forecasts, sea surface temperature, currents, sonar data on shoal size from instrumented FAD buoys, sister-vessel performance, information from auxiliary support vessels, knowledge of historic performance, etc.) such that it was felt strongly that skippers are not dependent on following other vessels and therefore providing those vessels with a commercial reason to hide their location.

7. It seems to me this investigation was necessary. The CAB were correct to have investigated this matter. This led them, in conclusion, to submit that:

Overall, the CAB concluded that relevant AIS legislation was likely being followed during the period of assessment, in that whilst AIS was not recorded as being 'on' (e.g., as reported by Blue Marine 2020), piracy remains a risk in the western Indian Ocean, such that AGAC Captains, with overall responsibility for the safety of their vessel and crew, are likely to have the AIS 'off' because of the 'exceptional circumstances' that exist within the region and are not at all likely to have the AIS "off" for commercial reasons.

Nevertheless, because of the absence of evidence of following relevant AIS legislation, a Condition of Certification is proposed against PI 3.2.3 SID, requiring the client to demonstrate that "there is no systematic non-compliance in the fishery".

8. I was provided with a lengthy amended text to the CAB's report and the text of the condition.
9. AGAC's submission aligned themselves with the CAB. They accept the condition. I was helpfully provided with an updated Client Action Plan which I have considered.
10. CTTF's well focused submission opposed the CAB's amended score and condition because:

For the reasons explained in this response and in previous rounds of this assessment, CTTF does not support this conclusion. In our original Notice of Objection we referred to widespread non-compliance with AIS regulations across the AGAC fleet in the Indian Ocean. We continue to believe this is the case. In this regard we would like to emphasise that both the EU and SOLAS requirements expects the reasons for "going dark" to be recorded in vessel logbooks. If this is not done, it raises suspicion about the intentional avoidance of AIS compliance. The non-compliance issue therefore does not only relate to "the clear evidence recording the reason(s) for the decision(s) to either turn AIS off or to another mode" as implied by the CAB, but also the fact that the reasons were not recorded in vessels logbooks as required under the relevant regulations.

11. Further AIS related information was provided and a reference was made to an opinion article by a lawyer called Irene Anastassiou. CTTF submitted the CAB failed to show evidence that there is no systematic non-compliance.
12. CTTF's follow up email clarified a number of points and directed me to an article in the Guardian which I have read and considered.

13. Post remand, pursuant to PD 2.9.3.1, the IA must determine what actions are necessary.
14. Having considered matters carefully I am satisfied with the CAB's response and approve their amendments to the Final Draft Report. The CAB has properly investigated the matter. They acknowledge AIS requires to be switched off for piracy reasons. I entirely accept this is proper and legitimate. Nothing said in this or my earlier decision should be taken to diminish the threat of piracy or the need to protect the crew from it by switching off AIS when required.
15. Further the CAB's more detailed investigation into this issue demonstrates there is no systematic switching off of AIS for commercial or other inappropriate reasons. CTTF state there is no evidence of this but the CAB's experienced assessors have investigated and report back to me on the issue. There is little scope with the MSC Scheme for an IA to reject such a judgement call following the CAB's own investigation. The Fishery Client's detailed written submissions also evidences and supports this position.
16. The condition is an appropriate one and will provide a proper mechanism to ensure AIS is being used properly.
17. That bring this Objection to a close. The CAB shall make the amendments to the FDR that are proposed and accepted by AGAC.
18. I thank all parties for their help and assistance.

**John McKendrick QC**  
**Independent Adjudicator**  
**23 June 2022**