www.Acoura.com

Acoura
Fisheries Department
6 Redheughs Rigg
South Gyle
Edinburgh, EH12 9DQ

T: 0131 335 6662
E: fisheries@acoura.com

Mr John McKendrick QC
MSC Independent Adjudicator

Marine House
1 Snow Hill
London
EC1A 2DH

13 December 2017

Dear Sir and parties to the IPNLF objection to the recertification of the PNA tuna fishery

Please find below the CAB response to Para 5b in the IA decision PNA7 dated 07 December 2017, namely a response to the second application made by the objector for information request provided for under PNA7:Para 5a.

Acoura hope that this provides the information to your, and the parties, satisfaction.

Should you have further questions then please contact Jason on 0044 (0) 7515 586 596

Yours sincerely

Dr Jason Combes

Head of Fisheries

Dear Mr McKendrick QC

Introduction

1. The application is without merit. The CAB are concerned that it is a belated attempt to delay the adjudication. The CAB continues to rely on its arguments as presented in emails of 30 October 2017 and 22 November 2017 and 30 November 2017, as well as those papers in its response to the Notice of Objection ("NoO").

The data requested; background

2. The Objector filed a Notice of Objection on the 26 September 2017 and an amended Notice of Objection on 6 October 2017. However, not until the 27 October 2017 (as per the IA decision on 01 Nov 2017) did the Objector raise an issue with the "*individual track record of individual purse seiners involved in the PNA fishery*" because it asserts that otherwise "*we have to entirely rely on an judgment call made by the assessment team on whether these vessels are compliant or not"* and it seeks access to all the original, raw observer data from individual ships "*in order to fully understand the way the Unit of Assessment has been defined and executed in the fishery as well as getting a better understanding of individual observations on shark finning and other compliance issues".*

Jurisdiction arguments for ordering disclosure

Principal reason to refuse application

3. The IA is correct to note that the Notice of Objection ("NoO") does not raise this request for what is asserted to be unpublished key information as an issue. This is essentially a complete answer to the point, as the IA rightly notes. The purpose of the defined process is as set out at PD2.1.1 to "*provided an orderly, structure, transparent and independent process by which objections to the Final Report and Determination of a Conformity Assessment Body can be resolved".* It does not in principle cause "*material unfairness*" to an objector if an objector does not raise an objection at the proper stage which could and should have been raised, see below; indeed it causes material unfairness to others to do so belatedly. This is expressly covered by PD 2.6.6. "*the independent adjudicator may not consider issues not raised in the notice of objection, even if the independent adjudicator is of the view that a particular issue should have been raised".* See further PD 2.3.4, 2.3.4.1, 2.3.4.2, 2.3.4.4.

4. This is a complete answer and the application should be refused.

5. It also severely risks delaying the forthcoming hearing, which is an unacceptable risk, given the difficulties in fixing a date. It is also not a good point, see below, and there is no likelihood that the evidence sought would indicate a material error in the assessment process. This would further weigh against material unfairness.

The Objector's grounds for why the IA has jurisdiction

6. In relation to the basis for which it is asserted that the IA does have jurisdiction despite the clear procedural basis in PD 2.1.1 and PD 2.6.6:

Reason 1: Ongoing breach of 4.4.1.1: key information (Application Paragraph [12-26])

7. The application is misconceived for multiple reasons. It does not give the IA a relevant jurisdiction to not apply PD 2.6.6.

8. The data sought is not "key information". Key information is "*all information used by the assessment team for scoring and in rationales that is not considered confidential information under FCR4.3, and that would be required to enable a stakeholder to be able to properly review the logic used by the team in their conclusion about a particular PI score".* The information and its sources that were used for scoring and in rationales relevant to this application were set out at the appropriate time. They were available to stakeholders to review the "logic" used by the team in their conclusion about a particular PI score. Indeed the Objector did so.

9. The evidence that is clearly set out as having been arrived at from personal communications is the evidence that was used in the assessment, as in particular set out in the relevant Tables. The evidence that PNA member countries are prosecuting vessel masters for sharkfinning violations as referred to at page 165 of the Final Report is the evidence which is referred to at page 335 of the Final Report. The judgment was clearly reached based upon the totality of that information. It was not based on some other analysis of other information which is not in the Final Report. There is no error which is "*material to the determination or the fairness of the assessment".*

10. It is noted that the personal communication referred to is from the SPC. The Oceanic Fisheries Programme of the SPC provides scientific services relating to oceanic (primarily tuna) fisheries management to its membership. These scientific services include fishery monitoring and data management. There is no reason in this case (and there would not normally be a reason) for the PNA Tuna assessment team to doubt the veracity of the information provided by the SPC, and it si normal practice for MSC assessment teams to rely on such data, provided to them by the relevant national data provider, to undertake their assessment work.

11. There is therefore no breach of 4.4.1.1, and no breach of PD 2.7.2.1.

12. Even if there were such a breach, this does not give a jurisdictional basis to order the disclosure given PD 2.1.1 and PD 2.6.6.

13. If there had been an earlier breach in relation to FCR 4.4, the IA is correct that this could and should have been raised at an earlier stage, and the IA's jurisdiction is in relation to the Final Report. However there was and is no breach of 4.4.1.1, so this issue does not arise.

Perversity

14. It is disingenuous to suggest as a basis for the adjudicator having jurisdiction to order disclosure of this material, that it could have jurisdiction if the CAB's view that the key information was set out in the Final Report was perverse, when:
    (i) The Objector does not in fact suggest CAB's view is perverse; this suggested basis for an inherent jurisdiction does not therefore arise on the facts of this case.
    (ii) The Objector could have raised perversity if it had so wished. It did not do so.
    (iii) In any event, CAB's view is not only not perverse, but it is clearly right. The key information upon which the scoring was based is provided in an accessible and transparent manner in the Final Report. That key information is as is set out in the Final Report in particular in Table 15 and Table 16 and the accompanying text. There are 7 key points. (1) The data in Table 16 is clear, showing that the total number of finning instances in 2015 was 14. This is a self

evidently a very small number of incidents in the context of the catch profile over time and specifically the data in Table 15. The supporting text explains how (2) there is 100% independent observer coverage, which is self-evidently a highly relevant factor, and (3) that in considering the history, the WCPFC had introduced CMM 2010-07 in 2010; that CMM 2011-02 and CMM 2013-08 had both been adopted and (4) discusses how CMM 2013-08 in particular appeared to have been effective given the sharp decrease between 2013 and 2014 (191 to 45 incidents of finning and further decreases in 2015 to 14) and (5) noted that the assessment team had evidence to show that prosecutions were occurring, referring to the publicly available information at p.335 of the Final Report and (6) all assessed in the context of the MSC's guidance. Thus, the assessment team were not relying on specific data in relation to specific prosecutions in specific countries, but rather the overall evidence as set out in the text and analysed at P12.2.2, where the score of 80 was clearly set out on the basis of the justification and evidence in the Main Report and where (7) there is a detailed response to the points being raised by the Objector, see in particular at p.335 of the Final Report. The CAB is satisfied that this process and approach of arriving at a conclusion is both well-described and consistent with MSC requirements.

"Completely unable" to assess information Application Paragraph [22-26])

15. It is asserted at paragraph 22 that the lack of what is now sought of as "*key information*" is "*material to the fairness of the assessment*" because, it is asserted, that the objector is "*completely unable to form a view on the veracity of the assessment made by the CAB…*"

16. There are two relevant points:
    (1) This, even if correct, which it is not, does not give a basis to overcome the intention of a clear framework as set out in PD 2.1.1 and the restrictions in PD 2.6.6.
    (2) It is not correct. The existence of the objection under SI 2.2.2(d) clearly indicates that the objector is wrong to state as at paragraph 22 and following that they are "*completely unable to form a view on the veracity of the assessment"*. They have put forward such a view; the CAB assessed the evidence that they put forward; and reached its independent view, expressly taking into account and commenting on their views; the objector has since filed a Notice of Objection, and amended it; CAB has responded; and the objector has not responded to that response. That process was transparent and is clearly set out, and the benefits of stakeholder engagement is ensured.

17. It is also noted that the Objector still has no specific information that it is putting forward, nor has it responded to the CAB's detailed response to the Objection. It is not acceptable to suggest without any evidence at all that there is a "*veracity"* issue. The Objector puts forward no evidence at all to suggest that there is any basis to consider that the information provided is not correct.

Reason 2: PD 2.7.2.3(d) (Application Paragraph [27-29])

18. There is no basis to argue that the scoring decisions for SI 2.2.(d) and justification put forward for the assessment is, without the data sought, "*arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it*". This is plainly without any rational basis. There is no material error. In particular:
    (1) This, even if correct, which it is not, does not give a basis to overcome PD 2.1.1 and PD 2.6.6.
    (2) It is also not correct. The IA is referred to §14(iii) above; the MSC Interpretations Log as set out in the Final Report at p.165 that "*if rare and isolated cases of shark finning are encountered in the most recent year (or the recent period considered in scoring the fishery, which should be no less than the last full season of landings), the team should evaluate the nature of such cases to*

determine whether further cases of shark fining could be happening in the fishery in a systemic way" and, importantly, that "*fisheries should not be perversely penalised, for example, for putting in place very good surveillance and enforcement systems that are proving effective and still detecting and quickly resolving the odd rare case"".* See also the examples of judgment set out at GSA2.4.3 (p.406 as to Regulations, p.407 as to examples of judgment), that good external validation is a validation level equivalent to 20% of effort, but other rates and other evidence/measures can be accepted. This is an industry with 100% independent observer coverage and only 14 incidences in the last full season of landings and with excellent regulatory framework (and other safeguards). It is squarely an example of a fishery that should not be perversely penalised for putting in place very good surveillance and enforcement systems that are proving effective.

Reason 3: PD 2.10.1.5: Application to Amend Objection (Application Paragraph [30-35])

19. It is totally without merit to argue that there are "*exceptional circumstances*" to amend an Objection at such a late stage. There are no "*exceptional circumstances"* in this case. There is no justification nor is there anything exceptional about this situation to warrant the objector seeking, belatedly and outside of the proper process, detailed, extensive information that was not relied upon for scoring. For completeness, the fact that the IA does not have an implied power to order disclosure in such a case is not an "*exceptional circumstance"* to permit a late application to amend the Objection, the CAB is not in breach of 4.4.1.1. and the adjudication is not unfair, for the reasons given above in particular at §3. It should also be noted that there is no evidence that any of the material sought would make any material change. There is no basis to exercise any discretion.

Reason 4: Within existing Material Scope of Objection (Application Paragraph [9] and [36-45])

20. The application for extensive disclosure is plainly not within the existing material scope of the objection:
    (1) The information sought in paragraph 23 (paragraph 36 of the recent application) is plainly not at all raised as an Objection in relation to the matters set out in paragraph 37 and 38.

    For completeness, the CAB disagree that the Final Report does "*nothing to address the lack of transparency".* The evidence available is clearly set out, including that which the Objector also references as set out to the WCPFC, and in the TCC documents, and the Greenpeace black list site, and the reference to local media reports assessed in the CAB's professional judgment, by reference to the MSC's methodology and the scoring indicated, together with Recommendation #1. The approach taken of providing information and its source is consistent with the approach taken in every other MSC report.

    (2) The information sought in paragraph 31 (paragraph 36 of the recent application) is plainly not raised as an Objection in relation to the matters set out in paragraph 41 and 43. The Objection criticises "*simple working"* as inappropriate; it does not suggest that disclosure is needed of the data which resulted in the working. However, as previously described, the 'simple working' involved calculating the percentage contribution of each species, and ordering the species. In fact, calculating the percentage is a requirement of the MSC process, to determine which species shall be considered main (SA3.4.1 and SA3.4.2). Ordering the species (by percentage contribution to the catch) then allows the assessment team and any stakeholders to most easily see which species comprise the largest proportions of the catch. This is a normal, professional, approach, consistent with the MSC requirements, and the approach taken in other Reports, see for example Tables 18 and 19 in the Norway North East Arctic cod and haddock fishery

(https://cert.msc.org/FileLoader/FileLinkDownload.asmx/GetFile?encryptedKey=mDe8aM36MkWsupyMUnXa+K2sABqtuz0RS7AJ9a2lXHMvrMng8nj1J8miQ/ocymPM).

Paragraph 31 information

21. For completeness, the CAB disagree with the Objector's contention that the information cannot be considered "relatively complete''. The Objector contends that the information cannot be considered 'relatively complete', and that the figures are arbitrary rather than being objective thresholds for confidence basis. In this regard, we highlight GSA3.6.3: "*Generally, for species that are highly variable, clumped in distribution and/or relatively rare, higher levels of observer coverage are needed. For more normal species, observer coverage rates above 20% provide only diminishing returns and small incremental improvements in the CV of catch estimates (Lawson, 2006).*" Therefore, because the data cover more than 60% of the tuna catch, it is reasonable and normal practice to state that they give the assessment team confidence that they are representative for the fishery.

Disclosure in any event

22. Further, in any event, CAB does not have the further "data" that the objector seeks, i.e. the CAB does not have the "*individual track record"* of all the *"individual purse seiners involved in the PNA fishery*" or all the original, raw observer data from individual ships obtained by the Regional Observer Programme. Clearly, such individual vessel data would need to be processed and aggregated in order for them to be meaningful to an assessment team assessing a fishery against the MSC Standard.

PNA letter (Application Paragraph [46-54])

23. Primarily, this aspect is irrelevant. The Objector in ten densely worded paragraphs entirely fails to engage with the fact that the CAB did not rely on data in such a form to reach the relevant judgments. It was not "key information". These are set out above.

24. Instead the Objector assets that "*we are seeking information which was used by the CAB".* This is wrong. The assessment is on the basis of the information publicly available or in particular as set out in the Final Report in Table 16 and the supporting text and concluded that the situation in relation to the gaps in this information was "*not ideal (such that it doesn't meet SG100)"* but assessed in its full context and concluded the appropriate score was 80. This discloses no error.

25. As to the points the Objector does make:
    (1) If the information were to have been key information (which it is not), the Objector misunderstands the obvious interrelationship between 4.3,4.4 and 4.5. 4.4 is about access to information, and provides that un-published "*key information*" which is "*necessary for stakeholders to be able to properly review the logic used by the team*" is to be made available, but makes clear that any such information does not have to be "*formally published"* in the public domain but should if it is "*key information"* be made available to stakeholders, subject to confidentiality agreements which are discussed at 4.5, and that as at 4.5.2, the CAB may use such key information in its assessment even if "*some*" stakeholders refuse to sign a confidentiality agreement. Confidential information is automatically the information in 4.3.3, namely (in short) financial matters and information that is private/confidential by law. If the CAB wishes to use such confidential information "*and that it is additional to that specified in 4.3.3"* then a variation request must be submitted. In other words, information which is financial information or private/confidential/protected by law, then it is automatically confidential within the framework of the 4.3 – 4.5, and it does not need a specific application to retain that status. Put simply, the overall effect is that information an assessment is based

on should be public; if it is confidential, then key information should be made available to stakeholders subject to stakeholders signing confidentiality agreements and in that event such key information can be used; and that if an individual stakeholder does not sign a confidentiality agreement that does not prevent the key information from being used. There is no surprise at all that the FCR makes appropriate provisions for confidential key information to be used and only shared subject to relevant safeguards.

(2) The Objector then criticises the PNA for (it would appear) not (belatedly) making available information to the Objector which, had the PNA made it available to the CAB, it appears the PNA would have sought to make it confidential, on the basis that (entirely unsurprisingly) relevant domestic legislation protects vessel-level and potentially individual-level information across an extensive period and revealing extensive information about where they are fishing, which the Objector now wants from being provided. This is baseless; it is also noted that nowhere in their response does the Objector even offer to sign a confidentiality agreement. This is particularly relevant where the Objector represents a commercial competitor to the PNA.

(3) It is not appropriate in a late application for disclosure for an objector to assert in these circumstances that the burden must be on the PNA to show clearly how information which self-evidently would be likely to be confidential is in fact protected. Rather, an objector making such a belated request should seek to satisfy all parties that in fact there is a lawful basis for the IA to order such a disclosure, where the PNA has expressly indicated it considers there is not. It is telling that in a densely worded application the Objector does not do so.