

# 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

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1. A preliminary hearing took place in London on 9 August 2018.
2. Mr Andrew Russell and Mr Philipp Kanstinger appeared on behalf of WWF. Mr Michael Davey QC and Mr Tom Maple, solicitor, represented IPNLF and Shark Project. Mr Martin Purves of IPNLF attended via video link. Acoura, the CAB, was represented by Ms Sasha Blackmore, counsel. Dr. Jason Combes, Ms Polly Burns, Mr Billy Hynes and Mr Andrew Kennedy attended on behalf of Acoura. Mr Jose Luis Jauregui and Mr Kepa Echevarria appeared for Echebatar, the Client Fishery. Dr Ziegler of Shark Project sent her apologies for not attending, but was represented through counsel, as I have indicated. Ms Hannah Norbury of the MSC attended as an observer for part of the hearing and Ms Tzara Cheung, paralegal, attended as the hearing administrator.
3. As previously directed, the parties were provided with an extended period of time in which to consult each other to seek to narrow the issues in dispute and to reduce the number of grounds of objection. Despite the extended period of time sought by the objectors, and agreed to by the CAB, the parties managed to engage in only one telephone conversation which, I am told, lasted thirty minutes. The parties were unable to agree anything substantive and the

number of grounds of objection has not been reduced. Each party updated me on the reasons why the consultation period had failed.

4. It followed, without opposition from any party, that it was necessary to conclude the consultation had formally ended and I notified the parties that the adjudication phase will now commence immediately, pursuant to PD 2.5.5.
5. The parties agreed that an oral hearing could not be convened within thirty days and pursuant PD 2.6.1. it was noted the hearing would take place on 1 October 2018 with a time estimate of five days. As previously indicated the hearing will take place in the Seychelles for the detailed reasons provided in the decision dated 18 July 2018.
6. An application has been made by the Objectors for disclosure of: i. VMS data; ii. Observer data; and iii. fishery client attendance records. All parties accepted at the hearing that as an independent adjudicator I have no jurisdiction to make such a disclosure order. I set out the reasons for this in the *PNA Tuna* decision dated 5 December 2017 (available on the MSC website). I explained at the hearing, I was not bound by that decision and would hear argument from any party should they wish to advance submissions as to why that decision was wrong. No party sought to do so. The Objectors, as I understand their position, accept there is no jurisdiction for me to make a disclosure order, but maintain the adjudication system is unfair if they continue not to have access to the information they have sought.
7. I expressed the view the parties should discuss the Objectors' request for the documentation sought and seek to agree a mechanism for it to be provided, if relevant proportionate and necessary, although I informed the parties I had formed no view on these issues, given I had no jurisdiction to order the documents release.
8. I understood the Fishery Client will provide the link to the attendance records shortly and they understand the reasons why the Objectors seek the VMS and Observer data, but point out they need the consent of the relevant authorities to release this information. They told me they would seek the consent from the authorities and release the information if possible.

9. The Objectors also seek disclosure of the MSC Interpretation Log. In anticipation of this issue, and given my understanding that the issue of the release of entire Interpretation Log is a governance issue for the MSC, I contacted Ms Hannah Norbury by email on 8 August 2018. I set out the email exchange below:

*“Dear Hannah*

*I plan to ask the MSC to disclose the Interpretation Log to the parties to be used one for the purposes of this adjudication until such time as the Log is made public.*

*I am letting you know so you can consider before the hearing at 10 am tomorrow.*

*Hi John,*

*Thanks for the heads up. The Interpretation Log is being published on 31<sup>st</sup> August 2018 (this is a target date subject to our platform service provider delivering), regardless of any request or outcome from the Echebatar objection process. This has been on the cards for a while, and the date was only recently approved by the Board of Trustees.*

*We wouldn't be able to make the log accessible an earlier due to the ongoing migration of content from the old platform to the new platform, and a period of testing is required.*

*I would be happy to update all parties on this tomorrow at the meeting.”*

10. In the light of this email exchange, Mr Davey indicated his clients remain of the view disclosure of the Interpretation Log is necessary (without the parts which deal with chain of custody) to ensure a fair adjudication. He suggested access could be granted by guest log-in codes or by way of sharing a physical print out of the Log. Mr Russell indicated his agreement with these submissions. The CAB and Echebatar are neutral on this issue. In the light of this I pressed Ms Norbury to ask the MSC to resolve the issue swiftly, given its impact on the adjudication. She helpfully stepped out of the hearing and called the MSC. She was then able to update all parties that the MSC would make a decision and update me today, 10 August 2018. I indicated any communication to me would be shared with the parties.

11. The last issue to be dealt with is the issue of the case management directions. The directions set out below will apply and must be followed by the parties as it is essential the hearing on the 1 October 2018 is effective.
12. The CAB raised a concern an objector may seek to rely upon an expert witness at the hearing. Mr Davey indicated on behalf of IPNLF and Shark Project that the only expertise would be employees of the objectors, such as Mr Purves. Mr Russell indicated he wished to rely on an expert on the subject of the MSC FCR, but then clarified he seeks to rely upon a representative with experience of the MSC scheme. As he only wishes to rely upon a representative and not a witness or expert, as understood in normal litigation, no permission is required.
13. Mr Jauregui repeated his offer to the me and the parties to inspect the fishing gear on a purse seiner in port at the Seychelles. The CAB previously indicated they considered this proposal to be a useful one. The Objectors do not object to the remaining parties and I undertaking such a site visit, but do not wish to attend. I noted that the paralegal would take a note of such a meeting which would be distributed to all parties and encouraged all parties to send a representative to the site visit. Echebstar will lead on coordinating the visit.
14. Otherwise the parties broadly agreed the directions with some encouragement from me. I explained my preference to the parties that dealing with issues on a phased topic basis would be easier rather than by hearing all of the objectors' cases first, then the other parties. It is easier to understand the complex issues by hearing the arguments for and against in a related, sequential fashion.

#### Directions

1. A list of the persons whom the parties would wish to attend the hearing and in what capacity they are attending, shall be submitted to the independent adjudicator and copied to all parties by no later than 10 days before the date set for hearing.
2. The MSC will notify the parties of the hearing location by no later than 14 September 2018. The MSC shall use reasonable efforts to find a location with a suitable number of break out rooms, to be made available to the parties at their cost, if they wish.

3. By 12pm on 14 September 2018, the Objectors shall file and serve their final written submissions, which shall use cross-referencing to the paginated bundle.
4. By 5pm on 26 September 2018, the Fishery Client and the CAB shall file and serve their final written submissions, which shall use cross-referencing to the paginated bundle.
5. The I.A. will have studied the written record. It will not be necessary for the parties to repeat what it contains.
6. The Fishery Client shall confirm the proposed dates and necessary arrangements that are to be made for the IA and parties to inspect the fishing gear of a purse seiner in port in the Seychelles by 14 September 2018. The parties shall respond by 21 September 2018.
7. The CAB to circulate a first draft of the index to electronic hearing bundle by 5pm on 6 September 2018, Objectors and the Fishery Client to suggest additions or amendments by 5pm on 11 September 2018. The CAB to circulate a second revised draft index by 5pm on 12 September 2018 and any comments are to be received by 13 September 2018. The CAB to make the paginated electronic bundle available to the parties and the IA by 5pm 14 September 2018.
8. If the parties are in dispute as to the inclusion of any document, then the CAB shall prepare a separate bundle of the disputed documents and the inclusion of these document will be subject to a ruling by the IA, if he considers it necessary.
9. The bundles shall be sent electronically, with each document in the order that it is provided in the index and with an electronic name and number that corresponds to the name and number in the index.
10. The hearing will be in private. Only notified representatives may attend, subject to the discretion of the IA to admit others. A representative of the MSC may observe the Oral Hearing, but will take no part in the proceedings. An Independent Paralegal may also be present. The Parties' witnesses may present the reasons for their judgement but no formal evidence will be given.
11. The independent adjudicator shall evaluate objections in accordance with PD2.6.5 and oral presentations and argument is to be limited accordingly.
12. A Hearing Schedule is to be adopted for the five day Oral Hearing, which is attached.
13. A written decision will be provided which will then appear on the MSC website.

14. Liberty to apply.

#### HEARING SCHEDULE

- The hearing day will be between 10.30am and 4.30pm with a 45 minute adjournment for lunch.
- Subject to agreement between the Parties, the time will be allocated as follows: on the morning of day 1, the first 15 minutes will be allocated to an address by the IA and any matters arising and each party may have up to 15 minutes to make an opening presentation.
- Each day with the exception of the last day of the hearing, the objectors are entitled to the morning until 13:00 , the CAB from 13.45 to 15.30, the Fishery Client from 15:30 to 16:15 and the Objectors from 16:15 until 16:30.
- The parties are to work together to provide a scheduling of topics or issues.
- The IA will determine the format of the final day of the hearing, if required.

**John McKendrick QC**  
**Independent Adjudicator**

**10 August 2018**