

IPNLF WRITTEN SUPPLEMENTARY REPLY

1. IPNLF maintains its Written Submissions of 8 January 2018 in full. Where the points made by the CAB are already refuted in our Written Submissions we will not repeat them here.
2. At the hearing, the CAB introduced written submissions on Principle 2 (27 pages) and Principle 3 (5 pages). These will be referred to as “the CAB’s submissions”.

Principle 2

3. Unless otherwise stated, page number references below are to the CAB’s submissions.
4. The CAB’s submissions refer repeatedly to “the PNA Tuna fishery” and claim that this “fishery” is clean (or even “very clean” (pp.9, 14 and 20) or “exceptionally clean” (p.6) or “extremely clean” (p.26)), where that is patently incorrect. To be clear, the PNA tuna fishery is the tuna purse-seine fishery carried out in PNA waters. That fishery includes FAD fishing, which is very far from clean, but is ignored (we say artificially and impermissibly) as a result of the UoA definition adopted.

Objection 1 (p.3)

5. The CAB wrongly focuses on guidance provisions in the FCR (GSA 3.4.4 and 3.4.2), concluding that: “Default position under GSA3.4.2 is that species are not main ... but team may designate if consider is a pausable argument as to why should be assessed at that level.” The normative text is in SA 3.4.4 (p.138 of the FCR). SA 3.4.4 uses the word “shall”. This cannot be overwritten by the use of the word “may” in the guidance (GSA 3.4.2).

Objection 2 (p.6)

6. FCR 7.10.6 (p.36 of the FCR) is clear. A change in the format of the template is no excuse for failing to apply the standard. A rationale is still required for each SG.
7. As for SA 3.2.1 (p.135 of the FCR), this requires a determination that there is “no impact”, not that the SI is inapplicable. Otherwise the phrase “if necessary” would not be necessary.

Objection 4 (pp.9 and 10)

8. The CAB suggests (p.9) that it must “take account” of the FCR in undertaking an assessment. That is a wholly inappropriate view of the standard. The rules must govern the assessment; they are not simply something to take into account.
9. The CAB does not “give credit where credit is due” because it gives credit for evaluation of a minor species strategy whereas SI 2.2.2(a) requires a main species strategy. This increases the overall score for PI 2.2.2 by giving credit

where none is due. Thus the CAB gives a default score of 80 under SI 2.2.2(a) because, although there is no main secondary species strategy, none is necessary on the CAB determination that there are no such species, and 2.2.1(a) is an “if necessary” provision. The CAB then proceeds to give 100 scores in 2.2.2(b) and (c) which are then averaged: see Final Report p.166.

10. At p.10 (1st bullet) it is said to be nonsensical to fail a fishery in respect of the SI in question (SI 2.2.2(b)). Failure is not the only option; a simple non-score (as is done elsewhere) would avoid inflating the default scores. At the 2nd bullet, it is said that the CAB has scored the UoA under PI 2.2.2 for having a partial strategy for “all” secondary species and that the partial strategy applies “even to minor species”. This is completely false. On the CAB’s determination, there are no main species and the partial strategy only applies to minor species. Whether it is “commendable” is beside the point: the standard does not give credit for a minor species partial strategy and, accordingly, the scoring given by the CAB to SI 2.2.2(b) and (c) must be wrong.

Objection 6 (pp.11-13)

11. The CAB simply ignores the fact that SI 2.2.2(a) states “if necessary” for 60 and 80, but not for 100, and not anywhere for SI 2.2.2(b), (c) and (e). The CAB does not answer the point.
12. At p.12, the CAB suggests that the UoAs should be rewarded for being “clean”. That is not what SI 2.2.2(b) refers to. It is not for the CAB to award additional bonuses where the standard does not do so.
13. At pp.12-13, the CAB refers to the high observer coverage. This is the only response to §127 of our Written Submissions and it entirely fails to meet any of IPNLF’s points. Lots of data (of which only some is used) does not make it good data. A bald assertion that the data “are good” (p.13), and unquestioning reliance on the data provider (SPC) (p.14), is inadequate in response to detailed criticisms. If there were answers, the CAB would no doubt have provided them.
14. In any event, 100% observer coverage is not as rare as has been made out. There are a number of other large-scale commercial fisheries which require 100% coverage: the Alaskan Pollock fishery; all the fisheries that operate under CCAMLR (Commission for the Conservation of Marine Living Resources); the NAFO (North Atlantic Fisheries Organisation) fisheries; the Hawaii Swordfish Longline fishery; the European union purse seine fishery in IOTC; the US West Coast Trawl IFQ; and the US WC At-Sea Hake fishery. Many countries such as New Zealand, Australia, Namibia and the US (to name a few) have national observer programmes that specify 100% coverage for many of their larger commercial fisheries. Most of the programmes mentioned above have higher minimum requirements for observers than that of the Regional Observer Programme of the WCPFC which requires a high school qualification. Observers in the Alaskan programme require a bachelor's degree in fisheries, wildlife biology, or a related field of biology or natural resource management. CCAMLR observers are similarly required to have a degree qualification. Although the level of education of an observer is not the only consideration when evaluating the quality of data it has been recognised by WCPFC that there

have been some problems with observer data pertaining to the misidentification of species and other data quality issues.

15. The CAB refers (p.13) to “a verification process”, and gives a reference to the Final Report 4.7.6 at pp.84-85. However, section 4.7.6 is headed “Vessel Day Scheme and effort limitation” and so does not seem to be relevant. Pp.84-85 of the Final Report covers section 4.7.7 which is headed “Fishery Information Systems and observers”. The final paragraph of section 4.7.7 looks, in very general terms, at some aspects of verification. It states that cross-checks apply at the landings stage. However, those checks will not relate to the very large majority of the bycatch data (because almost all of the bycatch is discarded at sea). It acknowledges that: “Observer data is known to have flaws and invariably require a quality assurance approach, particularly when using data for stock assessment and other scientific applications. This is expected to render proportions of observer data unusable or requiring verification.” The only response given to that is the following sentence: “Observer data bases have cross checks that verify, for example, vessel positions, species identification, and mass balances to check for consistency.” However, no details are provided. That sentence is not a substitute for the CAB responding to §127 (and §125) of our Written Submissions.

Objection 7 (p.15)

16. The CAB complains that it cannot respond as IPNLF has not explained its position. The CAB has simply ignored §136(1)-(4) of our Written Submissions.
17. The CAB’s assertion that it has complied with GSA 3.6.3.1 is belied by the points we have made in our Written Submissions at §125(c), (d) and (f), §127(i) and §127 (re error bars).
18. The CAB then attacks the Moreno *et al.* paper on the basis that two of the authors are representatives of OPAGAC. It should be noted that according to the Journal Citation Reports, the journal in which the Moreno *et. al.* paper was published, *Marine Policy*, has been ranked 4th out of 85 journals in the category "International Relations" and has a solid reputation as the leading journal of ocean policy studies. It is a monthly interdisciplinary peer-reviewed academic journal published by Elsevier. It is notable that the CAB does not attempt to deal with the substantive content of the paper, but just resorts to an ad hominen attack. There is no substantive answer.
19. The dismerits of the 1nm test are dealt with in §§ 41, 42 and 340 of our Written Submissions, by reference to the Moreno *et al.* paper.

Objection 8 (pp.17-18)

20. Our objection to the Interpretation Log on the basis of a private interpretation contradicting a public standard has already been made clear. There may be reasons for MSC to adopt a different public standard, but that is not the question here.
21. At p.18, the CAB alleges that the NoO was “disingenuous” in that data was presented in the wrong order; though it acknowledges that this was corrected in

our subsequent Written Submissions. It is assumed that the CAB did not intend to use “disingenuous” in its ordinary meaning of not candid or sincere, since it is an allegation of bad faith.

22. The CAB also refers to a WCPFC summary report for 2017 (“WCPFC-TCC ROP summary report for 2017”). This was published in November 2017 and is ineligible.
23. The CAB suggests that “the evidence” is that observer effectiveness has increased. However, a reduction in reported complaints is equivocal.
24. In any event, we cannot understand the rationale for watering down the test in the SGs for SI 2.2.2(d) in the case of increased observer coverage. The UoA cannot be given credit for observer coverage on the basis that the adverse consequences of that coverage (ie that it reveals criminal conduct) will be disregarded.
25. On p.18 it is said that IPNLF insinuates that the observer programme is “without merit”. We have never insinuated that.
26. Finally, the CAB refers to MSC oversight on p.19 (and elsewhere). The merits of an objection cannot be affected by the fact MSC has not raised an issue during their oversight process, otherwise there would be no point in any stakeholder challenging a determination via an objection process, which would become a mere formality. MSC holds out its certification programme as depending on the assessment of independent third party CABs. The CAB’s approach here completely undermines this.

Objection 16 (p.26)

27. It will be noted that the CAB is unable to meet any of the detailed points made by IPNLF. All it says, in effect, is that “it will be difficult to identify measures to further minimise UoA-related mortality of ETP species” (5th bullet point). But the standard does not say “if necessary”. In addition, it is unclear why the CAB effectively grants its client a dispensation from the requirement to conduct a mandatory review.

Principle 3

28. The CAB’s submissions on this principle contain paragraph numbers. There are 3 introductory paragraphs and 27 subsequent paragraphs. Unless otherwise stated, references are to the latter. It is not clear to us why the submissions refer repeatedly to the “PCDR”, rather than to the Final Report.

The CAB’s submissions refer repeatedly to “the PNA fishery”, and refer to “MSC certification of the PNA fishery” (§4). To be clear, the PNA fishery is the tuna purse-seine fishery carried out in PNA waters. That fishery has two parts: a FAD-free part and a FAD part. MSC re-certification is being sought for the FAD-free part only.

29. The CAB relies (Intro §3) on the first assessment and the lack of “significant changes”. This is not understood. There is no re-assessment process which assumes that an earlier assessment is correct. An assessment, including any re-assessment, requires compliance with the standard to be demonstrated, not assumed. The CAB’s reliance on the first assessment indicates that this did not occur, which might explain why it was unable to properly explain the scoring.
30. The CAB refers (§§1-7) to the “regional and sub-regional nature” of the PNA. It does not address the national level, which is what the standard requires the CAB to address. IPNLF did not criticise the “multi-layered governance framework” (as the CAB suggests in §7); instead, it criticises the CAB’s failure to score the framework against the actual standard instead of against its own notions of what might be required by the standard.
31. The CAB makes bald assertions (§7) that the PNA states have “implemented all” WCPFC CMMs, but it does not produce any evidence or even reveal what it claims to be the mechanism of implementation (if any) at national level. The Final Report certainly contains no reference to this.

Part 19

32. The CAB addresses bigeye tuna (again misusing “disingenuous”) by stating that it is a “regional” issue (§9). But that does not prevent demonstration of effectiveness at a national level. States could, for example, prohibit FAD sets, which would reduce bigeye bycatches.
33. At §10, the CAB asserts, without any evidence or explanation, that “national level governance is committed to the regional level governance”. It is entirely unclear what is being said here. If (as appears to be the case) it means that national government leaves it to the WCPFC (pursuant to obligations of compliance set out in the WCPFC Convention), then that is insufficient for the standard.
34. At §12, it is said that national legislation “has the capacity” to implement WCPFC commitments, implying, through the reference to “capacity” (i.e. mere potential), that in fact it may not do so. Given that IPNLF made it quite clear (in both the NoO and in our Written Submissions) precisely what was missing in the Final Report, these vague and unsupported assertions as to the national level serve only to confirm that there is nothing concrete that can be said about the national level.
35. At the end of §13, the CAB misquotes from §250 of our Written Submissions (it also gives a wrong reference to §249), and refers to the FFA website when our Submissions referred to the dropbox.
36. At the end of §14, there is an assertion that there is “little (known) IUU”. (“IUU” here means illegal, unreported and unregulated fishing.) This is demonstrably false. Shark finning is illegal and it is well-documented in the WCPO and, more specifically, in the PNA tuna purse-seine fishery (see §144 of our Written Submissions).

37. At §15, the CAB purports to address foreign-flagged vessels, but the explanation is not coherent. Our Written Submissions §247 state that the national legislation of non-PNA flagged vessel is relevant, but the CAB records us as stating the opposite. It also repeats a reference to China and Taiwan “for example”, failing to deal with our criticism of the limited nature of this reference (Written Submissions §266) and the lack of a list of relevant foreign flag States.

Parts 19 and 20

38. There is no attempt (§19) by the CAB to show that, at the PNA level, there is a dispute resolution mechanism short of consensus.
39. Reference to what is “typical” for States (§§20-21) is inadequate, for the reasons set out already in our Written Submissions.

Part 24

40. In §26, the CAB states that it “does not doubt that the PNA is not committed to the Precautionary Approach in relation to their practice and implementation of CMMs etc.”. However, this statement does not match up with the evidence. For example, in its document of 8 January 2018, the CAB states, at paragraphs 24 and 25, that “a Recommendation for PI 3.1.3 that PNA amend the Nauru Agreement to include explicit reference to the precautionary principle” (that Recommendation arising from the original assessment, back in 2011, “has not yet been fulfilled”.
41. At §27, the CAB fails to address the point made in our Written Submissions about subsidies.

The Interpretation Log

42. As already made clear, it is IPNLF’s position is that reference to the Interpretation Log (hereafter, “the Log”) is not legitimate. The following comments are made without prejudice to that.
43. The CAB has provided extracts from the Log, including all those extracts which are referred to in the Final Report.
44. It is not clear why IPNLF has not been given full access, so that it can see for itself what the Log says. There cannot be technical issues preventing such access, as IPNLF could easily be given login details. Presumably, MSC does not wish IPNLF to have such access. This only serves to reinforce how inappropriate it is to use the Log to construe a public standard.
45. The Final Report made highly selective use of the Log, and omitted sentences which, it seems, did not suit the CAB (in particular the reference to “only one or two cases” of shark finning). Nevertheless, the extracts from the Log as now provided appear to be complete.
46. By way of introduction, the Log has been extracted in a manner whereby each topic is introduced by reference to a “Notional number”. As the extract is not paginated, these will be used as the reference points.

Notional number 4 Shark finning requirements

47. This section begins by explaining the nature of SGs 60, 80 and 100 for SIs 1.2.1(e), 2.1.2(d) and 2.2.2(d). The nature of the scoring is apparent from the standard itself, and the Log begins by confirming that it means what it says: it is concerned with different levels of confidence that shark finning is not taking place “based on different levels of information and management control”.
48. The latter clearly acknowledges that levels of information are relevant. If there is no evidence of finning and high levels of observer coverage, the UoA gets a high score. The inevitable downside is that if the level of coverage reveals finning, the UoA fails. That is built into the standard.
49. The Log refers to “only” one or two cases, which have been “appropriately sanctioned”. Even this is inconsistent with the standard, which is not limited to systematic or unsanctioned finning. The “evidence” such as it is, will be addressed below.

Notional no.8 Harvest Control Rules

50. Whilst this answer relates to Harvest Control Rules (HCRs) under PI 1.2.2, which is not challenged, the answer under section 2 in relation to evidence of measures being “in place” is relevant (see our Written Submissions §§201-204). The Log makes it clear that “indefinite promises” of “vague future action” are insufficient, as are “general regulations” or “references to the Fish Stocks Agreement”. “Binding commitments” “supported by evidence of management action” will suffice.

Notional no.9 Flag states in Principle 3

51. Our Written Submissions §247 make the point that the national legislation of flag States is important. This section of the Log confirms that flag States are a jurisdictional level which applies to the management system under P3.

The Observer Data (Table 15)

52. IPNLF accepts that the observer data it was provided with was the basis for Table 15. It is difficult to understand why there was such reluctance to provide it.
53. Nevertheless, serious questions remain about the data. In addition to the concerns set out in §§125 and 127 of our Written Submissions:
 - (1) Although data collection in this fishery is claimed to be world class, there is a huge discrepancy between 100% observer coverage and the relatively low levels of data dissemination from CPC to the CAB.
 - (2) Usually there is a greater level of analysis, peer-reviewed reports and papers on the catch profile of a fishery (and levels of bycatches), instead of the two years of data as presented in Table 15 and a complete lack of statistical analysis.

- (3) In other studies where WCPFC observer data has been analysed by SPC, catch estimates have been reported in terms of number, rather than weight, of specimens for large or rare species (sharks, billfishes, turtles and marine mammals) as their number is usually small and as such more likely to be correctly estimated than large weights. Weight is generally used for finfish other than those finfish species referred to above (Peatman *et. al.*, 2017).
 - (4) For shark bycatches and bycatches of other ETP species, where catches are of large or rare specimens, the total estimated bycatches are usually presented in WCPFC reports as including the median, and lower and upper 95 % confidence intervals for large-scale purse seine fleets. Average annual bycatch rates are also usually presented by set and by ‘000 metric tonnes of target catch (Peatman *et. al.*, 2017).
 - (5) None of this analysis, i.e. that referred to in paragraphs (2) to (4) above, was included in Table 15. which makes it difficult to compare the UoA dataset to similar data that have been presented in WCPFC reports.
 - (6) The conclusions reached by the CAB, and the scores awarded to PIs relevant to bycatch issues, are based on relatively superficial analysis of data and not substantiated by sound scientific principles.
54. The WCPFC maintains a portal with public domain data (<https://www.wcpfc.int/bycatch-data-files>) with the source data given as “the WCPFC Regional Observer Programme (ROP) Database”. According to a note on this website, it was last updated on 30 June 2017 and an additional note states that “there is some backlog of data yet to be provided and processed, mainly for 2015 and 2016”.
55. The CAB has said that the data included in their Table 15 represents all the relevant observer data from the 2014 and 2015 seasons, although this table was compiled before 30 of June 2017 when WCPFC declared that the ROP dataset for 2015 was incomplete. In the light of this, it remains unclear (and the CAB should confirm) that the data presented in their Table 15 represents the catches from all the free school sets in the UoA where data was recorded by observers.

The Shark Finning Data (Table 16 and “evidence” of prosecutions)

56. The data provided at the hearing related to the period 2012 to 2015.
57. Shark finning (i.e. retention of fins without bodies) has been prohibited by the WCPFC since January 2008 (CMM 2006-05, §§6-9). This CMM was amended, and by 2011 the relevant measures that were in force were contained in CMM 2010-07.
58. The data on finning in 2015 therefore related to a point in time 7 years after the practice of finning was prohibited.

59. The measures required (§6 of CMM 2010-07) that fishers fully utilize any retained catches of sharks (i.e. retain all parts of the shark excepting head, guts and skins, to the point of first landing or transshipment) and that (§7) the fins on board total no more than 5% of the weight of sharks on board up to the first point of landing.
60. The data provided shows that observers reported 429 shark finning incidents in the free school sets of the certified PNA UoC between 2012 and 2015. All of these were in contravention of CMM 2010-07.
61. Since full utilization of sharks applies to retained catches “on the vessel” up to “the point of first landing or transshipment”, it is irrelevant whether the catches were taken on free school sets or FAD sets. The CAB was therefore wrong to refer only to catches taken on free school sets when compiling Table 16, as this does not provide an accurate reflection of the compliance of the vessels involved in the UoA with CMM 2010-07. Finning incidents on FAD sets should have been included.
62. We have already referred to the finning numbers for the fishery generally in our Written Submissions §144.
63. Table 16 does not even identify the species other than silky sharks, even though there are measures in place which relate specifically to oceanic whitetips and prohibit not just finning but retention (CMM 2011-04). The data now provided has not clarified this, and the Report ought to have clarified that either there is (surprisingly) no data on oceanic whitetip retention, or how it is treated in the table.
64. CMM 2013-08, a Conservation and Management Measure for silky sharks came into force midway through the 2014 season. It prohibits the retention of silky sharks, and not just their finning. Table 16 does not provide any clarity as to which of the transgressions occurred after that date.
65. As with the data on shark finning and the retention of oceanic whitetip sharks, the CAB was wrong to report only on silky sharks that were caught and retained on free school sets instead of looking at the sharks retained from both free school and FAD sets while the vessels were involved in the certified UoC. The number of transgressions under CMM 2013-08 is likely to be considerably higher when data for both set types are included.
66. Very little information has been provided by the CAB on investigations and potential sanctions on these transgressions. Based on the numbers in Table 16 only, there were 598 transgressions of CMMs in the UoA between 2012 and 2015. As already mentioned, the FAD component of catches on trips that involved the certified UoC should also have been included.
67. The Final Report p.59 states that “the Assessment Team was provided with evidence to show that PNA member countries are prosecuting vessel masters as required”. As noted above, part of the Log approach was that the one or two instances were appropriately sanctioned. The Final Report was originally

understood to be suggesting at p.59 that formal records of prosecutions were provided. Instead, it is now said by the CAB that the information is purely anecdotal, is limited to “some cases”, and those cases may be found in media reports and on the Greenpeace website, as referred to at page 335 of the Final Report.

68. As for the Greenpeace website:
- (1) There are 7 records of vessels involved in shark finning violations in the WCPFC area;
 - (2) Only 3 of these are likely to be relevant in terms of the 429 incidents that were reported by observers in the PNAFTF (Table 16) between 2012-2013. That is 0.7% of the incidents reported by observers.
 - (3) The other shark finning incidents mentioned on the Greenpeace Blacklist are not relevant as they either involved longliners (three instances) or reefers (one instance which occurred in the Indonesian EEZ) and not purse seiners.
 - (4) Apart from the 3 shark finning incidents that could be relevant to the ones listed in Table 16 only one other incident, involving a longliner, occurred in PNA waters.
 - (5) The Greenpeace Blacklist does not present any evidence of individual prosecutions or investigations on cases after July 2012. It therefore provides no support for the argument that such cases as exist in 2014-2015 were appropriately sanctioned.
69. This is wholly inadequate to meet even the rather different and less onerous regime suggested in the Interpretation Log.

The MSC Press Release

70. On 19 January 2018, the CAB forwarded to the IA a copy of MSC’s press release issued that day.
71. It will be recalled that at the hearing the CAB objected to a large number of documents being included in the bundle on the grounds that they post-dated the PCDR. The CAB’s position is entirely unprincipled, as it now seeks to adduce a document published not only after the PCDR but also after the hearing has taken place.
72. It purports to do so on the basis that it (the CAB) is “independent” and “impartial”. It must be using those words as terms of art rather than in their ordinary meaning. The CAB is paid by the client fishery, follows (selectively) MSC’s private interpretation and is actively defending its Final Report by introducing documents which are ineligible on its own argument.

73. Leaving all that to one side, the MSC press release will be said to be relevant in two respects. The first is that MSC recognises that there is a problem with the way it has allowed the standard to be applied, so as to permit an artificial division of a fishery, with the controversial part of a fishery being ignored and the other part being certified. This is to be put right, but, “for fisheries which are already under assessment or certified”, only once three years from August 2018 have elapsed (unless, of course, the certification concerned expires before then).
74. The second aspect is that MSC appears to consider that the current standard permits this anomaly. IPNLF disagrees with this, for the reasons that have already been articulated at the hearing and as set out by us in our NoO and Written Submissions. The true construction of the standard does not depend on MSC’s views. It is clearly in the interests of all stakeholders that the standard is amended so as to forbid explicitly an approach which, we say, is implicitly impermissible under the current standard. But that is a different issue.

WCPFC 2016g, Annex 2

75. At the hearing, the CAB made reference to WCPFC 2016g, Annex 2. IPNLF could not find the reference. After midnight last night, the CAB advised that this was a wrong reference, and provided the correct reference.
76. IPNLF will review the referenced paper and (if necessary) will make brief comments as soon as possible.

References

Peatman, T, Allain, V., Caillot, S., Williams, P. & N. Smith (2017). Summary of purse seine fishery bycatch at a regional scale, 2003-2016. WCPFC Scientific Committee, 13th Regular Session, Rarotonga, Cook Islands, 9-17 August 2017. WCPFC-SC13-2017/ST-WP-05

[IPNLF notes that this reference post-dates the PCDR, but was included as a reference in the Final Certification report by the CAB – see p. 112]