

MARINE STEWARDSHIP COUNCIL

INDEPENDENT ADJUDICATION

IN THE MATTER OF

Echebatar Indian Ocean Skipjack Tuna Purse Seine Fishery

FINAL DECISION OF THE INDEPENDENT ADJUDICATOR

Introduction

1. This is the final decision in the adjudication of the Echebatar Indian Ocean Skipjack Purse Seine Fishery (hereafter “the Fishery”), following a lengthy series of preliminary decisions; a case management hearing in London on 9 August 2018; and a site visit and two day final hearing on 1 and 2 October 2018 on the island of Mahé in the Seychelles.
2. The Fishery is operated by a company based in Spain and the Seychelles called Pesqueras Echebatar S.A. (hereafter “Echebatar” or “the Fishery Client”). It has been represented throughout the process by Mr. Jose Luis Jauregui and Mr. Kepa Echevarria Elizondo.
3. The Conformity Assessment Body (“CAB”), Acoura, was represented throughout by counsel, Ms Sasha Blackmore and by Dr Jason Combes. Mr I Scott, Dr K Stokes, Ms P Burns and Professor de Alteris (by video link) attended the final hearing and presented information.
4. Notices of Objection were received from Shark Project, the World Wildlife Fund and International Pole and Line Foundation.

5. The World Wildlife Fund (WWF) was represented throughout by Mr. Andrew Russell. He attended the hearing in London in person and the hearing in the Seychelles by video link. Mr. Philip Kanstinger has assisted Mr Russell and he attended the hearing in London in person and the second day of the hearing in the Seychelles by video link. Mr. Clarus Chu also attended the first day of the hearing in the Seychelles by video link. Mr. Bruce Robson presented WWF's case at the final hearing and he attended by video link. He is an independent fishery consultant with an impressive CV.
6. The International Pole and Line Foundation was represented by Mr Martin Purves with the assistance of Mr Michael Davey QC and Mr Tom Maple, solicitor. At the hearing in London, Mr Davey and Mr Maple attended in person and Mr Purves attended by video link from South Africa.
7. Shark Project was represented throughout by Dr Iris Ziegler, a volunteer. At the hearing in London, Mr Davey represented the Shark Project.

A History of the Objection

8. Echebatar has been assessed pursuant to the MSC Streamlining Pilot. This attempted to provide, as the name suggests, for a simplified assessment process. The Streamlining Pilot amends the Fisheries Certification Requirement (FCR) version 2.0, Annex PD. The Streamlining Pilot in Annex D, requires a mediation phase. The parties to the Objection in these proceedings were unable to agree the name of a mediator. Billy Hynes of Acoura, therefore, requested a variation of the Certification Requirements (the FCR as amended by the Streamlining Pilot) on 21 March 2018. The MSC acceded to this variation request in a written letter sent by email on 22 March 2018. The MSC varied the requirements by extending the period of time to agree a mediator from 10 to 20 days and directed that in the absence of agreement, then the Objections Procedure shall revert from the FCR, as amended by the Streamlining Pilot, to the FCR version 2.0 and Annex PD. The variation letter directed the Independent Adjudicator to exercise jurisdiction at Annex PD 2.36 and PD 2.4 and to follow Annex PD thereafter, with document names matching the Streamlining Pilot and not the original FCR version 2.0.

9. Acoura produced a final revised report on 1 February 2018 (“the Report”) (the first Final Report was published on 11 January 2018, but the further report was produced after MSC oversight). It runs to 469 pages. Their salient conclusion is that:

The assessment team contracted by Acoura Marine has concluded that the UoA meets the MSC standards, and the draft determination is to certify the fishery.

10. This decision led to three Notices of Objection. First, the Shark Project filed a Notice of Objection on 22 February 2018. Shark Project was founded in 2002 and has offices in Germany, Switzerland and Austria. Shark Project campaigns for the protection of sharks and the marine ecosystem. Shark Project raised objections in all four categories of objections: i. serious procedural error (1 objection); ii. the setting of conditions (4 objections); iii. the scoring (12 objections, all related to Principle 2); and iv. additional information (1 objection).
11. Secondly, the International Pole and Line Foundation (“the IPNLF”) also objected. IPNLF objected in all four categories of objection. Their Notice listed 65 objections. IPNLF describe themselves as “*IPNLF promotes the environmental and social benefits of one-by-one tuna fisheries by working on improvements with the fisheries and promoting these benefits to market partners. IPNLF also works closely with other organisations and market partners to promote improved regional management of tuna fisheries at the RFMO level.*”
12. A third Notice of Objection was received from WWF, UK with a covering letter dated 22 February 2018 from WWF, UK, WWF, DE and WWF, Spain. WWF states: “*WWF actively engages with key governments in the Indian Ocean as well as tuna processors, producer organisations and their fishing vessels, and local and international NGOs. This engagement aims to support improvement in the practice and management of tuna fisheries in the Indian Ocean so that consumers may in the future be assured that the tuna they purchase has been harvested sustainably.*” Their comments, with the Acoura responses, are set out in the Report at pages 298 to 306. WWF objects pursuant to PD 2.7.2.3, i.e. the CAB’s score. They have made six scoring objections. All of these relate to Principle 2 of the MSC Standards.

13. On 1 May 2018 I issued a written decision accepting all the grounds of objections could proceed. As a result of the number and complexity of the objections I extended time for the Fishery Client and the CAB to respond by five days each.
14. By way of an application dated 31 May 2018, Dr. Iris Ziegler, of behalf of the Shark Project, made an application for a costs waiver. I granted a costs waiver as sought.
15. On 12 June 2018 the Fishery Client responded to the three Notices of Objection. On 20 June 2018 the CAB filed and served its response to the three Notices of Objection.
16. By an email dated 25 June 2018, Mr Andrew Russell of the WWF wrote on behalf of all three objectors, making an application to extend the period for consultations. His application asked me to exercise the discretion found in PD 2.5.3.1 and extend the ten day period. On 25 June 2018, I invited responses from Acoura and the Fishery Client. On 26 June 2018, Dr Combes made the point that equal time should be given to the CAB to respond, namely providing them with ten days from the date of the Objectors' responses. On 26 June 2018, Mr Jose Luis Jauregui, on behalf of the Fishery Client, confirmed he supported the CAB's position.
17. On 26 June 2018, Mr Russell on behalf of all three Objectors made further submissions in an email. In summary, he sought to limit the CAB's further response to a submission "in reply" to be filed and served by 20 August 2018. It was further submitted the Adjudicator should then permit a period of consultation until 3 September 2018.
18. In a decision dated 27 June 2018, I directed that:
 - a. Pursuant to PD 2.5.3.1 the period for consultation was extended to 24 August 2018.
 - b. The parties were required to file and serve an agreed statement setting out the areas of agreement and any outstanding areas of disagreement, if any, by no later than 5 pm 31 August 2018.

- c. The parties were required to liaise and agree dates and location for a possible adjudication hearing in the window of 21 October to 1 November 2018. An agreed statement setting out the location and dates of the hearing was required to be filed by no later than 5pm 12 July, 2018. In the event the parties failed to agree the location and dates of the hearing, then the parties were required to file and serve written submissions on the outstanding issues in dispute by 20 July 2018.
19. The Fishery Client then strongly objected to these directions. It was submitted the consultation period should not be extended to 24 August 2018. They stated, in effect, they changed their minds and withdrew their previous support to Acoura's suggestion that time be extended to 20 August 2018 for the CAB to consult with the Objectors by way of a response to their submissions. Echebatar sought an oral hearing in August and asked me to conclude that the adjudication phase should formally commence as at that time.
20. In response, the Objectors noted the adjudication was concerned with the CAB's report and not the Fishery Client itself and therefore urged me to stand by the directions made. Mr Russell submitted: *"The PD prescribes a period of consultation and gives the LA an inherent power to extend time. In our view, the consultation period serves a useful purpose. The CAB agrees. It is the CAB's report and the Notices of Objection which are material to this process, not Echebatar's views of IPNLF's objection."*
21. Dr Combes on behalf of the CAB took a mid-way position. He noted that the CAB was prepared to continue to consult individually with each Objector to try to narrow the issues in dispute. The CAB continued to take the view that it may be possible to reduce the number of issues in dispute. The CAB further noted that 3 or 4 days may be insufficient for the hearing. The CAB argued the hearing should take place by the end of August or alternatively if August was not possible, by the end of September.
22. On 4 July 2018 Mr Russell also sought disclosure of the MSC interpretation Log.
23. Given the changed position I revised the directions and made the following directions:

- a. pursuant to PD 2.5.3.1 the extended period for consultation was altered from to 24 August 2018 to 10 August 2018;
- b. a one day preliminary hearing was listed to take place in London, UK during the week of Monday 6 August 2018, to assess the success or otherwise of the consultation; to narrow the issues in dispute; and to deal with any ancillary matters, including whether adjudication should then be confirmed and case management directions to a hearing issued;
- c. I further indicated that if adjudication were to be required it would commence on Monday 1 October 2018 with a preliminary time estimate of 5 days. I indicated this date would only be altered if parties filed and serve written submissions setting out an exceptional factor as to why the dates should be altered by 5pm 11 July 2018;
- d. the Objectors were directed to file and serve written submissions explaining why the hearing should not take place in the Seychelles by 5pm 11 July 2018;
- e. the parties were to file and serve written submissions on the issue of the disclosure of the MSC Interpretation Log by 5pm 20 July 2018 and it was indicated that the issue could be the subject of further submissions, if necessary, at the hearing in early August 2018;
- f. given the likelihood of a hearing and adjudication, any other ancillary issues were required to be raised by way of a written application supported by written submissions by 20 July 2018, and any party who opposed such an application, was to file and serve submissions in response by 27 July 2018, and the issues (if any) were to be considered at the hearing in early August 2018.

24. Reasons for the changed directions were provided in the decision dated 5 July 2018.

25. It was clear the adjudication was taking on an overtly legal character. I reminded all the parties that:

I admit to being somewhat dismayed that the objection process is becoming unduly adversarial. The parties are reminded they are not engaged in formal litigation. The objection process is a proportionate

and swift review of the CAB decision making. I find it unhelpful and contrary to the spirit of the scheme that the parties are rapidly reaching entrenched and critical positions.

26. On 18 July 2018, in line with the directions made and after detailed consideration of the parties' submissions on the issue, I issued a decision explaining that if an adjudication hearing were required it would take place in the Seychelles. I provided detailed reasons for that and I set them out below.

First, the Objectors submit the marginal cost of a hearing in the Seychelles as opposed to London for the Objectors and the legal representatives is £ 35, 000. I do not view the costs of legal representatives of any party as having much weight on a decision of this nature. Legal representation is not necessary. This is not formal litigation. In any event no explanation is put forward as to this additional cost. I consider the CAB's analysis to be more accurate, when they observe the main additional cost is the flight. They quote the cost from Europe to the Seychelles as being around £ 550-650. I accept there is a small additional cost, but agree that hotel and subsistence costs are likely to be the same wherever the hearing takes place. The high cost of a hearing is driven by the number of grounds of objection. Therefore, I conclude that whilst cost is a matter to which regard should be had, it is on the facts here, far from being decisive.

Shark Project submit they are unable to attend a hearing on the basis of costs. The only additional cost that I can weigh up (in the absence of any breakdown or submission from them as to the difference in cost) is the difference between a flight from Germany to London as opposed to the Seychelles. I am not persuaded that a few hundred Euros either way should be determinative. The Project is staffed by volunteers and there is no difference between accommodation and subsistence costs between London and the Seychelles. I am left unable to understand why the Shark Project could not attend a hearing in the Seychelles. I note they are being represented by counsel at the hearing in London.

Secondly, some regard must be had to the carbon footprint of a hearing. I accept a hearing in the Seychelles will increase the carbon footprint. This issue takes on lesser significance however than fairness to the parties. The MSC is a global standard and operates all over the world. I agree with the CAB there is real merit in the MSC being on the ground making decisions where the fishery and people are most impacted by those decisions if possible.

WWF submit they will be unable to attend because of their policies in respect of their carbon footprint. It is stated by Mr Russell that: "The WWF representatives based in the UK would be unable to attend a hearing in the Seychelles as it would exhaust the carbon budget allocated to their respective departments." First, it is not clear whether there are insufficient carbon miles to permit the UK representatives to travel or whether the travel would exhaust existing available miles for the department. The second interpretation appears closer to what has been submitted. How WWF allocate the importance of carbon miles within a department or between departments is a matter for them. Further, it is not clear why several representatives are required. Nor has it been explained why other WWF representatives cannot attend. The Objection from WWF is made jointly in the names of WWF Spain, WWF DE and WWF UK. No explanation has been provided as to why WWF UK must attend. Nor is there any explanation as to why Western European offices are objecting when WWF has an office in the Indian Ocean. Lastly, I have not been provided with the WWF carbon footprint policy and how it applies or whether for example carbon miles can be bought or offset. In the light of this analysis, whilst I very much hope WWF can send the representatives they consider most appropriate and effective, I am not persuaded that holding a hearing in the Seychelles would result in any unfairness. They have not persuaded me a hearing must be held in Western Europe for WWF to properly engage in a hearing nor that a representative from the UK office is the only person who can attend to set out their objection.

Thirdly, I place no weight on the location of the parties' legal representatives. Lawyers are not a necessary part of this process. The offices of the MSC and the parties to the objection are in various places, albeit Western Europe is home to most of them. Greater weight needs to be placed, however, on the global context of the MSC and the fact this decision concerns the Indian Ocean.

Fourthly the location of the 2015 objection hearing is irrelevant. I have not been addressed on why it was agreed or determined the hearing should take place there.

Fifthly, I disagree with the Objectors in that I find there is merit to the CAB's and Echebstar's arguments as to why a hearing in the Seychelles permits them to fully advance their case and is appropriate. I adopt the reasoning set out by the CAB at paragraphs 13 to 17 of their letter on this

issue. I also provisionally accept the position put forward by Echebatar in the third last paragraph of their letter dated 12 June 2018.

The CAB has reviewed the Objector's detailed objections to a hearing in the Seychelles, but continue to "strongly" submit a hearing should take place, if necessary, in the Seychelles. For the reasons I have advanced above, I agree.

27. I also observed in respect of the cost of any hearing it could be significantly reduced if the parties worked hard to consult and negotiate to reduce the number of grounds of objection.
28. A case management hearing took place on 9 August 2018. 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, Mr Davey. 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.
29. 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 lasted thirty minutes. The parties were unable to agree anything substantive and the number of grounds of objection has not been reduced. It followed, without opposition from any party, that it was necessary to conclude the consultation had formally ended and the parties were notified that the adjudication phase had commenced immediately, pursuant to PD 2.5.5. 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.

30. An application was 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 accepted 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.
31. 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.
32. As stated above, the Objectors sought disclosure of the MSC Interpretation Log. To assist to resolve this issue, 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 31st August 2018 (this is a target date subject to our platform service provider delivering), regardless of any request or outcome from the Echebstar 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.

33. The Objectors were dissatisfied with this response and sought earlier access to the Log.

34. With the agreement of all parties, directions were then made for the adjudication hearing and these are set out at the end of the decision dated 10 August 2018. Mr Jauregui had also previously indicated he considered it important that the parties conduct a site visit to one of the ships in his purse seine fleet at the harbor in Victoria. The CAB were supportive of this proposal and considered it relevant and useful to the adjudication. The Objectors did not object to the remaining parties and I undertaking such a site visit, but did not wish to attend. To ensure fairness to all, it was directed that the paralegal would take a note of the site visit which would then be distributed to all parties.

35. Following the hearing the MSC confirmed through Ms Norbury that:

It is our understanding that the Objectors have been provided with all the interpretations relevant to the assessment, as is recent practice.

In a wider context, it is also important to note that an early release of the interpretation log to selected stakeholders may be prejudicial to other stakeholders engaged in ongoing MSC fishery assessments that are currently at the public comment stage, some of which close prior to August 31st.

36. On 15 August 2018, Mr Maple requested directions in order for a determination and ruling to be made in respect of disclosure of the Interpretation Log. The Objectors in their submission of 17 August 2018 stated:

Unless the interpretations log, as it existed at the time of the assessment, is made available to all parties, no adjudication can take place, as PD 2.6.5.4 cannot be fulfilled. Unless the interpretations log, as it existed at the relevant time, is provided, the adjudication simply cannot progress. It must be suspended, with inevitable consequences for the timing of any final hearing. That is not what the Objectors want. They had expected the MSC to allow access. However, if they refuse to do so, and the CAB refuses or considers itself unable to produce the material, notwithstanding that this is supposed to be an adjudication independent of MSC, then delay is inevitable.

37. The CAB responded on 22 August stating it was essentially neutral and no responses were received from either Echebstar or the MSC.
38. In a decision dated, 31 August 2018, whilst I could not direct the MSC to disclose the Interpretation Log in force at the time of the fishery assessment, I was able, and did direct, that the CAB include this document in the “record”, the formal bundle of documents required for the adjudication hearing. My reasons were set out in the decision and are as follows.
39. Whilst the MSC provided the parties, and the public, with a version of the Interpretation Log on 31 August 2018, the Objectors sought access to the Interpretation Log in force at the time of the CAB’s assessment. Reasons why access to the Interpretation Log is important for reasons of transparency are set out in my relevant *PNA Tuna* decision.
40. I concluded the Objectors were correct to wish to have the copy of the Log in force at the time of the CAB’s assessment and no party to the Objection had objected to this and further the MSC had provided me with no reasons as to why the Log in force at the time should not be disclosed. I directed that the CAB must include the Interpretation Log relevant to their assessment (which may or may not be the same as the Log published on 31 August 2018) in the record pursuant to PD 2.6.5.4 (emphasis added):

The FCR current at the time of the assessment in question, together with GFCR and amendments thereof made by the MSC Technical Advisory Board and the Board of Trustees, any related interpretations to these documents whether or not of mandatory effect with regard to CAB conformity made by the MSC and MSC’s accreditation body.

41. I concluded it was clear that the Log in force at the time is a “related interpretation” to the FCR current at the time of the assessment.
42. The Objectors made wider submissions in respect of fairness and sought a suspension of the Adjudication. These were ambitious submissions and had no merit. I was not prepared to adjourn the hearing listed for 1 October 2018 (absent exceptional reasons). I indicated

all parties and the MSC should work together to resolve any outstanding issues to ensure fairness to all and a fair hearing.

43. IPNLF were required to agree and return the costs waiver agreement by no later than 24 August 2018. On 27 August 2018, Mr Purves returned the signed costs agreement to the MSC, by emailing Ms Cheung. He had signed and dated the costs waiver on 23 August 2018. Given the document was received late, I issued brief directions as follows on 28 August 2018:

Given the terms of PD 2.9.8, can I invite a formal application from IPNLF by close of business on 31 August 2018 and a response from any party who opposes their application by close of business on 4 September 2018.

44. A formal application was made on behalf of IPNLF on 31 August 2018. Two points were essentially developed. The first was that whilst there was a requirement to sign the cost agreement within 10 days of the notification of adjudication, there was no requirement to file the signed document with the MSC within the same timescale (or at all, presumably). Secondly, an argument based upon what English lawyers would call “relief from sanctions” was developed. The Fishery Client, Echebstar, filed and served submissions on 4 September 2018, noting there was nothing exceptional about the oversight on the part of Mr Purves and inviting me to dismiss the application. The CAB responded with detailed submissions on 4 September 2018. The covering letter appeared to take a broadly neutral approach, but attached a document entitled “further reasons” which argued strongly against IPNLF’s application.

45. By way of a written decision on 7 September 2018, I granted IPNLF’s application, permitting their grounds of objection to continue for the following brief reasons. First, I rejected IPNLF’s submission that it was sufficient to sign the document on 23 August 2018 but not file it with the MSC. This is an absurd interpretation of a common sense provision. The language is clear when it states twice: “*signed a costs agreement with the MSC*”. If the document was not returned to the MSC within the required period, there could be no agreement. Secondly, I refused to import into the adjudication process the concept of

“relief from sanctions”. Thirdly, I was persuaded that PD 2.10.1.5 applies. The CAB’s submissions that only the MSC can grant a variation to this time limit was wrong. I therefore exercise the power contained in PD 2.10.1.5. because it would be exceptional for an objector who had been involved in an objection for months, and who has already attended one hearing and invested significant time and energy in formulating objections to be barred from the objection process because of a delay of around one working day in filing the costs agreement.

46. On 10 September 2018 at 17:16 Mr Purves of the IPNLF wrote withdrawing IPNLF’s grounds of objection. He claimed the process was unfair for the following summarised reasons:

- a. the on-going failure of the CAB to disclose the Interpretation Log in force at the time of the assessment;
- b. the failure by the Fishery Client to disclose a complete version of all the VMS and Observer data;
- c. the decision to hold the hearing in the Seychelles was described as “a blemish on the Objection” and “absurd”;
- d. there were two “relevant” email exchanges between the IA and the MSC which the parties were not copied into;
- e. the CAB, through its actions, was not independent.

47. Mr Purves concluded:

In our opinion, the Objection process in the FCR is drafted in a way which, whether one considers matters such as the rules regarding the cut-off date for the admissibility of evidence, or the time limits afforded to objectors to reply to lengthy Final Reports, is not fit for purpose and is unfair to objectors (many of whom are small NGO’s with limited resources). As a result, objectors are denied a full and proper opportunity to provide full reasons why a fishery should not be certified.

The general problems with the FCR have been compounded by the specific problems experienced by us during the Objection detailed above. IPNLF is not willing to continue engaging in what we regard

as an unfair and flawed process which is neither rigorous, transparent nor credible, obligations that ISEAL requires.

48. At 17:27 on the same day Iris Ziegler informed the parties the Shark Project was also withdrawing from the Objection. Her email contains almost exactly the same wording as that of Mr Purves of the same date. She also added in respect of the hearing taking place in the Seychelles:

The LA did not explain how we, a small NGO, could raise those funds, nor, amongst other things, explain how the decision was reasonable given the impact it would have on Sharkproject including the additional travel time for Sharkproject's volunteers who have jobs outside of Sharkproject. For example, Iris Ziegler, the individual with responsibility for this matter, is a Sharkproject volunteer. She is also employed as a Pharmacist. The additional flight time alone for someone to get to and from the Seychelles would have been 2 days and that does not include any time to recover from the effects of a long haul flight and issues of jetlag.

49. Both Shark Project and IPNLF stated they would complain to “ASI, MSC and, if required, ISEAL”. It is no part of the function of an MSC Independent Adjudicator to consider complaints to the ASI, MSC and ISEAL. I am not aware of the complete role these bodies undertake in relation to the fishery assessment and adjudication process. Nor I am aware of the nature of the complaint jurisdiction they exercise. It is a matter for IPNLF and the Shark Project to complain as they see fit and for the relevant bodies to determine any such complaints received. As both the emails intimating the Objectors’ withdrawal from the objection contain criticisms of the process, I will briefly return to the issues they raise at the conclusion of this decision.

50. On 12 September 2018, the CAB made an application to set aside my earlier direction that they must include the Interpretation Log in force at the time of the assessment in the record for the adjudication hearing. They stated *inter alia* they were unable to comply with this and the Log had been elevated to an importance that it did not merit as the FCR remained the standard. On 14 September, Mr Russell on behalf of the WWF submitted that:

In response to the communications from Acura dated 12 September 2018, it remains the case that WWF requires the “AIL” (i.e. the Log(s) as it was at the material time) in order that the parties can have a fair hearing and ensure a fair process. As the CAB cannot comply, and the MSC cannot disclose the version of the Log used by the CAB, then, with reference to 78(g) above, no fair hearing is possible.

Accordingly, WWF submits that the position is such that no fair hearing can now take place. The objection process should forthwith be adjourned indefinitely pending disclosure of the AIL. WWF invites Mr McKendrick to make a Decision in those terms.

51. I responded to the parties on 14 September 2018:

I am not prepared to alter my previous directions. Nor I am prepared to indefinitely adjourn the objection adjudication. I will provide fuller reasons when I produce my final decision.

If the Interpretation Log in force at the time has not been provided prior to the hearing then the consequences of that and the extent to which it causes any unfairness in the context of WWF’s objections in the context of this fishery assessment, will be a matter upon which I will require the parties’ detailed submissions.

52. On the same date, I asked the parties to consider reducing the time estimate from, 5 days to 2 days. All parties agreed and the hearing time was reduced by a direction on 18 September 2018. WWF and a witness for the CAB indicated they would attend by video conference and the MSC made the appropriate arrangements.

53. On 17 September 2018 the CAB uploaded to the electronic bundle what they termed the “Antecedent Interpretation Log” (hereafter “AIL”). An amended version of the AIL was uploaded on 24 September 2014.

54. The Observer data was disclosed to the Objector on 26 September 2018 (although the CAB rightly point out there is a history to this data and it was not requested during the 2017 site visit, when access to the information could have been sought by a stakeholder).
55. In line with the directions all parties produced written submissions for the hearing in September 2018. I am grateful to all the parties for setting out their respective cases in writing in respect of the six remaining grounds of objection. These submissions were lengthy and the CAB's submissions alone ran, with appendices, to 84 pages.
56. On 28 September 2018 Mr Kanstinger of WWF Germany submitted a further written submission on the unfairness caused by the delayed disclosure of the AIL.

The Site Visit

57. In Echebstar's first communication to me on 12 June 2018, Mr Jauregui wrote *inter alia*:

Given the apparent intractable position of the IPNLF, we consider that an arbitration hearing will be required. We understand that the Independent Adjudicator selects the location for said hearing. May we respectfully suggest that the Seychelles be the location.

We make this suggestion because of our strong belief that those who review the fishery should have a solid understanding of the practical activities on board a tuna seiner including the characteristics of FADs, the observer programme and the way in which observers work on board, the professionalism of the crew and the experience and competence of the Seychelles authorities.

58. This suggestion also found support with the CAB. In their submission of 4 July 2018, Dr Combes stated (emphasis added):

Regardless of the location of the oral hearing almost all parties will be required to make international flights. The Objectors are each responsible for their own costs. The Fishery Client are disproportionately burdened with the expense of the objection given that they are responsible for the professional fees and travel and subsistence for two parties, their own and those of the CAB and team. By holding the oral hearing in Spain or Seychelles the Fishery Client will already be in attendance. If the venue were near a fishing port used by the Fishery Client in the Seychelles then the parties could benefit from viewing

the fishing gears that are fundamental to the several of the objections under dispute. Further the IOTC, the RFMO, is based in the Seychelles, the majority of the total catch is in international waters (65.4%), and the Seychelles is where 21.6% is caught (Table 42, Final Report, February 2018). For these reasons the CAB strongly supports that the hearing should be held in the Seychelles as the Fishery Client seeks, and in the alternative suggests Spain.

59. A site visit was duly arranged to the Echebatar vessel, the Izaro on Sunday 30 September 2018, the day before the hearing commenced. I have included my notes combined with those of Ms Cheung's, as Annex 1 to this Decision. Annex 2 to the Decision is the combined note of the CAB and Fishery client setting out some corrections to Annex 1. Photographs were also taken showing key installations such as the fishing gear, the FADs, the satellite connected buoys, the first and second conveyer belts and the nets. I was also shown how the fish were caught, raised and deposited on board into the fishing deck and then sorted on both the first and, if necessary, second conveyer belts. I have not included the photographs in this decision.
60. The note of the site visit and the photographs were shared with the WWF representatives in advance of the hearing. Mr Russell confirmed on behalf of the WWF that the note and the photographs had been read, seen and considered by his team and no issues arose.
61. Mr Robson commented that the site visit report and photographs were “*extremely helpful and informative*” for the WWF. Mr Russell and Mr Kanstinger in their post hearing submissions noted that: “*The notes and photos from the site visit to the F.V. Izaro were also very informative, in particular exhibits 5-7 that showed in detail the information available to vessel captains from the sonar buoys deployed on Echebatar FADs.*”

The Role of the Adjudicator

62. Annex PD of the Fishery Certification Requirements (hereafter “FCR”) sets out in full the Objections Procedure.
63. I must have regard to the following factors:

- a. Section 1 of the Fisheries Certification Requirements makes clear the Requirements “are for the CAB’s use when assessing fisheries against the MSC’s Fisheries Standard”. The Requirements are publicly available, but they are in reality a private document which directs how an expert body should carry out the assessment process and against what standards;
 - b. there has been no challenge by the Objector to the expertise of the team assembled by the CAB to carry out the re-certification of the relevant fishery;
 - c. the Objector has not relied on any substantive expert evidence, instead they have relied on Mr Robson as someone with expertise to present their case and interpret the correct application of the FCR;
 - d. FCR PD 2.6.6.2 states: “In no case shall the independent adjudicator substitute his or her own views or findings of fact for those of the CAB.”
64. The process of adjudication is very much one of review as seen against principles of English or US administrative law. At no stage of the adjudication is it appropriate for the adjudicator to set about a ‘first instance’ determination of whether or not the fishery meets the FCR requirements: that is the role of the CAB, deploying its expertise.
65. The role of the adjudicator is to review the CAB’s process of decision making without substituting factual decisions or judgements. This is reinforced by FCR PD 2.1.

The Background

66. In 2013 to 2015 the Echebatar Indian Ocean Tuna (skipjack, yellowfin and bigeye) free school purse seine fishery was assessed according to the then MSC fishery standard. Following an objection and adjudication the fishery was found not to meet the MSC standard. In early 2017, the Echebatar Indian Ocean Skipjack Tuna Purse Seine Fishery (Free school and FAD) re-entered MSC assessment. The Acoura assessment team completed a site visit to Bermeo, Spain and Victoria, Seychelles in late March / early April 2017. The Acoura team met with Government officials, fishery managers, scientists, other fishermen and NGOs.

67. The CAB's report is authored by Professor DelAlteris (P2 and team leader), Kevin Stokes (P1) and Ian Scott (P3). Their brief professional backgrounds are set out in the CAB report and their curricula vitaram were provided to me as part of the CAB's written submission for the hearing. It is clear each is a highly qualified and experienced assessor in their respective specialist areas of fishery management. Their expertise is apparent from the several detailed engagements I have had with the CAB report.
68. The Echebatar Indian Ocean fleet is currently made up of five active fishing vessels and a single supply vessel. Echebatar has introduced one hundred percent observer coverage from 2014 and has switched to ensure all FADs are non-entangling to reduce by-catches of silky sharks and turtles. More recently, the use of biodegradable FADs is being experimented with to minimise the life span of FADs that are lost or not recovered. Echebatar is working with AZTI on a project to evaluate operational feasibility of biodegradable FADS in the tuna purse seine fishery. Each Echebatar vessel uses no more than 400 FADs. The company's purse seiners each use about 375 active beacons, with a maximum 750 allocated per vessel.
69. Three vessels of the fleet have introduced second conveyer belts, which permit rapid release of unwanted catch straight back to the sea.
70. The CAB report sets out the tonnage of Echebatar Indian Ocean tuna landings by year between 2012 and 2015. This ranges from a minimum 33,602 tonnes to a maximum of 43,864 tonnes. Observer data suggests that FAD fishing accounts for around 86 % of the landed catch.
71. Purse seine nets in the Indian Ocean target tuna and are deployed in two ways: i. setting the seine on free schooling tuna (FSC), un-associated with any structure or object; and ii. setting the seine on tuna that are associated with some structure, such as a natural log or on artificial fish aggregating devices (FAD), or cetaceans such as dolphins and whale sharks.

72. The skipjack stock in the Indian Ocean is described as healthy and well managed by the IOTC (Indian Ocean Tuna Commission).

73. The report confirms the Unit of Assessment (UoA) as:

Species: skipjack tuna;

Stock: Indian Ocean

Harvest Method/Gear: Purse Seine including all set types, specifically Fish Aggregating Device (FAD or associated) and free school (FSC or non-associated).

74. The CAB concluded in their report the Unit of Assessment meets the MSC standards and recommended certification of the Fishery. The final scores for the three Principles were:

Table 4: Echebatar Skipjack Fishery: Final Principle Scores

Principle	Score
Principle 1 – Target Species	90.0
Principle 2 – Ecosystem Impacts	80.7
Principle 3 – Management System	81.9

75. Table 6 of the report set out eight conditions related to Principles 2 and 3.

76. Table 23 of the Report sets out a detailed analysis of the species caught between 2014 and 2016, broken down by MSC species designation. Skipjack, yellowfin and bigeye make up over 97 % of the catch (these amount to the UoA and two “primary main” species). Of the “FAD catch”, ETP species bycatch are recorded as follows:

Species	Total Estimated Annual catch (t)	Species weight % of average annual catch
Silky shark	101.8	0.3725
shortfin mako shark,	0.2	0.006

giant manta ray	1.1	0.0041
manta rays	0.1	0.0003
spinetail mobula ray	0.5	0.0020
other mobula rays	0.8	0.0031
Loggerhead sea turtle	0.0	0.002
Green sea turtle	0.0	0.002
Hawksbill sea turtle	0.0	0.002
Olive ridley sea turtle	0.1	0.002
Other sea turtle	0.0	0.000

77. Table 24 sets out figures for the free school catch for the same years. Unsurprisingly fewer ETP are included in these catch figures.

78. In relation to silky shark the CAB report notes (emphasis added):

The average annual catch of silky shark in Echebatar FAD sets is estimated to be about 101 t (4,406 individuals) or <0.4% of the total catch. About 50% of the animals were observed to be released alive. The average catch in the FSC sets is estimated to be 2 t (68 individuals) with about 50% released alive. Of the silky sharks that are released alive, between 20% and 40% survive. This implies an overall survival rate of 10% - 20% of those captured (Poisson et al. 2011, Poisson et al. 2014, Hutchinson et al. 2015, and Eddy et al. 2016).

The Final Hearing

79. Each party was provided with the opportunity to make an opening statement.

80. Mr Jauregui stressed that environmental protection is very important for his company and they are committed to ensure the Indian Ocean is sustainable. He expressed his hope that other fisheries would follow the example of Echebatar if the fishery is accredited by the Marine Stewardship Council (MSC). He acknowledged the important role of the Objector and considered the CAB had fully addressed the grounds of objection. He pointed out the 'Client Action Plan' extends over 4 years and he was satisfied Echebatar can meet that

plan. Mr Jauregui also thanked the WWF for the implementation of their Fishery Improvement Programme. This initiative, he stated, helped the Fishery to work towards MSC certification.

81. In their opening statement presented by Mr Chu it was explained WWF is a leading global international organisation. WWF has key engagements with Governments and tuna processors in the Indian Ocean which permits them to assist to improve fishing practices in the Indian Ocean. Mr Chu explained that as a stakeholder of MSC fishery assessments, the aim of WWF was to ensure proper application of the MSC standard. WWF does not believe Echebaster has been shown to have met the MSC standards.

82. Dr Combes opened by pointing out he wished to explain two issues: the MSC assessment and the objection. First, in terms of the MSC assessment, he said the fishery client had volunteered against the Streamlined system, but noticed the Streamlining had been complex. He was of the view the robustness of the assessment had been improved by stakeholder engagement. WWF are very knowledgeable and engaged extensively through their Fishery Improvement Programme. He explained it was a shame that WWF were unable to attend the April 2017 site visit, in person, remotely or by correspondence. Dr Combes acknowledged the CAB's final report on the Fishery required improvements and the final report (number 2) was reworked to ASI (Accreditation Services International) and MSC satisfaction. Secondly, turning to the objection he acknowledged it was at times overwhelming for a small team. He pointed out that the CAB provided, on 20 June 2018, a detailed response, but no response had been received to that. He acknowledged that maybe some areas of the final report would benefit from re-drafting. Lastly, he pointed out the MSC 'theory of change' is important when contextualising the assessment.

83. Ms Tzara Cheung attended the hearing as an independent administrator.

The Six Objections

84. WWF made six grounds of objection to the CAB report. All the grounds of objection deal with Principle 2 scoring. All the grounds of objection are based upon PD 2.7.2.3, namely:

The score given by the CAB in relation to one or more performance indicators cannot be justified, and the effect of the score in relation to one or more of the particular performance indicators in question was material to the determination because either:

- a. the CAB made a mistake as to a material fact;*
- b. the CAB failed to consider material information put forward in the assessment process by the fishery or a stakeholder;*
- c. the CAB failed to consider material information put forward by the peer reviewer(s);*
- d. the scoring decision was arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it.*

85. The grounds of objection are labelled “a” to “f” and my findings are set out below.

Ground A – PI 2.1.1

86. Performance Indicator (PI) 2.1.1 is concerned with primary species outcome and in particular stock status. The CAB scored Echebistar at SG 80 for both primary species (yellowfin and bigeye) in both the FAD and FSC types. A score of 80 requires:

Main primary species are **highly likely** to be able the PRI; or

If the species is below the PRI there is either **evidence of recovery** or a demonstrably effective strategy in place **between all MSC UoAs which categorises this species as main**, to ensure that they collectively do not hinder recovery and rebuilding.

87. PRI is defined in the MSC Vocabulary as: “Point of Recruitment Impairment – the stock level below which recruitment may be impaired.”

88. The relevant reasoning set out in the Report is as follows:

The yellowfin catch in the FAD sets is 38.8 % by weight of the overall catch by Echebatar purse seiners based on observer data. The expanded observer estimate is 10,617 t annually. Reported UoA landed catches of yellowfin in the Echebatar fishery in 2012-15 were: 24,535t; 24,855t; 16,930t; and 16,635t respectively. Client data indicates that the annual share of yellowfin in the total Echebatar catch averaged 58%.

Consistent with GSA2.2.3.1, the PRI is taken as 20%B0 (0.2 SB0).

The most recent stock assessment for yellowfin was in 2016 (IOTC 2016a, b) used the most recent catch data and a new longline CPUE index compared to the one conducted in 2015.

The 2015 assessment estimated SB2014/SB0 as 0.23 (0.21-0.36).

The 2016 assessment estimated SB2015/SB0 as 0.29, but does not provide any estimate of confidence.

In scoring this PI, it is necessary to determine how likely the estimate of 0.29SB0 is above the PRI of 0.20SB0.

Some guidance is available from the third annual surveillance audit of the Maldives pole and line fishery.

At (sic) reported in the third annual surveillance of this certified fishery, the previous stock assessment had estimated SB2014/SB0 as 0.23 (0.21-0.36). The IOTC used further analyses to estimate that across a range of model formulations, there was a greater than 80% probability that the 2015 estimate was above 0.2B0. The 2016 estimate is much higher and the model generally more optimistic.

89. WWF's reasons to support their ground of objection were essentially that: i. yellowfin tuna is not highly likely to be above PRI; ii. a more precautionary approach is required; and iii. they also pointed out that one of the peer reviewers (A) raised similar concerns. Mr Robson, in his helpful submissions, directed me to a document in tab 9.5, which is the IOTC report on yellowfin tuna, dated December 2016. The Indian Ocean Tuna Commission (IOTC) is the relevant Regional Fishery Management Organisation (RFMO). I was particularly directed to page 16 of the IOTC report, at Table 4. Mr Robson stated this table demonstrated there was a large uncertainty in respect of yellowfin stock status. He said it was more precautionary to stick to a score of 60, rather than 80. He also pointed out the IOTC did not provide a confidence range because it is not feasible to do so.

90. Mr Robson submitted I should appoint an independent stock expert to report, given the difference between the peer reviewer and the CAB.
91. Dr Stokes responded on behalf of the CAB. He explained the PRI is stock size below which some possibility of future renewability of the stock is compromised. He referred me to page 51 of the CAB report (which is partly set out above). The first of the two scoring options at SG 80 was identified as having been met. He invited me to read at Tab 9.3 of the electronic bundle the document entitled IOTC 2016m. This is a further IOTC yellowfin tuna document from December 2016, entitled “Executive Summary: Yellowfin Tuna”. I was also referred to the MSC Maldives Pole and Line Skipjack and Yellowfin Tuna re-assessment and surveillance reports, both dated 2017, authored by ‘Stokes’ et al.
92. Dr Stokes explained the assessment required consideration of the whole stock in the Indian Ocean, hence why the Pole and Line reports in respect of the Maldives were relevant. WWF indicated their agreement to this approach.
93. Secondly, Dr Stokes argued that the IOTC does not report against the MSC standard. The MSC is more precautionary (the MSC assesses this scoring indicator at 20 % and the IOTC at 13 %).
94. Having considered the IOTC reports and the Maldives Pole and Line reports and having carefully read the CAB’s and WWF’s written submissions, I am not able to conclude the score of SG 80 “cannot be justified”. The assessment of stock status is complex and whether the stock status is “likely” (SG 60) or “highly likely” (SG 80) to be above PRI is an exercise of expert judgement. The CAB’s report provides a clear rationale for a score of 80, this has been significantly expanded upon at pages 3-7 of its final written submission and in the dense Annex 1 of the same submissions, which runs to 8 pages.
95. I will not attempt to add a gloss to the detailed scientific calculations and information provided in the reports at tab 9 of the electronic bundle (which I have read). I accept three essential points made by the CAB. First, if one assesses the IOTC yellowfin reports from 2015 to 2016, I accept the 2016 stock size of 20%SB0 is higher than the 2015 assessment, namely the stock is in a better position. Secondly, the IOTC report shows that in 2015 the

yellowfin stock was at 23%SB0, with greater than 80% probability of being above 20%SB0 and the 2016 assessment suggests higher stock, namely 29%SB0, albeit this is not certain. Thirdly, it is relevant to consider the position of yellowfin tuna in the 2017 Maldives pole and line re-assessment. This is part, as Dr Stokes says, of the whole Indian Ocean stock. That report concludes a score of SG 80 was appropriate, for the following reasons:

The most recent stock assessment for yellowfin is reported in IOTC (2016ab). The assessment follows one conducted in 2015 but introduces the most recent catches and a new longline CPUE index. The 2015 assessment estimated SB2014/SB0 as 0.23 (0.21-0.36) while the updated assessment in 2016 estimates SB2015/SB0 as 0.29 but does not provide any estimate of confidence. For scoring, it is necessary to determine how likely the estimate of 0.29SB0 is above the PRI of 0.20SB0. Some guidance is available from the third surveillance of the pole and line fishery (available for download at www.msc.org).

At the third surveillance, the previous stock assessment had estimated SB2014/SB0 as 0.23 (0.21-0.36). Through the IOTC, further analyses were used to estimate that across a range of model formulations, there is a greater than 80% probability that the 2015 estimate was above 0.2B0. The 2016 estimate is much higher and the model generally more optimistic. Based on this, it is concluded that it is highly likely (Table SA9) the yellowfin stock is above the PRI.

We note also that the 2016 estimates of SB2015/SBmsy=0.89(0.79-0.99) and SB2015/SB0=0.29 imply SBmsy=0.33SB0 and SB2015/SB0 is in the range 0.26-0.33. This can be seen also in the “Kobe Plot” for the reference case from the 2016 stock assessment, though care is needed to read the grey 80% confidence interval bars which relate to SBmsy, not SB0.

SG80 was scored.

96. As can be seen there is a considerable overlap in reasoning between this MSC assessment and the CAB’s assessment for this Fishery.

97. I did not understand Mr Robson to argue with the figures and science which underpinned Dr Stokes’ analysis, his argument was really one of where should the precautionary line be drawn. I cannot therefore conclude the CAB omitted relevant facts or made a material mistake or adopted an unreasonable position. The CAB and its assessors are skilled and are due appropriate deference in what is a highly technical area of fishery science. Their

written and oral presentation well explains why they concluded SG 80 was more appropriate than SG 60, as I have attempted to summarise, above.

98. The fact that Peer Reviewer A took a slightly different approach does not weaken the CAB's conclusion. Peer Reviewer A opined:

The 2015 stock assessment for YFT found that the biomass SB2014/SB0 was estimated as 0.23 (80% CI = 0.21-0.36). The 2016 update was 0.29 with no CI listed. The justification given for the 'highly likely' to be above PRI was cited as guidance from the Third Surveillance Report from the Maldives Pole and Line fishery, but the link to open this report is broken, so the report is not available for review (link broken in the MSC Certification Report and on the IOTC website). The 4th Surveillance Report is available but gives no confidence intervals and no guidance. The question of how likely 0.29 is to be above 0.20 is pertinent but not answerable by saying the model for 2016 is more optimistic so if the 2015 assessment was highly likely than the 2016 should be highly likely as well, as higher variability in the data may change the confidence intervals. Thus, the SG=80 of 'highly likely' is not justified. It is more precautionary to stick with SG=60 as being likely (70% probability).

99. I can understand why PR A took this position, but it was not one supported by PR B or PR C. The CAB in its final written submissions at paragraph A12 is entirely correct to make the point it has omitted nothing relevant from its consideration of this performance indicator. Rather the CAB, backed by others, has reached a different qualitative analysis. The test for intervention and remand by an Independent Adjudicator at PD 2.7.2.3 is not met because of a reasonable range of professional disagreement.

100. Having concluded there was no error on the part of the CAB, it follows I cannot accede to Mr Robson's request to appoint an independent stock expert. The data has been provided and exhaustively considered by the parties and re-considered by the CAB in detail for the purposes of the adjudication hearing. Only delay and expense could be the product of seeking further opinions on existing data. Such an approach would be unfair to Echebatar and is neither proportionate nor necessary.

101. This ground of objection is dismissed.

Ground B - PI 2.1.2

102. Performance Indicator 2.1.2 requires fisheries to have in place a management strategy. It states:

There is a strategy in place that is designed to maintain or to not hinder rebuilding of primary species; and the UoA regularly reviews and implements measures as appropriate, to minimise the mortality of unwanted catch.

103. Scoring takes place in respect of the following five (a) to (e) issues related to the management strategy: “management strategy in place”; “management strategy implementation”; “management strategy evaluation”; (there are other measures if sharks are a primary species, which do not apply) and lastly there must be a review of the strategy.

104. The CAB scored the Fishery Client at 80 for PI 2.1.2 (a) (b) (c) and (e). The essential reasoning for the CAB was set out in the Report. Its reasons for the score of 80 for SI 2.1.1 (a) in respect of FAD fishing and in particular with regard to yellowfin tuna were:

The recovery plan for yellowfin (IOTC Resolution 16/01) has the objective of rebuilding the stock to $B > B_{msy}$ with 50% probability by 2024. The plan defined limits on FADs per purse seine and the number of supply vessels.

The UoA already operates within the defined limits. However, there is concern about the fleet wide implementation of Res 16/01.

Additionally, UoA catch of yellowfin tuna are about 6% of the total yellowfin catches in the Indian ocean. If combined with the Maldives Pole and Line Fishery, which had a 2015 catch of 36,299 t, then the total MSC UoA catch is about 13%. According to the FCR, v.2, GSA 3.4.6, if MSC UoA catches are less than 30% of the overall catches of this stock, then the UoA may not normally be considered to be hindering recovery of a species.

This provides evidence that measures and a partial strategy are in place to maintain the yellowfin stock above PRI.

105. WWF's concerns under this ground relate to the yellowfin tuna as the primary species. It was submitted the score of 80 for SI 2.1.2 (a) – (c) cannot be justified because the CAB failed to consider material information put forward by a peer reviewer and made a material error of fact. In large part, Mr Robson's case on this ground of objection was largely in relation to whether or not Echebatar had implemented IOTC Resolution 16/1, which is found at Tab 9.3 of the electronic bundle and allied to that whether the CAB had consistently and properly scored in respect of the IOTC resolution. He also raised concerns regarding whether or not the Government of the Seychelles had agreed to implement IOTC resolution 16/1.

106. IOTC Resolution 16/01 is in the electronic bundle. The relevant measures in respect of purse seiners are:

- a. CPCs whose Purse seine catches of yellowfin reported for 2014 were above 5000 MT to reduce their Purse seine catches of yellowfin by 15% from the 2014 levels.
- b. The number of Fish Aggregating Devices (FADs) as defined in Resolution 15/08, paragraph 7, will be no more than 425 active instrumented buoys and 850 acquired annually instrumented buoys per purse seine vessel.
- c. Supply vessels: The total number of supply vessels by CPC on the IOTC active list shall not exceed half of the number of Purse seine vessels reported per CPC on the IOTC active list for the same year. Complementary to Resolution 15/08 on "Procedures on FADs Management Plan including a limitation on the number of FADs, more detailed specifications of catch reporting from FAD sets, and the development of improved FAD designs to reduce the incidence of entanglement of non-target species" and to Resolution 15/02 "Mandatory statistical reporting requirements for IOTC Contracting Parties and Cooperating Non-Contracting Parties (CPCs)", CPC shall report annually which Purse seiners are served by each Supply vessel.

107. The CAB submitted that the Fishery complied with IOTC 16/01 and this amounted to a partial strategy. The Echebatar fleet has 5 ships with one supply vessel and each ship fishes with 400 FADs. It can be seen the “b” and “c” above have therefore been complied with and I accept the judgement of the CAB these are relevant measures which have been complied with which amount to a partial strategy in respect of yellowfin tuna.
108. The CAB acknowledged there had been a debate in respect of the Seychelles Government’s compliance with the reduction in catch by 15 % from a base year of 2014. The CAB informed me this issue was resolved: all CPC countries fishing in the Indian Ocean, apart from Seychelles, were required to reduce their catches from the baseline date of 2014. However, the Seychelles was permitted to use a baseline year of 2015. So, I am told there was no breach of the amended IOTC 16/01 resolution by the Seychelles Government. In any event the CAB, rightly, cautioned me not to confuse the UoA with the Indian Ocean stock.
109. Mr Jauregui explained how the Echebatar fleet has complied with the requirement to reduce its yellowfin tuna catch. He stated the fleet had spent more time in port. The fleet was required to cease fishing for 2 months under its Spanish flag and for 1 month under its Seychelles flag.
110. Although Mr Robson did not develop the argument in his oral submissions at the hearing, the WWF’s written arguments consider the changes with respect to the Seychelles’ requirement to reduce yellowfin tuna catches would not result in yellowfin tuna being at levels which are highly likely to be above the point where recruitment would be impaired. The CAB argued, however, that WWF has ignored, and I should apply, GSA 3.4.6. I agree it should be applied and I accept the CAB’s arguments at paragraph B19 of their final written submission for the reasons they give.
111. Further, it is important to record the CAB’s figures in respect of the Echebatar yellowfin tuna catch (mt) over time:

2013: 24, 855

2014: 16, 930

2015: 16, 635

2016: 16, 142

2017: 13, 782.

112. Meanwhile Indian Ocean yellowfin catches have gone up, but the MSC assessment is of the UoA, not the Indian Ocean catch. I accept it could be argued, given yellowfin tuna catches in the Indian Ocean have increased from 2013 to 2017, that Resolution IOTC 16/01 has not been successful. However, this argument is flawed in respect of the CAB's scoring of the Echebstar primary species management strategy for yellowfin tuna. First, because the 2013-2017 figures do not demonstrate the effect of the actual implementation of the 2016 resolution, which came into effect later and secondly because the strategies as implemented by Echebstar, in the judgement of the CAB, are an effective management strategy. Given the measures they have deployed are the measures recommended by the IOTC, I cannot accept the CAB's assessment is wrong, such that the scores of 80 for SI 2.1.2 at (a) to (c) cannot be justified.

113. Following the productive discussion and willing engagement of the parties at the hearing, the CAB offered, and did, distribute a re-written rationale for its Report. This adds greater detail and reasoning than was found in the original Report. Mr Russell on behalf of WWF wrote by email on 4 October 2018, that:

The CAB states that the addition to PI 2.1.2(a) is for Yellowfin - Both set types). Given that a substantial part of the proposed revision is related to the FAD measures implemented under ITOC 16/01 It is unclear to WWF how this relates to the FSC set type rationale. If instead this implies that the FSC and FAD set types will be combined under the PI 2.1.2(a) rationale, we are concerned that this would not be in line with the structure of the UoA and the rest of the report. Please clarify this point for us.

As the revised rationale relates to the FAD set type, WWF considers that the new rationale at PI 2.1.2(a) adds clarity and updates the information for this PI relative to IOTC Resolution 17/01 which is useful.

The proposed revisions also add clarity as to the application of MSC FCR at GSA3.4.6.

Taken together, WWF believes that the CAB's scoring rationale is clearer which will be useful for readers of the Public Certification Report if the fishery is certified. WWF thanks the team for their efforts to continually improve the clarity of the final scoring rationales.

As the remaining point of WWF's objection to PI 2.1.2 is at scoring issue (c) regarding implementation, WWF awaits the decision of the LA on this issue.

114. For these reasons the judgement reached by the CAB in respect of scoring 80 for all three areas is justified. The CAB shall add the amended rationale to the final report. This ground of objection is dismissed.

Ground C - PI 2.3.1

115. Performance Indicator 2.3.1 is concerned with Endangered, Threatened and Protected (ETP) species outcomes. It requires:

The UoA meets national and international requirements for protection of ETP species.

The UoA does not hinder the recovery of ETP species.

116. SI 2.3.1 (c) focuses on the indirect effects. The CAB scored 80, which requires: "Indirect effects have been considered for the UoA and are thought to be **highly likely** to not create unacceptable impacts". The CAB scored 80 because:

The ETP species that interact with the EIO tuna purse seine fishery include two species of shark, several species of rays, and several species of sea turtles. Possible indirect effects of the EIO skipjack tuna purse seine fishery on ETP species include reduced availability of forage species due to the removal of the UoA species and destruction or disturbance of habitat due to the fishing operations.

The manta and devil rays are primarily planktonic feeders, and it is highly unlikely that the Echebatar fishery would impact them.

The two shark species may consume some small skipjack tuna, but since the skipjack tuna stock is above Bmsy, it is highly unlikely that the Echebatar fishery affects the availability of tuna to sharks. Some sea turtles are vegetarians, others eat jellyfish, and some eat bottom dwelling crustaceans, and it is highly unlikely that the fishery affects the availability of food for sea turtles.

Because this fishery does not impact low trophic level species, and does not destroy or disturb seabed habitats, the team believes that it is highly unlikely to create unacceptable impacts.

There is some concern about the effects of FADs on the migratory patterns of tuna (this is a subject of ongoing research) as well as the effects of lost FADs on coral reefs. These concerns are addressed in Components 2.4 and 2.5.

117. WWF submits that the score of 80 cannot be justified for SI 2.3.1 (c) because the CAB failed to consider information from the peer reviewer and made a material mistake as to fact. WWF's submissions are particularly concerned with the feeding habits and migratory patterns of silky sharks. They submit the wording of SG 80 is relevant because the term "very likely" is difficult to objectively determine given it is a question of interpretation. Secondly, WWF are concerned as to how silky shark indirect effects have been documented and assessed at each level. They link their concerns pursuant to PI 2.2.1 to 2.5.1.

118. Mr Robson also makes reference to Interpretation 109 at page 120 of the Antecedent Interpretation Log (AIL) which states: *"In addition, 'indirect effects', which as explained above are different to unobserved, direct effects, also need to be scored for ETP species only."* Again, it is said this interpretation has a link to PI 2.5.1.

119. Ultimately, WWF's main concern here is that there is simply insufficient information regarding knowledge of the normal behavior of silky sharks and how they may be affected. I was asked to read the papers in the electronic bundle by Dagorn, Filmater and Davies. I could not find the article referred to at the hearing by "Filmater".

120. In the article entitled *"Is it good or bad to fish with FADs? What are the real impacts of the use of drifting FADs on pelagic marine ecosystems?"* (May 2012) Dagorn et al concludes:

Fish aggregating devices are not necessarily bad. They are efficient fishing gears that must be monitored and managed. Used correctly, they can reduce the fuel costs and ‘carbon footprint’ of the fleet without jeopardizing either the viability of the target species or the integrity of the pelagic ecosystem. Management of FAD fishing should be conducted in conjunction with the management of other gears catching the same species.

121. In “*The past, present and future use of drifting fish aggregating devices (FADs) in the Indian Ocean*” Davies et al states state:

Whilst FADs are evidently useful fishing tools, their use has been associated with several potential negative ecosystem impacts, including catch of juvenile tunas and bycatch of vulnerable non-target species. Furthermore, there is concern that the highly efficient practice of FAD fishing, if left unchecked, might exacerbate issues of overcapacity and ultimately lead to the unsustainable exploitation of tuna stocks.

.....

*Shark by catch on FADs is almost exclusively composed of two species; silky sharks *Carcharhinus falciformis* and oceanic white tip sharks *Carcharhinus longimanus*, together comprising over 90% of the shark bycatch by number[21]. As with many sharks, these species have slow growth rates, mature late and have long reproductive cycles with few offspring, and as such are highly susceptible to population decline from excessive fishing pressure[22]. FADs in particular are also associated with the mortality of sharks and turtles through entanglement with the net hanging beneath a raft (i.e. ghost fishing), although the extent of this mortality is not usually estimated.*

122. It should be pointed out this article was written in 2013 and published in 2014 and predates recent IOTC measures.
123. Given the extensive reference in the CAB’s final submissions, I have also read “*Drifting Fads used in tuna fisheries: an ecological trap?*” by Marsac et al, 2000. They conclude major aspects of the ecological trap hypothesis are “speculative”.
124. The CABs response was provided by Professor DeAlteris. His main points were:

- a. He rhetorically asked what is “*unacceptable impact*”? and answered it with the definition: “*some action that hinders the recovery of species*”. That is a judgement call for the CAB’s experts, he said.
- b. He indicated his agreement with the Dagorn article and explained that not enough is known about the effects FADs have on shark migratory behavior and alter their feeding.
- c. He stated the Filmater article was based on research about entangling FADs and therefore was of limited relevance.
- d. He stated there is not much evidence that silky sharks are feeding differently when associating with FADs or not.
- e. None of the papers demonstrate that FADs are an ecological trap.
- f. FADs impact short term behavior, so most unlikely that migratory behavior is impacted. He told me it is not known whether feeding behavior is affected by FADs.
- g. He recalled that he did not rely on the AIL and did not look at interpretation 109. In any event, his analysis and scoring were consistent with that interpretation guidance.

125. Mr Juaregui told me Echebatar do not use entangling FADs. He reminded me of the site visit, where I was shown “eco FADs”. Echebatar tries to make them biodegradable. He also confirmed the importance of the second conveyer belt, which I was shown, to return live by-catch to the sea as easily as possible.

126. Similarly, to the previous ground of objection, the CAB re-worded its rationale and Mr Russell commented by email that:

WWF considers that the proposed revision to the scoring rationale for PI 2.3.1c provides a for more complete scoring rationale at PI 2.3.1c SG80 and accurately reflects the CABs opinion on this issue as expressed during the oral hearing. However, WWF notes that while the team states that “the ‘ecological trap’ hypothesis is far from proven” it has also not been disproven. Perhaps this small

addition would imply a more balanced consideration by the team. Nevertheless, in its entirety this is a useful clarification to further document the CABs opinions and conclusions in the scoring rationale.

WWF awaits the decision of the LA on this point of objection.

127. I agree with WWF that the re-worked rationale is clearer and the CAB shall amend its wording in the final version of the Report. Considering the outstanding issues, I cannot second guess the CAB and add my own (imperfect) scientific views in respect of the debate as to whether or not the “ecological trap” theory is disproved or otherwise. The adjudication process does not permit me to substitute my findings for the CAB. From what I have set out above, it is clear to me the CAB have considered all the relevant scientific information and research papers that WWF raised. Professor DeAlteris was fully familiar with them all and had considered them in the context of the scoring. The debate on this ground of objection is based upon reasonable scientific inference in respect of incomplete research and a range of academic papers. I cannot extrapolate from the reasonable interpretations, that the CAB have made a material error of fact. In their scoring they have placed greater emphasis on certain aspects of the research than WWF have, that does not make them mistaken or their conclusions unreasonable.

128. For these reasons this ground of objection must be dismissed but the CAB shall amend its rationale in the final report.

Ground D - PI 2.3.2

129. PI 2.3.2 is concerned with ETP species management strategies. It requires:

The UoA has in place precautionary management strategies designed to:

- meet national and international requirements; and*
- ensure the UoA does not hinder recovery of ETP species.*

Also, the UoA regularly reviews and implements measures, as appropriate, to minimise the mortality of ETP species.

130. The CAB scored Echebatar 80 for PI 2.3.2 (a) and (c) to (e). WWF object on the basis the CAB failed to take into account relevant information and its scoring was arbitrary and/or unreasonable. Their ground of objection relates only to management strategies for silky sharks. The CAB's reasoning, in part, is as follows:

Silky shark is the ETP species with the highest catch in the Echebatar purse seine fishery. The average annual catch by the FSC and FAD set types is about 103 t or 4,500 individuals. The IOTC has issued periodic status updates (2013 and 2016) for the species, but there is no assessment or determination of stock status. The IOTC has in place a series of conservation and management measures that address silky sharks, and these taken together comprise a strategy to manage this ETP species in the Indian Ocean. The Echebatar fleet is in compliance with these IOTC resolutions.

Resolution 13/03 on the recording of catch and effort by fishing vessels in the IOTC area of competence sets out the minimum logbook requirements for purse seine, longline, gillnet, pole and line, handline and trolling fishing vessels over 24 metres length overall and those under 24 metres if they fish outside the EEZs of their flag States within the IOTC area of competence. As per this Resolution, catch of all sharks must be recorded (retained and discarded).

*Resolution 13/06 on a scientific and management framework on the conservation of shark species caught in association with IOTC managed fisheries prohibits, as an interim pilot measure, the retention onboard, trans-shipment, landing or storing any part or whole carcass of oceanic whitetip sharks (*Carcharhinus longimanus*) (and requests for all other species) by all vessels on the IOTC record of authorized vessels or authorized to fish for tuna or tuna-like species, with the exception of observers who are permitted to collect biological samples (vertebrae, tissues, reproductive tracts, stomachs) from oceanic whitetip sharks that are dead at haul-back and artisanal fisheries for the purpose of local consumption, and will conduct a review and an evaluation of the interim measure in 2016.*

Resolution 11/04 on a Regional Observer Scheme requires data on shark interactions to be recorded by observers and reported to the IOTC within 150 days. The Regional Observer Scheme (ROS) started on 1st July 2010.

Resolution 05/05 Concerning the conservation of sharks caught in association with fisheries managed by IOTC includes minimum reporting requirements for sharks, calls for full utilization of sharks and includes a ratio of fin-to-body weight for shark fins retained onboard a vessel.

Resolution 10/02 Mandatory statistical requirements for IOTC Members and Cooperating Non-Contracting Parties (CPC's) indicated that the provisions, applicable to tuna and tuna-like species, are applicable to shark spec.

131. WWF's concerns are essentially that whilst measures are in place there is no proper management strategy in place to protect silky sharks and far too many silky sharks (several thousand protected sharks each year) end up as Echebatar by-catch. Mr Robson argued that with silky sharks the following would be required to establish a strategy: (i) most importantly - to avoid catching them; (2) deploying chums - which baits sharks to keep them away; (3) avoid deploying FADs on smaller schools when there is less than 10 tonnes of biomass; and (4) special closures - closing an area to the fishery where they cannot set FADs.

132. Mr Robson referred me to the electronic bundle at tab 9.5, and a document entitled: "Draft best practice mitigation guidelines for sharks and rays taken in purse-seine and long-line fisheries" prepared by SL Fowler. Table 5 of this document sets out measures to avoid sharks:

While best practice currently includes the following, these and other measures are under review by RFMO working groups and best practice is likely to develop rapidly.

- *Avoid FADs: set on free-swimming tuna schools.*
- *Use chum to attract sharks away from FADs before the set is made.*
- *Remove and destroy entangling FADs.*
- *Avoid setting on FADs when less than 10t of tuna are present.*
- *Improve FAD design.*
- *Minimise the use of non-biodegradable materials in FAD construction.*
- *Vessels to report all interactions with FADs to the relevant RFMO.*
- *All FADs used by CPC vessels to be clearly identified with alpha-numeric codes.*
- *Regulate the total number of FADs deployed.*
- *Spatial closures, where FAD deployment is prohibited.*
- *Develop national and fishery-wide FAD Management Plans.*

133. Mr Robson was not entirely clear which strategies were implemented by Echebatar. He focused on his submissions on the four points made above.
134. Mr Kanstinger also referred to the ISSF Guidelines and the fact there were regular meetings with ISSF and captains where they discuss mitigation measures for silky sharks. He pointed out these handbooks are not in the bundle, but the meetings are mentioned in the Report. He also referred me to the observer data. He considered Echebatar were fishing on smaller sets less than 10 tonnes, where proportionately the bycatch was higher. He argued Echebatar should not target small schools of tuna.
135. Mr Scott responded on behalf of the CAB. He accepted that silky shark is ETP as it is listed in Annex 1 of Memorandum of Understanding on Conservation of Migratory Sharks, but he said they are not endangered. He referred me to the Fowler 2016 CMS guidelines and made the point that this is a draft document, which has not been adopted. They are not CMS guidelines. However, he accepted the mitigation measures are relevant.
136. He disputed the four points relied upon by Mr Robson. First, he explained that it was not worth Echebatar's time setting on schools of less than 10 tonnes, normally they set on schools of 15-20 tonnes. Secondly, in terms chumming, he stated that Echebatar have tried it and found it was not successful and this also impacted the tuna. Thirdly, he explained that avoiding FADs was just not practical. Lastly, he also clarified that the second conveyer belt, which I was shown, was an important and innovative strategy to ensure live silky shark by-catch were safely returned to the sea as soon as possible with the minimum amount of handling. I was told three ships have the conveyer belt and a fourth ship will have one in 2019.
137. In response to my request to take me through the 11 measures identified by Mr Robson in the CMS draft document, Mr Scott added: in terms of improved FAD design - Echebatar aim to introduce bio degradable FADs; Echebatar's FADs are connected to satellite connected buoys, so they are identified and provided with codes; they properly regulate FAD numbers and CMS 16/01 and 17/01 are complied with.

138. Professor DeAlteris also commented on the fact the average size of Indian Ocean sharks was increasing. He told me increased bodyweight is usually an indication that the stock is doing better, but he noted there were only 3 data points, so that was more of a hypothesis and 5 years of data would be required to take a firmer view. He did note, however, that the average size was not reducing. The professor also made the point that silky sharks, as a species, has only been an ETP species for several months, so it is hard to assess the evaluation of the strategies and their effectiveness.
139. Mr Juaregui argued that Echebstar would not set nets if the catch was less than 10 tonnes. The captains would always want a school of around 25 - 30 tonnes. The nets were expensive and could not be casually used. A net cost around \$650, 000. The captains avoid setting the nets on non-target species and they are skilled at using sonar and radar to identify target species. He also told me they did not deploy FADs in protected areas or where they do not have a licence. The VMS data and the observer would note these issues. Crews also attend best practice seminars at least twice per year.
140. Mr Kanstinger replied on behalf of the WWF. He reminded me that silky sharks are ETP because they are slow growing and have few offspring. He was concerned that there were no special closures implemented in the Indian Ocean. He then turned to the preliminary analysis undertaken by the WWF in respect of the Observer data for 2014-2016. He told me their analysis showed that far too high a percentage of sets were deployed on a biomass of less than 10 tonnes.
141. The focus of this PI is to ensure an effective strategy which protects identified ETP species within the context of national and international requirements. The CAB's written submissions correctly notes at paragraph D45:

Furthermore, review of the international and national requirements reveals: (i) Silky shark is not classified as an ETP species by IOTC; (ii) silky shark is not listed on CITES Appendix 1; (iii) IUCN does not classify silky shark as threatened and available data indicates that the percentage of silky shark interacting with the UoA fishery is extremely small; (iv) silky shark is not listed in CMS Appendix 1.

142. Whilst silky shark is recognised in the MOU cited above, the international and national standards are not as robust as for other ETP species. In assessing the CAB's score, I am mindful of the fact the management strategy is not required to meet as many national and/or international standards as other ETP species. This places the requirements for the strategy in perspective.

143. Having listened carefully to the very high quality of the debate at the hearing on this issue and read the relevant papers carefully, I am persuaded the CAB's view that the measures put in place by Echebatar in respect of silky sharks in particular, go beyond measures and do provide for a strategy that is highly likely to meet the national and international standards. I was not shown any national or international standards which had been agreed upon, in respect of which it was said Echebatar had failed to take measures to protect silky sharks. I find that the majority of the 11 draft CMS measures are in place: this alone is sufficient to amount to an effective strategy which is being successfully implemented by Echebatar.

144. Having reviewed matters carefully, the CAB's judgement on the strategy is easily within the margin of reasonable response and in no way arbitrary or unreasonable. This ground of objection is dismissed.

Ground E - PI 2.5.1

145. Performance Indicator 2.5.1 requires that:

The UoA does not cause serious or irreversible harm to the key elements of ecosystem structure and function.

146. The CAB scored the Fishery at SG 80, which requires:

*The UoA is **highly unlikely** to disrupt the key elements underlying ecosystem structure and function to a point where there would be a serious or irreversible harm.*

147. WWF object on the basis Acoura failed to consider relevant information and their score is arbitrary or unreasonable. WWF's concerns in particular focus on the effects of FADs on the epipelagic ecosystem and they limit their criticism of the CAB's report to the failure to analyse the effects of FADs in the marine environment on tuna and sharks. Further, WWF submits the inclusion of FADs in the Indian Ocean must be considered to be non-reversible whilst Echebstar do not use biodegradable FADs.
148. The CAB's report provides some detailed reasoning on this issue:

FAD set type

As noted in the Scope of the Assessment in Relation to the MSC program, MSC has identified FADs as qualifying as a habitat modification. The Echebstar fishery enhances fishing operations by aggregating fish to make capture more efficient. The impact on the ecosystem from aggregating fish is addressed here. A secondary issue that must be considered is the effects of FADs that are lost at sea, and eventually ground in shallow water or come ashore, these impacts are addressed in PI 2.4 scoring. The tuna purse seine is used in epipelagic waters. The key ecosystem elements of the Indian Ocean include abiotic and biotic factors, such as sea surface temperature, stratification, phytoplankton abundance, zooplankton bio-volume, total fish biomass, the ratio of pelagic to demersal fish biomass, size distribution of fish in the ocean, epipelagic oceanic food webs (trophic structure including predator/prey relationships), abundance of predators and availability of forage species, etc. Normal function within an ecosystem is dependent on relative stability in relation to key underlying biotic and abiotic elements.

The EIO skipjack tuna purse seine fishery has no impact on abiotic factors. Impacts of the fishery on biotic elements of the ecosystem (retained species, bycatch, endangered, threatened and protected species and habitats) have been considered in previous P2 scoring components. This PI considers potential UoA impacts at the whole system level.

Few published studies examine the overall health of the Indian Ocean ecosystem. Sherman et al (1998) describe the conditions of marine resources of the large marine ecosystems of the Indian Ocean and review assessment, management and sustainability. Tomczak & Godfrey (2003) and Longhurst (2007) both provide robust reviews on the structure of the Indian Ocean ecosystem as well as the underlying biotic and abiotic elements and oceanography of the region.

Some depletion of higher level predators in the Indian Ocean has been documented. Preliminary results of an analysis of abundance trends of several elasmobranch and teleost fish in the ocean's pelagic ecosystem using data from research longline cruises were presented to IOTC's WPEB meeting in 2009. This demonstrated: (i) a widespread decline in the abundance of top predators such as large pelagic sharks and tunas, and (ii) the emergence of several mid-sized, lower-trophic-level species such as crocodile shark and lancetfish.

The relative abundances of lancetfish and tuna showed a dramatic shift between 1960-1990 and 2000-2008, with tuna being replaced by lancetfish. From 1960 to 1990, there were 5 tunas per lancetfish; this moved to 1 tuna per 5 lancetfish. It was considered likely that this was related to the removal of large numbers of top predators in directed shark fisheries as well as bycatch of sharks in tuna fisheries. The decline in top predators was also likely due, in part, to declines in large pelagic tunas, especially southern bluefin, bigeye and yellowfin.

The imposed reductions in yellowfin catch and likely maintenance of most tuna stocks within biologically based limits is expected to prevent further reductions in abundance of large tunas.

Thus, consequential further changes in Indian Ocean fish community structure through removal of tuna are not anticipated and it is concluded that the UoA is unlikely to disrupt the key elements underlying ecosystem structure and function to a point where there would be a serious or irreversible harm.

The SG60 is met.

In a seminal review paper, Dagorn et al. (2013) consider the evidence for FADs causing negative impacts on marine ecosystems. They may increase the catch of juveniles of yellowfin and bigeye (Fonteneau et al.2000; Brodhead et al. 2003). However, any increase of juvenile catch of primary species is assessed by IOTC, WPTT and SC to assure that the species are exploited within safe biological limits and measures are implemented as required (as noted above). The UoA average annual catch of yellowfin tuna is about 20,000 t, being 5% of total Indian Ocean removals, and therefore it is considered highly unlikely to disrupt underlying ecosystem function.

- Modify the natural behaviour of tropical tunas (Hallier and Gaertner, 2008; Marsac et al., 2000; Sempo et al., 2013). The hypothesis that FADs may modify the natural behaviour of tropical tunas has not been proven. The tagging information available from IOTC-RTTP does not suggest any behaviour modification of tuna species. This is an ongoing area of research.*
- Increase bycatch and discards (Amandè et al., 2011, 2012). Echebatar vessels follow the code of conduct on making all possible effort to release alive megafauna such as sharks, marine turtles,*

etc. This issue is covered in the Secondary minor species and ETP species section. Additionally, non-entangling FADs are used exclusively in the Echebatar fleet and they are also working on the evaluation of the use of biodegradable material in the FADs so as to reduce the garbage and contamination on the sea.

Therefore, it is concluded that the UoA is highly unlikely to disrupt the key elements underlying ecosystem structure and function to a point where there would be a serious or irreversible harm.

• SG80 is met.

SG60 and SG80 requirements are met based on reasoned consideration of information available.

However, due to the lack of specific research, there is no evidence that the UoA is highly unlikely to disrupt underlying ecosystem structure and function to a point where there would be a serious or irreversible harm.

149. It is important for me to recall that this is the first fishery based on FADs which may be granted MSC certification. The effect of FADs on the marine environment must therefore be carefully scrutinised and WWF are entirely correct to raise this as a major issue.

150. Mr Robson submitted the CAB had failed to analyse the impact of FADs on the potential indirect effects on tuna and other species. He referred me to the 'ecological trap hypothesis' - fish are attracted to FADs, which is constraining how they should act. The aggregating effects of FADs is causing unwelcome changes. He also argued the indirect effects on sharks was not properly considered by the CAB and should have been. There are migratory and feeding behavior effects caused by FADs which amount to serious or irreversible harm to the ecosystem. He referred me to the Leroy 2013, Dagorn and Davies articles, all found in tab 9.3 of the electronic bundle.

151. Mr Robson also submitted the CAB's inclusion in their final written submissions of an article by Griffiths from 2018 should not be admissible and its inclusion in their rationale for the hearing was unfair and inconsistent with the FCR. I agree and have not read this article.

152. On behalf of the CAB, reference was also made to the ‘ecological trap hypothesis’ and FADs. To make good their ground of objection, I was told, WWF should demonstrate the marine species have made a choice to be in a habitat that is less preferable than normal because of the FADs and further, identify that this causes a negative effect on the population, for example that the feeding or migratory patterns have altered. The CAB argued this was very difficult to prove and there was no unequivocal evidence on tuna. When it came to consideration of the SG 80 requirement: “is there evidence of irreversible harm” - there is not enough published evidence. The CAB made reference to Marzak et al and the Daghorn paper.
153. Professor DelAlteris told me “*we can’t prove a negative, can’t prove no ecological trap and sharks, so unfair not to score at 80.*”
154. The CAB accepted in respect of the evidence here are some gaps - therefore they added a condition that Echebatar must work with a research organisation so that these issues can be analysed. The CAB argued that cooperative research on a tuna purse seine vessel would be extremely helpful. Ms Polly Burns reminded me that whilst the Marzac article was pioneering, it was now 18 years old.
155. I have considered this ground of objection with particular care, given I am told this could be the first MSC certified FAD fishery. Having listened to the parties’ contributions and read the documentation and research I was referred to, I am unable to find sufficient evidence to contradict the CAB’s judgement in respect of the deployment of FADs in the Indian Ocean and whether this is highly likely to cause serious or irreversible harm to key elements of the underlying ecosystem. The reality is that the research evidence currently only posits a hypothesis that FADs create an ecological trap and seriously impact upon tuna and shark feeding and migratory patterns. I understand WWF’s serious concerns, but even Mr Robson largely accepted that he could not, on the current state of the research, prove FADs cause an impact on the ecosystem in line with the test set out in PD 2.5.1. As as Daghorn et al point out, the ‘ecological trap’ hypothesis is just that, a hypothesis.
156. There are other reasons to consider the CAB’s score of 80 is justified. First, I accept the CAB’s logic when it points out the fact WWF score the Indian Ocean at SG 60 under

its Fishery Improvement Programme, that makes it very likely SG 80 is an appropriate score for the UoA, which comprises only 5 ships within the entire Indian Ocean. This is a rational position and I accept it. Secondly, I accept the expertise of the CAB's judgement that tuna and sharks are highly opportunistic feeders and that whatever impact FADs may have on their feeding patterns, these are highly unlikely to be irreversible or cause serious harm.

157. Having considered all these points in the round, the CAB have formed a judgement that is open to them and is not unreasonable. They have appropriately noted that FADs may have some impact, which explains their decision not to score the Fishery at SG 100. Having considered the arguments I must dismiss this ground of objection as the CAB has not failed to consider a material fact nor is its judgement unreasonable or arbitrary.

Ground F - PD. 2.5.2

158. Performance Indicator 2.5.2 requires: "There are measures in place to ensure the UoA does not pose a risk of serious or irreversible harm to the ecosystem structure and function. The CAB scored the Fishery at SG80. WWF objected on the ground that material information had not been considered and the score was unreasonable or arbitrary. WWF submitted the FAD measures were not consistent with best practice.

159. At the hearing it became evident that WWF's main concern was in respect of shark migration. It was noted by all parties that the Condition set out for PI 2.5.3 considered only research into tuna and not sharks. WWF indicated they would withdraw their objection if the condition could be widened to include sharks and tuna.

160. The relevant condition states:

Rationale

SIb. Investigation of UoA impacts. Main impacts of the UoA on these key ecosystem elements can be inferred from existing information, and some have been investigated in detail.

The effects of FADs used in the fishery on tuna behaviour, migration patterns and feeding is a subject of numerous ongoing investigations. Dagorn et al (2012) conclude that there is no unequivocal

empirical evidence that FADs represent an 'ecological trap' that inherently disrupts tuna biology, although further research should focus on this issue.

Condition

By the fourth annual surveillance audit, the client must provide evidence that the main impacts of the FADs on these key ecosystem elements can be inferred from existing information, and some have been investigated in detail.

Milestones

Year 1. Echebatar must provide evidence to the first annual surveillance that the options to investigate the potential impact of FADs on the ecosystem have been identified and the preferred option has been implemented. Expected score = 75.

Year 2. Echebatar must provide evidence to the second annual surveillance that the preferred option continues to be implemented Expected score = 75.

Year 3. Echebatar must provide evidence to the third annual surveillance of the preliminary results from the preferred option. Expected score = 75.

Year 4. Echebatar must provide evidence to the fourth annual surveillance that main impacts of FADs on key ecosystem elements can be inferred, and some have been investigated in detail. Expected score = 80.

161. I am content to accept the parties' agreement that this sixth ground of objection be withdrawn on the basis the condition applies to both tuna and sharks. I was not addressed by the parties on the mechanism for remanding the Report to the CAB to alter the condition, but the parties are in clear agreement that should happen and it can take place by consent.

162. I record therefore this ground of objection has been withdrawn by the WWF and the CAB and Echebatar agree that the condition related to PI 2.5.3 set out on page 193 of the Report will be amended to include sharks and tuna.

Post Hearing Submissions

163. At the conclusion of the hearing I checked with all parties that they had been able to follow and understand all evidence and submission. Mr Jauregui at one point had indicated

he found it a little difficult to follow in English. I was also concerned to ensure WWF's representatives and Professor DeAlteris from the CAB had fully followed on the video link. All parties confirmed they had followed and understood each parties' case.

164. At this stage WWF raised concerns that they had insufficient time to consider the Antecedent Interpretation Log (AIL) and the Observer data. Whilst both documents had been provided (shortly) in advance of the hearing to all parties, WWF indicated they required further time to consider these documents. As a result, I made the following directions at the end of the hearing and communicated them in writing the day following the hearing:

- a. *WWF have permission, if so advised, to file and serve by 4pm BST 12 October 2018 a written submission limited to responding to the disclosure of the Observer data for the years 2014-217;*
- b. *The other parties have permission, if so advised, to file and serve a written submission limited to a response to any submission filed pursuant to direction 1, by 4pm BST 19 October 2018;*
- c. *WWF have permission to file and serve by 4pm BST 12 October 2018 a submission limited to the disclosure of the antecedent disclosure log (AIL), if so advised. If a submission is filed it must:*
 - a. *set out in detail why the late disclosure of the AIL has caused specific unfairness to WWF's existing 5 grounds of objection; and/ or*
 - b. *set out (i) what further grounds of objection WWF would have made if they had receipt of the AIL at the time of formulating their original grounds of objection and specifically why those ground of objection could not be made without access to the AIL; (ii) the process by which the Independent Adjudicator and/ or the MSC can and should permit consideration of late grounds of objection at this stage in the adjudication; and (iii) formulate in detail what those grounds of objection would be;*
- d. *The other parties have permission to file and serve a written submission in response to any submission filed pursuant to direction 3 above, if so advised by 4pm BST 19 October 2018.*

165. In line with the directions the parties filed further submissions. Between the parties over 70 pages of further submissions were filed and a further research article was also filed by the CAB.

166. WWF filed concise and clear submissions. They raised four main points:
- i. the late disclosure of the AIL lacked transparency and was unfair;
 - ii. it was not possible for WWF to consider the AIL and formulate what additional or amended grounds of objection they would have filed earlier in the objection process if they had access to the AIL from an earlier date;
 - iii. AIL interpretation number 71 impacted upon their ground of objection related to PI 2.1.2 on the management of yellowfin tuna as a primary species;
 - iv. AIL interpretation numbers 39, 55 and 56 all impacted on their ground of objection related to PI 2.3.2
167. The CAB and Echebstar both filed and served written submissions in opposition to WWF's contentions.
168. First, I am unpersuaded the late disclosure of the AIL caused any actual unfairness to WWF in a general sense. I will return, below, to specific complaints they raise. Ideally the Interpretation Log should have been public from before the assessment of the Fishery began. This would have been more in keeping with the requirements of the MSC to operate, and for its CABs to assess, in a fully transparent manner. The MSC's decision to grant public access to the Interpretation Log on 31 August 2018 deals with this issue going forward.
169. The FCR is a document, a tool, directed to the CAB to enable the CAB to carry out its assessment role. The Interpretation Log began, as I understand it, as a relatively informal document to ensure consistency of approach when questions were raised regarding the proper interpretation of aspects of the FCR. The Interpretation Log cannot change the FCR. It only clarifies when there is a reasonable basis for doubt. I do not accept WWF's submission that without the AIL they could not challenge the CAB's scoring of the Fishery. The scoring was based on the FCR. The AIL may have made a marginal

difference to the score, given the AIL may have placed a gloss on the FCR. However, WWF have had the opportunity to review “the gloss” of the AIL on their 6 grounds of objection and to see whether that makes any difference to their submissions; and to consider whether they would wish to bring other grounds of objection. In those circumstances, I do not understand how these highly marginal issues create any actual direct impact that amounts to an unfairness.

170. WWF’s submissions filed in late September 2018 seek to rely on the *PNA Tuna* decision, dated February 2018. That decision must be placed in context. First, the non-disclosure of the log did not result in that objection being considered unfair by the Independent Adjudicator. Secondly, the Log created a difficulty in that particular adjudication because of the specific difference between what the Log said and the interpretation placed on the FCR by the Objector, the IPNLF, which created the possibility of different scoring outcomes. The objection was dismissed on the basis the Adjudicator placed neither reliance on the Log’s gloss on the FCR, nor on the IPNLF’s erroneous interpretation of the FCR. The proper interpretation was evident from the language of the FCR and the outcome was both transparent and fair. I reject, therefore, the WWF’s over-arching submission of unfairness without the identification of a specific examples how it is said the AIL created an actual unfairness as applied to one if its concrete grounds of objection or to a ground of objection it would have brought, if it had access to the AIL at an earlier stage, but did not bring.

171. WWF submits AIL interpretation 71 alters the submissions they wish to make in respect of their ground of objection at PI 2.1.1 - the management of primary species, yellowfin tuna. The FCR and AIL interpretation is helpfully set out by WWF in a table:

Issue of Concern	YFT Management, YFT Stock Status
Relevant PI	2.1.2(c) Management strategy implementation SG80 There is some evidence that the measures/ partial strategy is being implemented successfully

Relevant AIL Entry	71. Scoring stock fluctuations for P2 species above the PRI When determining the outcome score for a P2 species, is it true that if a population is not depleted, you only need to be confident that it is not decreasing (you do not need evidence that it is increasing)?
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	<p>Categories: FCR v2.0: Annex SA: Principle 2 07/05/2015 PI 2.1.1 PI 2.2.1</p> <p>This entry was posted on 07/05/2015.</p> <p>1Answer</p> <p>If a species is not depleted, i.e. likely/highly likely above the PRI/BBL, the stock does not need to increase in order to meet SG80. If the stock is highly likely above the PRI/BBL, but a decreasing trend is evident, the stock may still meet SG80 for the Outcome PI, but if poor management by the UoA is the cause of the decline, this would perhaps result in poorer scoring in the Management PIs.</p>
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172. Understandably WWF seize upon the AIL references to “decreasing trend” and “poor management of the UoA.” They submit this reinforces their argument that the CAB’s score of 80 is not justified and that 60 is a more reasonable score. They point out the CAB failed to make any reference to the Log in their Report. Now that WWF have been made aware of the AIL “gloss” on the FCR, they are able to make appropriate submissions, albeit they are playing catch-up. Overall, WWF are in no worse place than the CAB.

173. The CAB’s response *inter alia* is as follows :

There is nothing about Acoura's justification which is inconsistent with this Interpretation. The justification within the Final Report makes it clear why a score of SG80 is appropriate, especially in relation to the UoA which is the part of the fishery subject to the scoring.

The CAB would also wish to make briefly the following points:

a) *There was no evidence that identified "poor management" by the UoA as the cause of the stock decline. In fact, although not relevant to scoring, the opposite is the case in that Echebastar's improvements are ahead of the curve shown by the IOTC and other players in the Indian Ocean.*

b) *The evidence does not show there is a decreasing trend for yellowfin tuna. This misstates the evidence. At best it shows that there could/ might be a decline, but what the balance of the evidence shows, as explained at the Oral Hearing, is that the UoA meets the MSC requirements at SG80.*

.....

d) *The CR does not require, and nor does the AIL entry, that "when a decreasing trend is evident in a P2 stock it should be reflected by assigning a lower score to the corresponding management PI" as WWF assert. What the Interpretation Log says is simply that it "the stock may still meet" and it may "perhaps" lead to a lower score.*

....

The evidence in fact shows clearly that the stock is above the adopted PRI with a greater than 80% probability, and in any event there will be a new stock assessment considered by IOTC meetings in October and December 2018 which will be reviewed at the forthcoming surveillance audit of the Maldives Pole and line fishery.

174. I agree with the CAB's analysis. The use of the word "may" in respect of the score of SG 80 and a downward trend in stock is not definitive and cannot direct the CAB to reach a particular result which would require it to override its expert judgement and application of the FCR. Secondly, I agree there are no poor management practices adopted by Echebastar in the Fishery that can be linked to yellowfin tuna stocks in the Indian Ocean. The evidence does not support this contention.

175. Notwithstanding, the careful submissions of the WWF, it remains the case the original ground of objection, as supported by the WWF's supplementary submissions, incorporating the terms of the AIL, must be dismissed.

176. WWF also submit their original ground of objection related to PI 2.3.2. - management of ETP species, particularly silky shark is impacted by the AIL interpretations at 39, 55

and 56. WWF set out similar helpful tables for the three references. To save space, I set out below only the three relevant AIL interpretation relied on by WWF:

39

As long as the fishery has unwanted catch or any direct mortality of ETP species, they will need to review alternative measures (SA3.5.3). However, for primary and secondary species, if the numbers were to be reduced to a point that the species would no longer be considered “main” then the scoring issue for ‘review of alternative measures’ would only need to be scored at the SG100 level.

Or, if an in-scope species is used in some way so that it is no longer considered “unwanted”, the ‘alternative measures’ scoring issue would no longer need to be assessed for that species.

See GSA3.5.3 for more detail.

55

There should be evidence that a review has taken place, which could be a summary document listing what was reviewed and the outcome of that review or minutes from a meeting where it was discussed.

Guidance is provided in GSA3.5 (scoring issue e) indicating that the team are expected to review evidence to determine whether the client (UoA) has undertaken a review of the potential effectiveness and practicality of alternative measure to minimise mortality of unwanted catch of main species. The review could be undertaken by the client fishery group members, a fisheries association or similar body or the wider management authority.

56

In GSA3.5.3.3 the MSC indicates that at SG80 the alternative measures may be implemented either within the UoA or in the wider fishery as part of a sub-strategy or code of conduct on unwanted catch (which could be either species-specific or covering all unwanted catch). Implicit within this is that the review of measures themselves could be species-specific or could be a review covering all unwanted catch. The MSC notes this and will make it explicit in future standard reviews.

However, in both cases the unwanted catch of the species being scored needs to be considered. What is not covered, for example, is the situation where a review is undertaken for alternative measures specific to cod and that this review is used to score the alternative measures scoring issue for spurdog. If the management system had reviewed all unwanted catch, including both the cod and the spurdog, then this could be used to score both species.

In relation to cases where the unwanted catch occurs so infrequently that a review of alternative measures is not necessary, guidance GSA3.5.3 allows teams to indicate that the unwanted catch is negligible and use their discretion as to whether the 'alternative measures' scoring issue should be scored.

Implementation of this scoring issue will be considered in a mid-term review of the FSR changes. The MSC notes suggestions including removing the SG60 level in this scoring issue or adding an 'if necessary' clause to it.

177. WWF's overall submission is:

In summary, WWF is firmly of the opinion that MSC's intent, as confirmed by the AIL entries cited above and presented in accordance with LA direction, clearly establishes that the review of alternative measures under PI 2.3.2 constitutes an ongoing process through which the fishery can review, refine and as appropriate, implement best practice measures to minimize mortality of unwanted catch. In the case of ETP species this is of critical importance given the potential risk posed to these populations by the fishery.

178. WWF also submit the CAB have failed to fully evidence their findings, as required by the AIL.

179. The CAB disagree. Their best point is:

*Table 2, 3 and 4 in WWF's submission could be misunderstood. The AIL does not specifically identify any of these interpretations as specifically relating to 2.3.2(e). This focus by WWF in its Tables is not the approach in the AIL. In fact the AIL categorises AIL entry # 56 only to PI 2.1.2, PI 2.2.2, and SA 3.5.3, i.e. not 2.3.2(e) - 2.3.2 is not even mentioned (this is also true in the PIL, which has reviewed classifications, and this Interpretation is now tagged to Annex SA PI 2.1.1, 2.1.2, 2.2.1, 2.3.1, GSA 3.5.3). Note that this is not to say that WWF's approach in considering it is in error, as SA3.5.3 can apply to 2.3.2 e in regard to the following CR2.0. SA3.11.3.SA3.11.3: "In assessing scoring issue (e), clause SA3.5.3 and its sub-clauses shall apply here, noting that where those clauses refer to mortality of unwanted species they apply here to mortality of ETP species". However, what this demonstrates is that **the AIL makes no difference to the***

ability of WWF to make this argument - the argument runs from SA 3.5.3 - and in fact, if they had had it, could even have confused the argument. This is also clear from the fact that IPNLF and Shark Project both make a similar point in relation to the application of SA3.5.3 when considering 2.3.2(e), and the CAB in its response refers not to the Interpretation Log, but to SA 3.5.3. The Interpretations Log adds nothing to the responses on these points.

180. I accept this point. The AIL interpretation relied upon by WWF only really add the point that the CAB was directed to consider SA 3.5.3. But that should have been known and it was known, and was referenced, by the two previous Objectors. Aside from this ‘process’ point, the CAB is correct in respect of the substantive point made in respect of the reviews of the strategies:

*The substantive points made are also wrong for the reasons already set out above, namely the clear evidence of the biennial review of alternative measures through the AZTI-led reviews (see **Appendix 1** for their expertise, see **Appendix 2**, especially programmes Items 1 and Items 3). To have a world-class independent third party organisation running at least annual seminars on best practice seminars with a leading NGO, and to have them doing so from an office established in the Seychelles, plainly meets the FCR standard; it plainly meets and is well above “even minutes from a meeting where it was discussed”. It is an established, evidence-led, continuous, credible, verifiable, and frankly first-class process.*

181. Therefore, I conclude the disclosure of the AIL and the WWF’s further submissions add nothing to alter my finding that the CAB’s scores were justified and this ground of objection must be dismissed.

182. In terms of the AIL, that then leaves the WWF’s submission that they cannot now say what further grounds of objection they would have raised had they received the AIL from the outset of the Fishery assessment process. Notwithstanding this over-riding submission, WWF failed to set out what their additional grounds of objection would have been, contrary to my direction. WWF submitted the late submission of the AIL was a

“game changer” but that “rather than using the benefit of hindsight to speculate” they chose not to formulate what their further submissions would have been.

183. The CAB’s response was:

The LA’s direction was clear. The CAB disagrees that it is not possible for experienced stakeholder to identify what objections it might have raised. There is no evidence beyond assertion that WWF’s “capacity” to “understand” the MSC Standard has been “diminished” by the “late disclosure”. WWF is a highly experienced stakeholder. The reality is:

a) No prejudice is identified. The fact is that there is no material or even identified unfairness. That is a complete answer.

b) There is nothing difficult about reading the AIL; the CAB has even numbered each entry, listed them in a contents, put them all in a searchable word document. There is nothing complex about the language or content. It is easier to read that the FCR and Guidance.

c) It is not even comparatively time-consuming to matrix the AIL against the PIL. The CAB undertook this exercise in order to ensure there was no material change to scoring as a consequence of the PIL, it took less than a couple of hours to matrix, significantly less time than carrying out detailed primary research on Observer data.

Further, even if there were, unfairness must be considered in all its context.

184. I agree with the CAB. Given the insight and skill with which WWF have presented their case in respect of their six grounds of objection, it is evident that they are very familiar with the CAB’s report and Indian Ocean tuna. They are, in my judgement, experts in this field. They have had the CAB’s report since February 2018. They are highly experienced MSC stakeholders, with experience of applying the FCR. They worked closely with Shark Project and IPNLF who were both able to develop many grounds of objection in different areas, notwithstanding neither of those objectors had access to the AIL. WWF had access to the Interpretation Log on 31 August 2018 and the AIL from 17 September 2018. Given all this, WWF are in a position to formulate any other grounds of objection. I indicated they may be considered either by an IA extending the necessary timelines, if appropriate, or the MSC considering whether a variation could have been made to the FCR. In reality,

I believe the WWF, as a constructive objector, have properly sought to build on the six ground of objection that have concerned them most. They have had sufficient time and have sufficient expertise to formulate different grounds of objection based on the AIL but have chosen not to do so. In those circumstance no unfairness arises.

The Observer Data

185. WWF were provided with additional time to carry out an analysis of the data provided from the 100 % observer coverage which takes place on the Fishery fleet. WWF primarily used this time to analyse the data in respect of their ground of objection related to PI 2.3.2 and in particular the strategy in place to reduce silky shark by-catch. One of the issues hotly discussed at the hearing was whether or not Echebstar were complying with the recommendation not to set nets on a biomass of less than 10 tonnes. WWF carried out analysis of the observer data and noted in a helpful table that between 2014 and 2016 the average percentage of sets catching less than 10 tonnes of tuna was 23 %. They raised concerns that this may lead to catching more silky sharks and therefore questioned the score of SG 80 given by the CAB.

186. This issue can be shortly dealt with. As was discussed at the hearing by Mr Jauregui with the support of the CAB's team, the fact that some catches were less than 10 tonnes was no indication Echebstar were setting nets on a biomass in the sea of less than 10 tonnes. I was told this was not commercial and vessel captains would not set nets on less than 25-30 tonnes. As the CAB point out there are many reasons why the catch may well be significantly less than the biomass in the water. The CAB in their post hearing submission stated:

The observer data shows only what is caught, not the biomass estimated by electronic and visual means upon which the purse seine was set. For a number of reasons (e.g. the biomass dispersing or aggregating, a change in oceanographic conditions, the fish evading capture in the net) the actual catch may be considerably more or less than the estimated biomass. It therefore follows that the number of sets that caught 10 mt or less is not evidence that biomass of fish upon which the purse seine was set was less than 10 mt.

187. This is common sense and I do not accept the observer data demonstrates that Echebatar are fishing on biomass of less than 10 tonnes. They are in compliance with the suggested CMS measure not to do so. I do not follow WWF's submission in respect of the relevance of the observer data to the CAB's score of 100 for PI 2.3.2 (e). I am satisfied there are sufficient reviews of the Fishery's ETP species management measures. The CAB's score of 80 remains justified.

188. WWF's wider concerns about the late disclosure of the observer data lacks force when, if they had attended the 2017 site visit, the issue could have been appropriately addressed at that stage.

Conclusion

189. After a detailed and comprehensive objection process, I am satisfied the CAB's scoring is justified and the decision to certify the Echebatar Fishery is one open to the CAB in the exercise of its professional judgement. That being said there will be a remand limited to the points agreed by the parties, namely the addition of wording in the final report that was proposed by the CAB and the inclusion of research related to sharks, as well as tuna, in the condition identified in respect of PI 2.5.3.

190. The CAB is asked to make these amendments forthwith and ensure prompt finalisation of the report. Echebatar have been required to endure a lengthy process of certification and objection and it is now time to swiftly draw this process to a close.

191. WWF in their written submission for the hearing, closed their power point presentation by saying: "*WWF would like to thank all parties and the LA for their professionalism and engagement in this assessment process*". The conduct of WWF in this process has been extremely helpful. If I may say so, WWF have acted as a model objector, testing the CAB's conclusions and prompting them to provide fuller and more detailed evidence and rationale for the conclusions they reached. Their contribution has been invaluable to me to assist me to fully understand the decisions the CAB made and WWF have, rightly it

seems to me, focused on targeting issues around the certification of a FAD fishery. Whilst I agree with the CAB's scoring, it is important to acknowledge areas of the final report will be strengthened because of WWF's helpful engagement and crucially important scientific research will now be carried out in respect of the effect on sharks of the deployment of FADs in the Indian Ocean. This is an important conservation measure and one that will add to the protection of marine environments whilst permitting sustainable fishing. WWF's engagement strengthens the overall mission of the MSC.

192. Lastly, I turn briefly, as presaged, to the issue of the withdrawal by two objectors. At the end of the day, the AIL and observer data were disclosed and sufficient time was provided for the objector to consider this. It is also important to note the hearing was successfully conducted by video conference for some participants. The site visit provided information to all parties that was invaluable. A small NGO with limited resources could of course have sought determination of their objections on the papers or by attendance by video link.

193. It is, however, also important to acknowledge that considerable thought is required to ensure the rigour of the objection process is not unduly compromised by the limited resources of some objectors. Some of the complaints raised during this objection failed to appreciate the scale and importance of the MSC certification process. It is essential charities and NGOs can engage fairly and the objection and adjudication process are designed to facilitate this, hence, why a cost waiver was granted to the Shark Project. However, the proper evaluation of whether Echebaster's commitment and investment to sustainable tuna fishing in the Indian Ocean should be recognised by way of MSC certification cannot be compromised because a volunteer is concerned about jet lag or a charity is not prepared to raise an additional few hundred euros for a plane ticket.

194. More importantly, objectors who treat the objection and adjudication process as formal litigation will end up dissatisfied. The objection process is a proportionate and collaborative exercise to consider the boundaries of the CAB's judgement, with the aim of acting as safeguard and an independent and impartial review of how decisions have been made. It is not a process to be hijacked by lawyers and compared to litigation before the English High Court. That pathway can only lead to disappointment.

195. The complaints made against the CAB, Acoura, in this adjudication are without merit. The Acoura team have acted with integrity throughout the process, basing their decision-making on scientific and evidential material. If at times they have surrendered to temptation by responding in a rather legal manner, that was because they were invited to do so, given the approach taken by objectors. As I have stated throughout this process, it is not formal litigation and such an approach is unhelpful. I thank the Acoura team for the considerable amount of work they have expended in this process, the aim of which has been to assist me to understand the evidence as seen against the FCR.

Order

196. Pursuant to PD 2.7.1.2 the determination is remanded, limited to providing the CAB with the opportunity to amend its justification for the scoring at PI 2.1.2 and PI 2.3.1 and to amend the condition set out in respect of PI 2.5.3.

John McKendrick QC
Independent Adjudicator
24 October 2018

ANNEX ONE

Site Visit on IZARO on 30 September 2018 (8.30am – 9.45am Seychelles time)

Attendees

John McKendrick QC – Independent Adjudicator (IA)
Tzara Cheung (TC) – Independent paralegal and note-taker
Kepa Echebarria Elizondo (KE) – Echebatar
Jose Luis Jauregui (JLJ) – Echebatar
Jason Combes (JC) – CAB
Ian Scott (IS) – CAB assessment team
Kevin Stokes (KS) – CAB assessment team
Polly Burns (PB) – CAB
Sasha Blackmore (SB) – legal expert for the CAB
Various other members of the ship's crew were briefly present

The IA thanked everybody for attending the site visit proposed by Echebatar on board the bridge of the IZARO, purse seiner, at the Port in Victoria, Seychelles. The IA explained that TC would take notes to summarise what was being shown to the IA and the note and the photographs would be circulated to all parties on 1 October 2018.

JLJ explained that the crew were still unloading fish so we can find out more about the fishing process.

Location: Bridge

JLJ demonstrated the electronic panel and explained the multiple computers and screen. As they cannot stop fishing if one of the equipment is down, the panel has duplicates of equipment, for example the sonar, radar and sounding equipment. The sonar is located on the port and can be operated by the same or different person (Exhibit 1 and 2).

JC asked what the sonar is for. JLJ explained that the sonar gives an image of what you do not see under the water (different depths) and it is up to the captain to set it. Even if they have long nets, it does not make sense to set a net for to go deeper than 50m if the fish is not there.

JC asked how the sonar operates. JLJ explained that the captain operates it and helps him determine how to move and what area they go to, it will be his decision.

The IA asked how long an average journey is, JLJ stated around 30 days. The IA asked how far they travel, JLJ stated not far, they cannot visit a fishing ground for more than 48 hours.

JLJ explained that the sonar gives images which means more possibility to catch fish.

SB asked where the observer stands. JLJ replied the bridge as he has access to all systems. They have internet and phones on board so they can call the office or home any time of any day.

JLJ continued to show navigation tools and the radar equipment on the control panel.

KEE explained that they had a problem with pirates on 23 September 2018 and showed a picture to attendees. The boat was approaching a FAD and pirates were waiting at the FAD. The IA asked whether the pirates were armed. KEE said yes, the location was north, near Somalia but they managed to escape. The pirates' speedboats can go up to 17 knots so they can approach easily. As a security measure, they are not allowed to give away the position of the boat. The position is confidential between Echebatar and the authority. The army is not comfortable with Echebatar giving information to third parties. SB raised the issue that this was a matter to discuss at the hearing tomorrow. The IA agreed and emphasised the purpose of the site visit was to be shown the ship and the equipment, not to discuss matters that more properly could be discussed in front of all parties at the hearing.

JLJ clarified that this is why they switch off the AIS as pirates can detect it 50 miles away. KEE clarified 50 miles, but it depends on weather – if it is raining, maybe less.

JLJ explained the two main systems and showed the VMS (Exhibit 3). Once it is switched on, it transmits directly to the Seychelles authorities. They do not know how many it transmits per hour. It is part of the agreement with the authorities, maybe it transmits every 30 or 45 minutes. If it disconnects, the authorities are alerted and they will call the vessel.

The AIS was also shown to the IA and explained. KS noted that is it a peer to peer, vessel to vessel. JLJ stated that the information can also be found at home if someone is part of marine traffic.

[See Exhibit 5 - Computer screen]

JLJ explained that the captain looks at nearby areas, safe locations and workable areas. If they have FADS, it is the best way to get fishing information. They also look at the wind and current.

The Captain explained what the screen was showing (plankton, surface area down to 50 meters, sea, wind).

The IA asked how the information and screens determine where the vessel goes. The captain stated that right now it is not possible. The screen currently shows bad/good weather, the normal temperature of the sea is 27 – 29 degrees C, whether there is a nice current or not. If there are different currents, this can damage the net.

[See Exhibit 6, 7 and 8 – 2 Computer screens]

The Captain showed a screen which shows how to check FADs and explained the areas with red buoys are more likely to have an abundance of fish.

The IA asked what the difference was between the red and green buoys. KEE explained that red means potential fish and green normally means no fish. JLJ clarified that the buoys show fish, but not necessarily tuna.

The IA noted the FAD can check sea temperature and asked whether it can detect movement. The Captain confirmed that it can detect movement,

JLJ noted that the screen gives an idea, it is not precise. It is one more tool to facilitate the position for the Captain.

The IA asked when looking for an area, how long do they go for. JLJ stated it is up to the Captain to decide the position. If it is a week, they can get an update every hours or 6 hours so they can approach the FAD with constant information.

The IA asked if they decide to head in the direction of a red buoy but there is not fish, do they find another FAD. JLJ clarified that the Captain will look at more than one FAD in the area. Sometimes they set the net in an area and have 50 tonnes and sometimes they use the FAD and there is nothing. One buoy gives enough information to start fishing.

JC asked about the shading of the colour of the sea on the screens. JLJ stated that in some areas, they are licensed to fish. For example, in the Maldives they do not need any information as they do not have a license there. They keep all the FADs in the areas where they are licensed.

JC noted that they use FADs, and asked about areas where they do free school fishing. JLJ explained that they find the area, when they are searching they can find tuna or watch bird activity or there are white bubbles in the sea. JC noted that FADs are planned fishing, and free school fishing is about opportunity. JLJ clarifies that this is all reported by the observer.

[JLJ produced written information. The IA stated that this should be a matter for the hearing].

JLJ explained that the skipper sets the net, it takes about two hours to take the fish out of the sea. The skipper will check the net and make the report which is sent every day to the ESA office.

Location: Outside on the deck

Exhibit 9 and 10 shows 2.5 tons of fish mainly yellow fin. JLJ explained that the fish are in individual sacks as they are good quality. The fish will go to Asian or Europe markets, mainly London. Normal fish will be put in brine. Others are frozen.

[See Exhibit 11 – FAD]

A FAD was demonstrated to the IA. JLJ explains that is a FAD They use bio-FAD and eco-FAD and they are not entangling. The IA asked who makes the FADs, it looks like it is made out of bamboo and netting. JLJ confirmed that they make the FADs.

JLJ explained and demonstrated two buoys. There is a link with satellite on the buoy, it is solar powered.

JC asked if they could show any entangling nets. JLJ explained that they do not have any entangling nets to show. In the past at the end of the platform there would be four ropes one each end of the net so it was easy to entangle fish, now it is not allowed by law.

JLJ explained that 100% of the materials are biodegradable. It is not easy as it does not last, it only lasts 2 to 3 months so they have to take it back. They fish usually 2 to 3 tonnes, maximum 4 tonnes.

[See Exhibit 12, 13 14 – buoys]

JLJ explained that the solar panels are at top of the buoy. The buoy links to the two systems which showed the red, yellow, and green on the screens. The buoy has the vessel's name and reference number written at the top. JLJ confirmed that this is required by the Seychelles authorities. KS asked whether the buoys

were sealed. JLJ explained that the seal has a tag with the same reference number written on top of the buoy [Exhibit 14]. The IA asked whether this information is sent to the Seychelles authorities. The Captain responded no but they can ask for it. JLJ clarified it is not automatic. JLJ stated that they can have a maximum of 350 buoys but cannot buy more than 700 per year.

Location: downstairs on deck

The large nets, floats and crane were demonstrated to the IA. The IA was also shown the two smaller speedboats that take the nets out. The device for scooping out the fish from the nets was activated and shown. The IA noted how the device works and was shown the hole through which the fish are taken from the net, down below deck to the conveyer belt and the freezing chambers.

JLJ explained that this is the main operation. The net is 1800 m in length and 150m deep. However, the net never goes that deep because of the currents and wind. If it is more than 50m deep, there is no sense to fish. JLJ summarised that they set the net free school or using the FAD. If they use the FAD, they leave it in the middle of the net and get the fish. Two small boats remove the FAD from the area [Exhibit 16].

KEE clarify that it may not be 50m (see JLJ's explanation above) and it can be 70 to 75m depending on the current. JLJ explained that they remove the FAD then start heaving the nets until the sack is portside of the vessel and the fish is concentrated in the sack. The brawler is lifted into the sack and they remove the fish with the crane [Exhibit 17]. JLJ explained that they can separate the fish. If it is alive they can send the fish back to sea. The observer is down on the boat and getting samples of the fish on the main deck. Observer has to report how many fish there are on the fishing deck. The net brawler then goes down to the conveyer belt.

The IA asked JLJ to clarify about the net. JLJ explained that once they are in position, they need the sack which is the last 50 to 60m of the net. Once it is next to boat, the roller goes up then starts heaving with fish from the net [Exhibit 18].

JLJ explained that this is the first opportunity to get fish and remove fish. They have developed a second process which is downstairs on the conveyer belt.

SB asked what the vessel would do if there was a whale shark in the net. JLJ explained that if there was a big fish then maybe they would have to break the sack to let it go.

JLJ explained that the operation starts by setting the net, the Captain then says to let go outside of the vessel. [One part is to take the net out and the second part is to take the tip.] When taking out the net, they get it alongside the boat then they can start taking the fish with the brawler. This usually takes 2 ½ to 3 ½ hours depending on how many fish there is.

Location: Downstairs conveyer belt [Exhibit 19]

[Exhibit 20 shows the process from the brawler to the conveyer belt] The IA was shown the opening from the deck down to the conveyer belt, both conveyer belts and how they operated, the storage chambers and the opening back out to the sea from the second conveyer belt.

SB asked where the observer stands. JLJ stated at the beginning conveyor belt [Exhibit 21]. JLJ stated that when they decide to get the fish, they will load the conveyor belt with fish. The IA asked what the big metal boxes are for. JLJ stated that it is brine for canning.

JLG explained that there are two loading sides which can open [Exhibit 22]. There is also a second conveyor belt on top of the main conveyor belt [Exhibit 23]. The IA asked what it was for. JLJ explained that this is technology that they have implemented. The second conveyor belt (above) drops fish back at sea. The crew work on both sides of the belts, all species will be put in the main conveyor belt. If there are a different species and the fish are alive they are put onto the second belt.

[Exhibit 24 shows the route from the conveyor belt to the freezer. Exhibit 25 is a picture of the freezer.]

JLJ explained that the fish are either brined or frozen for the market and sold as fresh fish. The crew has to change crew every 20 to 30 minutes as the freezer is -60°C.

JLJ showed the attendees the second conveyor belt and opening to the sea [Exhibit 26].

Attendees headed back upstairs into the Bridge,

The IA thanked JLJ and the crew for showing them the ship and demonstrating the process.

Site visit ends.

The Captain offered the attendees some light refreshment in the mess of the ship.

ANNEX TWO

Site visit – amendments to Site Visit note by CAB.

1. Location: Bridge.
 - Change “they cannot visit a fishing ground” to “they cannot reach a fishing ground”
 - Change “Once it is switched on” to “Always”
 - Change “if someone is part of marine traffic” to “if member of Marine Traffic”
 - Note: when note records “the captain stated that right now it is not possible”, this was by reference to an image on the screen
 - Note: when note records “they keep all the FADS in the areas where they are licensed”, FADs obviously drift, FADs are shown in the areas where licensed to fish.
2. Location: Outside on the deck
 - Note: where it says “netting”, this is recording what was said, the FADs are not made of nets.
 - Change “four ropes one each end of the net” to “four ropes connected to a net one each end of the rope”.
 - Change “explained that 100% of the materials” to “explained developing for 100% of the materials”.
 - Add after “maximum 4 tonnes”, the addition “brailer capacity”
3. Location: downstairs on deck
 - Add: the brailer was demonstrated which was loud and took some time
 - Note: Final three paragraphs: the explanation as to how fish are brailed and the different operations to remove the whale shark should be explained in the hearing.
4. Location: Downstairs conveyor belt
 - Change: “brine for canning”, to “tanks for fish that are in brine for canning.”